

Bail injustice in the time of COVID-19 | COMMENTARY

By Doug Colbert and Colin Starger

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Bail reform has not panned out as many had hoped, especially during the pandemic. (Dreamstime/TNS)

Ever since Maryland courts closed in mid-March, we have been concerned how judges would approach bail hearings during the pandemic. Because of COVID-19, jailed defendants must wait in unsafe conditions for months as they face pretrial delays because courts aren't fully open. Those accused of crimes now are caged 23 hours a day in 12' x 15' cells and must endure without visits from loved ones, recreation, or even bathroom privacy. It's a nightmarish scenario.

To address the issue Chief Judge Mary Ellen Barbera issued an emergency order directing every judge to consider COVID-19's life-threatening health risk when deciding whether evidence clearly established a defendant's flight risk or level of danger to the community to justify no-bail lockup.

The question became would judges restrict "no bail," stay-in-jail remands to even more "carefully limited circumstances" that Supreme Court precedent requires.

We decided to investigate. Together with a team that included two of our law students, we received authorization to join the 11 a.m. daily bail hearings of male defendants conducted over Zoom. From June 1st through July 31st, we

listened to all 496 hearings decided in Baltimore City District Court courtroom 4. What we heard during these long hours was disturbing and raises serious concerns about bail practice during the pandemic.

For context, every bail hearing occurred after a defendant had either received a stay-in-jail, “no bail” incarceration ruling, or a bail he could not meet from a court commissioner. The reviewing district judge whom we observed considered pretrial status anew. While 10% of the cases we observed involved violent felonies, most cases (40%) involved misdemeanor assaults with no serious injury but carrying potential 10-year sentences. Defendants charged with misdemeanor weapons or felony drugs appeared regularly.

Frequently defendants charged with property and traffic crimes, such as driving without a license, also appeared and face a likely unconstitutional “preset no bail” condition where judges deny liberty to absent defendants without first waiting to hear the explanation of the accused. Reviewing judges make matters worse by declining to reconsider the uninformed, preset decision and returning the accused to jail.

Considering Maryland high court’s focus on reducing the jail population, a defendant’s entitlement to liberty before trial, and the chief judge’s pandemic memo, we expected to find a substantial majority of defendants released. Instead, we found the opposite. Judges remanded six of 10 detainees to jail (62%) and granted freedom to only one of three people. In the few remaining cases (5%), judges ordered often unaffordable money bail. It seems the court flipped the presumption of release to presuming incarceration.

While the 67% pretrial detention rate reflects judges as a whole, there was variation among the 14 different judges. Though all the judges generally treated defendants with the formal respect required, only two of the 14 judges

freed more than 50% of defendants. Several detained as many as 70% to 90% of defendants, a rate seemingly out of line with the acts and criminal records of the accused.

Prosecutors bear some responsibility for this situation. Across the 496 observed hearings, prosecutors urged release for 23 defendants based on COVID-19 concerns (with judges not always accepting these nods to the pandemic). Prosecutors recommended “no bail” lockup in 95% of cases. Likewise, the state’s pretrial services agency recommended detention over freedom in 80% of cases, sometimes ignoring low or moderate risk assessments.

How do we explain this overwhelming pretrial incarceration? Judges may fear the consequences of releasing a defendant who then commits a serious crime while on pretrial release. Even though this nightmare happens rarely, judges anticipate bad media coverage and blame from law-and-order officials. Better safe than sorry goes the logic. This possible explanation is supported by the fact that hardly anyone raises an objection when judges condemn another defendant, 90% of whom are African American, to jail or no bail.

However, the law presumes those accused of crimes to be innocent. Judges are supposed to ignore public opinion and personal interest when deciding cases. Prosecutors are supposed to be ministers of justice. And pretrial services is supposed to help facilitate pretrial release whenever possible. Efforts should be made by all to reduce pretrial incarceration — rather than making it the default option. It would be wrong to detain so many in ordinary times; it is doubly wrong during a pandemic.

In the end, we need all the actors in the system to commit to granting legally warranted freedom to more people. This will require the courage to push back against a culture of pretrial incarceration. With no end in sight for COVID-19, pandemic justice requires greater protection of accused people's liberty and lives.

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