

# PROSECUTORS & BAIL

## USING DISCRETION TO BUILD A MORE EQUITABLE AND EFFECTIVE SYSTEM

Compared to low-risk defendants detained for 24 hours or less:

Low-risk defendants  
detained for 2-3 days are

**40%**

more likely to commit  
new crimes before trial

Low-risk defendants  
detained for 31+ days offend

**74%**

more frequently



**7** out of **10**  
people in jail are  
presumed innocent

**Of the 630,000 people in U.S. jails today, 443,000 are awaiting trial.**<sup>1</sup>

That is, 7 in 10 people behind bars in the nation's more than 3,000 jails are presumed innocent. Over the last 15 years, 99% of the total jail growth in the United States was in pretrial detention,<sup>2</sup> and 90% of those awaiting trial in jail are incarcerated because they have not paid bond.<sup>3</sup>

As human stories and accompanying research increasingly document the urgent need for bail reform, and local and state legislatures consider legislation regulating the use of cash bail, prosecutors can take immediate action to advance bail reform that can help build a more equitable and effective system.

Using their power as democratically elected officials with significant discretion, prosecutors have the capacity to devise and implement bail policies and

practices that are true to the constitutional protections of equality under the law and innocent until proven guilty.

**The use of cash bail and pretrial detention undermines safety and exacerbates inequities.** Defendants

detained until trial or case disposition are more likely to be sentenced to prison and for longer periods of time than those released before trial.<sup>4</sup> And rather than keeping communities safe, pretrial detention has been shown to increase the likelihood that low-risk defendants will commit a new crime.<sup>5</sup>

People of color and low-income individuals are disproportionately impacted by pretrial detention. More than half of people in jail report income below the poverty line.<sup>6</sup> African-American and Latino defendants are more likely to be denied bail than similarly situated white defendants.<sup>7</sup>

**30%** of the U.S. population  
is Black or Latino

**vs**

**50%** of all pretrial detainees  
are Black or Latino

The effects of pretrial detention stretch beyond the jail gates, impacting families and entire communities. Even short-term periods of incarceration carry significant and destabilizing collateral consequences, hindering access to public benefits and housing, straining childcare and custody, and damaging ties to employment. Research shows that families with an incarcerated loved one struggle to meet their families' basic needs due to the loss of income, and the costs of calls and visitation.<sup>8</sup>

1. Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2017*, 2017.
2. Prison Policy Initiative, *Jails Matter. But Who is Listening?* 2015.
3. Pretrial Justice Institute, *Bail in America: Unsafe, Unfair, Ineffective*, 2017.
4. Laura and John Arnold Foundation, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, 2013.
5. Laura and John Arnold Foundation, *Pretrial Criminal Justice Research*, 2013.
6. James, D.J., *Profile of Jail Inmates, 2002*, Bureau of Justice Statistics, 2004.
7. Demuth, Stephen, "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees," *Criminology* 41.3, 2003.
8. The Ella Baker Center for Human Rights, *Who Pays? The True Cost of Incarceration on Families*, 2015.

## CASE STUDY

# COOK COUNTY, ILLINOIS STATE'S ATTORNEY KIM FOXX

In March 2017, Cook County, Illinois State's Attorney Kim Foxx announced that her office was reforming their bail policies.<sup>9</sup>

(1) SA Foxx requested lists of individuals who were detained on bonds of \$1,000 or less. The data revealed that over 200 people were held on bonds under \$1,000, and that specific low-level offenses were driving pretrial detention. After case review, prosecutors supported release of defendants on their own recognizance when held on bonds up to \$1,000.

(2) Assistant State's Attorneys were instructed and trained to affirmatively support release on recognizance when there is no prior violent criminal history, the current offense is a misdemeanor or low-level felony, and there are no other risk factors.

(3) The office instituted complementary policies that narrowed the scope of prosecution for retail theft—raising the felony threshold from \$300 to \$1,000—and declined to prosecute financially-related traffic cases.

### Prosecutors Have the Power to Drive Bail Reform

By examining local jail data—including how many individuals are held on low-level offenses and what charges are driving pretrial detention—and taking action to reduce reliance on cash bail, prosecutors can use their discretion to devise and implement policies that reduce the criminalization of poverty and enhance safety for all.

Prosecutors can also use their position to collaborate with other criminal justice stakeholders. State and local legislatures, for instance, are increasingly taking up bail reform as a priority. Prosecutors have a strong voice in supporting legislation that channels resources towards safety and fairness, and minimizes harm caused by unnecessary incarceration.

### Safety, Fairness, & Legitimacy: Potential Impacts of Bail Reform

Bail reform can lead to significant savings for jurisdictions. With the

annual jail stay reaching over \$70,000 per person in some jurisdictions,<sup>10</sup> there is an opportunity for resources to be reinvested into safety priorities and community-based services.

While those who oppose bail reform may contend that pretrial detention prevents crime and ensures court appearances, lessons from jurisdictions that are leading bail reform have shown that alternatives to cash bail do not jeopardize these vital components. Washington, D.C. eliminated cash bail in 1992 and has consistently shown positive results.<sup>11</sup> New Jersey and Connecticut both recently passed state-wide legislation limiting the use of cash bail, with studies pending.<sup>12</sup>

As elected officials, prosecutors have direct ties to the communities they serve. Frequently, communities most impacted by violent crime are also those that are disproportionately harmed by the use of cash bail and pretrial detention. Prosecutors have an opportunity through bail reform to work

### In Washington, D.C. in 2015

**91%** of released defendants remained arrest-free through adjudication

**90%** of released defendants made all scheduled court appearances

with their communities, to acknowledge harm from previous bail policies, and to demonstrate that they are dedicated to enhancing safety while ensuring fairness. Innovations that build a more equitable and effective criminal justice system ultimately strengthen community trust and legitimacy.

9. Schmadeke, S, "Foxx agrees to release of inmates unable to post bonds of up to \$1,000 cash," *Chicago Tribune*, 2017.

10. Pretrial Justice Institute, *Bail in America: Unsafe, Unfair, Ineffective*, 2017.

11. Pretrial Services Agency for the District of Columbia, *Research & Data: Performance Measures*, 2017.

12. "New Jersey Eliminates Most Cash Bail, Leads Nation in Reforms," PBS, 2017; Pazniokas, M., and K. Phaneuf, "Bail Reform Wins Final Passage in Senate," *The CT Mirror*, 2017.