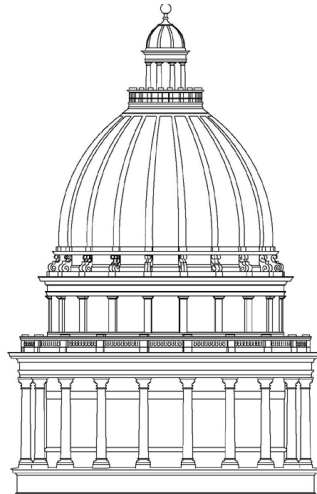


REPORT TO THE  
**UTAH LEGISLATURE**

Number 2017-01



**A Performance Audit of  
Utah's Monetary Bail System**

January 2017

Office of the  
LEGISLATIVE AUDITOR GENERAL  
State of Utah





STATE OF UTAH

# Office of the Legislative Auditor General

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JOHN M. SCHAFF, CIA  
AUDITOR GENERAL

January 26, 2017

TO: THE UTAH STATE LEGISLATURE

Transmitted herewith is our report, **A Performance Audit of Utah's Monetary Bail System** (Report #2017-01). A digest is found on the blue pages located at the front of the report. The objectives and scope of the audit are explained in the Introduction.

We will be happy to meet with appropriate legislative committees, individual legislators, and other state officials to discuss any item contained in the report in order to facilitate the implementation of the recommendations.

Sincerely,

John M. Schaff, CIA  
Auditor General

JMS/lm



# Digest of A Performance Audit of Utah's Monetary Bail System

This audit reviews the effectiveness of the two types of monetary bail<sup>1</sup> commonly offered in Utah's district courts: cash bail and surety bond. Cash bail involves a payment to the courts that is refunded to the defendant if not convicted, or if convicted, could be forfeited and applied to court-related fees. Surety bond involves a non-refundable premium, typically 10 percent of the full bail amount, paid to a commercial surety (a.k.a. bail bond agency). Since the primary objectives of bail are to assure court appearance and community safety, this audit compares the effectiveness of the two monetary bail types in assuring court appearances. Court appearance data also led us to review evidence-based pretrial release practices that enhance community safety as well as the surety bond forfeiture process.

## Chapter II While Limited in Use, Cash Bail Resulted in Higher Appearance Rates than Surety Bond

**Cash Bail Is Used On a Limited Basis.** Cash bail is used in a limited number of locations by a limited set of judges. In fact, based on a year of district court data provided by the Administrative Office of the Courts (AOC), cash bail was only used in 15 percent of all monetary bail cases in 2015. By reviewing existing court data, conducting a judicial survey, and interviewing judges, we found that cash bail is used mostly in the Fourth Judicial District. While used infrequently, judges who use cash bail report benefits.

**Limited Data Shows Cash Bail Resulted in Higher Court Appearance Rates Than Sureties.** A primary objective of bail is to ensure the appearance of the defendant in court. Commercial sureties reported to taxpayers and the Legislature that the use of cash bail results in fewer court appearances. Failure to appear (FTA) data does not support this claim. Based on statewide appearance data from fiscal year 2015, 17 percent of cash bail cases had at least one FTA while 26 percent of surety bond cases had at least one FTA. These results are better understood in the context of risk because factors associated with an individual defendant's risk can affect appearance rates. However, the only measurement of effectiveness that we could use in performing our review was the FTA rates. While this is a valid metric, a lack of data on defendant risk limited our analysis. Given that individual risk is a significant indicator of who will appear in court or pose a public safety concern, we wanted to statistically control for risk. Unfortunately, the criminal justice system does not

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<sup>1</sup> To clarify terms used in this report, refer to the glossary in Appendix A.

collect and share critical data needed to evaluate risk. This concern will be addressed in Chapter III.

## **Chapter III**

### **Pretrial Release Decisions Need to Be Evidence-Based and Account for Risk**

**Pretrial Release Decisions Are Made Without Adequate Information.** Our survey of all district and justice court judges revealed that judges lack basic information when making pretrial release decisions. Surveyed judges largely reported that they base their initial pretrial decisions on probable cause statements, which are the arresting officers' accounts of what occurred at the time of arrest. Little reliable information about a defendant's risk of flight or danger to the community is provided to judges outside of Salt Lake County. Salt Lake County has been using a validated risk assessment since 2013 on 76 percent of the county's inmates. For example, criminal histories, prior failure to appear, and ties to the community are not known when judges make their initial release decisions, despite studies that demonstrate such factors are highly predictive of a defendant's risk of flight or threat to public safety.

**Pretrial Decisions Impact Public Safety, Taxpayer Resources, and Defendant Outcomes.** Basing pretrial decisions on inadequate information negatively impacts public safety, taxpayer resources, and defendant outcomes. When judges have inadequate information about a defendant's risk, it is difficult to identify and detain defendants who pose a public safety concern. Likewise, over-incarceration can result when those who can be safely released are not, because of a lack of risk data. Maximizing the number of defendants who can be safely released saves taxpayer resources by freeing up jail space and reducing the costs associated with incarceration. Finally, even short amounts of time in jail for low-risk defendants are correlated with poor pretrial outcomes such as lowered court attendance and new criminal activity. Basing pretrial release decisions on risk mitigates these undesirable consequences while simultaneously promoting better outcomes and public safety.

**Evidence-Based Risk Assessment Tools Promote Better Outcomes at Reduced Costs.** Research demonstrates that risk assessment, added to professional judgment, results in better outcomes than professional judgment alone. Evidence-based risk assessment tools are empirically validated tools that predict the likelihood that a defendant will fail to appear in court or endanger the community pending trial. The tool assigns a defendant a risk score (low, medium, or high) that judicial officers can use in determining whether a defendant should be released or detained pretrial and the appropriate conditions, when necessary, to secure the safety of the public should the defendant be released. Risk assessments are designed to complement, not replace, judicial discretion.

**Positive Outcomes Are Driving Support for Evidence-Based Risk Assessments.**

Nearly all the surrounding western states, including Utah, have either recently adopted or are adopting an evidence-based risk assessment instrument to improve pretrial decisions. A common challenge for these states is to identify a risk instrument and validate the instrument using data from their own populations. A variety of assessment instruments are available, with some proprietary and others available at no cost. Among the most well-studied and widely used of these instruments is the Public Safety Assessment-Court (PSA-Court) developed by the Laura and John Arnold Foundation.

**Utah’s Criminal Justice System Needs to Improve Data Collection for Successful Risk Assessment.** The cornerstone of any risk assessment instrument is accurate and reliable data. Unfortunately, the data needed to accurately predict individual defendant risk is hampered by the fact that such information resides in a number of different criminal justice databases which are not linked to the courts information system. Additionally, key pretrial outcome and performance metrics, such as the number of inmates that remain in custody while awaiting trial, are not tracked. Basic information about pretrial release practices, such as the number of defendants released on recognizance, is also not tracked, resulting in inconsistencies in pretrial release practices across the state. The criminal justice system should coordinate and improve its data collection efforts to enable risk assessment and to prepare for the evaluation of pretrial service program performance.

## **Chapter IV Improvements Are Needed to the Surety Bond Forfeiture Process**

**Utah’s Forfeiture Grace Period Is Unnecessarily Long.** Utah’s forfeiture grace period is among the longest in the nation. Statute grants commercial sureties six months plus the possibility of a 60-day extension to bring bonded defendants to court or face a forfeiture of the bond. This long grace period appears unnecessary given the fact that the majority of defendants (71 percent) who fail to appear in court, return to court or custody within a month. Therefore, we recommend that the Legislature consider shortening Utah’s grace period from six months to between one and three months to better align with other states and with Administrative Office of the Court’s (AOC) data.

**The Forfeiture Process Needs to More Effectively Promote Court Appearances.** The surety bond forfeiture process is the only mechanism available to hold commercial sureties liable for bonded defendants’ court appearances. Statute requires commercial sureties to bring bonded defendants to court for all court appearances. The current surety bond forfeiture process needs to be more effective in promoting court appearances as reflected in the statewide 26 percent failure to appear (FTA) rate for all cases involving a commercial surety. While the forfeiture process purports to promote court attendance

through the threat of bond forfeitures, surety bonds are rarely forfeited. Based on one year of data, only 1.7 percent of all surety bond cases involving an FTA resulted in a forfeiture. Forfeitures are rare because of the opportunities for automatic bond exonerations permitted in statute coupled with long forfeiture grace periods, which increase the likelihood that a bond will be exonerated. Rare forfeitures, however, create a weak economic incentive for commercial sureties to ensure that defendants, for whom they are responsible, attend court. Therefore, we recommend that the Legislature work with the AOC to improve court attendance and reduce the number of automatic bond exonerations.

**Judges, Clerks, and Prosecutors Need to Process Forfeitures More Efficiently.**

Forfeitures are only successful when judges, clerks, and prosecutors efficiently perform their roles in processing forfeitures. Based on our judicial survey and AOC's forfeiture data, we found that judicial and prosecuting personnel were not always processing forfeitures in a timely and consistent manner. For example, some judges were not consistently ordering forfeitures or entering judgments in a timely manner. Also, clerks who are responsible for processing forfeitures identified administrative barriers to performing their duties. Finally, as evidenced by the low number of motions filed, prosecuting attorneys are not motioning to forfeit despite statute stating that they may do so. In fact, two county attorney's offices stated that forfeitures are not prioritized. Bond exonerations can result when these key players do not perform their roles in the forfeiture process efficiently. While judges, clerks, and prosecutors contribute to the successful completion of forfeitures, court reminder systems have been proven to efficiently reduce the number of missed court dates and should therefore be considered by the AOC.



# REPORT TO THE UTAH LEGISLATURE

Report No. 2017-01

## **A Performance Audit of Utah's Monetary Bail System**

January 2017

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# Chapter I

## Introduction

This audit reviews the effectiveness of the two types of monetary *bail*<sup>2</sup> commonly offered in Utah’s district courts: *cash bail* and *surety bond*. Cash bail involves a payment to the courts that is refunded to the defendant if they make all court appearances and are not convicted, or if convicted, could be forfeited and applied to court-related fees. Surety bond involves a non-refundable premium, typically 10 percent of the full bail amount, paid to a *commercial surety* (a.k.a. bail bond agency). Since the primary objectives of bail are to assure court appearance and community safety, this audit compares the effectiveness of the two monetary bail types in assuring court appearances. Court appearance data also led us to review evidence-based *pretrial* release practices that enhance community safety as well as the surety bond forfeiture process.

### A Limited Review of Cash Bail Proceeded This Audit

This audit is the second of two audits focusing on monetary bail. The first audit’s review of cash bail concluded that, though used infrequently, cash bail was being used appropriately.<sup>3</sup> Statute allows judicial discretion in determining the amount and form of payment required for a defendant’s release. Statute also permits bail monies, paid to the court, to be applied towards court-related obligations such as victim restitution. Because the first audit was limited in scope, it did not address which bail type is more effective. Chapter II of this second audit addresses this question by reviewing data on court attendance rates.

While there is value in comparing court attendance rates, we believe Utah’s pretrial system faces larger concerns. Notably, we found that pretrial release decisions are made in the absence of reliable information about defendant risk, as discussed in Chapter III. Having

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<sup>2</sup> To clarify terms used in this report, refer to the glossary in Appendix A.

<sup>3</sup> See: *A Limited Review of the Use of Cash Bail in the Utah District Courts*, Office of the Legislative Auditor General, February 2016.

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**Statute allows judicial discretion in determining the amount and form of payment required for a defendant’s release.**

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valid risk information is critical to help identify high-risk defendants who are likely to commit additional crimes or skip court and may therefore need to be detained. It can also identify those defendants who are low risk and unlikely to require and, in fact, may be harmed by jail time. In addition, court attendance data led to our review the surety bond forfeiture process in Chapter IV. We found several improvements are needed including reduced statutory timeframes, more effective promotion of court appearances, and ensuring court personnel process forfeitures in a timely and consistent manner.

## Utah's Current Release Practices Largely Rely on Monetary Bail

When a person is arrested, the judicial officer must decide whether to release the person and, if so, under what conditions. The legal considerations that underlie such a decision are complex. A judicial officer must ensure public safety and court appearances while balancing these risks against the accused's legal and constitutional rights, which include the presumption of innocence, the right to release, and the right to equal protection.

Bail safeguards these constitutional rights by allowing the accused to be released from jail while awaiting trial. All criminal defendants, except those charged with the most serious crimes for which substantial evidence exists to support the charge, have the right to bail.<sup>4</sup> *Utah Code* 77-20-1(2) states that, “[a] person charged with or arrested for a criminal offense shall be admitted to bail as a matter of right...” Judicial officers are given statutory discretion in determining how and under what conditions a person will be released pretrial:

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...

When a person is *released on recognizance* no payment is required, although certain release conditions may be imposed. For example,

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<sup>4</sup> For exceptions see: Utah Constitution art. I, § 8(1).

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**A judicial officer must ensure public safety and court appearances while balancing these risks against the accused's legal and constitutional rights.**

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**Typically, a judicial officer establishes probable cause and then sets monetary bail per the level of the offense charged.**

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staying away from the victim or entering drug rehabilitation may be ordered to safely release the accused without financial conditions. Typically, payment (posting bail) is required for release. This practice involves a judicial officer establishing probable cause and then setting monetary bail per the level of the offense charged according to the bail schedule.<sup>5</sup> Once bail is set, payment can be made to the courts using cash bail, or to a *commercial surety* (a.k.a. bail bondsman). Judicial officers can exercise their discretion in determining the bail amount as well as the form of payment. For example, a judicial officer may require the arrestee to pay cash bail to the courts and set the bail amount well above or below the amount expected for the charge. The primary difference between the two payment types is that cash bail is paid in full upfront and may be refunded at the conclusion of the case if the defendant attends all court hearings.

## Utah's Pretrial Landscape Is Changing

An important trend in pretrial policy over the last several years has been a shift away from charge-based release decisions towards risk-based release decisions that use evidence-based risk assessment. Basing release decisions on risk reduces decision-maker bias by using data to identify those defendants most likely to miss a court date or pose a danger to society.

Many jurisdictions across the United States—including Salt Lake County—use risk assessment to manage their jail populations more effectively by focusing limited correctional resources on the riskiest defendants. Recent research from the Laura and John Arnold Foundation shows that, in jurisdictions where risk assessment is used, the number of people awaiting trial in jails is reduced while community safety is enhanced.

Effectively managing Utah's jail populations is both timely and important in light of Utah's Justice Reinvestment Initiative (JRI). Utah's JRI was developed collaboratively by the state's Commission on Criminal and Juvenile Justice (CCJJ) and the Pew Charitable Trusts. By collecting and analyzing system-wide criminal justice data, drivers of Utah's growing correctional populations and associated costs were identified. In response, Utah's Legislature passed and

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<sup>5</sup> See: Utah Uniform Fine and Bail Schedule in Appendix B

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**Pretrial policy has recently shifted away from charge-based release decisions towards risk-based release decisions that use evidence-based risk assessment.**

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**In 2015, Utah's Legislature passed and implemented a set of reforms aimed at reducing incarceration rates.**

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implemented a set of reforms in 2015 aimed at reducing incarceration rates.

While specific estimates for Utah’s pretrial population are not available, for reasons discussed in Chapter III, national estimates suggest that the majority of those housed in jails have not been convicted and are awaiting trial. Pretrial risk assessment, which is an evidence based tool, can reduce Utah’s incarcerated population by pinpointing those individuals who can safely be released. CCJJ has JRI funds available for the Administrative Office of the Courts to use on a pretrial risk assessment tool.

## **Audit Scope and Objectives**

Members of the Legislative Audit Subcommittee approved this performance audit of Utah’s monetary bail system following the limited review released last year. They asked that we compare the effectiveness of two types of monetary bail, cash bail and surety bond. In addition, court data led us to an examination of pretrial release practices as well as the surety bond forfeiture process. This introductory chapter provided background information regarding Utah’s current pretrial practices as well as changing trends in pretrial decision-making. The remaining chapters will address the following areas and offer corresponding recommendations:

- Chapter II – While Limited in Use, Cash Bail Resulted in Higher Appearance Rates than Surety Bonds.
- Chapter III – Pretrial Release Decisions Need to Be Evidence Based and Account for Risk.
- Chapter IV – Improvements Are Needed to the Surety Bond Forfeiture Process.

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**Members of the Legislative Audit Subcommittee asked that we compare the effectiveness of two types of monetary bail, cash bail and surety bond.**

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## Chapter II

# While Limited in Use, Cash Bail Resulted in Higher Appearance Rates than Surety Bond

We were asked to review and compare the effectiveness and costs of *cash bail* and *surety bonds*.<sup>6</sup> This review responds to concerns raised by Utah's *commercial surety* industry that the court's use of cash bail is a growing problem, resulting in poor court appearance rates. They also report that cash bail is unconstitutional and unfair to their industry. In contrast to these concerns, we found that cash bail is used infrequently and, when used, appears to result in better defendant court appearance rates than surety bonds do. Specifically, data from fiscal year 2015 showed that cash bail resulted in higher court appearance rates by nine percentage points. We did not find any evidence that cash bail is unconstitutional and, according to statute, the practice is within the bounds of judicial discretion. One limitation of our review of court appearances was the absence of data on defendant risk, which is a significant driver of court appearance rates.

### Cash Bail Is Used On a Limited Basis

Cash bail is used in a limited number of locations by a limited set of judges. In fact, based on a year of district court data provided by the Administrative Office of the Courts (AOC), cash bail was only used in 15 percent of all monetary bail cases in 2015. By reviewing existing court data, conducting a judicial survey, and interviewing judges, we found that cash bail is used mostly in the Fourth Judicial District. While used infrequently, judges who use cash bail report benefits.

### Cash Bail Is Rarely Used

During the last two sessions, legislation addressing changes to the cash bail practice was proposed. Specifically, the proposed legislation would have required that the courts set the same monetary bail amount whether bail was paid as cash bail or as a surety bond. For

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**Only 15 percent of all monetary bail cases used cash bail in 2015.**

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<sup>6</sup> To clarify terms used in this report, refer to the glossary in Appendix A.

example, if a judge sets *bail* at \$5,000, the defendant would be required to pay \$5,000 if they used cash bail or secure a \$5,000 surety bond by paying a non-refundable premium of \$500 (typically 10 percent of bond amount) to a commercial surety. This proposal deviates from the current practice whereby a judge has the discretion to set the cash bail amount above or below the surety bond amount. While neither bill passed, effort expended by both supporters and critics of the bills suggested a sizable cash bail concern.

We found, however, that cash bail is not often used. We received data from the AOC that included all 9,652 district court cases involving monetary bail that were disposed in fiscal year 2015. Of these cases, 85 percent used only surety bond, 13 percent used only cash bail, and 2 percent used both surety bond and cash bail as shown in Figure 2.1.

**Figure 2.1 District Court Cases Involving Monetary Bail in Fiscal Year 2015 by Judicial District.** While the majority (85 percent) of district court cases use surety bonds, cash bail is occasionally used and most commonly found in the Fourth District Court.

**Surety bonds are the most common form of monetary bail in every district.**

District	Surety Bond 85%		Cash Bail 13%		Mixed 2%	
1	401	5%	46	4%	5	3%
2	1709	21%	213	16%	43	24%
3	2596	32%	137	11%	15	8%
4	1312	16%	560	43%	50	28%
5	1095	13%	65	5%	13	7%
6	291	4%	22	2%	6	3%
7	213	3%	48	4%	18	10%
8	555	7%	208	16%	31	17%
Total	8172	100%	1299	100%	181	100%
<b>Grand Total</b>	<b>8172 (surety bond) + 1299 (cash bail) + 181 (mixed) = 9652</b>					

*Source: Auditor analysis of Utah Administrative Office of the Courts data.  
Note: Individual percentages do not add to 100% because of rounding.*

While the majority of district court cases involved surety bonds, cash bail is used to some extent in every district. It is most prevalent in the Fourth Judicial District, where 43 percent of the state’s total cash bail cases were found. Cash bail, however, was used in only 30 percent of all monetary bail cases processed in the fourth district.

**There Are Two Forms of Cash Bail.** We define *low cash bail* as cash bail that is set below the bail schedule, whereas *high cash bail* is cash bail set at or above the bail schedule. Low cash bail is the form of cash bail commercial sureties are concerned about because it enables defendants to be released for an amount of money comparable to the amount required if they were released on surety bond. Judicial officers use high cash bail to detain high-risk defendants. The higher the perceived flight risk or risk to public safety, the higher the cash bail amount.

In over half of the cash bail cases, 763 of 1,299, the initial bail amount was set below the bail schedule. To place this data in the larger context, in only 8 percent of the 9,652 monetary bail cases disposed in 2015 was cash bail set below the bail schedule. Therefore, it is reasonable to conclude that low cash bail is used on a limited basis. The following section discusses why judges may be reluctant to use low cash bail.

### **While Permitted in Statute, Judges Use Low Cash Bail Infrequently**

Statute allows judges to exercise their discretion in determining how a defendant is released as well as the condition of their release. This determination includes the option of using cash bail and setting the bail amount below the bail schedule. Despite this discretion, there are a couple of reasons why low cash bail is used infrequently.

First, our judicial survey revealed that a number of judges are unaware that low cash bail is an option. For example, when asked, “when and why do you use cash bail (below the bail schedule)?” most judges responded “never used or not available.” Some judges who responded “never” said they were unaware that setting cash bail below the bail schedule was an option, while others reported that they use the bail schedule. The following excerpts illustrate the range of judicial responses we received regarding the use of low cash bail.

#### **Never Heard of Low Cash Bail**

I have never heard of such an option. If the bail is “bondable” they can purchase a bail bond, which usually costs about 10% of the bond and is paid to the bonding company. If I order cash bond the only option is to pay that amount into the court to guarantee their continued appearance.

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**Low cash bail, one of the commercial surety industry’s primary concerns, is used on a limited basis.**

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**Many judges are unaware that setting cash bail below the bail schedule is an option.**

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### **Adheres to Bail Schedule**

I try to follow the bail schedule and deviate from the schedule when justified by the facts of the case.

### **Uses Low Cash Bail**

When the defendant has limited finances, it is a nonviolent crime, and the defendant has no prior incidents of failing to appear.

As illustrated by the first excerpt, some judges are unaware that cash bail set below the bail schedule is an option. This may be explained by conflicting guidance in statute and rule. *Utah Code* 77-20-1 makes clear that judges have the discretion to release a person:

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....  
[emphasis added]

In contrast to the judicial discretion emphasized in statute, Rules of Criminal Procedure require judges to adhere to the bail schedule:

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.<sup>7</sup>

This inconsistent direction given to judges between statute and the Rules of Criminal Procedure creates inconsistencies in judicial practice since some judges may feel it necessary to follow the bail schedule.

Finally, defendants as well as their attorneys routinely request that bail be made bondable because the up-front costs of using a surety bond are lower, which is appealing to defendants with limited resources. For example, if a judge follows the bail schedule and the

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<sup>7</sup> Additionally, the Rules of Judicial Administration 4-302(9) further adds to the confusion by stating, "When imposing fines and setting bail, courts *should* conform to the uniform fine/bail schedule *except* in cases where aggravating or mitigating circumstances warrant a deviation from the schedule" (emphasis added).

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**Surety bonds have lower up-front costs for defendants than cash bail.**

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charge is a third-degree felony, then the bail amount is \$5,000. Cash-strapped defendants may find it more difficult to come up with \$5,000 cash than \$500 for a surety bond (typically 10 percent of the bail amount) if paying a commercial surety. Additionally, in some jurisdictions, judges do not set bail; rather, bail commissioners (jail officials) set bail according to the bail schedule. Despite cash bail's infrequent use, judges who use it report benefits.

### **Judges Who Use Low Cash Bail Report Benefits**

While the use of surety bonds is by far the most common monetary form of *pretrial* defendant release, we wanted to understand why judges occasionally deviate from the norm. To learn more about their pretrial decision-making practices, we sent a judicial survey to all judges in the district and justice courts. While only a handful of judges reported using low cash bail, none of these judges, as well as those we interviewed, reported drawbacks and many reported benefits.

The primary benefit judges reported was that cash bail money is returned in full to those defendants who make all court appearances and are not convicted. They report that this practice incentivizes court appearances. Even in the case that a defendant makes all court appearances but is convicted, the judge has discretion to apply all, some, or none of this money to fines and restitution costs. In contrast, money deposited with a commercial surety (typically 10 percent of the bail amount) is not returned to the defendant, even if the defendant makes all court appearances and is not convicted, and the money cannot be applied to a defendant's court-related fees. The following section will document that, when cash bail is used, it does not appear to have negative consequences for court appearance rates when compared with surety bonds.

### **Limited Data Shows Cash Bail Resulted in Higher Court Appearance Rates Than Surety Bonds**

A primary objective of bail is to ensure the appearance of the defendant in court. Commercial sureties reported to taxpayers and the Legislature that the use of cash bail results in fewer court appearances. *Failure to appear* (FTA) data does not support this claim. Based on statewide appearance data from fiscal year 2015, 17 percent of cash

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**Judges who use cash bail reported benefits.**

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**Cash bail money is returned in full to those defendants who make all court appearances and are not convicted.**

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bail cases had at least one FTA while 26 percent of surety bond cases had at least one FTA.

These results are better understood in the context of risk because factors associated with an individual defendant's risk can affect appearance rates. However, the only measurement of effectiveness that we could use in performing our review was the *FTA rates*. While this is a valid metric, a lack of data on defendant risk limited our analysis. Given that individual risk is a significant indicator of who will appear in court or pose a public safety concern, we wanted to statistically control for risk. Unfortunately, the criminal justice system does not collect and share critical data needed to evaluate risk. This concern will be addressed in Chapter III.

### **Failure to Appear Rates Indicate Cash Bail Had Better Court Attendance Than Surety Bonds in Fiscal Year 2015**

Defendants who fail to show up to court is a significant problem for Utah's courts. According to fiscal year 2015 data provided by the AOC, one quarter of all cases involving a defendant released on monetary bail missed at least one of their court appearances.

Using this same data set, we compared FTA rates by the two types of monetary bail and found that cash bail has a lower FTA rate (that is, better court attendance) than surety bonds, as shown in the Figure 2.2.<sup>8</sup>

**Figure 2.2 Failure to Appear Rates for District Cases by Bail Type in Fiscal Year 2015.** Cash bail cases have better court attendance or lower FTA rates than surety bonds.

Bail Type	Number of Cases	FTA Cases	FTA Rate
Surety Bond	8172	2124	26%
Cash Bail	1299	222	17%
<b>Total</b>	<b>9471</b>	<b>2346</b>	<b>25%</b>

*Source: Auditor analysis of Utah Administrative Office of the Courts data.*

<sup>8</sup> Our sample includes all district court cases where bail was posted with the courts in the form of cash bail or surety bond with charges disposed in FY2015. FTAs were counted only if they occurred between the posting of bail and forfeiture or exoneration. Each cash bail transaction was validated and all cases with accounting errors were eliminated.

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**One quarter of all defendants released on monetary bail missed at least one of their court appearances.**

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Based on appearance data provided by the AOC, 26 percent of surety bond cases had at least one FTA while only 17 percent of cash bail cases had at least one FTA. In fact, by analyzing the data in a variety of ways, we found using cash bail consistently resulted in better court appearance rates as demonstrated in the following test results.

**By Bail Transaction.** Appearance rates per bail transaction (every bail posting, including those in the mixed cases) were nearly identical to the rates shown in Figure 2.2.

**By Comparison to Low Cash Bail.** Low cash bail, as opposed to all cash bail, had higher appearance rates than surety bonds.

**By District.** Cash bail had higher appearance rates than surety bonds in all eight judicial districts.

**By Charge Type.** Cash bail resulted in better court attendance for misdemeanor A and above. Surety bonds had higher appearance rates for misdemeanor B and C as shown in Figure 2.3.

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**By analyzing the data in a variety of ways, we found using cash bail consistently resulted in better court appearance rates.**

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**Figure 2.3 Failure to Appear Rates for Felony and Misdemeanor District Cases in Fiscal Year 2015.** Cash bail resulted in higher appearance rates than surety bond in most charge types except for class B and C misdemeanors.

Charge	FTA Rate		Number of Cases	
	Cash Bail	Surety Bond	Cash Bail	Surety Bond
<b>Felonies</b>	<b>18%</b>	<b>29%</b>	<b>635</b>	<b>4952</b>
First Degree	8%	24%	52	277
Second Degree	20%	29%	219	1404
Third Degree	19%	29%	364	3271
<b>Misdemeanors</b>	<b>16%</b>	<b>22%</b>	<b>664</b>	<b>3220</b>
Misdemeanor A	13%	23%	329	2430
Misdemeanor B	19%	17%	255	718
Misdemeanor C	19%	13%	80	72
<b>Grand Total</b>	<b>17%</b>	<b>26%</b>	<b>1299</b>	<b>8172</b>

*Source: Auditor analysis of Utah Administrative Office of the Courts data.*

According to our analysis, cash bail had significantly lower FTA rates for felony cases. The reason for the differences in performance between cash bail and surety bonds is not known. We can speculate,

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**Surety bonds have higher appearance rates for misdemeanors B and C when compared to cash bail by charge type.**

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however, that defendant risk may be partially driving the result of our test, as discussed later in this report.

### **Commercial Sureties Report Benefits But Documentation Is Lacking**

Given the role that surety bonds play in ensuring court appearances, a 26 percent FTA rate is high and inconsistent with what is reported by commercial sureties. While national FTA rate standards do not exist, states are always striving to reduce their FTA rates to reduce costs and enhance courtroom efficiencies. FTA rates vary depending on jurisdiction and offense type, ranging from less than 10 percent to as high as 25 to 30 percent. For example, Kentucky (which tracks FTA rates) reported that 84 percent of pretrial defendants who were released in 2015 attended all their court appearances. Clearly, Utah has room to improve. A representative of the commercial surety industry reported that they provide the following benefits:

- Accountability, very high appearance rates; assurance a defendant will appear and insurance that the surety bond will be paid in the event the defendant fails to appear
- No cost to the general taxpayer
- Supervision, monitoring court schedule, keeping defendant on track; safety factor for private citizen
- Lower recidivism; involvement of loved ones or individuals who have an interest in helping defendants restructure their lives (contractual agreement)

We were unable to validate the accuracy of these reported benefits because the commercial surety representative provided no documentation. When asked to provide documentation supporting this statement, the representative indicated being unaware of any specific tracking or research on Utah's commercial surety industry operations. In fact, the FTA data, jail data (discussed in Chapter IV), and interviews we conducted appear to invalidate some of these claims. One large commercial surety, however, provided FTA data, reporting an FTA rate of 33 percent between February 2015 thru September 2016. While this only represents one commercial surety,

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**FTA rates vary depending on jurisdiction and offense type, ranging from less than 10 percent to as high as 25 to 30 percent.**

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their data appears to support our conclusion that surety bond cases have higher FTA rates than cash bail cases.

### **Audit Conclusions Limited by Lack of Data on Defendant Risk**

As mentioned, we were asked to review the effectiveness of two types of monetary bail. Based on FTA data, the only data available to evaluate this request, it appears cash bail outperforms surety bonds. We cannot, however, conclude that cash bail should be used more frequently. Two main factors limit such a conclusion.

First, each bail type is dependent on a defendant's risk level and existing court data does not track the factors needed for assessing risk. According to studies on pretrial risk, risk is a significant predictor of court attendance. Riskier defendants are less likely to appear in court and more likely to reoffend. Trends in the AOC's data, such as a defendant's flight risk, may contribute to the results of our analysis. For instance, in districts where cash bail is used more (fourth and eighth districts), there is a smaller difference in the appearance rate performance of the two types of monetary bail. Therefore, we are unable to confidently recommend that cash bail be used more frequently. What is clear in the data is that the use of cash bail does not result in lower appearance rates when compared with surety bonds, which was a concern raised by the commercial surety industry.

Second, FTA data does not solely predict public safety risk. "Ensuring the safety of the public" is one of statutory factors that a judge weighs in making a pretrial release decision. Therefore, any release type should be carefully evaluated for its ability to promote public safety. To do this, appropriate defendant information needs to be collected and compiled in a validated risk instrument. This information (such as criminal records, employment status, and housing status) can then be used as a tool for judges to objectively evaluate the risk each defendant poses of endangering public safety.

While the primary objective of this audit was to review the effectiveness of two types of monetary bail, it is important to acknowledge, especially in the context of Utah's Justice Reinvestment Initiative, that the existing monetary bail system (which includes both cash bail and surety bond) has received criticism. There is growing interest, both locally and nationally, in using evidence-based practices that account for an individual's risk level, rather than their ability to

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**Cash bail is not recommended over surety bonds due to a lack of defendant data on risk.**

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pay, to improve pretrial release decisions. Therefore, the following chapter will discuss why Utah needs to adopt evidence-based pretrial release practices that account for risk.

## **Recommendation**

1. We recommend that the Administrative Office of the Courts review and resolve inconsistent judicial direction in statute, the Rules of Criminal Procedure, and the Rules of Judicial Administration regarding pretrial release decisions.

## Chapter III

# Pretrial Release Decisions Need to Be Evidence-Based and Account for Risk

Our judicial survey of all Utah district and justice court judges revealed that judges lack basic information when making *pretrial* release decisions.<sup>9</sup> Basing pretrial release decisions on inadequate information negatively impacts public safety, taxpayer resources, and defendant outcomes. This is because the existing *bail* system allows individuals who present little risk of flight or threat to public safety to be detained at considerable cost to the taxpayer, while dangerous people with sufficient means can be released into the community. Evidence-based risk assessment tools help ensure that the right people remain behind bars while awaiting trial by predicting the likelihood that a defendant will fail to appear in court or endanger the community. Improved outcomes such as higher release rates, higher court appearance rates, greater public safety, and reduced costs are motivating states to adopt and national organizations to support evidence-based risk assessment. While the Administrative Office of the Courts (AOC) supports risk assessment, they do not collect the data needed for successful risk assessment.

### Pretrial Release Decisions Are Made Without Adequate Information

Our survey of all district and justice court judges revealed that judges lack basic information when making pretrial release decisions. Surveyed judges largely reported that they base their initial pretrial decisions on probable cause statements, which are the arresting officers' accounts of what occurred at the time of arrest. Little reliable information about a defendant's risk of flight or danger to the community is provided to judges outside of Salt Lake County. Salt Lake County has been using a validated risk assessment since 2013 on 76 percent of the county's inmates. For example, criminal histories, prior *failure to appears*, and ties to the community are not known when judges make their initial release decisions, despite studies that

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<sup>9</sup> To clarify terms used in this report, refer to the glossary in Appendix A.

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**Basing pretrial release decisions on inadequate information negatively impacts public safety, taxpayer resources, and defendant outcomes.**

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**Utah judges lack basic information when making pretrial release decisions.**

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**Sixty percent of surveyed judges reported not having sufficient information to make fair pretrial decisions.**

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**Inadequate information hinders the quality of judicial decisions and, by extension, negatively impacts public safety, taxpayer resources, and defendant outcomes.**

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**Maximizing the number of defendants who can be released safely saves taxpayer resources.**

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demonstrate such factors are highly predictive of a defendant’s risk of flight or threat to public safety.

Surveyed judges reported not having enough information pretrial. When asked whether they had sufficient information to make fair pretrial decisions, 60 percent of judicial respondents reported “no”, 27 percent reported “yes”, and 13 percent reported “sometimes”.

For example, a judge from Davis County stated, “I usually only have the probable cause statement and some of those are very brief.” A judge from Salt Lake County also indicated that more information is needed pretrial:

We need better information to allow us to decide up front if a person is likely to appear. If they are, *recognizance* is appropriate. While Salt Lake County uses such a tool, it is not administered until after probable cause is determined and bail is set, which is not logical.

Salt Lake County is the only county that provides judges with validated information about defendants to help inform their pretrial release decisions. When this information is available, judges report it is useful.

Additionally, the 2015 Utah Judicial Council study on pretrial release practices also found that, “...judges are not given the information they need when making a pretrial release or monetary bail decision.” Inadequate information is problematic because it hinders the quality of the decisions judicial officers make and, by extension, negatively impacts public safety, taxpayer resources, and defendant outcomes.

## **Pretrial Decisions Impact Public Safety, Taxpayer Resources, and Defendant Outcomes**

Basing pretrial decisions on inadequate information negatively impacts public safety, taxpayer resources, and defendant outcomes. When judges have inadequate information about a defendant’s risk, it is difficult to identify and detain defendants who pose a public safety concern. Likewise, over-incarceration can result when those who can be safely released are not, because of a lack of risk data. Maximizing the number of defendants who can be safely released saves taxpayer

resources by freeing up jail space and reducing the costs associated with incarceration. Finally, even short amounts of time in jail for low-risk defendants are correlated with poor pretrial outcomes such as lowered court attendance and new criminal activity. Basing pretrial release decisions on risk mitigates these undesirable consequences while simultaneously promoting better outcomes and public safety.

### **Public Safety Cannot Be Promoted Without Data on Risk**

When releasing defendants, public safety should be the top priority. The importance of public safety is clear in *Utah Code* 77-20-1 (3), which states that the purposes of the bail decision are to:

1. Ensure the appearance of the accused
2. Ensure the integrity of the court process
3. Prevent direct or indirect contact with witnesses or victims
4. Ensure the **safety** of the public (emphasis added)

Unfortunately, as previously documented, Utah judges have little information on a defendant's public safety risk. Consequently, judges have limited options for detaining defendants who present a public safety concern. As mentioned in Chapter II, the typical practice is for judges to set high bail amounts with the goal of detaining risky defendants. The problem with this practice is that it opens the door for dangerous defendants to finance their freedom.

A recent example involves a risky defendant who, while documented as indigent, paid over \$275,000 to post bail. The defendant was accused of stealing over \$100,000 in fur coats in Summit County. He was required to wear an ankle monitor and pay \$25,000 to secure his release. Meanwhile, he had a pending case in Salt Lake County where he posted the \$250,007 bail and was released despite charges of aggravated assault, discharge of a firearm, and gun possession as a "restricted person". Following his pretrial release, the defendant engaged in a police chase that ended in additional charges. This example highlights the problem of releasing risky defendants. Had the judges been made aware of the defendant's risk score through a validated risk instrument, perhaps there would have been enough information to rightfully detain this dangerous defendant.

Validated risk instruments can help to identify the level of risk a defendant poses and recommend the appropriate release conditions

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**Judges have limited options for detaining defendants who present a public safety concern.**

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**Validated risk instruments can help to identify the level of risk a defendant poses.**

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**The present offense, prior convictions, and prior failures to appear are all important predictors of pretrial rearrests.**

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**Defendants who are released and supervised cost \$7.17 per day, which is 90 percent lower than detention at \$74.61 per day.**

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needed to minimize public safety risk. One study that reviewed national data for over 100,000 defendants over a 15-year period found clear trends in identifying which defendants are more likely to commit crimes while free on bail.<sup>10</sup> This study found that the present offense, prior convictions, and prior failures to appear are all important predictors of pretrial rearrests. For example, older defendants with clean records accused of nonviolent crimes are less likely to commit crimes while out on bail, while younger defendants with extensive criminal history records are more likely to break the law while awaiting trial. This research is important because it supports the effectiveness of a validated risk instrument in helping identify those defendants who can be released safely, freeing taxpayer resources for other uses.

### **Taxpayers Pay to Detain Defendants Who, when Properly Screened for Risk, Could Be Released**

The prompt release of pretrial detainees who do not pose a public safety risk is associated with reduced recidivism and the wise utilization of limited jail resources. Release is less costly than detention. Defendants who are released and supervised cost \$7.17 per day, which is 90 percent lower than detention at \$74.61 per day, according to a 2016 report released by Harvard's Kennedy School of Government.<sup>11</sup> Additionally, screening for low-risk defendants and keeping them out of jail allows them to contribute to the tax base rather than be housed at taxpayer expense.

Experts report that roughly 25 percent of the currently detained pretrial population could be released without compromising public safety.<sup>10</sup> Assuming that this estimate holds true for Utah, taxpayers could be saving significant resources in detention costs. However, a portion of these savings would need to be reinvested on pretrial supervision services, which are significantly less costly than incarceration.

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<sup>10</sup> Baughman, Shima B. and Frank McIntyre. "Predicting Violence." *Texas Law Review*, vol. 90, 2012, p. 497.

<sup>11</sup> Wiseman, Jane and Stephen Goldsmith. "Fairness is Fiscally Responsible." June 27, 2016. Available at: <http://datasmart.ash.harvard.edu/news/article/fairness-is-fiscally-responsible-861>

Utah judges are reluctant to release defendants on their own recognizance despite statutory authority to do so. This reluctance may be caused by a lack of pretrial risk assessment and services. Providing risk assessment and services may give judges the necessary information and resources to release defendants on their own recognizance, saving taxpayer resources.

### **Basing Pretrial Decisions on Inadequate Information Results in Undesirable Consequences for Defendants**

A growing body of research suggests that when pretrial decisions result in detention, there are negative consequences for defendants. Low-risk defendants who spend just three days in jail are less likely to appear in court and more likely to commit new crimes because of the loss of jobs, housing, and family connections, according to an Arnold Foundation study of defendants in Kentucky jails.<sup>12</sup> Defendants who are detained before trial are also more likely to be convicted if they go to trial, receive prison or jail sentences, and have longer sentences than similar defendants released at some point pending trial.<sup>13</sup> Comparable results were found in a separate study using federal system data.<sup>14</sup>

Utah defendants spend a significant amount of time behind bars before they have been convicted. Jail data provided by Utah County shows that the average length of stay for pretrial detainees is 35 days (including those who are released on bail). Those not released on bail typically spend "...a minimum of 60 days, under perfect timeline conditions, even with an almost immediate plea resolution," according to a Utah County public defender.

In Davis County, those with misdemeanor charges spend, on average, between 22 and 27 days in jail and those with felony charges spend between 50 and 77 days in jail. While these counties do not use data to evaluate defendant risk, a portion of these pretrial defendants

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<sup>12</sup> Christopher T. Lowenkamp et al. "Hidden Costs of Pretrial Detention." Laura & John Arnold Foundation, 10-11, 2013.

<sup>13</sup> Christopher T. Lowenkamp et al. "Investigating the Impact of Pretrial Detention on Sentencing Outcomes." Laura & John Arnold Foundation, 10-11, 2013.

<sup>14</sup> J.C. Oleson et al. "The Effect of Pretrial Detention on Sentencing in Two Federal Districts." *Justice Quarterly*, 2014. DOI:10.1080/07418825.2014.959035

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**Low-risk defendants who spend just three days in jail are less likely to appear in court and more likely to commit new crimes.**

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**Utah defendants spend a significant amount of time behind bars before they have been convicted.**

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are likely low risk. The National Association of Counties 2015 report on jail populations and pretrial release states that two-thirds of defendants confined in county jails are pretrial and the majority are low risk.

Given the poor outcomes associated with detention, Utah courts need to support jails in limiting detention to those who are evaluated through risk assessment as likely to commit a new crime pretrial or fail to appear in court.

### **Evidence-Based Risk Assessment Tools Promote Better Outcomes at Reduced Costs**

Research demonstrates that risk assessment, added to professional judgment, results in better outcomes than professional judgment alone.<sup>15</sup> Evidence-based risk assessment tools are empirically validated tools that predict the likelihood that a defendant will fail to appear in court or endanger the community pending trial. The tool assigns a defendant a risk score (low, medium, or high) that judicial officers can use in determining whether a defendant should be released or detained pretrial and the appropriate conditions, when necessary, to secure the safety of the public should the defendant be released. Risk assessments are designed to complement, not replace, judicial discretion.

**Pretrial Decisions Are Not Driven by Data that Ensures Successful Outcomes.** While most of those who are arrested have the option to post monetary bail and remain free until they are arraigned, a segment of the jail population does not have adequate resources to secure release. This lack of financial resources is a common concern; as described by a state public defender, “people routinely spend weeks or months in custody for bails of \$5,000 bondable, which is the bail schedule [amount] for third-degree felonies.” This means many defendants cannot afford the \$500 premium (10 percent of the bond amount) needed to use a *commercial surety*. One recent example involves a Utah County case in which a person was arrested for minor retail theft with prior convictions. Her bail was set at \$5,000 cash or *surety bond*. While her case was resolved at the second hearing before

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**Evidence-based risk assessment tools are empirically validated tools that predict the likelihood that a defendant will fail to appear in court or endanger the community pending trial.**

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**There is a segment of the jail population that does not have adequate resources to secure their release.**

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<sup>15</sup> Andrews, D.A., J. Bonta, and J.S. Wormith. “The Recent Past and Near Future of Risk and/or Need Assessment.” *Crime and Delinquency*, Vol. 52 No.1, 2006 7–27.



the court, she was unable to afford her bail and will remain in custody until her sentencing date, ultimately serving 58 days in custody. This case illustrates why data on risk is needed to drive decision-making, by ensuring that those defendants who are kept in jail are there because they present a risk and not simply because they are too poor to afford bail.

Maximizing the number of defendant releases without negatively affecting court appearances or public safety is a win for taxpayers as well as defendants, but can only be done when information about a defendant's risk is collected and appropriately used. Other states are demonstrating positive outcomes following the adoption of a risk assessment tool.

## **Positive Outcomes Are Driving Support For Evidence-Based Risk Assessments**

Nearly all the surrounding western states, including Utah, have either recently adopted or are adopting an evidence-based risk assessment instrument to improve pretrial decisions. A common challenge for these states is to identify a risk instrument and validate the instrument using data from their own populations. A variety of assessment instruments are available, with some proprietary and others available at no cost. Among the most well-studied and widely used of these instruments is the Public Safety Assessment-Court (PSA-Court) developed by the Laura and John Arnold Foundation.<sup>16</sup>

Kentucky is among the earliest adopters of the PSA-Court, utilizing the risk instrument in all 120 counties beginning in July 2013. Since its adoption, Kentucky has released more defendants pretrial while at the same time reducing crime for these defendants by nearly 15 percent. Other states have demonstrated similar positive outcomes using pretrial risk assessment. Such results have received the attention of many national organizations, including the American Bar

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**Kentucky has released more defendants pretrial and reduced crime for these defendants by nearly 15 percent since adopting pretrial risk assessment.**

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<sup>16</sup> The PSA was created using a database of over 1.5 million cases drawn from more than 300 U.S. jurisdictions to identify which factors best predict whether a defendant will commit a new crime, commit a new violent crime, or fail to return to court. The PSA-Court is being piloted in a number of states and jurisdictions and is expected to be made available nationally in the near future.

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**Most of the surrounding western states are using or are in the process of adopting an evidence-based risk instrument to drive their pretrial decisions.**

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Association, National Institute of Corrections, and National Center for State Courts that support the use of risk assessment.

### **Surrounding States Are Using or Adopting Risk Assessment to Inform Pretrial Decisions**

We contacted all the surrounding western states and found that all, except Wyoming, are using or in the process of adopting an evidence-based risk instrument to drive their pretrial decisions. The following examples demonstrate some of the recent activities by these states.

- Colorado’s governor signed into law in 2013 House Bill 13-1236 that significantly overhauled their pretrial practices. Among other recommendations made by the Colorado Commission on Criminal and Juvenile Justice, the law, titled Evidence-based Decision-Making Practices and Standardized Bail Release Decision-Making Guidelines included the use of empirically developed risk assessment instruments.
- New Mexico’s Legislature in 2016 passed Senate Joint Resolution 1 (which voters approved in November) amending their state constitution. The constitution now allows the detention of dangerous defendants and ensures the release of non-dangerous defendants through a validated risk instrument.
- Arizona adopted the Arnold Foundation’s pretrial risk-assessment tool in June 2015. The state is among the 21 jurisdictions, including major cities and entire states, that have adopted the PSA-Court. Arizona’s Judicial Council approved the use of the tool based on the success of the five sites that originally piloted the tool.
- Idaho now has 18 of its 44 counties offering pretrial justice services. Idaho’s Pretrial Justice Planning Committee is working toward adopting a standardized risk assessment tool statewide. The state supreme court recently identified pretrial justice as a priority and is in the process of implementing a pretrial module into a new case management system to improve data collection efforts and standardize pretrial practices and risk assessment across jurisdictions.
- Nevada’s chief justice initiated a committee to study evidence-based pretrial release. A custom pretrial risk instrument was

developed and approved by the committee for validation in February 2016. Nevada plans to use the instrument in four jurisdictions to release more defendants on their own recognizance.

### **Utah Too Is Working to Improve Its Pretrial Practices.**

Specifically, the courts are taking steps to adopt a validated risk assessment instrument statewide. The following activities demonstrate the courts' commitment to pretrial risk assessment.

- In their 2015 report to the Judicial Council on Pretrial Release and Supervision Practices, the courts recommended that, “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.”
- The AOC supports the use of a validated risk assessment tool and has convened a pretrial release and supervision committee to adopt the above recommendation, among others.
- In the 2016 Utah State of the Judiciary address to the Legislature, pretrial release practices were given top priority. Specifically, the chief justice encouraged the Legislature to consider “instituting a validated pretrial risk assessment process for use in every district.”

Additionally, our survey of judges indicated a clear preference for more pretrial information, specifically, a validated risk assessment. The majority, 77 percent, of the judges who responded to our survey reported being “very interested” in pretrial risk assessment, 23 percent were “somewhat interested” and none reported being uninterested. Given the support of Utah’s courts as well as the level of interest in pretrial risk assessment from its judges, we believe Utah needs to adopt a risk assessment statewide.

The considerable effort western states are placing on the pretrial phase of the criminal justice system reflects a commitment to leverage data, technology, and research to improve outcomes. It will take time to demonstrate the success of these efforts. There are jurisdictions, however, that have been using evidence-based risk assessments long enough to demonstrate positive outcomes. The following section will describe some of these positive outcomes.

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**In the 2016 Utah State of the Judiciary address to the Legislature, pretrial release practices were given top priority.**

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**Jurisdictions that use pretrial risk assessment demonstrate enhanced court attendance and public safety.**

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## **Jurisdictions with Evidence-Based Risk Assessments Are Showing Positive Outcomes**

An increasing number of jurisdictions are using risk-based decision-making instruments to enhance pretrial decision success. Studies from four jurisdictions using pretrial risk assessments, along with other pretrial programs, show enhanced court attendance and public safety while releasing more defendants and saving money.

- Washington DC
  - Savings – \$182 a day per defendant released pretrial rather than incarcerated
  - Release Rate – 88 percent of pretrial defendants released
  - Public Safety – 91 percent of defendants remain arrest-free pretrial
  - Court Appearance – 90 percent of defendants made all scheduled court appearances
  
- Kentucky
  - Savings – Up to \$25 million per year
  - Release Rate – 73 percent of pretrial defendants released
  - Public Safety – 89 percent did not commit crimes while released
  - Court Appearance – 84 percent appearance rate
  
- Mesa County, CO
  - Savings – \$2 million per year
  - Release Rate – Pretrial jail population dropped by 27 percent
  - Public Safety – Uncompromised despite an increase in the number of defendants released
  - Court Appearance – 93 percent of lower-risk defendants and 87 percent of high-risk defendants made all court appearances before trial
  
- Lucas County, OH
  - Savings – not available
  - Release Rate – Doubled from 14 to 28 percent
  - Public Safety – Defendants arrested reduced by half from 20 percent to 10 percent.
  - Court Appearance – Increased by 12 percent from 59 percent to 71 percent.

These examples demonstrate how jurisdictions have leveraged evidence-based decision-making tools to reduce jail populations, crime rates, and taxpayer expense while also improving court appearance rates. Therefore, a growing number of national organizations support the adoption of risk-based decision-making.

### **National Organizations Support Risk-Based Decision-Making**

Numerous national organizations have endorsed (or issued policy statements in support of) risk-based pretrial release decision-making as well as the necessary pretrial services needed to mitigate defendant risk. Notably, the Conference of State Court Administrators (COSCA) adopted a white paper advocating, among other pretrial reform efforts, "...that court leaders promote, collaborate, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions."

The Conference of Chief Justices endorsed COSCA's policy position in 2012 and subsequently, many state and local courts are accelerating their efforts to advance legal and evidence-based pretrial practices. Figure 3.1 identifies the many national organizations that support improved pretrial practices.

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**National organizations have endorsed or have issued policy statements supporting risk-based decision-making pretrial.**

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**Figure 3.1 National Organizations That Support Pretrial Reform.** A growing number of national organizations back pretrial reform efforts and risk assessment, including the American Bar Association, the National Institute of Corrections, and the National Center for State Courts.

National organizations that support pretrial reform include the American Bar Association, the National Institute of Corrections, and the National Center for State Courts.



Source: Pretrial Justice Institute

For Utah, adopting risk-based decision-making is possible but data collection barriers will need to be addressed first. The following section discusses these barriers and recommends solutions for improving data collection.

### Utah’s Criminal Justice System Needs to Improve Data Collection for Successful Risk Assessment

Utah’s Criminal Justice System does not track key pretrial outcome and performance metrics, such as the number of inmates that remain in custody while awaiting trial.

The cornerstone of any risk assessment instrument is accurate and reliable data. Unfortunately, the data needed to accurately predict individual defendant risk is hampered by the fact that such information resides in a number of different criminal justice databases which are not linked to the courts information system. Additionally, key pretrial outcome and performance metrics, such as the number of inmates that remain in custody while awaiting trial, are not tracked. Basic information about pretrial release practices, such as the number of defendants released on recognizance, is also not tracked, resulting in

inconsistencies in pretrial release practices across the state. The criminal justice system should coordinate and improve its data collection efforts to enable risk assessment and to prepare for the evaluation of pretrial service program performance.

### **Reliable Defendant Information Is Not Tracked**

The AOC recommends that, “each person booked into jail should receive a pretrial risk assessment...” To reach this ambitious goal, the AOC will need to develop a way to collect information that can reliably and accurately predict a defendant’s risk of flight or re-offending. This information includes criminal histories, prior failure to appear occurrences, as well as other locally validated risk factors. For example, Salt Lake County gathers information from the following systems in collecting pretrial risk assessment data: Jail Offender Management System, Utah Bureau of Criminal Identification, Utah Courts System, and Salt Lake County Criminal Justice Services’ System. Also, unique identifiers are not used, which makes offender tracking between systems difficult.

When we began the audit, the only information that the AOC tracked was FTA data and this information was indirectly tracked through warrants. Other information needed to assess risk resided in different correctional databases not directly linked to the courts information system. Recently, the AOC has upgraded their information system, which has improved FTA tracking. They also report that they are in the process of receiving defendant data from state criminal history information systems in an effort to get all the data needed to assess risk. In addition to tracking individual defendant information, the AOC also needs to collect data to evaluate pretrial program performance.

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**Defendant information, needed for risk assessment, resides in many disparate data systems.**

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## **Key Pretrial Outcome and Performance Metrics Are Not Collected and Tracked**

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**The number of inmates that remain in custody while awaiting trial, the percentage of the jail population that is pretrial, and the average length of stay for this population is not currently tracked.**

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**Pretrial data is kept at the local jails and not shared with the AOC.**

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A number of meaningful pretrial performance metrics are not collected or tracked. For example, the number of inmates that remain in custody while awaiting trial, the percentage of the jail population that is pretrial, and the average length of stay for this population are not currently tracked. Basic data about pretrial release practices across the state are also not collected. For instance, we were unable to identify how often defendants are released on their own recognizance. Therefore, it is difficult to determine the effectiveness, or lack thereof, of different release types.

Unfortunately, pretrial data is kept at the locally run jails and not shared with the AOC. Therefore, the AOC is unable to evaluate pretrial practices statewide. AOC administrators report that they do not have the ability to ensure local jails collect and share key pretrial data using a standard set of definitions.

A failure to track basic information results in inconsistent pretrial release practices. This concern was reported in the Utah Board of District Court Judges May 2015 report to the Chief Justice as well as Utah Courts February 2015 Report to the Judicial Council on Pretrial Release and Supervision Practices. Both reports document significant discrepancies in pretrial release practices across the state.

Tracking pretrial information is important because it can help the AOC gauge how effectively it is delivering on its pretrial justice system goals. To this end, the National Institute of Corrections' (NIC) Pretrial Executive Network developed a 2011 report that recommends key outcome and performance metrics that pretrial programs should be tracking. Specifically, Figure 3.2 highlights key outcome measures that Utah's courts should be tracking.



**Figure 3.2 Pretrial Outcome Measures.** Utah’s courts should be tracking the National Institution of Corrections’ key outcome measures to improve its pretrial operations.

Appearance Rate	The percentage of supervised defendants who make all scheduled court appearances
Safety Rate	The percentage of supervised defendants who are not charged with a new offense during the pretrial stage
Concurrence Rate	The ratio of defendants whose supervision level or detention status corresponds with their assessed risk of pretrial misconduct
Success Rate	The percentage of released defendants who (1) are not revoked for technical violations of the conditions of their release, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision
Pretrial Detainee Length of Stay	The average length of stay in jail for pretrial detainees who are eligible by statute for pretrial release

*Source: National Institute of Corrections, Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field (Aug. 2011)*

In addition to the above outcome measures, performance measures, mission critical data, and guidance on setting SMART (specific, measurable, achievable, realistic, and time-bound) targets were also recommended in the report. While we fully support the AOC’s adoption of all the report’s recommendations, we specifically recommend that the AOC begin with the sizeable task of collecting outcome measures.

Collecting quality pretrial data will require a concerted effort to improve how different data systems interact as well as ensure that consistent and accurate data is collected from these systems. The AOC, however, is dedicated to such improvements as evidenced by their standing committee on pretrial release and supervision practices’ following statement: “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.”

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**Collecting quality pretrial data will require a concerted effort to improve how different data systems interact.**

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**We applaud the AOC's willingness to improve data collection efforts as a critical step toward implementing a successful pretrial risk assessment tool.**

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We applaud the AOC's willingness to improve data collection efforts as a critical step toward implementing a successful pretrial risk assessment tool as well as evaluating the effectiveness of various pretrial initiatives. We also acknowledge that receiving accurate and reliable data from the jails will not be easy. One possible solution is to require jails to supply key outcome metrics to the Utah Department of Corrections (UDC) in order to obtain reimbursement funds. Pretrial data could then be shared between UDC and the AOC. This solution, however, may require a Legislative mandate.

## **Recommendations**

1. We recommend that the Administrative Office of the Courts initiate a process for adopting a validated risk assessment instrument and provide this information to all judicial officers in the state.
2. We recommend that the Administrative Office of the Courts develop a case management system that incorporates a pretrial service module to track mission-critical pretrial data.
3. We recommend that the Administrative Office of the Courts collect and report key outcome metrics that may include but are not limited to:
  - a. Appearance Rate
  - b. Safety Rate
  - c. Concurrence Rate
  - d. Success Rate
  - e. Pretrial Detainee Length of Stay

## Chapter IV

# Improvements Are Needed to the Surety Bond Forfeiture Process

We reviewed the *surety bond* forfeiture process and found several opportunities for improvement. First, Utah's forfeiture timeframes are unnecessarily long. Compared with other states, Utah's forfeiture grace period is among the longest in the nation. Such a long grace period is unnecessary given the fact that most defendants—71 percent—who fail to appear in court return to court or to custody within a month. Second, the forfeiture process needs to be more effective in its core mission of promoting court appearances. Of the 2,124 surety bond cases in fiscal year 2015 in which the defendant failed to appear in court, only 38 (1.7 percent) resulted in a bond forfeiture. Forfeitures are uncommon, in part because of the long grace period that allows automatic bond exonerations; thus, there is insufficient economic incentive for *commercial sureties* to ensure court appearances. Finally, we found that judges, clerks, and prosecutors do not always process forfeitures in a timely and consistent manner. These key players could benefit from clarification of requirements and increased training to help ensure a successful forfeiture process.

### Utah's Forfeiture Grace Period Is Unnecessarily Long

Utah's forfeiture grace period is among the longest in the nation. Statute grants commercial sureties six months plus the possibility of a 60-day extension to bring bonded defendants to court or face a forfeiture of the bond. This long grace period appears unnecessary given the fact that the majority of defendants (71 percent) who fail to appear in court, return to court or custody within a month. Therefore, we recommend that the Legislature consider shortening Utah's grace period from six months to between one and three months to better align with other states and with Administrative Office of the Court's (AOC) data.

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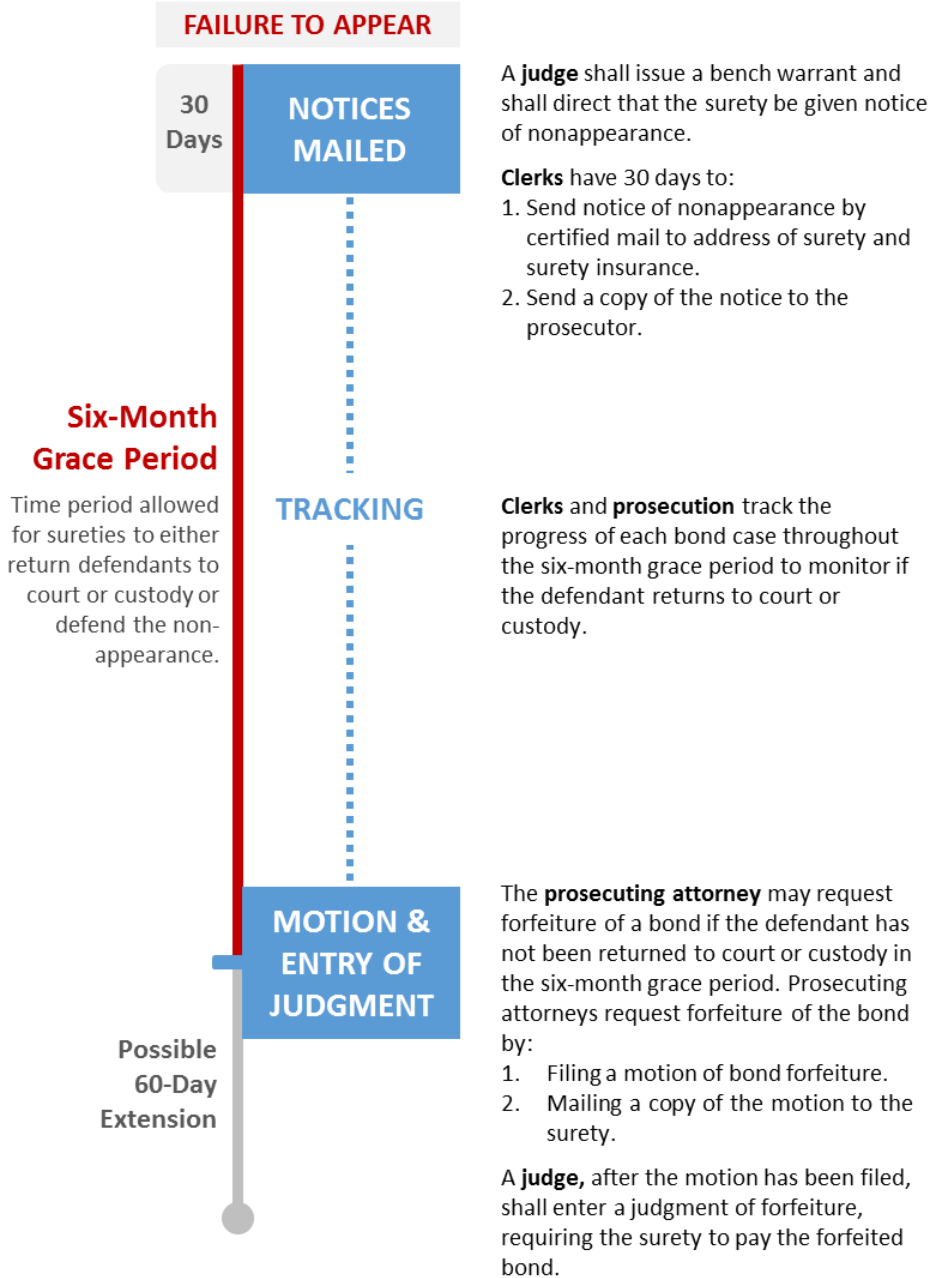
**Utah's forfeiture time frames are among the longest in the nation.**

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## **Utah's Six-Month Forfeiture Grace Period Is Among the Longest in the Nation**

In most surety bond cases, 74 percent, the defendant makes all court appearances. The remaining 26 percent of cases have at least one *failure to appear* (FTA) which initiates the bond forfeiture process. Following an FTA, notification is sent to the commercial surety, which has six months with the possibility of a 60-day extension to bring a defendant (for whom they are responsible) into custody. If the commercial surety is unable to bring the defendant into custody within the statutory timeframe, then the bond may be forfeited. Figure 4.1 illustrates the courts' current forfeiture process.

**Figure 4.1 Utah’s Surety Bond Forfeiture Process.** When a defendant is released through a surety bond and fails to appear in court within six months, the courts can require the commercial surety to forfeit the bond amount to the courts.

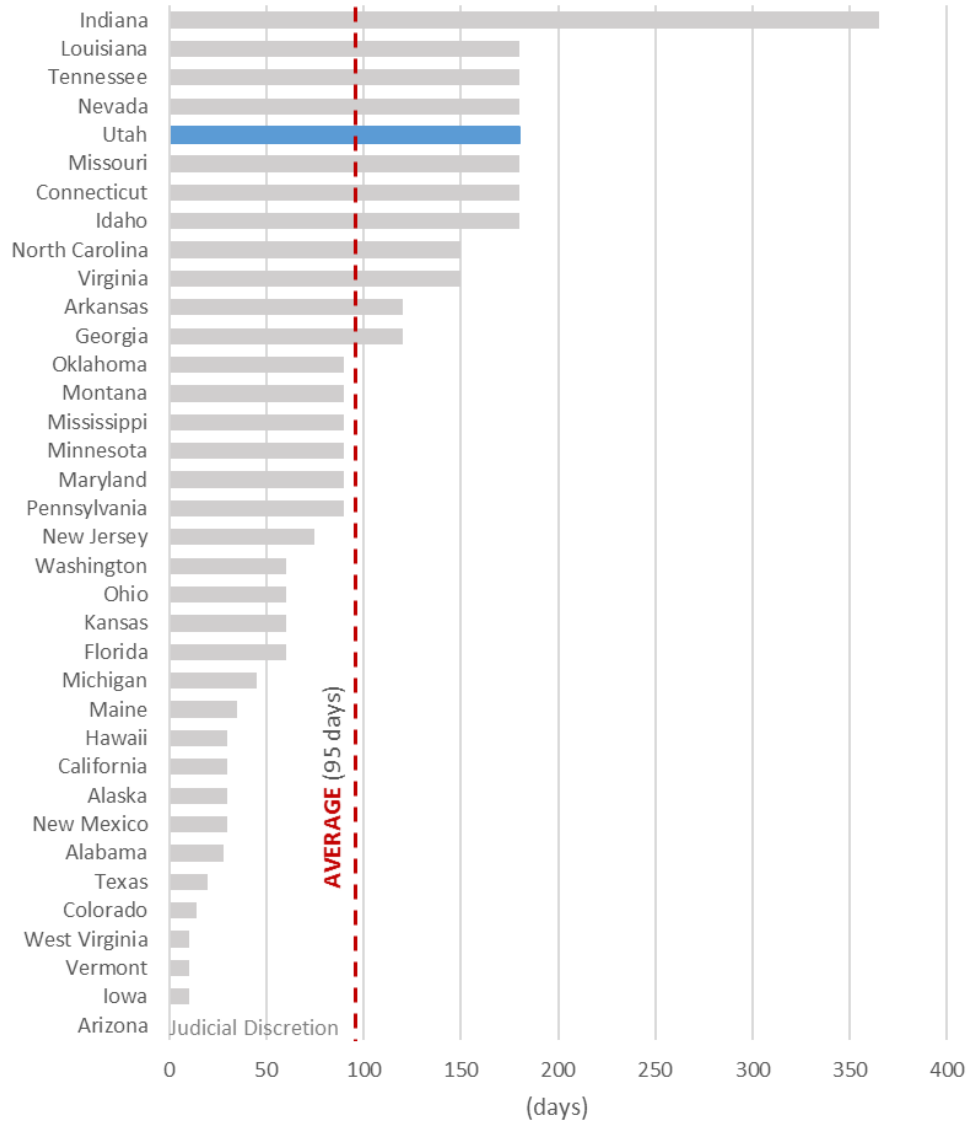


**The surety bond forfeiture process requires the efforts of judges, clerks, and prosecuting attorneys.**

Source: Office of the Legislative Auditor General

Utah’s six-month forfeiture grace period is relatively long. Many states process forfeitures in far less time than Utah, as shown in Figure 4.2.

**Figure 4.2 Surety Bond Forfeiture Grace Periods by State.**  
 Compared to 35 documented states, Utah has one of the longest surety bond forfeiture grace periods\*.



**Utah has a six-month bond forfeiture grace period; other states average three months.**

Source: National Conference of State Legislatures (NCSL) 2013. Updated and validated by Office of the Legislative Auditor General.

\*15 states are missing from the graphic because some states do not allow commercial sureties and because others do not specify grace periods in statute and leave the forfeiture proceedings to the discretion of the judge.

The forfeiture grace period is measured as the period between notification of failure to appear and payment required from the commercial surety. Most states have a shorter grace period for commercial sureties than Utah’s six months. In fact, the average grace period for all documented states is 95 days, about three months, and 29 percent of these states have grace periods that are one month or

less. Only one state, Indiana, exceeds the six-month grace period found in Utah, Louisiana, Idaho, Nevada, Missouri, Connecticut, and Tennessee. Notably, there are a number of states that do not have a grace period. Instead, most of these states require forfeiture payment upon motion of the prosecution. These states are not reflected in the 97-day grace period average reported in Figure 4.2.

In reviewing the grace periods of other states, we found differences in each state's forfeiture processes. States with shorter or nonexistent grace periods appear to have more judicial discretion to flexibly respond to the individual circumstances of a case. Arizona, for example, has a surety bond forfeiture process in which forfeiture hearings are scheduled immediately following an FTA. At this hearing, commercial sureties are required to provide evidence showing why the bond should not be forfeited. In response, the judge will determine whether to forfeit the bond wholly or partially, to reinstate the bond, or to grant the commercial surety an extension.

Additionally, while forfeiture payment is required typically around 3 months for states with predetermined grace periods, a number of states allow an extended period for the surety to bring the defendant into custody and have their forfeiture money returned. For instance, Iowa requires forfeiture payment after a 10-day grace period but allows an additional 90 days for commercial sureties to return the defendant into custody for a refund of forfeiture monies. In contrast, Utah allows a 60-day extension in addition to the 6-month grace period (when warranted) to allow time for a commercial surety to return the defendant to custody or pay the forfeited bond amount. AOC data, however, indicates that a six-month grace period is unnecessarily long for sureties to return defendants into custody.

### **Long Forfeiture Grace Periods Are Not Needed to Return Defendants into Custody**

We randomly sampled AOC data from 2015 and found that 71 percent of defendants, who missed one or more of their court dates, reappeared or were apprehended within one month. In fact, 89 percent reappeared or were apprehended within three months (the average grace period of other states) and the remaining 11 percent returned beyond three months, as shown in Figure 4.3.

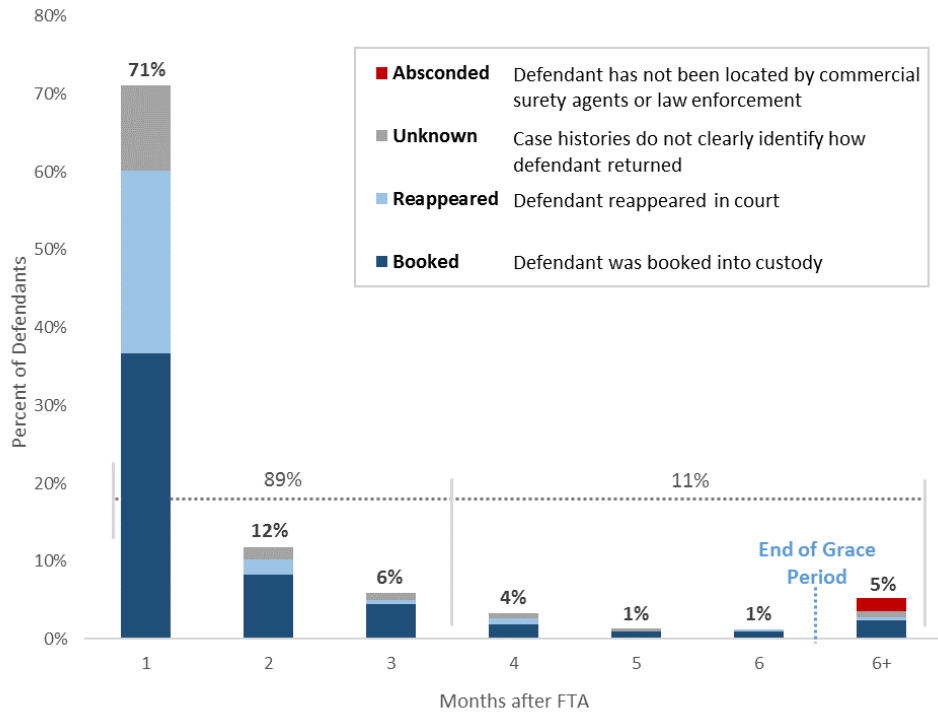
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**71 percent of bonded defendants return within the first month after their FTA.**

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**89 percent of bonded defendants return within three months of their FTA.**

**Figure 4.3 Percent of Bonded Defendants Returned to Court or Custody Following an FTA by Length of Time.** Random sampling of 325 cases shows that 71 percent of defendants return to court or custody within the first month.



Source: Auditor analysis based on AOC Data and XChange Database.  
 Note: There can be more than one FTA per case.

Given that the majority of defendants return to custody within three months, a shortened grace period will likely encourage quicker defendant apprehension and shorten the amount of time judicial staff and prosecution track cases. Additionally, the data shows that 56 percent of defendants are brought into custody through law enforcement or *commercial surety* agent efforts (as shown in dark blue) and 27 percent of defendants reappeared in court (as shown in light blue) either voluntarily or through commercial surety efforts.

The commercial surety industry commonly claims that they return bonded defendants to custody if they fail to appear in court at no taxpayer cost. For example, documentation provided by one commercial surety states, “The right to arrest and revoke at no cost to the taxpayer is a huge value to the judicial system.” While commercial sureties have the authority to return defendants to custody, data



provided by Salt Lake County indicates that they are not always exercising this authority.

Salt Lake County provided us with 2015 jail records data that shows who brought in bonded defendants following an FTA. Commercial sureties apprehended 13 percent (119) of the 928 defendants who were released on surety bond and then absconded. The remaining 87 percent (809) of defendants were brought in by law enforcement agencies. While we do not discount commercial sureties' role in bringing defendants back into custody, and acknowledge that they may play a significant role in other parts of the state, this data highlights that the cost of returning defendants to custody is often borne by law enforcement and, by extension, taxpayers.

Additionally, we randomly sampled *cash bail* cases from 2015 to see how quickly cash bail defendants returned to court or custody follow an FTA. We found that defendants returned to court or custody at nearly identical rates in both cash bail and surety bond cases. Defendants released on cash bail, however, were slightly more likely to be missing after six months than those released on surety bond. While most defendants return to custody relatively quickly following an FTA violation, the bond forfeiture process needs to be more effective at promoting court appearances.

## **Forfeiture Process Needs to More Effectively Promote Court Appearances**

The surety bond forfeiture process is the only mechanism available to hold commercial sureties liable for bonded defendants' court appearances. Statute requires commercial sureties to bring bonded defendants to court for all court appearances. The current surety bond forfeiture process needs to be more effective in promoting court appearances as reflected in the statewide 26 percent failure to appear (FTA) rate for all cases involving a commercial surety. While the forfeiture process purports to promote court attendance through the threat of bond forfeitures, surety bonds are rarely forfeited. Based on one year of data, only 1.7 percent of all surety bond cases involving an FTA resulted in a forfeiture. Forfeitures are rare because of the opportunities for automatic bond exonerations permitted in statute coupled with long forfeiture grace periods, which increase the likelihood that a bond will be exonerated. Rare forfeitures, however,

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**Salt Lake County data shows that law enforcement is usually involved in returning bonded defendants who have absconded.**

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**Cash bail defendants return to court at nearly identical rates as bonded defendants.**

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**The surety bond forfeiture process is the only mechanism available to hold commercial sureties accountable.**

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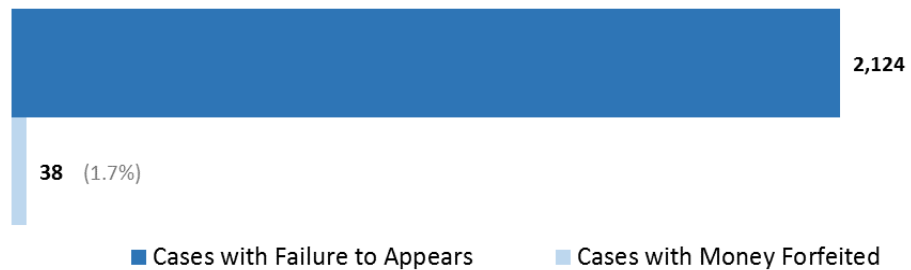
create a weak economic incentive for commercial sureties to ensure that defendants, for whom they are responsible, attend court. Therefore, we recommend that the Legislature work with the AOC to improve court attendance and reduce the number of automatic bond exonerations.

### While Missed Court Dates Are Common, Forfeitures Are Rare

*Utah Code 77-20-7* states that commercial sureties are liable “...for all court appearances required of the defendant up to and including the surrender of the defendant for sentencing” or up to serving a sentence. A commercial surety’s failure to perform this duty is a “breach of the conditions” and allows for the bond to be forfeited and collected by the state.

Purportedly, the forfeiture process incentivizes commercial surety accountability for court appearances by allowing the state to recover the full bond amount from a commercial surety should the bonded defendant fail to appear. In practice, however, the forfeiture process does not effectively promote court appearances. Despite over 2,100 cases in which a bonded defendant missed one or more court dates, only 38 (1.7 percent) cases resulted in bond forfeiture, as shown in Figure 4.4.

**Figure 4.4 District Surety Bond Cases in 2015 that Resulted in a Bond Forfeiture.** Of the 2,124 surety bond cases involving an FTA, only 38 cases were ultimately forfeited.



Source: Auditor analysis of 2015 Administrative Office of the Courts data.

We do not expect every failure to appear to result in a forfeiture. In fact, most FTAs will not result in forfeiture for a number of reasons. First, many defendants return to court or custody within the statutory grace period, as previously discussed. Second, many statutory opportunities for bond exonerations occur, as discussed in the

Commercial sureties are liable for all court appearances required of their clients.

Of the 2,124 surety bond cases with an FTA, only 1.7 percent resulted in a forfeiture.

following section. We are concerned, however, that infrequent forfeitures do not incentivize court attendance, resulting in significant taxpayer costs.

Taxpayers pay when defendants fail to appear in court. FTA costs include lost court time, the use of law enforcement to bring defendants into custody, and defendant incarceration. Based on data from a comprehensive study, which is the best cost estimate data available, we estimate that when a defendant fails to appear and commercial sureties return defendants to custody (instead of law enforcement), taxpayers pay on average \$1,414 per event.<sup>17</sup> If commercial sureties returned 100 percent of defendants in 2015, the cost to Utah taxpayers would have been nearly \$3.3 million because of bonded defendants' missed court dates. This estimate is understated because it discounts the costs associated with law enforcement who bring into custody a number of bonded defendants. This expense was not offset by the \$305,000 in surety bond forfeitures collected in fiscal year 2015, indicating a losing proposition for taxpayers.

**Failure to Appear Rates Measure Commercial Surety Performance Better than Forfeiture Rates Do.** Commercial sureties report that low forfeiture rates reflect successful performance. Forfeiture rates, however, are a problematic performance metric because surety bonds can be exonerated following an FTA even when a commercial surety does not return a bonded defendant to court or custody. Hence, forfeiture rates are not an accurate measure of commercial surety performance. FTA rates are a more meaningful metric of commercial surety performance because they are an honest indicator of whether a commercial surety has performed its statutory duty. Therefore, we suggest that FTA rates for each commercial surety be tracked by the courts. This data could then be provided to the Department of Insurance, which regulates the commercial surety industry, to enhance commercial surety oversight.

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**FTAs are costly to taxpayers because of lost court time, law enforcement efforts, and defendant incarceration.**

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**FTA rates are a more meaningful metric of commercial surety performance than forfeiture rates.**

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<sup>17</sup>Auditor Analysis: This amount takes into accounts for lost court time as well as additional court hearings, arrests, bookings, jail housing, and issued warrants caused by the FTA.

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Exoneration means that the commercial surety is released from having to pay the bond.

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## Statute Provides Many Opportunities For Surety Bond Exonerations

Statute appears to limit commercial surety liability by providing opportunities for bond exonerations. Exoneration means that the commercial surety is released from paying the bond and is no longer responsible for the defendant's court appearance. The following examples highlight some of the more common statutory provisions that result in automatic bond exonerations. By reviewing a sample of 2015 AOC forfeiture data, we also documented how frequently these statutory provisions might apply.

- According to *Utah Code* 77-20b-101 (4)(c), if a defendant fails to appear and then is booked (either by law enforcement or commercial surety agents) on the FTA warrant, the commercial surety's bond is exonerated. This is a likely outcome, given that 56 percent of all bonded defendants were booked within the six-month grace period following an FTA in 2015.
- According to *Utah Code* 77-20b-101 (4)(a), if a defendant fails to appear and reappears in court more than one week later, the bond is exonerated unless the commercial surety gives consent to reinstate the bond. Reappearance is also a likely outcome, given that 13 percent of all bonded defendants reappeared in court more than one week following their FTA in 2015.
- According to *Utah Code* 77-20b-101 (4)(d), when a defendant is arrested on a new warrant or charge and released on their own recognizance pursuant to pretrial release or jail overcrowding, the bond is exonerated. While we are unable to track how often this occurs, we know that it is common for Salt Lake County defendants to be released because of overcrowding, causing exoneration of any previous bond. A 2010 Salt Lake County study found that 40 percent of Salt Lake County defendants were released because of overcrowding.

Under some circumstances, surety bonds are exonerated even when a defendant is not brought into court or custody.

- According to *Utah Code* 77-20b-101 (1) and (3), if a clerk does not send a notice of nonappearance by certified mail to the commercial surety and surety insurer within 30 days, the

bond is exonerated. While the frequency of this occurrence is unknown, we found many cases in 2015 that had no record of notices sent out.

Certified mail can be costly. The estimated cost of certified mail postage for 2015 alone (district cases only) was \$26,000. This does not include the cost of labor associated with processing these notifications. One clerk reported that she processes 10 to 20 forfeiture cases a day and each case requires time to fill out forms, print notices, have them signed, copy or scan them for records, and mail them. To enhance efficiencies and reduce the costs associated with certified mail, the Legislature should consider allowing the courts to send out notification via certified electronic mail. There are certified email services specifically designed for court documents that verify the date and time that the email was transmitted and proof of opening.

While not exhaustive, these examples demonstrate that statute provides opportunities for commercial sureties to exonerate their bonds, even when the commercial surety is not actively involved with returning defendants to court or custody. In the rare event that a bond is forfeited, the commercial surety can collect the bond payment and related expenses from the defendant (or the defendant's co-signers). Hence, commercial sureties experience little incentive to promote court appearances.

**We Are Concerned that Statute Is Inconsistent in Holding Commercial Sureties Liable for Court Attendance.** As previously mentioned, *Utah Code* 77-20-7 specifically requires that commercial sureties be accountable "...for all court appearances required of the defendant." As we have demonstrated, the statute limits this liability by providing several opportunities for bond exonerations. While there are legitimate reasons for bond exonerations, statute appears to work at cross purposes and is therefore not effectively promoting court attendance. The AOC's legal counsel agrees that statute is inconsistent, stating, "We agree completely that the statutes are inconsistent and need to be fixed." Therefore, we recommend that the Legislature consider working with the AOC to design a forfeiture process that improves court appearances and reduces the number of automatic bond exonerations.

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**Utah Code limits commercial surety liability by providing many opportunities for bond exonerations.**

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## **Judges, Clerks, and Prosecutors Need to Process Forfeitures More Efficiently**

Forfeitures are only successful when judges, clerks, and prosecutors efficiently perform their roles in processing forfeitures. Based on our judicial survey and AOC's forfeiture data, we found that judicial and prosecuting personnel were not always processing forfeitures in a timely and consistent manner. For example, some judges were not consistently ordering forfeitures or entering judgments in a timely manner. Also, clerks who are responsible for processing forfeitures identified administrative barriers to performing their duties. Finally, as evidenced by the low number of motions filed, prosecuting attorneys are not motioning to forfeit despite statute stating that they may do so. In fact, two county attorney's offices stated that forfeitures are not prioritized. Bond exonerations can result when these key players do not perform their roles in the forfeiture process efficiently. While judges, clerks, and prosecutors contribute to the successful completion of forfeitures, court reminder systems have been proven to efficiently reduce the number of missed court dates and should therefore be considered by the AOC.

### **Judges Are Inconsistent in Their Forfeiture Practices**

Our survey of judges revealed that judges do not always initiate forfeitures as required. This is despite statute requiring that the court "...shall within 30 days of the failure to appear issue a bench warrant ..." and "...shall also direct that the surety be given notice of the nonappearance." Our survey found that only half (50 percent) of the responding judges indicated they always ordered the forfeiture of a surety bond after an FTA. From the survey, 18 judges said they sometimes ordered a forfeiture following a failure to appear, 11 said rarely, and one said never. One judge we interviewed, who responded "sometimes" to the survey stated that it is "not worth it" for clerks to do the work associated with the forfeiture process when "everyone eventually gets picked up before six months." According to this judge, law enforcement routinely brings defendants into custody within the six-month forfeiture timeframe, resulting in exoneration of the bond.

Although judges are not always initiating forfeitures, clerical staff can also initiate the process. According to a statement from the AOC's legal counsel, the forfeiture process can proceed without a judge's

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**According to AOC data, judges are not always initiating forfeitures.**

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order. For this to occur, in-court clerks must notice and correctly document that the bond terms have been breached. However, clerks who process forfeitures may not detect the need to begin the forfeiture process if judges do not initiate forfeitures or in-court clerks fail to document any breach in the bond terms. Therefore, the courts should clarify judicial and clerical roles in the forfeiture initiation process.

Finally, judges can delay forfeiture completion. Following the prosecutors motion to forfeit the bond, the final step necessary for a successful forfeiture is for the judge to enter judgment. Based on discussions with court personnel, we found that some judges are not entering judgments against forfeited bonds in a timely manner, despite having the statutory direction to do so. According to Utah Code 77-20b-104 (2), “a court shall enter judgment of bail forfeiture without further notice” when the following conditions are met.

1. The defendant failed to appear.
2. The surety was given notice of nonappearance.
3. The surety failed to bring the defendant to the court within the six-month period (or eight months if given an extension).
4. The prosecutor complied with the notice requirements.

Judges occasionally delay the entry of judgment even when all these elements have been met. For example, in one case, a defendant was charged with rape of a child, paid \$250,000 bail, and absconded. The forfeiture, which was processed correctly by the clerks and prosecution, has now been extended for over 10 months because the judge granted additional time for the commercial surety to bring the defendant to court.

One reason judges may be delaying judgment is to allow time for the surety to return the defendant to court. While we do not know the extent of this practice, this example demonstrates that judges do not always enter timely judgments. When judges do not follow the statutory timeframes, coupled with a weak forfeiture process, the incentives for commercial sureties to ensure defendants appear in court are reduced.

### **Clerks Reported Barriers in Processing Forfeitures**

Clerks reported barriers that can undermine efforts to carry out their forfeiture duties. Clerks have 30 days following an FTA to send

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**Judges occasionally delay the entry of judgment even when all requirements of forfeitures are met.**

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**Judicial clerks may lack adequate training regarding their role in the forfeiture process.**

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certified mail notification of nonappearance to the commercial surety, the commercial surety's insurance, and to mail a notification to the prosecutor. Clerks are also responsible for tracking the surety bond throughout the six-month period to make sure it has not been exonerated or extended.

Interviews with two clerks who handle all forfeitures for two metropolitan regions revealed that these responsibilities are made difficult for several reasons. First, the clerks indicated that the courts have not supplied adequate training to clerks that handle forfeitures. The two clerks said they felt that little training on processing forfeitures was provided to them or to in-court clerks. Second, the forfeiture process is difficult to track. For example, these clerks reported having ongoing difficulties tracking forfeitures cases through the entire process because of poor programming controls that allowed case tracking to be stopped on some cases. Third, bond forfeiture records can be lost when transferring cases to different courthouses, which they also attributed to control weaknesses. These concerns highlight the need for training on clerks' responsibilities in the forfeiture process.

### **Prosecuting Attorneys Do Not Always Prioritize Forfeitures**

While prosecuting attorneys have responsibility to request forfeiture of the surety bond at the end of the six-month timeframe, AOC data shows they do not always complete this task. Failure to do so prevents forfeiture completion. Prosecuting attorneys are required to file a motion for bail forfeiture and mail a copy of the motion to the surety. In practice, however, prosecuting attorneys may not be taking the necessary steps to process forfeitures.

We interviewed a deputy county attorney who stated that, while their county prioritizes forfeitures, they are one of the few counties to do so. Staff in two Wasatch Front county attorney's offices stated they do not prioritize bond forfeitures because "the defendant will return to court within a few weeks anyway." Again, this prevents the forfeiture process from proceeding. For example, one county attorney stated that the time and effort put into the process made the "...cost to carry out forfeitures greater than the reward." Prosecuting attorneys who fail to take the necessary steps to process forfeitures undermine the efforts of other key players in ensuring forfeiture completion. While improving the efficiencies of judges, clerks, and prosecutors will be an important

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**Two county attorney's offices reported not prioritizing bond forfeitures because of the likelihood of bond exoneration.**

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step towards processing forfeitures, court reminder systems offer an opportunity to prevent the need for forfeitures in the first place.

### **Court Date Reminders Show Evidence For Improving Court Appearance Rates**

Given Utah’s relatively high FTA rate of 25 percent, the courts should implement court date reminders. Studies from other states, including Colorado, Arizona, Oregon, Illinois, and Nebraska, have shown that reminding defendants of their court dates is very effective. For example, Jefferson County in Colorado studied the effect of telephone calls to provide reminders of upcoming court dates in addressing their rising FTA rates. Staff found a significant 43 percent reduction in FTA rates, reducing court staff time and providing an estimated \$200,000 in annual savings in jail bed costs. With the success of the study, the pilot was expanded to become the court date notification program. Similarly, Coconino County, Arizona, reduced their FTA rates from 25 percent to less than 13 percent by calling defendants in advance and reminding them of their hearing dates.

Despite strong evidence that court-automated notification systems are effective in improving court appearances and reducing costs, Utah’s courts do not use such a notification system. Utah court’s 2015 report on pretrial release and supervision practices recognized this deficit and recommended implementing a notification system. In light of successes elsewhere, we recommend that the courts adopt a court date reminder system.

While we found opportunities to improve the efficiency of court personnel in the forfeiture process and improve court attendance through a court reminder system, the need to redesign the forfeiture process to incentivize court appearance cannot be overstated. When people fail to appear in court, valuable staff time and court resources are wasted. Therefore, we recommend that the courts work with the Legislature to streamline the forfeiture process and implement the following recommendations aimed at improving court attendance and reducing costs.

### **Recommendations**

1. We recommend that the Legislature consider reducing the statutory timeframes for processing forfeitures from six months

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**Studies from Colorado, Arizona, Oregon, Illinois, and Nebraska have shown that reminding defendants of their court dates is very effective.**

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to between one and three months to better align with other states and Administrative Office of the Courts data.

2. We recommend that the Legislature consider requiring all forfeiture notifications to be processed via certified electronic mail.
3. We recommend that the Legislature consider working with the Administrative Office of the Courts to design a forfeiture process that improves court appearances and reduces the number of automatic bond exonerations.
4. We recommend that the Administrative Office of the Courts provide ongoing training to judges, clerks, and coordinate with prosecuting attorneys to receive training regarding statutory requirements for completing the forfeiture process.
5. We recommend the Administrative Office of the Courts adopt a court date reminder notification system.

# Appendices



## **Appendix A**



## Glossary of Terms

**Bail** – Bail refers to a deposit or pledge to the court of money or property in order to obtain the release from jail of a person accused of a crime. It is understood that when the person returns to court for adjudication of the case, the bail will be returned in exchange. If the person fails to appear, the deposit or pledge is forfeited.

**Bond** – A term that is used synonymously with the term “bail” and “bail bond.” (See above). This term is used in our report as shorthand for surety bond.

**Cash Bail** – Money deposited with the court that is refunded to the defendant if not convicted or if convicted can be forfeited and applied to court related fees. The bond can be paid by anyone, including the defendant. For specific types, see below.

**Cash Bail (low)** – A bond deposited with the court, the amount of which is below the Uniform Fine/Bail Forfeiture Schedule for the charge.

**Cash Bail (high)** – A bond deposited with the court, the amount of which is at or above the Uniform Fine/Bail Forfeiture Schedule for the charge.

**Commercial Surety/Bail Bondsmen** – A third party business who acts as a surety on behalf of a person accused of a crime by pledging money or property to guarantee the appearance of the accused in court when required.

**Conditional Release** – A form of nonfinancial pretrial release in which the defendant agrees to comply with specific kinds of supervision (e.g., drug testing, regular in-person reporting) in exchange for release from jail).

**Failure to Appear (FTA)** – When a defendant misses a scheduled court appearance.

**Failure to Appear Rate** – The percentage of cases that had one or more missed court appearances. One of the most basic outcome measures for pretrial service programs.

**Pretrial** – The term “pretrial” is used throughout this paper to refer to a period of time in the life of a criminal case before it is disposed. The term is a longstanding convention in the justice field, even though the vast majority of criminal cases are ultimately disposed through plea agreement and not trial.

**Release on Recognizance** – A form of nonfinancial pretrial release in which the defendant signs a written agreement to appear in court when required and is released from jail.

**Surety** – A person who is liable for paying another’s debt or obligation.

**Surety Bond** – A bond that requires the defendant to pay a fee (usually 10% of the bail amount) plus collateral if required, to a commercial surety, who assumes responsibility for the full bail amount should the defendant fail to appear. If the defendant does appear, the fee is retained by the commercial surety.

Source adapted from: *2012-2013 Policy Paper Evidence-Based Pretrial Release*, Conference of State Court Administrators; *Utah Code 31A -35-102 and 77-20b-100*.





## **Appendix B**



## 2016 UNIFORM FINE BAIL SCHEDULE

ANY OFFENSE NOT SPECIFICALLY NAMED ON THE BAIL SCHEDULE, AND NOT CONTAINED IN A SPECIFIC FINE/BAIL SCHEDULE SHALL BE AS FOLLOWS:		
<u>FELONIES</u>	<u>BAIL</u>	<u>COMMENTS</u>
• 1st degree with minimum mandatory sentence	\$25,000.0	Mandatory Court Appearance
• Other 1st degree	\$20,000.0	Mandatory Court Appearance
• 2nd degree	\$10,000.0	*Mandatory Court Appearance
• 3rd degree	\$5,000.00	*Mandatory Court Appearance
<u>MISDEMEANORS OTHER THAN LOCAL</u>		
• Class A	\$1,950.00	*Mandatory Court Appearance
• Class B	\$680.00	*Mandatory Court Appearance
• Class C	\$340.00	
• Infractions	**\$100.00	
<u>LOCAL ORDINANCES</u>		
• Class B	\$150.00	*Mandatory Court Appearance
• Class C	\$80.00	*Mandatory Court Appearance
• Infractions	\$25.00	

\* Unless otherwise authorized by Utah Code of Judicial Administration 7-301.

\*\* On an infraction, defendant cannot be held in jail in lieu of posting bail.

\*\*\*Local ordinances are subject to security surcharge.



## **Agency Response**





## Administrative Office of the Courts

Chief Justice Matthew B. Durrant  
Utah Supreme Court  
Chair, Utah Judicial Council

December 19, 2016

Daniel J. Becker  
State Court Administrator  
Raymond H. Wahl  
Deputy Court Administrator

John Schaff, Auditor General  
Office of Legislative Auditor General  
W315 State Capitol Complex  
Salt Lake City, Utah 84114

Dear Mr. Schaff:

Thank you for the opportunity to respond to the recently completed audit entitled *A Performance Audit of Utah's Monetary Bail System*. We concur in the audit findings and recommendations. I should note that the audit findings and recommendations are consistent with actions the Utah courts are already in the process of implementing.

I would like to acknowledge the professional manner in which your staff conducted this audit.

Sincerely,  


Daniel J. Becker  
State Court Administrator

cc: Chief Justice Matthew B. Durrant

The mission of the Utah judiciary is to provide the people an open, fair,  
efficient, and independent system for the advancement of justice under the law.

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