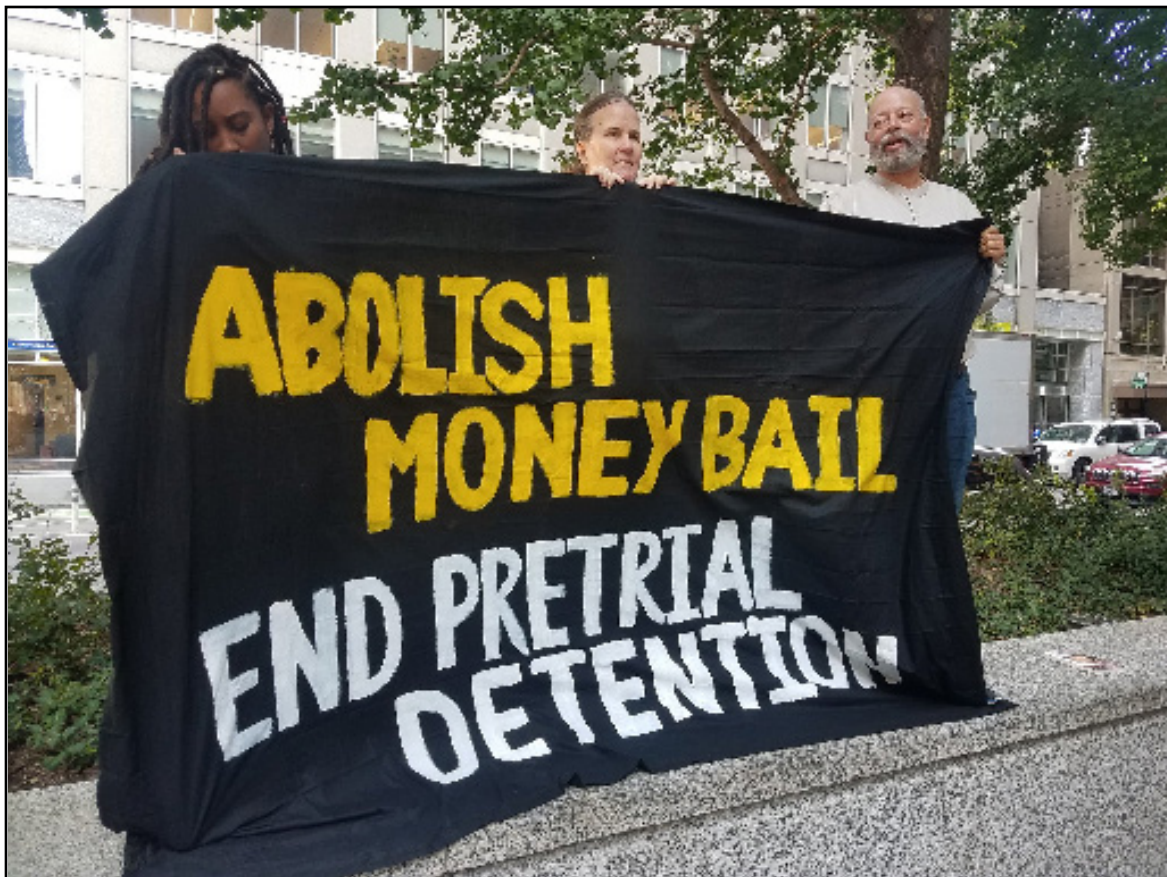

SHIFTING SANDS:

AN INVESTIGATION INTO THE FIRST YEAR OF BOND REFORM IN COOK COUNTY



**A NEW REPORT BY THE COALITION TO END MONEY BOND
SEPTEMBER 18, 2018**

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I. INTRODUCTION

The stated purpose for the use of money bond in the criminal legal system is to secure an accused person's future presence in court after their release. For decades, it has instead resulted in the pretrial incarceration of thousands of people across Cook County who are presumed innocent under the law. In effect, money bond has provided a way around the constitutional protections guaranteed to all accused people in the United States: the government cannot take away a person's freedom without proving their incarceration is necessary and providing them with sufficient due process. Ultimately, the unchecked use of money bond to incarcerate people pretrial contributes to mass incarceration and racial disparities in the criminal legal system.¹

In July 2017, Cook County sought to become a national leader in righting the injustices caused by money bond that target impoverished individuals and communities of color.² The Chief Judge of Cook County, Timothy Evans, issued General Order 18.8A (Order), instructing judges in Cook County to follow existing state and federal laws requiring transparent pretrial release, to use money bond only when necessary, and when money bonds are used to set them only at amounts a person can afford to pay.³

In February 2018, the Coalition to End Money Bond released "Monitoring Cook County's Central Bond Court: A Community Courtwatching Initiative," a report analyzing the initial impact of General Order 18.8A at Central Bond Court.⁴ Because there was no other method for collecting bond court data, dozens of volunteers recorded the outcomes of bond hearings each day for a month before and after the Order went into effect, demonstrating the need for full implementation of the Order and ongoing data collection and publication by the court system. This new report from the Coalition to End Money Bond updates the earlier report by reassessing the impact of General Order 18.8A nearly one year after its passage. In particular, new data shows that judges' adherence to the Order is worsening with time and that more than 2,700 people are presently incarcerated in Cook County Jail solely because they are unable to pay money bonds.⁵

***MORE THAN 2,700 PEOPLE ARE PRESENTLY
INCARCERATED IN COOK COUNTY JAIL SOLELY
BECAUSE THEY ARE UNABLE TO PAY MONEY BONDS.***

II. THE INITIAL IMPLEMENTATION OF GENERAL ORDER 18.8A

General Order 18.8A took effect on September 18, 2017 with the intention of “ensur[ing] no [person] [be] held in custody prior to trial solely because [they] cannot afford to post bail.” To implement this change, Chief Judge Evans assigned six new judges to Cook County’s Central Bond Court. At first, the Order appeared successful in its aims: in the first month of the Order’s implementation, the number of people receiving money bonds decreased by more than 50%, falling from 52% to 23% of all bonds.⁶ The number of people released on their own recognizance without having to first pay money doubled from 25% to 51%. Data released by the Office of the Chief Judge also showed that the amount of money that people were required to pay to secure their release decreased.⁷ As a result, the number of people in Cook County Jail decreased from over 7,500 to under 6,000 between September 18 and December 29, 2017.

The Order’s success was, however, limited. After the Order went into effect, one in five people were given money bonds without the judge ever receiving information about their ability to pay, in spite of the Order requiring that judges consider this information. Additionally, even when the judge was provided information about the accused person’s ability to pay a money bond, fewer than half of those people (46%) actually received affordable money bonds. The Coalition to End Money Bond’s Courtwatching report showed that the unconstitutional, wealth-based pretrial incarceration of people in Cook County Jail persisted even immediately following the Order’s implementation and the replacement of all the Central Bond Court judges.

THE COALITION TO END MONEY BOND'S COURTWATCHING REPORT SHOWED THAT THE UNCONSTITUTIONAL, WEALTH-BASED PRETRIAL INCARCERATION OF PEOPLE IN COOK COUNTY JAIL PERSISTED EVEN IMMEDIATELY FOLLOWING THE ORDER'S IMPLEMENTATION AND THE REPLACEMENT OF ALL THE CENTRAL BOND COURT JUDGES.

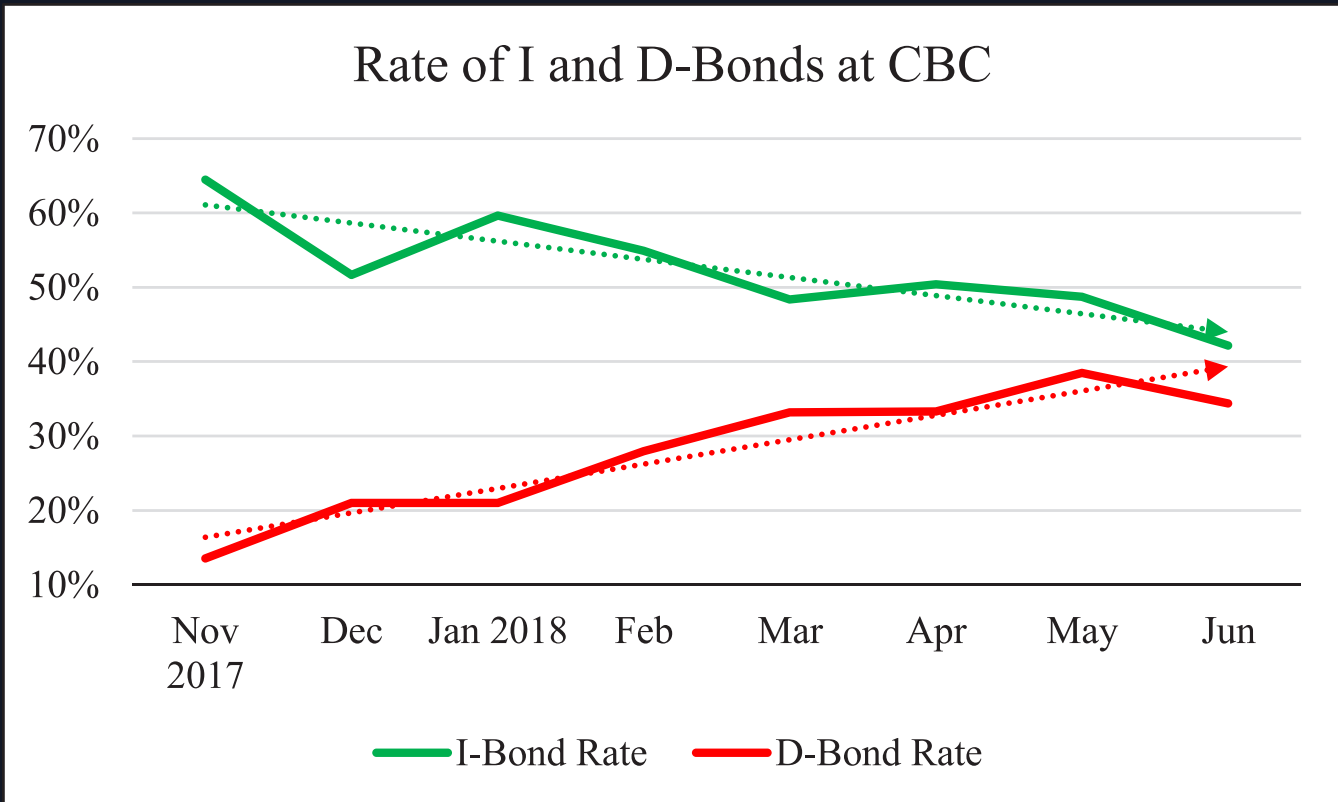
III. BOND COURT DATA ANALYSIS: JUDICIAL PERFORMANCE FROM FALL 2017 TO PRESENT

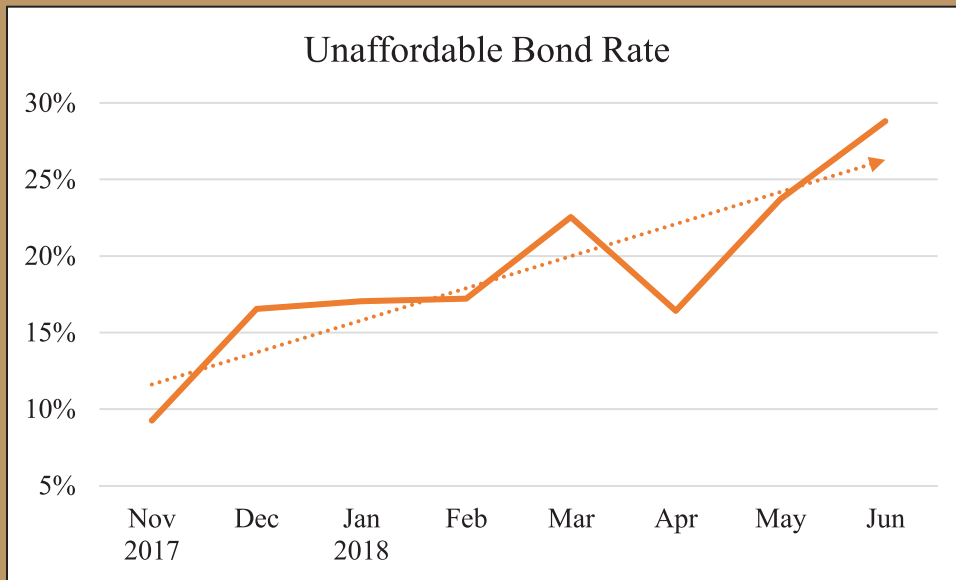
Nearly one year after General Order 18.8A went into effect, its goal of ending pretrial incarceration resulting from the inability to pay a money bond has not been achieved.⁸ Indeed, the effects of the Order are consistent with other reforms where a “sharp change in practices and outcomes [occurs] right after” the change in policy, but the changes “eroded over time as judges returned to their previous bail-setting practices.”⁹

After the Order took effect on September 18, 2017, the rate at which people were released with I-Bonds (meaning they were released without having to pay a money bond) increased substantially for the first few months. Likewise, the rate at which people were given a D-Bond (meaning they had to pay money to be released) substantially decreased. The following chart indicates, however, that in the months following these observations, those gains have steadily evaporated and bond court outcomes are now approaching pre-Order levels.¹⁰

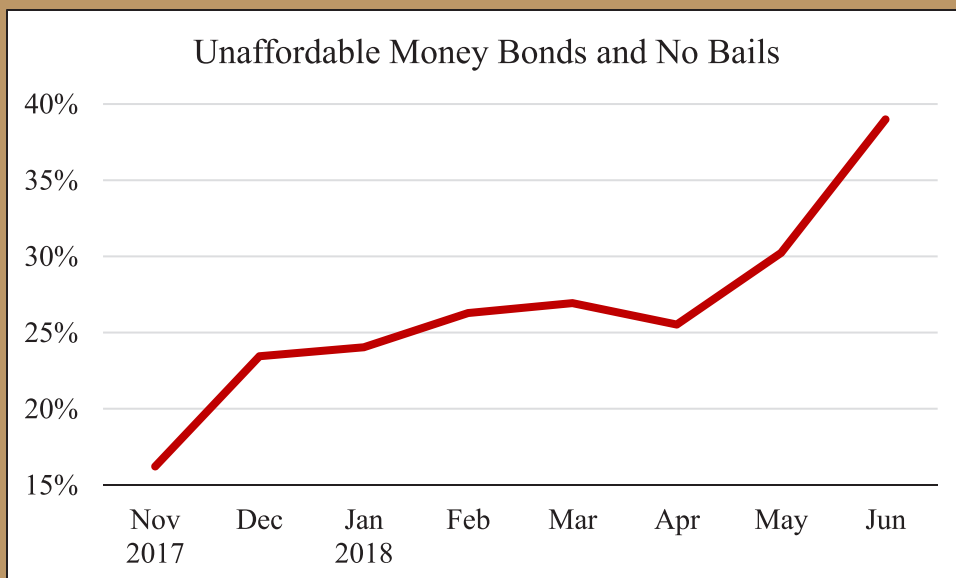
In theory, the increasing use of money bonds could conceivably align with General Order 18.8A’s instructions if those D-Bonds were affordable and led to pretrial release. That is not the case. Even more disappointing than the increasing rate of D-Bonds overall is the rate at which D-Bonds are being set above what a person clearly indicated they could afford to pay. If judges were adhering to the Order, the rate of unaffordable bonds would be 0%. Instead, unaffordable money bonds now comprise nearly 30% of all bonds set in Central Bond Court.

From November 2017 to June 2018, judges in Central Bond Court ordered more than 1,350 people to pay unaffordable money bonds. Each unaffordable money bond is a *de facto* order of pretrial incarceration, and says to a presumed innocent person, “You would be free if you had more money.”



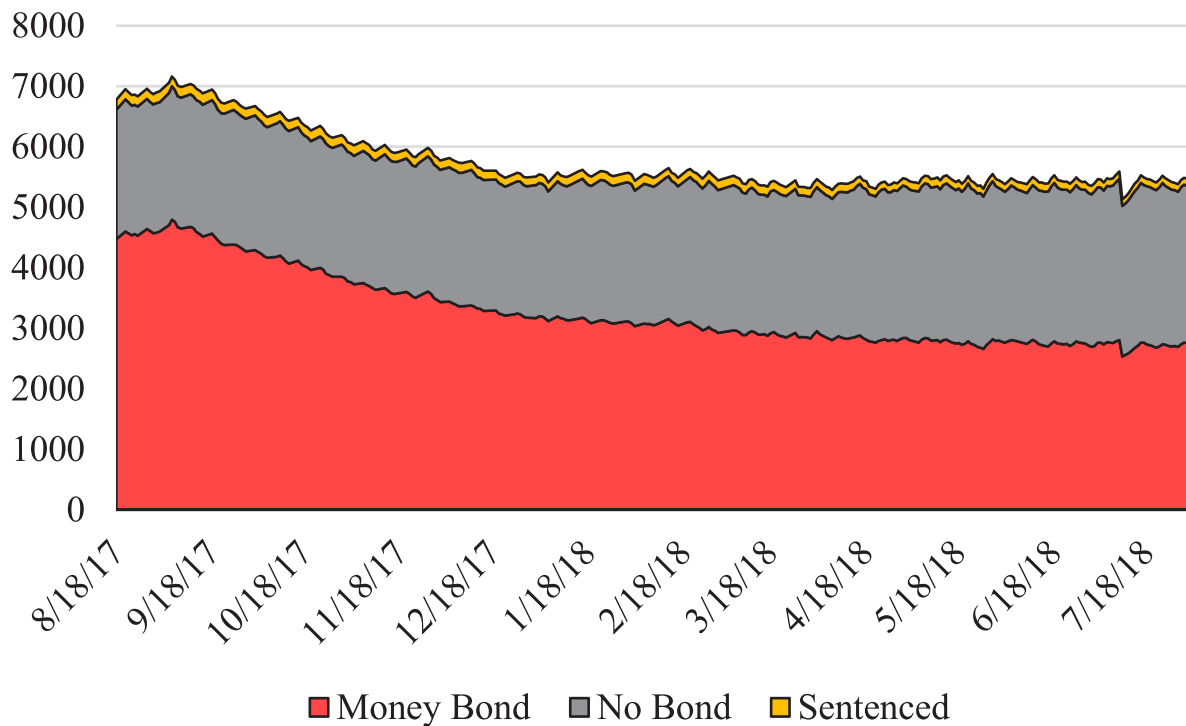


During the same time November to June time period, an additional 522 people were incarcerated pretrial without any possibility of release on bond. This outright denial of release is referred to as a “no bond” order. The rate at which people are denied bond has also increased fourfold from 2% to 8% since the Order took effect.¹¹ These two factors are the main contributors to the number of people who have gone from Central Bond Court to Cook County Jail more than doubling since November 2017. If current trends continue, the improved outcomes that initially resulted from the implementation of the Order will be all but gone in a matter of months.

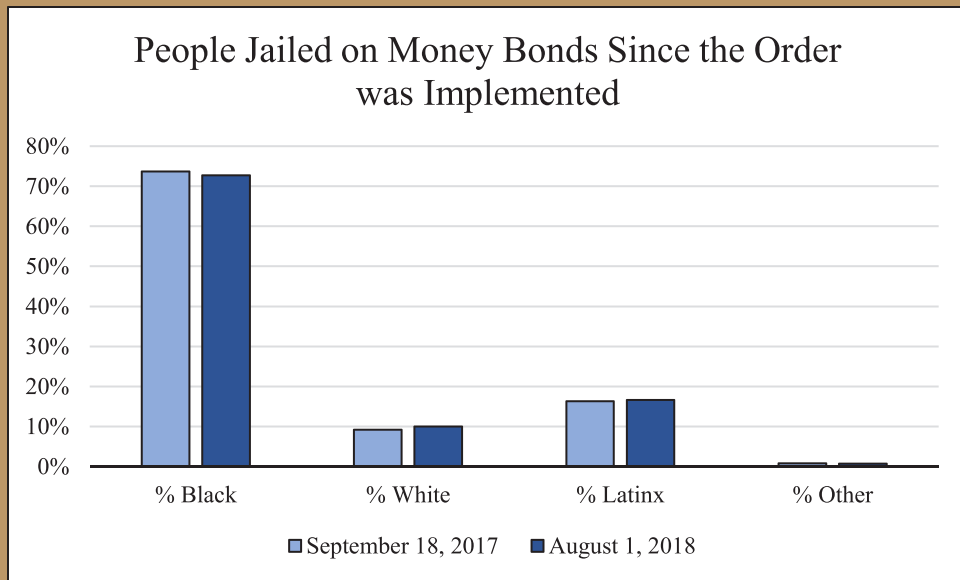


In the wake of the Order's initial implementation, there was a significant decrease in the number of people in jail due to decreased use of money bonds by judges in Central Bond Court. On December 21, 2017, the number of people incarcerated in Cook County Jail dropped below 6,000 people for the first time in decades. In the nearly eight months since, however, from December 21, 2017 to August 15, 2018, the number of people incarcerated on a money bond decreased by just 472 people while the number of people incarcerated on no bond increased by 461 people.¹² As a result of this nearly equal replacement of people incarcerated on unpaid bonds with people on no bond, the number of people in Cook County Jail has remained largely unchanged in the entirety of 2018 so far.

People Incarcerated in Cook County Jail



Moreover, the Order has not led to a decrease in the significant racial bias that pervades Cook County's criminal legal system. People currently in Cook County Jail are 74% Black, though Black people make up only 24% of Cook County's residents. Black and Brown people are also still more likely to be incarcerated pretrial due to an unpayable monetary bond and to be held without bond. The percentage of Black and Latinx people jailed based on a money bond has not changed since the Order went into effect.



IV. DISPARITIES IN COOK COUNTY JUDGES' BOND DECISIONS BETWEEN NOVEMBER 2017 - JUNE 2018

Bond outcomes vary widely and depend on the preferences of the judge making the decision. The judge presiding on a Monday might be willing to assign an I-Bond, while the judge presiding that Tuesday may set an unaffordable money bond. This means that a person could be incarcerated for years while the allegations against them are pending just because they saw the judge on Tuesday instead of the judge on Monday.¹³ Here are some statistics regarding the disparities in Cook County judges' bond decisions between November 2017 and June 2018:

JUDGE SOPHIA ATCHERSON

- When the Order was first implemented, Judge Atcherson set the highest rate of I-Bonds among the six judges. Courtwatchers did not observe her set even one unaffordable money bond in the month after the Order took effect. Since then, she has assigned unaffordable money bonds to 16% of people, including 28% of people in April 2018 and 23% of people in May 2018. The rate at which Judge Atcherson set D-Bonds more than tripled from 9% of people in November and December 2017 to 28% in May 2018.¹⁴

- Judge Atcherson is setting I-Bonds at a declining rate, falling from a high of 76% in December 2017 to 57% in April 2018 and 59% in May 2018. Where she had given I- and IEM-Bonds to approximately 86% of people in November and December 2017, in April and May 2018, Judge Atcherson gave I- and IEM-Bonds to just 61% and 68% of people, respectively.

JUDGE MICHAEL CLANCY

- Judge Clancy gives I-Bonds at the lowest rate of any Central Bond Court judge (41% of people), and D-Bonds at the highest rate (44% of people). He sets unaffordable bonds a staggering 27% of the time.¹⁵

- Judge Clancy is the only one of the six Central Bond Court judges who sets D-Bonds (44%) more frequently than I-Bonds (41%). The rate at which Judge Clancy has set either an I-Bond or an IEM-Bond has declined steadily from 57% of people in December 2017 to 43% in June 2018. The rate at which he has set D-Bonds has steadily increased from 38% in December 2017 to 55% in June 2018.

JUDGE JOHN LYKE JR.

- Judge Lyke set I-Bonds at the second-lowest frequency (46%) of the six Central Bond Court judges. He also set IEM bonds at by far the highest rate (23%), and accounted for 36% of all IEM bonds.

- Judge Lyke has more than doubled the rate of unaffordable bonds that he has assigned, from 14% of people in December 2017¹⁶ to 34% in June 2018, and has assigned an unaffordable money bond to 25% of all people before him. He further sets either an unaffordable bond or no bond at the highest rate of all six Central Bond Court judges: 32% of the time.

JUDGE MARY MARUBIO

- Judge Marubio presided over the fewest bond hearings in the recorded time period, but still decreased the rate at which she set I-Bonds by half (from 61% of people in November 2017 to 29% in June 2018), nearly tripled her rate of D-Bonds (from 20% of people in November 2017 to 58% in June 2018), and sextupled her rate of unaffordable money bonds (from 7% in November 2017 to 44% in June 2018). The rate at which Judge Marubio set D-Bonds increased every month that she sat in Central Bond Court.¹⁷

- Judge Marubio assigned unaffordable money bonds 19% of the time, impacting nearly 200 people in total. She also had the highest single-month D-Bond rate, assigning D-Bonds to 58% of people in June 2018.

JUDGE STEPHANIE MILLER

- Judge Miller set I-Bonds at the highest rate of any of the six Central Bond Court judges (65% of people) and D-Bonds at the lowest rate (11% of people), but she also is setting I-Bonds decreasingly, down from 76% in November 2017 to 51% in June 2018. The rate at which she is assigning D-Bonds has more than tripled, from only 6% of people in November 2017 to 20% in June 2018.

JUDGE DAVID NAVARRO

- Judge Navarro assigned either No Bond or a D-Bond to 59% of people in May 2018, and 54% of people in June 2018, after giving no more than 35% of people D-Bonds or No-Bonds from November 2017 through January 2018. He set more D-Bonds than any other judge, impacting 487 people in total.

THIS INCONSISTENCY CREATES A SYSTEM IN WHICH FREEDOM SEEMINGLY RESULTS FROM THE SPIN OF A ROULETTE WHEEL.¹⁸ UNFORTUNATELY, THOUGH, DECREASING COMMITMENT TO THE CONSTITUTIONAL REQUIREMENTS EMBODIED IN GENERAL ORDER 18.8A IS A CONSTANT ACROSS ALL JUDGES. AS THE MONTHS HAVE PASSED, NO MATTER WHICH JUDGE IS ON THE CENTRAL BOND COURT BENCH, MORE AND MORE OF THE SLOTS ON THE ROULETTE WHEEL ARE TURNING FROM "FREE" TO "CAGED."

V. REQUESTS FOR HELP PAYING BOND SHOW ONGOING NEED

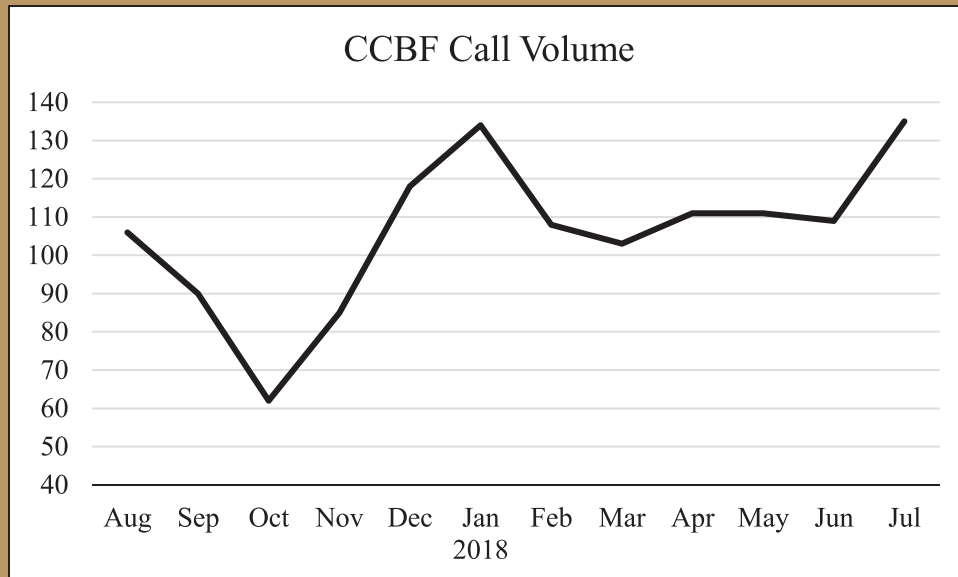
The stated purpose of General Order 18.8A was to end pretrial incarceration resulting solely from a person's inability to pay a money bond. After September 18, 2017, under the terms of the Order, any price placed on someone's freedom by a money bond was supposed to be in an amount that the accused person could afford to pay. A truly affordable bond would allow the person to secure release on their own with resources already at their disposal.

If the Order achieved its declared goal, it would render obsolete an organization such as Chicago Community Bond Fund (CCBF), which pays bonds for people who cannot afford to themselves. There would be no need for people to request help paying their bonds all money bonds set were in amounts accused people could afford to pay, as required by the order.

THERE WOULD BE NO NEED FOR PEOPLE TO REQUEST HELP PAYING THEIR BONDS IF ALL MONEY BONDS WERE SET IN AMOUNTS ACCUSED PEOPLE COULD AFFORD TO PAY, AS REQUIRED BY THE ORDER.

Since the Order took effect, however, CCBF has not seen a decrease in the number of calls that it receives from people requesting help paying bond for a loved one in Cook County Jail. **FROM JUNE 2017 THROUGH JULY 2018, 1,606 PEOPLE REQUESTED CCBF'S HELP PAYING A MONETARY BOND.** In fact, since the Order was implemented, the rate at which CCBF received requests for help was approximately the same as before the Order. Though CCBF is only contacted on behalf of a small fraction of the people jailed in violation of General Order 18.8A, the frequency of these requests and the bond amounts are indicators of judicial adherence to the Order since September 18, 2017.¹⁹ More than half the people who contacted CCBF for help paying bond (55% or 877 people) were incarcerated as a result of an unaffordable money bond that was set after General Order 18.8A.²⁰ The significant ongoing need for CCBF's help paying money bonds over the past year make it clear that the order has not ended wealth based jailing in Cook County.

THE SIGNIFICANT ONGOING NEED FOR CCBF'S HELP PAYING MONEY BONDS OVER THE PAST YEAR MAKE IT CLEAR THAT THE ORDER HAS NOT ENDED WEALTH-BASED JAILING IN COOK COUNTY.



General Order 18.8A’s mandate that any money bond be affordable is not limited to an accused person’s initial bond hearing. Any person whose bond was set before September 18, 2017 is entitled to a bond review and a new bond that is in compliance with the Order.²¹ Despite this, CCBF has paid bond for more than 50 people since the Order was implemented and has received over 600 calls from people whose bonds were set before the Order. These are people that the Order has failed to help. This significant ongoing need also raises concerns about whether motions to reconsider bond and appeals are being made on behalf of people with unaffordable money bonds, and if they are if the outcomes are just.

Though CCBF has observed the average amount of bond requests decrease since September 18th, the average bond request is still over \$80,000, which requires payment of over \$8,000 to secure release. Many people cannot afford a bond in excess of \$8,000. Thus it is little consolation to a person whose family or community cannot afford their bond that, “at least the bond amount isn’t higher.” To a person with little or no money, a \$1,000 bond—or even a \$100 bond—may as well be a \$1 million bond . . . or, more accurately, an order of pretrial detention.

CCBF’s work paying bond for people is not a solution to the problem of money-based pretrial incarceration. In the year after General Order 18.8A was implemented, people’s need for help buying their freedom was supposed to diminish or dissipate entirely. Neither has happened. While some improvements occurred for a few months, the current situation is much the same as before.

VI. RECOMMENDATIONS

In order to fully realize the goal of General Order 18.8A and end pretrial incarceration caused by money bonds, piecemeal reform efforts must be abandoned in favor of more transformative and forceful changes to the pretrial justice system in Cook County and Illinois. Most simply, we must completely end the use of secured money bond in Illinois. Additionally, judges and other court personnel must receive training on the repercussions of pretrial incarceration and relevant constitutional and state law standards for detention. Finally, we must ensure that all services offered to people awaiting trial are truly supportive and not merely punitive or surveilling.²²

VII. CONCLUSION

The Cook County criminal court system is one of the largest in the country, impacting tens of thousands of accused people each year. Through the use of unaffordable money bonds, thousands of people are incarcerated for days, months, and even years without ever going to trial, much less being convicted. The basic constitutional and moral principles behind General Order 18.8A—that people are presumed innocent and should not receive different treatment based on their access to money—are unassailable. General Order 18.8A recognizes that the use of unaffordable money bonds unjustly incarcerates people for being poor, and proclaimed its intent to end that practice.

While some judges in Central Bond Court followed the Order at its outset, adherence to 18.8A in recent months has declined to the point that it is no longer effectively discouraging the use of oppressive money bonds. In fact, the number of people in Cook County Jail on unaffordable money bonds increased from 2,500 in May 2018 to over 2,700 in August 2018. Judges have shown that they will not follow the Chief Judge’s Order, and a more drastic solution must be pursued. Rather than attempting to merely restrict the amount of money bonds while allowing their ongoing use, judges should be completely stripped of the power to require financial payments as a precondition to freedom. Specifically, the Illinois Supreme Court should enact a rule that judges must follow, and the state legislature should abolish secured money bond.

End Notes

- 1 See Monitoring Cook County's Central Bond Court: A Community Courtwatching Initiative, August - October, 2017 (February 27, 2018), available at http://www.chicagoappleseed.org/wp-content/uploads/2018/02/Courtwatching-Report_Coalition-to-End-Money-Bond_FINAL_2-25-18.pdf.
- 2 Richard A. Oppel, Jr., "Defendants Can't Be Jailed Solely Because of Inability to Pay Bail, Judge Says," *New York Times* (July 17, 2017), available at <https://www.nytimes.com/2017/07/17/us/chicago-bail-reform.html>.
- 3 General Order No. 18.8A - Procedures for Bail Hearings and Pretrial Release (July 17, 2017), available at <http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/2562/GENERAL-ORDER-NO18-8A-Procedures-for-Bail-Hearings-and-Pretrial-Release.aspx>; See also 725 ILCS 5/110-2.
- 4 Central Bond Court is where most people in Cook County have their bonds decided.
- 5 Based on data obtained via Freedom of Information Act request submitted to the Cook County Sheriff's Office.
- 6 All findings in this section are based on analyses already explained in "Monitoring Cook County's Central Bond Court" unless otherwise noted.
- 7 For example, 50% of people who were ordered to pay money bonds needed to pay just \$1,000 or less to secure release, a stark contrast from before the Order. Circuit Court of Cook County, "Circuit Court Of Cook County Model Bond Court Dashboard, Performance Period: October - December 2017," available at <http://www.cookcountycourt.org/Portals/0/Portal/MBC%20Dashboard%20CY17%20Q4.pdf>.
- 8 The data that is described and analyzed in this report has been collected by administrators of the criminal legal system in Cook County. However, Central Bond Court is a hectic and fast-paced environment. As courtwatchers observed in August to October 2017, it is difficult to record the proceedings and outcomes with 100% accuracy. These difficulties are present regardless of who observing and recording information. Therefore, the data presented here may not be 100% accurate, and where multiple data sources overlap, the data is not always identical. For these reasons, we support collection and dissemination of official bond outcomes by the court system itself.
- 9 Megan Stevenson, "Assessing Risk Assessment in Action" (December 8, 2017), p. 5, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016088 (discussing implementation of pretrial risk assessments in bond court decisions).
- 10 In Cook County, there are four types of bonds that judges can set. An I-Bond is a bond that does not require any money to be paid, and the person is released immediately. An IEM (or EMI) Bond results in the person being immediately released onto Electronic Monitoring (if they have a place to stay), and allows the person to pay money to have the Electronic Monitoring removed. A D-Bond requires the person to pay 10% of the value of the bond to be released (i.e., a \$50,000D bond requires the person to pay \$5,000, or else they will remain incarcerated). A C-Bond requires the person to post 100% of the money to be freed (i.e., a \$50,000C bond requires the person to pay \$50,000 or they will remain incarcerated).
- 11 All findings in this section are based on information obtained via Freedom of Information Act requests submitted to the Cook County Sheriff's Office.
- 12 This analysis is based on information obtained via Freedom of Information Act requests submitted to the Cook County Sheriff's Office.
- 13 While people in Cook County may pursue a motion to reconsider bond in front of a different judge after their initial bond hearing or even appeal to a higher court, general practice is for judges not to "disturb" another judge's bond decision.
- 14 Judge Atcherson was not recorded sitting in Central Bond Court in June 2018.
- 15 Judge Clancy was not recorded sitting in Central Bond Court in November 2017, February 2018, or April 2018.
- 16 Judge Lyke was not recorded sitting in Central Bond Court in November 2017.
- 17 Judge Marubio was not recorded sitting in Central Bond Court in December 2017, or February-March 2018.
- 18 This is not a situation unique to Cook County, but it still begs for a solution that would make outcomes more fair across judges. For an example of variance in bond outcomes by judge in another jurisdiction, see Anna Maria Barry-Jester, "You've Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend On Your Judge." *Five-Thirty Eight* (June 19, 2018), available at <https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/>.
- 19 While CCBF's call volume is not a perfect indicator of adherence to the Order, it is indicative of the number of people subject to wealth-based pretrial incarceration at any given time.
- 20 CCBF also sometimes receives calls from people who do not have payable money bonds, such as people who are being held without bond. Those calls are not included in the 877 number.
- 21 See Shannon Heffernan, "No Strategy to Review Bail For Thousands In Cook County Jail," *WBEZ* (September 28, 2017), available at <https://www.wbez.org/shows/wbez-news/no-strategy-to-review-bail-forthousands-in-cook-county-jail/751b7b16-0265-4053-92c4-15e6206f7734>; General Order 18.8A (paragraph 11); and notices issued by the Circuit Court of Cook County regarding the Order that are posted outside some courtrooms in the George N. Leighton Criminal Courthouse, viewable at <https://www.facebook.com/ChicagoCommunityBondFund/photos/a.1897802563778162/2603547526536992/?type=3&theater>.
- 22 For more information on this recommendation, see "Punishment is Not a 'Service.' The Injustice of Pretrial Conditions in Cook County," *Chicago Community Bond Fund* (October 24, 2017), available at <https://chicagobond.org/docs/pretrialreport.pdf>.