

McGee House of Representatives Research Department

Report on Pretrial Release for Misdemeanor Offenses *Made Upon Request of the House Criminal Justice Committee*

December 30, 2016

A. Summary of the Issue

Each year in McGee, prosecutors charge approximately 50,000 misdemeanor offenses. Over 45,000 of these charges result in a conviction, but more than half of those convictions receive a sentence which includes no additional incarceration time.¹ Yet many people arrested for and subsequently charged with misdemeanors spend at least two days in jail following their arrest, because under current McGee law any person arrested for a criminal offense, including for a misdemeanor, may not be released until monetary bail and/or conditions of release are set by a judge at a bail hearing.

Under current McGee law, a defendant's bail hearing must be held by the close of the second business day after the defendant's arrest. Pursuant to this law, nearly 40,000 misdemeanor arrestees spent two days or more in jail before securing pretrial release. In only 6,000 cases did the court impose any amount of monetary bail at the bail hearing; in all other misdemeanor cases, the defendant was released either on his or her own recognizance or with conditions of release after the bail hearing. Given that the vast majority of misdemeanor arrestees are released without posting monetary bail and that most misdemeanants are not sentenced to additional jail time upon conviction, stakeholders have begun to question whether McGee's bail statutes should be amended to permit people arrested and charged with misdemeanors to obtain pretrial release in a speedier manner.

¹ Misdemeanants are often sentenced to "time served," meaning that a jail sentence is imposed which is equal to the amount of time the misdemeanant already spent incarcerated before conviction. For instance, a misdemeanant who spent two days in jail before obtaining pretrial release may receive a "time served" sentence that includes two days in jail, which would require the misdemeanant to spend no additional time in jail after sentencing.

Any time during a given day spent in jail counts as one day in jail, so a person who is released the day after arrest is considered to have spent two days in jail.

Pretrial incarceration can have significant negative impacts upon an arrestee beyond the unpleasantness and stress of spending time incarcerated. Incarceration, even for a brief period of time, can lead to job loss, childcare problems, medical issues, and interference with familial and personal relationships. Given the issues summarized above, the House Criminal Justice Committee requested that this Department research options for changes to the law governing pretrial release in misdemeanor cases.

B. Reform Opportunities

1. Making Misdemeanors Non-Arrestable

Making misdemeanor offenses generally non-arrestable would ensure that few people charged with such offenses spend any time in jail prior to conviction. Under such a legal regime, misdemeanors would be charged via issuance of a citation by a police officer. Once a misdemeanor citation is issued, the person cited would generally not be arrested or incarcerated prior to trial. The citation would be followed by a court summons informing the defendant of where and when to appear for initial court proceedings.

Any law deeming misdemeanors non-arrestable could include provisions intended to enhance public safety. One such measure could be maintaining the arrestability of certain categories of misdemeanors (for instance, offenses involving violence, harassment, or intoxication).² Another possibility is permitting police discretion to arrest for misdemeanor offenses in the interest of public safety but requiring a prosecutor to make a special emergency application to the court setting forth the reasons to detain the misdemeanor arrestee in jail pending a bail hearing.

In considering whether to make misdemeanor offenses non-arrestable, the Legislature should take into account whether imposition of some amount of monetary bail will help ensure future appearances of arrestees in court. Studies on this topic have reached differing conclusions, though there is some evidence that arrestees who are

² Offenses such as simple assault, violation of an order for protection, and driving while impaired are all misdemeanors in McGee, unless the charged conduct is accompanied by aggravating circumstances that enhance the offense to a more serious level.

released without posting any amount of monetary bail are more likely to fail to appear for at least one future court appearance in the case.³

B. Shortening the Time Between Arrest and Individualized Bail Hearing

Current McGee law requires that all arrestees receive a bail hearing by the close of the second business day following arrest. Accordingly, the amount of time a person spends incarcerated prior to the bail hearing often depends on the particular time and day of the arrest. Under this regime, an arrestee sometimes receives a bail hearing on the day of arrest, and sometimes must wait multiple days for the hearing.

The amount of time arrestees spend incarcerated before their bail hearings could be reduced by shortening the length of time permitted to hold the bail hearing under the law. The law could be amended to reduce the number of business days to one, or could impose a hard cap on the number of hours an arrestee may be held without a bail hearing.

Determinations of appropriate amounts of bail and/or conditions of pretrial release are by their nature fact-intensive, and any change in law requiring McGee's courts to hold bail hearings closer to the actual time of arrest would very likely require McGee to increase the number of judges available to preside over bail hearings and to establish courts that are open and performing bail hearings at times that McGee courts are currently closed (such as on the weekend and in the evening).

C. Standard Cash Bail to Secure Immediate Release

The Legislature could also reduce the amount of time that many arrestees spend in pretrial incarceration by establishing a formula or schedule for standard bail amounts that could be posted immediately by an arrestee to secure pretrial release. Under such a regime, once the booking process is completed (which for most offenses takes an hour or less from the time of arrival at the jail), a misdemeanor arrestee could secure pretrial release by immediately posting cash bail in the predetermined amount.

This process would allow many arrestees to spend little time incarcerated following arrest, minimizing unnecessary interference with the arrestee's freedom and lessening negative impacts upon the arrestee's life. At the same time, such a system would still only allow the defendant to be released upon the posting of monetary bail or

³ Compare, e.g., Brief for Amici Curiae American Bail Coalition, et al., in Support of Defendant City of Calhoun, at *9-16, 2016 WL 3452938 (C.A.11), with Brief for Amicus Curiae National Association of Pretrial Services Agencies, et al, in Support of Petitioner Maurice Walker, at *10-14, 2016 WL 4417419 (C.A.11).

following an individualized bail determination by a judge, which arguably would help ensure the future appearance of misdemeanor defendants in court.

Such a regime, however, would raise questions of fairness and differential treatment of arrestees who cannot afford to post immediate bail. To address such potential concerns, the Legislature should consider whether, if an immediate standard bail system is implemented, it would be necessary or appropriate to provide alternative procedures by which individuals who cannot afford to post standard bail could secure immediate release. For instance, an individual who does not have the money or assets to post immediate bail could make such an averment by affidavit or by other competent proof of indigency. Upon such a showing, appropriate conditions such as daily reporting with a probation officer or other types of monitoring could be imposed to attempt to ensure the arrestee's appearance at future court appearances in the absence of monetary bail. Of course, establishing such a system of supervision for a large class of thousands of arrestees could require significant governmental resources.

3. Conclusion

Opportunities exist to reform McGee law to ensure both that adequate tools exist to ensure public safety and the appearance of misdemeanor defendants at court proceedings and that arrestees are not unnecessarily subjected to pretrial incarceration. In considering potential changes to law, the Legislature should consider (1) the effectiveness of the law to ensure public safety and future appearances of defendants in court; (2) to what extent the law will avoid unnecessary pretrial incarceration of defendants; and (3) the financial and logistical burdens the change in law will place upon the McGee's courts, government agencies, and finances.