The Bronx Defenders Redefining public defense.

Memorandum of Opposition

S. 4483 (Nozzolio) / A. 6799 (Lentol)

Submitted by Justine Olderman, Managing Attorney, Criminal Defense Practice

June 12, 2013

Introduction

The Bronx Defenders is a holistic public defender office that provides criminal defense, family defense, civil legal services, immigration defense and social services to indigent people in the Bronx. We serve over 28,000 Bronx residents each year, all of whom are poor and nearly all of whom are Black and Latino. The Bronx Defenders views our clients not as "cases," but as whole people: caring parents, hard workers, recent immigrants, native New Yorkers, and students with hope for the future. Whether defending a client's liberty; connecting a young man to mental health services; preventing an elderly woman's eviction; working to keep a family together; or preparing a neighborhood teenager to join the next generation of leaders, The Bronx Defenders ultimately strives to improve the lives and futures of all Bronx residents.

The Bronx Defenders is a leader in addressing the problem of bail in New York. In 2007, our office launched The Bronx Freedom Fund, a separate 501(c)(3) organization that posted bail for clients of The Bronx Defenders who were charged with misdemeanor and non-violent felony offenses. Chief Judge Lippman cited our bail fund and its 93% appearance rate in his 2013 State of the Judiciary, stating "In the days ahead, we should be considering approaches like this in other parts of the state . . . ." Last year, The Bronx Defenders brought a successful legal challenge to the setting of cash-only bail, the hardest form of bail for poor people to post.[1] The Bronx Defenders also spearheaded a city-wide bail initiative bringing together public defenders from all five boroughs to address the problem of bail in New York.

As Managing Attorney of the Criminal Defense Practice at The Bronx Defenders, I oversaw the city-wide bail initiative, created teaching materials and conducted trainings about the bail statute at public defender offices around the city as well as at the New York State Defender's Association's annual conference. I have also trained judges through the creation of a video about bail at the Judicial Institute in White Plains and by participating in a panel about bail

[1] People ex rel. McManus v. Horn, 18 N.Y.3d 622 (2012).

at the Judicial Institute's Criminal Court Judicial Training in Brooklyn. I have been a panelist at CUNY's forum on bail: "Bail: Guilty Until Proven Innocent" as well as at John Jay's Guggenheim Symposium panel "Jailed Without Conviction: Rethinking Pretrial Detention During the 50th Anniversary of Gideon v. Wainright." I recently authored an article entitled "Fixing New York's Broken Bail System," to be published this summer by CUNY Law Review. I submit these comments on behalf of The Bronx Defenders.

The Bronx Defenders strongly opposes passage of the proposed bill A.6799/S.4483. Several problems with the bill as drafted undermine the legislature's dual concerns of public safety and fairness: First, the bill does not provide the requisite constitutional safeguards to protect the rights of those presumed innocent yet detained pretrial as a threat to public safety. Second, the bill will not make our bail system fairer to poor people charged with low level offenses. Third, the bill's sweeping requirement that judges consider public safety in all cases, not just those charging serious or violent felony offenses, will lead to a marked increase in the number of people detained pretrial, including those accused of low-level offenses. This increase will result in unwanted financial and non-financial consequences for those detained, their families, their communities and our state.

While we agree that New York's system of bail needs improvement, the problem does not lie in the law as written but rather as applied. New York's bail rules as currently enacted are already perfectly designed to address both of the legislature's primary concerns. The current statute allows judges to consider public safety when making bail determinations in carefully delineated circumstances. Moreover, the current statute includes multiple provisions that give judges the flexibility to tailor their bail determinations to an amount and form that is not beyond the "financial wherewithal" of the accused but rather is individually tailored to his or her financial resources. When applied as intended, New York's current bail statute is all that is needed to ensure fairness and protect the public.

For these reasons, The Bronx Defenders <u>opposes</u> A.6799/S.4483 and urges the legislature and the judiciary to support efforts to realize the potential of New York's current bail statute.

1. **The Proposed Bill Fails To Provide Adequate Constitutional Safeguards Necessary To Support The Public Safety Provision Of The Statute**

The proposed bill fails to provide adequate constitutional safeguards necessary to support the public safety provision of the statute because the only procedural safeguard is a de novo review of the original bail decision on the first court appearance. Such a procedural safeguard falls short of what is necessary to protect the accused and offers much less protection than the safeguards provided for by the Federal Bail Reform Act, which similarly allows detention to protect the public. Under the federal statute, a judge can detain an arrestee pretrial to protect the public only after an adversarial hearing where the government has to prove by clear and convincing evidence that no release conditions will reasonably assure the safety of any other person and the community. At that hearing, the accused can cross-examine any Government witnesses that are called and may testify and present witnesses on his behalf. Moreover, the Federal Bail Act provides for an expedited review of any decision to order pretrial detention. [2]

In contrast to the extensive procedural protections in the Federal Bail Reform Act, the proposed bill lacks any such protections. The bill provides no adversarial hearing, much less one with procedural safeguards that mirror the constitutionally-sound federal statute like the right to testify and present witnesses, proffer evidence, or cross-examine other witnesses appearing at the hearing. The bill does not require a judge to state his or her findings of fact in writing or require "clear and convincing evidence" or any other standard of proof to support those findings. Nor does the proposed bill provide for expedited appellate review as the Federal Bail Reform Act does.

Even if the Legislature were to amend the proposed bill to provide the necessary procedural safeguards to support pretrial detention in order to protect public safety, New York's under-resourced and over-burdened criminal justice system could not handle the demands of such hearings. The volume of arraignments in New York City's five boroughs alone is over 300,000 cases annually.[3] This volume of cases far exceeds that in federal court. The United States Attorneys' Office "received" between 109,173 and 172,511 cases annually in fiscal years 2002 to 2010, and "filed" between 56,658 and 68,581 and criminal cases during that same

[2] United States v. Solerno, 481 U.S. 739, 741 (1987).
[3] See New York City Criminal Justice Agency Annual Report 2011 at 7, 8 (indicating a total of 346,834 cases prosecuted in 2011 of which CJA conducted interviews of 282,769 individuals held for criminal court arraignment).

period.[4] Given our much higher volume of arraignments, the State's criminal justice system would collapse under the added strain of these necessary constitutional safeguards and would add further delay to the already slow administration of justice.

2. The Proposed Bill Will Not Make Our Bail System Fairer For Poor People Charged With Low Level Offenses.

The proposed bill will not make our bail system fairer for poor people charged with low level offenses because it does nothing to change current bail setting practices that disadvantage poor people. While we support the explicit presumption in favor of release and provision giving judges the authority to order release on recognizance or bail with conditions, neither of these provisions will result in greater fairness to poor people.

The current bail statute already reflects a presumption in favor of release. Under the statute, judges can only set bail when doing so is necessary to secure a person's return to court.[5] Implicit in the current statute, then, is the presumption that if bail is not necessary to secure a person's attendance in court, the accused must be released on his or her own recognizance. Indeed, should a Criminal Court judge set bail when doing so is not necessary to secure a person's attendance in court, the accused can appeal the bail decision de novo to a higher court and argue that the bail is excessive.[6] If bail that is not necessary to secure a person's attendance in court is set by a Supreme Court judge, then the accused can file a bail writ alleging that the decision to set bail was an abuse of discretion. Despite the implicit presumption in favor of release and the procedural safeguards in place for challenging securing orders that are not based on the statutory purpose of bail, courts routinely set bail that is beyond the financial wherewithal of the accused. Simply making the presumption explicit will not change current bail setting practices that disadvantage poor people charged with low-level offenses.

The provision allowing judges to order release on recognizance or bail with conditions will similarly not change current bail setting practices because judges already have the power to make a securing order subject to conditions. While the current bail statute does not explicitly authorize judges to set conditions of release or bail, the statute does not prohibit judges from

---

[4] United States Attorneys' Annual Statistical Report for Fiscal Year 2010, U.S. Department of Justice Executive Office for United States' Attorneys at pp. 7-9.

[5] C.P.L. § 510.30(2)(a). Under this provision, the court must base its order on the measures necessary to "secure [the defendant's] attendance at court when required."

[6] C.P.L. § 530.30.

doing so and such conditions have been upheld by the courts of this state. For instance, it is not unusual for judges to require a person to relinquish his or her passport or to impose a curfew when the accused is a minor as a condition of release or bail. Since judges already have the authority to set conditions—and already exercise that authority--adding the proposed provision will have no discernible effect on current bail setting practices. Consequently, neither of the two provisions designed to ensure greater fairness for poor people charged with low-level, non-violent offenses will bring about the legislature's stated goal.

3. The Proposed Bill Will Lead To An Increase In The Number of People Detained Pre-Trial And Will Result In Unwanted Financial And Non-Financial Consequences

Contrary to the drafters' intent as laid out in its findings, the proposed bill will actually increase the disproportionate impact of bail on poor people charged with low-level offenses because of its sweeping requirement that judges consider public safety in all cases. Under the proposed bill, judges are required to consider public safety when a person is charged a felony, misdemeanor, or violation as well as when the alleged crime is violent or non-violent. Since judges are required to consider public safety in all cases, and the proposed bill does nothing to change current bail setting practices that disadvantage poor people charged with low level offenses, the public safety provision will result in an increase of pretrial detainees. Further exacerbating the problem is that the proposed bill does not define public safety or provide judges with evidence-based guidance for determining when someone poses a threat to the public. As such, even those charged with low-level offenses such as simple knife possession, petit larceny, or harassment could now be held in on bail as judges struggle to comply with the public safety requirement.

The increase in the number of people detained pretrial will result in significant financial and non-financial consequences for those detained, their families, and their communities as well as the state as a whole. Financially, any increase in pretrial detention will come at a high cost given that in 2009, the New York City Department of Correction estimated that the average daily cost per inmate in New York City jails was $202.65.[7]

[7] *See* Human Rights Watch, "The Price of Freedom:Bail and Pretrial Detention of Low Income Defendants in New York City (2010), at 56 available at: http://www.hrw.org/node/94581.

Pretrial detention also comes at a high cost to the bedrock of our criminal justice system – the right to trial - since people detained must often choose between pleading guilty and securing their freedom or fighting their case and staying behind bars. In fact, for those who are held in on bail, the incentive to plead guilty is so strong that studies show people held in on bail are almost twice as likely to end up with a conviction as those who are at liberty.[8] Even after controlling for the arrest charge and criminal history, those held in on bail suffer worse case outcomes.[9] Being held in on bail not only has an impact on case outcomes but it destabilizes the lives of those detained. Too often, being held in on bail means the loss of employment, housing, benefits, status in this country, and sometimes even custody of one's children. Families are weakened and communities are torn apart as people, presumed innocent, languish behind bars away from their loved ones for days, weeks, months, and even years waiting for the resolution of their case. [10]

Since the proposed bill does nothing to change current bail setting practices and, in fact, provides judges with another basis for detaining poor people accused of crimes, this bill as drafted will lead to an increase in pretrial detention and will continue to disproportionately impact the poor and their families as well as exact an enormous financial and non-financial toll on communities and the entire state.

4. The Current Bail Statute Addresses The Stated Purpose Of The Proposed Bill

The Bronx Defenders arraigns close to 28,000 people each year in Bronx County; we see first-hand the disproportionate impact that current bail setting practices have on our clients, all of whom are poor. We also understand the legislature's interest in ensuring that our bail system is one that protects the public. However, our current bail statute adequately addresses both of the legislature's stated concerns. The problem of bail in New York does not lie with the law as written but rather with the law as applied.

Our current bail statute was drafted in 1970. At the time, the New York State Legislature was similarly concerned with the disproportionate impact that bail had on poor people. In response to this concern, the legislature revamped New York's bail system. The new system was based on "a presumption in favor of pretrial release" and included several new provisions that

[8] Id. at 33.
[9] *See* Mary T. Phillips, New York City Criminal Justice Agency, "Bail, Detention, & Nonfelony Case Outcomes," Research Brief No. 14, May 2007, http://www.cjareports.org/reports/brief14.pdf (accessed October 26, 2010), p. 5.
[10] *See* William Glaberson, *Justice Denied: Inside the Bronx's Dysfunctional Court System:Faltering Courts, Mired in Delays* NY Times, April 13, 2013.

were designed to make New York's system of bail fairer.[11] For example, the legislature created less onerous forms of bail, including partially secured and unsecured bonds, that permitted bail to be posted with minimal or no security, required that judges consider individualized bail factors including a person's financial resources when setting bail, provided that a person could not be detained without bail in a misdemeanor case, mandated that judges set at least two forms of bail to give more options to those criminally charged, and allowed for judges to set bail in any amount, rather than in fixed increments, so that bail could be tailored to the individual's financial resources. Despite these provisions, poor people continue to suffer under our current bail system.

The most prominent reason for this disconnect between the law as written and as applied is that many within the criminal justice system simply don't know and have not been educated on the law's history, goals, and various provisions such as the one providing for partially secured and unsecured bail. Until recently, the bail statute has not been a significant part of the regular trainings held at the Judicial Institute nor has it been routinely taught within defender offices and organizations. However, that has begun to change. Over the past few years, as awareness of the problem with our current bail system has increased, judges and defense attorneys have begun to receive trainings on the history of the statute, the purpose of bail in New York, and the alternative forms of bail. For example, last year, The Bronx Defenders, along with The Legal Aid Society and Chief Administrative Judge Camacho for Queens Country Supreme Court, Criminal Division created a training video for judges at the Judicial Institute in White Plains to educate judges about the history, purpose, and particular provisions of the bail statute. Just this past winter, The Bronx Defenders helped train all New York City Criminal Court judges on alternative forms of bail which make it easier for poor people to be released. Trainings have also

---

[11] The "Memorandum in Support and Explanation of Proposed Criminal Procedure Law," Prepared by the Commission on Revision of the Penal Law and Criminal Code, described the Criminal Procedure Law as follows:

> In structure, substance, form, phraseology and general approach, the proposed Criminal Procedure Law bears little resemblance to the distinctly archaic Code of Criminal Procedure . . . it lays a new foundation and, in the process, proposes numerous significant changes of substance in an attempt to provide a workable body of procedure accommodated to modern times. Among the innovations are . . . a reformulated system of bail and release on recognizance (Arts. 500-540) . . . [the goal of which was] to reduce the unconvicted portion of our jail population.

(S. Int. 7276, A. Int. 4561). People v. Burton, 150 Misc.2d 214, 225 (Sup. Ct., Bronx Co. 1990), overruled on other grounds, People v. Sielaff, 79 N.Y.2d 618 (1992) ("New York's statutory scheme [of bail under the Criminal Procedure law] manifests a continuing sensitivity for the rights of criminal defendants, and reflects an admirable attempt to reduce the cost of liberty for those citizens awaiting trial.").

been taking place for the past few years among the defense bar. As a result of increased awareness and newly created trainings, we in the criminal justice system are beginning to see judges setting bail in forms and amounts that are uniquely tailored to what is necessary to ensure the accused's return to court. The answer to the disproportionate impact of our bail system on poor people and their families requires much less than a legislative amendment. It simply requires awareness, education, and application.

Second, the current statutory scheme sufficiently addresses the legislature's public safety concern. While the current scheme does not allow judges to consider public safety in all cases, it does in carefully circumscribed circumstances. For example, in domestic violence cases, judges are not only allowed but are required to consider "any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household . . . and the principal's history of use or possession of a firearm."[12] Judges are also broadly empowered to revoke bail or release on recognizance at any time for "good cause shown."[13] Finally, the current statute gives judges the tools to revoke recognizance or bail any time "the court finds reasonable cause to believe the defendant committed one or more specified class A or violent felony offenses or intimidated a victim or witness . . . while at liberty."[14]

Even without an explicit provision requiring judges to consider public safety, the current statute provides judges with the tools they need to protect the public. Unlike the proposed bill, which requires judges to consider public safety in all cases regardless of the charge or offense history, the current statute is carefully drafted to allow consideration of public safety when appropriate. Since the current statutory scheme adequately protects the poor and the public, the proposed bill is not necessary to achieve the goals of the legislature.

---

[12] C.P.L. § 510.30(2)(vii)(A) and (B)(L.2012, c. 491, pt. D, § 1, eff. Dec. 24, 2012).

[13] While a judge must order recognizance or bail in misdemeanor cases, the statute allows judges to deny bail and order the accused held without bail when he or she is charged with a felony after considering the statutory factors, which includes the nature of the charges, the weight of the evidence, and the possible sentence. See C.P.L. § 510.40(c) ("a court may "Deny the [bail] application and commit[] the principal to, or retain[] him in, the custody of the sheriff."). Although not explicitly authorized by statute, judges routinely take public safety into account when considering the statutory factors judges must consider such as the defendant's character and nature along with the nature of the offense. Mary T. Phillips, "A Decade of Bail Research in New York City," (herein "A Decade of Bail Research") Final Report, New York Criminal Justice Agency, Inc. (August 2012) at 27 ("New York City judges do not ignore safety; they address it by setting high bail to detain individuals who pose a threat to the community.")

[14] C.P.L. § 530.60(2)(a).

Conclusion

Should this bill pass, New York's already overcrowded jails will swell with even more poor people who are presumed innocent, charged with low-level offenses, but are detained pretrial. Those who are already incarcerated even though they pose little risk of flight will now be joined by those who pose no risk of flight but who a judge, without the benefit of empirical data or a risk assessment instrument for guidance, has deemed to be a threat to public safety. Without any meaningful way of challenging the determination, many more of those detained will have to choose between pleading guilty and gaining their freedom, or exercising their constitutional right to trial and remaining incarcerated. As the population of pretrial detainees grows, so will the collateral consequences for each of them, their families, and their communities. More people will lose their jobs, their housing, and their benefits. More people will lose their status in this county and have their children taken away from them. More people will lose faith in the criminal justice system and we as a state will suffer under the financial and non-financial weight of incarcerating more and more of our citizens who have not been convicted of anything at all.