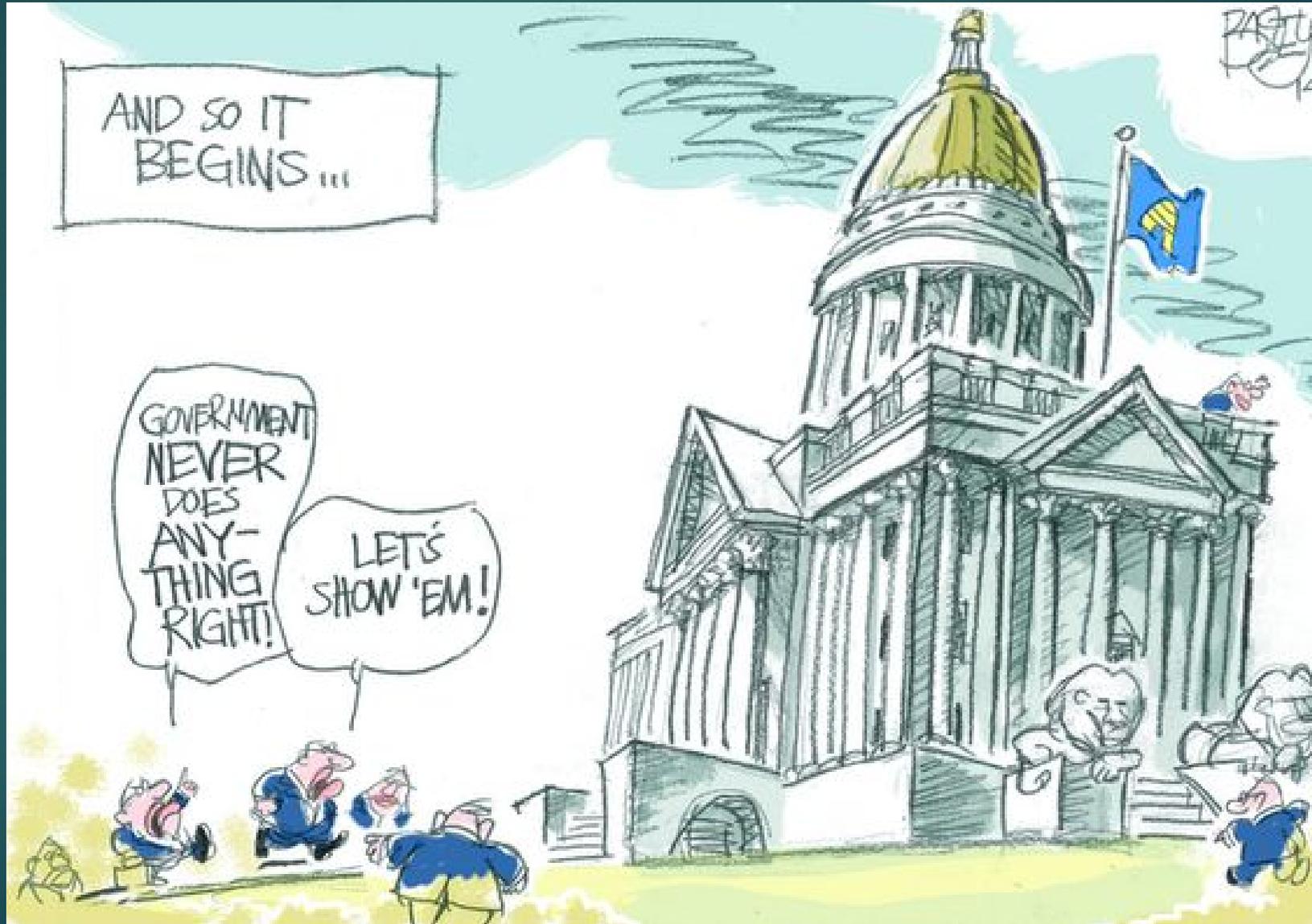
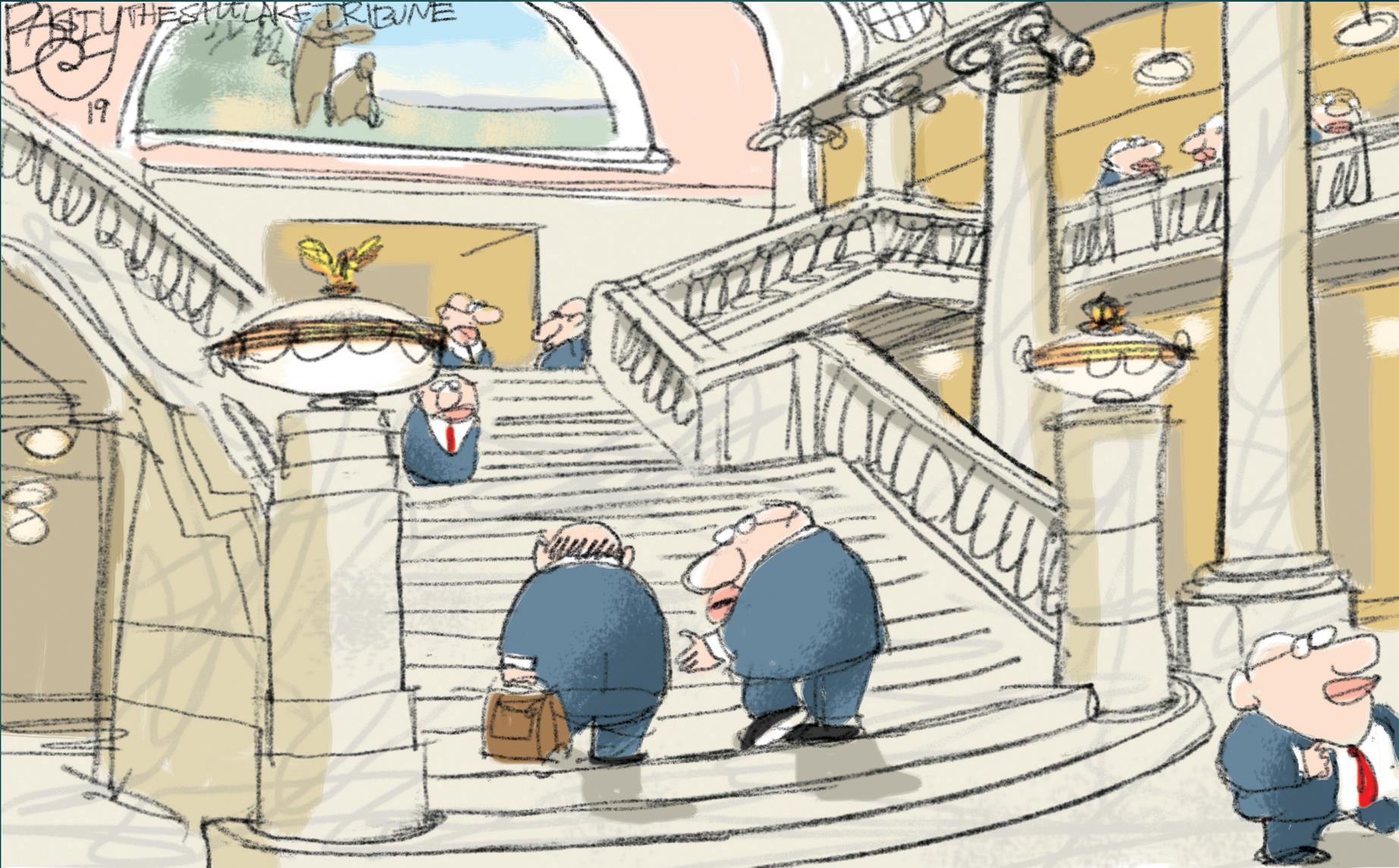


HB206 and Pretrial Reform

The Legislature...





"IT'S FINE TO IGNORE THE WILL OF THE PEOPLE. THE PUBLIC COULDN'T RECOGNIZE A BAD IDEA IF IT PUT ON A SUIT AND WALKED UP THESE STEPS!"

Background of H.B. 206

Background

-
- Report to the Utah Judicial Council on Pretrial Release and Supervision Practices (2015)
 - SB202: “Pretrial Release Amendments” (Sen. Hillyard, Rep. Hutchings) (Jan 2016)
 - A Performance Audit of Utah’s Monetary Bail System (Jan 2017)
 - Case law & legislation in other states
-

Pretrial Caselaw

Liberty is the norm

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

Pretrial detention may be acceptable, provided the circumstances are carefully limited and procedural safeguards are in place.

“...arrestee is entitled to a prompt detention hearing...”

“...the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act...”

United States v. Salerno
481 U.S. 739 (1987)

Bail Schedules

“The evidence demonstrates that the Sheriff’s use of the Bail Schedule significantly deprives plaintiffs of their fundamental right to liberty, and a plausible alternative exists which is at least as effective and less restrictive for achieving the government’s compelling interests in protecting public safety and assuring future court appearances.”

“Operational efficiency based upon a bail schedule which arbitrarily assigns bail amounts to a list of offenses without regard to any risk factors or the governmental goal of ensuring future court appearances is insufficient to justify a significant deprivation of liberty.”

There is no 48-hour safe harbor window for making indigency determinations.

Even relying solely on the PSA to determine release would be less restrictive and at least as effective at ensuring appearance and public safety

Sub Rosa Detention Orders

“...although the prosecutor presented no evidence that non-monetary conditions of release could not sufficiently protect victim or public safety, and the trial court found petitioner suitable for release on bail, the court's order, by setting bail in an amount it was impossible for petitioner to pay, effectively constituted a sub rosa detention order lacking the due process protections constitutionally required to attend such an order.”

Liberty may be deprived only to the degree necessary to serve a compelling government interest.

Bail schedules are based on the inaccurate assumption that defendants charged with more serious offenses are more likely to flee and reoffend. They enable detention of poor defendants and release wealthier ones who may pose greater risks.

Money bail has no logical connection to protecting the public.

In Re Humphrey
Case No A152056
California Court of Appeals

Due Process - Equal Protection

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“...Applying the County’s current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both [wealthy and indigent] arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.”

“No pretrial bail system can prevent every defendant who is released on money bail or personal bond from committing an offense or failing to appear.”

“Every American bail system must comply with the Constitution, which presumes innocence and eligibility for pretrial release...hindsight disagreements with individual case outcomes have no bearing on whether the decree is a fair, reasonable, and adequate remedy for the constitutional violations that the record shows prevailed in Harris County.”

O’Donnell v. Harris County
Case No. 4:16-cv-01414

U.S. District Court for the Southern District of Texas

Due process within 48 hrs of arrest

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5th Circuit largely affirmed lower court's decision, but found the injunction overly broad and remanded to the lower court with a suggestion that an appropriate remedy would require a case-by-case determination, notice, an opportunity to be heard and to submit evidence within 48 hrs of arrest, and a reasoned decision by an impartial decision maker.

Shortly after, 15 of the 16 Harris County judges who had been named in the original suit lost their reelection bids. In the election, a historic 17 African American women were elected. Those judges agreed to drop the appeal and worked to amend the bail law.

Lower court adopted a new law requiring prompt release of all misdemeanor arrestees on a personal bond, except for more serious offenses, and guaranteed a bail hearing within 48 hrs of arrest for those not released.

Lower court approved a consent decree and settlement requiring major reforms, including a clear and convincing finding requirement on ability-to-pay, increased funding to provide counsel for all misdemeanor arrestees at bail hearings, and \$4 million in attorney's fees (among other things).

O'Donnell v. Harris County, Texas
892 F.3d 147 (5th Cir. 2018)(ODonnell I)
900 F.3d 220 (5th Cir. 2018)(ODonnell II)

There are many more, here are a few....

- ▶ *Caliste et al. v. Cantrell (LA)*
- ▶ *Commonwealth v. Wagle (MA)*
- ▶ *Welchen v. Sacramento (CA)*
- ▶ *Martinez v. City of Dodge City (KS)*
- ▶ *Snow v. Ascension Parish (LA)*
- ▶ *Cooper v. City of Dothan (AL)*
- ▶ *Thompson v. Moss Point (MS)*
- ▶ *Powell v. City of St. Ann (MS)*
- ▶ *Pierce v. City of Velda City (MO)*
- ▶ *Varden v. City of Clanton (AL)*
- ▶ *Mock et al v. Glynn County (GA)*
- ▶ *Kunkeli v. Anderson (NY)*
- ▶ *Howard v. City and County of Denver (CO)*
- ▶ *White v. Hesse (OK)*
- ▶ *Allison v. Allen (NC)*
- ▶ *Robinson v. Martin (IL)*
- ▶ *Hester v. Gentry (AL)*
- ▶ *Daves v. Dallas County (TX)*
- ▶ *Little v. Frederick (LA)*
- ▶ *Edwards v. Cofield (AL)*
- ▶ *Dixon v. City of St. Louis (MO)*
- ▶ *Targa v. Tulsa County (OK)*
- ▶ *Ross v. Blount (MI)*
- ▶ *Booth v. Galveston County (TX)*
- ▶ *Philadelphia Bail Fund v. Bernard (PA)*
- ▶ *Hiskett v. The Honorable Rick Lambert (AZ)**
- ▶ *Still v. El Paso County (CO)*
- ▶ *Moran v. Landrum-Johnson (LA)*

Primary Findings

- ▶ **Reasonable pretrial release decisions must:**
 - ▶ consider the defendant's ability to pay
 - ▶ be individualized
 - ▶ be least restrictive
- ▶ Charge-based bail schedules are unconstitutional (as applied in most jurisdictions)
- ▶ Due Process guarantees apply to pretrial detention decisions
- ▶ Operational efficiency and jurisdictional resources are not a sufficient excuse

High Cost to Maintaining the Status Quo

- ▶ **Fees and costs in Harris County, TX:**
 - ▶ \$3,725,231.00 in fees and \$114,832.54 in costs to Civil Rights Corps;
 - ▶ \$2,161,262.00 in fees (to be forgone) and \$30,214.86 in costs to Susman Godfrey L.L.P.;
 - ▶ \$632,453.00 in fees to Wilmer Cutler Pickering Hale and Dorr LLP; and
 - ▶ \$182,715.90 in fees and \$5,378.00 in costs to the Texas Fair Defense Project.
 - ▶ Plus....the cost of implementing reforms

H.B. 206

Protects counties by bringing state in compliance with caselaw

Three main parts:

- ▶ Pretrial release practices + standard of release
- ▶ Changes to bond forfeiture funding scheme
- ▶ Creation of CCJJ grant for pretrial services

Pretrial Status Order (77-20-1(3)(a))

- ✓ A pretrial status order (PSO) is required every time a court makes a pretrial release decision, including during an initial probable cause (PC) review, at initial appearance, and bail hearings.
- ✓ A PSO sets the terms and conditions of pretrial release or detention.
- ✓ The court shall issue a PSO without unnecessary delay.

Presumption of own recognizance release (77-20-1(4)(a))

- 1. Court shall order own recognizance release (with the condition that the arrestee not fail to appear), unless court finds that additional conditions are necessary to reasonably ensure:**
 - the individual's appearance in court when required;
 - the safety of any witnesses or victims;
 - the safety and welfare of the public; and
 - that the individual will not obstruct or attempt to obstruct justice

Presumption of detention (77-20-1(8)(a))

- 2. There is a presumption of detention if individuals are charged with one or more of the following offenses:**
 - criminal homicide as defined in 76-5-201, and
 - any offense for which the term of imprisonment may include life
- ✓ The offense must still qualify for a no-bail hold under 77-20-1(2)
 - ✓ The presumption is rebuttable (see "Detention Hearing" below)
 - ✓ The intent expressed during the legislative drafting process was for the presumption to apply at the outset (including at PC review). It doesn't override judicial discretion to release and doesn't negate the findings required for a no-bail hold under 77-20-1(2).

Least restrictive, reasonably available conditions (77-20-1(3)(b))

- 3. If Own Recognizance release is insufficient, court must impose the least restrictive, reasonably available conditions necessary to reasonably ensure:**
 - the individual's appearance in court when required;
 - the safety of any witnesses or victims;
 - the safety and welfare of the public; and
 - that the individual will not obstruct or attempt to obstruct justice

Ability-to-Pay financial condition of release (77-20-1(4)(c))

4. Court may set a financial condition of release (monetary bail) only upon finding that a financial condition is least restrictive and reasonably necessary.

- ✓ Must consider an individual's ability to pay the amount set, unless issuing an unsecured bond (see below)
- ✓ Must find:
 - that the individual does (or does not) have the ability to pay the amount set; and
 - that the monetary amount is the least restrictive, reasonably available condition necessary to reasonably ensure:
 - the individual's appearance in court when required;
 - the safety of any witnesses or victims;
 - the safety and welfare of the public; and
 - that the individual will not obstruct or attempt to obstruct justice
- ✓ If individual's financial information not available, could presume indigence and make the least restrictive, reasonably available findings above when setting an amount.

Ability-to-Pay Matrix

- The new Ability-to-Pay matrix assists court in determining affordable monetary bail amounts. Judges have discretion to deviate.
- The matrix incorporates the poverty guidelines and recommends affordable monetary bail amounts using an individual's:
 - gross household income;
 - number of dependents; and
 - PSA failure to appear risk score (if available)

Unsecured Bonds:

- An unsecured bond is a "written undertaking without sureties" and has been an option for judges for many years (77-20-4(1)(b)(iii)). **Not a change in HB206*
- Judges do not have to conduct an ability-to-pay analysis if they are issuing an Unsecured Bond (77-20-1(4)(c)).
- Defendants would not have to pay money upon release from custody, but if they failed to appear in court the bond may be forfeited and a judgment issued.

Detention Hearings (77-20-1(3)(c)(ii), (6), (7), and (8))

5. After (or upon) the filing of charges, the State may file a motion for detention if one or more of the offenses qualify for a no-bail hold under 77-20-1(2).

- ✓ If a prosecutor files a motion for detention, judges may delay issuing a PSO and hold a defendant in custody until after a hearing, if the court finds:
 - the prosecutor’s motion states a reasonable case for detention; and
 - detaining the defendant until after the motion is heard is in the interests of justice and public safety.
- ✓ Upon filing of a detention motion, the court shall set a hearing on the matter as soon as practicable.
- ✓ The defendant has the right to counsel at the detention hearing, and the court shall give both parties the opportunity to make arguments and to present relevant evidence.
- ✓ There is a presumption of detention if individuals are charged with one or more of the following offenses:
 - Criminal homicide as defined in 75-5-201; and
 - any offense for which the term of imprisonment may include life
- ✓ The presumption is rebuttable if the defendant demonstrates, by a preponderance of the evidence, that specified conditions of release will reasonably ensure:
 - the individual’s appearance in court when required;
 - the safety of any witnesses or victims;
 - the safety and welfare of the public; and
 - that the individual will not obstruct or attempt to obstruct justice.
- ✓ After the hearing, the court may detain the individual if:
 - at least one of the charged offenses qualifies for a no-bail hold under 77-20-1(2);
 - there is substantial evidence to support the charge and the State meets all additional evidentiary burdens required under 77-20-1(2)(e.g., “clear and convincing”); and
 - the court finds that no conditions of release will reasonably ensure:
 - the individual’s appearance in court when required;
 - the safety of any witnesses or victims;
 - the safety and welfare of the public; and
 - that the individual will not obstruct or attempt to obstruct justice.

Pretrial Status Order

- ▶ A pretrial status order (PSO) is required every time a court makes a pretrial release decision, including during an initial PC review, an initial appearance, and bail hearings
- ▶ A PSO sets the terms and conditions of pretrial release and detention
- ▶ The court shall issue the PSO without unnecessary delay

Presumption of OR Release

- ▶ A court shall order own recognizance release (with the condition that the arrestee not FTA) unless the court finds that additional conditions are necessary to reasonably ensure:
 - ▶ The individual's appearance in court when required;
 - ▶ The safety of any witnesses or victims;
 - ▶ The safety and welfare of the public; and
 - ▶ That the individual will not obstruct or attempt to obstruct justice

Presumption of Detention

- ▶ There is a presumption of detention if an individual is charged with one or more of the following offenses:
 - ▶ Criminal homicide as defined in 75-5-201; and
 - ▶ Any offense for which the term of imprisonment may include life.
- ▶ The offense must still qualify for a no-bail hold under 77-20-1 (2)
- ▶ The presumption is rebuttable

Detention Hearings

- ▶ There is a presumption of detention if an individual is charged with one or more of the following offenses:
 - ▶ Criminal homicide as defined in 75-5-201; and
 - ▶ Any offense for which the term of imprisonment may include life.
- ▶ The offense must still qualify for a no-bail hold under 77-20-1 (2)
- ▶ The presumption is rebuttable
- ▶ This presumption should apply at the outset (including PC review)

“Least Restrictive, Reasonably Available”

- ▶ If Own Recognizance Release is insufficient, the court must impose the least restrictive, reasonably available conditions necessary to reasonably ensure:
 - ▶ The individual’s appearance in court when required;
 - ▶ The safety of any witnesses or victims;
 - ▶ The safety and welfare of the public; and
 - ▶ That the individual will not obstruct or attempt to obstruct justice

Ability-to-Pay Matrix

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

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

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

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

- ▶ Recommended amounts are discretionary, judges can deviate up or down
- ▶ Decisions are fact-based. Judges consider:
 - ▶ The circumstances outlined by law enforcement in the probable cause affidavit
 - ▶ The defendant's ability-to-pay (if the defendant has money and is high risk, the amount necessary to incentivize them to appear in court may be higher)
 - ▶ The defendant's failure to appear risk score
 - ▶ Any other relevant information

Unsecured Bonds

- ▶ Authorized under the statute (not a change in HB206)
- ▶ Exception to the ability-to-pay analysis
- ▶ Arrestee does not have to pay money upon release from jail, but if they fail to appear, the court may forfeit the bond and enter a judgment
- ▶ Money forfeited goes to the state/city/county per the Statute (just like cash and secured bonds)
- ▶ Research shows they are just as effective as secured bonds at getting people to court, and the new criminal activity rates are the same

Rules of Criminal Procedure

▶ **Amendments to the Rules of Criminal Procedure effective October 1st:**

▶ **Rule 4:**

- ▶ Prosecutors must attempt to determine the defendant's current address and include it in the Information
 - ▶ My recommendation to judges: Carefully consider whether issuing a warrant vs. a summons is appropriate based solely on contact information. If it were me, I might require prosecutors to explain in the Information what steps they took to obtain a current address (asked law enforcement or pretrial services). It may not be available because the defendant is homeless.
 - ▶ Prosecutors must include an SID number in the Information if the defendant was arrested

▶ **Rule 6:**

- ▶ The new pretrial decision process outlined in 77-20-1 applies when issuing a warrant at case initiation
 - ▶ **it's also required when issuing a bench warrant for failure to appear*

▶ **Rules 7 and 7A:**

- ▶ Judges **MUST** address pretrial release and issue a pretrial status order at the initial appearance
- ▶ The only exception in the rule is after a good cause finding on a motion for continuance – or upon a motion for pretrial detention under 77-20-1
- ▶ Per the victims' rights statute, prosecutors are required to notify victims of all hearings at which release may be considered. Failure to notify a victim is likely not good cause unless there are special circumstances
- ▶ Parties can file a motion to modify the pretrial status order issued at initial appearance without showing a change in circumstances, but subsequent motions require it

▶ **Rules 9, 9A, 10, 27, 27A, 27B, 28, 38**

- ▶ Relatively minor amendments to clarify terms and otherwise make the rules consistent with HB 206

▶ **Rule 41 (NEW)**

- ▶ Outlines forfeiture and exoneration procedures for unsecured bonds

Changes to bond forfeiture funding scheme

New Bond Forfeiture Distribution Scheme

- ▶ HB206 creates a new bond forfeiture distribution scheme
- ▶ Instead of sending all forfeited bonds to the state's General Fund, monetary bail (cash, secured bonds, and unsecured bonds) forfeited in District Court cases is now distributed as follows:
 - ▶ 15% to the prosecuting agency
 - ▶ 25% to the General Fund
 - ▶ 60% to the Pretrial Release Programs Fund

Pretrial Release Programs Special Revenue Fund

- ▶ Administered by CCJJ
- ▶ The fund consists of:
 - ▶ Money collected under new bond forfeiture distribution scheme
 - ▶ Appropriations from the legislature
 - ▶ Interest earned from money in the fund, and
 - ▶ Contributions from other public or private sources

Pretrial Release Programs Special Revenue Fund

- ▶ CCJJ will award grants from the fund to county (and other) agencies to establish or expand existing pretrial supervision programs
- ▶ Pretrial Supervision Programs must serve the purpose of:
 - ▶ Assisting a court in making an informed decision regarding an individual's pretrial release; and
 - ▶ Providing supervision of an individual released from law enforcement custody on conditions pending a final determination of a criminal charge filed against the individual

Changes to the Secured Bond Grace Period

HB206 reduces the secured bond forfeiture grace period from 6 months to 90 days

Unsecured Bonds (Not a Change in HB206)

- ▶ Unsecured bonds forfeited by the Court. No action required on the part of prosecutors.
- ▶ Forfeiture hearings scheduled within 30 days of failure to appear.
- ▶ Prosecuting agencies get 15% of these funds as well.

Pretrial Services

- ▶ Pretrial programs are inexpensive to start and run
- ▶ Minimal services may be offered, such as:
 - ▶ Court reminders (phone, text) – cheap software programs do it automatically
 - ▶ Defendants call to check in with staff. Frequency depends on supervision level
 - ▶ Defendants meet with staff in person (or by video). Frequency depends on supervision level
 - ▶ Staff checks for new charges and notifies court of violations
- ▶ Success rates of programs across the state are high

- ▶ Pretrial supervision services are more critical than ever and they are much cheaper than housing defendants in jail
 - ▶ Avg. daily cost to house in jail = \$60-\$75/day
 - ▶ Avg. daily cost to supervise a defendant pretrial = \$5.71/day

Cost savings for county: \$54.29-\$69.29/day per defendant

- ▶ Counties and cities are being sued and losing millions of dollars, by allowing sheriffs to continue to use charge-based bail schedules without conducting (or waiting for a judge to conduct) an ability-to-pay analysis and an individualized assessment of the defendant's risk.

- ▶ Duchesne County started a comprehensive pretrial program run by the sheriff's office and still saw significant cost savings:
 - ▶ 122 participants in first 2 years
 - ▶ 6,520 inmate days avoided. Jail housing costs \$63.09-\$72.40/day
 - ▶ Pretrial supervision with an ankle monitor, including administration costs, deputy tracker, and UAs = \$40.72/day
 - ▶ County savings \$32.00 per day
 - ▶ In two years, the county saved over \$200,000

Judiciary implementation Schedule training:

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