Written Comments of The Bronx Defenders

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New York City Council Committees on Courts and Legal Services and

Fire and Criminal Justice

Oversight Hearing: "Examining The New York Bail System And The Need for Reform"

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Justine Olderman, Managing Director of the Criminal Defense Practice, Robyn Mar, Director of Early Advocacy, and Noelle Turtur, Project Associate, submit these comments on behalf of The Bronx Defenders and thank the City Council for the opportunity to testify.

The Bronx Defenders provides innovative, holistic, and client-centered criminal defense, family defense, civil legal services, social work support, and advocacy to indigent people of the Bronx. Our staff of nearly 250 represents 32,000 people each year and reaches thousands more through outreach programs and community legal education. Our Criminal Defense Practice is comprised of 81 full time criminal defense attorneys, 13 supervisors, 10 social workers, and 10 investigators who defend clients in 28,000 primary cases and 3,000 conflict cases per year.

We are assigned to represent clients at arraignments in 8 out of the 19 shifts each week and are the assigned conflict provider in each of the other 11 shifts. Our recent numbers show that 21% of our clients charged with misdemeanor offenses, excluding those who are issued Desk Appearance Tickets and those whose cases were resolved at arraignments, are held in on bail. Those charged with non-violent felony offenses are held in bail 39% of the time. And clients charged with violent felony offenses are held in on bail 64% of the time.

Through our work on the front lines of the criminal justice system, we have seen first-hand the devastation that our broken bail system has wrought. It punishes people who have not

been convicted of anything. It penalizes New Yorkers for being poor. It discriminates against people of color. And it is a perversion of everything the justice system is supposed to stand for: the presumption of innocence, proof beyond a reasonable doubt, and the burden of proof. Because more than any other factor – more than the strength of the evidence, more than guilt and innocence – bail determines whether someone will end up with a conviction. Why? Because those who are held in on bail will do anything to get out, get back to their lives, and be with their families. Even if it means pleading guilty to something they did not do.

We have also seen how a single bail decision made in a paltry few minutes can upend people's lives, their families, and communities. Unemployment, homelessness, and disruption of education are just some of the consequences of a judge's bail decision. There are many more. Being held in on bail can cause people to lose their benefits which can take months to get back even after people are released from jail. It can cause the Administration for Children's Services to start a neglect proceeding against a parent who has nobody to look after his or her child while in on bail. And on the most basic level, being held in on bail destabilizes families while parents are separated from their children and husbands from wives, for days, weeks, months, even years waiting for their case to be resolved.

The Bronx Defenders has been on the forefront of the bail reform movement for years. In 2007, The Bronx Defenders launched The Bronx Freedom Fund, a 501(c)(3) organization that posted bail for people too poor to pay the price of their freedom. After receiving a legal opinion calling into question the legality of the Fund, the Fund temporarily shut down but was resurrected after a bipartisan group of lawmakers approved a bill, which The Bronx Defenders helped draft, that permits nonprofit groups to pay the bail for people accused of misdemeanors. The Fund has bailed out 230 people since the fall of 2013.[1]

In 2009, The Bronx Defenders spearheaded a city-wide bail reform initiative to increase the use of bail bonds that require little or no money down, such as unsecured and partially secured bonds. We collaborated with other New York City indigent defense providers to raise the awareness of these alternative forms of bail among defense attorneys, judges, and court staff. We met with representatives of the Office of Court Administration as well as the Chief Administrative Judge in each county. We created and distributed educational materials about

[1] Alyssa Work, The Bronx Freedom Fund, 16 June 2015. Online.

these alternative forms of bail and conducted trainings for judges and defense attorneys across the city.

Just this past year, we set out to study the impact of bail on our clients' housing, employment, education, physical and mental health, and families. We conducted in-depth interviews of 50 clients charged with misdemeanor offenses who had bail set that was not posted at arraignments.

As a result of our work in and out the courts, we are well positioned to evaluate the efficacy of the current bail statute, identify the reasons our bail system is broken, illustrate the devastation that it wreaks on people's lives, families, and communities, and identify the solution to a system that has taken too great of a human and financial toll for too long.

Based on all of our experience, we have concluded that the only real, long-lasting solution is to abolish money bail.

I. THE LAW IS NOT THE PROBLEM

In 1970, the New York legislature recognized that the state's jails were filled with people who had not been convicted of anything but simply could not afford the price of their bail. In response, the legislature enacted a new bail statute with provisions designed to correct this problem and limit pre-trial detention. That statute is still in place today. It is still the law. The problem is that nobody follows it, and as a result we find ourselves grappling with the exact same issue forty-five years later.

The Purpose of Bail: Securing Attendance Only

The first provision of the statute governing bail in New York states that the purpose of bail is to "secure court attendance when required."[2] In New York, with a few legislated exceptions, a judge cannot set bail because she is worried that the accused is going to commit another crime or because the judge thinks the person might pose a danger to the community.[3] The decision to limit the purpose of bail to ensuring someone's return to court was not

[2] N.Y. CRIM. PROC. LAW § 510.30(2)(a).

[3] In limited circumstances involving allegations of domestic violence, the court may consider prior violations of orders of protection and possession of firearms in setting bail. These provisions do not apply in any other context. N.Y. CRIM. PROC. LAW § 510.30(2)(a)(vii).

accidental. Many people involved in drafting the 1970 bail statute wanted judges to have the power to set bail based on the likelihood that the accused would reoffend or the belief that the person charged was a danger to the community.[4] In fact, many states[5] as well as the federal government[6] allow judges to set bail based on those considerations. But New York explicitly rejected the idea that judges should consider risk of re-offense and perceived dangerousness when determining bail.[7] This decision was monumental, not only because it departed from the mainstream approach, but also because setting bail to ensure someone's return to court, at least objectively, is not loaded with the historical race and class biases as speculation about "future dangerousness."[8]

In practice, however, judges nevertheless consider the perceived risk of future arrest or "danger to the community," sometimes tacitly, sometimes explicitly, in making bail decisions. In part, they do so because they face potential political and media criticism for their decisions. In some cases, they set high bail – higher than necessary to secure a person's return – in order to "send a message" that they take crime seriously.

The Form and Amount of Bail: Maximizing Release Options

New York's bail statute also created nine forms of bail in recognition that some forms of bail would be easier for people to post than others.[9] Prior to the enactment of the 1970 statute, the law limited the forms of bail that a judge could set and all of them were difficult for poor people to make. As part of the new bail statute, the legislature included "partially secured" bail bonds that allow someone to pay the court 10% of the bail with a promise to pay the remainder if

[4] N.Y. CRIM. PROC. LAW § 510.30 cmt. (McKinney 2012) (Preiser Practice Commentary).
[5] *See generally*, 8A Am. Jur. 2d Bail and Recognizance § 28 (2013) (providing overview of approaches to bail across states).
[6] *See* 18 U.S.C. § 3142 (2006).
[7] In 2013 Chief Judge Jonathan Lippman reignited the debate over the purpose of bail by calling for changes in the bail statute that would allow judges to consider public safety when setting bail. THE STATE OF THE JUDICIARY 2013, 3–4. In response to that call, a bill was introduced in the State Senate seeking to amend the Criminal Procedure Law to allow judges to consider both what is necessary to secure someone's appearance in court as well as safety to the community. An Act to Amend the Criminal Procedure Law, in Relation to the Issuance of Securing Orders, S. 05167/ A. 07028 (Feb. 14, 2013).
[8] While "dangerousness" and "risk of re-offense" are objective on their face, these criteria may still lead to discrimination in bail setting practices. If judges stereotype people of color as more prone to criminal behavior, as they historically have, then they will be more inclined to use "dangerousness" and "risk of re-offending" as a proxy for race-based decision-making. Cynthia Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 NYJLPP 919, 943 (2013).
[9] N.Y. CRIM PROC. LAW § 520.10(1) (McKinney 2012).

the accused does not return to court.[10] The law also provides for "unsecured" bail bonds that do not require money to be paid upfront.[11] Instead, the accused, her family, or friends can simply sign a bond and an affidavit promising to pay the full amount in the event that the accused fails to return. More recently, the legislature added the option of allowing the bail to be paid by credit card when the amount is $2,500 or less.

Additionally, the statute requires a judge to select not just one, but two forms of bail from the list of nine to provide options for the accused and make it easier for a person to be released on bail.[12] The statute also allows the court to set bail in any amount it chooses so that judges can tailor the price of bail to the amount that the accused can afford.[13]

Despite the creation of additional forms of bail, the current practice is still to set the only two forms of bail that existed prior to 1970, which are also the two most onerous and inconvenient forms of bail to post – cash bail and insurance company bond. Cash bail requires posting of the entire amount upfront in order to secure the release of the accused. However, most people arrested in New York are indigent, are living paycheck to paycheck, and simply do not have immediate access to cash. Sometimes, even for people who do have money sitting in a bank account, an obstacle as mundane as ATM withdrawal limits after banks close can result in extra hours of unnecessary, disruptive, and taxpayer-funded detention.

The second onerous form of bail frequently set involves commercial bail bondsmen. These companies charge significant fees, which are non-refundable, even if the case is eventually dismissed. These fees are based on a percentage of the bond amount. The higher the bond, the higher the fee. Some bail amounts are considered "too low" to secure an insurance company bail

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[10] *See id.* § 520.10.
[11] *Id.*
[12] *Id.* § 520.10(2)(b).
[13] *See generally* People ex rel. McManus v. Horn, 18 N.Y.3d 660, 665 (2012). While the plain language of the statute requires judges to set two forms of bail, some judges have read the statute as simply giving them the option of setting bail in more than a single form. In 2010, after a judge set cash only bail, The Bronx Defenders filed a writ of habeas corpus challenged the judge's reading of the statute. The writ was denied, as was the appeal to New York's appellate division. However, armed with legislative history and buttressed by legislative intent, Marika Meis, the Legal Director of The Bronx Defenders took the case all the way to the Court of Appeals. In reversing the lower courts, the Court of Appeals noted: "[p]roviding flexible bail alternatives to pretrial detainees – who are presumptively innocent until proven guilty beyond a reasonable doubt—is consistent with the underlying purpose of Article 520." *Id.* at 665.

bond since the fees do not yield enough profit for the bond company.[14] In addition, the insurance company bail bonds process can be extremely slow. First, the family must find a bondsman, put together the necessary documentation, pay upfront cash for fees, and provide collateral. Then the bondsman must obtain a signature from the judge and send someone from the company to the jail to post the bond. Bondsmen have little incentive to move quickly once they have received the fees and collateral. Even after the bondsman submits the paperwork, it takes many hours for the Department of Corrections to let the person out of jail once the bond has been paid. The whole process, start to finish, can take several days.

Despite the option to set partially secured bonds or unsecured bonds, which create the same financial incentives for a person to return to court without requiring the money to be produced in cash upfront or losing fees to bondsmen, in practice, most judges never set these alternative forms of bail. The Bronx Defenders internally tracks the frequency with which alternative forms of bail are requested and granted. Our informal study suggests that judges grant secured, unsecured, or partially secured bond as a bail option in only 16% of cases where the request is made. In fact, judges frequently react negatively when attorneys request alternative forms of bail, cutting off our applications to the court and summarily rejecting our requests.

Individual Financial Resources: Ignored

The statute lists nine factors that the court must consider when deciding whether to set bail, what forms to set, and what the amount should be to ensure that the bail decision is tailored to the individual circumstances of the accused. Most importantly, the statute requires judges to consider the accused's financial resources[15] in order to ensure that judges are setting bail in an amount low enough for the accused to pay but high enough to ensure their return to court.

Yet judges routinely fail to consider a person's financial resources, despite language in the bail statute requiring them to do so. If anything, a judge would likely be lauded as "consistent" for fixing the same amount of bail in the cases of two people charged with the same offense who have similar criminal histories, even if one person has a full-time job and the other person relies on a disability check. It is unusual for a judge to ever inquire about a person's

[14] Mary T. Phillips, Making Bail in New York City, N.Y.C. Crim. Justice Agency Res. Brief, May 2010, at 2 (reporting that commercial bond agents will not sign a bond for $1000 or less because they will not make enough money on such a relatively low amount).
[15] N.Y. CRIM. PROC. LAW § 510.30(2)(a) (McKinney 2012).

financial resources during a bail hearing in making this determination, but without this information it is impossible for judges to follow the law.

We know that judges do not take into account individual financial resources not only because they do not make any inquires, but because of the common practice of setting bail of at least $500 and only setting bail in $500 or $1000 increments, rather than amounts actually tailored to a person's ability to pay. For a person receiving a disability check each month, $150 might be an amount sufficient to ensure her return to court and $500 an amount beyond her ability to pay – for her, the functional equivalent of a $1 million bail. The practice of fixing minimum bail amounts and standardized $500 increments flies in the face of a system that supposedly eschews "bail schedules,"[16] in favor of individualized determinations by judges.

Prosecutors' Requests: Thwarting Legislative Intent

Most bail "hearings" take only a few minutes. In practice, prosecutors speak first and make the initial request for bail in both misdemeanor and felony cases. There is no explicit statutory authority for prosecutors to be heard in misdemeanor cases and while the bail statute does allow them to be heard in felony cases, there is nothing in the law that requires them to be heard or to make a specific bail request.[17] Yet, studies have shown that judges base their bail determinations – both whether or not bail is set and the amount of bail set – on the prosecutor's bail request.[18] However, like judges, prosecutors almost never calibrate their bail requests to an accused person's actual ability to pay bail. Also like judges, prosecutors seek the political and public relations cover of asking for bail. Prosecutors almost always request bail of $500 or more, even for people who have never missed a prior court date or have never been arrested before. Finally, prosecutors are actors in an adversarial system in which all parties know that pre-trial detention significantly increases the likelihood of a future conviction. Extracting a guilty plea from someone sitting in jail, even if they have a viable defense at trial, is easy. Doing so is particularly easy when it would require a person to sit in jail longer to have their trial date than to

[16] Broadly speaking, bail schedules are procedural schemes used by some jurisdictions that provide judges with standardized money bail amounts based upon the offense charge, regardless of the characteristics of the individual person accused. New York State does not have bail schedules.
[17] N.Y. CRIM. PROC. LAW §§ 530.20(1), 530.20(2)(b)(i) (McKinney 2012).
[18] Mary T. Philips, A Decade of Bail Research in New York City, N.Y.C. Crim. Justice Agency Res. Brief, August 2012, at 57-58.

plead guilty. It doesn't require evidence or witnesses, it only requires the desperation of a person dying, in some tragic cases literally, to get out of Rikers.

The bail system in New York is designed to let people out of jail during the pendency of their cases, not keep them locked up. The goal of the bail statute is to permit people to return to their community, to stay connected with their families, and to keep their jobs and housing intact, while fulfilling their obligations to the court system by appearing at their scheduled court dates. In short, the goals are release and return.

The legislative intent is there. The law is there. And yet, here we are. Our jails are filled with people who haven't been found guilty of anything. The widespread failure of judges to set bail in accordance with the law results in excessive and unnecessary pre-trial detention of poor New Yorkers.

II. THE IMPACT OF CURRENT BAIL SETTING PRACTICES ON LIFE OUTCOMES

This spring over a five-week period The Bronx Defenders conducted a survey of our clients charged with misdemeanors and held in on bail. We interviewed 50 clients. The majority of the clients we interviewed are poor African-American or Hispanic men between 18 and 56 years old (average 33 years old). The goal was to determine the impact that even a few days incarceration has on a client's life.[19] The clients we interviewed had been detained on average 4.5 days.[20] They were held in jail because neither they nor anyone else they knew could scrape together the $500 to $3,000 necessary to pay bail, and therefore had to sit in one of New York City's notorious jails.

Many of our clients' lives hang in a precarious balance – where two, three, five days in jail can lead to the loss of their jobs, housing, and medical care, in addition to having an equally devastating impact on their loved ones. The case of A.M. is one such example:

A.M. is the super in his building, and in exchange for his work in the building, the landlord lets him live in the basement apartment. He also has been diagnosed with Hepatitis C.

[19] Please note that this is a self-reported survey. The survey was conducted continuously between April 7, 2015 and May 11, 2015.

[20] Clients interviewed had been detained between two days and two weeks. As can be seen from the average of 4.5 days, most clients were detained for a week or less.

At the time we interviewed A.M., he had been held in for five days. He had already missed his appointment at a local clinic for his Hepatitis C. While in jail, A.M. was not given any treatment for his Hepatitis C, even though he informed the medical staff of his diagnosis. His landlord was not yet aware that A.M. had been arrested. A.M.'s brother is living with him and was covering for him by doing his super duties. A.M. did not know what would happen if he was held in any longer. A.M. told us that his boss would fire him if he finds out that A.M. was arrested – which became more likely the longer A.M. was held in on bail. If A.M. loses his job, both A.M. and his brother will be homeless. All of this is because neither A.M. nor anyone else he knows has $500 for bail.

The Impact of Bail on Children and Families

Half of the clients we interviewed reported having families and loved ones that they support financially and with non-financial assistance. Thirty-two percent reported that they were parents with either full or shared custody of their children. For many, even while sitting in a jail cell, their greatest concern was the well-being of their children. For our clients and their families, being held in on bail meant finding someone they could trust to care for their young children, which often put a strain on already burdened extended families. In their absence, children missed school and had their daily routines interrupted.

Those we interviewed not only care for their own children, but are responsible for the care of other family members such as nieces, nephews, cousins, children, grandchildren, siblings, and parents. They take parents to and from doctors' appointments and pay their medical bills. They take the other family member's children to school, buy them clothes, take them to the doctor when they are sick, and help with homework. One client discussed the impact that his pre-trial detention had on his sister and her family. Since he regularly watches her children while she is at work, she had to find full-time childcare while he was detained – a serious financial hardship for the family.

The Impact of Bail on Employment

Many of our clients held in on bail are also employees responsible for supporting themselves and others. Fifty-two percent of clients reported being employed at the time of their arrest. They are the men who deliver your food, sell water on the side of the road, and fix your

car when it breaks down. They work in construction, in restaurants, in bakeries, and in IT departments.

While missing a few days of work may be of little consequence for some New Yorkers, for many of our clients and their loved ones it is devastating. Nearly all of the clients we interviewed are unsalaried and work for each day's wages. Eighty-five percent of the 26 employed clients reported missing work as a result of being held in bail, resulting in a collective loss of 91 days of work and $7,634 in lost wages. Not only is this income vital to our clients and their loved ones, but missing work for a few days often results in our clients losing their jobs. Approximately, 41% of clients who were employed at the time of their arrest reported that they were either fired, suspended, or were unsure whether their job would still be there when they got out. Considering that approximately 57% of employed clients financially support someone else, the impact of a lost job spirals beyond the individual client, but to the entire family. For people with few financial resources, losing a job can mean losing everything – their homes, their belongings, their access to healthcare, the pride and stability that comes from waking up each morning and earning that day's pay.

The Impact of Bail on Housing

Our clients have homes that are dear to them and are put at risk when they are arrested and held in on bail. Approximately, 44% of our clients interviewed live in private housing and 26% live in public housing or subsidized housing. For some clients, the money that eventually gets posted as bail is that month's rent. Even when they have the financial resources, their physical absence can mean that they cannot pay that month's rent on time or they miss a critical housing appointment, both of which can result in losing their homes and belongings. Considering that many of our clients share their homes with relatives, significant others, children, and others, a client's eviction can lead to those connected to the client to become homeless.

Additionally, 12% of clients interviewed reported living in shelters and 8% reported living in supportive housing.[21] For these clients, being detained for just one night can put their housing at risk. Five of the six clients living in shelters reported losing their bed in their shelter because they were held in on bail. When these clients are eventually released, they may have

[21] An additional 8% of clients were either homeless or without any stable living situation.

nowhere to go and have lost their belongings, since most shelters will only hold onto a person's belongings for one week. These clients have lost that basic stability and comfort that comes from knowing that they have a place to sleep at night.

The Impact of Bail on Health

In addition, many of our clients held in on bail have injuries, illnesses, mental health needs, and addictions. While conducting this survey, we spoke to clients who reported having degenerative bone disease, bipolar disorder, lifelong struggles with addition to heroin, paranoid schizophrenia, HIV/AIDs, Hepatitis C, anxiety, ADHD, asthma, depression, cardiovascular diseases, stab wounds, and taser burns. Fourteen percent of clients reported receiving Supplemental Security Income due to a disability. Nearly everyone with a reported illness, mental health need, or injury reported receiving inadequate care from the jail infirmary. Forty-six percent of clients reported adverse health consequences from their detention. Many reported no medical care. In some instances, medical staff was aware of clients' medical conditions and refused to treat them.

D.D. was held in on $2,500 cash bail or $3,000 insurance company bail bond – an amount that she was never going to make. Prior to being arrested, D.D. was unemployed and living in supportive housing for individuals with HIV/AIDS. When we spoke to D.D., she had been held in on bail for six days. She was terrified that she would lose her supportive housing. But she was even more scared of the consequences that her detention was having on her health. During her health examination at the jail, D.D. informed the examiner that she had been HIV+ for 16 years. She listed the drugs that she takes each day in order to keep her viral levels low. The examiner told her that they would not give her medication because she might be "going home soon." D.D. was told to return to the clinic if she was not released that week and given an appointment for three weeks later. Fortunately, the case against D.D. was dismissed that day. D.D. said as soon as she had taken a bath, she was going to see her doctor and have her viral levels tested.

The Impact of Bail Sometimes Cannot Be Measured

The real trauma of being held in jail, the experiences that leave enduring scars, often cannot be measured with quantifiable metrics such as lost wages, housing displacement, or illness. Jail is undeniably the closest place to hell on earth. In fact, many clients called jail "hell," a place unfit for human beings. For one client, the most memorable trauma of her detention was the fact that she was not allowed to make a collect call, which was necessary to reach her out-of-state family. At a time when she was so scared, she couldn't reach out to the one person who could help her and comfort her – her mother. Clients reported sleeping on the floor, roaches, bed bugs, freezing cold cells – as one client put it, the treatment was "beneath human dignity." One female client reported being forced to undress repeatedly in front of corrections officers for health screenings and searches. She had been molested as a child and being forced to continually undress revived the trauma.

Repeatedly, clients discussed how their pre-trial detention was derailing their lives. They talked about their dreams of getting their degree, finding work, obtaining their drivers' licenses, having the financial ability to move into their own apartments, and being able to take custody of their children. One father discussed his desire to pull his life together and become the father that he never had. Being held in on bail was like "going back to square one." One client described being disappointed that the judge did not have enough faith in him to return to court. Clients reiterated this idea of trying to do everything right, trying to be better people, being held in on bail, and simply becoming disillusioned with the criminal justice system and their ability to ever escape it, improve their lives and fulfill their dreams.

While this study focused exclusively on clients charged with misdemeanors and the immediate impact detention had on their lives, the consequences of pre-trial detention are similar in nature for clients charged with felonies. In fact, these consequences are magnified as clients charged with felonies are detained for longer periods of time while their cases are pending.

III. PRE-TRIAL DETENTION'S EFFECT ON CASE OUTCOMES

Pre-trial detention has a significant negative impact on almost every metric of case outcomes. People held in on bail are convicted at higher rates, convicted of more serious charges, more frequently receive incarceratory sentences, and are sentenced to longer periods of

incarceration. People are desperate to get out of jail, will readily throw away their right to trial regardless of their innocence if doing so will get them out of jail and are at a significant disadvantage when plea bargaining with prosecutors. As a result, people held in on bail are punished more harshly for not having the money to buy their freedom.

Impact of Bail on Conviction Rates

Considering the devastating impact that each moment in custody has on people and their families, it is understandable that most people held in on bail are willing to say or do anything to get out as soon as possible. Being held in on bail significantly increases the likelihood of conviction – a reality that we as defense lawyers see every day. Guilt or innocence is irrelevant. Clients are almost always willing to plead guilty if it means they can go home, sleep in their own bed that night, and return to their lives in the morning.

H.A. had been divorced for a number of years when he met a young woman who lived in his building. She was outgoing and vibrant, interesting and attractive. It didn't take long before the two started dating. But soon afterwards, he got a knock on his door from the young woman's father. It turns out that she had lied about her age and she was just seventeen. Although she was legally an adult, H.A. told her that he could not be with her anymore. She begged and pleaded with him and eventually became hysterical and angry. Two days later, after H.A. ignored her calls and knocks at the door, she went to the police and accused him of assault. There were no injuries or medical records to support her allegations. There were no witnesses who would back up what she said. There was no evidence except her word. But in our criminal justice system, the word of one person is enough. And so, H.A. was arrested, taken to Central Booking, and charged.

Before I met him, H.A.'s only contact with the criminal justice system had been an arrest for driving with a suspended license. Nevertheless, the judge at his arraignment set bail at $2,500 cash or insurance company bond. H.A. was self-employed and work had been slow recently. He was barely getting by and could not afford the price of his bail. Like so many others, H.A. was sent to Rikers Island where he sat for six days until his next court date. In that time, he missed out on several jobs, a rent and child support payment, and a visit with his four year-old daughter. On his next court date, the prosecution made H.A. an offer. If he pleaded guilty, he

could receive a sentence of time served which would mean that he could go home that very day. If he didn't, he would have to wait months in jail for a trial date. He accepted the plea, but H.A., a forty-two year-old man, wept openly as he did.

Holding someone in on bail creates an immense pressure to plead guilty, regardless of guilt, innocence, or the existence of a viable defense. Pleading guilty often seems like the only option when in the Bronx, it takes on average 512.3 days to get a misdemeanor bench trial and 732.9 days to get a misdemeanor jury trial.[22] Given the delay in the Bronx, clients held in on bail spend more time in jail waiting for a trial, than they would if they pled guilty. Pre-trial detention prevents people from exercising their constitutional right to a trial and punishes those who chose to exercise their rights.

The statistics show that men like H.A. are not the exception, but rather the norm. According to 2012 study by the Criminal Justice Agency (CJA), when a person facing a non-felony charge is detained continuously until disposition, the conviction rate is 92%. For people facing similar charges and released from arraignments, the conviction rate is 50%. Any amount of detention increases the likelihood of conviction.[23] The same proves true for people charged with felonies – the longer someone is detained, the higher the conviction rate. For a person charged with a felony and detained for more than eight days, the conviction rate is 85%. For people released from arraignments, the conviction rate is 59%. The effect of pre-trial detention on conviction rates was statistically significant even after controlling for other characteristics.[24] Given that trial verdicts account for only 0.2% of Criminal Court cases and 5% of Supreme Court cases resolved in the Bronx, we can safely assume that nearly all of these convictions are a result of pleas.[25] Being held in on bail is the ultimate loss of bargaining power and prosecutors

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[22] Lindsay, 50.

[23] People who were detained because they could not initially make bail had a 60% conviction rate. People who were initially released, but detained later in the pendency of the case, had a 69% conviction rate. Mary T. Philips, A Decade of Bail Research in New York City, N.Y.C. Crim. Justice Agency, Res. Brief, August 2012, at 115-117.

[24] *Id.*

[25] Lisa Lindsay, Criminal Court of the City of New York 2013 Annual Report, ed. Justin Barry, Office of the Chief Clerk of the New York City Criminal Court, July 2014, at 17. Please note that the categories "Guilty Plea," "ACD," and "SCI" were merged to create a "Plea" category, while "Convictions" was merged with "Acquitted" to create a "Resolved by Trial" category. Finally, we also removed the "Other" category, which accounts for "resolutions of Criminal Court warrants outstanding in another county; removals to Family Court; extradition matters; and transfers to another court." And The Mayor's Office of Criminal Justice, Fewer Cases, Pleas, and Trials, meeting, New York, New York, Dec. 8, 2014.

know that once someone is detained, they can easily obtain a guilty plea without having to prove anything in court.

In fact, not only are people held in on bail more likely to be convicted, but they are more likely to be convicted of felony charges. If a prosecutor knows that a person is willing to plead guilty because they are detained, then the prosecutor has no reason to offer them a reduced charge. For people initially charged with a felony and released from arraignments, only 22% are convicted of a felony and 37% are convicted of a misdemeanor. For people charged with a felony and detained for eight to sixty days, those rates shift to a 53% conviction rate for a felony and a 32% conviction rate for a misdemeanor. For people detained for over sixty days, 72% are convicted of a felony and 12% are convicted of a misdemeanor.[26] Detaining someone during the pendency of the criminal case – before proving her guilty of anything – is the easiest and surest way to obtain a conviction.

For clients who are determined to fight their case even if it means staying in jail, being held in on bail diminishes their ability to aid in their own defense. While statistically hard to quantify, being held in on bail may also increase the chance that a person will be convicted at trial. If the accused is locked up, that person cannot track down witnesses, look for other evidence, or prepare for trial with his or her lawyer as easily as someone who is at liberty. But the damage is more than that. Jail itself can make it difficult for people to play an active role in their defense. Many simply shut down as a consequence of the toll that detention takes – the lack of sleep, the unrelenting anxiety about one's personal safety and future, the poor diet and hygiene, depression, illness, humiliation, the disillusionment with the criminal justice system and the so-called presumption of innocence.

Impact of Bail on Sentencing

Not only does the bail decision have an impact on the likelihood of conviction, but it also affects sentencing. There is a saying among criminal defense attorneys: "Once you are out, you stay out." Every defense attorney knows from experience that if someone is released, that person is likely to receive a non-incarceratory sentence even if she is convicted of a crime, and the statistics bear this out. While out, people can continue to go to work, to care for their loved ones,

[26] Mary T. Philips, A Decade of Bail Research in New York City, N.Y.C. Crim. Justice Agency, Res. Brief, August 2012, at 115-117.

to get an education, to get treatment, and to stabilize their lives. Our clients' behavior and accomplishments are considered and weighed by the judge and the prosecutor when determining sentencing. For people who are released at arraignments, only 10% of those charged with non-felonies and 20% of those charged with felonies ultimately receive an incarceratory disposition. For the person who has remained in jail for the duration of the case, she has little to bring to the court to convince the judge and the prosecutor that she should receive a non-incarceratory sentence.[27] The CJA reports that, "detention to disposition was the strongest *single* factor influencing a convicted defendant's likelihood of being sentenced to jail or prison for nonfelony and felony cases alike."[28] For individuals who were convicted detained until disposition, 84% of those charged with nonfelonies and 87% of those charged with felonies received incarceratory sentences.[29]

Pre-trial detention not only increases the likelihood of receiving an incarceratory sentence, but it also increases the length of their jail or prison sentence. People charged with non-felonies who were detained pre-trial for at least 60 days prior to their conviction were sentenced to 90 days in jail on average. In contrast, people who were similarly situated, but detained for a one day or less, were only sentenced to five days in jail on average. These disparities are magnified in cases where a person is charged with a felony. People charged with felonies, detained for a day or less, and convicted, were sentenced to an average of 120 days in jail. Similarly situated people who were detained for over 60 days in jail were sentenced to an average of 730 days in prison. While it may seem like time served would contribute to these disparities, time served accounted for a larger proportion of the sentences for persons detained for a week or less, than it did for persons detained for over a week.[30] Our criminal justice system punishes people unable to pay for their freedom doubly—by first making them languish in jail while waiting for their case to be resolved, and then by handing them longer and harsher sentences.

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[27] *Id.*, at 119.
[28] *Id.*, at 118.
[29] *Id.*, at 119.
[30] *Id.*, at 120-121. For example, 31% of people charged with a felony, detained for less than a day, and convicted were sentenced to time served. However, only 2% of people charged with felonies detained pre-trial for over 60 days were sentenced to time served. The pattern is similar for non-felonies.

IV. THE SOLUTION

New York is at a critical moment for bail reform. With the nation grappling with questions about how to restore faith in our police, our courts, and our jails, we must lead the way with bold, innovative solutions to our own criminal justice problems. Tinkering around the edges will not solve our problems nor will it put New York City at the forefront of a national movement for change.

Legislating Public Safety: An Unnecessary and Dangerous Reform

Recent efforts to reform our broken bail system have resurrected old arguments about the need to include public safety as a basis for setting bail. However, expanding the purpose of bail to include public safety would be a significant step backwards in the bail reform movement. It will exacerbate existing inequities in bail setting practices, multiply the disproportionate impact of communities of color and will do nothing to reduce the current pre-trial detention population.

The call to include public safety suggests that people who are released pre-trial are committing violent felony offenses at rates that require corrective action. However, a study by CJA reveals that only 17% of people released pre-trial on their own recognizance or on bail are re-arrested during the pendency of their case. More significantly, only 1.7% are re-arrested for a violent felony offense. While the study does not document case outcomes, it is safe to assume that not all of 1.7% were in fact convicted of those new charges.[31] Moreover, while validated risk instruments may be able to predict within a broad range which clients are likely to be re-arrested, predicting which ones will be re-arrested for a violent felony offense would be exceedingly difficult. Presumably, some of the 1.7% cited in the CJA study were released on non-violent misdemeanors and felonies, which would normally not trigger a concern about the risk of re-arrest for a violent felony offense and that subset of the 1.7% would continue to be released even under a public safety argument, assuming that they were not a flight risk. Since there is no instrument that would allow judges to identify with pinpoint precision who would pose a real public safety risk, including public safety as a reason to set bail would undoubtedly increase, rather than decrease, the number of people held in jail pre-trial.

[31] Qudsia Siddiqi , Predicting the Likelihood of Pretrial Failure to Appear and/or Re-Arrest for a Violent Offense Among New York City Defendants: An Analysis of the 2001 Dataset, N.Y.C. Crim. Justice Agency Res. Brief, January 2009, at 9-10.

Including public safety as a reason to set bail will also increase the disproportionate impact of bail on poor people charged with low-level offenses because it would give judges two reasons to set bail: risk of flight and public safety. While it is common knowledge that some judges set bail based on perceived public safety risks, they are not currently required to do so and, in fact, are not allowed to do so. However, adding public safety would *require* them to do so and make them responsible for any errors in judgment. It is not hard to imagine the impact of this kind of responsibility on a judge's bail setting habits. Judges will undoubtedly increase the number of people they hold in pre-trial under a "better safe than sorry" rationale.

Not only would the inclusion of public safety in the purpose of bail undermine current bail reform efforts, but it would also require extensive amendments to the bail statute. If New York were to move to a bail system that required judges to consider public safety, the legislature would have to put into place the kind of extensive procedural protections that exist in the Federal Bail Reform Act. The statue would have to provide for an adversarial hearing, 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. Judges would have to state their findings of fact in writing and make findings by "clear and convincing evidence" or another standard of proof to support those findings. And the statute would have to provide for expedited appellate review as the Federal Bail Reform Act does.

Even if the Legislature were to amend the statute 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.[32] This volume of cases far exceeds that in federal court. The United States Attorneys' Office filed between 56,658 and 68,581 criminal cases in fiscal years 2002 to 2010.[33] 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.

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[32] 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).

[33] 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.

Absolute public safety is an unattainable goal. It is a mirage. In any system of justice that is predicated on the presumption of innocence, there is going to be some risk. And chasing an ideal that is unattainable will only exacerbate our current problems and distract from the real and hard work of making New York's bail system something that we can all be proud of.

Supervised Release: Proceeding with Caution

Despite the many release options in the current bail statute, recent reform efforts have focused on creating additional options in the form of supervised release programs. Well-designed release programs do not reduce the number of people released on their own recognizance, recognize the importance of the defense attorney as gatekeeper, minimize the supervision imposed, and only offer services on a voluntary basis. As a result, they have succeeded in ameliorating our current bail problem by ensuring that more people are released pre-trial while imposing the least restrictive conditions to ensure their return to court.

However, some advocates for bail reform have called for the creation of a tiered supervision structure that would mandate services and impose greater restrictions on certain participants. Under a tiered supervision structure, participants could be assigned different levels of supervision depending on an assessment of their perceived needs as well as their risk of flight. Most alarmingly, participants could also be assigned different levels of supervision based on their risk of re-arrest. Expanding supervised release programs to include a tiered supervision structure with mandated conditions and restrictions will perpetuate the current disparate treatment of poor people of color caught up in our criminal justice system.

First, mandating conditions and imposing restrictions on New Yorkers who are unable to pay bail is in essence sentencing them when they have not been convicted of anything. The vast majority of sentences in New York City are non-incarceratory and some look remarkably like the kind of mandated conditions, such as attending drug, alcohol, and mental health treatment, and restrictions, such as refraining from using alcohol and drugs, that are being contemplated as part of a tiered supervision structure. Pre-trial supervision programs should continue to offer services to participants who want them. However, mandating services perpetuates the practice of punishing those presumed innocent because they are too poor to pay the price of their freedom.

Second, mandating conditions and imposing restrictions preserves our two-tiered pre-trial release system: one for the rich and one for the poor. Those with financial means could buy their

way out of mandated conditions and restrictions by posting money bail while those without financial resources would have no choice but to agree to the terms of supervised release or languish behind bars. Bail reform efforts should eradicate current inequalities in our bail system, not reinforce them.

Finally, mandating conditions and imposing restrictions based on an instrument that assesses risk of re-arrest rather than risk of flight is an end-run around our current bail statute. Our law prohibits considerations of public safety in release decisions. Considerations of public safety should similarly be prohibited in supervised release programs. Under the proposed reforms, participants found to be at risk of re-arrest could be mandated to services and required to accept restrictions. If they fail to comply with these conditions and restrictions, they would be discharged from the pre-trial services program, and bail could be set. Since the conditions and restrictions were based on public safety considerations rather than risk of flight, any decision to impose bail would be based on those considerations as well. While mandating services and imposing conditions may be appropriate in jurisdictions that require judges to consider what measures are necessary to ensure public safety, permitting New York supervised release programs to do so is inconsistent with state law.

The current design of the New York's pre-trial supervision programs should be maintained. Doing so will ensure that current bail reform efforts achieve their goal of mitigating decades of inequities and discrimination in our system of pre-trial release.

The Bronx Freedom Fund: A Replicable Model and a Lesson About Money Bail

One of the well-worn assumptions of our current bail statute is that what makes people come back to court is money – theirs or their family's. But The Bronx Freedom Fund has debunked that long-accepted assumption. The Freedom Fund has paid bail for 230 people since October 2013. These are people who judges believed would not come back to court until they or their family had to pay for their release. But instead, a charitable bail organization paid their bail. People bailed out by the Freedom Fund did not have to pay anything upfront nor would they have to pay anything if they fled. And there were no restrictions or conditions, drug testing, or

mandatory services. All they had to do was appear on the court dates and check in from time to time by phone. And yet, 97% of them came back anyway.[34]

One of the recommendations of Speaker Mark-Viverito is to expand charitable bail funds and make them available citywide. Others have suggested expanding the types of cases beyond misdemeanors and raising the amount that can be posted. Certainly, embracing these ideas would result in more people getting out of jail and the success of The Bronx Freedom Fund suggests that they would not compromise return rates. But the success of the Fund raises the question of whether we need charitable bail funds at all. If money is not what makes people come back to court, why do we even have money bail? More poignantly, how can we have money bail? How can we have a system of release that favors the rich and penalizes the poor without being able to show that the system exists because it is what works? It isn't what works. And we cannot in good conscience continue a system of bail that so patently discriminates against poor New Yorkers of color and yet at the same time call our system, just.

A Long Term Solution: State Legislative Change

Eliminating money bail is a long-term solution would require an amendment to the Criminal Procedure Law. It would require that all forms of bail that require money to be put down upfront be struck from the statute. Such an amendment would abolish cash bail, insurance company bond, partially secured bonds, and maybe even credit card bail. Instead of choosing among different forms of bail, judges would be required to choose from different forms of release. These options would be a combination of some we already use and some that are new.

1. Release on Recognizance**.**

   There are and will always be a large group of people who will come back to court on their own without any restrictions or conditions. We should safeguard this group and ensure that we do not disturb what already works well.

[34] Alyssa Work, The Bronx Freedom Fund, 16 June 2015. Online.

2. Unsecured Bond.

   Unsecured bonds are widely used in federal court and require no money upfront. This is a good option for people who may be considered a moderate risk of flight but who do not need supervision and who have friends or families that are willing to sign a bond.

3. Supervised Release.

   For those clients who are considered a moderate to high risk of flight and who do not qualify for unsecured bond because they don't have anyone to sign a bond for them, supervised release is an important option.

4. Electronic Monitoring.

   For those who are charged with a violent felony offense and are a high risk for failure to appear, we should develop a system of supervision that includes electronic monitoring.

Short Term Recommendations: Local Reforms

Eliminating money bail is a long-term solution, but the problem of bail cannot wait. Thousands of poor New Yorkers are languishing in jails right now because they cannot afford the price of their freedom. We must take immediate action to address the inequalities in our bail setting practices that are systematically destroying people's faith in our criminal justice system. We should push to eliminate money bail in the long term but we must also come up with solutions to address the problem of bail today. These short-term solutions include:

1. Mandate trainings for all judges, prosecutors, defense attorneys, and clerks about the bail statute, educate them about cutting edge research, and encourage evidence-based practices.

2. Require CJA to make bail recommendations based on a person's financial resources for all people who are considered a moderate and high risk of flight to ensure that bail decisions are tied to an individual's financial resources.

3. Mandate reporting for judges on their use of alternative forms of bail and release to increase awareness about bail setting practices and encourage broader use of more accessible bail bonds.

4. Increase funding for charitable bail funds so that while we still have money bail, more people are released.

5. Expand supervised release programs to all boroughs and broaden eligibility to include more categories of offenses.

6. Pilot, as part of supervised release, electronic monitoring for those charged with violent felony offenses and who are a high risk for FTA.

7. Create a memorandum of understanding whereby prosecutors agree to highlight factors for the judge to consider but stop making specific monetary bail requests.

8. Reform the bail-posting process to make it easier for family and charitable bail fund administrators to post bail.

9. Fund bail expediters in each indigent defense office who can meet with clients held in on bail, identify and reach out to bail resources in the community, and help facilitate the expeditious posting of bail.

10. Reject the incorporation of “public safety” rationales into bail determinations that would increase pre-trial detention.