

**The Bronx
Defenders**

**Redefining
public
defense**

**New York City Council
Committee on Criminal Justice &
Committee on Justice System
Oversight Hearing on
Why Does the City Make It So Hard to Post Bail?
December 3, 2018
Testimony of The Bronx Defenders
By Scott D. Levy**

Chairman Powers, Chairman Lancman, and members of the Committees, my name is Scott Levy and I am Special Counsel to the Criminal Defense Practice at The Bronx Defenders. I am grateful for the opportunity to testify before you today about this important matter.

The Bronx Defenders is a community-based and nationally recognized holistic public defender office dedicated to serving the people of the Bronx. The Bronx Defenders provides innovative, holistic, client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people of the Bronx. Our staff of over 300 represents approximately 28,000 individuals each year. In the Bronx and beyond, The Bronx Defenders promotes criminal justice reform to dismantle the culture of mass incarceration.

Introduction

In 2017, The Bronx Defenders welcomed the enactment of legislation intended to address some of the obstacles facing our clients and their families when attempting to pay bail that needlessly keep people in jail and cause additional pain and frustration. While we recognize that there have been some tangible improvements since their passage, the City — and the Department of Corrections (DOC) in particular — has failed to fully implement and adhere to the laws. The unfortunate reality is that many of our clients and their families continue confront the same obstacles that existed last year. As the Bronx Freedom Fund's recently released report shows,

there is still a long way to go.¹ Many of the bills' mandates remain unfulfilled. And significant challenges remain unaddressed. Chief among them are the persistent problems associated with the outdated practice of using nominal \$1 bail as an administrative hold and the barriers to utilizing the City's new online bail payment system. That is why The Bronx Defenders supports Int. 0944-2018, which would require DOC to notify detainees and their attorneys whenever a person is detained solely on \$1 bail, and Int. 1199-2018, which would remove fees associated with credit card bail payments and allowing payments by direct deposit and electronic check. Also, given our experience with the 2017 bail laws, we urge the Council to take preemptive action to ensure compliance with these new proposals.

The Obstacles to Paying Bail

New York City's bail payment system is riddled with inefficiencies, anachronisms, and unnecessary hurdles that create confusion and anxiety for those trying to pay bail for loved ones on Rikers Island and that lead to hours, and sometimes days, of unnecessary incarceration for people who are presumed innocent.

Impediments to Paying Bail Immediately after Criminal Court Arraignment

The time from arrest through arraignment is often the most consequential time in a criminal case. Whether or not a person is released at or immediately after arraignment on bail can determine whether that person maintains stable housing, keeps a job and livelihood, stays on track at school, or receives necessary medical care. Thus, the ability to pay bail immediately after arraignment not only prevents a person from being transported to Rikers Island and undergoing a lengthy and costly intake process, but is often the key to maintaining stability in a person's life.

Contacting friends and family to come to court and pay bail is one of the most pressing needs whenever bail is set. Local Law 126, requiring the NYPD to give people access to their cell phones to gather contact information for loved ones, was a critical step toward ensuring that people would actually be able to post bail before being transported to Rikers. The Bronx Freedom Fund, however, found that at least 70% of the people they interviewed had not been given the opportunity to retrieve contact information as required by Local Law 126.² My own experience corroborates these findings. Just this past week I worked an arraignment shift in which every single client I interviewed told me that the police had not given them the

¹ Bronx Freedom Fund, *Implementation of City Council's Bail Easement Laws* (Oct. 2018) ("Freedom Fund Report"), available at <http://www.thebronxfreedomfund.org/citycouncil/>.

² *Id.* at 6.

opportunity to retrieve contact information from their cell phones before they were seized and vouchered. The NYPD's failure to comply with Local Law 126 erects significant barriers to the quick and efficient post of bail immediately after arraignment.

Relatedly, Local Law 124 requires DOC to keep people in the courthouse for a period of time after bail has been set if there is someone available to post bail to facilitate in-court payment and obviate the need to transport people to Rikers. While the system does not always work, we have seen an increased willingness on the part of DOC to honor courthouse holds for our clients to allow for immediate in-court bail payment, saving our clients many hours, if not days, of unnecessary incarceration. We are also encouraged by the recent change by the Criminal Justice Agency's Bail Expeditors allowing holds whenever a person is eligible to be bailed out by one of the city's charitable bail funds. Still, too often, DOC refuses to honor holds and people are unnecessarily taken to Rikers.³

Finally, while New York's bail statute clearly contemplates that a person incarcerated on bail may post bail for themselves — such as with a partially secured appearance bond — DOC, NYPD, and OCA refuse to allow our clients to post bail for themselves, even if they have sufficient cash or a credit card with them.

Lack of Accessible Information

After bail is set, our clients' friends and family often find themselves completely in the dark about where and how to pay bail. The bail payment system is by no means self-explanatory. It is for this reason that the City's failure to meet the mandate of Local Law 127, requiring the posting of information in the courthouse about how the bail system and bail payment work, is particularly confounding. Of all of the bills passed last year, Local Law 127 seemed to be the easiest with which to comply. Yet, as of today, there are still no signs or instructions posted in the courthouse giving people basic information about how to free a loved one.

Every day, we hear stories from our clients and their families about their experiences trying to post bail. In moments of intense crisis — when a loved one has been arrested and is threatened with pretrial incarceration — people are forced to navigate an opaque and confusing system that exacerbates their anxiety and desperation to obtain liberty for friends and family members. The process and mechanics of posting bail can be overwhelming in these moments without basic information, such as how to determine the amount of the bail and where and how to pay it. And while we are encouraged by the long overdue push to expand the use of alternative forms of bail,

³ See *id.* at 4.

their increased use only magnifies the need for transparency. The need for information is also especially acute among our non-English speaking clients and their families, who face additional obstacles when trying to post bail, especially in light of the dearth of court interpreters.

Paying Bail at DOC Facilities: Obstacles and Delay

Because DOC does not have a bail payment facility in or near the Bronx courthouses, our clients' families cannot post bail for their loved ones at the courthouse except on days where the person is physically present in court.⁴ Local Law 123 requires DOC to accept or receive bail payments "immediately and continuously" at or within a half mile of the courthouse. As of today, DOC has failed to comply with Local Law 123. As a result, those wishing to pay bail in the Bronx must travel to the Vernon C. Bain Center, known as "the Boat," in Hunts Point, an facility served by a single bus line in an isolated industrial zone. For people in the Bronx, the difficulty of getting to and from the Boat can add hours to the bail payment process and can be prohibitive for some.

Once someone reaches the Boat — a trip that itself can take hours — they will likely have to wait many more hours to post bail. Despite all of the focus on bail payment across the city, paying bail at a DOC facility remains an unacceptably arduous and lengthy process. Whether due to staffing issues, the outdated reliance on fax machines, the lack of necessary forms and other paperwork, and countless other, often hidden, hindrances, paying bail regularly takes many hours, filled with confusion, misinformation, and frustration. It is also unacceptable that with the City's push to increase the use of credit card bail, DOC is still unable to process credit card payments at its facilities. (It is equally troubling that the City's Supreme Court clerks are similarly unable to process credit card payments.) Payment acceptance and processing is anything but "immediate and continuous" as required by Local Law 123. As the Bronx Freedom Fund reported, it can take up to 20 hours to post bail.⁵

Once bail is paid, our clients often face many more hours of unnecessary incarceration due to delayed processing and discharge. According to the Freedom Fund Report, it took DOC an average of 13 hours to discharge people whose bail had been paid, despite Local Law 123 mandate to expedite release.⁶ These delays not only result in needless incarceration, but also act as a destabilizing force in our clients' lives. Our clients are released at odd hours, without notice, so that their families or advocates cannot meet them upon release, making seamless reentry to the

⁴ Even when our clients are in court, bail cannot be posted during the lunch hour, because OCA closes the clerk's window.

⁵ *Id.* at 2.

⁶ *Id.*

community impossible. Clients being released to drug treatment or mental health programs are left to fend for themselves.

Dollar Bail

The obstacles and delays facing our clients and their families are particularly frustrating when our clients are only being held on \$1 bail. Rather than utilize administrative holds, DOC and the courts require the imposition of bail in order for a person to receive credit for time spent in pretrial detention and to be produced to court dates from DOC custody. As a result, judges are forced to set nominal bail in the amount of \$1 whenever a person is incarcerated on one case, but still technically at liberty in another. The practice of setting \$1 bail in lieu of an administrative hold is anachronistic and can lead to absurd and devastating consequences. These consequences arise most commonly when a person has two cases open simultaneously in different counties and one of them is resolved or when a parole hold is lifted, leaving the person in custody on only nominal bail on the remaining case in another borough. In such cases, the person will remain in jail until a friend or family member posts \$1 with a DOC facility.

The experience of James,⁷ a 16 year old client, shows how the practice of setting \$1 bail interacts with the rest of the bail payment system to destabilize our clients' lives. This past spring, James was detained on significant bail in the Bronx and \$1 on a case in Manhattan. Unable to afford the bail, James spent months on Rikers Island before pleading guilty and agreeing to participate in a residential program for adolescents. Representatives from the residential program were present in court for the plea and were prepared to escort James directly from court to the program. The judge released James with the understanding that he would immediately enter the program and comply with the conditions until his sentencing date.

Because James was also held on \$1 bail, however, DOC refused to release him to the program. The \$1 bail could not be paid in the Bronx courthouse because it originated in another county. And because there are no DOC bail payment facilities in or around the Bronx courthouse, the \$1 had to be paid at the Manhattan Detention Center by a volunteer. Thus, instead of being released directly to his program, James was taken back to Rikers and was not released until after midnight. DOC's failure to comply with the laws passed by the City Council, as well as the continued practice of relying on \$1 bail resulted in a child remaining in custody, his family being subjected to unnecessary anxiety and frustration, and a plan carefully crafted by our client's attorney and approved by the court being thrown into disarray.

⁷ The client's name has been changed to ensure confidentiality.

Because there is no automatic system to alert defense attorneys when their clients are being held on nothing more than \$1 — such as when a case in another borough is resolved or a parole hold is lifted, leaving only nominal bail — we regularly encounter situations in which clients remain unnecessarily incarcerated for days or longer because of a lack of information and communication. Int. 0944-2018 would go a long way toward eliminating these unjustifiable periods of over-incarceration by giving attorneys and other stakeholders the ability to take immediate action whenever a person is detained only on nominal bail. Moreover, efforts must be made to ensure that credit card bail is available whenever \$1 is set to avoid the necessity of traveling to a DOC facility just to pay \$1.

Currently, we rely on a network of volunteers across the city known as the Dollar Bail Brigade to pay bail for our clients held on \$1 bail. While we are grateful and inspired by their work, it is outrageous that their public service is even necessary in light of the obvious absurdity of the practice.

Credit Card Bail and Online Bail Payment

The ability to pay bail online using a credit card has been a welcome improvement that is increasingly being utilized by our clients and their families. We have had multiple instances where family members who live out of state were able to post bail online. The ability to do so has greatly expanded the contacts that our clients can look to when considering who can post bail for them. There have been instances where family members present at arraignments were able to post bail using a credit card at the courthouse and clients were released within an hour. The recent elimination of the \$2,500 cap on online bail payments was also a welcome improvement.

The rollout of the online payment system, however, has not been entirely smooth. Many of the issues arising from the online payment system, however, can be traced to administrative errors within DOC and OCA. For instance, in one case the judge set \$500 cash bail in our client's case, with a credit card alternative. When our client's sister attempted to pay online, however, she discovered that the system listed the amount as \$1,500. When she attempted to pay the higher amount, the system rejected the payment far higher than what the client and his attorney had told her. Although she was prepared to pay the higher amount, the system still would not allow her to post the bail. In order to resolve the issue, a Bronx Defenders attorney had to alert DOC, inform the court and have corrected information sent to DOC, and then repeatedly follow up with DOC to ensure that the issue was being prioritized. After all was said and done, our client stayed in jail an extra day as a result of a mix-up. In another case, DOC's internal records erroneously showed our client to have a hold that did not actually exist, preventing our client's friend from

posting bail online. Only after numerous calls to DOC did an attorney in our office discover that the client was being held on a mistakenly entered immigration detainer.

We would like to note, however, that whenever these issues have been brought to the attention of people at the Mayor's Office of Criminal Justice, they have taken immediate action. Erin Pilnyak at MOCJ has been particularly responsive whenever issues have been brought to her attention. And many issues — such as the rejection of payments when the the cash and credit card amounts are different — have been resolved. But others, such as Supreme Court's inability to process credit card payments, have not.

In particular, many financial obstacles remain for our clients and their families. Fees for credit card payments online, for example, add just another unnecessary burden to the bail payment process and impose a tax on our clients' freedom. A more significant obstacle, however, is the inability to use debit cards, direct deposit, and electronic checks. Many of our clients' families do not have access to credit and are unable to avail themselves of the online payment system. We applaud the Council for its attention to these issues and urge quick passage of Int. 1199-2018, which would remove fees associated with credit card bail payments and allowing payments by direct deposit and electronic check.

We are also concerned that an online bail payment system that requires people to provide a social security number creates an unnecessary barrier by prohibiting payment by those who may not readily know their social security number or not have one but can otherwise provide sufficient identifying information. Furthermore, such requirement could disproportionately impact non-citizen New Yorkers by creating additional obstacles for their families. If New York City does not require New Yorker to provide a social security number to get an IDNYC, it should not require them to get their loved one out of its jails.

Even improved online bail payment, however, is not a substitute for in-person payment options, as many of our clients and their families are unable to access the online payment system because they lack access to banking. Indeed, a 2015 report by the Urban Institute found that 21.8% of households in the Bronx do not have a bank account, compared to only 12.7% in Brooklyn, 8.8% in Manhattan, 8.0% in Queens, and 7.2% in Staten Island.⁸ DOC must continue to make improvements to all of its bail payment processing systems if it is to serve the low-income communities most directly impacted by pretrial incarceration.

⁸ Caroline Ratcliffe, et al., *Where Are the Unbanked and Underbanked in New York City?* (Sept. 2015), at 3, available at <https://www.urban.org/sites/default/files/publication/71511/2000430-Where-Are-the-Unbanked-and-Underbanked-in-New-York-City.pdf>.

Court Resistance to Change

Adding to the obstacles facing our clients, the culture and practices of the court system itself have been slow to change. New York's bail statute provides nine different forms of bail.⁹ The New York State Legislature created these alternative forms of bail with the specific intention of giving judges bail options that would facilitate release and be less onerous than traditional cash bail and insurance company bonds.¹⁰ Two forms in particular -- partially secured and unsecured bonds -- do not require clients' friends or families to put up large amounts of nonrefundable premiums or fees at the beginning of a case to secure the release of a loved one. With partially secured bonds, sureties must simply post up to 10% of the value of the bond directly with the court; the full amount is refunded at the end of the case. With unsecured bonds, the surety is not required to put up any cash up front. Partially secured and unsecured bonds function similarly to commercial bail bonds, but do not require a for-profit middleman or the payment of nonrefundable premiums.

Despite the fact that these alternative forms of bail have been on the books for years, the city's Criminal Court judges have largely ignored them, overwhelmingly opting to set bail in only two forms: cash bail and commercial insurance company bonds. In a 2017 study of bail-setting practices across the city, the Vera Institute identified only 99 cases city-wide in which judges set partially secured or unsecured bonds.¹¹ While we have recently seen an increase in their use in the Bronx, we find that some judges are now requiring clients' families to provide excessive and unnecessary financial documentation to post partially secured and unsecured bonds, erecting yet another set of obstacles.

Moreover, while many judges are becoming increasingly comfortable with setting a credit card alternative in the Bronx, some are still hesitant to do so, making the online bail payment system completely inaccessible to many of our clients. Judges should be encouraged to set a credit card alternative in all cases.

⁹ See C.P.L. § 520.10.

¹⁰ See Insha Rahman, The Vera Institute, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts* (Sept. 2017) ("Vera Report"), at 8, available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/against-the-odds-bail-reform-new-york-city-criminal-courts/legacy_downloads/Against_the_Odds_Bail_report_FINAL3.pdf.

¹¹ *Id.* at 11.