



Reforming Florida's Pre-Trial Decision Making

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At the heart of the United States' criminal justice system is the principle that someone accused of a crime is innocent until proven guilty. Nevertheless, 60 percent of those detained in Florida jails—35,000 people on any given day¹ are awaiting trial, not convicted of a crime—at an average cost of more than \$815

million per year to Florida taxpayers.²

As it stands, current practices related to the pretrial phase of our criminal justice system do not fully promote public safety, fair and equitable treatment of defendants, or the effective use of community resources. It is instead a system based on a defendant's financial resources, as opposed to their

measured risk.

As Florida sets its sights on making significant and positive changes to our criminal justice system, it is imperative to examine pretrial decision making through a more rational, modern lens.

The point in the process where defendants are accused of a crime and are legally considered innocent until proven otherwise is among the most important decision making thresholds criminal defendants face. Yet this period (post-arrest

safety threat or that he or she will show up for court. Conversely, not having the ability to pay one's bail does not ensure that the accused is a public safety threat or won't show up for court. This inequitable treatment of the criminally accused at this stage by itself would warrant serious examination, and yet there are additional concerns with existing policy. Even the shortest of stays in a county jail can have significant impacts on both individual and longer-term public safety outcomes. Imagine, for example,

the consequences on employment, family security, and on a defendant's children. Further, the inability of an individual to afford bail can and often does exert additional pressure to enter a guilty plea, without regard to innocence or guilt, when facing the prospect of a destabilizing jail stay.

Pretrial release is a constitutionally protected right for defendants,³ with

many qualifiers in place to safeguard public safety.⁴ The presumption for most defendants is that they will be released pending resolution of their case. Florida law defines that the purpose of a bail determination is to ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the criminal defendant.⁵ As such, when bail determinations/release decisions are made,



EZ Out Bail Bonds in downtown Dallas Texas.

and prior to trial, often termed “pretrial”) is handled arbitrarily, with money serving as a much too powerful factor in the decision to release or detain a defendant. Chance is seldom if ever a game to be played in matters of public safety, and yet it is in fact the scenario we engage when money—instead of public safety—drives these decisions.

The challenge is that, often, having the money to pay a bail fee does not ensure a person accused of a crime is not a public

the majority fall under three categories:

- ROR (release on own recognizance— or with a personal pledge to return to court)
- release on cash or surety bond, and/or
- release under conditions (such as electronic monitoring or drug testing, often supervised through a branch of the court known as a pretrial services agency⁶).

For those released with monetary conditions, the decision on the cost of bail is guided by a bond schedule, for allowable offenses,⁷ which is a uniform list of recommended amounts by offense, with increasing amounts relative to the seriousness of the offense.⁸ While uniform bond schedules are an attempt to tie a monetary amount to the seriousness of the offense for which the individual is accused, they cannot account for factors that are illustrative of a person's potential risk of flight and reoffending, the protective purposes of bail.⁹

Money is not a proxy for public safety. However, money is a major determinant regarding pretrial release, and is a release factor for three out of every five felony defendants. Further, it has been a growing determinant. Between 1990 and 2009 the percentage of pretrial releases involving financial conditions rose from 37 percent to 61 percent. Money is also a substantial

factor in the unnecessary detention of too many defendants. Of those pretrial defendants detained with money set as a condition for release, nine out of 10 are not able to afford release.¹⁰

In 2015, Florida law enforcement made more than 750,000 arrests across the state.¹¹ What happens to these individuals as a function of pretrial status varies across the state. And while differentials do exist from county to county, there is an important parallel across all counties that compels additional statewide scrutiny: the cost. At more than \$8.2 billion annually, public safety demands the largest expenditures of

Florida's county budgets by category, with law enforcement and jails comprising half of that total.¹²

Apart from the sheer gravity of the taxpayer expense, there now exist bodies of research that can and should be leveraged to bring better value to both public safety and taxpayer investment. Defendants detained pretrial tend to experience harsher penalties than those who are not detained, and emerge with an increased

likelihood for future criminal activity. Comparing defendants detained pretrial versus those who are released, research by the Arnold Foundation found that those who were detained were:

- four times more likely to be sentenced to jail;
- three times more likely to be

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

Chief Justice William Rehnquist

- sentenced to prison; and
- when sentenced, sentenced for longer—almost three times as long for those sentenced to jail and more than twice as long for those sentenced to prison.¹³

Another Arnold Foundation study found that jailing someone unnecessarily affects short and longer-term public safety outcomes. Both low- and moderate-risk defendants detained in the pretrial period were more likely to commit crimes in both the immediate-term pretrial period, as well as years later. Low-risk defendants held for as little as three days were nearly 40 percent more likely to commit a new crime before trial than a low-risk defendant held no longer than a day, while the longer low-risk defendants were held, the more likely they were to re-offend.¹⁴

However, there is room for hope. Promisingly, research and practice in risk-based decision making is propelling changes in pretrial practices all over the country.¹⁵ Even more, Florida has a sound foundation and infrastructure of court practices and processing that is amenable to change, and indeed in some places innovation is already occurring.¹⁶

Pretrial services agencies exist in 29 of Florida’s 67 counties. These agencies are branches of the court charged with interviewing defendants and verifying information, administering assessments, making release and supervision recommendations to the court, and

supervising defendants. What’s missing is consistent across most jurisdictions throughout the country: an empirically-based risk assessment instrument¹⁷ to inform the processes.

Currently, most jurisdictions do not require a risk assessment. Instead, Florida law provides guidance on what information should be considered by judicial officers charged with decision making.¹⁸ However, while the law encourages that assessments are routinely employed, unlike an empirically-driven assessment, the law does not account for how much weight should be given these factors—or whether the information required is even useful.

Additionally, as required by Section 907.043 (4)(a)(b), Florida Statutes, the “Citizens’ Right-To-Know Act,” each pretrial services agency is required to submit weekly and annual reports intended to increase transparency of operations in these programs, yet which have no mechanism for measuring program

outcomes. Instead, the law requires the collection of already publicly available information described by the Florida Legislature’s auditing and accountability arm, OPPAGA, as adding, “limited value or are ambiguous.”¹⁹

Taking into account both the strengths and weaknesses of Florida’s current system and the universe of research available to address challenges being faced, there are policy prescriptions that can work on the margin. The following are two recommendations:

... jailing someone unnecessarily affects short and longer-term public safety outcomes.

Require the use of scientific pretrial risk assessments across Florida, to integrate the science of risk into modern and safe detention and release practices, to better inform the court, to reduce the costs and impacts of unnecessary pretrial detention, and to advance public safety.

Amend the statutorily required reporting by pretrial services agencies to focus on measures that reflect the core work of supervision and less on bureaucracy and information of limited value. Further study should include a statewide assessment and evaluation of current statutes and practices, focused on performance, and a more robust

collection of local jail population data.

Change can be challenging, and policy makers and criminal justice practitioners are well positioned to reduce the negative impacts of crime when the evidence stacks so compellingly against it. At the front-end of the system, in the decision-making process of whether to detain or release those accused of crimes prior to trial, we now have ample opportunity to do things differently, more driven by evidence, in order to achieve greater public safety and individual and societal gains. Every decision matters in cost and in consequence.

1. Project on Accountable Justice analysis of FL Dept. of Corrections monthly county detention facilities' statistics, at: <http://www.dc.state.fl.us/pub/jails/index.html>. Note, this does not include all counties.
2. Florida average cost per day per detainee is \$64. Florida Department of Corrections and Florida Legislature's Office of Economic and Demographic Research, 2014 Annual Jail Population Survey, accessed at: <http://www.dc.state.fl.us/pub/jails/2014/2014AnnualJailCapacitySurvey.pdf>.
3. The Eighth Amendment of the U.S. Constitution bars "excessive bail."
4. Article I, Section 14, Florida Constitution: "Pretrial release and detention.—Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained."
5. 903.046 (1), F.S.
6. There are 29 Pretrial Services agencies in Florida.
7. Many offenses are "not bondable," including for capital crimes and felonies punishable by life in prison.
8. See: 13th Circuit at: <http://www.fljud13.org/Portals/0/AO/DOCS/S-2014-023.pdf>.
9. The U.S. Supreme Court in *Stack v. Boyle*: bail must be based on an individualized assessment of a defendant's strengths and weaknesses.
10. BJS, Felony Defendants in Large Urban Counties-2009, 2013, accessed at: <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4845>.
11. Florida Department of Law Enforcement, at http://www.fdle.state.fl.us/cms/FSAC/Documents/PDF/arr_age_race.aspx
12. Florida Office of Economic and Demographic Research, Total County Expenditures, 2014, accessed at: <http://edr.state.fl.us/Content/local-government/data/revenues-expenditures/cntyfiscal.cfm>. Note: Courts are a separate category at nearly \$1 billion annually.
13. Lowenkamp et al., Laura & John Arnold Foundation, Investigating the Impact of Pretrial Detention on Sentencing Outcomes, 2013.
14. Lowenkamp et al., Laura & John Arnold Foundation, The Hidden Costs of Pretrial Detention, 2013.
15. Recent reform has included legal challenges and changes handled administratively, statutorily, and constitutionally. See: http://www.cleveland.com/metro/index.ssf/2016/12/13_places_that_saw_bail_reform.html#1.
16. Volusia County is testing an instrument with the Arnold Foundation, see: <http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/>. Palm Beach County is part of the MacArthur Foundation's Safety and Justice Challenge, see: <http://www.safetyandjusticechallenge.org/>. In 2011, a validated risk assessment instrument was made available to all counties. See: [http://www.pretrial.org/download/risk-assessment/FL%20Pretrial%20Risk%20Assessment%20Report%20\(2012\).pdf](http://www.pretrial.org/download/risk-assessment/FL%20Pretrial%20Risk%20Assessment%20Report%20(2012).pdf).
17. "The pretrial risk assessment should be empirically based and locally validated to be predictive of failure to appear in court and re-arrest while on pretrial status." See: <http://www.pretrial.org/solutions/risk-assessment/>
18. See: 903.046(2), F.S.
19. In 2010, OPPAGA reviewed the requirements of Citizens Right to Know and concluded that the Legislature could amend the statutes, "to improve accuracy and data uniformity, streamline reporting requirements, and reduce local costs..." to "...minimize administrative requirements that impede programs' ability to screen and supervise defendants."