Bail Reform in North Carolina -- What Are the Options?

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Categories : Uncategorized

Tagged as : bail, bond, policy, pretrial release, reform

Date : February 18, 2019

In my last post, I discussed some of the reasons why stakeholders are interested in bail reform. In this one I explore some of the changes that are being implemented and evaluated.

Procedural Changes

Citation in Lieu of Arrest

One procedural change jurisdictions are implementing is encouraging law enforcement officers to issue citations in lieu of arrest for low-risk defendants. The setting of pretrial conditions only occurs after an arrest. As discussed in my last post, in North Carolina the secured bond is the most common condition imposed, and can lead to wealth-based detentions and other negative downstream consequences. Encouraging officers to issue citations instead of making arrests for low-risk defendants limits the number of such defendants who might be subject to wealth-based detentions. Citation in lieu of arrest is widely used in the US and has been shown to save time for officers that can be diverted to more serious public safety matters.

Summons in Lieu of Arrest

Related to citation in lieu of arrest is encouraging judicial officials to issue a summons in lieu of an arrest warrant for a similar class of low-risk defendants, particularly those who would simply be released on non-financial conditions and without restrictions after arrest.

Early Participation by Defense Counsel

Because of the significant consequences of pretrial detention, national standards recommend early participation by defense counsel in pretrial proceedings. In North Carolina, defendants receive no representation at the first pretrial determination, the initial appearance. Because counsel typically isn't appointed for an indigent defendant until the first appearance, counsel has had no time before then to meet with the defendant, obtain the defendant's prior record, or prepare a meaningful pretrial strategy.

Early Participation by the Prosecutor

The prosecutor may have important information about the charges at issue that can inform the bail decision. Additionally, having the prosecutor involved as early as possible can facilitate early resolution of cases, which may benefit both the defendant and the system.

Prompt Judicial Review of the Magistrate's Pretrial Decision

Under North Carolina law felony defendants who are detained pretrial by a magistrate are entitled to a first appearance before a district court judge within 96 hours of arrest. However, no statute requires a first appearance for misdemeanor defendants who are detained pretrial. Although some North Carolina jurisdictions voluntarily provide first appearances

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to such defendants, many do not. In jurisdictions that don't, defendants charged with misdemeanors can spend more time incarcerated pretrial than they could possibly receive if ultimately found guilty. Prompt review of the magistrate's pretrial decision for all defendants is thus one avenue for reform.

Feedback Loop for Decisionmakers

Decisionmakers may not be fully aware of how their bail decisions translate into detention, appearance and public safety rates. For example, it may surprise some to learn that detention can result even at relatively low bail amounts. Providing decisionmakers information about the consequences of their decisions may improve pretrial decisionmaking.

Court Date Reminder Systems

When you have a hairdresser or dentist appointment, you're likely to get a phone call or text reminder. Many people want to do the same with criminal court dates. They note that there are many reasons why a defendant may not appear in court: the defendant may not know when or where his or her court date is, particularly if it's been continued; or may struggle to make adequate preparations, such as transportation, childcare, or getting time off from work. For these defendants, court date reminders in the form of mail notifications, phone calls, or text messages may greatly increase appearance rates. Thus, many support the use of court date reminders for all defendants, including those charged by citation or summons.

Better Ways of Assessing Risk

Another pretrial reform strategy is developing better tools for assessing a defendant's pretrial risk.

More Robust Pretrial Proceedings

One way to do this is with more robust pretrial release proceedings. Currently, many pretrial release proceedings happen quickly, taking only minutes per case. It's hard to imagine that in such a short period of time a judicial official can effectively evaluate risk of flight, risk of serious crime, whether conditions of release are necessary and what they should be, and, if money bail is used, the defendant's ability to pay. Taking more time in bail proceedings is likely to improve decisionmakers' ability to evaluate risk and determine appropriate conditions. Also, early involvement by defense counsel and prosecutors would improve decisionmaking at pretrial proceedings. Having more robust pretrial proceedings may increase court system costs. However if this change is implemented along with others—such as use of citation and summons in lieu of arrest—fewer bail hearings may be required overall.

Screening Tools

Because of the negative consequences for defendants and the community of unnecessary pretrial detention, jurisdictions are looking at screening tools to help immediately release defendants whose detention would cause more harm than good and to better measure pretrial risk posed by defendants so that appropriate pretrial conditions can be imposed. Jurisdictions can consider simple charge-based tools, such as a rule providing that all defendants charged with certain misdemeanors will be released on nonfinancial conditions. Other jurisdictions are using more sophisticated screening tools that use a set of defendant- and offense-specific factors to screen out those defendants who can be immediately released on nonfinancial conditions. Still other jurisdictions are using actuarial or empirically-based tools that seek to calculate the defendant's pretrial risk based on a set of factors that have been tested for predictiveness. The issue of using empirically-based tools is complicated, both in terms of the ability to create a tool that is sufficiently predictive and locally validated, and in terms of concerns that such tools are inherently unfair.

Right-Sizing Risk Management Strategies

Right-sizing pretrial risk management strategies means employing evidence-based practices to better match pretrial

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release conditions to the defendant's level of risk. In my prior bail reform blog post, I discussed how we're both over- and under-supervising defendants pretrial. The goal with right-sizing is to get that right, by carefully examining which tools work best for which defendants, without producing the set of negative consequences that I outlined in my last post. The range of risk management strategies is broad; it includes things like pretrial supervision services, electronic monitoring, substance use or mental health counseling, court date reminders, courthouse childcare, and transportation or transportation vouchers for court.

Empirical Evaluation

Rigorous empirical evaluation is incredibly important, not just to determine whether reforms are working vis-à-vis core pretrial metrics such as failure to appear and new criminal activity, but also to assess whether reforms are creating or exacerbating other problems, like racial disparities and wealth-based detentions.

Local Policy

North Carolina law expresses a preference for nonfinancial conditions. G.S. 15A-534(b). Notwithstanding that, financial conditions—secured bonds—are the most common condition imposed. Some jurisdictions are looking at revising their local bail policies to better conform to the statutory preference. They also are looking at whether bond tables, which are included in most local policies and recommend a financial condition at almost every offense level, are operating in contravention of the statutory mandate and the requirement for individualized bail determinations. Jurisdictions also are interested in providing better guidance in local policy regarding assessing defendants' ability to pay.

Statutory Changes

North Carolina stakeholders are discussing a variety of changes to state statutes. I mention just a few here. First, to statutorily require first appearances for all in custody defendants. Second, a constitutional preventative detention procedure so that decisionmakers have a lawful procedure to detain those defendants who are too risky to be released pretrial. Third, repeal provisions that allow defendants or others to opt out of conditions determined by a judge. For example, under current law if a judge determines that the most appropriate pretrial condition is a custody release, a defendant can refuse that form of release, opting for a secured bond. Fourth, a data bill. There is interest in this reform because current systems make it difficult for stakeholders to get accurate, timely reporting on key pretrial metrics such as the number of people detained pretrial in North Carolina, their charges, their demographics, and how long they've been in jail; court appearance rates for those charged by citation or summons and those released pretrial; new criminal activity rates with respect to conditions imposed; and racial disparities.

Having summarize these broad areas for reform, in future posts I'll discuss pretrial reform projects already underway in North Carolina.

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