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Fixing the Money Bail System

By Judge Theresa Doyle

"[U]sually one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?"
—Robert F. Kennedy

The money bail system is under scrutiny across the nation, and for good reason. Requiring an accused to post money bail or go to jail conflicts with the presumption of innocence. Money bail fails to achieve effectively the goals of protecting public safety and ensuring future court appearances. Poor defendants who may pose little or no risk of violence or not appearing in court can languish in jail awaiting trial. Wealthy defendants at high risk for violence or flight can remain free by posting cash or property. Taxpayers pay the high costs of detaining people unnecessarily. Society bears the non-economic costs of lost employment, housing, family support, public benefits, and financial and emotional security for the children of the incarcerated person.

Racial disparities are worsened under a money bail system. Studies show that judges, like most others in our society, suffer from implicit racial bias, and that the race of the accused affects release and bail decisions.

Outcomes are worse for defendants who are in jail pretrial. Many decide to plead guilty, whether or not they are, in order to avoid the collateral consequences of remaining in jail. Studies show that defendants who remain in jail pending trial and decide to plead guilty receive stiffer sentences than do recidivist offenders who are not incarcerated pretrial, but are otherwise similarly situated.

Judges have discussed concerns about the unconscious influence that a defendant's custody status has on their sentencing decisions. With an out-of-custody defendant, the judge has to make an affirmative decision to send the person to prison or jail rather than imposing an alternative. An in-custody defendant is already there.

The data supports these concerns about defendants who are incarcerated pretrial receiving worse sentences. A study by the Arnold Foundation showed that in-custody defendants were three times as likely to be sentenced to prison, and their sentences were more than twice as long, when compared with out-of-custody defendants convicted of similar offenses and with comparable criminal histories.

Money bail has been challenged in recent lawsuits. The Equal justice Initiative recently filed a class action in California and seven other states. The grounds are violation of

equal protection, due process and the presumption of innocence. The constitutionality of monetary bail schedules, which set the bail amount by offense, is being litigated in several jurisdictions.

Many states and counties recognize the failures of the money bail system. Projects are underway across the nation to ensure release is based on risk, not financial ability. Most use an assessment of the risk of violence and failure to return to court. Judges set conditions of release to maximize the goals of court appearance and public safety. Pretrial monitoring follows.

Washington State is a "right to bail" state. The exception is where the charge is a capital offense or carries a potential life sentence. Wash. Const. Art. I, section 20. For all other offenses, Criminal Rule (CrR) 3.2 applies and presumes personal recognizance release (PR) absent a substantial likelihood of failure to return to court, or risk of commission of a violent crime or interfering with the administration of justice. Where the risk is failure to appear, CrR 3.2 requires the least restrictive alternative to money or property bond.

King County has one of the lowest incarceration rates nationwide, and a vigorous pretrial release program. In King County Superior Court, judges review the evidence supporting the current charge, the defendant's criminal history and other relevant information to assess risk of violence. To assess the risk of nonappearance, the judge considers prior warrants, family and community ties, residential stability, treatment participation, employment and other relevant information. If straight PR is not appropriate, judges then make an informed decision whether to detain the person on bail, or order work release, electronic monitoring, supervised treatment and education programs (Community Corrections Alternative Programs or "CCAP"), call-in day reporting, or other conditions. The call-in day reporting program costs less than $6 a day per participant, excluding overhead costs.

Some courts, such as Seattle Municipal Court, send text and telephone reminders of future hearings. Multnomah County uses an automated call system, which reduced the number of persons who failed to appear by 45 percent, and saved $1.6 million in a single year.

This smarter approach reserves jail beds for those who pose a risk of violence or flight, allows the remainder to be released and keep their jobs and housing, and offers treatment and support resources for those who need them. Often defendants in King County released to CCAP begin turning their lives around long before their trial date, and in return receive a more favorable resolution of their case. Judges who have presided over the felony release calendar, and have ordered defendants to CCAP, regularly hear from grateful defendants battling drugs or mental illness that CCAP was life-changing.

Pretrial release programs are not available in all counties. In preparing a presentation on money bail for the Superior Court Judges Association (SCJA) spring judicial

conference, I surveyed my colleagues and learned that other courts have nothing like CCAP's wrap around program. Few jails offer work release. Most counties have no day reporting. Many courts permit electronic monitoring through a private vendor, but the fees charged make it inaccessible to poor defendants. Some courts are using a risk assessment to inform release decisions, but report there are not enough jail alternatives when there is some but not a high risk of non-appearance in court. The default is jail. The problem is that pretrial programs and supervision cost money.

With a grant from Department of Justice (DOJ), Yakima County recently launched a pretrial release program as one of three national "Smart Pretrial" sites. The program uses a validated risk assessment from the Arnold Foundation to evaluate likelihood of violence and failure to appear. Pretrial release decisions are based on a tiered system, ranging from PR with an automated reminder call, to electronic monitoring with weekly contact with the pretrial services supervisor. Effectiveness and cost savings will be studied. The program could become a model for other Washington jurisdictions.

Even with sensible pretrial release programs, issues with Washington's bail system would still remain. Washington is a "right to bail" state, unless the charged offense carries a possible life sentence. Only then is preventive detention, or a "no bail" hold allowed. In all other high risk cases, the Washington Constitution requires judges to set a bail amount. What happens with these likely violent defendants is that prosecutors will recommend, and judges will often impose, a prohibitive bail amount they hope the defendant cannot afford. This practice perverts the purpose of bail which, according to the appellate courts, is to effect release of the accused. Paradoxically, a dangerous defendant who is wealthy and able to meet the high bail is automatically released. This undermines the goal of public safety. A fix, however, would likely require an amendment to the Constitution because bail setting is required in all but capital and potential life sentence cases.

Another problem is the unavailability of an appearance bond after a recent amendment to CrR 3.2, following State v. Barton, 181 Wash.2d 148 (2014). The prior version of CrR 3.2 provided in subsection (b)(4) that an accused could deposit ten percent of the bail bond amount with the court, and get that amount returned at resolution of the case, if the person attends court and has no new crimes. Unlike a commercial surety bond, an appearance bond allows the defendant return of the ten percent cash, which commercial bail bondsmen usually take as their fee. Obviously the appearance bond option benefits defendants with limited financial resources, who cannot afford to lose their 10 percent. Judges sometimes used appearance bonds where there was future appearance risk but little or no violence risk, and pretrial jail alternatives either were not available or not appropriate.

The problem in Barton was that the pretrial order required the ten percent "in cash or other security." The Washington Supreme Court in Barton held that this violated the defendant's constitutional right to bail "by sufficient sureties", meaning a third party guarantee of that ten percent of the bail amount. Barton, 181 Wash.2d at 168. Barton

threw the legality of appearance bonds into question. Commercial bonding companies hailed the decision.

Responding to its Barton decision, the Supreme Court then repealed that section of Criminal Rule 3.2 specifically authorizing appearance bonds. Likewise, King County Superior Court repealed that part of its counterpart local court rule. Now, fashioning a release order that operates like an appearance bond but complies with Barton and court rule is challenging. There is a proposed amendment to CrR 3.2 being studied which would specifically authorize appearance bonds and also comply with Barton.

The money bail system contradicts the presumption of innocence, discriminates based on wealth, fails to ensure public safety, jails people unnecessarily, imposes high social costs, and drives up jail costs. Fortunately, these flaws are coming to the attention of local governments, prosecutors, defenders and judges.

In April, at the annual SCJA judicial conference, there will be a presentation about money bail and alternatives used in other jurisdictions. Likewise, on May 25, 2016, Justice Mary Yu and I will co-chair a Symposium at the Temple of Justice in Olympia for the Supreme Court on issues with the money bail system. The Symposium is open to the public, lawyers welcome.

Theresa Doyle has been a King County Superior Court judge since 2005, and was a Seattle Municipal Court judge from 1998-2004. She has served as Assistant Chief Criminal Judge, Drug Court judge, Mental Health Court Judge (in Seattle Municipal Court), and on the criminal trial civil trial, and family law calendars. Judge Doyle works on criminal justice reform issues for the Minority & Justice Commission and Superior Court Judges Association (SCJA).