



Bail shift threatens bondsmen

Ariz. courts moving away from cash-based system

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Every three hours, family members and friends of alleged lawbreakers sit in a tiny, windowless waiting room in downtown Phoenix, straining to hear the fate of their loved ones.

Through a monitor, they can watch as the defendants approach a judge and listen to the allegations of crimes committed. The big moment comes at the end, when the judge reveals the bond amount.

"You have a \$5,000 secured appearance bond in this court case, sir," she tells one man accused of possessing dangerous drugs. A floppy-haired young man accused of resisting arrest is released on his own recognizance.

In the lobby, there are small celebrations and sighs of relief for the good news. For the high bonds, family members curse or shake their heads.

Celebrations may be even more like-

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ly as the months pass.

A metamorphosis is underway in the state's pretrial-release system. Through judges' directives, Arizona courts appear to be paving the way to wipe out the financial-bail model.

Judges have been urged to rely on individuals' personal risk factors, rather than a standardized dollar amount based on allegations, to determine their release conditions.

Proponents for bail reform say changes could ensure that low-risk defendants aren't sitting in jail just because they are poor, and high-risk defendants aren't released because they can't foot the bill.

An April 3 rule change set in motion by the Arizona Supreme Court urges judges to embrace the risk-assessment system, spelling out the release options that should be favored over the ones that require a bail-bond company.

"This is a major undertaking," said Jerry Landau, government-affairs director for the Arizona Supreme Court. "It's a major step in criminal-justice reform that affects the community and affects many people who come in contact with the criminal-justice system."

The move is energizing criminal-justice reform advocates but stoking fear among the state's bail-bonds companies, whose industry faces certain death should courts stop imposing financial release conditions.

Joshua Burns, president of Quick Bail Inc. in Phoenix and Tucson, said the demand for his business plummeted after the April 3 rule change.

"Before, we would have tons of calls rolling in, people needing my help," he said. "Calls have significantly dropped. I've noticed more people have been released no matter what the charge is."

Burns said people accused of felonies now are more likely to be released on their own recognizance, under the supervision of pretrial-service officers or on a bond of a couple hundred dollars.

"I'm extremely worried," he said. "I'm not only worried for my business, but for my community. I do live here as well, and seeing people released so easily without supervision is a little alarming to me."

Bail reform in the U.S.

Bail reform has been gaining traction around the country, largely based on models that federal courts and Washington, D.C., have followed for years.

While Arizona is one of the states leading the charge, the strategy has been to slowly phase out the old model and let the justice industry ease into a new one.

Other states are taking a different tack. New Jersey almost entirely overhauled its system this year, with changes implemented Jan. 1.

Cherise Fanno Burdeen, CEO of the Pretrial Justice Institute, said there's been a national resurgence in efforts to reform the money-based practice.

Until about five years ago, she said, her organization was working county by county, looking to spark incremental changes. But she said states recently have looked to play a more fundamental role, working to secure a uniform process throughout their lower courts.

Fanno Burdeen points to a catalog of research that demonstrates the benefits of bail reform. A study from the Laura and John Arnold Foundation notes how low-risk defendants may lose their job or housing if they can't foot the bill to get out of jail, making them more likely to be arrested again.

A 2013 study from the Pretrial Justice Institute found that defendants paying for release were no more likely to show up in court than people who promised to pay on the back end if they failed to appear.

"There is absolutely no scientific evidence, anywhere, that (a bail bond) makes you more likely to come to court," Fanno Burdeen said. "This whole 'skin in the game' business is false."

What's happening in Arizona

A few pretrial courts in Arizona have used a risk-assessment tool for years, but the standardized assessment became statewide only last year.

Here's how it works: After an arrest and before their first appearance with a judge, defendants will be screened by a court employee to predict both potential danger to the community and failure to appear.

The test is deceptively simple. It doesn't require an interview with the defendant, and it's based on just nine variables, including whether the defendant had prior felony convictions or prior failures to appear in the past two years.

The tool is based on evidence gathered from the Arnold Foundation, which analyzed data from more than 1.5 million cases over 300 jurisdictions, according to its website. After the screening, the assessment will give a score that will determine whether the defendant should be released, released with conditions like pretrial supervision or held in jail before trial.

The results are then forwarded to the court commissioner, who sets release conditions at the defendant's first courtroom appearance. The commissioner isn't required to follow these recommendations; it's just one factor they consider in their deliberations.

Some critics — the most vocal of which represent bail-bond companies — say there isn't yet enough infrastructure in place at the courts to replace the private-sector bail industry. Short of a financial stick, they argue, courts lack the incentive to draw defendants back to court dates. Samantha DuMond, the attorney for the Arizona Bail Bonds Association, said she believes the recent rule changes already have spiked the number of people who are failing to show up for their hearings.

DuMond said the courts haven't yet created a method to enforce collections — a task that traditionally was shifted to bail-bond companies and their bounty hunters. "I think they've had too much focus on getting people out quickly, and not doing enough to secure their appearance," she said.

Courts are now favoring low, cash-only bonds as well, DuMond said. These bonds are not eligible for assistance from a bail bondsman.

"The bonds that I'm seeing more of are the \$50, \$100, cash-only bonds, and people are paying that and then not going to court," she said. "People are willing to lose \$100 ... but it's different when Mom's house is on the line."

DuMond said she's seen studies that support the risk-based system. But she said that model relies on an enforcement method, which she said is currently lacking in Arizona.

"It solves one problem — not as many people in the jails now — but it created a new one," she said. "I think if a study was pulled right now, it would show there are more active warrants out there than before."

A spokeswoman for Maricopa County Superior Court said there is no evidence that failures to appear have risen since the rule change. And a spokesman for the Maricopa County Sheriff's Office said it's too early to tell if the rule changes have increased the number of active warrants.

Ariz. courts leading the charge

So far, the Arizona Legislature has been slow to move the system forward.

A Democrat-sponsored bill that would have all but eliminated financial bail conditions was never granted a hearing. And a bipartisan bill that would have made it easier to keep high-risk defendants in jail passed the state Senate but never was given a hearing in the House Judiciary Committee.

Republican Rep. Eddie Farnsworth, who would have scheduled the bill, declined to comment on the matter during the legislative session and did not respond to recent requests for comment.

For now, the Arizona Supreme Court is moving forward on its own, under the direction of Chief Justice Scott Bales. That court sets guidelines for all of the state's lower courts.

Tossing the cash bail system was one of the key recommendations from last year's Task Force on Fair Justice For All, a committee spearheaded by the Supreme Court.

Court rules direct judges to favor their pretrial-release options in order of least burdensome to most burdensome to the defendant, while still ensuring court appearances and community safety. They should first consider unsecured bond (pay the court only if they fail to appear), then a deposit (pay the court a portion of a bond), then a cash bond paid directly to the court.

Only lastly are they to choose a secured bond, which would allow the defendant the aid of a bail-bond company.

Payments made directly to the court will be fully reimbursed to those who make court appearances. Bail-bond companies are

allowed to pocket 10 percent.

Judges still have the discretion to set a financial-based bond, but since the changes were implemented, courts have seen a slight uptick in individuals released without financial conditions.

Giving a snapshot of the progress, Arizona Supreme Court officials said 43 percent of defendants were released on a non-money bond in April 2017, compared with 37 percent in April 2016. (These figures do not include data from Maricopa and Pima counties.) There's always a chance that defendants out on release could commit another crime, whether they paid bail or not.

Fanno Burdeen of the Pretrial Justice Institute said judges may be nervous to dive into the risk-assessment tool because they feel more personal responsibility for a defendant's outcome.

"There's what I like to call a risk hot potato," she said. "I can't guarantee to anybody that you're not going to do something stupid after you get released. But if I set a bond, then I have passed the risk hot potato; that's what (the bail bondsman) gets paid to take this risk off my back."

Kathy Waters, division director for adult probation services for Arizona courts, said the measured approach to change helps to foster a culture shift among the judges and helps them learn to trust the risk-assessment tool.

"Change is difficult," she said. "When you relied on money forever, if you take away money, you have to have something to replace it with."

Justices to vote on bond change

That replacement is a key component of reform that's still missing from Arizona's equation. Short of setting a high bond amount, Waters said courts must be permitted a mechanism to keep dangerous or flight-prone individuals in jail before their trial.

This is where the next court rule change comes into play. In the next few months, Arizona's Supreme Court justices will vote on whether to allow judges to set hearings that will deem a defendant non-bondable. Currently, only prosecutors can request this hearing, and prosecutors often aren't present at the initial court appearance.

Inevitably, this would mean that more defendants are deemed ineligible for release no matter what the conditions.

Before, these were the cases in which bond was set in six- or seven-digit amounts to keep defendants in lockup.

Reform advocates contend that relying only on a high bail amount can put the community at risk. Suspects with, say, family money or connections to the illegal drug trade easily could pay their way to

freedom before a trial.

The rule change also would allow courts to deny bail to those with a history of failures to appear.

It's for this reason that Arizona's bailreform efforts have run into unlikely opposition from progressive groups, including the American Civil Liberties Union of Arizona.

Traditionally a champion of criminaljustice reform, the ACLU's local attorneys say the change would be counterproductive for some defendants, actually keeping them in jail longer.

ACLU Policy Director Will Gaona said the issue lies in who the courts deem "high risk." Many low-level offenders will be tagged high-risk because they repeatedly failed to show for court, not because they are a danger to the community, he said.

Gaona said there will inevitably be overlap here with people who can't pay bail, particularly in homeless and mentally ill populations.

"These are already the people languishing in jail because they can't afford the \$500 to pay for their bail," he said.

In an official comment to the courts, ACLU attorneys called the proposals "both premature and backwards-facing." They said the changes were premature given that the Arizona Legislature may address the issue at a later date. And they were backward-facing, the attorneys said, in light of a recent Arizona Supreme Court ruling that expanded the rights of some individuals facing pretrial detention.

"The proposed rule changes rely in part on the notion that being charged with certain serious crimes serves as a convincing proxy for unmanageable dangerousness," the comment said. "Yet, in *Simpson*, the Court held that a specific, serious charge — sexual conduct with a minor — is not always inherently predictive of future dangerousness."

Waters said the court's "frequent flyers" — the ones who are poor, are often arrested and miss court dates — are the hardest part of the equation. But she said the intent of the court's rule change was more intended to target individuals who pose an actual flight risk.

Waters said in the future, the state may require statutory or constitutional changes to fully embrace bail reform.

"I think it just depends on the improvements and what can be done (in the courts)," she said. "I think only time will tell that."

