



THE BAIL PROJECT

November 21, 2018

State Representative David LaGrand
N-1094 House Office Building
100 N. Capitol Ave.
Lansing, MI 48909

Dear Representative LaGrand,

Our organizations have partnered to launch Michigan's first large-scale revolving bail fund. Since June 2018, we have bailed out 56 clients in Detroit, 20 of whom have had their cases closed. We see firsthand the devastating impacts of wealth-based detention on our clients and their families, many of whom stand to lose their jobs, housing, and even their children because of an inability to afford a few hundred dollars' bond. Our clients include Ramon,¹ a young man in his early 20s who was jailed in Wayne County for just over a week last summer. Every day that Ramon was in jail, he missed out on his school courses and work. After bailing him out and reconnecting him with his family, our team learned that, while Ramon was in jail, he had been trading his breakfast and lunch to use a fellow detainee's phone card to call his mother. His family did not have money to put on a phone card for him, so he traded his county-issued meals to be able to communicate with them. This is the reality of some of our clients' lives. And it is their experience and wisdom that motivate us to end the injustice of cash bail and pretrial detention.

We have reviewed Michigan House Bills 6455-6463, introduced last month as a legislative package to reform the bail system in Michigan. While we think that bail reform is critical, we have concerns about the ways in which this legislation will perpetuate the inequity of cash bail and introduce risk assessment tools that may further entrench structural racism in the criminal justice system. The bills fail to implement alternatives that would address the needs of the accused, keep communities safe, and honor the presumption of innocence. As organizations deeply invested in creating a more just pretrial system for our clients, we cannot support the proposed legislation. What follows is a summary of our concerns:

I. Presumption of Release on Personal Recognizance

¹ The client's name has been changed to maintain confidentiality.

The bill package aims to create a presumption that anyone facing a criminal charge will be released on personal recognizance (PR) bonds, unless a judge decides they present a risk to public safety or of failure to appear.² As proposed, MCL 765.6(2) would require that the accused be released on a PR bond unless the court finds, by a preponderance of the evidence, either that the accused “would pose an undue danger to the community” or that there is a “significant risk” of willful failure to appear.

However, the proposed amendment is duplicative of the requirement found in the existing Michigan Court Rules, issued by the Michigan Supreme Court and binding on all levels of Michigan’s court system.³ Court Rule 6.106(C) already mandates that an accused person not ordered to be held in custody must be released “on personal recognizance, or on an unsecured appearance bond ... unless the court determines that such release will not reasonably ensure the appearance of the defendant as required, or that such release will present a danger to the public.” The proposed amendment to MCL 765.6(2) does require that a judge find one of these risks by a preponderance of the evidence; however, that is a low standard.

Although legally binding, these court rules are routinely ignored by judges setting bail in Michigan. In 2016, the Michigan State Court Administrative Office (SCAO), an agency of the Michigan Supreme Court, issued a memo urging judges to adhere to the court rules directing them to release people facing criminal charges on PR whenever possible and only impose cash bail after a finding that no condition or combination of conditions will assure public safety or their appearance in court.⁴ Given that Michigan jails continue to have a high population of people incarcerated pretrial, it seems that this memo did little to change judges’ bail determinations. Without more fundamental changes to the bail statute, it is likely that judges will continue to ignore mandates requiring a presumption of PR release.

II. Non-monetary Alternatives to Money Bail

As mentioned above, Court Rule 6.106(D) and (E) mandate that a judge consider whether any non-monetary release conditions can address the perceived risks to public safety and failure to appear. Release conditions that a judge may impose include a wide range of supervisory levels, from less burdensome conditions such as checking in with a court agency and complying with a stay-away order to very burdensome conditions such as participation in a treatment program and electronic monitoring. As the court rule currently mandates, a judge may set cash

² Rep. David LaGrand. “LaGrand Bail Reform Package: Bill Summaries,” Version 1.96. 2 Oct. 2018.

³ “Michigan Court Rules and Other Rules.” *Michigan Courts*, <https://courts.michigan.gov/courts/michigansupremecourt/rules/pages/current-court-rules.aspx>

⁴ Mack, Milton L., Jr. “Memorandum re: MC 240 - Order for Pretrial Release Order,” 7 June 2016, <https://perma.cc/T83F-ARM5>

bail only upon a finding that no condition or combination of these conditions will assure public safety and the accused person's appearance in court.

While MCL 765.6F would mandate that the court impose "the least onerous condition or combination of conditions of release" possible, much in the proposed bills neglects this spectrum of pretrial release conditions that fall between release on a PR bond and money bail. For example, the proposed language in MCL 765.6(2) provides that an accused person must be released on a PR bond unless the court finds either a risk to public safety or failure to appear; the next section states that if one of those circumstances applies and "the defendant will not be released on a personal recognizance bond, the court, in fixing the amount of the bail, shall consider" a list of factors. As proposed, this statute completely skips over the intermediary steps of determining whether any non-monetary condition or combination of conditions of release might be sufficient to address concerns about either dangerousness or flight risk. By neglecting to address this mandated step in the bail determination process, the proposed amendment ensures that cash bail will continue to be set before judges comply with the requirement to consider alternatives. The proposed bills are far from ensuring that cash bail will be a last resort.

III. Requirement for the Judge to Make Findings on the Record

Proposed language in MCL 765.6 would require that, if the court determines that the accused person will not be released on a PR bond, the court must make "written or oral" findings on the record, based on consideration of the factors discussed in the following section. Similar to the presumption of PR bonds, this requirement that a judge make findings on the record is already mandated by a court rule. Court Rule Court Rule 6.106(F) requires that whenever the court orders a person to be released on a pretrial condition, including money bail, the court must "state the reason for its decision on the record."

IV. Steps Towards an Individualized Assessment of Pretrial Release

As proposed, MCL 765.6F would prohibit the use of bail schedules. Doing away with unconstitutional generic bail schedules is a laudable first step towards an individualized determination of pretrial release conditions. As MCL 765.6(1) currently exists, the court must consider the following factors in setting bail: 1) the seriousness of the offense charged; 2) the protection of the public; 3) the previous criminal record and the dangerous of the person accused; and 4) the probability or improbability of the person accused appearing at the trial of the case. The proposed amendment would expand the list of factors the court must consider to 11 more specific inquiries.

However, Michigan Court Rule 6.106(F) already mandates that the court consider a nearly identical list of factors (including financial status and ability to pay) when deciding the form of release and which conditions to impose. The proposed amendment is arguably worse because it limits consideration of these factors to the setting of money bail rather than the imposition of all available release conditions.

A. Assessment of Ability to Pay Bail

Among the factors included in the amendment to MCL 765.6(3) is “employment and financial status and history and financial history insofar as these factors relate to the ability to post money bail.”⁵ As proposed, MCL 765.6F(3) would require the court to provide a “financial disclosure form” to each person facing a criminal charge prior to arraignment. The form must contain a prominent warning that filing “intentionally inaccurate statement of finances may result in perjury charges or action for contempt of court.” The warning must also state that, by signing the form, the person authorizes “anyone possessing any information or records pertaining to your personal finances” to provide information to the court. A template financial disclosure form has not been released as part of the bill package.

As noted below, people facing criminal charges in Michigan are not given legal representation until after their first court appearance. This means that accused people would be filling out this form and submitting it to the court without any guidance from counsel. Held overnight in a jail cell, without the ability to speak with a lawyer, and without access to their financial records, it is difficult to see how a person can be expected to record accurate financial information under penalty of perjury. While prosecution is only threatened for “*intentionally* inaccurate statements,” people deserve the opportunity to seek advice from counsel before disclosing information that could lead to additional criminal charges.

B. Pretrial Risk Assessment

Another factor in the proposed amendments to MCL 765.6(3) would require the court to consider “the score from a pretrial risk assessment that has been approved for use by the State Court Administrative Office.” This could be interpreted to mean either 1) each county has the ability to choose their own risk assessment tool, so long as it has been approved for use by the SCAO; or 2) the SCAO will choose and approve a risk assessment tool for use across all counties statewide. There is no other mention of the risk assessment tool in the proposed bills.

The Bail Project and Detroit Justice Center opposes the introduction of risk assessment tools into the pretrial process. While cloaked in the objectivity of science, these algorithms rely on factors that reflect the pervasive racial bias of the criminal justice system. Challenging the bias of these tools is obstructed by the fact that many are carefully guarded proprietary products, making it impossible to scrutinize how the algorithm weighs factors to determine a risk score.

⁵ Note the possible typo in the proposed language of this factor.

Existing risk assessment tools also fail to consider how pretrial incarceration significantly increases the risk of harm to the individual facing detention and their community. Concern about the bias of risk assessment tools is growing.⁶ This summer, more than 100 civil rights, digital justice, and community groups published a shared statement of concerns regarding the use of these instruments.⁷ Renowned scholar and civil rights advocate Michelle Alexander published an op-ed in *The New York Times*, warning that pretrial risk assessment tools and the growing system of “e-carceration” represents “The Newest Jim Crow.”⁸

There is no evidence to prove that risk assessments have reduced pretrial jail populations and racial disparities in pretrial systems in which they have been implemented. Since 2011, Kentucky has used the Arnold Foundation’s Public Safety Assessment tool during intakes conducted by the state’s Pretrial Services Agency. While the tool uses vast sums of data, pulled from 1.5 million cases in over 300 jurisdictions, the impacts of its implementation are concerning. A report, released in November 2017 by the conservative-leaning Pegasus Institute, found that in 2016, “there were 64,123 non-violent, non-sexual defendants detained in Kentucky because they could not afford their bail.”⁹ A 2018 case study of Kentucky found that “[r]isk assessment had no effect on racial disparities in pretrial detention.”¹⁰

If the bill must include the incorporation of a risk assessment tool, statutory language should be added to ensure that courts that implement the tool collect data regarding its potential bias on the basis of race, ethnicity, gender, and income level. The statute should also contain a provision to contract with an academic institution, public policy center, or other research entity to conduct an independent evaluation of the impact of the use a risk assessment tool. The design of the tool should be made public to ensure transparency and accountability. Additionally, the court should be instructed that the risk score is not determinative of release decisions and should be weighed as one of the 11 enumerated factors.

C. Consideration of Dismissed Criminal Charges

Another factor in the proposed amendments to MCL 765.6(3) would require the court to consider the accused person’s criminal record “including any charges that were deferred and

⁶ See Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, “Machine Bias,” ProPublica, May 26, 2016. <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>; Levin, Sam, “Imprisoned by algorithms: the dark side of California ending cash bail” *The Gaurdian*, Sept. 7, 2018, <https://www.theguardian.com/us-news/2018/sep/07/imprisoned-by-algorithms-the-dark-side-of-california-ending-cash-bail>

⁷ “The Use of Pretrial ‘Risk Assessment’ Instruments: A Shared Statement of Civil Rights Concerns,” July 30, 2018, <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf>

⁸ Alexander, Michelle, “The Newest Jim Crow,” *The New York Times*, Nov. 8, 2018, <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html>

⁹ Crawford, Josh, “Reform Opportunities in Kentucky’s Bail System,” Pegasus Institute, Nov. 17, 2017, <https://www.scribd.com/document/388004383/Reform-Opportunities-in-Kentucky-s-Bail-System-pdf>

¹⁰ Stevenson, Megan, “Assessing Risk Assessment in Action,” *Minnesota Law Review*, Vol. 103, Jun. 14, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016088

dismissed by law.” If a charge was deferred and dismissed, an entry of the judgment of guilt was not entered while the person completed a period of probation. A judgment of guilt is only entered if the person is found to have violated the requirements of probation. The statute governing deferred charges states that this disposition “is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.”¹¹ By allowing judges to consider charges that were dismissed in this way, the proposed amendment contradicts the stated intentions of the legislators who crafted this disposition. To honor the presumption of innocence, we believe that judges should not be permitted to consider charges for which a person was never found guilty.

D. Counsel at Arraignment

The Bail Project was founded on the understanding that a court’s decision to release or set bail for an individual can have a profound impact on their criminal case and life in general. We believe that zealous representation during an initial bail hearing is everyone’s constitutional right.¹² A lawyer can help show the court why the accused person is unlikely to be a danger to the community, why they will appear for all court dates, and why non-monetary conditions of release sufficiently address any perceived concerns. Without the advocacy of an attorney, an accused person will likely be unable to effectively present this information to the court. Until Michigan provides indigent people with appointed counsel during arraignments, it is doubtful that any meaningful, individualized assessment will be possible.

V. Prohibition of Unaffordable Money Bail

The proposed bills would prohibit the imposition of bail amounts that result in pretrial incarceration due to inability to pay. MCL 765.6E would mandate that the court “shall not impose a financial condition of release that results in the pretrial detention of a defendant solely because the defendant is financial incapable of meeting that condition.” This amendment would prohibit the setting of unaffordable bail amounts that act as de facto custody orders, without the due process required by the Michigan Constitution and Michigan Court Rules before a court may detain a person pretrial.¹³

While this language is strong on paper, we have seen very similar language routinely ignored by judges. In July 2017, the Chief Judge of Cook County, Illinois issued General Order 18.8A, which “intended to ensure no defendant is held in custody prior to trial solely because the

¹¹ MCL 333.7411(1)

¹² See Bunin, Alexander, “[The Constitutional Right to Counsel at Bail Hearings](#)” ABA Criminal Justice, Volume 31, Number 1, Spring 2016.

¹³ Art. 1 Sec. 15 of the Michigan Constitution and Michigan Court Rule 6.106(B) and (G)

defendant cannot afford to post bail.”¹⁴ Just like the Michigan bill package, the Order instructed judges to collect information regarding ability to pay, use a risk-assessment tool, and set affordable monetary bail only when the judge found non-monetary conditions of release to be insufficient. In September 2018, Chicago’s Coalition to End Money Bail published a report analyzing the impact of the Order in the year since its issuance.¹⁵ The report demonstrated that while the number of PR bonds initially increased, over time judges failed to obey the order and court outcomes regarding recognizance and money bond releases were “approaching pre-Order levels.”¹⁶ Despite a binding order explicitly prohibiting unaffordable bail amounts, 30% of the bonds set remain unaffordable, so that “more than 2,700 people are presently incarcerated in Cook County Jail solely because they are unable to pay money bonds.”¹⁷

A. Enforcement Mechanism

One lesson from Cook County is the importance of establishing an enforcement mechanism to ensure that judges adhere to a prohibition against unaffordable money bail. An enforcement mechanism could operate as follows: Any person who is deemed eligible for pretrial release, has had money bail imposed as a condition of their release, and remains in custody due to an inability to pay must be released on unsecured money bond within 24, 48, or 72 hours after their arrest. The bail amount determined by the court would remain unchanged, but it would be required on an unsecured, rather than a secured, basis. Any additional conditions of release imposed by the court would remain in place. Alternatively, these same conditions could trigger a bail review hearing in which the accused person is brought back before the judge, with counsel, to argue for a reduction of bail to facilitate their release.

VI. Release of People Facing Misdemeanor Charges after Delay in Arraignment

MCL 780.581, as it currently exists, requires that people facing a misdemeanor charge must be brought before a magistrate for an arraignment “without unnecessary delay.” The proposed legislation would require that people facing misdemeanor charges, who were not released on an appearance ticket, must be released on their own recognizance and provided a date to appear for arraignment if “the magistrate is not available or immediate trial cannot be had in a timely manner.”

¹⁴ Judge Timothy Evans, [General Order No. 18.8A](#) “Procedures for bail hearings and pretrial release”

¹⁵ Coalition to End Money Bail, “Shifting Sands: An Investigation into the First Year of Bail Reform in Cook County,” 18 September 2018, <https://www.chicagobond.org/reports/ShiftingSands.pdf>.

¹⁶ *Id.* at 3 and 6.

¹⁷ *Id.*

The proposed statute does not provide any further guidance of what is meant by “a timely manner.” Setting a firm time limit (eg. 24 or 48 hours) would ensure timely arraignments or release for people facing misdemeanor charges.

VII. Data Collection

Proposed language in MCL 765.6G would require each District Court to submit a quarterly report to the SCAO. The quarterly reports would “provide data detailing the types of bail issued by the court to individuals released.” To specify, the statute requires that the reports include “an accounting for the number of individuals released on personal recognizance bonds, or on money bail with a 10% deposit bond or a cash bonds for the full bail amount.” The proposed language would also allow the Supreme Court to promulgate rules regarding the “type and format” of data.

As noted with other sections of the proposed bills, this language fails to address the range of non-monetary conditions that a court may impose. Additionally, this language does not enumerate the many other data points regarding pretrial release decisions that should be collected by District Courts, including: the bail amounts when money bail is set; the number of pretrial detainees who remain incarcerated due to inability to pay; how pretrial risk assessment scores impact release decisions; violation of release conditions; among others. The statute should require that these quarterly reports be made freely available to the public by posting the data or a summary of the data online. A statutory mandate that District Courts collect a more comprehensive and transparent set of data could help inform future legislation.

VIII. Allocation of Cost Savings

Nothing in the proposed statutory language dictates how local governments may use cost savings from a reduction in pretrial incarceration. However, the proposed House Resolution would “urge” cities and counties to use “savings realized from bail reform to increase spending on community policing efforts and staffing of sheriff and police departments.” The resolution stresses the expense incurred by pretrial incarceration (pretrial incarcerations costs “local municipalities \$150 million in taxpayer dollars annually”) and states that local governments “can utilize” savings to “to initiate or bolster community policing programs.” Copies of the resolution are to be sent to the Michigan Municipal League, the Michigan Association of Counties, the Michigan Sheriffs' Association, and the Michigan Association of Chiefs of Police.

It is our understanding that this resolution would not have any binding power on how cities or counties in Michigan choose to use any savings that may result from a decrease in their jail’s pretrial population. The Bail Project and the Detroit Justice Center opposes increased spending

on policing and would urge counties to use savings towards investment in quality schools, job creation, affordable housing, drug treatment, and mental health care.

IX. Conclusion

If Michigan legislators want a pretrial system that gives fair and equal justice for all, there is much work to be done. The Bail Project and the Detroit Justice Center would support efforts to ensure indigent people receive counsel at arraignments, an expansion of pretrial services that honor the presumption of innocence, and an elimination of money bail and other monetary conditions of release. The proposed bill package does not address these more significant and necessary overhauls to the system. Without critical amendments, the bill package will not only perpetuate the unconstitutional practice of setting unaffordable money bail, but also introduce risk assessments that can entrench racial bias. However, with amendments informed by the voices and concerns of impacted communities, there is potential for these bills to be a step in the right direction.

Sincerely,



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