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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,

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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 support 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 under way 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 is a "right to bail" state. The exception is where the charge is a capital offense or carries a potential life sentence.1 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, 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 dates, 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 drug use 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 wraparound program.