



# Utah State Courts

## Report to the Utah Judicial Council on Pretrial Release and Supervision Practices

November 23, 2015

# Committee

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## Acknowledgements

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# Executive Summary

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## *Committee Charge*

In fall 2014, the Judicial Council chose pretrial release practices and alternatives as its 2015 study item. A committee was formed and was charged with conducting a thorough assessment of existing pretrial release practices used in Utah's courts and determining if there are alternatives that should be considered. Specifically, the committee was asked to: (i) determine what constitutes "best practices" in the field of pretrial release; (ii) conduct an inventory of current practices and assess both their effectiveness and the extent to which they are consistent with best practices in this field; (iii) determine how best to improve the information needed by judges when making a release decision, including evaluating evidence-based assessment tools and instruments; (iv) review the statutory history of release and bail legislation; and, (v) evaluate pretrial release alternatives in terms of public protection, the integrity of the court process, the ability to guard against punishment prior to conviction, and cost implications or savings potential.

The Council asked the committee to complete its work and report its findings at the November 2015 Council meeting. The Committee met monthly from March through October and heard from local and national experts on pretrial release issues. These included presentations from, among others, Professor Shima Baradaran of the S.J. Quinney College of Law at the University of Utah, Rob Butters of the Utah Criminal Justice Center at the University of Utah, David Litvak and Pat Kimball from Salt Lake County Pretrial Services, national experts Timothy Schnacke, Executive Director of the Center on Legal and Evidence-Based Practices, and Michael R. Jones, Director of Implementation at the Pretrial Justice Institute, as well as committee members Brett Barrett, Deputy Insurance Commissioner at the Utah Department of Insurance, Judge James Brady of the Fourth Judicial District Court, Judge Brendan McCullagh of the West Valley City Justice Court, Brent Johnson, General Counsel for the Utah State Courts, and Gary Walton, owner of Beehive Bail Bonds. In addition to gathering data from court databases, the committee surveyed district and justice court judges and compiled data from county jails.

The committee divided its work into three parts and formed subcommittees to address the following: (i) legal frameworks as they currently exist both nationally and locally and possible changes to local frameworks; (ii) monetary bail or financial conditions to pretrial release; and (iii) non-financial conditions to pretrial release. These subcommittees met between committee meetings to gather information and prepare

recommendations. As part of this process, the committee conferred with representatives from Arizona and Colorado concerning pretrial reform efforts underway in those states, and with the Laura and John Arnold Foundation (Arnold Foundation), a non-profit foundation that has funded research and developed tools to improve pretrial release systems. Committee members also spent many hours researching their assigned topics and reviewing the substantial literature in this area. Although this report is intended to be comprehensive, due to the volume of research done, only a fraction of the information members gathered and considered is included in this report. Many of the materials cited in this report have been compiled in an electronic database, which will be made available upon request.

### *Issues Identified*

The committee identified numerous areas in need of improvement in Utah's current practices. First, and foremost, Utah's laws discourage judges from exercising discretion to make individualized decisions regarding pretrial release. Instead, judges are encouraged to follow a system driven by a fixed monetary bail schedule that sets amounts based on the level of the charged offense and not on the pretrial risks a particular person poses.

A second issue, related to the first, is judges are not given the information they need when making a pretrial release or monetary bail decision. For example, judges usually make pretrial release decisions with nothing more than a probable cause statement prepared by an arresting officer or prosecuting attorney, rendering it all but impossible to make individualized determinations. Only one county utilizes a validated risk assessment tool to measure the risk associated with pretrial release; even coupled with a pretrial services division tasked with community supervision, significant obstacles to getting judges necessary information remain.

Other serious problems stem from differing customs and practices that have developed among and within the various judicial districts that hinder the careful application of uniform standards. There is also great hesitation among judges to deny bail under circumstances where it can properly be denied and to instead set monetary bail at unusually high levels with the hopes that it will keep defendants in custody. Conversely, judges hesitate to order defendants released on recognizance or on other non-monetary conditions, despite having statutory authority to do so.

Lastly, there is a lack of meaningful, reliable data. Court IT systems do not capture all of the data needed and most jails in Utah lack important information, so between the two we are unable to track such basic data as how many inmates remained

in custody until their trial, what percentage of inmate populations are pretrial, and how long pretrial detainees are in custody.

These problems are solvable and judges in Utah are genuinely committed to solving them. Fixing the problems will not be quick or easy but it is essential that the judiciary start now, in a comprehensive, organized fashion. The committee has developed the following recommendations that, as a whole, will go a long way toward addressing this important issue.

### *Summary of Recommendations*

1. Persons arrested for or charged with crimes are presumed innocent. There should be a presumption in favor of pretrial release, free from financial conditions.
2. Individuals arrested for or charged with minor offenses should not be held in custody pending the resolution of their cases.
  - a. For example, class B and C misdemeanors, other than DUI, domestic violence, and offenses involving a continued breach of the peace, should be initiated by issuance of a citation and release on recognizance with reporting instructions.
  - b. When these types of charges are filed by Information, service should be by summons, rather than a warrant.
3. Uniform and consistent practices for making pretrial release and supervision decisions should be promulgated, and judges throughout the state should review those decisions as the case progresses.
  - a. The recommendations of the Board of District Court Judges regarding pretrial release and monetary bail practices should be promptly implemented.
4. Each person booked into jail should receive a pretrial risk assessment, using a validated instrument, and current assessment results should be available at each stage where a pretrial release and supervision decision is made.
  - a. Judges should evaluate pretrial release and supervision, taking into account the assessment and all other relevant factors.
  - b. Individuals who present a low pretrial risk should be released on their own recognizance without any conditions other than appearance in court.
  - c. Individuals who present a moderate pretrial risk, or for whom conditions to release are necessary, should be released with the least restrictive conditions necessary to meet the pretrial risk presented.

- d. For individuals who present a high pretrial risk, the court should determine whether the offender can be held without monetary bail. If so, the court should order no pretrial release and revisit that decision as appropriate. If not, under current law, the court must set monetary bail and should order the least restrictive conditions necessary to meet the pretrial risk presented.
5. Pretrial supervision practices and procedures, that are appropriate to the size and needs of the community involved, should be developed and implemented.
  - a. Because release conditions will be imposed, and alternatives to jail detention ordered, a mechanism to monitor and enforce them should be implemented.
  - b. The court or local governments should consider an automated system that uses phone calls, texts, or other technology to remind defendants of upcoming court dates.
6. Pretrial release is an individualized decision. Judges should not set monetary bail based solely on the level of offense charged.
  - a. The Uniform Fine and Bail Schedule should not be used to set monetary bail. Rather, the schedule should be used only to determine the amount of fines a defendant should remit to avoid the need for a court appearance in non-mandatory appearance cases (traffic citations, for example).
  - b. The Uniform Fine and Bail Schedule should be renamed “Uniform Fine Schedule.”
7. Prosecutors and defense counsel should provide more and better information at pretrial release or bail hearings to help judges make informed, individualized evaluations of the risk of pretrial release.
8. The laws and practices governing monetary bail forfeiture should be improved and updated so that when monetary bail is used, the incentives it is designed to create can be furthered.
9. The Council should create a standing committee on Pretrial Release and Supervision Practices that includes representatives of all stakeholders to stay abreast of current practices in this area, develop policies or recommendations on pretrial release and supervision practices, to assist in training and data collection, and to interface with other stakeholders.
10. Uniform, statewide data collection and retention systems should be established, improved, or modified.

- a. Accurate risk assessments require correct and easily accessible data. Existing data systems are inadequate. They should be improved to permit these tools to operate effectively.
  - b. All stakeholders should collect and share consistent data on pretrial release and supervision to facilitate a regular and objective appraisal of the effectiveness of various pretrial release and supervision practices.
  - c. The committee on pretrial release and supervision practices should help determine what data should be collected, how to collect it, and how best to study the efficacy of release and supervision practices.
11. Judges, lawyers, and other stakeholders should receive regular training on current best practices in the area of pretrial release and supervision practices.
  12. The public in general and the media in particular should be educated about pretrial release and supervision practices issues.

## Introduction

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“It is a paradox of criminal justice that bail, created and molded over the centuries in England and America primarily to facilitate the release of criminal defendants from jail as they await their trials, today often operates to deny that release.”<sup>1</sup> More than ever, the judiciary appears to be using monetary bail to decide whether someone will remain in custody pending the resolution of their case. For those who lack the financial resources to pay this money to the court, or to pay 10% to a commercial bail agent, this usually means they will remain in custody until their cases are resolved. And for most of those who remain in custody, their cases will ultimately be resolved by guilty pleas and sentences with credit for time served—meaning they will be released back into the community.

The problem is not new. The Manhattan Bail Project, undertaken by New York City during the early 1960s, demonstrated the problems associated with overreliance on monetary bail and showed that many defendants could be safely released on their own recognizance if judges had the right information and tools available to them. The American Bar Association (“ABA”) studied the issue, inviting input from a broad range of interested parties. In 1964, with the publication of its *Standards for Criminal Justice*, the ABA articulated a series of standards governing pretrial release decisions. The National Association of Pretrial Services Agencies (“NAPSA”) formed in 1972 and, six years later, published its first set of standards. In February 2002, the ABA House of Delegates approved the Third Edition of the *ABA Standards for Criminal Justice: Pretrial Release*.<sup>2</sup> And in 2004, NAPSA published its third edition<sup>3</sup> which borrowed from and expanded upon the ABA Standards. These standards, complimented by a growing body of evidence-based practices, form the foundation for how pretrial release and supervision practices should look moving forward.

Utah’s statutory framework does not currently meet these standards. Moving Utah closer to these standards will require a sustained, consistent effort. It is sadly ironic that New York City, which was at the forefront of pretrial release reform decades ago, now finds itself in the midst of a crisis brought about in large part by imposing

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<sup>1</sup> TIMOTHY R. SCHNACKE, U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORRECTIONS, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 1 (2014) [hereinafter SCHNACKE, FUNDAMENTALS OF BAIL].

<sup>2</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE (3rd ed. 2002).

<sup>3</sup> See NAT’L ASS’N OF PRETRIAL SERV’S AGENCIES, STANDARDS ON PRETRIAL RELEASE (3rd ed. 2004).

irrational monetary bail on individuals who cannot afford it, and then housing them in a dangerous jail populated almost entirely by those awaiting trial.<sup>4</sup> Thankfully, the committee found nothing in Utah approaching these kinds of abuses. There are undoubtedly serious issues, but those issues can be remedied with meaningful, sustained efforts accompanied by a constant review of our performance.

## Background

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### *Definitions and Meaning*

As the committee quickly discovered, any discussion of this topic must begin with defining some basic terms and discussing how these terms and phrases are frequently misused. Of course, the most vexing term among them is the word “bail.” As legal writing authority Bryan Garner explains, “bail” is a “chameleon-hued legal term” with strikingly different meanings depending on its overall use as a noun or a verb.<sup>5</sup> *The Fundamentals of Bail* offers a good explanation of how and why this and other terms have morphed from their intended meanings and why it matters.

A sentence from a newspaper story stating that “the defendant was released without bail,” meaning perhaps that the defendant was released without a secured financial condition or on his or her own recognizance, is an improper use of the term “bail” (which itself means release) and can create unnecessary confusion surrounding efforts at pretrial reform. Likewise, stating that someone is being “held on \$50,000 bail” not only misses the point of bail equaling release, but also equates money with the bail process itself, reinforcing the misunderstanding of money merely as a condition of bail—a limitation of pretrial freedom which, like all such limitations, must be assessed for legality and effectiveness in any particular case.<sup>6</sup>

Unfortunately, the public and the media have come to use the amount of bail “as a sort-of barometer of the justice system’s sense of severity of the crime.”<sup>7</sup> This faulty use of terms has its genesis in how states define “bail,” which can vary even within the same statute. Utah is a perfect example of this. Utah’s statute states that a person “who may

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<sup>4</sup> Jennifer Gonnerman, *Kalief Browder, 1993-2015*, THE NEW YORKER, June 7, 2015; *PBS NewsHour: How Kalief Browder Became the Face of Rikers Island Abuse* (PBS television broadcast June 23, 2015) (transcript available at <http://www.pbs.org/newshour/bb/kalief-browder-became-face-rikers-island-abuse>).

<sup>5</sup> BRYAN GARNER, *DICTIONARY OF MODERN LEGAL USAGE* 100 (Oxford Univ. Press, 3rd ed. 2011).

<sup>6</sup> SCHNACKE, *FUNDAMENTALS OF BAIL*, *supra* note 1, 115.

<sup>7</sup> *Id.*

be *admitted to bail* may be released either on the person's own recognizance or upon posting bail..."<sup>8</sup> Thus, under the Utah Code, "admission to bail" can mean either release on recognizance or release on satisfying monetary conditions, but "bail" by itself refers to financial conditions of release.

As this report will explain, what "bail" or "admission to bail" should reference is the *process* of releasing a defendant from custody on conditions designed to assure both public safety and the person's appearance in court. For clarity, the committee attempts here not to use "bail" without explaining what it means. So when referencing the financial conditions that the term "bail" has come to mean in modern usage, the phrase "monetary bail" is used.

"Bond" and "bail bond" are other misunderstood terms. "A bond... occurs whenever the defendant forges an agreement with the court, and can include an additional surety [(bail bondsman)], or not, depending on that agreement."<sup>9</sup> Because bonds are an agreement with the court to return and face the process surrounding criminal charges, they do not necessarily have to include money, but can instead include a variety of other conditions for release, such as electronic ankle monitoring and probation-style check-ins.

A "surety" is a person who is primarily liable for paying another's debts or performing another's obligations.<sup>10</sup> So a "surety bond" is when a commercial bail bond agent signs an agreement with the court, secured by an amount of money, pursuant to which the surety guarantees the defendant will appear in court. The surety charges the defendant a fee for the service—in Utah, usually no more and no less than 10% of the face amount of the bond. The surety is then liable for the full amount of the monetary bond if the defendant fails to appear. Commercial bail bond companies frequently require collateral from the defendant or the defendant's family as a condition of issuing the bond. "Cash bond" or "cash bail," meanwhile, reference the amount of money that must be posted with the court to secure release. If the defendant makes all court appearances, the money is returned; if the defendant fails to appear, the money posted is forfeited. "Unsecured bonds," as the name suggests, are agreements between a defendant and the court whereby the defendant agrees to pay money to the court if the

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<sup>8</sup> UTAH CODE § 77-20-1(2) (2015).

<sup>9</sup> SCHNACKE, *FUNDAMENTALS OF BAIL*, *supra* note 1, 105.

<sup>10</sup> *See id.* 23-25.

defendant fails to appear, but that agreement is not secured by cash, bond, or other collateral.<sup>11</sup>

A “commercial surety” or “compensated surety” is a third party who guarantees the defendant’s appearance in court by promising to pay a financial condition if the defendant fails to appear.<sup>12</sup> The agent for that surety is sometimes called a “bail bondsman.” In Utah, commercial sureties must be licensed by the Utah Department of Insurance. Some are asset backed, meaning they must maintain and commit assets with a total value that exceeds the total amount of surety bonds issued by them at any given time.<sup>13</sup> Others are insurance backed, meaning an insurer or underwriter guarantees the surety bonds up to a certain amount.<sup>14</sup>

“Pretrial,” as used in this context, means the period of time between arrest and sentencing.<sup>15</sup>

“Pretrial services” is used to describe pretrial services agencies or programs that perform a variety of functions, including actively monitoring the defendant and the administration of a “pretrial risk assessment,” which refers to a scientifically validated instrument that attempts to measure likelihood of failure to appear, likelihood of committing crimes during the pretrial period, and, sometimes, propensity for violence.<sup>16</sup>

“Pretrial risk” refers to the risk that a defendant will either fail to appear in court (sometimes called “FTA”) or commit a new criminal offense during the period of pretrial release.

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<sup>11</sup> PRETRIAL JUSTICE INSTITUTE GLOSSARY OF TERMS, <http://www.pretrial.org/glossary-terms> (last visited Nov. 4, 2015) [hereinafter PJI GLOSSARY OF TERMS].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Under Utah Code section 77-20-7(1)(a), the surety remains liable on a bond or undertaking during all proceedings “up to and including the surrender of the defendant for sentencing” even if the undertaking provides otherwise. A surety may, at any time and for any reason, surrender a defendant to any county jail booking facility in the state and in doing so obtain an exoneration of the bond. *See* UTAH CODE § 77-20-8.5.

<sup>16</sup> PJI GLOSSARY OF TERMS, *supra* note 11.

## *History of Bail*

The history of “bail” is long, reaching as far back as ancient Rome, and much has been written on the subject.<sup>17</sup> There are several historical threads relating to bail that are of interest to our discussion, the first of which began in those ancient times, moved through the Middle Ages, and continued until the 1800s. That thread was marked by the use of personal sureties. Personal sureties were respected members of the community that agreed to take responsibility for those accused of crimes, make sure they appeared to face the charges, and, in early days, agreed to stand in for them if they failed to appear. A personal surety pledged to secure the release of the accused, which required the surety to pay if the accused failed to appear. The surety could not charge a fee for this service or otherwise seek indemnification. For centuries, this personal surety system existed as the primary means of ensuring those charged with crimes appeared to face charges.<sup>18</sup>

The second, related thread followed the Norman Invasion and was marked by a move from private criminal justice to public justice and “crimes of royal concern,” which we know as felonies today, that came under the jurisdiction of royal justices. At the same time, sheriffs were commanded under the *writ de homine replegiando* to release defendants forailable offenses, and, concomitantly, to detain defendants for non-ailable offenses. Around the 1270s the British crown uncovered two primary abuses by sheriffs within the bail system: “(1) they were extracting money fromailable defendants before releasing them (and sometimes even arresting innocent people for no reason to demand payment); and (2) they were releasing otherwise unailable defendants, also for ‘considerable sums of money.’” Both were considered equally egregious.<sup>19</sup> This resulted in the Statute of Westminster, which “made it clear thatailable defendants were to be released and unailable defendants were to be detained,” thereby removing the sheriffs’ discretion. Nonetheless, over the next few centuries several other major statutes were enacted to address these continued abuses.<sup>20</sup>

The seventeenth century brought about the “most notable reforms,” including the creation of the Petition of Right and the Habeas Corpus Act of 1679. The former

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<sup>17</sup> See SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, 23.

<sup>18</sup> See *id.* 23-29.

<sup>19</sup> TIMOTHY R. SCHNACKE, U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORRECTIONS, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE’S DECISION TO RELEASE OR DETAIN A DEFENDANT PRETRIAL 15-16 (2014) [hereinafter SCHNACKE, MONEY].

<sup>20</sup> *Id.* 17-18.

prohibited detention without charge, and the second provided procedure for preventing delays in bail hearings.<sup>21</sup> Because the Habeas Corpus Act, as part of its procedure, allowed for discretion in setting bail amounts, this also led to the setting of bail in “unattainable amounts.” Ultimately, that led to the English Bill of Rights, which proscribed excessive bail.

The proscription against excessive bail, however, was in the context of the personal surety system, which persisted through this period of English history.

[S]ureties were individuals who were willing to take responsibility over defendants—for no money and with no expectation of indemnification upon default—and the sufficiency of the sureties behind any particular release on bail came from finding one or more of these individuals, a process that was made exceedingly simpler through the use of collective, non-family groups.<sup>22</sup>

“[A]ny financial condition set at bail was . . . secured only by the promise of the personal surety, and it was payable only upon” the accused’s failure to appear and face the charges.<sup>23</sup> “[T]he personal surety system . . . virtually ensur[ed] that those deemedailable were released with ‘sufficient sureties.’”<sup>24</sup>

However, in the 1800s both England and America began to run out of personal sureties. The reasons are varied. In America, there was a “growth of impersonal urban areas [that] diluted the strong, small community ties and personal relationships supporting the personal surety system,” and “the unsettled frontier [] increased the risks of a defendant’s flight and created a further disincentive to the undertaking of a personal surety obligation.”<sup>25</sup> The bottom line is the demand for personal sureties outstripped supply, which meant changes to come.

It is at this point in history that England and the United States parted ways in how to resolve the dilemma ofailable defendants being detained for lack of sureties. In England (and, indeed, in the rest of the world), the laws were amended to allow judges to dispense with sureties altogether

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<sup>21</sup> *Id.* 19.

<sup>22</sup> SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, 36.

<sup>23</sup> SCHNACKE, MONEY, *supra* note 19, 14.

<sup>24</sup> SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, 40.

<sup>25</sup> Schnacke, Money, *supra* note 19, 31 (first alteration in original).

when justice so required. In America, however, courts and legislatures began chipping away at the laws against surety indemnification.<sup>26</sup>

The states, then, ended up with a system that looks very different from the one originally created. “[A]n alternative to the personal surety system was necessary to effectuate bail as a mechanism for release and to reduce the growing jail populations due to the detention ofailable defendants. Accordingly, states began experimenting with new ways to administer bail” and this meant a transition to commercial sureties.<sup>27</sup> The first commercial surety opened for business in America in 1898. By 1912, the Supreme Court wrote that “[t]he distinction between bail [i.e., common law bail, which forbade indemnification] and [personal suretyship] is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary.”<sup>28</sup>

So, while countries like England, India, Ireland, and New Zealand made commercial sureties effectively illegal, the United States (and the Philippines) created a system in which “bondsmen chose defendants for their ability to pay [the bondsmen’s] fees and offer collateral, and those who could not do so typically stayed in jail.”<sup>29</sup> In doing so, the United States arguably rejected its own Supreme Court precedent that proscribed a system in whichailable defendants were not freed prior to trial.<sup>30</sup>

Tim Schnacke, of the Center for Legal and Evidence-Based Practices, comments that “[i]nstead of being a solution to the problem of unnecessary detention ofailable

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<sup>26</sup> SCHNACKE, *FUNDAMENTALS OF BAIL*, *supra* note 1, 40.

<sup>27</sup> SCHNACKE, *MONEY*, *supra* note 19, 31.

<sup>28</sup> *Id.* 32 (quoting *Leary v. United States*, 224 U.S. 567, 575 (1912)) (third alteration in original).

<sup>29</sup> *Id.* 31.

<sup>30</sup> See *United States v. Barber*, 140 U.S. 164, 167 (1891) (“[I]n criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time; and, as these persons usually belong to the poorest class of people, to require them to pay the cost of their recognizances would generally result in their being detained in jail at the expense of the government, while their families would be deprived, in many instances, of their assistance and support.”); *Hudson v. Parker*, 156 U.S. 277, 285 (1895) (“The statutes of the United States have been framed upon the theory that a person accused of [a] crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction, and pending a writ of error.”); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citation omitted) (“This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”)

defendants due to the lack of sureties, the advent of commercial bail in America virtually guaranteed that the problem would continue.”<sup>31</sup> “The traditional money bail system has little to do with actual risk, and expecting money to effectively mitigate risk, especially risk to public safety, is historically unfounded.”<sup>32</sup> Yet reform in the American twentieth century was slow due to a line of cases that essentially affirmed the monetary bail system.<sup>33</sup> One area of reform that did occur, however, was in the federal bail statutes, which returned to the release/no release dichotomy. When someone is charged with a federal offense, the presumptive financial condition is unsecured, meaning no money is required up front for release. Other accepted release conditions include release to a personal surety, someone who agrees to have custody of the defendant and “who agrees to assume supervision and to report any violation of a release condition to the court.”<sup>34</sup> States, on the other hand, have been much slower to change even as large reform efforts in the area of pretrial release have cropped up across the nation.

This resistance to change is seen in Bureau of Justice Statistics data from 2009. That data shows that 50% of defendants released pretrial in the 75 largest counties in the country were released on commercial monetary bail.<sup>35</sup> Overall, 62% of felony defendants were released pretrial while 38% were detained until case disposition.<sup>36</sup> Of that 38%, only 4% were actually denied monetary bail.<sup>37</sup> Among detained defendants, 83% were allowed monetary bail, but could not pay it.<sup>38</sup> Moreover, only 50% of those released were released within 1 day.<sup>39</sup> 83% of all released defendants made all court

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<sup>31</sup> SCHNACKE, MONEY, *supra* note 19, 33.

<sup>32</sup> *Id.* 34.

<sup>33</sup> See, e.g., *United States v. Lawrence*, 26 F. Cas. 887 (C.C. D.C. 1835) (No. 15,577) (Defendant’s inability to pay \$1,500 financial condition was not *per se* excessive); *United States v. McConnell*, 842 F.2d 105, 107 (1988) (“But a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement.”); see also SCHNACKE, MONEY, *supra* note 19, at 34-38.

<sup>34</sup> See 18 U.S.C. §§ 3141, 3142; see also SCHNACKE, MONEY, *supra* note 19, 39-40.

<sup>35</sup> Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009-Statistical Tables* Figure 12 (Bureau of Justice Statistics, U.S. Dep’t of Justice, NCJ 243777), <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

<sup>36</sup> *Id.* Table 12.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Table 14.

appearances, while only 17% failed to appear.<sup>40</sup> And 84% of released defendants were not rearrested pretrial.<sup>41</sup>

Defendants detained pretrial have worse outcomes than those who are released. “Controlling for all other factors, defendants detained pretrial are convicted and plead guilty more often, and are sentenced to prison and receive harsher sentences than those who are released.”<sup>42</sup> The Laura and John Arnold Foundation also studied this issue using a sample size of 150,000 defendants and, in November 2013, released its findings. Its findings showed “that—all other things being equal—defendants detained pretrial were over four times more likely to be sentenced to jail (and with longer sentences) and three times more likely to be sentenced to prison (again with longer sentences) than defendants who were not detained.”<sup>43</sup>

### *Reform Movements in Other States*

Several states have embarked on pretrial release reform, the effect of which is to make the pretrial release decision more consistent with its historical meaning. Common themes in each of these jurisdictions, consistent with ABA and NAPSA standards, is the implementation of pretrial risk assessment tools, which use a defendant’s risk level, rather than financial conditions, to prescribe release decisions. According to the ABA, “[a] pretrial risk assessment is a tool that calculates a risk level for a defendant. The risk level corresponds to the defendant’s likelihood to fail to appear or of new criminal activity.” Moreover, “[i]t provides a calculated analysis of the risk the defendant poses, rather than just determining risk based on gut instinct or the limited facts provided to a judge. It also helps eliminate any personal biases against defendants for their race, age, gender, or socio-economic class.”<sup>44</sup>

Kentucky is one of these states and it has worked hard to get pretrial release right. In 1976, Kentucky created a pretrial services agency as part of its state judiciary to replace its outlawed commercial surety system. Kentucky administered a pretrial risk instrument it had created based upon other jurisdictions’ validated instruments. The instrument included factors such as prior failures to appear along with non-static

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<sup>40</sup> *Id.* Table 18.

<sup>41</sup> *Id.* Table 19.

<sup>42</sup> SCHNACKE, *FUNDAMENTALS OF BAIL*, *supra* note 1, 28.

<sup>43</sup> *Id.*

<sup>44</sup> ABA CRIMINAL JUSTICE SECTION, ABA RESTORING THE PRESUMPTION OF INNOCENCE PROJECT 1, [http://racialjusticeproject.weebly.com/uploads/6/9/3/9/6939365/pretrial\\_risk\\_assessment\\_website\\_summary\\_aba\\_poi\\_2015.pdf](http://racialjusticeproject.weebly.com/uploads/6/9/3/9/6939365/pretrial_risk_assessment_website_summary_aba_poi_2015.pdf).

factors, such as residency and community ties, which were uncovered through interviews. Kentucky validated its own instrument in 2010 and the results indicated it was working fairly well.<sup>45</sup> In 2013, Kentucky began using the Arnold Foundation’s “Public Safety Assessment—Court (or PSA-Court).” Six months into its pilot program, Kentucky reported pretrial release crime rates had dropped 15%, while the number of defendants released pretrial had increased.<sup>46</sup> Additionally, “[t]he PSA-Court [had] proven to be highly accurate at identifying the small group of Kentucky defendants who are at an elevated risk of committing violence if released before trial.”<sup>47</sup> And Kentucky had noted no increase in the number of missed court appearances.<sup>48</sup>

More recently, five counties in Arizona attempted to achieve similar results as they began pilot programs using the PSA-Court. Arizona ultimately chose to adopt that assessment tool statewide, and while Arizona’s pilot report has not yet been released, feedback from Arizona representatives to the committee has been positive.

According to the Arnold Foundation’s website,

The PSA was created using a database of over 1.5 million cases drawn from more than 300 U.S. jurisdictions. We analyzed the data to identify the factors that are the best predictors of whether a defendant will commit a new crime, commit a new violent crime, or fail to return to court. These factors are related to a defendant’s criminal history and current charge. They do not include factors that could be discriminatory such as race, gender, level of education, socioeconomic status, and neighborhood. The PSA is more objective, far less expensive, and requires fewer resources to administer than previous techniques. And because it was developed and validated using data from diverse jurisdictions from across the country, it can be used anywhere in the United States. It is currently being used in 29 jurisdictions, including three entire states—Arizona, Kentucky, and New

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<sup>45</sup> JAMES AUSTIN, ET AL., KENTUCKY PRETRIAL RISK ASSESSMENT INSTRUMENT VALIDATION 1 (October 29, 2010), <http://www.pretrial.org/download/risk-assessment/2010%20KY%20Risk%20Assessment%20Study%20JFA.pdf>.

<sup>46</sup> LAURA & JOHN ARNOLD FOUND., RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT-COURT IN KENTUCKY 1 (2014), <http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* 1-2.

Jersey—as well as three of the largest cities and two of the largest jail systems.<sup>49</sup>

The PSA or PSA-Court is a good example of a pretrial risk assessment that is consistent with ABA and NAPSA standards—which call for the use of evidence-based practices in pretrial release and supervision decisions—and could be administered in Utah to improve the pretrial process.

*“Evidence-Based Practices:” What It Means in this Context*

The term “evidence-based practices” encompasses a wide variety of movements within the criminal justice system to capture relevant data and use them to improve the predictive value of pretrial release and other decisions. “Under the current system, we make decisions based on gut and intuition instead of using rigorous, scientific, data-driven risk assessments. This has led to a public safety crisis nationally, where too many high-risk defendants go free, and too many low-risk defendants remain locked up for long periods.”<sup>50</sup> What it means to embrace evidence-based practices, then, is to use “scientific, data-driven risk assessments” to make pretrial, supervision and, longer term supervision decisions. “With the advent of the newest versions of statistical pretrial risk instruments that test the interrelated predictability of numerous variables . . . research has added an indispensable tool to allow any particular judge to do his or her job of trying to predict the inevitable failures.”<sup>51</sup>

Every pretrial release decision carries with it some degree of risk. The pretrial release decision is perhaps best viewed as an exercise in risk management, recognizing that risk cannot and will never be eliminated entirely, but when fairly understood can be minimized. Release decisions should “embrace risk so that release is the norm, and then [] mitigate that risk only to the level of *reasonable* assurance. Pretrial risk assessment instruments are tools that allow judges to both embrace and mitigate risk.”<sup>52</sup> An evidence-based assessment of a defendant’s risk of failure to appear or danger to others “can increase successful pretrial release without financial conditions that many defendants are unable to meet. Imposing conditions . . . appropriate for that

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<sup>49</sup> Laura & John Arnold Found., *Public Safety Assessment*, ARNOLDFOUNDATION.ORG, <http://www.arnoldfoundation.org/initiatives/case-studies/public-safety-assessment-2/> (lasted visited Nov. 5, 2015).

<sup>50</sup> LAURA & JOHN ARNOLD FOUND., RESEARCH SUMMARY, DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 5 (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf).

<sup>51</sup> SCHNACKE, MONEY, *supra* note 19, 54.

<sup>52</sup> *Id.*

individual . . . reduces pretrial detention without impairing the judicial process or threatening public safety.”<sup>53</sup>

In Utah, portions of the Justice Reinvestment Initiative (JRI) were passed and implemented this year. As part of JRI, the Utah Commission on Criminal and Juvenile Justice (CCJJ) issued a request for proposal (RFP) to counties statewide on several new evidence-based reforms.<sup>54</sup> One tool specified on the RFP is the LSI-R:SV, an evidence-based tool assessing the criminogenic risk and needs of individuals booked into jail that includes mental health and substance use screens. “[The LSI-R:SV] will identify low-risk/low-need offenders who may be released or assigned to minimal interventions to prevent the inefficient use of time, resources, full assessments, and programming, from which the offender is not likely to benefit.”<sup>55</sup> The CCJJ’s RFP provides for “supervision/transition programs and practices implemented by counties that reduce recidivism and reduce the number of offenders per capita who are incarcerated utilizing evidence-based principles.” The RFP further provides for “a Pre-trial Risk Assessment on individuals charged with a class B misdemeanor or above offense entering the county correctional facility/jail.” This latter priority is a subject of this report. Though it sounds similar to the criminogenic risk and needs screen (LSI-R:SV), the pretrial risk assessment serves a fundamentally different purpose.

The pretrial risk assessment is designed only to assist judges in making release decisions at the pretrial stage. So, although both the pretrial risk assessment and the risk and needs screen are designed to assess risk, including risk to recidivate (commit new crimes), the pretrial risk assessment applies only to pretrial release while the risk and needs screen applies to case processing and disposition. Said another way, the pretrial risk assessment is not intended to predict long term whether a defendant will commit new crimes; it is only intended to predict the likelihood that, if released, the defendant

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<sup>53</sup> Arthur W. Pepin, *2012-2013 Policy Paper: Evidence-Based Pretrial Release*, CONF. ST. CT. ADMINS. 2 (2012), [http://www.americanbar.org/content/dam/aba/administrative/criminal\\_justice/evidencebased\\_pretrialrelease.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/evidencebased_pretrialrelease.authcheckdam.pdf).

<sup>54</sup> The CCJJ has adopted three priorities for the RFP: A) Statewide Evidence-Based Risk and Needs Screening, B) Statewide Pretrial Risk Assessment, and C) Supervision/Transition Programs and Practices. Priority A grants have been awarded and the RFP has been issued for Priority C. The RFP has been delayed for Priority B for a number of reasons, including the receipt of input from this report and ensuring sufficient resources for implementation of the tool selected.

<sup>55</sup> Commission on Criminal and Juvenile Justice, *Grant Application*, JUSTICE.UTAH.GOV, <http://webcache.googleusercontent.com/search?q=cache:0Q5i6vsCEs4J:www.justice.utah.gov/Documents/CCJJ/Grants/JRI/2015CPIPGRANTAPPLICATION2015.doc+&cd=1&hl=en&ct=clnk&gl=us> (last visited Nov. 5, 2015).

will commit new crimes prior to the disposition of the case and return to court to face the charges. The risk and needs screen, on the other hand, is designed to predict the long-term risk of committing new crimes and the defendant's need for supervision before and after sentencing. Both sets of tools demonstrate a firm commitment to evidence-based practices.

### *Public Attitudes about Pretrial Release*

How courts handle pretrial release issues affects the public's perception of and confidence in the judiciary. Since 2010, pretrial release policies and practices have received increased attention in the media. In the past year especially, the monetary bail system has received increasingly critical attention from the media.<sup>56</sup> News articles have questioned whether the monetary bail system we currently use is the best way to ensure court appearances and to prevent violence and recidivism by defendants before trial.<sup>57</sup> Indeed, the consistent theme throughout these reports is that the system unduly burdens poor people, even though they remain innocent until proven guilty.

Reports of monetary bail's effect on individuals are sobering. Numerous articles told of Kalief Browder, a teenager who was held without trial for more than three years at Rikers Island—including two years in solitary confinement—for allegedly stealing a backpack which he claimed he did not steal.<sup>58</sup> Following his release, he committed suicide.<sup>59</sup> The media also reported on a mother arrested for endangering a child when she left her baby with a friend at her domestic violence shelter and went to get diapers after curfew.<sup>60</sup> After her arrest, she remained in jail for nearly a month because she could not afford bail.<sup>61</sup> Five months after her release, she was still trying to regain custody of her child.<sup>62</sup>

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<sup>56</sup> Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed With Inmates*, Nat'l Pub. Radio (Jan. 21, 2010), <http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates>.

<sup>57</sup> See, e.g., Editorial, *Bail System Should Be Based on Risk, Not Resources*, THE HARTFORD COURANT, August 20, 2015, <http://www.courant.com/opinion/editorials/hc-ed-reform-the-bail-system-20150819-story.html>.

<sup>58</sup> See Gonnerman, *supra* note 4; PBS NewsHour, *supra* note 4.

<sup>59</sup> *Id.*

<sup>60</sup> Nick Pinto, *The Bail Trap*, N.Y. TIMES, August 15, 2015, <http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Not all of the media attention about pretrial release is negative, though. A number of reports have highlighted the initiatives cities and states are taking to reform their laws and constitutions to create more efficient systems. These articles speak favorably of systems that incorporate pretrial risk assessments<sup>63</sup> and expanded pretrial service programs, including drug testing, drug recovery programs, and ankle monitoring.<sup>64</sup>

Perhaps in part due to media reports about these issues, the public supports pretrial release reform. A poll of likely 2016 nationwide voters conducted in 2013 showed that 7 in 10 voters support using pretrial risk assessments in lieu of monetary bail. Further, nearly half of those polled strongly support the use of pretrial risk assessments. See Table 1 below.

**Table 1. Support for Pretrial Risk Assessments Nationwide.**

% Support (% Strong Support)		
All		70% support (47% strong)
Gender	Men	72% support (52% strong)
	Women	67% support (44% strong)
Age	Under 50	72% support (50% strong)
	Over 50	67% support (44% strong)
Party Identification	Democrat	74% support (51% strong)
	Independent	66% support (44% strong)
	Republican	69% support (46% strong)
Region	Northeast	66% support (40% strong)
	Midwest	70% support (50% strong)
	South	69% support (48% strong)
	West	74% support (51% strong)

Source: Public Welfare Foundation and Pretrial Justice Institute, 2013.

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<sup>63</sup> *Id.*

<sup>64</sup> Patrick Sullivan, *Addiction Getting Worse, So Bail Restrictions To Get More Severe*, THE TICKER, September 8, 2015, <http://www.traverseticker.com/story/addiction-getting-worse-so-bail-restrictions-to-get-more-severe>.

### *Utah's Current Pretrial Release and Supervision Practices System*

Utah's current statutory system includes many of the things needed for effective pretrial release and supervision, but it could be improved. Utah law provides that persons accused of a crime are bailable, with notable exceptions.<sup>65</sup> Under the Utah Constitution, all persons charged with a crime are bailable except:

- (a) [P]ersons charged with a capital offense when there is substantial evidence to support the charge; or
- (b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or
- (c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.<sup>66</sup>

The Utah Code adds another category of non-bailable offenses for a person charged with a felony "when the court finds there is substantial evidence to support the charge and it finds by clear and convincing evidence that the person violated a material condition of release while previously on bail."<sup>67</sup> Further, a person arrested for domestic violence may not be released on bail, recognizance, or otherwise, unless as a condition of that release the person is ordered and agrees in writing that until further order of the court, "the person will: (a) have no personal contact with the alleged victim; (b) not threaten or harass the alleged victim; and (c) not knowingly enter onto the premises of the alleged victim's residence or any premises temporarily occupied by the alleged victim."<sup>68</sup>

Outside of this, all arrestees have a right to "bail," and under the United States and Utah constitutions, "[e]xcessive bail shall not be required..."<sup>69</sup> Within existing law, the right to "bail" includes release on recognizance or release upon posting monetary bail.

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<sup>65</sup> UTAH CONST. art. I, § 8(1).

<sup>66</sup> *Id.*

<sup>67</sup> UTAH CODE § 77-20-1(1)(d).

<sup>68</sup> *Id.* § 77-36-2.5(2).

<sup>69</sup> U.S. CONST. amend. VIII; UTAH CONST. art. I, § 8(1).

Any person who may be admitted to bail may be released either on the person's own recognizance or upon posting bail, on condition that the person appear in court for future court proceedings in the case, and on any other conditions imposed in the discretion of the magistrate or court....<sup>70</sup>

The conditions must be calculated to: (a) ensure the appearance of the accused, (b) ensure the integrity of the court process, (c) if appropriate, prevent direct or indirect contact with witnesses or victims by the accused, and (d) ensure the safety of the public.<sup>71</sup>

Current pretrial release and supervision practices in the state also need improvement. There is no statewide office or agency for pretrial release and supervision. These responsibilities are handled at the county level. Other than Salt Lake, no county has a dedicated pretrial services agency. In other counties, pretrial supervision, to the extent it exists, must be done by private, for-profit providers. In jurisdictions where private providers are not available, or where defendants cannot afford them, there is no pretrial supervision at all. In these circumstances, judges can either release defendants on recognizance and hope they come to court, or hold them in custody until their cases resolve.

Salt Lake County has a pretrial services agency that manages pretrial release. According to the agency's website,

All defendants booked into the jail are screened for release by a Criminal Justice Services Jail Screener. In order to be recommended for release from the jail, a defendant must:

- Have current charges and criminal history that falls within court authorized release guidelines.
- Have verifiable ties to the community.
- Provide names and phone numbers of individuals who can verify information regarding the defendant.
- Not have had a previous Pretrial release that was unsuccessful.
- Not be a threat to self or the community.<sup>72</sup>

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<sup>70</sup> UTAH CODE § 77-20-1(2).

<sup>71</sup> *Id.*

<sup>72</sup> Salt Lake County Criminal Justice Services, *Pretrial Screening*, SLCO.ORG, <http://slco.org/criminal-justice/pre-trial-programs/pre-trial-screening/> (last visited Nov. 5, 2015).

Salt Lake County is the only county in Utah that uses a validated pretrial risk assessment. Although both Utah and Weber counties use worksheets that take into account information such as the defendant's offenses, employment status, and whether the defendant has a place to live in order to assess whether the defendant should be released on recognizance, these worksheets do not appear to be validated.

Salt Lake County uses a tool called the SLPRI, or Salt Lake Pretrial Risk Instrument, to conduct its jail release screenings. The SLPRI uses a combination of static and non-static factors to determine a risk score. The SLPRI has its merits for long-term, statewide application, especially since it is already in use. But the drawback to having a tool with non-static factors is that it requires an interview with the defendant to complete the process. An interview-based tool results in more manpower and time resources than those tools that use only static factors, such as the Arnold Foundation's PSA, which pull from existing databases only. The Arnold Foundation asserts that "none of the interview-based factors improved the predictive analytics of the risk assessment. In other words, for all three categories—new criminal activity, new violent crime, or failure to appear—the addition of interview-dependent variables did not improve the risk assessment's performance."<sup>73</sup> However, Salt Lake County has validated both the static and non-static factors it uses in the SLPRI; those factors are thus predictive of the behavior they seek to measure. Salt Lake County feels strongly that both static and non-static factors are an important part of any pretrial risk assessment tool.

The committee recommends that a uniform statewide pretrial risk assessment tool be adopted. The Arnold Foundation's PSA is an attractive option because it is both cost-effective and efficient. But Salt Lake County's perspective should be weighed against the benefits of simplicity and uniformity since it is arguably an open question whether a pretrial risk assessment tool should have both static and non-static factors. On balance, if the Arnold Foundation's PSA is selected for statewide use, it must be locally validated after one year—as the SLPRI has been—to ensure that it is in fact predictive of recidivism and failures to appear.

### *When and How Pretrial Release Decisions Are Made in Utah*

In Utah, the prosecution process relevant to this committee's work starts in one of two ways.<sup>74</sup> The first is by a warrantless arrest, meaning the arrestee is taken into

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<sup>73</sup> LAURA & JOHN ARNOLD FOUND., *supra* note 50, at 4.

<sup>74</sup> Traffic and other minor offenses initiated by citation proceed in a slightly different fashion. Under Utah Code section 77-7-18, "[a]ny person subject to arrest or prosecution on a misdemeanor or infraction

Continued...

custody based on a law enforcement officer's determination of probable cause that the arrestee committed a criminal offense, and the charging document formally setting forth those offenses is filed with the court thereafter. The second, lesser-used method, is the filing of an Information or Indictment with the court, and then serving the defendant with a summons or an arrest warrant.<sup>75</sup> The court is involved in each process at different stages, but in both situations, a neutral magistrate must make a preliminary decision regarding whether there is a factual and legal basis to hold the person in custody or to arrest them, and, if so, whether and under what conditions the person should be released from custody pending the resolution of the case.<sup>76</sup>

Where the process starts with a warrantless arrest, the rules state that “[i]n order to detain any person arrested without a warrant, as soon as is reasonably feasible, but in no event longer than 24 hours after the arrest, a determination shall be made as to whether there is probable cause to continue to detain the arrestee.”<sup>77</sup> This occurs when an officer submits to a magistrate a written, sworn probable cause statement (which may be transmitted to the judge verbally or electronically, subject to certain conditions).<sup>78</sup> If the magistrate finds there is not probable cause to continue to detain the arrestee, “the magistrate shall order the immediate release of the arrestee.”<sup>79</sup> “If the

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charge may be issued and delivered a citation that requires the person to appear at the court of the magistrate with territorial jurisdiction.” A person receiving a citation issued pursuant to section 77-7-18 must appear where and when ordered “unless the uniform bail schedule adopted by the Judicial Council or Subsection 77-7-21(1) permits forfeiture of bail for the offense charged.” UTAH CODE § 77-7-19(1). For these non-mandatory appearance cases, bail forfeiture is used as a mechanism to collect a fine without requiring court appearance.

<sup>75</sup> See UTAH R. CRIM. P. 4(a) (2015) (“[A]ll offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed”); UTAH R. CRIM. P. 5(a) (same); UTAH R. CRIM. P. 6.

<sup>76</sup> This process is one place where the law and the policies of the judicial branch intersect with the law enforcement functions of the executive branch; much of it occurs before anything is formally filed with the court; and it also occurs almost entirely at the local level because the counties operate the jails and prosecute the cases. What all of this means is that although the process is governed both by law and by court rule, in many important respects it has come to be governed by local customs and practices that have developed over time.

<sup>77</sup> UTAH R. CRIM. P. 7(c)(1). “The determination may be made by any magistrate, although if the arrestee is charged with a capital offense, the magistrate may not be a justice court judge.”

<sup>78</sup> UTAH R. CRIM. P. 7(c)(2).

<sup>79</sup> UTAH R. CRIM. P. 7(c)(3)(A). The rule continues, “[i]f a probable cause statement is presented to a magistrate more than 24 hours after the arrest, the magistrate shall order the release of the arrestee unless the probable cause statement establishes that the delay was caused by a bona fide emergency or other extraordinary circumstances.” *Id.* 7(c)(4).

magistrate finds probable cause to continue to detain the arrestee, the magistrate shall immediately make a bail determination.”<sup>80</sup>

This is the first point at which the judicial branch steps in to determine whether and under what conditions someone will be held in custody. In most jurisdictions, responsibility for this function rotates among the judges so the judge who determines probable cause and sets monetary bail or release conditions is unlikely to preside over the case. In some jurisdictions, the probable cause review and bail determination occurs at the same time. In other jurisdictions, these are separate steps. In some, monetary bail is set by the judge; other jurisdictions rely on the Uniform Fine and Bail Schedule and use statutory bail commissioners. In short, the existing practices for making this particular determination vary greatly.<sup>81</sup>

In all jurisdictions, the judge tasked with making this decision has a probable cause statement prepared by the arresting officer, information about the criminal offense on which the individual has been booked in jail, and little else. In a few jurisdictions, the judge might be provided a record of prior bookings or a BCI report. Even in Salt Lake County, where individuals booked into the jail are given a validated pretrial release assessment, the results of that assessment are not made available to the judge at this stage. One consistent comment from judges formally surveyed by the committee and those with whom the committee discussed the matter informally is the lack of meaningful information with which to make an informed pretrial release decision.

With respect to setting monetary bail at this stage, the Rules of Criminal Procedure state, “[t]he bail determination *shall* coincide with the recommended bail amount in the Uniform Fine/Bail Schedule *unless the magistrate finds substantial cause to deviate from the Schedule.*”<sup>82</sup> The Uniform Fine and Bail Schedule establishes a fixed monetary bail amount based on the level of the offense charged, without regard to the likelihood that a particular arrestee may fail to appear at court hearings or commit new offenses if released. For third degree felonies, the bail schedule amount is \$5,000; second degree felonies are \$10,000; first degree felonies that do not involve a minimum mandatory sentence are \$20,000; and first degree felonies with a minimum mandatory

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<sup>80</sup> UTAH R. CRIM. P. 7(c)(3)(B) (emphasis added).

<sup>81</sup> Memorandum from the Board of District Court Judges to Chief Justice Matthew B. Durrant Regarding Recommendations for a Uniform Process for Setting Bail (May 29, 2015) (attached as Addendum A).

<sup>82</sup> UTAH R. CRIM. P. 7(c)(3)(B) (emphasis added).

sentence are \$25,000.<sup>83</sup> The bail amount for class A misdemeanors is \$1,950 while the amount for class B misdemeanors is \$680, and for class C misdemeanors it is \$340.<sup>84</sup> <sup>85</sup> This provision of rule 7 purports to limit the judge’s discretion to set a higher monetary bail for someone who presents a high pretrial risk and commits a serious offense; it also purports to limit the judge’s ability to order an arrestee’s release on recognizance or on conditions other than monetary bail. The Utah Code, however, makes clear that the judge has the discretion to order a person released “on the person’s own recognizance *or* upon posting bail, on condition that the person appear in court for future court proceedings in the case, and on any other conditions imposed in the discretion of the magistrate or court....”<sup>86</sup>

Once the court finds probable cause and sets monetary bail, the prosecutor must file an Information (or an Indictment) with the court setting forth the charges. Many jurisdictions in the state follow what has come to be known as the 72-hour rule—a “rule” that appears nowhere in court rules, the Utah Code, or case law—under which the prosecution must file charges within 72 hours of arrest, or obtain from the court a written extension of that deadline. If the prosecution fails to file within that time, the arrestee will be released. In most jurisdictions, this process is automatic and the jail simply releases arrestees if charges are not filed by the deadline. In others, arrestees are brought before the court to determine whether they should be ordered released, sometimes well beyond 72 hours after arrest. The processes seem to be driven by custom and practice, rather than law.

With the filing of the Information, or return of the Indictment, the “magistrate shall cause to issue either a warrant for the arrest or a summons for the appearance of the accused.”<sup>87</sup> <sup>88</sup> In the warrantless arrest scenario described above, the prosecution may request an arrest warrant; that warrant, upon issuance by the court, essentially

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<sup>83</sup> See UTAH UNIFORM FINE AND BAIL SCHEDULE 8 (approved May 12, 2015), [https://www.utcourts.gov/resources/rules/ucja/append/c\\_fineba/FineBail\\_Schedule.pdf](https://www.utcourts.gov/resources/rules/ucja/append/c_fineba/FineBail_Schedule.pdf).

<sup>84</sup> *Id.*

<sup>85</sup> Apart from these guidelines, the Schedule also sets a specific bail amount for certain offenses.

<sup>86</sup> UTAH CODE § 77-20-1(2) (emphasis added). Thus, insofar as rule 7 is read as requiring “substantial cause” to order release on recognizance, it conflicts with Utah Code section 77-20-1(2) and the statute controls.

<sup>87</sup> UTAH R. CRIM. P. 6(a).

<sup>88</sup> If the person now charged by Information was previously arrested, it is not common practice to notify the filing judge of that initial bail determination. Therefore, the signing judge on the Information may, without knowledge, supplant the prior decision.

supersedes the pretrial hold established at the probable cause review and becomes the basis for detaining the defendant. Also, “[w]hen a warrant of arrest is issued, the magistrate shall state on the warrant . . . the amount of bail . . . .”<sup>89</sup> Thus, the monetary bail set at this time supersedes the monetary bail set at the probable cause stage.

For the warrantless arrest scenario, this is the second point at which the judicial branch steps in to determine whether someone will remain in custody and, if so, under what conditions.<sup>90</sup> In practice, very little new information is provided to the judge at this stage. The State is now represented by counsel so the probable cause statement will have been reviewed by a prosecutor and the charges screened. More information may be known about the arrestee—who is now a defendant—but there is not a systematic method to ensure judges are provided this additional information. Once again, in most jurisdictions, judges are provided nothing more than a probable cause statement and the charges filed. In Salt Lake County, the only jurisdiction where pretrial risk screening is occurring, the results of the pretrial risk assessment are not made available to the judge reviewing the Information or arrest warrant.

According to the rule, an arrest warrant at this stage should be the exception rather than the norm. “If it appears to the magistrate that the accused will appear on a summons and there is no substantial danger of a breach of the peace, or injury to persons or property, or danger to the community, a summons may issue in lieu of a warrant of arrest to require the appearance of the accused.”<sup>91</sup> In some jurisdictions, summonses are regularly and effectively used to advise out-of-custody defendants of the pendency of the case and notify them of court dates. In other jurisdictions, summonses are almost never used even with defendants who are no longer in custody or never were in custody. When an arrest warrant is used, a law enforcement officer must locate, arrest, and book the defendant in jail; the jail must then hold these individuals (unless they post monetary bail or are otherwise released) and transport them to court, all at substantial cost. A summons, on the other hand, “may be served by . . . any person authorized to serve a summons in a civil action,”<sup>92</sup> or “by mailing it to

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<sup>89</sup> UTAH R. CRIM. P. 6(b)(1).

<sup>90</sup> For cases initiated by the filing of an Information or Indictment, this is the first occasion on which the court reviews probable cause and determines whether pretrial detention is appropriate.

<sup>91</sup> UTAH R. CRIM. P. 6(b).

<sup>92</sup> UTAH R. CRIM. P. 6(c)(1).

the defendant's last known address." <sup>93</sup> If a defendant fails to appear in response to a summons or a citation, "[a] warrant of arrest may issue . . . ." <sup>94</sup>

As alluded to above, after charges are filed, the defendant must appear in court. <sup>95</sup> The point at which this first appearance occurs varies across jurisdictions. In most jurisdictions, it occurs within one or two business days after the charging document is filed. At the first appearance, the defendant is notified of the charges, provided a copy of the Information or Indictment, and advised of a variety of other rights including "rights concerning pretrial release, including bail . . . ." <sup>96</sup>

If the defendant is charged with an offense other than a misdemeanor for which voluntary forfeiture of bail may be entered as a conviction under Subsection 77-7-21(1), the defendant shall be taken without unnecessary delay before a magistrate within the county of arrest for the determination of bail under Section 77-20-1 and released on bail or held without bail under Section 77-20-1. <sup>97</sup>

At this point, the court must "allow reasonable time and opportunity to consult counsel and . . . allow the defendant to contact any attorney by any reasonable means, without delay and without fee." <sup>98</sup>

In most jurisdictions, the first appearance is used to make an indigency determination and to appoint counsel if the defendant qualifies. It is also the defendant's first opportunity to address the court on the matter of pretrial release and monetary bail. If both sides are represented by counsel at this stage, the prosecution may have additional relevant information, the defendant has an opportunity to address the issue for the first time, and the court has another opportunity to examine whether

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<sup>93</sup> UTAH R. CRIM. P. 6(c)(3).

<sup>94</sup> UTAH R. CRIM. P. 6(b). For defendants who are in custody at the time the charging document is filed, an arrest warrant and the corresponding review of pretrial release by the court is appropriate. But for defendants who are not in custody at that time, prosecutors should make a good faith determination of whether an arrest warrant is necessary or appropriate under rule 6.

<sup>95</sup> This appearance is not necessarily in person. Courts increasingly are relying on video connections with jails to handle this first appearance and this practice is expected to grow. One issue this presents is whether the defendant will have had at that point opportunity to consult with counsel regarding pretrial release and bail. Where this has not occurred, an additional in-court hearing with both parties represented by counsel may be necessary as a matter of right.

<sup>96</sup> UTAH R. CRIM. P. 7(e).

<sup>97</sup> UTAH R. CRIM. P. 7(d)(5).

<sup>98</sup> UTAH R. CRIM. P. 7(f).

the defendant should remain in custody or be released and, if released, on what conditions.<sup>99</sup> Because this is the defendant's first opportunity to address the issue, pretrial release and monetary bail should be given *de novo* consideration with no weight given to prior decisions on the subject, unless the judge had detailed information when making the initial decision. In those jurisdictions where indigent defendants are not represented at this initial appearance, the topic should be addressed at the first hearing after which counsel has been appointed, subject to the same standard.

The issue of pretrial release and monetary bail can be addressed at later stages of the proceedings. "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."<sup>100</sup> That can occur in conjunction with a preliminary hearing or any other pretrial hearing. Once this type of bail hearing takes place and the court rules on the question, "[s]ubsequent motions to modify bail orders may be made only upon a showing that there has been a material change in circumstances."<sup>101</sup> What constitutes a "material change in circumstances" is undefined. Our survey of judges suggests that judges are open to addressing custody status generally whenever asked to do so, although those responding indicated that such requests are the exception rather than the norm.

Concurrent with the work of this committee, the Board of District Court Judges undertook a survey of practices across the state and the development of a series of recommendations to establish a uniform process for making pretrial release and monetary bail decisions. The Board's report to the Chief Justice, dated May 29, 2015, explains in detail the practices that have developed over time in various jurisdictions.<sup>102</sup> The report explains that "[g]eographic and demographic realities drove different bail practices too. In some rural counties, the district court convenes only twice per month to hear felony cases. The limited number of court days determines how quickly an arrested person appears for initial appearance and how quickly prosecutors are required to file."<sup>103</sup> At the other end of the spectrum, in "metropolitan areas, jail

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<sup>99</sup> As noted, these appearances frequently are done by video conference at the jail and indigent defendants often do not yet have counsel appearing for them, requiring them to address pretrial release issues pro se. In these circumstances, courts uniformly address custody status at the first hearing after counsel has been appointed.

<sup>100</sup> UTAH CODE § 77-20-1(5)(a).

<sup>101</sup> UTAH CODE § 77-20-1(5)(a).

<sup>102</sup> Memorandum from the Board of District Court Judges, *supra* note 81, 2-7.

<sup>103</sup> *Id.* 2.

crowding and transportation resources affect when people are released and brought to court.”<sup>104</sup> After much effort and deliberation, the Board unanimously approved in May a series of recommendations, the implementation of which forms the basis for many of the recommendations we propose here. Those recommendations include the following:

- Probable cause statements for warrantless arrests must be reviewed electronically within 24 hours of arrest and, to meet this deadline, judges must review probable cause statements at least two times per day, once in the morning and once in the afternoon, seven days a week, 365 days a year.
- If the reviewing judge finds probable cause, an initial pretrial release decision would be made at the same time, which may include imposing conditions of release or setting monetary bail.<sup>105</sup>
- Informations would be required to be filed within 72 hours of booking. Failing to file within that deadline would result in the automatic release of the detained person, unless the prosecutor obtains an order from the court extending the time to file.
- If the prosecutor determines that charges will not be filed prior to the expiration of the 72 hour period, the prosecutor would be required to file proof of declination with the clerk and the court should enter a written order releasing the person from custody.
- Arrested persons who remain in custody would appear for an initial appearance on the next court day after the Information is filed, recognizing that these initial appearances will, in many instances, take place by video conferencing links with the jail.
- At the initial appearance (or the first appearance after which counsel has been appointed), the defendant would have the right to

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<sup>104</sup> *Id.*

<sup>105</sup> The Board recommends establishing an electronic system that permits the magistrate to view the probable cause statement, enter a monetary bail amount, impose other conditions of release, and allow the arresting officer to include additional information that may be relevant to the release decision including statutory and constitutional factors. *Id.* 7. These recommendations make sense. However, the Board also recommends a link to the Uniform Fine and Bail Schedule for convenience. Because the committee recommends elimination of the “bail” aspects of the schedule, for reasons discussed in this report, a link to that schedule would be inappropriate but a link to the standards to be developed by the pretrial release committee would be appropriate.

readdress the issue of pretrial release or the monetary bail set at the probable cause stage. “This allows the arrested person the opportunity to be represented by counsel and to be heard regarding factors relevant to the setting of bail.”<sup>106</sup>

- After a “bail hearing” has been held, any further motion to modify monetary bail or release conditions must be made in advance of the hearing and with notice to the prosecutor consistent with the requirements of Utah Code section 77-20-1(5) and (6).<sup>107</sup>

In addition to its ultimate recommendations, it is notable that the Board’s report, not surprisingly, voiced the same concerns regarding current practices that this committee heard in its own survey of judges.

When bail is set immediately upon a finding of probable cause, the reviewing magistrate has no [I]nformation or [I]ndictment, no recommendation from pre-trial release, and no other reliable records. By statute, conditions of release are imposed in the discretion of the magistrate to ensure appearance of the accused, ensure the integrity of the court process, prevent contact with victims and witnesses by the accused, and ensure the safety of the public. But the probable cause statement alone generally includes limited information that might guide the discretion of the magistrate in setting conditions of release designed to serve these important objectives.<sup>108</sup>

Before meaningful reform of the pretrial release and monetary bail systems can take place, uniform and consistent procedures must be implemented. Without this basic overhaul—as recommended by the Board of District Court Judges—efforts to improve the system and to incorporate evidence-based practices will inevitably fall short.

### *Incomplete Data*

A significant obstacle affecting Utah’s ability to enact reforms in this area is a lack of data. The collection and retention of pretrial release and supervision data in the state is unfortunately inconsistent and incomplete. The court has access to very little pretrial release data,<sup>109</sup> although it does have some limited monetary bail data, which

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<sup>106</sup> *Id.* 8.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* 8-9. The Board also questioned the wisdom of the requirement in the Rules of Criminal Procedure that judges adhere to the Uniform Fine and Bail Schedule. *Id.* 9.

<sup>109</sup> District Court Cases with Bail or Bond from Cases Filed in FY2013 (on file with author).

the committee refers to below. When the committee requested pretrial release data from 24 county jails, only Beaver, Iron, Salt Lake, Summit, Tooele, Utah, Washington, and Weber counties responded. But the committee has a reason to lack confidence in the data.<sup>110</sup> One or more of the responding county jails were unable to provide data on: (i) the average number of days a detainee was held without any hold or commitment; (ii) how many persons were arrested without a warrant; (iii) how many persons were released on their own recognizance; (iv) how many posted cash bail; (v) how many posted bond; (vi) how many were released on conditions other than OR, cash, or bond; or (vii) how many remained in custody until trial.

Although incomplete, data provided by the county jails is the best we have regarding the current pretrial release landscape in Utah.<sup>111</sup> Jail data shows that as of June 1, 2015, the total capacity of the jails was 5,724.<sup>112</sup> Of the 4,845 detainees that were housed on that date, 2,529 (52%) were pretrial detainees.<sup>113</sup> Of 446 (9%) pretrial detainees, the most serious charge was a misdemeanor.<sup>114</sup> In 2014, 38% (14,329) of the pretrial detainees in responding jails were released on commercial bond, with 14% (5,351) released on monetary bail, and 10% (3,951) released on their own recognizance.<sup>115</sup> The jails could provide no data regarding how many pretrial detainees were offered monetary bail as a condition of release but remained incarcerated because they could not afford to pay it. The data showed the average time pretrial detainees were held ranged from 7 hours to 140 days depending on the county's policies.<sup>116</sup>

Other than Beaver County, none of the counties who responded to our survey could identify the number of inmates who remained in custody until their cases were resolved.<sup>117</sup> This data does not exist in court databases either. That fact alone is concerning.

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<sup>110</sup> See Appendix B, Information on County Jails' Occupancy and Pretrial Detainees (June 1, 2015).

<sup>111</sup> *Id.* There is a discrepancy with the data provided by the jails when it comes to the number of pretrial detainees. The jails that responded reported that there were only 1,525 defendants held only on pretrial detention. However, the jails reported that there were 446 pretrial detainees with a misdemeanor as the most serious charge, and 2,083 pretrial detainees with a felony as the most serious charge, bringing the total number of pretrial detainees to 2,529.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

## Recommendations and Discussion

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Based on the background and issues identified above, the committee sets forth the following recommendations. These recommendations build on one another and should therefore be viewed as a comprehensive set of reforms, rather than individual action items.

**1. *Persons arrested for or charged with crimes are presumed innocent. There should be a presumption in favor of pretrial release, free from financial conditions.***

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of our criminal law.”<sup>118</sup> “Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”<sup>119</sup> This core principle is embodied in our state constitution’s admonition that “[e]xcessive bail shall not be required; excessive fines shall not be imposed.”<sup>120</sup>

Consistent with this basic principle, there should be a clear, unequivocal statement—preferably in statute—recognizing a presumption in favor of pretrial release, free from financial conditions that many defendants cannot meet.

Utah has an existing framework that comes close to this standard, with statutes providing that “[a] person charged with or arrested for a criminal offense shall be admitted to bail as a matter of right...” and making clear that, in this context, being “admitted to bail” means “released either on the person’s own recognizance or upon posting bail....”<sup>121</sup> A clearer statement of this core principle, though, is appropriate.

To that end, and consistent with the other recommendations in this report, the committee recommends the following changes to pretrial release provisions of the Utah Code:<sup>122</sup>

- Utah Code section 77-20-1 or section 77-20-3 should be amended to incorporate the presumption identified above. Unless the judge

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<sup>118</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895).

<sup>119</sup> *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

<sup>120</sup> UTAH CONST. art. I, § 9.

<sup>121</sup> UTAH CODE § 77-20-1(1), (2); *see also id.* § 77-20-3 (same).

<sup>122</sup> Members of the committee have drafted proposed revisions to Utah Code Title 77, Chapter 20; Title 77, Chapter 20b; and Title 77, Chapter 7. Senator Hillyard has opened a bill file and has agreed to look at the proposed changes.

finds that monetary bail is necessary to ensure the defendant's appearance, there is a presumption of release on recognizance or other, non-financial conditions. Where monetary bail is required, it should be set in the lowest amount likely to guarantee the defendant's appearance given the defendant's history and financial ability to provide security.

- Utah Code section 77-20-10(2) outlines a variety of conditions for release that the court can impose on defendants. This section should be referred to in section 77-20-3(1) which deals with release on recognizance, to make clear these conditions apply to all pretrial releases not just those pending appeal. That section should be further amended to make clear that the judge should impose the least restrictive conditions necessary, that the judge has the discretion to impose other, reasonable conditions on release, and to eliminate those conditions not applicable at the pretrial stage.
- Utah Code section 77-20-4 should be amended to make clear that a defendant is not entitled to a surety bond.
- Utah Code section 77-20-1(6) should be amended to make clear that: (i) a defendant is entitled to a full "bail hearing," at such time as the defendant is represented by counsel; (ii) pretrial release issues will be considered *de novo* at that hearing; and (iii) the material change in circumstance standard does not apply until after the defendant has been afforded such a hearing.
- Decisions regarding whether and under what conditions someone should be released from custody pending trial or appeal is a judicial function.<sup>123</sup> To ensure jail employees are not performing judicial functions, Utah statutes authorizing bail commissioners should be repealed, including Utah Code sections 10-3-920 to -922 and 17-32-1 to -4. To the extent authority is necessary to allow sheriffs to collect monetary bail, a limited provision in Title 17 Chapter 22 allowing this practice should be adopted.

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<sup>123</sup> Existing law provides that "[t]he initial order denying or fixing the amount of bail shall be issued by the magistrate or court issuing the warrant of arrest or by the magistrate or court presiding over the accused first judicial appearance." UTAH CODE § 77-20-1(3)(a). If this applies at the probable cause stage, then the bail commissioner statutes are in conflict. If, on the other hand, this applies only after issuance of a warrant, it is unclear why judicial involvement would not be required at this stage.

- Bail-jumping, as a criminal offense, should be limited to felony cases and Utah Code section 76-8-312 should be amended to eliminate the offense of misdemeanor bail-jumping. Likewise, Utah Code section 77-7-22 should be amended to eliminate the misdemeanor crime of failure to appear on a citation. The committee's research showed that, at the felony level, bail-jumping charges are very rarely filed; at the justice court level, however, this charge is being filed far more than seems to be warranted.<sup>124</sup> Other sanctions exist to address any abuse of the process at the misdemeanor level.
- Utah Code section 77-7-21 should be amended to provide that only DUI, domestic violence and offenses involving a continued breach of the peace are class B and C misdemeanor offenses for which a person may be booked instead of cited.<sup>125</sup>
- Consistent with Recommendation 3 below, Title 77, Chapter 7 should be amended as necessary to ensure implementation of the recommendations of the Board of District Court Judges.
- Consistent with Recommendation 6 below, various statutory and rule references should be changed from the "Uniform Fine and Bail Schedule" to the "Uniform Fine Schedule."
- Consistent with Recommendation 8 below, Title 77, Chapter 20b, governing bail bond forfeiture, should be revised and updated to simplify the process and to address consistency, clarity, and organization.

The committee also recommends a number of amendments to rules 6 and 7 of the Utah Rules of Criminal Procedure, and to the Utah Code of Judicial Administration, including the following:

- Rule 7 of the Utah Rules of Criminal Procedure should be amended to incorporate the recommendations of the Board of District Court Judges, including establishing filing deadlines and addressing

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<sup>124</sup> According to Court Services, in Fiscal Year 2015, the number of cases filed statewide under Utah's bail-jumping statute (section 76-8-312) were 210 in justice courts and 6 in district courts.

<sup>125</sup> Of course, cited individuals may be arrested and booked for other outstanding warrants. But persons charged with petit misdemeanor charges should be issued a citation.

failure to meet those deadlines, and making clear the prosecution has a responsibility to determine who has been charged and who must be released if they have not been charged.

- Rule 7 should also be amended to remove the requirement that the judges and magistrates must use the Uniform Fine and Bail Schedule when setting monetary bail.
- Rule 6 should be amended to more expressly state the preference for summonses, especially with a lack of information about risk.
- Rules concerning exoneration of bonds and procedures related to booking in counties other than where the warrant is issued should be clarified and revised.
- An amendment to the practice of law rules allowing bail agents and sureties to file pro se motions should be considered.

**2. *Individuals arrested for or charged with minor offenses should not be held in custody pending the resolution of their cases.***

- a. For example, class B and C misdemeanors, other than DUI, domestic violence, and offenses involving a continued breach of the peace, should be initiated by issuance of a citation and release on recognizance with reporting instructions.***
- b. When these types of charges are filed by Information, service should be by summons, rather than a warrant.***

Individuals charged with low-level offenses should not be held in custody pending trial. “It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.”<sup>126</sup> In a number of jurisdictions, due to costs, jail crowding, and related issues, this has become a de facto policy. In these jurisdictions, law enforcement understands that the jail will not accept most class B and C misdemeanors so

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<sup>126</sup> AM. BAR ASS’N, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: PRETRIAL RELEASE, STANDARD 10-2.1 [hereinafter ABA PRETRIAL RELEASE STANDARDS]. The standards further provide that, unless necessary to ensure the safety of any person or the community, “a police officer who has grounds to arrest a person for a minor offense should be required to issue a citation in lieu of taking the accused to a police station or to court.” *Id.* 10-2.2. The ABA standards recognize exceptions for things such as being subject to arrest but failing to provide satisfactory identification, reasonable grounds to believe the person will not respond to a citation, violations of conditions of probation or parole, or a substantial likelihood of continuing criminal conduct. *Id.* 10-2.2(c)(i)-(vi).

individuals charged with these offenses who do not present a public safety risk are cited and released with instructions for reporting to court.

The committee recommends that the Utah Code be revised to reflect that class B misdemeanors, class C misdemeanors, and infractions should be initiated by citation or by Information and summons unless the offense involves driving under the influence, domestic violence, or another specified offense involving a continued breach of the peace.

Additionally, in all cases, judges should adhere to the standards of rule 6(b) of the Utah Rules of Criminal Procedure, which creates a presumption in favor of summonses over arrest warrants unless certain facts are shown in the Information—particularly as it relates to defendants who are not in custody or are no longer in custody, by requiring prosecutors to prepare and submit summonses when appropriate, rather than warrants.<sup>127</sup> Prosecutors should be required to identify, in the Information, the custody status of the defendant. If the defendant has been released, based on a judge’s order, posting monetary bail, or otherwise, the prosecutor should not ordinarily request a warrant. Instead, the prosecutor should proceed by summons. If a prosecutor obtains information that he or she believes justifies issuance of warrant for a defendant who has been released from custody, or who has not been taken into custody, the prosecutor should specifically explain in the Information why a warrant is appropriate.

This recommendation is consistent with the changes other jurisdictions have made to their pretrial release practices.<sup>128</sup> This recommendation will require a change in practice for some prosecutors who, too often, request appearance by warrant when a summons is appropriate to secure a defendant’s appearance.

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<sup>127</sup> *Id.* 10-3.3 (discussing standards for warrants versus summonses and requiring that judges state on the record reasons for declining to issue a summons).

<sup>128</sup> Rick Rojas, *New York City to Relax Bail Requirements for Low-Level Offenders*, N.Y. TIMES, July 8, 2015, [http://www.nytimes.com/2015/07/09/nyregion/new-york-city-introduces-bail-reform-plan-for-low-level-offenders.html?\\_r=0](http://www.nytimes.com/2015/07/09/nyregion/new-york-city-introduces-bail-reform-plan-for-low-level-offenders.html?_r=0).

3. *Uniform and consistent practices for making pretrial release and supervision decisions should be promulgated, and judges throughout the state should review those decisions as the case progresses.*

- a. *The recommendations of the Board of District Court Judges regarding pretrial release and bail practices should be promptly implemented.*

“While the laws and rules related to bail are the same, bail procedures throughout the State are not.”<sup>129</sup> As discussed above, the Board of District Court Judges has recommended the adoption of a uniform and consistent procedure to be followed by all courts across the state when making pretrial release and monetary bail decisions.<sup>130</sup> These recommendations build on those advanced by the Board. The committee urges the prompt implementation of the Board’s recommendations. The committee’s proposed changes to governing statutes and the Rules of Criminal Procedure will help to ensure compliance, but the many changes the Board recommends can be implemented immediately.

4. *Each person booked into jail should receive a pretrial risk assessment, using a validated instrument, and current assessment results should be available at each stage where a pretrial release and supervision decision is made.*

- a. *Judges should evaluate pretrial release and supervision, taking into account the assessment and all other relevant factors.*
  - b. *Individuals who present a low pretrial risk should be released on their own recognizance without any conditions other than appearance in court.*
  - c. *Individuals who present a moderate pretrial risk, or for whom conditions to release are necessary, should be released with the least restrictive conditions necessary to meet the pretrial risk presented.*
  - d. *For individuals who present a high pretrial risk, the court should determine whether the offender can be held without monetary bail. If so, the court should order no bail and revisit that decision as appropriate. If not, under current law, the court must set monetary bail and should order the least restrictive conditions necessary to meet the pretrial risk presented.*

Judges surveyed responded that they have too little meaningful information available to them when they make initial pretrial release decisions. When asked what information they would like to receive when making these decisions, the judges requested pretrial risk assessments that include information on the likelihood of the

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<sup>129</sup> *Id.*

<sup>130</sup> Memorandum from the Board of District Court Judges, *supra* note 81, 1.

party to appear and domestic violence issues, AP&P supervision histories, employment and income verification, residency information, and criminal histories. By having current assessment results available at each stage where a pretrial release decision is made, judges will have the information they need to make informed, individualized decisions.

A validated pretrial risk assessment, with an accompanying risk level or score that is clear and understandable, is critical to this stage of the process:

[W]hile complete predictability will never be attained, a pretrial risk assessment tool nevertheless allows a judge to say, for example, “This defendant is scored as ‘low risk’ or ‘category one,’ and accordingly I know that his performance should look like that of other defendants in the past who have been scored the same, which means that he likely has a 95% chance of showing up for court and a 91% chance of not committing a new crime.”<sup>131</sup>

These assessments also help isolate what conditions of release, if any, may be relevant, confirm when and under what circumstances a no pretrial release decision can appropriately be made, and support that decision.<sup>132</sup>

When the committee examined the literature, heard from the experts, and looked at the trends both locally and nationally, the question was not whether a risk assessment tool should be implemented statewide, but rather what kind and how soon. There are a number of different types of validated assessments in use in various places. Some of these assessments use both static and non-static factors, meaning they collect data on the individual from various sources, such as criminal histories, prior failures to appear, etc., and also employ a short interview, usually consisting of between 5 and 15 questions, with some verification of information provided. This is the model Salt Lake County has developed and is the favored model in a number of jurisdictions. Others use an entirely static tool, meaning there is no interview with the arrested person, but instead just the collection of data from various public databases.

The committee collected information about both types of tools from a number of sources. This included consulting with Salt Lake County and the researcher who helped develop and validate its tool. It also included consulting with representatives from

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<sup>131</sup> SCHNACKE, MONEY, *supra* note 19, 54.

<sup>132</sup> See *U.S. v. Salerno*, 481 U.S. 739, 747 (“Congress did not formulate the pretrial detention provisions [of the Bail Reform Act] as punishment for dangerous individuals. . . . There is no doubt that preventing danger to the community is a legitimate regulatory goal.”).

jurisdictions that have employed a purely static tool. There is a cost and time savings associated with a static tool, and it would be easier to employ remotely – something that may be of value to our more rural jurisdictions. Additionally, a static tool avoids some of the potential problems associated with the introduction of interviewer-based bias and the potential for variations in quality associated with the differences in interviewers' skills.

According to the Arnold Foundation, following a meta-analysis of the risk assessment tools used nationwide since the early 1960s, “the strongest predictors of FTA [(failure to appear)] and NCA [(new criminal activity)] were static factors such as prior convictions, prior misdemeanors, prior felonies, and prior failures to appear. In addition, the more dynamic factors such as residence and employment were less predictive or not predictive at all.”<sup>133</sup>

The committee had a number of conversations with representatives from the Arnold Foundation and with pretrial services representatives in Arizona, which has implemented the Foundation's PSA-Court assessment statewide following a smaller pilot program. For a variety of reasons, the committee concluded that the PSA-Court tool, or one like it, should be implemented statewide. Using the PSA-Court as its standard, the committee determined the following about any pretrial risk assessment that is used:

- The tool must be research- and evidence-based, meaning there is empirical evidence to support its use in this context.<sup>134</sup>
- The tool must be either locally or nationally validated (meaning the tool has been statistically confirmed to do what it is expected to do), and if nationally validated, there must be a plan in place to validate it locally after one year.

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<sup>133</sup> MARIE VANNOSTRAND, CHRISTOPHER T. LOWENKAMP, ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW 5 (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_no-interview\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_no-interview_FNL.pdf).

<sup>134</sup> During the course of its research, the committee learned that a number of jurisdictions prepare “risk assessments” of inmates. Some of these appear to be used for jail management purposes, such as determining where particular individuals should be housed or what risk factors they may present in a jail setting, and the committee presumes they are appropriate for this purpose. However, some that the committee saw appear to be used for making pretrial release decisions. To the best of our knowledge, none of these assessments have been validated for that purpose. To the extent these assessments are being used to make pretrial release decisions that practice should cease.

- The tool should measure the risk of failure to appear and the risk of committing a new offense during the pretrial period. Also, if possible, it should have a valid mechanism for identifying the potential for violence.
- The committee recommends a tool that is capable of being administered without an interview (i.e., one that uses static rather than dynamic factors) as an interview-based tool may be impractical in some areas,<sup>135</sup> so long as it has the same or better outcomes than the interview-based tools currently in use.
- It should be cost- and time-effective, meaning ideally it would take less than 30 minutes to complete.
- It must be one that will work with our existing data systems— understanding that those systems may need to be modified going forward— and capable of prompt implementation.

The committee recommends that whatever tool is selected be employed statewide and that jurisdictions avoid adopting different assessment tools in different parts of the state. Doing so ensures quality and uniformity. It also makes training easier and provides a better basis for evaluating how the systems are working.

Systems need to be established that give the judge access to the results of the assessment any time a release decision must be made, including at the probable cause review stage. Judges should consider the results, along with the other facts available to them, and determine whether to order release. If the person presents a low pretrial risk, and the circumstances warrant, the judge should order the person released on recognizance with instructions to appear for court. If the person presents a moderate risk, or it appears release conditions are necessary or appropriate, the person should be released on the least restrictive conditions necessary to address an identified risk. If the person presents a high pretrial risk, the court should examine whether the person can be held without monetary bail and, if so, enter a no bail hold and then review that decision as the matter proceeds and circumstances warrant. If after exhausting these steps the judge is required to set monetary bail, the judge should do so with guidelines to be provided by the pretrial release committee. This process, outlined in the

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<sup>135</sup> The committee understands that, as part of the implementation of JRI, risk and needs screening tools will be administered to all incarcerated persons, that these will require an interview, and that some of these interviews will be done remotely. If a static tool is not feasible for some reason, it may be possible to add to these screening interviews a pretrial risk assessment component.

flowcharts included in the addenda to this report, ensures that pretrial release without unnecessary monetary conditions remains the presumption and preserves judicial discretion to make an individualized decision.

5. *Pretrial supervision practices and procedures, that are appropriate to the size and needs of the community involved, should be developed and implemented.*
  - a. *Because release conditions will be imposed, and alternatives to jail detention ordered, a mechanism to monitor and enforce them should be implemented.*
  - b. *The court or local governments should consider an automated system that uses phone calls or other technology to remind defendants of upcoming court dates.*

The ABA's standards governing pretrial release state that "[e]very jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions...."<sup>136</sup> Additionally, "[p]retrial services should also monitor, supervise, and assist defendants released prior to trial, and review the status and release eligibility of detained defendants for the court on an ongoing basis."<sup>137</sup>

Each jurisdiction in the state needs to have a team, the size and sophistication of which will vary, to provide an appropriate level of pretrial supervision. At present, only Salt Lake County has an established pretrial services agency. The least restrictive conditions pursuant to which individuals should be released from custody include things like periodic in-person and/or telephone check-ins; random drug and alcohol testing; classes and/or counseling; curfews; and electronic monitoring. For these conditions to be meaningful, someone must monitor compliance with them and "promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released pending trial."<sup>138</sup>

There are private, for-profit providers who provide some or all of these services, but private providers may not be the answer. Many defendants cannot afford these services. After all, if they cannot afford monetary bail, it is unlikely they will be able to

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<sup>136</sup> ABA PRETRIAL RELEASE STANDARDS, *supra* note 126, 10-1.10.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 10-1.10(f). That is not to say every person released requires supervision. As we have seen with sentencing and probation, individuals who are low risk to reoffend and have low needs should not be actively supervised.

afford a private pretrial services provider. This also raises constitutional concerns about punishment before conviction. So, while private providers may be appropriate for some things in some circumstances, they are not a complete solution to the problem.

The committee understands that not every community in the state has the same needs or the same resources; pretrial supervision teams necessarily must be tailored to fit the size and the needs of the particular community involved. Implementing this model will take time and require the dedication of resources. The committee did not have the time or the resources to develop a model pretrial program tailored to fit the needs of the various jurisdictions in the state. The committee recommends the pretrial committee undertake this task. The committee further recommends that each county that operates a jail facility and does not currently have a pretrial supervision program designate a liaison to that committee so that each jurisdiction can develop a program that serves the needs of their community and meets the standards set forth by the ABA and others.

The committee did identify one thing the judiciary can and should do early on that will be fairly simple to implement. There is research showing that one of the easiest and most effective ways to reduce failures to appear is to institute a notification system. We are all familiar with the reminder calls, texts, and emails routinely used by everyone from doctors and dentists to hairdressers. These reminders are effective in reducing missed appointments and, not surprisingly, they work for courts, too. Michael Jones of the Pretrial Justice Institute, who addressed the committee, reported that one county in Colorado decreased its failure to appear rate by 60% after instituting a telephone reminder system for court dates. Salt Lake County Pretrial Services is developing a smartphone app that would perform a similar function—reminding defendants of their court dates. This is a relatively simple, concrete step the judiciary can and should take statewide to reduce failure to appear rates.

6. *Pretrial release is an individualized decision. Judges should not set monetary bail based solely on the level of offense charged.*
  - a. *The Uniform Fine and Bail Schedule should not be used to set monetary bail. Rather, the schedule should be used only to determine the amount of fines a defendant should remit to avoid the need for a court appearance in non-mandatory appearance cases, e.g. traffic.*
  - b. *The Uniform Fine and Bail Schedule should be renamed “Uniform Fine Schedule.”*

Pretrial release decisions should be individualized based on a defendant’s risk of failure to appear and threat to public safety.<sup>139</sup> Moreover, the court should impose the least restrictive conditions to release that are necessary to address the particular risk presented. Under the current system, however, monetary bail amounts are dictated by a schedule that looks only at the level of the offense charged, and not individual circumstances, and the Rules of Criminal Procedure require the monetary bail determination to “coincide with the recommended bail amount in the Uniform Fine/Bail Schedule *unless the magistrate finds substantial cause to deviate from the Schedule.*”<sup>140</sup> The committee recommends that the schedule be revised to apply only to fines that may be imposed at the time of conviction, or amounts that may be paid and are subject to forfeiture in non-mandatory appearance cases, such as traffic citations, and that pretrial release concepts, including monetary bail, be removed from the schedule.

The “Uniform Fine and Bail Schedule” combines two distinct concepts that exist at opposite ends of the prosecution process. Fines reflect part of the penalty that courts may impose at the end of the process—after the defendant has been convicted and as part of sentencing. “Bail” as it is used in this context refers to the amount of money that may be pledged to the court, personally or through a surety, to secure release from custody prior to trial and conviction. There is not necessarily any logical connection between the two. The fine/bail schedule in Utah appears to have developed to accommodate the legal mechanism that we use to address traffic and other minor citations for which an appearance in court is not required. Under Utah Code section 77-7-21, a citation may be used in lieu of an Information “to which the person cited may plead guilty or no contest and be sentenced or on which bail may be forfeited.”<sup>141</sup> In other words, for those cases in which a court appearance is not required, the recipient of

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<sup>139</sup> Pepin, *supra* note 53, 3.

<sup>140</sup> UTAH R. CRIM. P. 7(c)(3)(B) (emphasis added).

<sup>141</sup> UTAH CODE § 77-7-21.

the citation can pay the amount set forth on the schedule as “bail” and when the person fails to appear, that bail is forfeited and imposed as a fine for the offense. This is a useful mechanism for addressing these cases. Whether it should be changed is beyond the scope of this committee’s work. If it is retained, however, it should apply only to those offenses designated as “non-mandatory court appearance” in the schedule or by a judge.

One benefit of the fine/bail schedule in the pretrial release context is that it provides some level of uniformity in setting the amount of monetary bail across different courts and judges.<sup>142</sup> The committee believes that guidance and standards for handling pretrial release decisions, including the setting of monetary bail where it is necessary, are useful and should not be abandoned. Such guidelines, however, must recognize that pretrial release is an individualized decision, not one susceptible to plugging into a matrix. So, such a schedule could be expressed in ranges, not absolute figures, and should take into account risk factors. This schedule should be developed and promulgated by the pretrial release committee, keeping in mind the need to preserve judicial discretion in this area.

Another advantage of eliminating “bail” from the Uniform Fine and Bail Schedule, and deleting reference to it in rule 7(c) of the Utah Rules of Criminal Procedure is it will make clear that, when appropriate, judges can and should order appropriate individuals released on their own recognizance, or on any other conditions, as Utah law already permits.<sup>143</sup> Anecdotal evidence suggests that rather than doing this, judges currently reduce monetary bail to an amount that—hopefully—the defendant can afford. Conversely, Utah law allows certain individuals to be held without setting monetary bail, where there is substantial evidence to support the charge. These include persons: (a) who commit capital felonies, (b) who commit felonies while on probation, parole, or on pretrial release, (c) who commit a felony “and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community, or is likely to flee the jurisdiction . . . if released,” and (d) who commit a felony and violate a material condition of pretrial release.<sup>144</sup>

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<sup>142</sup> This uniformity may not be as uniform as commonly believed. By way of example, the schedule is silent on the question of what to do when there are multiple offenses charged – do you determine a monetary amount for each offense and then add them together, or do you set monetary bail based on the most serious offense charged? Judges in different districts—and often judges in the same districts—have opposite views on this.

<sup>143</sup> UTAH CODE §§ 77-20-3, 77-20-1(2).

<sup>144</sup> UTAH CODE § 77-20-1(1).

Anecdotal evidence suggests these provisions are rarely if ever invoked and individuals are almost never held without bail even when the circumstances warrant it. Instead, the practice has been to set a monetary bail amount that exceeds what the defendant could reasonably afford—with no guarantee the defendant or a commercial bail bondsman will not be able to pay it. Training judges to release on recognizance when circumstances warrant it, and to order “no bail” when circumstances warrant it, furthers transparent decision-making.

Finally, another reason to eliminate pretrial release and monetary bail from the fine/bail schedule is to eliminate potential court challenges. The committee takes no position on the merits of any legal challenge to Utah’s Uniform Fine and Bail Schedule. The committee notes, however, that state and federal courts in a number of jurisdictions have struck down “bail schedules.” Some have done so on statutory grounds,<sup>145</sup> others on constitutional grounds, relying on both due process,<sup>146</sup> and excessive bail clauses.<sup>147</sup> The features most commonly found in bail schedules that are struck down are fixed monetary bail amounts, rather than ranges,<sup>148</sup> and explicit or implicit requirements that the court set monetary bail in these amounts.<sup>149</sup>

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<sup>145</sup> *Pelekai v. White*, 75 Haw. 357, 861 P.2d 1205 (1993) (striking down bail schedule because it violated Hawaiian statutory provision requiring the amount of bail be set at the discretion of the judge on an individualized basis).

<sup>146</sup> *Clark v. Hall*, 53 P.3d 4116 (Okla. Crim. App. 2002) (striking down bail schedule because it “sets bail at a predetermined, nondiscretionary amount and disallows oral recognizance bonds under any circumstances” in violation of due process rights of citizens to an individualized determination of bail as guaranteed by Oklahoma Const. art. 2, § 8); *see also Ackies v. Purdy*, 332 F. Supp. 38 (D. Fla. 1970) (holding that setting bail according to master bond list which resulted in defendants being held anywhere from three days to three weeks violated due process clause of 14th Amendment).

<sup>147</sup> *Woods v. City of Michigan, Ind.*, 940 F.2d 275 (7th Cir. 1991) (discussing the possibility that bail schedules may be unconstitutional if “the bail amount listed on the schedule is excessive for a particular defendant accused of having committed a particular crime,” thus running afoul of the 8th Amendment); *see also People v. Rosario*, 2015 WL 2445971 (V.I. May 20, 2015) (finding fixed amount bail schedule could violate 8th Amendment if the amount set according to the schedule was excessive as applied to a particular defendant).

<sup>148</sup> *See Pelekai*, 861 P.2d at 1210 (concluding that bail schedule setting fixed amount was illegal, but use of bail guidelines clearly leaving bail amount to discretion of judge based on individualized determination was permissible); *see also Demmith v. Wisconsin Judicial Conference*, 480 N.W. 2d 502 (Wis. 1992) (remanding fixed amount bail schedule to Judicial Conference to consider implementing bail schedule with range of amounts which would satisfy statutory requirement that bail guidelines must “relate primarily to individuals”); *Ex parte Jackson*, 687 So.2d 222 (Ala. Crim. App. 1996) (concluding that bail schedule listing a recommended range of amounts was permissible so long as bail was set after an individualized determination considering several factors).

<sup>149</sup> *People of the Virgin Islands v. Simmonds*, 2007 WL 1964540 (June 25, 2007) (holding that wholesale adoption of Court’s Bail Schedule Order setting fixed amounts for bail based on charged offense as the

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***7. Prosecutors and defense counsel should provide more and better information at pretrial release or bail hearings to help judges make informed, individualized evaluations of the risk of pretrial release.***

Judges who have scores from a validated pretrial risk assessment tool will be in a much better position to make informed pretrial release decisions. These tools, however, do not answer every question or address every situation. Even with a pretrial release score, judges will have to conduct “bail hearings” and gather additional information. In Salt Lake County, judges can request from the county pretrial services agency a narrative report that explains the results of data they have gathered, makes detailed recommendations, and articulates what conditions if any should be imposed on the defendant’s release. This “Sterling Report” is a useful tool that goes beyond a risk screening and the committee encourages other counties to adopt similar systems. Where such reports are not available (and even where they are), the court will have to rely on counsel to provide information and explain its significance.

Our survey confirmed that the practice in most courts in the state is each side simply proffers information to the court, much of it unsubstantiated, and then expects the judge to make a reasoned decision. That practice needs to change. Rules should set forth what information should be provided, in what form, and how that information bears on the release question. Release options should be explored and arrangements made before the hearing. Potentially affected parties should be consulted and given an opportunity to be heard. And all of these matters should be discussed by counsel in good faith in advance of the hearing. In this way, judges will be better educated and have the best opportunity to make sound pretrial release decisions.

***8. The laws and practices governing monetary bail forfeiture should be improved and updated so that when monetary bail is used, the incentives it is designed to create can be furthered.***

Of the twin goals of pretrial release—ensuring attendance at court and ensuring the defendant does not commit new offenses while on pretrial release—monetary bail is designed to address only the first. Monetary bail is not intended to protect the public or victims from harm that could result if a person is released from custody, nor could it. The risk that a person will commit a new offense if released may affect the dollar amount the judge sets for a monetary bond, thereby reducing the likelihood the person

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only method for determining bail amount violated the federal Bail Reform Act); *see also Pelekai*, 861 P.2d at 1205 (court order establishing fixed amount bail schedule as exclusive means for determining bail amount); *Woods*, 940 F.2d at 278 (same); *Clark*, 53 P.3d at 416 (bail determined by statute and set at nondiscretionary amount).

will be able to post monetary bail, and therefore be released from custody. However, if the defendant can pay that amount—or can obtain a bail bond<sup>150</sup> by paying 10% of that amount to a commercial bail agent—the person must be released from custody notwithstanding the risk they pose of committing new offenses.

Monetary bail purports to accomplish the goal of ensuring a defendant comes to court by a simple mechanism—if the defendant fails to appear, the bond is forfeited and the money paid to the state. For the commercial bail industry, this creates what they maintain is a powerful financial incentive to make sure the defendants they bail out show up for court. Bail agents are incentivized because they do not want to forfeit the monetary bail they have posted for the defendant. Defendants (or their families) are incentivized because if forfeiture occurs, the bail agent will come after them for the amount of the bond. Obviously, these financial incentives are built on one basic assumption—if a defendant fails to appear, the bond will be forfeited and paid to the state. Our committee discovered, however, that in Utah there is little to no risk that a bail bond will be forfeited even if the defendant fails to show up for court.

The committee obtained court data from district courts statewide for calendar year 2013 and discovered the following: Of the 16,981 defendants who were released on bail bond, 3,989—or approximately 23%—failed to appear at a subsequent court hearing.<sup>151</sup> For the 3,989 defendants who failed to appear, the court sent out forfeiture notices in only 990 cases—or 25% of the time. This means that 75% of the time, when a defendant failed to appear for court, the forfeiture process was *not even initiated*, let alone completed. In the 990 cases where forfeiture notices were sent, motions to forfeit were filed in only 32 cases, or 3% of the time. Prosecutors are required to file these motions, and these figures show this is not consistently being done. In sum, of the almost 4,000 defendants who failed to appear, only 32—or less than 1%—made it to the point of facing a motion to forfeit bail.<sup>152</sup>

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<sup>150</sup> Under the Utah Code, a bail bond is “a bond for a specified monetary amount that is ... issued to a court ... as security for the subsequent court appearance of the defendant upon the defendant’s release from actual custody pending the appearance.”

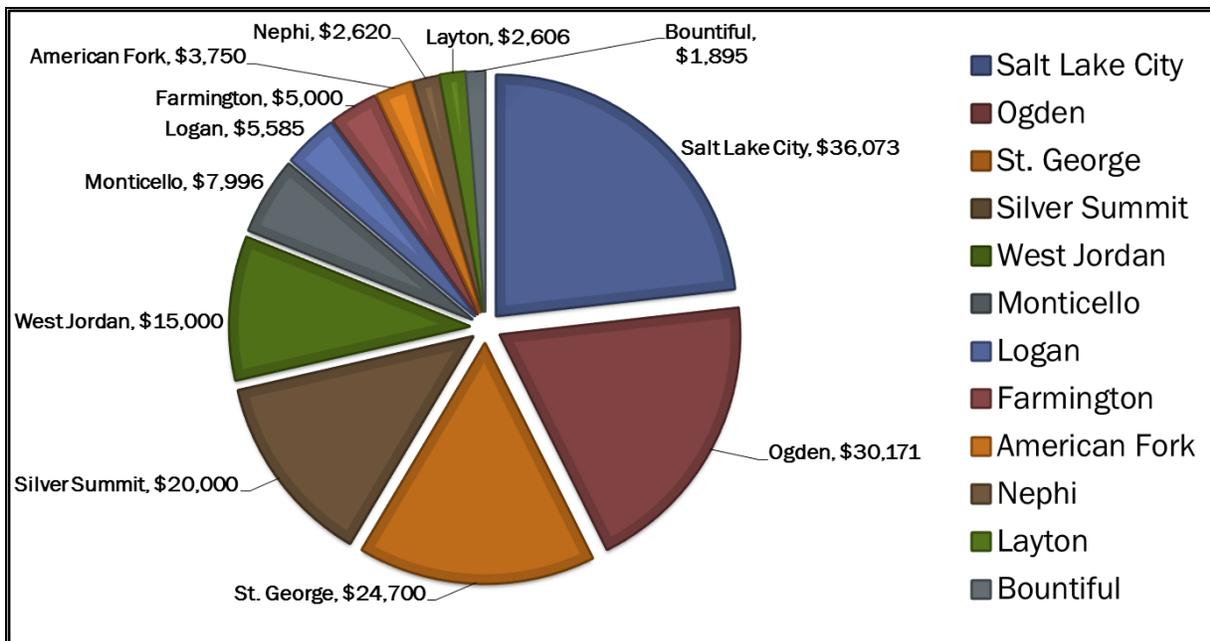
<sup>151</sup> The numbers obtained from Utah’s court data seem consistent with other data the committee reviewed. Our county jail survey reported that during 2014, 14,329 inmates posted bond, with only 5,351 posting cash bail. Information on County Jails Occupancy and Pre-Trial Detainees, *supra* note 113.

<sup>152</sup> A forfeiture of bail does not follow every single time a defendant fails to appear. Sometimes people legitimately forget their court date and reschedule an appearance; sometimes they are picked up by law enforcement before the forfeiture process is completed; and occasionally the bail agent will locate and surrender the defendant to the court or a county jail. However, we know that 75% of the time the notice that triggers the forfeiture process, which is due within 30 days of the non-appearance, is not even

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Data assembled by the Utah Insurance Department confirms these findings. There are currently 39 licensed commercial bail bond agencies in Utah, all regulated by the Utah Insurance Department. The data the Department presented showed that in 2014 the total amount of bail bonds written for Utah’s courts was \$110,546,649. The total judgment forfeitures paid by bail agencies that same year was \$418,403 – or 0.37%.<sup>153</sup> In fiscal year 2015, commercial bail bonds written for Utah’s courts totaled \$115,759,441, with \$99,866,784 written in district court and \$15,892,657 written in justice court. *See* Table 2. That same year, bail agencies paid a total of \$246,892 in forfeitures, with \$155,396 in district court (0.16% of the total written) and \$91,496 in justice court (0.58% of the total written). *See* Table 3.

**Table 2. District Court Forfeiture FY 2015 – Top 12.**



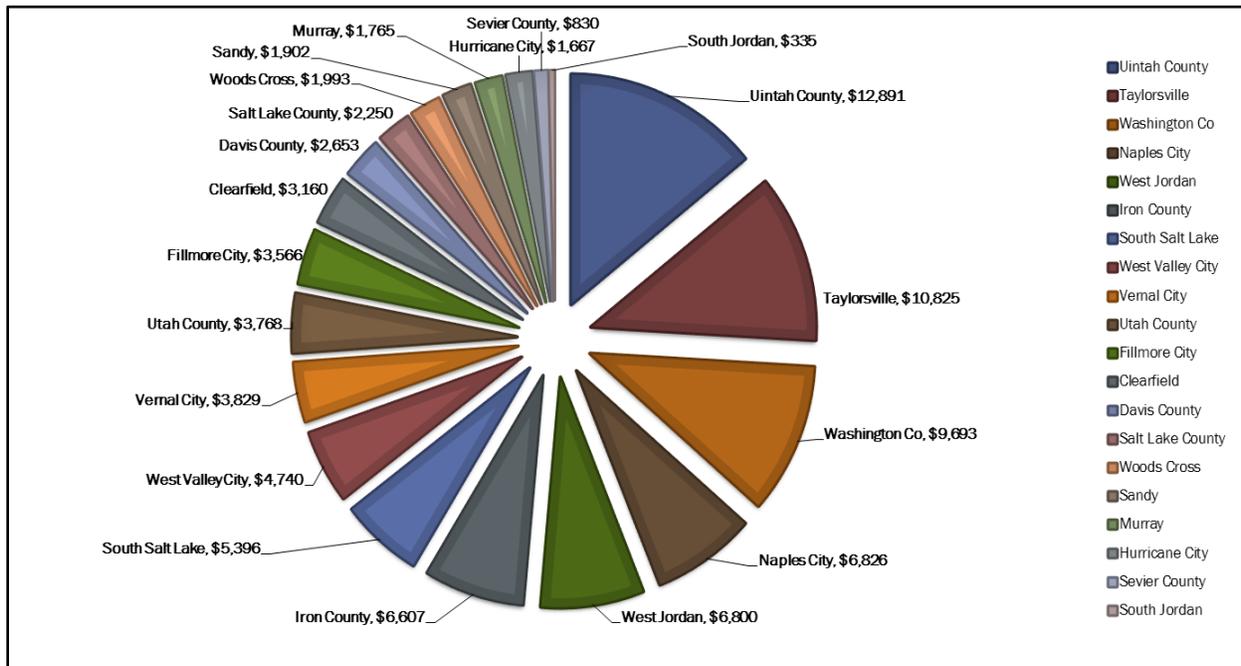
District Court
Total Bail: \$99,866,784
Total Forfeiture: \$155,396

Source: Utah Department of Insurance, 2015

sent. That means in all of these instances the bond is automatically exonerated. Similarly, motions to forfeit are not filed every time a defendant fails to appear, but only when the defendant fails to appear and the surety agent does not locate and surrender them within 6 months. The low numbers of motions filed suggests that prosecutors are not filing motions to forfeit when they should be filed.

<sup>153</sup> According to the Insurance Department data, forfeitures in 2014 were more than double the forfeitures in 2013, which the total amount forfeited was \$197,102.

**Table 3. Justice Court Forfeiture, FY 2015 – Top 20.**



Justice Court
Total Bail: \$15,892,657
Total Forfeiture: \$91,496

Source: Utah Department of Insurance, 2015.

In short, defendants released on commercial bail had a 23% failure to appear rate in 2013. A failure to appear rate of between 20 to 25% seems reasonably consistent with studies that have been done on the topic. But in Utah, when such a defendant fails to appear, there is a 75% chance the court will not even send the notice required to commence forfeiture proceedings; and, if it does, there is a 97% chance forfeiture proceedings will not make it past the motion phase.<sup>154</sup> Successful forfeitures account for considerably less than 1% of the total commercial bail posted with the court. Perhaps the only bright spot here is the record for collecting judgments in the rare instances in which forfeiture actually occurs. Thanks to the efforts of the Utah Insurance Department, commercial bail that is forfeited is actually collected almost 90% of the time.

A large part of the problem described above is the cumbersome statutory process for bail forfeiture. Over the years, with incremental changes, the forfeiture process has

<sup>154</sup> This data does not take into account cases where a motion may not be justified.

grown even more burdensome and difficult with some requirements seemingly imposed only for the purpose of making forfeiture more difficult and therefore less likely to occur. As an example, Utah Code section 77-20b-101 states that the clerk of court must, within 30 days of the defendant's failure to appear, "mail notice of nonappearance by certified mail, return receipt requested...;" notify the surety as listed on the bond "of the name, address, and telephone number of the prosecutor;" deliver a copy of the notice to the prosecutor "at the same time notice is sent" to the surety; and "ensure that the name, address, and telephone number of the surety or its agent as listed on the bond is stated on the bench warrant."<sup>155</sup> Additionally, the court clerk must do all of this not only for the bail agent but also for the underlying surety if the surety is different than the agent, requiring a careful examination of the bond itself (if one is actually filed with the court).<sup>156</sup> Any misstep may be fatal—when this occurs, the surety and its agent may be "relieved of further obligation under the bond...."<sup>157</sup> As noted earlier, there were almost 4,000 failures to appear in 2013. The cost of certified mail is \$6.48. So, the State of Utah would be required to spend almost \$26,000 on postage costs alone, just to send the notices required to start the process for district court cases.<sup>158</sup>

Additionally, responsibility for successfully forfeiting bail is divided between the court clerk, who is statutorily tasked with notice and related issues, and the prosecuting attorney, who must file the motion for bail forfeiture.<sup>159</sup> If the prosecuting attorney fails to follow up with a timely motion to forfeit the bail, it is again automatically exonerated.

At present, the supposedly powerful incentive that commercial bail bonds create to ensure court appearance does not exist. If commercial bail bonds are to have any utility, the forfeiture process must be simplified and improved. Specifically, we recommend:

- The notice process should be streamlined and updated. Notice to the surety and agent should be by electronic means sent only to a single email address the party provides at the time they post the bond. Such notices should be generated and sent automatically

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<sup>155</sup> UTAH CODE § 77-20b-101(1).

<sup>156</sup> *Id.*

<sup>157</sup> UTAH CODE § 77-20b-101(3).

<sup>158</sup> The personnel costs necessary to prepare and manually mail these notices is many times greater than that.

<sup>159</sup> UTAH CODE § 77-20b-104.

from CORIS at the time of the hearing and/or issuance of the bench warrant.

- The surety can determine from the court file much of the information they need and artificial requirements for information to be included in written notices should be eliminated.
- Because this is a system purportedly built on financial incentives, creating financial incentives for agents to locate and surrender defendants early should be considered—for example, give the agent a reasonably short period of time to surrender a defendant and in return the bond is fully exonerated; then require the agent to pay an increasing percentage of the face amount of the bond as time goes on, until the full amount of the bond is forfeited. This would give agents real financial incentive to locate and surrender defendants who fail to appear instead of relying on law enforcement to do so.

There appear to be a number of legitimate reasons why courts have failed to diligently pursue forfeiture. Nevertheless, the judiciary needs to do a better job. Court personnel need to be trained and steps must be taken to ensure the process is commenced in a timely fashion and followed up as necessary. Finally, prosecutors must do their part in tracking and following up on these matters. Unless and until these steps are taken, these bonds truly are not worth the paper they are written on.

***9. The Council should create a standing committee on Pretrial Release and Supervision Practices that includes representatives of all stakeholders to stay abreast of current practices in this area, to develop policies or recommendations on pretrial release and supervision practices, to assist in training and data collection, and to interface with other stakeholders.***

The more time this committee spent studying the issue of pretrial release, the clearer it became that a long-term, sustained effort is necessary. Many states have worked on pretrial release issues and we talked to a number of them. Many of those efforts started the same way this one did—a committee tasked with exploring the issues. In each state we talked to, the work of these committees went on for years, not months, and those efforts were ongoing. The issues are too complex and there is too much at stake not to find a meaningful way to carry forward the work this committee has done.

Another thing that became clear over the last several months is that a centralized clearinghouse is needed where interested parties can go to collect information, seek

recommendations, and learn from the experience of others. We heard a number of stories about well-intentioned officials who undertook to improve their pretrial release practices, or set up pretrial service programs, only to find themselves quickly overwhelmed with the task and the associated costs. A multi-disciplinary committee focused specifically on these issues would be an invaluable resource. Such a committee could also serve the important purpose of creating a forum where the various stakeholders could address issues of common concern, seek input from others, and improve practices. If Utah wants to do pretrial release and supervision practices right, it will require a sustained effort. The creation of a standing committee, with a clear charter, moves this process forward.

***10. Uniform, statewide data collection and retention systems should be established, improved, or modified.***

- a. Accurate risk assessments require correct and easily accessible data. Existing data systems are inadequate. They should be improved to permit these tools to operate effectively.***
- b. All stakeholders should collect consistent data on pretrial release and supervision to facilitate a regular and objective appraisal of the effectiveness of pretrial release and supervision practices.***
- c. The committee on pretrial release and supervision practices should help determine what data should be collected, how to collect it, and how best to study the efficacy of release and supervision practices.***

Pretrial release and supervision data is spotty and inconsistent in Utah. In part, this is because there are different data systems in the different branches designed to accomplish different things. The committee recommends that all pretrial release and supervision stakeholders work to create uniform, statewide data collection systems or to improve or modify existing systems. First, and perhaps most important, accurate and up-to-date data is necessary for accurate and up-to-date pretrial risk assessments.<sup>160</sup> These assessments rely on data that resides within systems maintained by the courts, systems maintained by the executive branch, and systems maintained by the counties. It is essential to make sure these systems collect the right data in the right way. Additionally, accurate data from all stakeholders is necessary to measure our progress and the effectiveness of the changes we recommend. Adhering to evidence-based practices requires periodic review of how well those practices are performing. Identifying the particular changes that need to be made in this regard is beyond the

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<sup>160</sup> As one example, a critical item necessary for a risk assessment is accurate information concerning prior failures to appear. Our system does not track this information as precisely as would be ideal.

scope of this report. We recommend that the pretrial release and supervision practices committee be tasked with identifying the shortfalls in existing data systems and making recommendations to fix them. This will allow all participants in the process to remain accountable.

***11. Judges, lawyers, and other stakeholders should receive regular training on current best practices in the area of pretrial release and supervision practices.***

The changes in pretrial release and supervision practices recommended in this report represent, for some, a very different way of doing business, and training for all participants in the process to help them understand the principles behind these efforts will be critical. Judges and lawyers need to understand how evidence-based practices bear on the pretrial release decision, the utility and limits of the assessments we recommend, and how best to approach these important decisions. Without training, these changes will not take hold in an effective, uniform way.

***12. The public in general and the media in particular should be educated about pretrial release and supervision practices issues.***

Because the public and the media tend to use the amount of monetary bail “as a sort-of barometer of the justice system’s sense of severity of the crime,”<sup>161</sup> it will be important to educate them on the principles behind pretrial release and supervision practices and the difficult decisions judges sometimes have to make. Judges strive to make sound pretrial release decisions, ones that do not result in harm to the public. Because pretrial release practices should derive from evidence-based risk assessments, coupled with the sound exercise of discretion, the “baramoter” the media and public are accustomed to using for gauging the severity of the crime will, in many cases, no longer fit. As such, the goal of education should be to help the public understand the principles behind these decisions.

## Conclusion

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The committee appreciates the opportunity to address the Judicial Council on this important issue. This report is just the beginning and only scratches the surface. Long-term, dedicated efforts are needed if we are going to get pretrial release and supervision practices right in Utah.

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<sup>161</sup> SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 1, at 115.

# Appendices

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**Appendix A:** Memorandum from the Board of District Court Judges to Chief Justice Matthew B. Durrant Regarding Recommendations for a Uniform Process for Setting Bail (May 29, 2015)

**Appendix B:** Information on County Jails' Occupancy and Pretrial Detainees (June 1, 2015)

**Appendix C:** Survey of District and Justice Court Judges Regarding Pretrial Release Practices (March 25, 2015)

**Appendix D:** Case Initiation by Warrantless Arrest Diagram

**Appendix E:** Case Initiation by Filing Information Defendant not in Custody Diagram

# Appendix A

# MEMORANDUM

TO: Chief Justice Matthew B. Durrant  
FROM: Board of District Court Judges  
DATE: May 29, 2015  
RE: Recommendations For A Uniform Process For Setting Bail

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Dear Chief Justice Durrant,

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

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

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

## **Non-Uniform Process Related To Bail**

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

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

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

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

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

### **Bail Practices and Procedures By Judicial District**

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

#### ***First District***

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

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

#### ***Second District***

### Weber County

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

### Davis County

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

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

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

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

### *Third District*

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

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

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

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

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

#### *Fourth District*

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

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

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

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

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

### *Fifth District*

In Washington County, the morning after a person is arrested the assigned judge reviews the probable cause statement provided to the courts by jail staff. Bail is set. Copies of the approved probable cause statements are sent back to the jail so that jail staff can record the bail amount.

Arrested persons appear before the Court for first appearance or arraignment. Arrestees who have not bailed out appear by closed circuit television. At that time the magistrate reviews the charges, appoints counsel, and reviews the initial setting of bail. On weekends, jail staff

sends copies of the probable cause statements to the assigned judge who sets bail. Arrestees who are unable to bail out appear for first appearance on Monday at 1:30 p.m.

### *Sixth District*

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

### *Seventh District*

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

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

### *Eighth District*

The Eighth District judges review probable cause statements within the 24 hours required under the rule, but for probable cause only. Bail is not set by the court at that time. The jail automatically sets bail according to the bail schedule. For example, the jail sets a \$5,000 bail for

a third degree felony charge; for concurrent third degree felony and class "A" misdemeanor charges against the same person, the jail uses the bail schedule to set a combined bail amount of \$7,500.00, and so forth. There is a standing order that the jail not set bail on first degree felony charges. Thus, for first degree homicide, rape, and child abuse charges, no bail is set until the inmate appears before a magistrate. Typically, this initial appearance occurs within 48 hours of incarceration, even if no charges have been filed.

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

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

### **Recommendations**

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

- **Schedule for Probable Cause Review.** Probable cause statements for warrantless arrests should be reviewed electronically within 24 hours of arrest. URCrP 7(c)(1). To meet the twenty-four hour deadline, district court judges must review probable cause statements two times per day, once in the morning and once in the afternoon. This must occur both on weekdays and weekends.
- **Bail Set At The Time of Probable Cause Review.** If the judge finds probable cause, the judge shall immediately make a bail determination. URCrP 7(c)(3)(B). Any electronic system should allow (1) the reviewing magistrate to see the Uniform Bail Schedule amount for the offense; (2) the reviewing magistrate to enter a bail amount, and impose conditions of release; and (3) the arresting officer to enter information relevant to the setting of bail, including those factors enumerated in the Utah Constitution and in the Utah Code. See, Utah Const., art. I, sec. 8; Utah Code § 77-20-1(2)(a)-(d).
- **Informations Filed Within 72 Hours of Booking (Failure to File Deadline).** If the prosecutor decides to file charges, she should do so within 72 hours of

booking. Failure to file timely shall result in release of the detained person unless the prosecutor obtains from the Court an order extending the time to file.

- **Orders for Release Upon Declination of Prosecution.** If the prosecutor declines to file charges before the date scheduled for initial appearance, the prosecutor shall provide proof of declination to the clerk and the court should enter a written order authorizing the release of the arrestee.
- **Initial Appearance On The Next Court Day After The Information Is Filed.** An arrested person who is unable to post bail should appear before the court for initial appearance on the court day immediately following the date the information is filed. In rural areas where court days occur only a few times per month, the same rule should apply. In these areas, initial appearances should be conducted by video-conferencing.
- **Automatic Right To Readdress Bail Set At Time of Probable Cause Review.** At the initial appearance, the arrested person shall have the right to readdress the bail amount set by the magistrate at the time of probable cause review or to wait to readdress bail upon notice to the prosecutor. This allows the arrested person the opportunity to be represented by counsel and to be heard regarding factors relevant to the setting of bail.
- **Subsequent Motions to Modify Bail.** After a bail hearing has been held and bail set, any further motion to modify the bail must be made in advance of a hearing, with notice to the prosecutor, and “may be made only upon a showing that there has been a material change in circumstances.” Utah Code 77-20-1(5) and (6).

#### **Other Concerns—Limited Information and Excessive Bail**

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

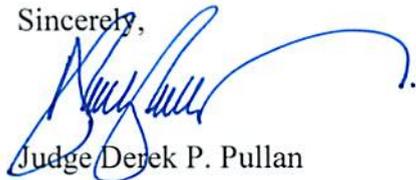
- **Limited Information At The Time Bail Is Set.** When bail is set immediately upon a finding of probable cause, the reviewing magistrate has no information or indictment, no recommendation from pre-trial release, and no other reliable records. By statute, conditions of release are imposed in the discretion of the magistrate to ensure the appearance of the accused, ensure the integrity of court processes, prevent contact with victims and witnesses by the accused, and ensure the safety of the public. But the probable cause statement alone generally includes little information that might guide the

discretion of the magistrate in setting conditions of release designed to serve these important objectives.

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

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

Sincerely,



Judge Derek P. Pullan

Chair, Board of District Court Judges

# Appendix B

## PRETRIAL RELEASE DATA FROM UTAH JAILS

As of June 1, 2015:

1. What is the total capacity of the jail?

<i>Beaver</i>	400
<i>Iron</i>	216
<i>Salt Lake</i>	2154
<i>Summit</i>	100
<i>Tooele</i>	277
<i>Utah</i>	1172
<i>Washington</i>	517
<i>Weber</i>	888
<b>Total:</b>	5724

2. What was the total number of detainees housed in the jail?

<i>Beaver</i>	384
<i>Iron</i>	152
<i>Salt Lake</i>	2046
<i>Summit</i>	76
<i>Tooele</i>	150
<i>Utah</i>	922
<i>Washington</i>	421
<i>Weber</i>	694
<b>Total:</b>	4845

3. Of those held, how many were held only on pretrial detention (not serving a commitment)?

<i>Beaver</i>	4
<i>Iron</i>	53
<i>Salt Lake</i>	1097
<i>Summit</i>	24
<i>Tooele</i>	61
<i>Utah</i>	Unknown
<i>Washington</i>	143
<i>Weber</i>	143
<b>Total:</b>	1525

4. What was the number of detainees held only on pretrial detention where a misdemeanor was the most serious charge?

<i>Beaver</i>	1
<i>Iron</i>	15
<i>Salt Lake</i>	257

<i>Summit</i>	7
<i>Tooele</i>	12
<i>Utah</i>	53
<i>Washington</i>	40
<i>Weber</i>	61
<b>Total:</b>	446

**5. What was the number of detainees held only on pretrial detention where a felony was the most serious charge?**

<i>Beaver</i>	3
<i>Iron</i>	38
<i>Salt Lake</i>	698
<i>Summit</i>	17
<i>Tooele</i>	49
<i>Utah</i>	1093
<i>Washington</i>	103
<i>Weber</i>	82
<b>Total:</b>	2083

**6. What is the average number of days a detainee was held without any hold or commitment (on June 1, 2015, or an average for the past year depending on your available data)?**

<i>Beaver</i>	16-20
<i>Iron</i>	140
<i>Salt Lake</i>	23 - Males; 16 - Females
<i>Summit</i>	14
<i>Tooele</i>	Unknown
<i>Utah</i>	32
<i>Washington</i>	7 hours
<i>Weber</i>	Unknown

**Regarding your current policies:**

**7. Does your jail have any policy or system for releasing a pretrial detainee on his/her own recognizance prior to them speaking to a judge, magistrate, or bail commissioner? If yes, please describe the policy.**

<i>Beaver</i>	No.
<i>Iron</i>	Yes. A person arrested for intoxication is released on OR if there are no other charges pending, the person's intoxilyzer test results are .000, 24 hours has passed since the arrest, and the shift supervisor thinks imprisonment is unnecessary for the protection of the person or another.

<i>Salt Lake</i>	They use the SLPRI tool. Protective Order violations, felony DUIs, DV with injury, sex abuse, judge holds, marshall holds are all ineligible for immediate release. Pretrial is authorized by Third District Court to release up to F3 non-violent cases and up to F2 non-violent cases with a judge's approval. If inmate qualifies, they are released on OR or supervised release. Supervised cases report to pretrial office and are supervised until their case is adjudicated. If inmate does not qualify, Pretrial Services explains other options for release (bail, bond, etc.).
<i>Summit</i>	No.
<i>Tooele</i>	They release pretrial detainees for the following reasons: if detained for 72 hours without seeing a judge or having charged file, medical reasons, or class C misdemeanors.
<i>Washington</i>	No.
<i>Weber</i>	Yes. A screening officer that determines whether the inmate meets specific criteria. Usually the court is involved in any pretrial release.

**8. Do you use bail commissioners? If so, how?**

<i>Beaver</i>	Yes. Sheriff is bonded bail commissioner.
<i>Iron</i>	No.
<i>Salt Lake</i>	Some staff are considered bail commissioners because they enter the bail amounts into the system. However, they do not exercise discretion with the amounts - they enter the bail amount listed on the bail schedule based on the charge.
<i>Summit</i>	Use Uniform Bail Schedule.
<i>Tooele</i>	No.
<i>Utah</i>	Yes. They set bail on all eligible inmates.
<i>Washington</i>	Yes. After the booking process has been completed, arrestees eligible for a bail bond release are provided the opportunity to call a bondsman to attempt to secure a release on bond. A list of authorized bail bond businesses and their telephone numbers is provided to assist prisoners attempting to secure bail. Jail officers cannot recommend a bail bond business or bondsman.
<i>Weber</i>	No.

**During 2014, of the total pretrial detainees delivered to your jail:**

**9. How many persons were arrested without a warrant?**

<i>Beaver</i>	65
<i>Iron</i>	1015
<i>Salt Lake</i>	Unknown
<i>Summit</i>	742
<i>Tooele</i>	Unknown
<i>Utah</i>	Unknown
<i>Washington</i>	4613

<i>Weber</i>	Of the 11,639 bookings last year, an average of 143 per month were arrested on new charges without warrants.
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**10. How many were released on their own recognizance?**

<i>Beaver</i>	20 after seeing the judge.
<i>Iron</i>	91
<i>Salt Lake</i>	2834
<i>Summit</i>	0
<i>Tooele</i>	Unknown
<i>Utah</i>	592 OR or Promise to Appear. Utah County does not accept new class B or class C misdemeanor charges unless the charge is for DUI or domestic violence assault. Agencies in Utah County do not book on these charges. They accept court commitments, AP&P holds, warrants, and new class A misdemeanor and felony charges.
<i>Washington</i>	344
<i>Weber</i>	78 by the jail prior to court involvement.
<b>Total:</b>	3959

**11. How many posted cash bail?**

<i>Beaver</i>	2
<i>Iron</i>	142
<i>Salt Lake</i>	1427
<i>Summit</i>	562
<i>Tooele</i>	Unknown
<i>Utah</i>	1307
<i>Washington</i>	401
<i>Weber</i>	1510
<b>Total:</b>	5351

**12. How many posted bond?**

<i>Beaver</i>	32
<i>Iron</i>	447
<i>Salt Lake</i>	7873
<i>Summit</i>	176
<i>Tooele</i>	Unknown
<i>Utah</i>	1746
<i>Washington</i>	1531
<i>Weber</i>	2524
<b>Total:</b>	14329

**13. How many were released on conditions other than OR, cash, or bond (e.g. GPS, home confinement, treatment center, etc.)?**

<i>Beaver</i>	4
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<i>Iron</i>	335
<i>Salt Lake</i>	6548 (Pretrial Supervision releases)
<i>Summit</i>	4
<i>Tooele</i>	Unknown
<i>Utah</i>	1084
<i>Washington</i>	2337
<i>Weber</i>	Unknown, since all other releases were done by court order.
<b>Total:</b>	14076

**14. How many remained in custody until their trial was heard?**

<i>Beaver</i>	12
<i>Iron</i>	Unknown
<i>Salt Lake</i>	Unknown
<i>Summit</i>	Unknown
<i>Tooele</i>	Unknown
<i>Utah</i>	Unknown
<i>Washington</i>	Unknown
<i>Weber</i>	Unknown

**15. Do you use a pretrial risk screening tool to make your decisions? If so, please provide a copy.**

<i>Beaver</i>	Yes.
<i>Iron</i>	No.
<i>Salt Lake</i>	Yes.
<i>Summit</i>	No.
<i>Tooele</i>	No.
<i>Utah</i>	Yes.
<i>Washington</i>	No.
<i>Weber</i>	Yes. Weber County has an OR process with interview questions and a matrix for release that a dedicated deputy administers when appropriate. The deputy also does all the follow-up with research and phone calls.

Weber County was only able to provide approximate numbers in each of the categories.

# Appendix C

## Survey of District and Justice Court Judges Regarding Pretrial Release Practices March 18, 2015

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Presiding and justice court judges were recently surveyed on the following questions regarding pretrial release practices. Their responses are included below.

**1. When making an initial pretrial release decision, what information do you have to assist you?**

- Generally what I have is only the police report and what I learn during the video arraignment.
- On a felony case, I have the probable cause statement, the factual basis for the charges included on the charging document, and proffers of evidence from counsel.
- Charge and pc statement, number of bookings, Pre-Trial evidenced based and validated evaluation.
- Criminal history, the Information and PC statement, employment and housing information
- At the initial appearance, I have a BCI and a DL report to review, if necessary, for setting terms of pretrial release.
- The nature of the charges and information from the defendant are typically the only information that is considered. On occasion the prosecutor will make recommendations or a criminal history will be reviewed.
- A. When reviewing PC affidavits over our electronic review system, I have no other information but the affidavit. B. During the first appearance, generally only verbal information is provided by the prosecution and/or the defense. The prosecution (City Attorney) may provide information from police reports, victim contacts with their office, as well as criminal history information. The booking log also provides some information. If an OR interview was done at the jail, we may have a copy of the document provided by the jail, but not usually.
- Information/Citation, Formal Information, Booking Sheet, Own Recognizance Sheet, and/or Probable Cause Statement.
- The probable cause statement and the prior criminal history.
- Charging documents, booking sheet, and sometimes the probable cause statement.
- The questions that I ask of the Defendant, and the booking sheet.

- The only information I have is the initial charge(s), information in the judicial workspace with docket and filings of previous cases for that person, and my memory of past history of the defendant.
- If it is when I am on-call with the jail, the jail provides a brief oral description of the incident, and the number of prior bookings. If it is a misdemeanor that I am handling out of my court I have a criminal history, and a citation if one has been filed. I generally don't have any other information.
- Be careful about the phrase "initial release decision" here. If you mean initial in the sense that the defendant has been booked in jail on suspicion of criminal activity, then we have the PC sheets. That contains a brief description of the crime and little else, maybe the number of times the defendant has previously been booked. From that we decide if there is probable cause to support the charges, or at least a charge, if there is not then the defendant is released. If there is PC then we set a bail amount, hold the defendant for a short time to allow charges to be filed, or release the defendant on their recognizance to appear when charges are filed. These are all pre-filing decisions.

If by "initial release decision" you mean whether we decide to issue an arrest warrant or summons to a defendant who is currently out of custody, upon the filing of an information, we rely on facts in the information which would lead us to conclude that the defendant is "not likely to appear at the initial appearance."

If by "initial release decision" you mean what to set for a defendant making their initial appearance in front of us while in custody, then typically the input comes from prosecutors, and perhaps the counsel we just appointed to represent the defendant.

- Whatever information is in the file. Typically nothing more than the PC statement in the Information. If raised at a bail hearing, by the defendant or counsel, I may get additional information verbally at the hearing. The State usually has access to a rap sheet and can provide prior convictions (but doesn't usually provide prior bookings, prior pretrial release, etc because it's not available).
- The court docket, a copy of the citation, sometimes the Information, sometimes a Probable Cause statement, and criminal history.
- Typically we make this decision at a video conference where the defendant is being held in jail; I have information provided by the prosecutor regarding the seriousness of the alleged criminal activity and the defendant's record, as well as information regarding the defendant's address, living arrangements, employment and family, as well as an affidavit of impecuniosity that we have

the defendant fill out, normally provided by the defendant. Some information is provided by the public defender, who is normally at the jail for the appearance.

- When I set bail, I usually have the probable cause statement.
- Sometimes I have just the probable cause statement, with information about the alleged crime. Sometimes I have information about criminal history. Sometimes I have information about past court appearances. Sometimes I have information about alleged victim wishes. I rarely have information about defendant resources.
- The probable cause statement.
- Any information I have, which is usually precious little. Criminal history is usually all we have with a little information about employment and ties to the community. A real risk assessment would be good. Current bail practices are a waste of resources.
- Not enough generally. County jail has the number of bookings, the probable cause statement for the offense(s) booked, occasionally I have the first page, booking sheet indicating all offenses and/or warrants on which the defendant is recently incarcerated. (Not including bail reduction hearings.)
- Juvenile Court: Probation report, past history, booking sheet and parent's or guardian's input.

## **2. Who gives you this information and how do they provide it?**

- My clerk gives it to me (if she has it at all). Otherwise the jail tells me what the charge is. I haven't seen a probable cause statement in years.
- The documentary information is in CORIS. The proffers are provided orally in court by prosecution and defense counsel.
- County Pre-Trial Services.
- Prosecution provides the criminal history at arraignment, information and PC statement from the file, defendant usually provides information about employment and housing upon inquiry from the Court.
- This is provided by court staff.
- The charges are filed by the police department/prosecutor. The defendant provides information about his/her background directly to the Court. The Clerk of the Court provides the criminal history.

- From the City Attorney or attorney, generally provided verbally. They have a copy of the criminal history and reports, if questions arise.
- Information – by prosecutor. Booking Sheet from jail daily e-mail. Citation from PD. PC Statement by arresting officer. O.R. sheet from jail.
- The prosecutor.
- Court clerks who get some of it from the jail.
- The Defendant provide answers to my questions, and my clerks provide me with the booking sheet.
- All of this information is in the judicial workspace, placed there by the court clerks.
- Jail personnel provide the oral description. On the other cases, court staff provides the criminal history and a copy of the citation, if there is one.
- Counsel for the parties. Almost always verbal at a bail hearing.
- The court generates the docket. The file contains the citation, the Information and sometimes (although usually not) the Probable Cause statement. The officer who issues the citation submits the citation electronically. The prosecutor submits the Information by dropping it off at the court office. The law enforcement agency submits the Probable Cause statement if that is in the file. The criminal history is accessed through the Utah Criminal Justice Information System (UCJIS).
- Typically we make this decision at a video conference where the defendant is being held in jail; I have information provided by the prosecutor regarding the seriousness of the alleged criminal activity and the defendant's record, as well as information regarding the defendant's address, living arrangements, employment and family, as well as an affidavit of impecuniosity that we have the defendant fill out, normally provided by the defendant. Some information is provided by the public defender, who is normally at the jail for the appearance.
- The probable cause statement is emailed to me by the jail personnel.
- When acting from a probable cause fact sheet for someone in the jail, I have just what the officer wrote. When I am requested to issue a warrant, the prosecutor provides the information the prosecutor wants. When I act in court, I get information from the defendant, defense counsel, the prosecutor and occasionally the alleged victim.
- I receive it from the jail.

- With the new rule 7, usually nobody gives us any information. What we do get comes from the arresting officer. Further information is then presented at the first appearance.
- County Jail is the exclusive source. On occasion the county pretrial services provides verbal background in requesting a Pretrial Release, supervised by county/public entity.
- Juvenile Court: Given in person by probation, and parents or guardians

**3. If you revisit a pretrial release decision, how often do you do so, and upon whose request would you revisit it?**

- If the defense attorney or the defendant's family ask, then I'll revisit it. This rarely comes up, maybe once every two years.
- As often as either party requests it. Both parties are required to give notice to the other in advance that a pretrial release condition will be addressed. It would be very rare for such an issue to be addressed more than twice during the pendency of a case.
- Reviewed at the initial appearance and subsequent bail hearing. Possible after a plea is entered or the prelim is waived, etc.
- Upon request of defendant or counsel – almost always revisited if requested.
- Terms of pretrial release are reviewed at each subsequent hearing, to ensure that they are adequate, but not unnecessary.
- Reconsideration of pretrial release decisions happens very rarely and would be in response to a request by the defendant, his/her attorney or the prosecutor.
- It will usually be addressed at the next court setting, if a person remains incarcerated and further proceedings are required. This is usually more for scheduling and timing purposes, unless the defense asked the court to review the last order of the court. If an OR interview by the jail was ordered and the person rejected, the court will review the interview sheet and the reasons for denial.
- Revisited on a weekly basis to determine if defendant has been released. Jail compiles weekly video arraignment list and schedule and notifies court clerk by e-mail.
- At least once after counsel has been appointed or appeared.
- If defendant in jail by letter, or less frequently his/her family.

- I do not often revisit pre-trial decisions. If I do revisit it, it is base upon a request from the Defendant (or their attorney), the prosecutor, or on occasion the jail if it is a health related problem with the Defendant.
- I have never had a request to revisit pretrial release decision.
- If a release was granted, I would generally only revisit that decision if there were new charges, or a violation of the conditions of release. If bail was set and the defendant cannot afford it, I revisit the release decision at every scheduled hearing, which generally are no more than 2 or 3 weeks apart. In justice court I can't deny bail, so I do not revisit decisions denying release.
- Upon defendant's failure to appear, or motion of the parties.
- Yes; at the request of defense counsel or a joint request by counsel.
- I do not recall any specific instances of revisiting a pretrial release decision. I suppose that could happen upon request of any party.
- I do not often revisit release decisions unless the defendant is alleged to have committed a new crime, has failed to appear at court or is appearing incarcerated and new information is available. The request to revisit may come from the state, regarding the first change, from the non-appearance of the defendant as to the second, and from the defendant's lawyer for the third.
- If a pretrial release decision (bail) is re-visited, it is usually done because the defendant has not bailed out of jail by the next time we hold court with prisoners. We do this once each week. Prisoners are brought to court and we review their status as well as conduct an arraignment (assuming they are ready for one). Occasionally, a defendant in jail will hire a lawyer who will make an agreement with the prosecutor regarding bail.
- I will always reconsider release at the first court appearance. I am sometimes asked to reconsider after that, but rarely make a change unless stipulated. This can occur on waiver of preliminary hearing or after guilty plea.
- Very rarely, but the defendant or the prosecution may ask for a change.
- Any party can seek to readdress the issue. We address it usually on almost every case once.
- Very seldom. Most pretrial release decisions are moot within 3 business days. Defendant should be released or attending an arraignment hearing, including a bail decision. Of approximately 100 district court felonies at jail booking, I have reviewed 3. 2 requests made by the county jail to confirm my earlier decision. 1 request by county prosecutor to extend time for screening. (Not including bail reduction hearings.)

- Juvenile Court: Weekly if the youth is not released, or sooner.

**4. What information do you have to assist you for subsequent pretrial release decisions?**

- Rarely do I have any other data. If I haven't seen a probable cause statement within 24 hours, and they haven't made bail (rare), then I release them at that time.
- Usually just additional proffers from counsel. Better attorneys will bring documentary evidence—such as proof that the defendant has been accepted into an inpatient program or that critical medical attention is required, etc.
- Pre-Trial diagnostic evaluation and information provided by the parties.
- Usually have additional proof of employment or housing to bolster what the defendant has stated orally in Court—Sometimes we have the benefit of supervision history from AP&P.
- Pretrial release is supervised by third party providers, which provide reports, usually monthly.
- The charges are filed by the police department/prosecutor. The defendant provides information about his/her background directly to the Court. The Clerk of the Court provides the criminal history.
- We may have the OR interview, but otherwise just additional information that may be provided by the parties.
- Jail has information in the event of pending charges from other jurisdiction(s) that may be holding defendant (or 72 hour hold by AP&P).
- Information provided by defense counsel.
- Whatever the source of the request – letter from whomever.
- Subsequent release decisions usually are accompanied by verification of employment, permanent address, or medical request from the medical personnel at the jail.
- Information in the judicial workspace.
- Generally these issues are revisited with counsel present for both sides. Defense counsel will almost always be present, or appointed by the court, in a case where there are any significant conditions of release. I have information that is presented by counsel, either showing a violation, or a defense counsel's

argument, with various support, showing why bail or other release conditions should be relaxed.

- No additional information.
- Any information normally is provided by the state or the defendant's lawyer, although occasionally the information may come from pre-trial release services or the Department of Corrections if the defendant is already on probation.
- Pre-trial release decisions are almost always made at the very early stages of the case. It is very rare to have otherwise. Usually I would only have the probable cause statement as well as the defendant's argument to me in court.
- I have complete information if the prosecutor and defense are prepared, which they usually are.
- Most of the time there is a hearing with both parties present.
- Criminal history is usually all we have with a little information about employment and ties to the community.
- The jail provided me verbal information regarding alleged aggravating circumstances not contained in the probable cause statement. No changes were made. The D.A. filed a written motion to extend time, and good cause why. Granted.
- Juvenile Court: Any other information gathered by probation or new information regarding appropriateness of parental supervision or home detention by the parents.

##### **5. Who gives you this information and how do they provide it?**

- My clerk gets info from the jail or directly from the arresting officer.
- Counsel provides it, either orally or through documentary means. Once in a while, a family member may present evidence.
- Pre-Trial or counsel.
- Defense counsel (and defendant) & AP&P.
- Pretrial release is supervised by third party providers, which provide reports, usually monthly.
- The charges are filed by the police department/prosecutor. The defendant provides information about his/her background directly to the Court. The Clerk of the Court provides the criminal history.

- We may have the OR interview, but otherwise just additional information that may be provided by the parties.
- Jail provides this information by e-mail or phone call to/from court clerk.
- The attorneys usually provide it at a subsequent hearing.
- Whoever is asking for the release – and if someone is opposing it (very rare in justice court jurisdiction).
- The Defendant (or their attorney), the prosecutor, jail medical personnel
- All of this information is in the judicial workspace, placed there by the court clerks.
- Generally it is from counsel, either prosecution or defense, and it is given orally, sometimes with support, in court.
- The information for subsequent decisions typically is given orally in open court at the defendant's subsequent appearances. Pretrial release services information comes from reports filed with the court.
- On the rare case when a decision is made in a later stage of the case, I would have any agreement submitted by the attorneys. This is rare because almost everyone is able to bail out of jail before the case goes very far.
- Counsel. Defendant sometimes interjects. On rare occasions, a victim speaks.
- Both parties at a hearing.
- Just further information from the defendant and the prosecutor.
- The jail.
- Juvenile court: Any other information gathered by probation or new information regarding appropriateness of parental supervision or home detention by the parents.

**6. Do you make a pretrial release decision when you determine probable cause, or do you conduct a separate proceeding?**

- I make the pretrial release decisions during the probable cause hearing.
- We set bail electronically, on an ex parte basis, when probable cause is found. This bail can be reviewed once without advance notice, or without having to prove a change in circumstances, by either party because it was – after all – set without any input by either party.

- No.
- Sometimes, but usually done at the initial appearance
- Pretrial release is determined at arraignment, and reviewed at each subsequent hearing.
- Bail is set at the time probable cause is determined. If the defendant is not able to bail out, a separate proceeding is initiated by the defendant, his attorney or the prosecutor.
- Usually PC is determined through our electronic system. Bail is usually determined initially by the jail applying the Uniform Bail Schedule. We can adjust bail, however, in our review. There is no component for OR. Pretrial release decisions outside of that are generally address at the first appearance, which is the next court date after arrest (Monday through Friday).
- A separate proceeding is conducted in the form of a hearing by video.
- Usually at the initial appearance.
- Same time usually.
- A separate proceeding.
- When I view probable cause.
- In Salt Lake County most individuals that are booked only on misdemeanors out of justice court are released before I see them, and no probable cause determination is ever made. The individuals I do see are generally being held on either felonies, or multiple warrants. For those individuals that I do see, OR release is granted on the vast majority of cases. Protective orders are included as a condition of release on many DV cases where a release is granted.
- Right then as required by rule.
- Not done at PC stage. Defendants either bail out or appear for first appearance (typically within 72 hours of arrest) at which pretrial release may be discussed.
- I always make this determination when making a probable cause determination.
- This question is a little unclear; if by probable cause you mean a No Warrant Arrest Fact Statement, the pretrial release decision is normally made at a different proceeding, when the defendant appears before the court. If you mean probable cause as in a preliminary hearing, typically the pretrial release decision has been made by the time the prelim is held; although, occasionally we will review the defendant's custodial status at the preliminary hearing if the parties have been negotiating.

- I set bail at the same time I determine probable cause.
- Yes.
- It depends on the case and the situation.
- Both.
- Same proceeding per Rule 7(c). I do not preside over arraignment calendars, therefore do not have an opportunity to review earlier decisions or hear from other sources of information. (Not including bail reduction hearings.)

**7. Do you follow the bail schedule when making pretrial release decisions? If you deviate from it, when and why do you deviate from it, and what information do you rely on in making your decision?**

- I usually follow the bail schedule. I only deviate from the schedule if I feel that flight risk is low due to local family units, employment, etc.
- My presumption is to follow the bail schedule. Deviations occur frequently – either up or down – to address any particular factors relating to this specific defendant’s flight risk and danger to the community.
- If you deviate from it, when and why do you deviate from it, and what information do you rely on in making your decision? Follow the schedule unless there are factors that support deviation.
- Generally yes, may deviate based on criminal history and specific facts associated with the new offense
- Pretrial release is not tied to the Uniform Bail schedule, but it focused on measures to protect the defendant, third parties (esp. victims) and the public. Ordinarily this involves drug and/or alcohol testing, and/or home confinement. In some cases, it involves mental health treatment.
- The third party providers are expected to work with defendants regarding payment. If they are indigent, it is written off. In any event, upon sentencing, the cost of pretrial treatment and supervision is taken into account. If possible, public resources are used (VA, etc.)
- The bail schedule is followed in the majority of cases. On occasion the prosecutor will provide additional information that will result in an adjustment to the bail schedule.
- Yes. Both the Prosecution and Defense may provide verbal information meriting a different amount, usually based on the reports, victim information and criminal history. If the recommended fine would be lower than the bail schedule, it might

merit a reduction. In DV cases, sometimes increased bail is requested and ordered because of risks to the victim, etc. Bail may also be increased when the defendant has other pending cases before the court.

- Yes, for the most part. If you deviate from it, when and why do you deviate from it, and what information do you rely on in making your decision? Based on defendant's ability to pay.
- I try to follow the schedule, but I do deviate from it based on such things as criminal history and danger to the community.
- Follow bail schedule if bail is being imposed as condition of release – most often in justice court jurisdiction the release is O.R.
- I almost universally use the bail schedule.
- I generally follow the bail schedule. Sometimes I deviate from the schedule when I get a request from the agency of arrest or I see that they have multiple cases of non-compliance.
- More often than not, I deviate downward. In the justice court most cases do not involve serious risks to public safety. As a result, individuals are often given OR releases. In some cases where a defendant has demonstrated a continuing pattern of not coming to court, bail will be set. Bail is generally set with the defendant's financial condition in mind, which is generally unemployed, with no money. Bail is set at a reasonable amount to allow the defendant to bail out.
- Follow the bail schedule, as long as you don't think that means the bail schedule requires Cumulative bail for every chicken crap charge they added. And there is no presumptive bail for Felonies. One also should balance a defendant's ability to pay any bail in setting bail, especially for petit misdemeanors.
- Initial pre-filing bail is set by a magistrate (county justice court judge) who I believe follows the bail schedule. If the magistrate is not available to set bail or is delayed in doing so, the jail will release if bail is posted in amount of bail schedule based on charges for which D was booked. At warrant stage, we follow the usual and customary warrant amounts unless special considerations are identified in the PC statement (i.e., request for higher than normal bail).
- When making pretrial release decisions, I usually follow the bail schedule. If I deviate, I would do so when rounding the bail (minimally) for convenience or if I had some other information that seemed to support the deviation in the interest of justice. If I deviate due to the interest of justice, I would do that if I had information either from cases before me or based on criminal history that showed a defendant had a pattern of conduct or lacked a pattern of conduct.

- Although I follow the bail schedule generally, I often use the bail bond cost, rather than the full bail amount; for example, if a third degree felony is involved, I will set bail at \$500.00 cash rather than \$5,000 bond. I consider the information I have outlined in paragraph 1 above.
- The bail schedule is almost always used. If I deviate from it, it is usually because the probable cause statement contains information which causes me to be concerned about the safety of the defendant or the public. Alternatively, I might lower bail if I think the defendant poses no safety or flight risk.
- I roughly follow the bail schedule, but I do not consider it important to get it accurate to within \$5 when there are multiple charges. If there are felonies, I usually disregard the misdemeanors in setting bail.
- I follow it most of the time unless there are extenuating circumstances that warrant raising or lowering the bail.
- No, or rarely. The one-size-fits-all approach of the bail schedule on felonies is a joke.
- Yes, follow bail schedule but might deviate to round numbers (e.g. \$680 class b misdemeanor, \$700; or Intoxication \$270, + Trespass \$680, + retail theft \$680 = \$1,600;) Otherwise Rule 7(c)(3)(b), substantial cause to deviate from Uniform Bail Schedule.
- Juvenile Court: No

**8. Do you ever consider a person's ability to pay when setting bail? If so, how do you receive that information?**

- I'll sometimes consider that issue if the defendant raises it. Since the bail amounts are usually so low it isn't often a problem. If, however, the defendant makes a special request, I'll consider it.
- Yes. This information is provided directly by the defendant in open court.
- Not generally, although it could be raised by counsel.
- Yes.
- The third party providers are expected to work with defendants regarding payment. If they are indigent, it is written off. In any event, upon sentencing, the cost of pretrial treatment and supervision is taken into account. If possible, public resources are used (VA, etc.)
- Bail is generally set according to the bail schedule.

- Sometimes, but not as the sole criteria. Information about ability to pay would be provided by the defendant or defense council.
- Yes. Verbally and/or O.R. Sheet.
- No.
- No.
- I do not consider the person's ability to pay.
- Yes I consider a person's ability to pay at times if I am made aware of their circumstances. This can come from personal knowledge, Prosecuting Attorney, or that they are indigent.
- Yes, in most cases where there is not a public safety concern. The information is obtained by asking the defendant.
- Yes, not enough sources to tell us that.
- This is considered at bail hearing stage but not at initial bail set stage.
- When I initially set bail, I usually do not have any information about a person's ability to pay. If I did have any information, that information would come from the Probable Cause statement or from previous dealings with the party.
- Occasionally I consider the person's financial situation when setting bail. Typically we make this decision at a video conference where the defendant is being held in jail; I have information provided by the prosecutor regarding the seriousness of the alleged criminal activity and the defendant's record, as well as information regarding the defendant's address, living arrangements, employment and family, as well as an affidavit of impecuniosity that we have the defendant fill out, normally provided by the defendant. Some information is provided by the public defender, who is normally at the jail for the appearance.
- Yes. If the defendant comes to court and tells me about his/her financial situation and inability to post bail, I will often lower the bail (assuming I don't see a significant risk).
- When the person is before me. If so, how do you receive that information? From the defendant or counsel. Sometimes the prosecutor will point out a resource the defendant has neglected to mention.
- I rarely have this information available.
- Yes. From the defendant usually.
- Ability to pay is/should be a factor at arraignments and bail reduction hearings.

- Juvenile Court: No.

**9. What information do you rely on when releasing a person on their own recognizance ("O.R.")?**

- I question the defendant as to their local ties. I also look at the seriousness of the charge. On a D.V. assault, I lean toward setting a cash-only bail. If they can't pay it, then they stay in jail.
- What the likely sentence will be, whether the defendant is employed, whether the defendant has ever been incarcerated before, what the defendant's ties are to the community, whether the defendant was on probation at the time of the commission of the offense, and many other items of information.
- The pre-trial evaluation and items described above.
- Rely heavily on representations made by defense counsel and the State as to the present living situation and other risk factors.
- At initial appearance, I have a BCI and a DL report to review, if necessary, for setting terms of pretrial release.
- Own recognizance releases are based upon the defendant's ties to the community including time lived in the area, family members present, residence, job longevity, nature of the offense charged and risk to the community.
- We may have a copy of an OR interview from the jail, but this is not consistent. Usually we only have the oral representations of the parties, based on the police reports, criminal history, booking log, etc. On occasion I have had our probation agency do a report/verification, but this would be rare because of the unreimbursed costs to the agency. Usually this happens, when they are already on probation to the agency.
- Prior Failure to Appear. Residency Issues. Employment. Family support. Victim Request.
- Their lack of criminal history, lack of any prior failures to appear in their history, and whether they have a prior history of violence.
- Severity of allegations, threat to a victim or the community, likelihood of appearance.
- Usually how permanent the Defendant residency is; does the Defendant have a job, and if so for how long and with whom; What are the Defendant's permanent contacts with the area if any.

- To release O.R. I rely on the type of charge, and my gut feeling that they will appear.
- The seriousness of the charge, the defendant's prior criminal history, the defendant's history of failure to appear, and any request from the victim/victim's advocate/prosecutor which there rarely is.
- Whether a citation was issued for the charges, the relative trivial nature of the charges.
- Very little. Basically what's in the file. No pretrial supervision is available in this county so it is all straight OR.
- I would consider the following: ability to pay, criminal history, whether the party has a history of failing to appear for court, and whether they have a hearing in the near future.
- Typically we make this decision at a video conference where the defendant is being held in jail; I have information provided by the prosecutor regarding the seriousness of the alleged criminal activity and the defendant's record, as well as information regarding the defendant's address, living arrangements, employment and family, as well as an affidavit of impecuniosity that we have the defendant fill out, normally provided by the defendant. Some information is provided by the public defender, who is normally at the jail for the appearance.
- I will want to make sure that a defendant has a good place to go, family or good friends to support him/her, a commitment to be law-abiding, and a credible assurance that he/she will return to court as ordered.
- Connection to community and state, past history of appearances, criminal record and nature of offenses.
- Recommendation from the prosecutor and consideration of the charges.
- OR is usually only allowed when they lack a criminal history.
- Length of current residence, employment (length with most recent employer), family connections to community, other persons defendant would reside with pending court hearings; nature of offense (e.g. person crime; property crime; presence of substance/alcohol at time of offense;) history of substance misuse; prior failures to appear or failures to complete probation successfully.

**10. Is there information you would like to rely on, but do not have access to, when making pretrial release decisions?**

- A risk and needs assessment of the defendant. It would be nice to know what the defendant's criminogenic needs/factors are and whether any of those needs can be addressed during the pretrial stage.
- Information is generally provided by county pre-trial services and their evaluations and recommendations.
- Would like to have supervision history from AP&P for those individuals who have previously been on supervision.
- Not usually.
- Additional information would be preferred, but practicalities generally obviate against obtaining the same on a regular basis.
- It would be nice to have a consistent interview procedure that can verify the information provided.
- More general information regarding domestic violence issues. (Not to compromise ex parte communication.)
- Yes. I wish I had a representative of pretrial services to provide additional information about the defendant.
- I'm fine with what we generally have – about the only exception might be DV cases where information from the victim would help.
- Usually how permanent the Defendant's residency is; does the Defendant have a job, and if so for how long and with whom; What are the Defendant's permanent contacts with the area if any.
- I would like to know how many charges in how many courts the person has.
- ABSOLUTELY. The allegations of the underlying charge. The regular and consistent input of an informed victim's advocate (on DV cases).
- A RANT or other Risk/assessment tool. The pre-trial release score from the Jails' pretrial screening tool. The defendant's current employment.
- Absolutely. Info that's available in Salt Lake and pretrial services would be ideal.
- Some kind of verification of income or employment – from a source independent from the party.
- A composite of the likelihood of the party to appear – how many previous failures to appear, if any.

- Criminal background to determine safety of release and likelihood to recommit offenses.
- Typically we make this decision at a video conference where the defendant is being held in jail; I have information provided by the prosecutor regarding the seriousness of the alleged criminal activity and the defendant's record, as well as information regarding the defendant's address, living arrangements, employment and family, as well as an affidavit of impecuniosity that we have the defendant fill out, normally provided by the defendant. Some information is provided by the public defender, who is normally at the jail for the appearance.
- I guess I would like to have criminal history as well as witness statements, but these are not easily obtained, given the short 24 hour time restraint.
- Yes. I would like information about criminal record, past record of court appearances, connection to community, resources and views of alleged victim.
- Sometimes.
- A real risk assessment.
- Much of the information described in Response # 9, is not available from 1 source. And the information may not be credible based upon the proponent of the information. (e.g. prosecution submits all the various arrests, but not the dispositions, or sufficient detail to weigh accuracy; defense is self-serving to obtain the defendant's release or reduced restrictions for pretrial release.)

#### **11. Are defendants represented at pretrial release hearings?**

- Rarely.
- Yes, unless they've waived representation.
- Only at the initial appearance forward.
- Sometimes at IA, but always at the next hearing.
- At arraignment, frequently there is no public defender available. If that is the case, a pretrial conference, for the express purpose of reviewing pretrial release, is scheduled as soon as possible, usually on the next Tuesday or Thursday (court day), with the public defender. In almost every case, the terms of pretrial release are reviewed with the public defender and the defendant at a pretrial conference, within 2-4 days.
- Not generally.
- They are usually represented by a public defender.

- Sometimes.
- Yes, after the initial appearance.
- Not usually in justice court jurisdiction.
- Usually they are not.
- They are almost never represented.
- Generally not. Release is often determined at the first appearance. Many individuals cannot afford their own attorney and the first appearance is where they request the assistance of a public defender.
- Only after the initial appearance.
- Yes.
- Usually not at the initial hearing.
- The defendants are almost always represented, or at least are able to speak with the public defender.
- Defendants are usually not represented at the very beginning of the case when bail is set originally. They have almost never had time to hire a lawyer that quickly. Many of them ask me to appoint the public defender at the same hearing where I am considering bail.
- In open court, yes, unless defendant insists on addressing bail before getting counsel.
- Yes.
- I preside over bail reduction hearings. Yes, significant majority are represented by counsel.
- Juvenile Court: Not usually. Occasionally a parent will hire an attorney up front.

**12. Do you have any concerns about the pretrial release process? If so, please state them.**

- Getting probable cause statements in my hands so I can review it – that would be nice.
- The sooner we can be aware of, and address, a criminal defendant's criminogenic needs, the better we can protect the public and reduce recidivism. Recidivism occurs during periods of pretrial release far more than it should. Also, other than

me, the judge, nobody follows through to make sure that the defendant is complying with any court-imposed conditions of release.

- Pleased with the evaluations and personnel from pre-trial services.
- Short of AP&P, Tooele lacks any pretrial release supervision.
- At the justice court level, frequently cases take months to resolve, and are then appealed de novo to the district courts. They are then pending there for months. Most district court judges routinely stay any sentencing by the justice court. If a defendant has a drug or alcohol problem, that means up to a year or more may go by before a final sentencing can take effect. Savvy defendants and counsel intentionally game the system to do this. This is time “lost” when viewed from the standpoint of helping the offender, and it can needlessly expose the public to risk during this process. My strong suggestion is that the justice courts are encouraged and trained to take pretrial release seriously, and that sentences from the justice court are not automatically stayed upon appeal, without a careful and considered review by the district courts. Many judges seem to have the impression that pretrial release terms unfairly “sentence” a defendant without a finding of guilt. However, the SCOTUS has made clear that there are no constitutional barriers to setting appropriate terms of pretrial release.
- No.
- Although our jail has OR release authority under a matrix, which I believe was approved by the District Court, I do not see it provided on a consistent basis.
- Yes, in domestic violence cases, particularly.
- I wish I had more information about the defendant.
- No.
- I do feel that I am operating on very limited information, and I am not able to verify the information I do have to a satisfactory degree.
- The jails are requesting that we fax them a release so they have a paper copy. The hearing is on Viack which is secure, so the officer should be able to hear the ruling and not have to have a paper copy.
- Yes. I generally do not have adequate information on which to make an informed decision. I am left to guess in many cases. I tend to guess in favor of a defendant (except in DV cases or others where public or victim safety may be an issue). However, I am sure I could make better decisions if I had the necessary information.

- Issuing citations to people and then booking them in jail. This guarantees that a poor defendant waits until some mythical Fail to file deadline before being released. It acts as a 48-72 hour timeout for poor people. Even if the magistrate sets a bail, no prosecutor is ever going to seek to file an information, b/c the officer issued a citation, which will begin the court process.

A misdemeanor bail schedule that is preemptively a total amalgamation of all the kitchen sink charges an officer threw at the defendant, rather than a number, with a "not more than" recommendation.

Courts that hold defendants in jail on bail settings and then set court hearings for more than 7 days out, like months more, especially on petit misdemeanors.

Bail suretys who accept 10% fee from families of defendants who are subject to ICE holds, who then seek exoneration when the defendant is sucked up by ICE, and keep the 10%.

Courts that issue warrants for all cases filed, regardless of the likelihood of a defendant appearing on a summons.

Jail release agreements and orders that last forever, even if no charges are ever filed against a defendant.

So many more.

- Yes. I am particularly concerned about re-offense in those cases where re-offense seems likely. It would be nice to be able to have more pretrial release options for those cases – see below.
- Approximately a year ago we arranged to have the public defender available at the jail when we do video appearances; this has helped alleviate most of the concerns I had with pretrial release decisions. Our goal is to get people counsel and have them appear in court as quickly as possible.
- It seems to work fairly well. I am interested in knowing how other courts do it so that I can see if there are ways to improve it.
- Our rule says set bail when determining probable cause. Statute says initial bail set at first appearance. Vast majority of defendants have bail set by bail commissioners, not judges.
- Private sureties are not utilized in a manner that has a rational connection to the safety of the community. Public entities (county pretrial services, county jail release programs) are underfunded and understaffed and therefore increase the failures in proper supervision.
- Juvenile Court: No.

### 13. In your view, how can the pretrial release process be improved?

- Bail bondsmen provide virtually no service to the courts. If the funds used to pay them could be redirected to fund a pre-trial release services program that assesses a defendant's criminogenic risks and needs, recommends terms of release that address those risks and needs, and supervises a defendant's compliance with those terms of release, then the defendant him/herself and the courts and the public would be far better off than we are now.
- Would like reassurance that the jail will hold the individuals that the court designates.
- It would be really nice to have a standardized pretrial release report of some sort and it would be nice to have standardized pretrial supervision.
- More vigorous and consistent OR interview program.
- More information in domestic violence cases, especially from alleged victim, but not to compromise ex parte communication.
- I believe that pretrial services would be a good asset to the court.
- All defendants could be given a O.R. interview by the jail prior to any hearing before the judge, and the information from that interview could be passed along to the judge in aiding in their decision.
- Go paperless.
- Prosecutors should be providing the necessary information. However, they are not always available, and often when they are the do not have helpful information or are not prepared. One simple thing that would be helpful is to allow the judge easy and quick access directly to the probable cause statement or police reports to look at the allegations, so we do not have to rely on a prosecutor to get the information. Better participation by victim's advocates would also be helpful.
- Fix all of the above:  
  
Require each county jail to do a RANT type assessment, as well as a pre-trial risk (FTA/recidivism) assessment upon booking and provide that score to the reviewing magistrate.  
  
If a defendant is issued a citation, they cannot be booked in jail on THOSE charges. If they have other warrants, great, but a citation presupposes a person's willingness to appear without other coercion.

Require misdemeanor cases make at least weekly court appearances (not by video, but transported) by any court continuing to hold a defendant after an initial video appearance.

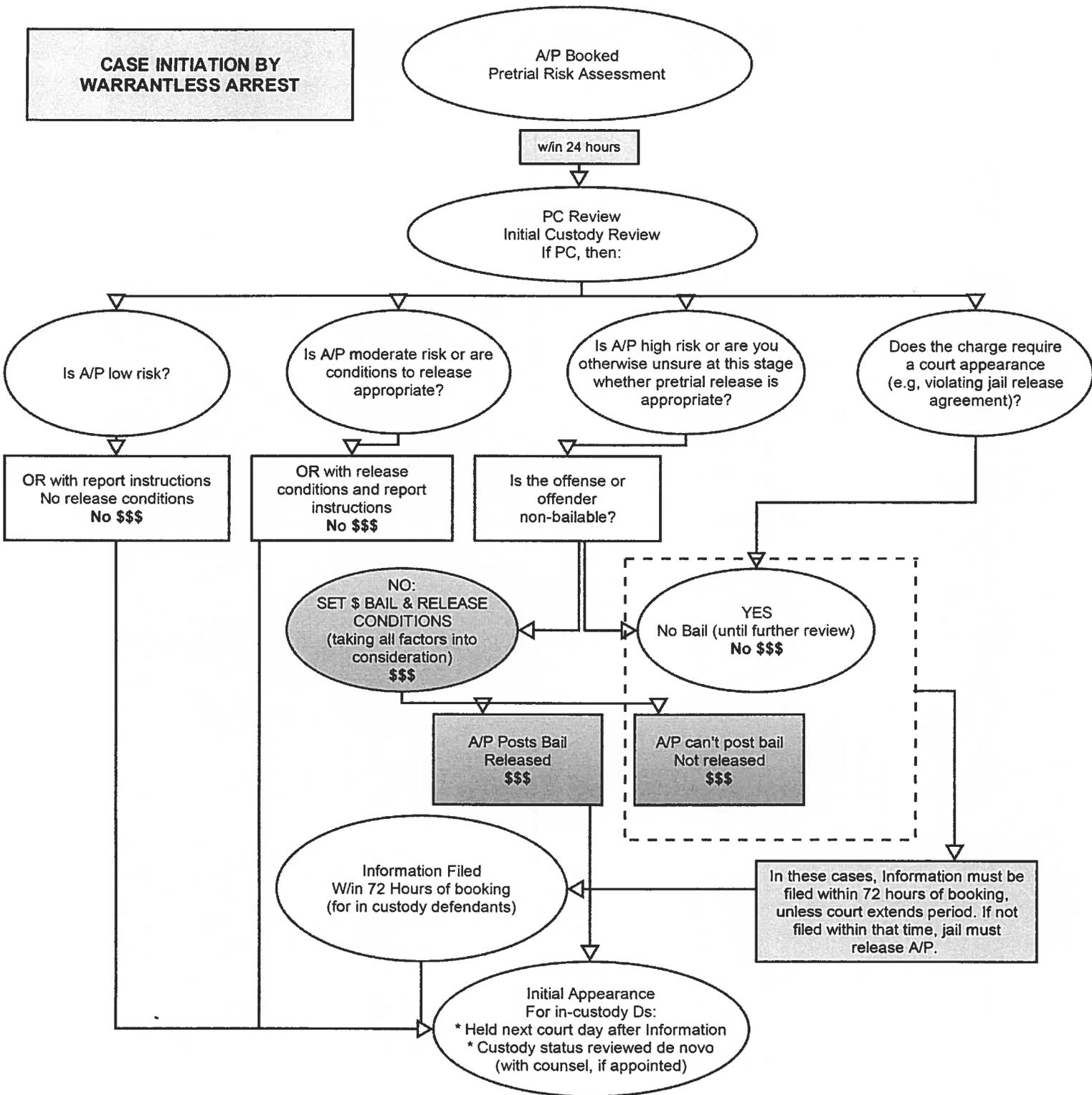
Defendants being held on class b misdemeanors or below shall be tried within 30 days.

Remove anti competitive minimum surety fee of 10%. Make it refundable where a defendant is not actually released from custody.

Require suretys who collect 100% collateral on forfeitable bail amounts to forward all that money through to courts as cash bail posted by the guarantor, not a bond.

- Funding for any who are placed on a pretrial release program – for monitoring, counseling, legal representation, investigation of defendant representation of employment or sobriety and so forth for the defendant’s counsel.
- Since the public defender has begun appearing at the video appearances, and we have a pretrial supervision provider in the area, I am not sure we can do much better, but I am glad to see this topic studied in an organized fashion. I am sure someone has some good ideas about streamlining this process.
- I am not sure. I would love to see how everyone does it.
- There is an enormous range of possible situations to address. We should tread carefully. For example, we might decide all bail should be set by a judge. Many people will not consider it much comfort that a judge will be setting bail if they have to spend twelve hours in jail on a minor charge waiting for judicial review. I think we need to have presumptive amounts for run of the mill cases, but give both police and prosecutors the option to bump cases out of that queue. Then resolve the differences between rule and statute and provide a way for judges to get this additional information in probable cause fact sheets if they will be setting bail from them.

# Appendix D



# Appendix E

**CASE INITIATION BY FILING INFORMATION D NOT IN CUSTODY**

**Information**  
Must identify whether D booked on these charges, results of risk assessment and release status

**PC Review**  
If PC, then:

D was previously booked on these charges (ie, risk assessment completed)

D was not previously booked on these charges (ie, risk assessment not completed)

Is D low risk?

Is D moderate risk or are conditions to release appropriate?

Is D high risk or are you otherwise unsure at this stage whether pretrial release is appropriate?

Does the charge require a court appearance (e.g, PO violation)?

Service by summons only  
No warrant  
No release conditions  
No financial conditions

Service by summons  
Existing or prior release conditions remain ??  
No financial conditions

Is the offense or offender non-bailable?

**SET \$ BAIL**  
(based on available information)  
Risk assessment done at time of booking  
\$\$\$

**NO**  
SET \$ BAIL  
(taking all factors into consideration)  
\$\$\$

**YES**  
No Bail (until further review)  
No financial conditions

D posts bail  
Released  
\$\$\$

D can't post bail  
Not released  
\$\$\$

For these cases, Initial Appearance must be no later than 72 hours after arrest ??

**Initial Appearance**