



OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL

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Research Memorandum

Attorney-client privileged/attorney work product

To: Representative Schultz and Representative Lisonbee

From: Jackie Rogers and Lee Killian, Associate General Counsels; John Fellows, General Counsel

Date: January 20, 2021

Re: Legal research concerning bail reform and repeal of HB206

I. Introduction

You have asked for an analysis, including case citations, of potential legal issues concerning a repeal of the changes made by HB206, which modified Utah's bail system in the 2020 General Session. In addition, we have included potential legal issues concerning the current state of the law (with HB206 in effect).

II. Background on Bail Terminology and Issues with Prior Bail System

A. Definitions and Meaning¹

“**Bail**” has several meanings and the term is often used incorrectly. 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. When referencing the financial conditions that the term “bail” has come to mean in modern usage, the phrase “**monetary bail**” is used.

A “**surety**” is a person who is primarily liable for paying another's debts or performing another's obligations, and 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 10% of the face amount of the bond. The surety is then liable for the full amount of the monetary

¹ The section has been adapted from the extensive discussion in the Judicial Council Committee [Report](#) to the Utah Judicial Council on Pretrial Release and Supervision, November 23, 2015.

bond if the defendant fails to appear. The surety does not refund the fee to the defendant even if the defendant makes all court appearances.

“**Cash bond**” or “**cash bail**” 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**” are agreements between a defendant and the court whereby the defendant agrees to pay money to the court if the defendant fails to appear, but that agreement is not secured by cash, bond, or other collateral.

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. The agent for that surety is sometimes called a “**bail bondsman**.”

“**Pretrial**” means the period of time between arrest and sentencing.

“**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.

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

B. Summary of the Issues Identified by the Judicial Council Committee in 2015

The following excerpts are taken from the Judicial Council Committee Report to the Utah Judicial Council on Pretrial Release and Supervision issued in 2015.² These quoted sections provide a succinct summary of the problems that the judicial committee studying this issue had identified with the then-existing bail statutes and rules in Utah:

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

² This 19-member committee was made up of a diverse group that included judges, a representative of the bail bond industry, a member of the House (Rep. Hutchings), a member of the Senate (Sen. Hillyard), and representatives from CCJJ, the Administrative Office of the Courts, and others.



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.

As part of its 2015 Report, the Judicial Committee recommended numerous statutory and rule changes, including:

- *Utah Code section 77-20-1 or section 77-20-3 should be amended to incorporate the presumption [in favor of pretrial release, free from financial conditions, based on the presumption of innocence]. Unless the judge 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 77-20-1(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.*
- *Finally, [a] reason to eliminate [reliance on the Uniform Fine and Bail Schedule, which sets amounts of monetary bail based solely on the level of offense] 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, others on constitutional grounds, relying on both due process, and excessive bail clauses. The features most commonly found in bail schedules that are struck down are fixed monetary bail amounts, rather than ranges, and explicit*



*or implicit requirements that the court set monetary bail in these amounts. (Numerous citations omitted.)*³

C. Current Statutory Law and Court Rules Related to Bail

1. Changes specific to 2020's HB206

HB206 made several major changes. First, it specifically required judges to set the least restrictive conditions to reasonably ensure (1) that a defendant would appear in court; (2) the safety of the public, witnesses, and victims; and (3) that the defendant will not obstruct the criminal justice process. The bill specified that except for certain circumstances, the presumption was to release a defendant on his or her own recognizance, but if the court determined that additional release conditions were necessary, the bill specifically listed 21 non-financial conditions that could be imposed (*e.g.*, submit to electronic monitoring, maintain employment, comply with requirements for house arrest). Furthermore, the bill provided that if the court determined that a financial condition was necessary, the court was required to consider the individual's ability to pay when determining the amount of the financial condition.

Regarding the determination of pretrial detention or release, the bill set up procedures so that a prosecutor could file a motion for detention and have a hearing on the issue. Further, if the charges against the defendant included those eligible for pretrial detention (such as capital felonies, felonies committed on parole, etc.), upon the prosecutor's motion, a detention hearing was required, and the defendant was afforded the right to counsel. At the detention hearing, both sides would be able to make arguments and present evidence before the court made its pretrial detention decision. The bill likewise set forth a number of offenses that created a rebuttable presumption of pretrial detention.

HB206 also created a funding mechanism to create a pretrial release program in each county. These programs were meant to assist courts in (1) making an informed decision regarding individual pretrial release decisions and (2) providing supervision of defendants on pretrial release. Finally, HB206 revised the statutes regarding the forfeiture of surety bonds including tightening timelines for forfeiture and allowing for notices to sureties to be emailed.⁴

2. Current Court Rules

Both Rule 6 and 7 of the Rules of Criminal Procedure have been amended and now reflect the requirements in HB206. In particular, rather than being required to rely on the Uniform Fine and Bail Schedule (which establishes specific monetary amounts for varying levels of offenses), the

³ The Report included a number of other suggestions for statutory and rule changes, including for the repeal of statutes that allowed non-judicial officers to set monetary bail, the issuance of citations for certain offenses, and streamlining the monetary bail forfeiture process.

⁴ HB206 made a number of other changes, including (1) requiring defendants charged with certain crimes (*e.g.* domestic violence, DUI) to appear in court as opposed to remitting a fine; (2) defining terms, including "monetary bail," "pretrial release," and "bail," and amending the use of these terms in various statutes; (3) removing the authority of bail commissioners to make bail determinations; and (4) requiring the collection of pretrial release data.



court is now required to consider the individual's ability to pay when setting monetary bail, and to set it at the lowest amount reasonably calculated to ensure the defendant's appearance in court. *See* Utah R. Crim. P. 6(e)(1) (amendments effective October 2020). Likewise, Rule 7 has been amended to require the issuance of a pretrial status order and to require the parties to be prepared to address the issue of pretrial detention. Utah R. Crim. P. 7(c) (amendments effective October 2020).

III. Question and Short Answer

Question: Do the statutes governing Utah's monetary bail system that were in effect before the 2020 annual general session violate the United States or Utah constitutions?

Short Answer: A court is unlikely to conclude that these pre-2020 General Session sections of the Utah Code violate the Equal Protection, Uniform Operation of Laws, or Due Process Clauses on their face. However, if judges apply them in an unconstitutional manner, United States Supreme Court precedent and precedent from some circuit courts suggest that those practices may infringe upon indigent arrestees' constitutional rights in certain circumstances.⁵

IV. Discussion

A. Terminology⁶

This memo primarily discusses the pretrial release condition of monetary bail, meaning both cash bail and surety bonds, and its impact on indigent arrestees. Other pretrial conditions (i.e., bail) may be non-monetary conditions such as an arrestee's recognizance. The alternative to pretrial release is pretrial detention.

B. Statutory and Rule Framework for Pretrial Release Prior to Passage of HB206 in 2020

The following statutes and rules were enacted or adopted before 2020 HB206. They reflect the history of changes that have been made.

1. Section 77-20-1, 2019 HB428 (Enrolled bill sponsored by Rep. Lisonbee; strikethroughs reflect changes made by HB428 while italics are included for emphasis on key passages):

(3) Any individual who may be admitted to bail may be released by [~~written undertaking or an equal amount of cash bail~~] posting bail in the form and manner provided in Section 77-20-4, *or on the individual's own recognizance*, on condition that the individual appear in court for future court proceedings in the case, *and on any other conditions* imposed in the discretion of the magistrate or court that will reasonably: (a) ensure the appearance of the accused, (b) ensure the integrity of the court process, (c) prevent direct or indirect contact with

⁵ A **facial challenge** is a **challenge** to a statute in which the plaintiff alleges that the legislation is always unconstitutional, and therefore void. It is contrasted with an **as-applied challenge**, which alleges that a particular application of a statute is unconstitutional.

⁶ For definitions and discussion of these concepts, *see supra*, Part II.



witnesses or victims by the accused, if appropriate, and (d) ensure the safety of the public.

2. Section 77-20-3, 2017:

(1) *Any person who may be admitted to bail may likewise be released on the person's own recognizance in the discretion of the magistrate or court.*

(2) After releasing the defendant on the defendant's own recognizance or admitting the defendant to bail, the magistrate or court may:

- (a) impose bail or increase or decrease the amount of the bail; and
- (b) impose or change the conditions of release under Subsection 77-20-1(3).

3. Section 77-20-4, 2019 HB428 (statute reflects changes made by HB428):

(1)(a) Except as provided in Subsection (2), the judge or magistrate shall set bail at a single amount per case or charge.

(b) Subject to Subsection (2), a defendant may choose to post the amount described in Subsection (1)(a) by any of the following methods:

- (i) in cash;
- (ii) by written undertaking with sureties;
- (iii) by written undertaking without sureties, at the discretion of the judge or magistrate; or
- (iv) by credit or debit card, at the discretion of the judge or bail commissioner.

4. Rule 6 of the Utah Rules of Criminal Procedure, 2016:⁷

(e) When a warrant of arrest is issued, the judge shall state on the warrant:

(e)(1) Whether the defendant is denied pretrial release under the authority of Utah Code § 77-20-1, and the alleged facts supporting.

(e)(2) The conditions of pretrial release the court requires of the defendant, including monetary bail or release on the defendant's own recognizance.

(e)(3)(A) *In determining the amount of monetary bail, the judge shall set the lowest amount reasonably calculated to effect the purposes of Utah Code Section 77-20-1(3). [This language was added as of July 1, 2016]*

⁷ Current Rule 6(e)(1) (amendment effective October 2020) provides: "When a warrant of arrest is issued, the judge must state on the warrant: . . . (C) As required by Utah Code section 77-20-1, if the court determines monetary bail is necessary, the judge must consider the individual's ability to pay and set the lowest amount reasonably calculated to ensure the defendant's appearance at court." Rule 6 was also amended effective May 1, 2020.



5. Rule 7 of the Utah Rules of Criminal Procedure, 2014:

(c)(3)(B) If the magistrate finds probable cause to continue to detain the arrestee, the magistrate shall immediately make a bail determination. The 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.*

6. Rule 7 and 7A, 2018:⁸

(c) Release conditions.

(c)(1) If counsel are present and prepared, the court must address whether the defendant is entitled to pretrial release pursuant to Utah Code § 77-20-1, and if so, what if any conditions the court will impose to reasonably ensure the continued appearance of the defendant, integrity of the judicial process, and safety of the community. The court must utilize the least restrictive conditions needed to meet those goals.

(c)(2) The determination of pretrial release eligibility and conditions may be reviewed and modified upon application by either party based on a material change in circumstances, or other good cause.

C. 2020 HB206 – Bail and Pretrial Release Amendments

HB206 repealed Section 77-20-3, substantially amended Section 77-20-1, and amended Section 77-20-4's "bail" references to "monetary bail."

As discussed above, HB206 requires the court to impose least restrictive conditions for an arrestee's pretrial release, reasonably necessary to ensure the arrestee's reappearance, safety of witnesses and victims, public safety, and no obstruction of justice. The bill essentially creates a presumption in favor of release on the arrestee's recognizance unless the court finds that additional conditions, including monetary bail, are reasonably necessary. And if the court determines that monetary bail is necessary, the court must consider the arrestee's ability to pay.

⁸ Current Rule 7(c) and Rule 7A(d) (amendments effective October 2020) provides:

(c) Release Conditions. Except as provided in paragraph (c), the court must issue a pretrial status order pursuant to Utah Code section 77-20-1. Parties should be prepared to address this issue, including notice requirements under Utah Code section 77-37-3 and Utah Code section 77-38-3.

(1) A motion to modify the pretrial status order issued at initial appearance may be made by either party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for the hearing and to permit each alleged victim to be notified and be present.

(2) Subsequent motions to modify a pretrial status order may be made only upon a showing that there has been a material change in circumstances.

(3) A hearing on a motion to modify a pretrial status order may be held in conjunction with a preliminary hearing or any other pretrial hearing.



The Judicial Council Committee tasked with studying pretrial release practices in Utah recommended a statutory policy statement amendment that HB206 appears to respond to:

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...” A clearer statement of this core principle, though, is appropriate.⁹

The sponsor of the HB206 asserted that the bill is a response to equal protection and due process legal challenges across the country that challenge monetary bail systems.¹⁰

D. Supreme Court and Circuit Precedent

1. Supreme Court

Several Supreme Court decisions laid the foundation for equal protection and due process claims related to pretrial detention of indigent arrestees in holding that detention based solely on indigency or wealth is unconstitutional.¹¹

Three decisions involved convicted defendants who were unable to pay the required fine or restitution as part of their sentence.¹² *Williams* and *Tate* were based on equal protection principles; *Bearden* was rooted in both equal protection and due process principles: “Due process and equal protection principles converge in the Court’s analysis in these cases” because the Court generally analyzes “the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.”¹³

In *Bearden*, the Supreme Court did not apply constitutional review (i.e., strict scrutiny or rational basis) to the equal protection claim raised in a challenge to Georgia’s withdrawal of a probation due to the defendant’s indigency and nonpayment of the fine. Instead, the Court balanced the “rationality of the connection between the legislative means and purpose” and decided that there was an alternative for punishing the defendant.¹⁴

⁹ Judicial Council Committee Report to the Utah Judicial Council on Pretrial Release and Supervision, November 23, 2015, page 32.

¹⁰ [Salt Lake Tribune, March 10, 2020.](#)

¹¹ See *Bearden v. Georgia*, 461 U.S. 660, 671 (1983); *Tate v. Short*, 401 U.S. 395, 399 (1971); *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956).

¹² See *Bearden*, 461 U.S. at 662-63.

¹³ *Id.* at 665.

¹⁴ *Id.* at 668-60.



In a fourth decision, the Supreme Court upheld the federal Bail Reform Act’s authorization of pretrial detention based on an individual’s future dangerousness, concluding that it did not violate the Eighth Amendment’s Excessive Bail Clause or the Due Process Clause but noted that at some point pretrial detention might become excessively prolonged, and therefore constitute a due process violation.¹⁵

Although these decisions laid the groundwork for equal protection and due process claims, the Supreme Court has not heard a matter dealing specifically with monetary bail and ability to pay.

2. Circuit Courts of Appeals

The Fifth Circuit considered an equal protection challenge by an arrestee, charged with a misdemeanor, who was unable to meet the county’s monetary bail condition for pretrial release.¹⁶ The court determined that because the bail scheme resulted in two classes of arrestees based on indigency or wealth, and because it could result in an arrestee’s “absolute deprivation” of liberty, intermediate/heightened scrutiny was appropriate.¹⁷ The court concluded that the *automatic* imposition of pretrial detention on indigent arrestees arrested for a misdemeanor, without a bail hearing, violated arrestees’ procedural due process and equal protection rights.¹⁸

The case returned to the Fifth Circuit on appeal of the district court’s injunction and denial of stay. The Fifth Circuit held that the lower court’s revised injunction, which required immediate release of arrestees arrested on misdemeanor charges who could not make bail, exceeded constitutional requirements in light of the additional requirement of a 48-hour bail hearing.¹⁹

The Fifth Circuit recently considered another challenge to mandatory monetary bail for indigent arrestees.²⁰ In these facts, county judges used a suggested bail schedule for individuals arrested for misdemeanor offenses but routinely treated the schedules as binding when determining bail, rather than taking an arrestee’s ability to pay into consideration.²¹ “The Plaintiffs assert that cash-bail cannot be required when an indigent arrestee cannot pay, absent a finding that there is no other alternative that would serve the State’s interest” because it would violate the substantive due process right to pretrial liberty.²² The Fifth Circuit agreed that Plaintiffs have a pretrial liberty right that may not be taken without constitutionally adequate justification, but it would not extend that right to effectively eliminate cash bail for indigents.²³

¹⁵ *U.S. v. Salerno*, 481 U.S. 739, 747 (1987). Legal scholars debate whether the *Salerno* Court applied heightened scrutiny even though Court recognized the fundamental nature of the right to liberty. *See, e.g., Daves v. Dallas Cty., Texas*, No. 18-11368, 2020 WL 7693744, at *22 (5th Cir. Dec. 28, 2020).

¹⁶ *ODonnell v. Harris Cty.*, 892 F.3d 147, 160-63 (5th Cir. 2018) (*ODonnell I*). The court explained the complicated appellate history of *ODonnell* in *Daves v. Dallas Cty., Texas*, No. 18-11368, 2020 WL 7693744, at *24 (5th Cir. Dec. 28, 2020).

¹⁷ *ODonnell I*, 892 F.3d at 160-163.

¹⁸ *Id.* (ultimately remanding the matter to the district court to reissue the injunction to cure the constitutional deficiencies).

¹⁹ *ODonnell v. Goodhart*, 900 F.3d 220, 222 (5th Cir. 2018) (*ODonnell II*).

²⁰ *Daves v. Dallas Cty., Texas*, No. 18-11368, 2020 WL 7693744 (5th Cir. Dec. 28, 2020).

²¹ *Id.* at *2.

²² *Id.* at *19; *24.

²³ *Id.* at *24.



In the Eleventh Circuit, indigent arrestees brought a class action against the city, alleging that the city violated equal protection and procedural due process of arrestees by conditioning immediate release from jail on an arrestee's ability to pay a preset amount of monetary bail without providing meaningful alternatives.²⁴ The court effectively denied an injunction, holding that bail scheme, which allowed a 48-hour window for a bail determination, is presumptively constitutional.²⁵ "Under the Standing Bail Order, Walker and other indigents suffer no 'absolute deprivation' of the benefit they seek, namely pretrial release. Rather, they must merely wait some appropriate amount of time to receive the same benefit as the more affluent."²⁶

E. Application of Caselaw to Pre-HB206 and Post-HB206 Language

At issue is whether HB206 mitigated constitutional concerns or if it had no significant effect. Based on the caselaw outlined above, it appears that **the most significant issues that courts consider in their constitutional analyses are: (1) individualized determinations for pretrial release, as opposed to reliance on set bail schedules, (2) timely bail hearings for defendants at which defendants are able to present evidence, and (3) the consideration of a defendant's ability to pay when setting pretrial release conditions.**

As outlined above, HB206 required judges to set the least restrictive conditions to reasonably ensure that a defendant would appear in court and to protect the public. The bill specified that except for certain circumstances, the presumption was to release a defendant on his or her own recognizance, but if additional release conditions were necessary, the bill specifically listed 21 non-financial conditions, and required that if the court determined that a financial condition was necessary, the court had to consider the individual's ability to pay. Regarding the determination of pretrial release or release, the bill set up procedures for pretrial detention hearings where both sides would be able to make arguments and present evidence.

Returning the law to its pre-HB206 state would remove these specific requirements for courts to consider and procedures to follow, removing the direction and guidelines that are currently being provided to the courts. This does not mean that courts would then necessarily proceed in an unconstitutional manner, however. Importantly, the fact that the relevant rules of criminal procedure have been changed, specifically to remove reliance on the Uniform Bail and Fine Schedule and to instead require the individualized consideration of the defendant's ability to pay, to set the lowest amount of monetary bail necessary to ensure the defendant's appearance in court, and to provide the opportunity to be heard on these issues, will provide much of the guardrails necessary to protect the constitutional rights of pretrial defendants even if guidance and requirements are removed from statute. However, if these rules were reverted to their earlier state as well, the calculus and risk assessment would be quite different.

F. Conclusion

A court is unlikely to find any facially unconstitutional issue with pretrial release statutes in effect before HB206's passage. A judge had discretion under the prior version of the statute to admit an arrestee to bail or to release the arrestee on his or her own recognizance indicating no mandatory bail schedules. However, according to the 2015 report to the Utah Judicial Council, judges' customary practice included making monetary bail determinations by relying on the

²⁴ *Walker v. City of Calhoun*, 901 F.3d 1245, 1260 (11th Cir. 2018).

²⁵ *Id.* at 1266-67.

²⁶ *Id.* at 1261.



court system's bail schedule rather than on individualized determinations or pretrial risk assessments. This was due in part to a statute that did not preclude this, and in part based on the Utah Rules of Criminal Procedure, which have been amended since that report was issued.

HB206 recognizes a presumption in favor of pretrial release, free from financial conditions that indigent arrestees may not be able to meet. In that sense, HB206 provides guard rails so that judges are bound to a constitutional practice. But **reinstating the statutes prior to HB206 would not preclude judges from following a constitutional practice of setting monetary bail.**

V. Legal Issues Based on Current State of Law (Post HB206)

There are two pending criminal matters challenging the constitutionality of the current version of Utah Code Section 77-20-1: *State v. Flanders* and *State v. Hachmeister*. Both were brought by prosecutors in Davis County in the fall of 2020, and the Attorney General's Office has notified the Legislature about the litigation.

A. Pending Davis County Criminal Actions Challenging § 77-20-1

Prosecutors in these criminal matters allege that the amended (post-HB206) § 77-20-1 is unconstitutional because it grants courts discretion to authorize the pretrial release of certain defendants who are constitutionally prohibited from pretrial release. This theory is based on a certain reading of Article I, § 8 of Utah's Constitution, which provides:

- (1) All persons charged with a crime shall be bailable except:
 - (a) persons 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.
- (2) Persons convicted of a crime are bailable pending appeal only as prescribed by law.

In the matters, the prosecutors assert that this constitutional provision prohibits the posting of bail if the elements of (1)(a), (1)(b), or (1)(c) are met. Specifically, as explained in the brief in the *Hachmeister* case:

Article I, Section 8 of the Utah Constitution plainly states, using the mandatory auxiliary verb "shall," "[a]ll persons charged with a crime shall be bailable except" those who fit within at least one of three enumerated categories already described above. Utah Const. Art. I, § 8(1). ... As such, if a court finds that substantial evidence supports the charge



and that any other constitutional prerequisite is met, the Utah Constitution prohibits that court from releasing a defendant on bail.

The relevant portion of the current (post-HB 206) version of § 77-20-1 provides:

- (7) After hearing evidence on a motion for pretrial detention, the court may detain the individual if:
 - (a) the individual is accused of committing an offense that qualifies the individual for detention under Subsection (2) or Utah Constitution, Article I, Section 8;
 - (b) the prosecution demonstrates substantial evidence to support the charge, and meets all additional evidentiary burdens required under Subsection (2) or Utah Constitution, Article I, Section 8; and
 - (c) the court finds that no conditions that may be imposed upon granting the individual pretrial release will reasonably ensure compliance with Subsection (3)(b).

In the two pending matters, the Davis County prosecutors assert that Subsection (7) is unconstitutional:

Now, the Utah Legislature, in its amendment of Section 77-20-1(7) of the Utah Code by House Bill 206, has attempted to add one additional requirement before a defendant can be detained prior to trial and, in doing so, render Article I, Section 8 of the Utah Constitution as discretionary. The Utah Legislature did this by saying that “the court may [instead of shall] detain the individual,” § 77-20-1(7), and by requiring the court to also “find[] that no conditions that may be imposed upon granting the individual pretrial release will reasonably ensure compliance with Subsection (3)(b),” § 77-20-1(7)(c).

This means that a court must ask if there is any other less restrictive condition that might be imposed in place of detaining the defendant. Utah Code Ann. § 77-20-1(3)(b). Thus, if the court finds that there is at least one other condition—and Subsection (4)(b) enumerates 21 different potential examples of less restrictive conditions a judge might impose in lieu of detention—Subsection (7)(c) now requires a judge to disregard his or her constitutional mandate and release the criminal defendant.

....

This is unconstitutional because it makes a defendant bailable even when the Constitution prohibits bail. It grants discretion to a court where the Constitution does not confer any such discretion.

The relief sought in these cases (in addition to keeping the two defendants in jail without bail) is for the court to strike down § 77-20-1(7) as unconstitutional.

B. Response to Pending Davis County Constitutional Challenge

Defendants have not filed opposition briefs filed in these cases to date concerning the constitutional issue, and from a recent review of the docket, it does not appear that any



proceedings regarding the constitutional issues have taken place. It seems likely that these issues will not be addressed or appealed in those cases. Even if those cases fail to address the constitutional issue, the issue remains and could be raised in subsequent cases.

In a subsequent case, or if the litigation proceeds in one of these cases, we assume that the argument will be that the current version of § 77-20-1(7) is constitutional because of an alternative reading of Article I, § 8 of the Utah Constitution. For reference, here is the constitutional provision again:

- (1) All persons charged with a crime shall be bailable except:
 - (a) persons 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.
- (2) Persons convicted of a crime are bailable pending appeal only as prescribed by law.

The language in Subsection (1) above can be read in two alternative ways:

- “All persons charged with a crime shall be bailable [*i.e.*, eligible for bail] except” for persons who meet the conditions in Subsections (1)(a) through (1)(c), who can never be released on bail;
- or
- “All persons charged with a crime shall be bailable [*i.e.*, must be released on bail] except” for persons who meet the conditions in Subsections (1)(a) through (1)(c), who may, or may not, be released on bail at the court’s discretion.

The constitutional challenges raised by the Davis County prosecutors rely on the first interpretation. Because the provision in the Utah Constitution can arguably be read in several ways, it is difficult to determine what the outcome of that litigation will be. We would either need to amend the constitutional language to clarify it or wait for the Utah Supreme Court to provide us with a conclusive interpretation.

C. Conclusion

In summary, although there have been two challenges to the constitutionality to Section 77-20-1 to date, the issue has not been addressed, nor is it clear whether it will be addressed. If the issue is considered, it is too difficult to determine what the result will be, due to the ambiguity of the constitutional provision on bail.

