Illustration by Joshua Boulet

SPECIAL REPORT

Locked Up and Poor

King County and Seattle courts use money bail to incarcerate defendants before trial. Should the system be reformed?

By Josh Kelety
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Roughly six days a week, recently arrested defendants in the King County jail in downtown Seattle stand before judges to be arraigned and, potentially, held in jail on money bail — often with little to no regard of their ability to pay it.

Money bail is a mechanism long employed and sanctioned by the Seattle and King County criminal-justice systems as well as in jurisdictions across the state and nation. Judges often set money bail in high figures to detain defendants, ensure they show up in court, and deter them from committing violent crimes.

But the system has come under fire by those who argue that bail unfairly imprisons poor and minority defendants, pushes defendants to plead guilty to charges regardless of their innocence, causes incarcerated defendants to lose their jobs and housing, fuels a bail-bond industry that profits off the incarceration of poor defendants, and ultimately doesn't serve public safety goals.

And the data largely bears this out. As of 2016, 65 percent of all inmates in city and county jails nationwide were non-convicted defendants, according to the U.S. Department of Justice. These same pretrial defendants account for the rapid growth in jail populations across the country in the 1980s and 1990s. Research has found that black defendants get pegged with higher money bail amounts than whites accused of similar offenses, and that defendants held on bail garner harsher sentences than non-incarcerated defendants facing similar charges.

States such as New Jersey, New Mexico, and Kentucky have restricted the use of cash bail, while California has completely eliminated it—instead requiring courts to decide whether to keep a defendant in custody or release them on conditions to await trial.

Local public defenders have long held the position that money bail is, at its core, unfair.

"It's innately flawed," Anita Khandelwal, interim director of the King County Department of Public Defense, told *Seattle Weekly.* "Because a rich person charged with a crime has bail set at $100,000 is able to leave jail and a poor person charged with that same crime can't."

The bail amounts requested by prosecutors depend on the seriousness of the charge along with the defendant's criminal history and record of meeting court conditions, such as showing up to court dates and obeying no-contact orders.

In King County Superior Court, prosecutors' bail requests for defendants facing felony charges (including armed robbery, domestic violence, and drug possession with intent to sell) can range from $5,000 to over $250,000, according to recent case filings compiled by the county Department of Public Defense.

In Seattle Municipal Court, where strictly low-level misdemeanor cases are handled, prosecutors' bail requests for minor charges such as criminal trespass and theft usually amount to around $1,000 or less, public defenders claim. Defendants facing misdemeanor domestic violence charges can garner up to $10,000 bail requests.

Some public defenders say prosecutors shouldn't even file low-level offenses such as criminal trespass and theft.

"People come out with criminal convictions and criminal histories that make it harder for them to rehabilitate and increases recidivism," Khandelwal said. "Those cases don't belong in the system at all."

'A Lot of Our Clients are Homeless'

Most of the county jail inmates who cycle through Seattle Municipal Court are homeless or experience housing instability, according to Marci Comeau, a longtime public defender with the King County Department of Public Defense who frequently represents those defendants during their arraignments.

“The biggest problem for our clients isn’t that it’s $1,000 or less,” Comeau said of money bail. “Our clients generally can’t pay any amount.”

Comeau recalled a recent a client who was arrested on a bench warrant for missing a court date.

“I remember he had a reasonable excuse on why he had missed the court date, and it was sleeping in a park,” she said. “A lot of our clients are homeless and it is not easy for them to keep track of court dates.”

In court, the city asked for bail because of her client’s bench warrant. The judge granted it, and the client eventually pleaded guilty because he didn’t want to spend more time in jail.

“Those are the kind of cases that are really hard because if he had been a person of even moderate means, he would have been able to exercise his right to go to trial, a right we’re all supposed to have,” Comeau said. “But because he is poor and homeless, he now has a conviction on his record.”

During a recent arraignment in Seattle Municipal Court, defendant James Mammes was charged with stealing hats, socks, and pants from the TJ Maxx in downtown Seattle. Mammes had missed some of his recent court obligations. His defender argued against the imposition of bail, and told the presiding magistrate judge—magistrates serve as appointed unofficial judges in low-level court proceedings—that Mammes was homeless and lacked a violent criminal history.

But the magistrate judge pointed to his extensive list of bench warrants, which are arrest warrants issued by the court if a defendant fails to appear. Mammes’ bail was maintained at $500.

Mammes, obviously distressed at the prospect of being detained, repeatedly asked why he couldn’t be released.

“I already told you. You don’t come to court,” replied Mary Lynch, the magistrate judge. Absent from her response was any inquiry into the defendant’s ability to post bail.

Mammes was quickly escorted out of the courtroom, and another red jumpsuit-clad inmate took his place.

Another defendant, David Arlotta, had his bail maintained at $5,000 because of outstanding warrants stemming from charges of obstruction of a police officer and theft. One public defender who was present told *Seattle Weekly* after the court session ended that it had been one of the better days for their defendants.

Up to the Judge

Per the state constitution, Washington is a right-to-bail state. And while statewide court rules give an explicit "presumption of release" for all defendants (except those accused of capital crimes), bail is permitted if defendants are deemed by judges to be at risk of not showing up to court, committing a violent crime during the length of their case, or impeding the court proceedings, such as tampering with witnesses.

The rules also note that judges "must consider [the] accused's financial resources" when setting bail and that the "least restrictive" option, such as electronic home monitoring, be pursued when trying to ensure a defendant's appearance in court.

In theory, the rules governing courtroom practices statewide prioritize the release of defendants, but also allow for pretrial incarceration of defendants under money bail if judges think it's warranted.

Despite the existence of the court rule, bail practices in Washington state constitute a "two-tiered" criminal justice system, according to a 2016 report from the American Civil Liberties Union.

"In Washington counties where data is available, approximately 60 percent of the people in county jails at any given time — thousands of people — have not been convicted of a crime," the ACLU report reads. "They are locked in jail simply because they cannot afford the amount of bail set by the judge. This high rate of pretrial detention exists despite the fact that Washington court rules generally mandate the release of people accused of crimes before trial."

The report continues: "Judges in Washington often impose bail at an amount much higher than many people can afford to pay, and without consideration of individual financial circumstances and resources. This

practice is a glaring example of the reality that for people facing criminal charges in our state, there are two systems: one for the wealthy and one for the poor."

Judges in all courts frequently only have minutes to decide whether to hold or release a defendant, and arraignment calendars are packed. Relying on a systematic way of evaluating defendants — such as strictly by their criminal history and record of failures to appear — can become a way for judges to navigate their calendars efficiently.

Arraignments for individual defendants take, at most, 10 minutes, and courts are routinely expected to move through more than 20 inmates in a few hours. Judges usually only have access to police incident reports and defendants' criminal histories when making their decisions about release.

"We only have, virtually, seconds, to review that information," said Ed McKenna, a presiding judge at Seattle Municipal Court. "We don't have adequate information in many cases."

"There has to be a mechanism to bring defendants to court and to protect the public against violent offenders," he added. "Bail, it's not always effective. It benefits many people. But it hurts a lot more."

Seattle Municipal Court judges have limited options to keep defendants out of jail, but still ensure their appearance in court. Defendants can only be mandated to day-reporting at a resource center in downtown Seattle or given electronic home monitoring. The latter requires that defendants have a home and resources to pay for the costs of wearing an ankle bracelet. Between 60 and 100 municipal court defendants are referred to home monitoring and day-reporting each month, according to court spokesperson Gary Ireland. The court uses an automated calling system to inform defendants several days in advance of an upcoming court date and is working on implementing a text-message reminder system by the end of 2018.

"Right now, we don't have a whole lot of really great tools to ensure defendants return to court," McKenna said. "If we can find a way to release a defendant in a way to ensure that defendants will come back to court, I think all judges would utilize that."

Mark Larson, who oversees roughly 170 deputy prosecutors in the criminal division of the King County Prosecuting Attorney's Office, vigorously contests the notion that King County as a whole is incarcerating people more often than it's releasing them on various conditions like day reporting or electronic home monitoring.

Larson argued that the disparity between the roughly 12,000 defendants his office files annually and the estimated 1,600 non-convicted inmates held in county detention facilities on any given day as evidence that the system, is, if anything, lenient.

According to the King County Department of Adult and Juvenile Detention, the average length of incarceration for pre-sentence felony inmates is 40 days.

"I don't think this system is looking to jack people up and hold [them]," he said. "I think we have a great willingness to put people out in the community while we await trial."

Staff from both the Seattle City Attorney's Office and the King County Prosecutor's Office told *Seattle Weekly* that their attorneys largely prioritize a defendant's criminal history – including any history of failing to appear in court or meet other imposed conditions – over a given defendant's ability to realistically post bail.

As for non-violent defendants and chronic re-offenders who commit frequent property crimes (such as car prowls) driven by drug addiction, Larson said: "I don't want them in custody pretrial because I'm aware of those detrimental effects. I would love to sort of guard against those. But the community also demands some assurances that they're not committing new crimes."

Local Courts

Local courts lack comprehensive and detailed data on how bail is being utilized on a regular basis, such as what types of defendants are garnering bail and for how much. There is also little information on how bail decisions are affecting the pretrial inmate population in county jails.

Based on available data, it's clear that local King County detention facilities are largely filled with defendants who have yet to be convicted.

While the total number of inmates in King County detention facilities has dropped significantly over the past two decades, about 75 percent of the average 2,124 adult inmates held on any given day in county jails are either pre-trial or currently on-trial, according to King County Department of Adult and Juvenile Detention spokesperson Linda Robson. Out of those roughly 1,600 inmates that are pretrial, the majority (68 percent) are defendants accused of felonies.

Spokespersons for King County Superior Court—which handles felony cases—and the county's Department of Adult and Juvenile Detention told *Seattle Weekly* that they had no way of determining how many of those inmates were held on bail. The estimated daily cost of keeping defendants in county detention facilities is $189 per inmate.

How many of those inmates are held on bail amounts that they can't pay? Seattle Municipal Court alone has some idea how many of their defendants end up in that situation. According to data from Jan. 2017 through July 2018, the court keeps between 117 and 180 defendants with misdemeanor charges in the King County jail in downtown Seattle on bail holds. The City of Seattle contracts with King County to keep its detained municipal court defendants in the downtown Seattle county jail.

According to a 2015 internal court study of a small sample of municipal court defendants, 31 percent of defendants facing misdemeanor charges were held in jail after their arraignment because they couldn't post bail. That same study also found that 60 percent of the defendants included in the sample who did not post bail were homeless.

Dan Clark, assistant chief criminal deputy at the King County Prosecuting Attorney's Office, said his staff collaborated with the Department of Adult and Juvenile Detention to find out what portion of the county jail inmate population was held on bail amounts of $1,000 or less. The result, according to their analysis, is less than one percent.

However, this stat doesn't provide much context to the true scope of the issue because many bail amounts set by Seattle and county judges frequently range from $5,000 to the tens of thousands of dollars, depending on the severity of the charges against a defendant and whether they've missed court appearances in the past. For example, in March 2018, bail was set at $5,000 by King County Superior Court for a defendant charged with retail theft from a Nordstrom who had a history of numerous drug possession charges, jail bookings, and bench warrants.

In Seattle Municipal Court rooms, the same logic applies. Kelly Harris, criminal division chief at the Seattle City Attorney's Office, told *Seattle Weekly* that his attorneys request bail amounts to ensure a given defendant "can't afford to set down that amount of money and walk away from court."

Harris added that his attorneys will adjust bail requests based on the known economic circumstances of a given defendant. Of the underlying problem that the bail system innately rewards rich defendants and jails poor defendants, Harris said: "That's always been the case."

Larson with the prosecutor's office said that his deputy attorneys will usually request a summons to court and not money bail in non-violent cases where defendants lack a substantial criminal history or record of missed court dates.

However, anecdotal observations from some public defenders contest that narrative. John Marlow, a felony attorney with the Department of Public Defense, told *Seattle Weekly* back in June: "I can only recall at most two cases [over the past several months] where a prosecutor has recommended to the court that they just issue a summons."

Bail Reform Options

Amendments to the Washington state constitution — which is what would be required to eliminate the money bail entirely — require the approval of two-thirds of the Legislature and a vote of the people.

King County Superior Court Judge Theresa Doyle, an advocate for money bail reform, said it's unlikely the system can be written off the books entirely.

“For all practical purposes money bail is here to stay in Washington state,” Doyle told *Seattle Weekly.*

But some reform efforts are underway. In 2017, a statewide Pretrial Reform Taskforce consisting of prosecutors, judges, public defenders, and researchers was established to develop policy recommendations to expand pretrial release. Those recommendations are slated to be published in the coming months.

Seattle City Councilmember Lisa Herbold has also convened an interdepartmental workgroup with the City Attorney’s Office, the Seattle Municipal Court, and the King County Department of Public Defense to discuss how the city can reform its pretrial bail practices. This group is compiling a two-part report, and the second portion is due at the end of this year.

“It feels like there’s resistance to changing practices and I think resistance to an approach that challenges the courts right to make these determinations,” Councilmember Herbold told Seattle Weekly of her workgroup.

However, these conversations are just that — conversations. Part of the slow movement on the issue is due to the fact that bail has been baked into Washington’s criminal justice system for so long.

“If the practice is developed in the court among judges to do things a certain way … that will continue until it’s interrupted,” Doyle said. “We’re kind of in the early stages of internalizing all that information about the very ill, counterproductive effects of pretrial incarceration.”

When it comes to bail, judges are concerned about public safety and ensuring defendants appear in court — except that they are the ones making the final call on whether a defendant goes free. And with that, particularly in cases of defendants accused of violent felonies, comes its own set of pressures on judges to prioritize public safety above civil liberties.

“If we make the wrong call in our prediction about whether this person is going to commit a violent crime, then we’re on the front page of the Seattle Times the next day,” Doyle said. “Judges are afraid of getting it wrong. We’re afraid of people being hurt by our decisions. And then there’s the reaction to that and that is unpleasant.”

Virtually all stakeholders—including prosecutors—point to beefing up services for defendants that can serve as alternatives to pretrial detention to reduce the local justice system’s reliance on money bail.

King County funds several pretrial alternative services, such as electronic home monitoring and the Community Center for Alternative Programs (CCAP), which is a Seattle-based facility where defendants can be referred in lieu of incarceration.

At CCAP, defendants are required to check in, and the program keeps them abreast of upcoming court dates or probation procedures. They can access case managers, on-site GED preparation classes, drug treatment, domestic violence education, and referrals to services in the broader community. In the past 12 months, just under 1,000 clients have been served by the program. CCAP also serves pretrial defendants and post-conviction individuals.

Some say CCAP is inadequate as a pretrial service to ensure defendants show up to court.

“CCAP’s design really is for the post-conviction world,” said Marcus Stubblefield, a criminal justice policy adviser to King County Executive Dow Constantine. “As a sort of a monitoring system to ensure people show up to court or help them not recidivate, that is not CCAP’s strength. It’s sort of a band-aid on that.”

As such, Constantine has not allocated additional funding in his 2019-2020 budget proposal to expand CCAP to the Maleng Regional Justice Center—the county’s other jail that holds roughly 40 percent of its inmates—despite calls from some stakeholders to do so. King County Superior Court already has funding for a text message reminder system, but hasn’t made it

mandatory for all defendants due to concerns from public defenders over their clients' privacy and that it could lead to pretrial detention for clients who receive text messages but still fail to appear in court.

Some have pointed to Spokane and Yakima counties, which utilized grant money to reform their pretrial detention practices partially through implementing "risk assessment tools," which are essentially computer algorithms that utilize a defendant's criminal conviction history, age, and record of failing to appear in court. These factors are used to quickly judge whether a candidate is likely to commit a violent crime or fail to appear in court if released.

So far, Spokane County has had mixed results—that jail population has remained largely stagnant—while Yakima County has experienced reduced racial disparities in defendants released pretrial, among other positive outcomes.

Khandelwal, interim director at the Department of Public Defense, argues that local governments should fund non-court based pretrial alternative services similar to the Law Enforcement Assisted Diversion (LEAD) program, which sends low-level drug and prostitution offenders to social workers instead of jails.

The line of thinking is that these defendants would be better served by case managers who can help them keep up with their court appearances, but also find services that could address some of the underlying issues – like drug addiction and homelessness – that cause them to end up in jail in the first place. LEAD case managers also don't cut off services to clients if they relapse into drug use, unlike CCAP, which frequently requires that defendants submit random drug testing. A 2015 evaluation of LEAD found that participants in the program experienced improved outcomes in terms of jail bookings and time spent in jail.

But building up any kind of new or additional service alternatives to pretrial incarceration requires significant financial resources—and King County is already strapped for cash. Expanding CCAP services to the Maleng Regional Justice Center in Kent is estimated to cost between $1.4 million and $2.5 million annually.

“The constitutional, legal, and really the public policy issue with pretrial release is this: how much risk of a future event ... commission of a violent crime, witness tampering, or failure to appear in court, does it take, in a free democratic society, to warrant jailing a constitutionally presumed innocent person before trial,” Judge Doyle said. “That’s the essence of it.”

This story has been updated.

King County Correctional Facility is located at 500 5th Ave., Seattle. Photo by Josh Kelety