NEW YORK STATE BAR ASSOCIATION

Join Us...

Bail Reform in New York State: Moving Forward

Sponsored by the New York State Bar Association Committee on Civil Rights.

Tuesday, May 3, 2016 | 5:30 – 7:30 p.m.

Fordham University School of Law
150 West 62nd Street, New York, NY
Moot Court Classroom

A program that will examine current law and address the issues regarding the need for reforming bail procedures in New York State courts.

Welcome Remarks and Moderator
Steven M. Raiser, Esq.
Raiser & Kenniff, PC
New York, NY

Participants
Hon. Jonathan Lippman
Latham & Watkins, New York, NY
Former Chief Judge, New York State Court of Appeals

Adele Bernhard, Esq.
New York Law School

Scott Ross Hechinger, Esq.
Brooklyn Defender Services

Light refreshments provided at a post-program reception 7:30 – 8:00 p.m.
There is no charge to attend, but advance registration is required.
This program will provide 1.5 MCLE credits in Professional Practice, pending approval.

NYSBA

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Program

5:30 p.m. **Introduction of panelists by Moderator**

5:35 p.m. **From the Bar**
- The need for bail reform, how it can affect clients
- The promises and limitations of reform methods currently underway
- The practical process of how bail is set and how bail reform can work
- Typical forms of relief
  - release of the defendant
  - alternative forms of bail
  - supervised release
  - bail fund
  - filing a habeas writ

6:05 p.m. **An Academic's Perspective**
- Alternatives to cash bail

6:35 p.m. **From the Bench**
- Bail reform as a major civil rights issue in New York

7:05 p.m. **Break**

7:10 p.m. **Question and Answer**

7:30 p.m. **Reception with light refreshments**
Vasiliou Faculty Dining Room, 2nd Floor

Hon. Jonathan Lippman

The Honorable Jonathan Lippman, former Chief Judge of New York and Chief Judge of the New York Court of Appeals, the state's highest court, is Of Counsel in the New York office of Latham & Watkins and a member of the firm's Litigation & Trial Department. He provides strategic counsel to clients on New York Law and appellate matters nationwide, and is a leader of the firm's pro bono practice.

Judge Lippman served as Chief Judge of the State of New York and Chief Judge of the Court of Appeals from February 2009 through December 2015. During his tenure on the Court of Appeals, Chief Judge Lippman authored major decisions addressing constitutional, statutory, and common law issues shaping the law of New York, the contours of state government, and the lives of all New Yorkers.

As the state's Chief Judge, he championed equal access to justice issues in New York and around the country and took the leadership role in identifying permanent funding streams for civil legal services. Chief Judge Lippman made New York the first state in the country to require 50 hours of law-related pro bono work prior to bar admission and established the Pro Bono Scholars and Poverty Justice Solutions Programs to help alleviate the crisis in civil legal services. He strengthened the state's indigent criminal defense system, addressed the systemic causes of wrongful convictions, created Human Trafficking Courts across New York State, and led efforts to reform New York's juvenile justice, bail and pre-trial justice systems. Judge Lippman championed the commercial division as a world class venue for business litigation, reformed the state's attorney disciplinary system, adopted the Uniform Bar Exam, and succeeded in the creation of a statewide salary commission for judges.

Chief Judge Lippman has served at all levels of the New York State Court system in a career spanning more than four decades, including service as a staff attorney, administrator and judge. From January 1996 to May 2007, he served as the longest-tenured Chief Administrative Judge in state history, playing a central role in many far-reaching reforms of New York's judiciary and its legal profession. From May 2007 to 2009, Judge Lippman served as the Presiding Justice of the Appellate Division of the Supreme Court, First Department, dramatically reducing the court's pending backlogs.

In 2008, Judge Lippman received the William H. Rehnquist Award for Judicial Excellence, presented each year by the nation's Chief Justice to a state court judge who exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics. Judge Lippman was selected for his "unparalleled ability to promote and achieve reform in the state courts. His leadership in the New York courts contributed to numerous improvements in that state's justice system and served as an example for courts across the country." In 2013, the American Lawyer named Chief Judge Lippman one of the Top 50 Innovators in Big Law in the Last 50 Years. A New York Times article in December 2015, stated that Judge Lippman had left an altered legal profession in New York by using "his authority to promote an ideal of lawyering in public service."

This year, Judge Lippman was named Chairman of the Independent Commission on New York City Criminal Justice and Incarceration Reform, a 27 person blue ribbon commission, formed to examine the future of the Riker's Island jail facilities in the context of systemic criminal justice reform.

Adele Bernhard, Esq.

Adele Bernhard began practicing law as a public defender with the Legal Aid Society in the South Bronx and has concentrated on criminal law for most of her career. In 1988, she started a grant-funded project providing training and resources for private court-appointed counsel assigned to represent the indigent accused of crimes. The project successfully convinced New York City to establish the first permanent citywide training unit for court-appointed counsel, where she served for three years as the director of training. She was one of the original members, and subsequently chaired, the First Department Indigent Defense Organization Oversight Committee, which monitors the provision of defense services by organizations in New York City. Bernhard is the recipient of the First Annual Shanara Gilbert Emerging Clinician Award, AALS Clinic Section. She was appointed to the Task Force on Criminal Justice of the New York County Lawyers' Association. She is nationally recognized for her efforts to create a right to compensation for those who have been unjustly convicted and later exonerated.

She is currently serves as a Distinguished Adjunct Professor of Law at New York Law School and is involved with the School's Post-conviction Innocence Clinic.

Scott Ross Hechinger, Esq.

Scott Hechinger is a Senior Staff Attorney at Brooklyn Defender Services (BDS), a public defense firm representing about half of all those arrested in Brooklyn each year. Scott has represented thousands of low-income individuals accused of crimes ranging from low-level misdemeanors to the most serious felonies, from arraignment to trial, in and outside of court. Scott also leads office wide policy initiatives on a range of issues, including bail, and directs advocacy films and other new media projects.

Scott co-founded the Brooklyn Community Bail Fund, an independent 501(c)(3) charitable bail organization, which raises money and pays bail so that low-income individuals can defend their cases from a position of freedom while remaining productive, stable, and together with their families. Scott's work has been featured in the New York Times, New York Times Magazine, Huffington Post, and VICE, and most recently presented at SXSW Interactive 2016.

Scott graduated magna cum laude from Duke University and cum laude from New York University School of Law, where he was named a Florence Allen Scholar, served as Articles Editor for the NYU Journal of Legislation and Public Policy, and was awarded the Ann Petluck Poses Graduation Prize for outstanding clinical work. Thereafter, he served as Judicial Law Clerk to the Honorable Raymond J. Dearie, U.S. District Judge for the Eastern District of New York. Scott is admitted to practice in New York State, the District of Columbia, and the federal Eastern and Southern Districts of New York.

Steven M. Raiser, Esq.

Steven Raiser is a founding partner at Raiser & Kenniff, PC. Steven's practice area is criminal defense and civil rights litigation.

Steven is a native of Long Island and has also resided in Manhattan and the Bronx. Before attending college, Steven was a counselor for teenagers who had trouble with the law and were residing in group homes. While attending law school at night, Steven ran a full-service social work and community service program in mid-town Manhattan. Here, he supervised individuals previously convicted of crimes through Rikers Island's Early Release Program.

Since being admitted to the New York Bar, Steven has represented the city of New York, serving as a Special Assistant Corporation Counsel. He handled all aspects of litigation in child neglect cases there, representing the interests of the children and the city. He then served as an Assistant District Attorney, where he successfully prosecuted hundreds of criminal cases, from violations of the Vehicle and Traffic Law to homicides. During his time as a prosecutor, Steven was involved in high-profile cases such as those involving Rapper DMX and NY Rangers' Defenseman Sandis Ozolinsh. While serving as a prosecutor, he joined the U.S. Army. As a commissioned officer in Judge Advocate General's Corps, Steven volunteered for active duty in Iraq. There he served in the office of the Staff Judge Advocate, defending soldiers from actions instituted by the federal government, making probable cause determinations for the command, and assisting in the training of Iraqi soldiers in legal proceedings. In recognition of his service in Iraq, he earned the Global War on Terrorism Expeditionary Medal for meritorious service in support of Operation Iraqi Freedom and the Army Commendation Medal for exceptional meritorious service during combat operations. He, along with his unit, received the New York State Bar Association's Award for Excellence in Public Service and was presented with our state flag by Senate Majority Leader Joseph Bruno.

Steven is a graduate of the Albany State University, School of Criminal Justice and earned his Juris Doctorate at St. John's University School of Law, where he received the Excellence for the Future Award for excellent achievement in the area of criminal trial advocacy and was a recipient of the certificate of appreciation from the Nassau County Bar Association. He is a member of New York, Suffolk, and Nassau County Bar Associations, Chair of the Veterans and Military Law Committee of the Nassau County Bar Association as well as a Past President of The Criminal Court's Bar Association of Nassau County, and former President of the Nassau County Criminal Courts Foundation, a not-for-profit organization dedicated to assisting disadvantaged youth and adult. In addition, he is the President of the Political Action Committee, Citizens for Veterans in Government and also is a member of the Veterans' Legal Assistance Project (devoted to assisting low income veterans). In addition, he was recently selected to serve on the Veterans Committee for Rep. Lee Zeldin of the 114th Congress.

Steven M. Raiser is admitted to practice law in the state courts and federal court in the Eastern District. On November 14, 2010, he was sworn in to the United States Supreme Court by Chief Justice John Roberts in Washington, D.C. Steven has appeared as a legal analyst for FOX, CNN, and Court TV (TRU TV).

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed. Further, the statements made by the faculty during this program do not constitute legal advice.

FROM THE BAR

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title P. Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants and Witnesses Under Control of Court--Recognizance, Bail and Commitment (Refs & Annos)
Article 510. Recognizance, Bail and Commitment--Determination of Application for Recognizance or Bail, Issuance of Securing Orders, and Related Matters (Refs & Annos)

McKinney's CPL § 510.30

§ 510.30 Application for recognizance or bail; rules of law and criteria controlling determination

Effective: December 24, 2012
Currentness

1. Determinations of applications for recognizance or bail are not in all cases discretionary but are subject to rules, prescribed in article five hundred thirty and other provisions of law relating to specific kinds of criminal actions and proceedings, providing (a) that in some circumstances such an application must as a matter of law be granted, (b) that in others it must as a matter of law be denied and the principal committed to or retained in the custody of the sheriff, and (c) that in others the granting or denial thereof is a matter of judicial discretion.

2. To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than of law, an application is determined on the basis of the following factors and criteria:

(a) With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 [1] of the family court act, or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any; and

(vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

(vii) Where the principal is charged with a crime or crimes against a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, the following factors:

(A) 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 as that term is defined in subdivision one of section 530.11 of this title, whether or not such order of protection is currently in effect; and

(B) the principal's history of use or possession of a firearm; and

(viii) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

(ix) If he is a defendant, the sentence which may be or has been imposed upon conviction.

(b) Where the principal is a defendant-appellant in a pending appeal from a judgment of conviction, the court must also consider the likelihood of ultimate reversal of the judgment. A determination that the appeal is palpably without merit alone justifies, but does not require, a denial of the application, regardless of any determination made with respect to the factors specified in paragraph (a).

3. When bail or recognizance is ordered, the court shall inform the principal, if he is a defendant charged with the commission of a felony, that the release is conditional and that the court may revoke the order of release and commit the principal to the custody of the sheriff in accordance with the provisions of subdivision two of section 530.60 of this chapter if he commits a subsequent felony while at liberty upon such order.

Credits

(L.1970, c. 996, § 1. Amended L.1977, c. 447, § 6; L.1979, c. 411, § 13; L.1981, c. 788, § 1; L.1982, c. 920, § 77; L.2012, c. 491, pt. D, § 1, eff. Dec. 24, 2012.)

Footnotes

1 So in original. Probably should be “section 354.1”.

McKinney's CPL § 510.30, NY CRIM PRO § 510.30

Current through L.2016, chapters 1 to 32, 50 to 53, 55, 56.

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title P. Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants and Witnesses Under Control of Court--Recognizance, Bail and Commitment (Refs & Annos)
Article 520. Bail and Bail Bonds (Refs & Annos)

McKinney's CPL § 520.10

§ 520.10 Bail and bail bonds; fixing of bail and authorized forms thereof

Effective: January 1, 2006
Currentness

1. The only authorized forms of bail are the following:

(a) Cash bail.

(b) An insurance company bail bond.

(c) A secured surety bond.

(d) A secured appearance bond.

(e) A partially secured surety bond.

(f) A partially secured appearance bond.

(g) An unsecured surety bond.

(h) An unsecured appearance bond.

(i) Credit card or similar device; provided, however, that notwithstanding any other provision of law, any person posting bail by credit card or similar device also may be required to pay a reasonable administrative fee. The amount of such administrative fee and the time and manner of its payment shall be in accordance with the system established pursuant to subdivision four of section 150.30 of this chapter or paragraph (j) of subdivision two of section two hundred twelve of the judiciary law, as appropriate.

2. The methods of fixing bail are as follows:

(a) A court may designate the amount of the bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in either of the forms specified in paragraphs (g) and (h) of subdivision one;

(b) The court may direct that the bail be posted in any one of two or more of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms; [1]

Credits

(L.1970, c. 996, § 1. Amended L.1972, c. 784, § 1; L.1986, c. 708, § 2; L.1987, c. 805, § 3; L.2005, c. 457, § 4, eff. Jan. 1, 2006.)

Footnotes

1 So in original. Sentence should probably end in a period.

McKinney's CPL § 520.10, NY CRIM PRO § 520.10

Current through L.2016, chapters 1 to 32, 50 to 53, 55, 56.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 24 MISCELLANEOUS MOTIONS

----------X *Index No.*

THE PEOPLE OF THE STATE OF NEW YORK
Ex Rel: SCOTT HECHINGER : **WRIT OF HABEAS CORPUS**
On Behalf of: [redacted],

Petitioner,

-against- NYSID # [redacted]
B&C # [redacted]
: D.O.B. [redacted]

WARDEN, Rikers Island, RMSC, 18-18 Hazen Street,
East Elmhurst, NY 11370,
or any other person having custody of Ms. [redacted],

Respondent,

----------X

THE PEOPLE OF THE STATE OF NEW YORK

WE COMMAND YOU that you have and produce the body of [redacted] by you imprisoned and detained, as it is said, together with your full return to this writ and the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged before Hon. Presiding Justice _____, one of the Justices of the Supreme Court of the State of New York, county of Kings, at 320 Jay Street, Brooklyn, New York, in the courthouse thereof on the ____th day of April, 2016, at ____, to do and receive what shall then and there be considered concerning the said person and have you then and there this writ.

ORDERED, that service of a copy of this ORDER, together with the petition upon which it is based, on the District Attorney on or before the ____th day of April, 2016, shall be deemed sufficient service.

WITNESS, Hon. Presiding Justice _____, one of the Justices of our said Court, the ____th day of April, 2016.

_____Clerk

Sufficient reason appearing therefore, let personal service of a copy of this order and the papers upon which it was granted upon all parties entitled to service on or before __ o'clock __ on the ___ day of _____, be deemed good and sufficient service.

_____/S/_____
SCOTT HECHINGER, Esq.
Brooklyn Defender Services
177 Livingston Street, 7th Fl.
Brooklyn, NY 11201
(718) 254-0700, ext. 390

_____
JUSTICE OF THE SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 24 MISCELLANEOUS MOTIONS

----------X *Index No.*

THE PEOPLE OF THE STATE OF NEW YORK
Ex Rel: SCOTT HECHINGER : **PETITION FOR WRIT OF HABEAS CORPUS**

On Behalf of: [redacted],

Petitioner,

-against- NYSID # [redacted]
B&C # [redacted]
: D.O.B. [redacted]

WARDEN, Rikers Island, RMSC, 18-18 Hazen Street,
East Elmhurst, NY 11370,
or any other person having custody of Ms. [redacted]

Respondent,

----------X

To: THE SUPREME COURT OF THE STATE OF NEW YORK

The application of SCOTT HECHINGER, an attorney duly admitted to practice Law in the State of New York, affirms under penalty of perjury as follows:

1. I am an attorney associated with Brooklyn Defender Services.

2. I make this application on behalf of [redacted].

3. I am the attorney assigned to this case and I am familiar with its facts and records.

4. Petitioner is unlawfully detained by Respondent Department of Corrections at the Rose M. Singer Center.

5. Habeas Corpus review by this Court is appropriate as the bail-fixing court violated "the constitutional [and] statutory standards inhibiting excessive bail." People ex rel. Rosenthal on Behalf of Kolman v. Wolfson, 48 N.Y.2d 230, 232 (1979) ("The writ of habeas corpus affords an opportunity under constitutional and historical aegis for re-examination of a nonappealable order fixing or denying bail--no more, no less.").

6. Ms. Netwon is not detained by virtue of any judgment, decree, final order or process of mandate issued by the Court or Judge of the United States in a case where such Court or Judge had exclusive jurisdiction under the laws of the United States or has acquired exclusive jurisdiction by the commencement of legal proceedings in such Court, nor has he been committed or detained by virtue of the final judgment or decree of a competent tribunal of Civil or Criminal jurisdiction or the final order of such tribunal made in a special proceeding instituted for any cause or by virtue of any execution or process issued upon such judgment, decree or final order.

7. No Court or Judge of the United States has exclusive jurisdiction to order Ms. [redacted] released.

8. This petition for habeas corpus requests this Court exercise its authority to overturn the bail determination set by the Criminal Court for abuse of discretion.

9. [redacted] [redacted] is a thirty-seven year old mother who suffers from epilepsy, and as confirmed by the Criminal Justice Agency ("CJA"), lives with her disabled veteran husband, [redacted], at a stable address.

10. Ms. [redacted] was falsely arrested.

11. Indeed, the People's allegations make out no crime whatsoever.

12. Ms. [redacted] is alleged to have engaged in a drug sale with an undercover.

13. However, no drugs were recovered despite the fact the People allege that an undercover officer observed her throw "heroin into the air to prevent the informant from recovering" the heroin. Despite the simple physics of 'what goes up, must come down,' nothing was recovered.

14. Additionally, no pre-recorded buy money was recovered off of Ms. [redacted].

15. Indeed, according to the People's recitation of facts at arraignment, Ms. [redacted] rejected the undercover's attempt to hand her money by throwing the money that the undercover allegedly handed her to the ground.

16. Accordingly, the People's own allegations do not even make out misdemeanor possession, let alone felony sale.

17. Despite these unfounded allegations with no corroboration whatsoever, and despite Ms. [redacted]'s serious health problems, strong community ties, recent record of returning to court when released on her own recognizance, and lack of financial resources, the Criminal Court erroneously set bail at $1500 bond over $750 cash without taking into account any of these factors, as required.

18. I respectfully request that this Court release Ms. [redacted] on her own recognizance. In the alternative, I request that this Court modify bail to an unsecured appearance bond, which would be a less discriminatory alternative.

The Habeas Court's Authority

19. Under New York law, the "*only matter of legitimate concern*," when setting bail is "whether any bail or the amount fixed was *necessary to insure the defendant's future appearances in court*." Matter of Sardino v. State Comm'n on Judicial Conduct, 58 N.Y.2d 286, 289 (1983) (emphasis added).

20. To this end, the New York bail statute delineates set criteria that the bail-setting court "*must* consider . . . and take into account" to determine "the kind and degree of control or restriction that is necessary to secure his court attendance when required." N.Y. C.P.L. § 510.30(2)(a) (emphasis added); see also People ex rel. Klein v. Krueger, 25 N.Y.2d 497, 499-500 (1969) ("[T]he State constitutional guarantee against excessive bail . . . requires that legislative provisions must, to satisfy constitutional limitations, be related to the proper purposes").

21. There are nine statutory factors that courts must consider in setting bail, which are tailored to bail's sole purpose of ensuring the defendant's return to court, including but not limited to:

> (i) The principal's character, reputation, habits and mental condition;
> (ii) His employment and financial resources; and
> (iii) His family ties and the length of his residence if any in the community; and
> (iv) His criminal record if any; and
> (v) His record of previous adjudication as a juvenile delinquent . . . ; and
> (vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and
> (vii) [T]he weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; and
> (viii) [T]he sentence which may be or has been imposed upon conviction.

N.Y. C.P.L. § 510.30.

22. The unambiguous text of the statute mandates that the bail-setting court consider all of these factors. Id. ("[T]he court *must*, on the basis of available information, consider and take into account: [the nine factors]") (emphasis added); People ex rel. Benton v. Warden: N.Y.C. House of Det. for Men, E. Elmhurst, N.Y. 11370, 118 A.D.2d 443, 444-45 (1st Dept. 1986) (overturning bail determination because while some N.Y. C.P.L. § 510.30 factors were considered, "there is little if any indication that the other factors [family ties, long-term residence at one address, and reliable record of appearing in court] whose consideration is mandated by statute figured in his determination").

23. When the bail-fixing court's decision fails to consider any or all of the relevant statutory factors in determining whether bail is actually necessary to ensure a defendant's return to court, any amount of bail fixed is per se "excessive" under both the New York and federal constitutions, and reversal by the Habeas court is required. People ex rel. Mordkofsky v. Stancari, 93 A.D.2d 826, 827, 460 N.Y.S.2d 830 (2d Dept. 1983) (Supreme Court must review record before the bail-setting court to determine whether all statutory factors were considered); People ex rel. Masselli v. Levy, 126 A.D.2d 501, 503, 511

N.Y.S.2d 236 (1st Dept. 1987) (reversing bail determination where "there was not a sufficient showing in the record which would support [bail-fixing court's] decision . . . based upon the statutory criteria set forth in C.P.L. § 510.30"); People ex rel. Moquin v. Infante, 134 A.D.2d 764 (3d Dept. 1987) (reversing where bail-fixing court's decision was not supported by the statutory considerations for setting bail).

24. Moreover, bail is excessive and therefore unlawful when it is not adjusted to a defendant's financial circumstances to be the minimum amount needed to ensure the defendant's return to court. See, e.g., Stack v. Boyle, 342 U.S. 1, 4-5 (1951) ("Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."); United States v. Salerno, 481 U.S. 739, 754-55 (1987) (affirming Stack and holding that "[w]hen the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more"); People ex rel. Benton, 118 A.D.2d at 445 ("[B]ail may not be set in an amount greater than necessary to ensure court attendance."); People v. Rezek, 204 N.Y.S.2d 640, 643 (Kings Cnty. Ct. 1960) ("[A defendant] is entitled to release on bail in a sum which he can furnish. . . . This presents little difficulty for the wealthy; it presents considerable difficulty for the poor. *The law does not favor the rich and discriminate against the poor. The law requires the court to consider the economic circumstances of the defendant in fixing bail*.") (emphasis added).

25. Although the decision to set bail is discretionary, the Habeas court has an obligation to carefully reexamine the bail decision and underlying facts to ensure that discretion was not abused – that the bail set was actually based on the statutory criteria and supported by the facts known to the court. Sardino, 58 N.Y.2d at 289; see Krueger, 25 N.Y.2d 497, 501 (1969) ("[Under habeas review] there is a *constitutional issue* of law that *cannot be blinked by saying that an exercise of discretion is involved*. . . . [E]ven where an

exercise of discretion is operative there *must, as a matter of law, be underlying facts* which will support that exercise either in denying bail or fixing the amount of bail.") (emphasis added); People ex rel. Rosenthal on Behalf of Kolman v. Wolfson, 48 N.Y.2d 230, 232 (1979) (recognizing Habeas court's "second stage re-examination" as a "*limited but significant* review of the determination of the bail-fixing court") (emphasis added); People ex rel. Deliz v. Warden of City Prison (Tombs) in City of New York, 260 A.D. 155, 157, (1st Dept. 1940) ("In view . . . of the importance of th[e] constitutional protection [against excessive bail], the fact that bail has been fixed by another court should not prevent a *careful consideration* of the question nor call for a denial of relief as a matter of course.") (emphasis added); People ex rel. Rothensies v. Searles, 229 A.D. 603, 604-05 (3d Dept. 1930) ("To determine the question correctly, *proper inquiry* must be made.") (emphasis added).

26. A Writ of Habeas Corpus from this Court is the only effective means whereby the petitioner can obtain relief from his illegal detention and gain his release.

27. No appeal has been taken from any order of commitment.

28. No previous application has been made for this relief.

The Criminal Court's Bail Determination

29. Ms. [redacted] was arrested on March 30, 2016, and was arraigned the following day on baseless felony drug possession and sale charges.

30. The Criminal Court set bail at $1500 bond over $750 cash.

31. The Criminal Court, however, did not consider several significant and required factors in making its determination on the record, despite defense counsel informing the Court.

32. The Criminal Court did not examine, for instance, the unique weakness of this particular case, Ms. [redacted]'s long time stable residence (as confirmed by CJA), or recent history of returns to court. Nor did the Criminal Court conduct a record inquiry into Ms.

[redacted]'s financial resources as a welfare recipient and wife of a disabled veteran with no job and no source of income. N.Y. C.P.L. 510.30(2)(a)

33. Ms. [redacted] has not—and cannot—post the bail or bond set. Ms. [redacted] is indigent.

34. Ms. [redacted]'s husband is disabled and relies on government assistance, including Medicaid and Social Security Disability, to meet his basic needs. No one in Ms. [redacted]'s family can afford to pay bail for her.

35. Consequently, Ms. [redacted] has been confined at Rikers since March 31, 2016 solely because of her inability to afford unconstitutionally excessive bail. Because of the weakness in the case against her, as well as Ms. [redacted]'s community ties, recent demonstrated success in returning to court when released, serious health condition, and lack of financial resources, this Court should release Ms. [redacted] on her own recognizance or, in the alternative, modify bail to an unsecured appearance bond.

The Bail-Setting Court Set Excessive Bail and No Amount of Bail is Required to Ensure Ms. [redacted]'s Appearance in Court

36. In New York, "[B]ail may not be set in an amount greater than necessary to ensure court attendance." People ex rel. Benton, 118 A.D.2d at 445. No amount of bail is required to ensure Ms. [redacted]'s appearance in court.

37. Under the New York bail statute, the bail-setting court *"must* consider . . . and take into account" certain criteria to determine "the kind and degree of control or restriction that is necessary to secure his court attendance when required." N.Y. C.P.L. § 510.30(2)(a) (emphasis added).

38. *First*, the New York bail statute requires the bail-setting court to consider the principal's character, reputation, habits and mental condition. N.Y. C.P.L. § 510.30(2)(a)(i).

39. Ms. [redacted] suffers from a serious seizure disorder. Indeed, the moment that bail was set at arraignments, Ms. [redacted] fell backwards, hit her head on the ground, and then began to suffer repeated seizures, requiring EMS and emergency hospitalization.

40. *Second*, the New York bail statute requires the bail-setting court to consider the principal's family ties and the length of residence in the community. N.Y. C.P.L. § 510.30(2)(a)(iii).

41. As noted at arraignment, Ms. [redacted] has lived in Brooklyn, New York her entire life—thirty-seven years. Ms. Newton has strong community ties as verified by the CJA: a stable residence where she has lived with her disabled veteran husband, [redacted], for the last three years, and two telephone numbers. Ms. [redacted] has already been connected to services through Brooklyn Criminal Court Part AP8. In addition, Brooklyn Defender Services Senior Master Social Worker, Stacey Bisignano has met with Ms. [redacted] and is prepared to serve immediately as her counselor and liaison between programs, and ensure her return to court in tandem with her lawyers.

42. *Third*, the New York bail statute requires the bail-setting court to consider the principal's criminal record and the principal's previous record, if any, in responding to court appearances when required or with respect to flight to avoid criminal prosecution. N.Y. C.P.L. § 510.30(2)(a)(iv); N.Y. C.P.L. § 510.30(2)(a)(vi).

43. Despite Ms. [redacted]'s extensive criminal record and <u>past</u> failures to appear, Ms. [redacted] has most recently been released on her recognizance and repeatedly returned to court without warranting.

44. Since 2013, Ms. [redacted] has been arrested four times for low-level misdemeanors—theft of services, criminal possession of a controlled substance in the 7th degree, petit larceny, and prostitution—and has not missed one court date. In Cycle 38, Ms. [redacted] was released and returned six days later to take a plea, and in Cycle 39, Ms. Newton

was released and came back to court multiple times between September 2015 and December 2015 before taking a plea. Most recently, Ms. [redacted] appeared for her open case (Cycle 40) on the date of her most recent arrest, knew her next court date (May 11, 2016), and has a meeting to begin a diversion program on April 7, 2016.

45. In any case, when determining the appropriate bail order to ensure a defendant's return to court, the Criminal Court must consider the risk that the defendant will intentionally evade court process by fleeing, which is distinct from the risk that she will miss a court appearance due to a lack of money for transportation or disorganization due to potential substance abuse.

46. These distinct causes for a missed appearance are regularly conflated by criminal courts, even though New York case law interpreting the bail statute is clear that an appropriate risk assessment focuses on the defendant's propensity to flee—not to miss court appearances because of reasons related to indigence and substance abuse. People ex rel. Lobell v. McDonnell, 296 N.Y. 109, 111 (1947) (stating that the bail amount must be no more than necessary to "guarantee [defendant's] presence at trial" and his "tie to the jurisdiction"); People ex rel. Benton v. Warden, 499 N.Y.S.2d 738, 740 (1st Dept. 1986) (stating that the only relevant factors influencing bail must demonstrate the defendant's "propensity to flee" the jurisdiction); People v. Rezek, 204 N.Y.S.2d 640, 642 (Kings Cnty. Crim. Ct. 1960) (basing its bail determination on the "probability that this defendant may abscond").[1]

47. Ms. [redacted] has demonstrated most recently time and again that bail is unnecessary to ensure to her return to court.

[1] This interpretation is consistent with federal standards defining the characteristics of a defendant who constitutes a flight risk. *See, e.g.*, Statement of Interest of the United States, at 6, Varden. v. City of Clanton, No. 2:15-cv-34-MHT-WC (M.D. Ala. Feb. 13, 2015).

48. *Fourth*, the New York bail statute requires the bail-setting court to consider the principal's employment and financial resources. N.Y. C.P.L. § 510.30(2)(a)(ii).

49. Ms. [redacted] cannot afford bail or bond at the amount set. Ms. [redacted] is welfare dependent; she is not employed and has no source of income. Ms. [redacted] cannot pay any amount of bail.

50. Moreover, Ms. [redacted]'s family is indigent and has no means with which to pay bail or bond. Ms. [redacted]'s husband relies on government assistance, including Medicaid and Social Security Disability, to meet his basic needs. No one in Ms. [redacted] family can afford to pay bail for him.

51. Further, because Ms. [redacted] does not have access to financial resources, she is much less likely to have the means to flee the jurisdiction. C.f. People ex rel. Litman ex rel. Odierno v. Warden of Manhattan House of Detention, 23 A.D.3d 258, 804 N.Y.S.2d 78 (1st Dept. 2005) (upholding a bail determination because of "the financial resources petitioner could use to facilitate flight, including property outside the jurisdiction"). Because Ms. [redacted] is unemployed and has no money, she would be unable to flee the jurisdiction.

52. *Fifth*, the New York bail statute requires the bail-setting court to consider the weight of the evidence against the defendant. N.Y. C.P.L. § 510.30(2)(a)(viii).

53. There is no evidence that Ms. [redacted] intended to possess, let alone sell any heroin, as would be required for a conviction on any of the charged offenses—felony or misdemeanor.

54. Ms. [redacted] was falsely arrested.

55. No drugs were recovered despite the fact the People allege that an undercover officer observed her throw "heroin into the air to prevent the informant from recovering" the heroin, and no pre-recorded buy money was recovered from Ms. [redacted]. Instead, the

People's own version of events indicates that Ms. [redacted] rejected the undercover's attempt to hand her money.

56. What is more, just prior to the TPO—3:30pm on March 30, 2016—Ms. [redacted] left an appearance in Brooklyn Criminal Court, Part AP8, where she had just appeared voluntarily for an afternoon call on a pending case on which she had been released on her own recognizance.

57. Presumably, Ms. [redacted] had been searched prior to entry into criminal court, and the idea that she would engage in a criminal transaction just around the corner from 120 Schermerhorn (corner of Willoughby Street and Bridge Street) in broad daylight strains credulity.

58. A far more realistic and innocent interpretation of what occurred is that Ms. [redacted] was approached by an undercover hoping to lure her into a drug transaction, and after being harshly rebuffed, including having his pre-recorded buy money thrown back at him, he decided to abuse his power of arrest to teach her a lesson.

Excessive Bail Resulting in Pretrial Detention Impairs Ms. [redacted]'s Due Process Rights

59. The bail determination must be balanced against the defendant's "right to freedom from unnecessary restraint before conviction." People ex rel. Lobell v. McDonnell, 296 N.Y. 109, 111 (1947); People ex rel. Benton, 118 A.D.2d at 445 ("The presumption of innocence accorded every criminal defendant militates strongly against incarceration in advance of a determination as to guilt.").

60. Even though Ms. [redacted] does not pose a flight risk, by setting bail, the Criminal Court forced her to spend time in pretrial detention, thereby inhibiting her procedural due process right to present a defense. See Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (stating that the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense") (internal quotation marks omitted); Barker v.

Wingo, 407 U.S. 514, 533 (1972) ("[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious."); Bandy v. United States, 81 S.Ct. 197, 198 (1960) ("Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel . . .").

61. Pretrial detention also exposes Ms. [redacted], who is presumptively innocent, to the criminal elements and brutality inflicted upon inmates at Rikers Island, especially problematic for women and those, like her, with serious health conditions.

62. Here, the Criminal Court's bail determination unjustifiably resulted in a deprivation of Ms. [redacted]'s freedom and exposed her to horrific jail conditions without any reason to believe that bail was actually necessary to ensure his return to court.

The Bail-Setting Court Failed to Consider Statutory Alternatives to Bail in Addition to Bond Over Cash

63. The New York bail statute and case law specifically authorize and encourage the bail-setting court to utilize alternative forms of bail rather than setting rote bail amounts in the form of bond over cash. N.Y. C.P.L. § 520.10(1) (setting forth several less onerous forms of bail including an unsecured appearance bond and an unsecured surety bond); N.Y. C.P.L. § 520.10(2)(b) (stating that a court may designate different amounts of bail varying with the forms); N.Y. C.P.L. § 520.10(2)(a) (allowing the defendant to post bail in the form of an unsecured appearance bond or surety bond if the court does not designate the form or forms in which bail may be posted); People ex rel. McManus v. Horn, 18 N.Y.3d 660, 674 (2012) (holding that courts are prohibited from fixing only one form of bail and stating that "[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").

64. Ms. [redacted] is willing to provide a written promise to pay a specified bail amount to the court should she fail to appear for the proceedings. Even though this would require Ms. [redacted] to pull money out of her meager earnings, such as from the government assistance programs from which she receives benefits, she is willing to sign the affidavit because she is confident that she will appear in court.

WHEREFORE, for the foregoing reasons, petitioner, Ms. [redacted] respectfully requests that a Writ of Habeas Corpus should be issued directing the Commissioner of the NYC Department of Corrections to produce [redacted], imprisoned and detained by him, before a Justice of the Supreme Court, to release [redacted] on her own recognizance; or, alternatively, modifying the bail order to an unsecured appearance bond, which is a form that she can afford to post.

Dated: Brooklyn, New York
April 4, 2016

_____/S/_____
Scott Hechinger, Esq.
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Bail by the Numbers: Brooklyn Defender Services ("BDS") 2013 Misdemeanor Clients

Summary: BDS collected data for those arraigned between January 1, 2013 – December 31, 2013. During the year-long control period, the prospect or imposition of bail on BDS clients accounted for approximately **1,956 misdemeanor guilty pleas**. **1416** of those occurred on the day of arraignment, with clients facing the *prospect* of bail being set. **540** of these misdemeanor pleas occurred after bail was set, the vast majority of the time in an amount of $2000 or less.

The Numbers:

1. **The majority of all misdemeanor cases are "disposed of" at their criminal court arraignment, within a day of arrest, moments after the cases have formally begun.**

   Brooklyn Defender Services arraigned **26650** individuals where the top count was a misdemeanor in 2013.

   13507 or **51%** of these cases were "disposed of" at arraignment, within a day of arrest.

   Nearly all of these 'same-day' cases get "disposed of" through guilty pleas, dismissals, or ACDs (adjournments in contemplation of dismissal).

2. **The majority (90%) of cases that terminate at arraignments are disposed of "favorably," meaning that the cases end with dismissals or the equivalent, or pleas of guilty to lesser, non-criminal violations or infractions with negligible impact on individual's lives.**

   90% (12903) of the **13507** 'same-day' cases were "favorably" disposed of at arraignments:

   6886 ACDs

   628 Outright Dismissals

   4310 Guilty pleas to lesser, non-criminal violations or infractions.

   269 Other

3. **For the remaining 10% of cases that terminate at arraignments, poor defendants plead guilty to misdemeanor crimes in exchange for their freedom, facing the threat of bail being set that they can't afford.**

   In 2013, **1416 individuals pled guilty to misdemeanor crimes at arraignments** at the same moment they were actually charged. In our experience, misdemeanor pleas at arraignments generally only happen when clients are facing prospect of bail being set.

-**715** (50%) were sentenced to time already served

-**428** (30%) were sentenced to additional jail time (average length of sentence = 12 days).

-Remainder sentenced to fines, community service, and other low level sentences.

3. **Bail was set on 14% (1753[1]) of the remaining 12213 misdemeanor cases that survived beyond arraignments**

   Of these cases, BDS was able to track case outcomes for the **1325 individuals**, who BDS continued to represent post-arraignment.[2]

4. **Of the 1325 we could track:**

   -71% (940) could not afford to pay bail and stayed in.[3]

   -93% (870) of these individual who could not afford bail were incarcerated **on $2000 or less**, on average **$839.70** of bail.

5. **Of those incarcerated on $2000 or less:**

   92% (804) pled guilty

   Compare to "free clients": **40%** (3489) ultimately plead guilty

   67% (540) to misdemeanor crimes

   Compare to "free clients": **7.5%** (646) ultimately plead guilty to misdemeanors

   74% of misdemeanor pleas occurred **within a month of arraignments**,

   Average turn around for pleas was **9.6 days**.

   Only **38%** (330) of cases **favorably resolved** when stuck in on bail.

   Compare to "free clients": **88%** (7579) favorably resolved.

   0 cases ultimately **went to trial.**

[1] Excluded $1 bail, ice detainers, remand, or outliers (bail greater than $10,000)

[2] Cases that were not adjourned to other boroughs or where BDS was relieved (to LAS, private counsel, 18-B)

[3] Note: this does not mean that 29% could afford to pay bail. Many individuals were released pursuant to law for prosecutorial failure to file appropriate paperwork, or other reasons.

6. The comparison with the group of individuals who were ROR'd at arraignments or who otherwise were able to fight their cases from a position of freedom is striking.

-Of the **8603** free clients BDS was able to track:

> -**3489** (40%) pled guilty, but of these, **only 7.5% (646) pled guilty to misdemeanors [compare to 67% when "in" on less than $2000]**
>
> -**7579 (88%) favorably resolved [compare to 38% when "in" on less than $2000]** their cases with dismissals or equivalent, or pleas to non-criminal dispositions.

The State of Criminal Justice 2016

American Bar Association

Chapter: Pretrial Detention and Bail

By Lisa Schreibersdorf and Andrea Nieves

"[U]sually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?" - Attorney General Robert F. Kennedy, 1965

I. INTRODUCTION

Robert Kennedy's remarks about pretrial detention are as true today as they were fifty years ago. An estimated half a million people are detained every year in jails across the country because they are unable to make bail. In New York City, where we practice, judges set bail in the amount of $1,000 or less in the majority of cases where bail is set. Though this amount might seem low to court actors, 85 percent of defendants who have bail set at $500 or less cannot make bail at arraignment and are incarcerated pending trial. On average, people detained on bail amounts of $1,000 or less serve 15.7 days. Three out of four of them are accused of nonviolent, non-weapons related crimes.[1]

The consequences of pre-trial incarceration can be devastating for people already struggling to make ends meet, resulting in lost jobs, homelessness, disrupted mental health, substance abuse and medical treatment, and too often, the loss of one's children to the foster care system. There are also stark racial disparities in the existing bail system: in 2010, Human Rights Watch found that 89% of those incarcerated on Rikers Island on a bond of $1,000 or less were Black.[2] Pretrial incarceration is also the single greatest predictor of conviction. In New York City, 90 percent of people detained on bail plead guilty as compared to 40 percent of people who are not detained pretrial. People who are able to fight their cases out of court are also more likely to have their charges dismissed than people in on bail: 88 percent versus 38 percent. A 2012 report by the New York City Criminal Justice Agency determined that "detention itself creates enough pressure to increase guilty pleas."[3] In the past year, federal courts across the country have acknowledged the toll that pretrial detention takes on immigrants facing criminal charges and deportation and have limited the power of the government to detain immigrants arbitrarily and for extended periods of time without a hearing and an individualized assessment of their risk factors including failure to appear.

The current system of pretrial justice is deeply flawed and results in disparate outcomes for poor people. Yet the trend seems to be bending towards reform, with 2015 bringing about modest but important changes in pretrial detention across the country. This chapter describes a sampling of trends

[1] Brooklyn Community Bail Fund, www.brooklynbailfund.org.
[2] Jamie Fellner, THE PRICE OF FREEDOM (Human Rights Watch 2010).
[3] Mary T. Phillips, A DECADE OF BAIL RESEARCH IN NEW YORK CITY 51 (New York City Criminal Justice Agency 2012).

in pretrial justice, including constitutional challenges to bail schedules, bail reforms in the courts, and new case law concerning pretrial detention for immigrants. Combined, these changes indicate a meaningful shift towards reform.

II. CONSTITUTIONAL CHALLENGES TO BAIL SCHEDULES

In 2015 the Washington, D.C.-based non-profit law firm Equal Justice Under Law filed nine class action lawsuits challenging the legality of fixed-sum bail systems, otherwise referred to as "bail schedules," that base bond amounts on the charges. Those who can afford to pay the amount are released and those who cannot are detained, without consideration of individualized factors that may recommend release. Bail schedules differ in how they work, sometimes corresponding with the level of the charge or number of charges, but they have been adopted in a majority of U.S. jurisdictions. In a 2009 poll, nearly 64% of respondent counties indicated that their jurisdictions use bail schedules.[4]

Equal Justice Under Law's first case, *Varden v. City of Clanton*, drew national attention in the wake of the United States Department of Justice's decision to file a Statement of Interest in the case.[5] The Statement of Interest stated clearly that "[i]t is the position of the United States that…any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy."[6] The government argued that "[b]ecause such systems do not account for individual circumstances of the accused, they essentially mandate pretrial detention for anyone who is too poor to pay the predetermined fee. This amounts to mandating pretrial detention only for the indigent."[7] Shortly after Equal Justice Under Law's lawsuit, and the subsequent Statement of Interest from the Department of Justice, the City of Clanton announced that it would reform its bail system to stop using secured money bond for new arrestees.

Since filing the Clanton suit, Equal Justice Under Law has reached similar settlements in cities in Alabama, Missouri, Mississippi, Tennessee and Louisiana. The federal court in St. Louis, Missouri, issued an injunction ending the use of secured money bail in Velda City and a declaratory judgment affirming that the use of secured money bail schedules to detain indigent defendants after arrest violates the United States Constitution.[8] A federal court in Montgomery, Alabama, held that "the use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment."[9] A federal court in Mississippi held that the use of a secured bail schedule in the City of Moss Point violates the Equal Protection Clause of the Fourteenth Amendment.[10] The most recent suit

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[4] The Pretrial Justice Institute, PRETRIAL JUSTICE IN AMERICA: A SURVEY OF COUNTY PRETRIAL RELEASE POLICIES, PRACTICES AND OUTCOMES 7 (2009), available at http://www.pretrial.org/Docs/Documents/Pretrial Justice in America.pdf.
[5] *Varden v. City of Clanton*, Case No. 2:15-cv-34-MHT-WC, Statement of Interest of the United States (filed Feb. 13, 2015).
[6] Id. at 1.
[7] Id. at 9.
[8] *Pierce v. City of Velda City*, No. 4:15-cv-570-HEA, slip op. (E.D. Mo. June 2, 2015).
[9] *Jones v. City of Clanton*, No. 2:15cv34–MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015).
[10] *Thompson v. Moss Point, Mississippi*, No. 1:15cv182LG-RHW, slip op. (S.D. Miss. Nov. 6, 2015).

aims to abolish cash bail in all of California's 58 counties. Sheriff Ross Mirkarimi of the City and County of San Francisco submitted a declaration stating his office's position on the lawsuit, arguing that "the use of monetary conditions to detain pretrial defendants penalizes indigent arrestees solely based on their wealth status. The notion that someone's freedom depends on the amount of money they have is anathema to equality and justice."[11] This wave of litigation will hopefully spur the majority of jurisdictions across the country that rely on bond schedules to reconsider their pre-trial detention policies to ensure that they do not violate the constitutional rights of indigent defendants.

III. NEW YORK CITY AS A CASE STUDY

This year, more jurisdictions adopted plans to expand alternatives to bail to reduce pretrial detention populations. This section looks to New York City as a case study for the kinds of reforms that are happening across the country. In July 2015, New York City Mayor Bill de Blasio announced that the City will spend $17.8 million to supervise 3,000 eligible defendants safely in the community instead of detaining them on Rikers Island, the City's jail complex, while they wait for trial. The city-wide program will be based on two smaller pilot programs in Queens and Manhattan. The program will expand judges' options beyond setting bail or releasing a defendant to the community without a system in place to ensure the defendant returns to court without reoffending. Eligibility will be determined in part by a risk assessment instrument currently in development by the City. Notably, the supervised release program, which plans to serve only 3,000 New Yorkers per year, will fall short in clearing city detention facilities of defendants imprisoned because they cannot afford bail. In 2015, the average daily population in City jails was 11,400, of whom approximately 80% were incarcerated pre-trial.[12]

It is also unclear whether a pre-trial supervision program is the right approach to secure a return to court. There is no real "failure to appear" problem in New York City. In our current criminal justice system, there are very few trials and almost all cases are resolved by way of plea bargaining. Defendants are required to appear in court every three weeks or once per month until there is a satisfactory plea bargain, which can take many months and even years. Discounting the non-appearance of someone who could not get child care, had no carfare, arrived late or had other life-related reasons to miss one of many court appearances, there is almost no chance of someone absconding. Court-ordered supervision is not designed to address these issues.

New York State's former Chief Judge Jonathan Lippman also took steps to reform bail practices in the courts. Former Chief Judge Lippman ordered that a judge in each New York City borough be appointed to conduct an automatic review of all bail determinations within 10 days of arraignment to see if bail should be reduced. He also ordered judges to periodically review the strength of the prosecution's case and the people's readiness to go to trial in felonies. The judge must then consider lowering or eliminating bail if the case has weakened. Finally, judges across the state will be retrained to encourage them to apply less onerous forms of bail than secured money bail, which have been available in the New York statute since 1970, yet are almost never used. (It must be noted that criminal court judges in New York City have received training in this subject, and we have not yet seen significant

[11] *Buffin v. City and County of San Francisco*, Case No. 15-CV-4959 (Northern Dist of Ca, San Francisco Div), Class Action Complaint, Declaration of Sheriff Ross Mirkarimi, Oct. 28, 2015.

[12] New York City Department of Correction

changes in the courtroom.) The Chief Judge cited the case of Kalief Browder, a 16-year-old alleged to have stolen a backpack who was incarcerated on Rikers Island for three years before the prosecution dropped the charges, as an example of the necessity for reform. During his three year imprisonment, Browder was repeatedly beaten by corrections officers and other incarcerated people and spent approximately two years in solitary confinement. In June 2015, two years after his release from Rikers Island, Browder committed suicide.

We believe additional reforms are required to improve access to equal justice in New York, though each requires a change in state law. First, New York should prohibit orders of secured bail for people charged with Misdemeanors. Second, state law should be amended to reflect case law requiring courts to impose the least onerous form of bail—beginning with an unsecured appearance bond—that is required to secure a defendant's return to court, and show cause on the record for the use of any form other than unsecured sureties. Third, New York should require Assistant District Attorneys to submit unique written motions requesting bail conditions and explaining the reasons for the request. Fourth, every defendant facing the prospect of pre-trial incarceration must be afforded an individualized assessment of ability to pay. Lastly, New York should require courts to reconsider bail at the end of every week of a defendant's incarceration and consider her inability to pay as a "change of circumstance" that warrants a bail reduction or a conversion to a less onerous form.

Ultimately, we believe that money bail should be abolished, as it is inherently discriminatory and there is no evidence that it is more effective at securing court appearances than non-monetary alternatives. However, we acknowledge the possibility that the New York State Legislature could replace it with a system that is more onerous for our clients or one that does not reduce the number of those who are paradoxically presumed innocent yet languishing in jail.

IV. PRETRIAL DETENTION AND IMMIGRANTS

In 2015 the Ninth Circuit Court of Appeals issued an important decision that protects immigrants charged with criminal acts in federal court from arbitrary pre-trial detention. A three-judge panel held in *U.S. v. Santos-Flores* that "the district court's decision to detain [the defendant] pending trial based on the possibility of his detention or removal by immigration authorities is…contrary to the express language of the Federal Bail Reform Act."[13] The Bail Reform Act requires judges to review individualized factors set forth in 18 U.S.C. § 3142(g) to determine bail eligibility. The Ninth Circuit held that "[t]he court may not…substitute a categorical denial of bail for the individualized evaluation required by the Bail Reform Act."[14] Unfortunately for Mr. Santos-Flores, the court concluded that consideration of the statutorily required factors supported the magistrate judge's decision to detain him pretrial. These factors included "Santos-Flores's violation of the terms of his supervised release, his multiple unlawful entries into the United States, his prior failure to appear when required in state court, his use and possession of fraudulent identity documents, and the severity of the potential punishment and the weight of the evidence against him."[15] Despite the outcome in the defendant's case, the Ninth Circuit's

[13] 794 F.3d 1088 (9th Cir. 2015).
[14] *Id.* at 1092.
[15] *Id.*

decision affirms the importance of considering individualized risk factors, as required by law and in the interest of justice.

In a move that may significantly reduce the number of pretrial immigration detainees in New York, the Second Circuit Court of Appeals this year recognized that, in immigration detention cases, due process requires a bail hearing within six months. The court in *Lora v. Shanahan* held that, "the detainee must be admitted to bail unless the government establishes by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community."[16] This decision is in line with cases from the Ninth, Third and Sixth Circuit Courts of Appeals holding that failure to provide a bond hearing implicates detainees' constitutional rights.[17] The Second Circuit adopted the reasoning developed in the Ninth Circuit over a ten-year period in the *Rodriguez* class action litigation. In *Rodriguez II* (2013), the Ninth Circuit held that immigration detainees are entitled to bond hearings after six months of detention at a proceeding before a neutral immigration judge at which the government bears the burden of proof by clear and convincing evidence. The Ninth Circuit extended this bright-line rule in *Rodriguez III* (2015), holding that detainees are entitled to bond hearings every six months. The court noted the compelling reasons for pretrial release:

> Prolonged detention imposes severe hardship on class members and their families. Civil immigration detainees are treated much like criminals serving time: They are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors. Confinement makes it more difficult to retain or meet with legal counsel, and the resources in detention facility law libraries are minimal at best, thereby compounding the challenges of navigating the complexities of immigration law and proceedings. In addition, visitation is restricted and is often no-contact, dramatically disrupting family relationships. While in detention, class members have missed their children's births and their parents' funerals. After losing a vital source of income, class members' spouses have sought government assistance, and their children have dropped out of college.[18]

It is no surprise, then, that, in the words of the Ninth Circuit: "many detainees choose to give up meritorious claims and voluntarily leave the country instead of enduring years of immigration detention awaiting a judicial finding of their lawful status."[19] These Circuit trends towards providing bond hearings in immigration cases demonstrate a growing awareness of the devastating effects of pretrial detention on families and communities.

V. CONCLUSION

On February 6, 2016 Lisa Foster, Director of the Justice Department's Office for Access to Justice, delivered the lunch keynote at the 11th Annual ABA Summit on Public Defense. In her remarks, Foster laid out the DOJ's position on money bail:

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[16] *Lora v. Shanahan*, 804 F.3d 601, 616 (2nd Cir. 2015).

[17] See *Ly v. Hansen,* 351 F.3d 263 (6th Cir. 2003); *Diop v. ICE/Homeland Security,* 656 F.3d 221 (3d Cir. 2011); *Rodriguez v. Hayes (Rodriguez I)*, 591 F.3d 1105 (9th Cir. 2009); *Rodriguez v. Robbins (Rodriguez II)*, 715 F.3d 1127 (9th Cir. 2013); *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir. 2015).

[18] *Rodriguez III* at 1073.

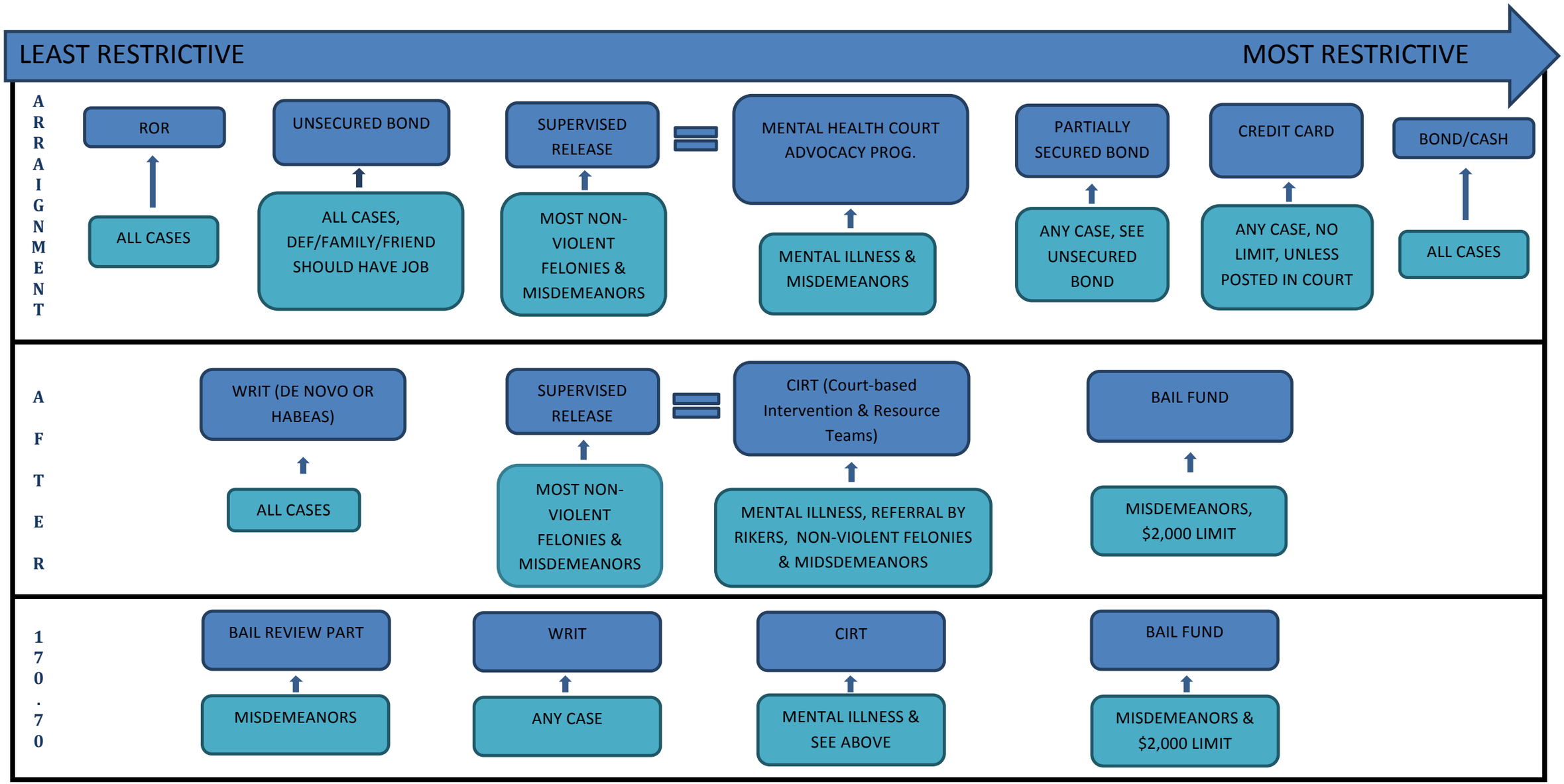
[19] *Id.* at 1072.

> "However the system is designed or administered, if the end result is that poor people are held in jail as a result of their inability to pay while similarly situated wealthy people are able to pay for their release, the system is unconstitutional. Although it may be theoretically possible to design a money bail system that does not regularly violate the Constitution, we haven't seen it yet."

The official policy stance of the Department of Justice, and the changes outlined in this article in jurisdictions across the country, demonstrate the shift away from money bail systems that discriminate against the poor. The research is clear that limits to pre-trial detention reduce jail and prison populations and improve case outcomes and policymakers and judges are paying attention. It is no coincidence that bail reform is taking place as a part of a broader national conversation about criminal justice reform and the devastation wrought by the ongoing epidemic of mass incarceration. 2016 may even bring about bipartisan federal legislation reducing mandatory minimums. This leads us to believe that there will continue to be a space for policymakers and judges to think creatively about how they can limit pre-trial detention to reduce costs, protect defendants' constitutional rights, and keep the community safe. If the last year is any indication, 2016 will bring new ideas to improve outcomes for communities across the country. Ultimately, government should live up to its promise of presumed innocence and end pre-trial incarceration for all but the most serious cases.

BROOKLYN DEFENDER SERVICES

OBTAINING CLIENT RELEASE



THE Bronx Defenders

Type of Bail	Who Pays	What is Required	$500 Example
Cash	Anyone can pay bail (serve as obligor), including client (who is called the principal)	Full amount in cash must be posted	Client and/or others pay $500 cash
Insurance Company Bond	Insurance Company is surety-obligor and must be an insurance company licensed by the superintendent of insurance to engage in the business of executing bail bonds	Insurance Company covers entire face of bond and requires percentage of bond, signatures, and fees from those posting via Insurance Company	Client and/or others pay a percentage of the $500 (percentage varies from company to company and from case to case), agrees to pay the full amount if the client does not appear, and pays up to 8% of the bond amount in fees
A Secured Surety Bond	Obligor(s) are one or more sureties, or one or more sureties and the principal (client)	Bond is fully secured by (1) personal property valued equal to or greater than of bond, or (2) real property with a value of at least twice the amount of bond	People other than the client (and possibly client) put up car, jewelry, stocks, etc. worth at least $500 or a house/land worth at least $1,000
A Secured Appearance Bond	Obligor is principal (client)	Bond is fully secured by (1) personal property valued equal to or greater than of bond, or (2) real property with a value of at least twice the amount of bond	Client alone puts up car, jewelry, stocks etc. worth at least $500 or a house/land worth at least $1,000
A Partially Secured Surety Bond	Obligor(s) are one or more sureties, or one or more sureties and the principal (client)	Bond is secured by a deposit of money not to exceed 10% of total amount of bond	People other than the client (and possibly client) put down $50

Type of Bail	Who Pays	What is Required	$500 Example
A Partially Secured Appearance Bond	Obligor is client (principal)	Bond is secured by a deposit of money not to exceed 10% of total amount of bond	Client alone puts down $50
An Unsecured Surety Bond	Obligor(s) are one or more sureties, or one or more sureties and the principal (client)	Bond is secured by signatures guaranteeing return to court and agreeing to be responsible for full amount of bond in case of nonappearance, but not secured by any deposit of or lien upon property	People other than the client (and possibly client) agree that they will pay $500 if client does not appear.
An Unsecured Appearance Bond	Obligor is client (principal)	Bond is secured by defendant/principal's signature guaranteeing return to court and agreeing to be responsible for full amount of bond in case of nonappearance, but not secured by any deposit of or lien upon property	Client alone agrees that s/he will pay $500 if s/he does not appear
Credit card or similar device	Anyone can pay bail (serve as obligor), including client (who is called the principal)	Full amount must be posted by credit card or similar device and court may assess a "reasonable administrative fee"	Currently unavailable because OCA has not set the "reasonable administrative fee"

FROM THE BENCH

Portions of New York State of the Judiciary Addresses Addressing Bail Reform

State of the Judiciary 2013

BAIL INITIATIVE: Ensuring a Rational Approach to Pre-Trial Justice

I BEGIN BY ADDRESSING A CRITICALLY IMPORTANT CONCERN in criminal justice, an area in which New York has seen so much progress. For the past twenty years, the state has confounded expectations by managing to reduce both crime and incarceration. Many have played a key role in this success — from the police departments that have instituted new management techniques, to the mayors and governors who have embraced new approaches to enforcement, to the judges who with great wisdom and skill interpret and apply our laws and offer meaningful alternatives to incarceration to thousands of offenders in our drug courts, mental health courts and community courts. Amidst all of this good news, however, there is still one vitally important area of the criminal justice system that has been untouched by reform: the process of making bail determinations while a case is pending in our criminal courts.

A. REVAMPING OUR BAIL STATUTES

New York offers special challenges in achieving bail reform. In almost every other state, judges are required by statute to consider public safety when making a bail determination. In New York, they are not required, or even permitted, to do so. Because of this, defendants in New York are screened for their risk of failure to appear in court — using a range of factors such as ties to the community, criminal record and past failure to appear — but not for their risk of committing a new crime. As a result, defendants

may be put back on the street with insufficient regard to public safety, with possibly catastrophic consequences. Few, if any, would seriously argue that judges should not consider the safety and well-being of people on our streets or in our homes when making bail decisions. This makes no sense and certainly does not serve the best interests of our communities and our citizens.

The time has come to join 46 other states and the District of Columbia by changing New York's bail laws to require judges to take into account public safety considerations. Fixing this glaring deficiency must be the top priority of any revision to our bail statutes. Judges must be authorized to consider public safety as well as the risk of failure to appear for court when making bail decisions. To allow the present situation to continue is bad public policy at a time when we need to do everything we can to be smart, effective and principled in combating crime and violence in our society.

But this should be just the start of a top-to-bottom revamping of the rules governing bail in our state — a new vision of pre-trial justice in New York. Back in 1964, Robert F. Kennedy made a powerful case for bail reform, saying: "Usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money." While, thanks to the efforts of reformers like Herb Sturz and others, much has improved in our criminal justice system in New York since Kennedy spoke these words, the reality is that we still have a long way to go before we can claim that we have established a coherent, rational approach to pre-trial justice.

Our overriding goal must be to ensure that pre-trial detention is reserved only for those defendants who cannot safely be released or who cannot be relied upon to return to court — and to do all we can to eliminate the risk that New Yorkers are incarcerated simply because they lack the financial means to make bail. More than simply being unfair, incarcerating indigent defendants for no other reason than that they cannot meet even a minimum bail amount strips our justice system of its credibility and distorts its operation. Jailing defendants before trial can subject them to economic and psychological hardship, limit their ability to assist in their defense and place them at a serious disadvantage in the plea bargaining process.

To avoid these results, our bail statutes must be reformed to make clear that, where defendants are charged with non-violent offenses, there is a statutory presumption that they will be released with the least restrictive conditions possible unless prosecutors demonstrate that the defendant poses a threat to public safety or a legitimate risk of failure to appear in court. At the same time, to support judges when they make determinations to release defendants pre-trial, we need to ensure that they have authority to impose a range of release conditions when necessary, such as curfews, drug testing and substance abuse treatment.

Finally, we also need to ensure that judges have accurate and complete information before them when they make these important, and often difficult, decisions. For example, in some instances, primarily in rural parts of the state, judges do not always have the defendant's criminal history record (the 'rap sheet') at the arraignment. This is not only contrary to law but it also defies common sense, and we need to do everything we can to rectify this problem.

B. EXPANDING SUPERVISED RELEASE

New York's present approach to bail is not cheap. It costs a lot of money to jail thousands of New Yorkers each year before even determining whether they are in fact guilty as charged. At a time when our governments are under pressure to reduce spending, we should be taking a hard look at these expenditures. The research suggests that an evidence-based approach called "supervised release" — which monitors defendants who are released pre-trial and also provides them with access to needed services — can, in a carefully structured program, both guarantee that defendants appear in court and save substantial money by avoiding incarceration costs.

Nationally, the average cost of pre-trial detention is $19,000 per defendant. The average cost to put a defendant in a supervised release program that keeps him or her in the community but monitors his or her whereabouts and provides access to social services, is between $3,100 and $4,600. Nearly 30,000 people are held in local jails in New York State at any given moment. You do the math — there is enormous potential savings if we can figure out how to safely and responsibly keep non-violent defendants in the community while their cases are pending. For example, a supervised release program in Kentucky has saved the state approximately $31 million dollars since 2005, with nearly 90 percent of participants reliably appearing for trial without having committed any new crimes during release.

Given these results, New York should be making a deeper investment in supervised release. In Queens, Mayor Michael Bloomberg and the City of New York have successfully tested one model — focusing on felony cases — with the help of the

Criminal Justice Agency and the active support of local judges. I applaud Mayor Bloomberg for his vision and his commitment to change and I encourage counties across the state to consider such supervised release programs.

We should be mindful, however, that the vast majority of the cases in our criminal justice system are misdemeanors, not felonies. While misdemeanor defendants are typically detained for shorter periods of time than their felony counterparts, the sheer volume of misdemeanor cases and the frequency with which such defendants are detained on minor bail amounts demand that we look at reforming bail practices for this population as well. I am pleased to announce that the court system and the Center for Court Innovation will be developing a supervised release program in New York City that will target misdemeanor defendants who are currently being detained pre-trial because they are unable to make even low bail amounts.

C. REFORMING THE BAIL BOND INDUSTRY

Bail reform is further complicated by the role of the bail bond industry. Bail bondsmen, who typically receive a fee equal to 10 percent of the bond amount, almost never write bail bonds for $1,000 or less, because there is only a small profit to be made in such bonds. They are far more likely to underwrite high bail amounts, which means, ironically, that defendants charged with serious offenses are more likely to obtain bail bonds than those accused of minor crimes.

Studies reveal that, in recent years, the use of bail bonds has increased across the nation. Along with this trend, pre-trial release rates have fallen and the role of commercial bail-bonding companies has expanded. With precious little public

accountability, bail bondsmen exercise enormous influence over who is released pending trial and who stays in jail. The fact is that, in many cases, bail bondsmen, not judges and not prosecutors, ultimately make the most critical decisions affecting the liberty of those accused of crimes in our criminal justice system.

How can that be? Are there other options that can take the place of bail bonds? In fact, several alternatives are already authorized by statute, including partially secured and unsecured bonds. We should be encouraging judges to make greater use of these options, when appropriate, instead of relying so heavily on traditional bail bonds.

At the same time, we should also be testing whether we can take the profit motive out of bond making. State legislation passed last year allows not-for-profit organizations to act as bail bond agents, provided they are licensed by the State Insurance Department. This legislation was prompted by the work of The Bronx Defenders, an institutional defender office, that created a special fund to help low-income offenders post minor bail amounts. The fund reports a 93 percent appearance rate for participating defendants. In the days ahead, we should be considering approaches like this in other parts of the state and with larger bail amounts.

Just last week, the U.S. Conference of Chief Justices unanimously adopted a resolution urging court leaders across the nation to promote evidence-based practices that limit the use of pre-trial detention to those defendants who present a risk to public safety or of failure to return to court. The three-pronged strategy that I announce today — revamping our bail statutes to require public safety considerations and a presumption of release for non-violent offenders, investing in supervised release programs with great cost savings for New York's taxpayers and exploring alternatives to traditional bail

bonds — will overhaul our approach to pre-trial justice in New York and place us in the front ranks of bail reform in the United States. I will shortly submit legislation to make these changes a reality and to bring us a step closer to achieving the fundamental promise of our justice system: to protect public safety and ensure fairness for all. Nothing could be more important!

ADDITIONAL RESOURCES AND REFERENCES

THE BRONX FREEDOM FUND

The Bronx Freedom Fund
Mid-Year Summary of Activities
April 2014

SUMMARY

It has been six months since the Bronx Freedom Fund reopened in October 2013 as a licensed charitable bail organization. Since then, the Bronx Freedom Fund has provided direct bail assistance to 66 clients of The Bronx Defenders who have been charged with misdemeanor offenses and have had bail set at $2000 or less.

Ninety-eight percent of the Freedom Fund's clients have returned to all of their scheduled court appearances to date. Early case outcomes for Freedom Fund clients are promising: of 14 closed cases, 11 resulted in a dismissal, one resulted in a non-criminal disposition, and bail was exonerated prior to disposition in two cases. No Freedom Fund client has had to serve a sentence of incarceration in the case where we posted bail. We continue to collect encouraging data on the Fund's impact on collateral consequences related to employment, education, housing, mental health, and more.

In its first six months, bail refunds from the first closed cases have revolved back into the fund, and we expect the majority of funds posted during this six-month period to cycle back into the Fund within the span of one year.

REFERRALS AND CRITERIA

The Bronx Freedom Fund takes cases by referral from attorneys at The Bronx Defenders. When an attorney arraigns a client that she believes is a candidate for Freedom Fund assistance, she makes a referral to the Bronx Freedom Fund project director, who screens all clients for eligibility under the following criteria:

1. *The client is charged with a misdemeanor.* The Bronx Freedom Fund is legally constrained to post bail in misdemeanor cases only. A client may be charged with more than one misdemeanor, but the Freedom Fund may not post bail in a case where the client is charged with a felony.

2. *Bail is set at a maximum of $2000.* Under the law, the Freedom Fund can post bail only in cases where bail is set at $2000 or less. We rarely post the full amount of $2000: the average Freedom Fund bail is under $800. By posting only low bails, we maximize the number of clients assisted and ensure that the fund is sustainable over the long term.

3. *The client meets our internal criteria and demonstrates ties to the community.* Due to limited resources and the need to keep bail money revolving back into the fund, we limit bail fund assistance to clients of The Bronx Defenders who meet specific criteria. Before posting bail for any client, the Bronx Freedom Fund interviews the client and client's family and reviews non-confidential information provided by the client's attorney. We review for community ties, history of appearance in court, and ability to stay in communication with Freedom Fund staff. Our assessment also draws heavily on information gleaned from the client's pre-arraignment interview with New York's Criminal Justice Agency, an independent pretrial services agency that gathers information about residence, employment, family, and arrest history.

Once we have posted bail for a client, the Bronx Freedom Fund staff stays in regular contact by phone and mail to remind him of upcoming court dates, facilitate his appearance at court, and connect him with services necessary to stabilize his/her life after an arrest. In several cases, the Freedom Fund has provided clients with referrals to shelters and housing resources immediately upon release, referred clients to job training and employment programs, and set up appointments with Bronx Defenders social workers to discuss substance abuse treatment and other programs.

360 EAST 161ST ST. • BRONX, NY 10451 • P (347) 842-1263 • F (718) 665-0100 • THEBRONXFREEDOMFUND.ORG

CLIENT APPEARANCE RATES

Below are some important figures for the Bronx Freedom Fund in its first six months:

- **Sixty-six people** have received bail assistance from the Bronx Freedom Fund.
- **Ninety-eight percent of clients have returned to all scheduled court appearances.**
- Our clients have returned to court for **138 out of 140 scheduled court dates.**
- No client is currently serving a sentence of incarceration on the case in which the Bronx Freedom Fund paid his or her bail.
- The average bail paid by the Bronx Freedom Fund is $791.
- Eleven out of fourteen cases that have been resolved to date have resulted in a dismissal. One has resulted in a non-criminal disposition (a violation with a one-year conditional discharge). Bail was exonerated prior to disposition in two cases.

We continue to track collateral consequences of incarceration that the Bronx Freedom Fund has helped clients to avoid. Our clients have regained the chance to carry on their daily lives in countless ways while their cases are pending. A small selection of these life outcomes include:

- Avoiding deportation – one client avoided deportation to a country where he had not lived since he was a teenager; another avoided deportation to a country where she would not be able to receive adequate medical treatment for a chronic condition.
- Maintaining an apartment in public housing where our client had been told she would be evicted if she remained in jail.
- Retaining a spot in supportive housing with integrated drug treatment.
- Attending parenting classes mandated by ACS in order to get visitation with children.
- Spending the holidays with a four-year-old son.
- Keeping employment as a certified nursing assistant for senior citizens.
- Completing a GED course.
- Graduating from an employment readiness program at the Fortune Society.
- Enrolling in an auto mechanic course, a pharmacy course and a commercial driving course.
- Enrolling in and receiving financial aid at a local community college.
- Getting grief counseling with a licensed social worker.
- Keeping a job our client had just started the week before as a sous-chef at a restaurant.

CASE OUTCOMES

Six months in, we are beginning to see Freedom Fund cases close. It has taken time for cases to begin to resolve, largely because once clients are not detained on bail they are empowered to continue fighting their cases for as long as it takes to achieve the best possible resolution. The significant delays in Bronx Criminal Court mean that, even for misdemeanors, this can take several months to over a year.

Of the 66 cases in which the Freedom Fund has posted bail, fourteen have closed (not counting the one case in which a bench warrant was issued). Of those cases, eleven resulted in a dismissal. One was resolved with a violation carrying a one year conditional discharge. Two had bail exonerated after one case appearance, while the case was still open. The eleven cases in which all charges were dismissed, as well as the case that ended in a non-criminal disposition, resulted in a full refund of the bail money posted by the Fund.

We continue to predict that clients of the Freedom Fund who are enabled to fight their cases from outside of jail will receive fewer sentences of incarceration, and will have more cases dismissed or resolved with a non-criminal disposition than similar cases where clients are detained on bail.

Please feel free to contact Alyssa Work, Project Director, at awork@thebronxfreedomfund or 347-842-1263 with questions about The Bronx Freedom Fund.

Justice Fund

Charges:

Name:_____**D.O.B.**_____**Age:**_____**Male/Female**

AKA:_____ **Y/N Interpreter:**_____

Address:_____**How Long:**_____

Town:_____ **Phone Number:**_____
Cell Phone Number:_____

Relationship:_____ **Prior Address:**_____

☐ **Returning Home / if not, will reside at**_____

With:_____**Phone:**_____

Marital Status: ☐ **Married** ☐ **Divorced** ☐ **Single** ☐ **Widowed** ☐ **Separated** ☐ **Other**

Spouse's Name:_____**Phone:**_____

Address:_____

☐ **Probation, Judge**_____ ☐ **Parole** ☐ **I.C.E.**

☐ **Requests Lawyer/ Has lawyer assigned:**_____

☐ **Has/Will get Private Attorney Name:**_____

FAMILY COMPOSITION

# of Children	Resides with	Address/Phone	Age

Parent(s): **Address:** **Phone:**
F-

M-

Contact Name: **Relationship** **Address:** **Phone:**

EMPLOYMENT OR SCHOOL/FINANCIAL INFORMATION

Military Service Branch_____Years_____Discharge Type_____

PRESENT JOB ☐ Full Time ☐ Part Time ☐ Retired ☐ Disabled ☐ Unemployed

Employer/School:_____Telephone:_____

Address: _____

Job Title/ Student_____Length of time at above:_____ Salary $_____

PRIOR JOB ☐ Full Time ☐ Part Time ☐ Retired ☐ Disabled ☐ Unemployed

Employer/School:_____Telephone:_____

Address:_____

Job Title/Student:_____Length of time at above:_____ Salary $_____

Other Sources of Income: ☐ Public Assistance or TANF ☐ Unemployment Compensation/Insurance
☐ Medicare/Medicaid ☐ Social Security Pension ☐ Social Security Income or Disability (SSI,SSD)
☐ Food Stamps ☐ Veterans Benefits ☐ Other Pension Spouse/Parent Income $_____

Assets: Bank$_____ Make/ Year of Car_____ Car Loan (Monthly)$_____

Liabilities: Mortgage/Rent (Monthly) $_____ Y/N is Child support Court Ordered

Child Support $_____ Other Income $_____

Verified Criminal Justice History Currently on/off Probation/Parole Office:_____

Name of Officer:_____ Phone:_____On for:_____

SPO:_____ Phone:_____

Case #_____ Closed: F_____ M_____ Fam/Crim Ct_____ VOP_____ Prob:_____ Parole_____

# of Warrants_____ # of open cases_____ Last Incarceration_____ Time Served_____

Self Disclosed Criminal History: Y/N Ever arrested before ☐ Copy of Rap Sheet

Earlier arrest:_____ Last arrest before this one _____

Convictions: # of Misdemeanors_____ # of Felonies_____

Drug and Alcohol

Y / N Are you now or have you ever been in a Drug or Alcohol Program If yes, Impatient/Outpatient
Where:_____

When:_____ How Long:_____ **Y/N** Requests alcohol or drug treatment

Y / N Recommend for Alcohol/ Substance Abuse Screening

Mental Health

Y / N **Any Mental** Health Issues If Yes: Last Date Treated:_____ Impatient / Outpatient

Where_____ How Long:_____

Y / N Requests Treatment **Y / N** Recommend for Mental Health Screening

Medication(s)

Y / N Are you on medication If yes, for what condition_____

What medication(s):_____

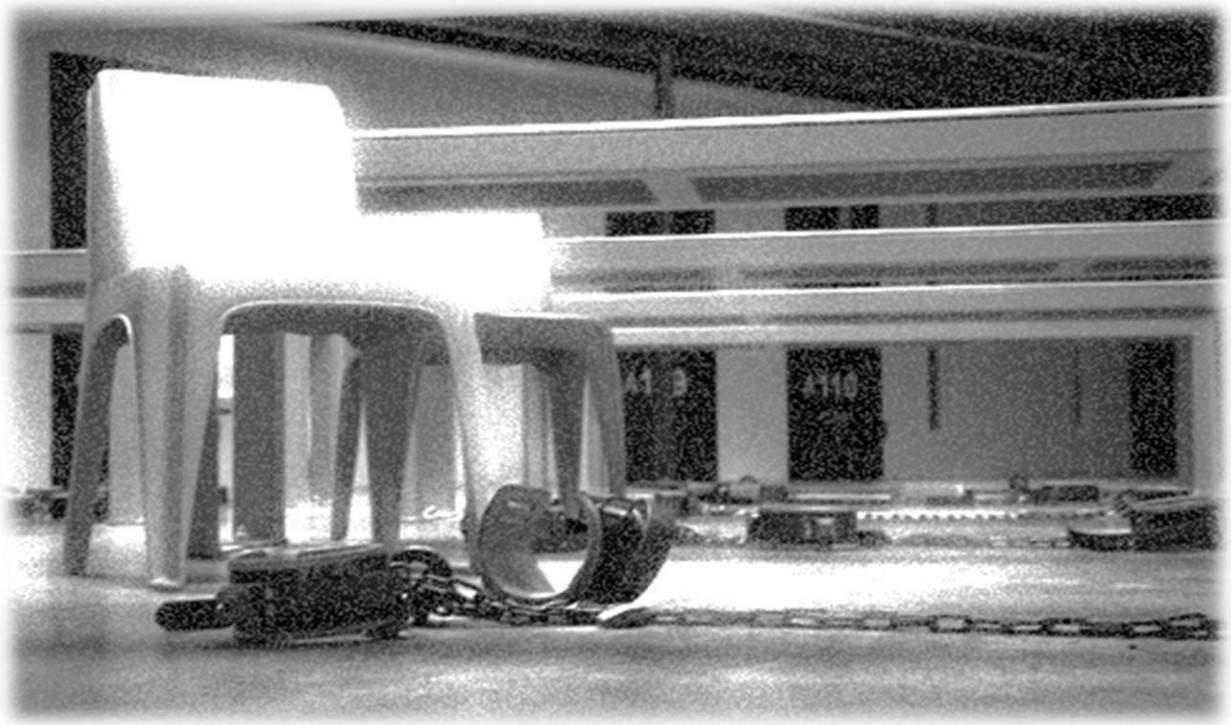
Justice Fund
Application Sheet

Name:_____

To be considered, Defendant needs:

1. A Suffolk, Nassau, Queens, Brooklyn or Manhattan address where they can be reached, AND
2. A total of 5 points from the following rating scale categories:

Unverified	*Verified*	
		Residence (Steady residence in Suffolk, Nassau, Queens, Brooklyn, Manhattan)
3	3	1 year at present residence
2	2	1 year total between present and last residence OR 6 months at present residence
1	1	6 month total between present and last residence; OR 5 years or more in Suffolk, Nassau, Queens, Brooklyn or Manhattan
0	0	Less than 6 months in present and prior residence; OR less than 5 years living in Suffolk, Nassau, Queens, Brooklyn or Manhattan; OR None of the above/Conflicting Info
		Family Ties/Contact
3	3	Living in established family home AND has regular contact with immediate family members
2	2	Lives in established family home
1	1	Does not live in established family home AND has regular contact with immediate family members
0	0	None of the above/Conflicting info
		Employment
3	3	Steadily employed in present job for 1 or more years
2	2	Steadily employed in present job for 4 months OR steadily employed in present AND prior job for 6 months OR Homemaker OR Retired
1	1	In present job less than 4 months AND job is still; OR is unemployed for less than 3 months AND was employed for 9 or more months steadily in last job
1	1	Is currently on Public Assistance, Unemployment Insurance, SSI, SSD, Retired
		School
3	3	Presently attending school regularly
2	2	Out of school less than 6 months AND employed OR in training program
1	1	Out of school less than 3 months AND unemployed AND not in training program
0	0	None of the above/Conflicting Info
		Prior Record of Arrests
2	2	No convictions
0	0	1 Misdemeanor conviction OR Youthful Offender Adjudication
-1	-1	2 Misdemeanor OR 1 Felony conviction
-2	-2	3 or more Misdemeanor OR 2 or more Felony convictions
0	0	Not Verified/Conflicting Info
		Discretion
1	1	Cooperative, over 65 years old, attending hospital or treatment program
-1	-1	Uncooperative, under the influence of alcohol or drug Warrants
_____	_____	**Total Points Verified and Unverified**



ESTABLISHING A CHARITABLE BAIL FUND IN NEW YORK STATE

A STEP-BY-STEP GUIDE

Extreme poverty shouldn't keep anyone in jail, and the inability to come up with five hundred dollars shouldn't force anyone to plead guilty. *But it does*. The sad reality of our criminal justice system is that people who can't pay small amounts of bail often stay in jail while their cases wind slowly through the system, or are forced to plead guilty in a criminal case to get out of jail.

In July of 2012, with the passage of the Charitable Bail Act, which amended Article 68 of New York's insurance law to allow not-for-profit bail funds, New York's legal landscape changed in an important way. Now, nonprofit organizations certified by the Department of Financial Services can post up to $2000 bail for misdemeanor defendants.

This new law, championed by The Bronx Defenders and The Bronx Freedom Fund, will fill an important gap for people charged with minor crimes who might otherwise languish in jail because of their poverty. Because for-profit bail bond companies profit from fees based on the bail amount, they frequently refuse to write bonds in cases where their fees would be $200 or less, leaving those at the very bottom of the economic heap – those held on small amounts of bail – without any recourse.

Finally, charitable bail organizations have the potential to serve this important and underserved population. Under the law they can operate in any county in New York State.

In short, a small revolving bail fund managed by a minimal staff can make an enormous impact in hundreds of people's lives.

Before beginning the certification and licensing process, it's important to consider the time and resources of your organization. Licensing can take up to six months, and involves the inherent frustrations of filing with several different state and federal agencies. It will also cost a minimum of $1050 and up to $2000, depending on whether your organization is already registered with the state and federal government. You may also want to think about board membership, fiscal sponsorship and funding sources before or during the licensing process.

Do I need to create a Charitable Bail Organization?

Under Article 68 of New York's Insurance Law, any individual or organization that deposits bail or executes a surety bond more than twice in one month is considered to be engaged in a bail bond business and must be licensed by the Department of Financial Services. So if your goal is to post bail more than twice a month, then YES, you need to be certified as a charitable bail fund.

If you've decided to create a charitable bail fund, what follows is a comprehensive step-by-step guide to do just that.

A warning: this may seem daunting at first, but it is mostly a matter of filling out forms, and complying with a complicated oversight structure. The Bronx Freedom Fund is here to help you at every stage of the process. This guide is intended to be a one-stop reference for information on how to:

1) register as a nonprofit organization under federal tax laws;
2) register as a charity under New York state law;
3) obtain a Charitable Bail Organization (CBO) license from New York's Department of Financial Services;
4) obtain an individual bail bond agent license from New York's Department of Financial Services; and
5) establish procedures and processes for posting bail, although these procedures will vary widely by county and courthouse.

At the end of this guide are most of the forms required for licensing, along with information about how much they cost and where to send them.

I. Register as a 501(c)(3) organization under federal law.

Only nonprofit organizations that are tax-exempt under Section 501(c)(3) of the U.S. tax code can apply for certification as a charitable bail organization. Useful information about applying for recognition of tax-exempt status is available from the IRS website at http://www.irs.gov/Charities-&-Non-Profits/Application-for-Recognition-of-Exemption.

The application for tax exemption will require:

Articles of incorporation or other organizing documents filed with New York's Department of State. Once filed, the state department will certify receipt. At the time of incorporation, your organization may also want to establish by-laws. **[Appendix A]**

Form 1023, Application for Recognition of Exemption, available on the IRS web site. The application must describe completely the organization's actual and planned activities. **[Appendix B]**

You should also submit Form SS-4 [**Appendix C**] to receive a federal employee ID number, which will be required for your charitable bail organization application as well as for federal tax purposes.

What do I need to file articles of incorporation?

A proper header: "Certificate of Incorporation of [Organization], under Section 402 of the Not-For-Profit Corporation Law."

Name of the organization

Type of corporation (private or public) *

The purpose for which the corporation is formed.

County of incorporation

The names and addresses of all initial directors

A fee of $75

If the application is complete, it should be approved around a month after applying.

II. Register as a charity under New York law.

In addition to being recognized as a nonprofit organization under federal law, a charitable bail organization must be registered as a charity under Article 7-A of New York's Executive Law. Your organization must apply for federal tax exemption status before registering with the state. To submit your registration as a charitable organization, you will need to have ready:

Articles of incorporation or other organizing documents filed with New York's Department of State (see above).

Form CHAR410, available at http://www.charitiesnys.com/charities_new.jsp. The form requires basic information about the organization, a specific description of its purposes, and the signatures of two officers. **[Appendix D]**

A $25 fee if you intend to solicit contributions

III. Apply to DFS for a Charitable Bail Organization certificate.

Once your group is organized and registered as a nonprofit, you can apply to DFS for certification as a Charitable Bail Organization. The forms needed to apply are available on the Department of Financial Services website, dfs.ny.gov, by accessing "Home," "Applications and Licensing," "Insurance Agents and Brokers" and "Charitable Bail Organization Instructions and Applications." **[Appendix E]**

The application should be completed by a director, officer or executive in your organization. With the application you need to include:

A **check for $1000** made out to the Superintendent of Financial Services

A copy of your organization's articles of incorporation or other founding documents

Proof of 501(c)(3) status and New York registered charity status

Name, residence, SSN and DOB of all directors, trustees and executives

A **director or executive's attestation** to criminal history and child support obligations (attached to the application form)

The director or executive completing the application must also have his or her **fingerprints** taken by MorphoTrust USA, a contractor with the Division of Criminal Justice Services. There are a few steps to getting fingerprints taken:

1. Go to MorphoTrust's website at www.identogo.com and click "Book an Appointment." Choose your state and "Online Scheduling" to make an appointment. The "ORI Code" is NY921270Z. For "Reason for Appointment," select "Principal, Executive or Director of Insurance Company." Appointments are generally available as early as the same week.

2. Fill out the form attached to the CBO application and bring it to your appointment. For "job or license type," select **"Principal, Executive or Director of Insurance Company."**

3. Bring a **check or money order for $102.25** and **two forms of photo ID** to your appointment.

After all of these steps are completed, mail your application to the New York State Department of Financial Services, Licensing Bureau, One Commerce Plaza, Albany, NY 12257.

Once granted, certificates are good for a period of five years. After that, the organization has to apply for a renewal.

IV. Apply to DFS for an individual bail bond agent license.

Useful Licensing Contacts

Jacqueline Catalfamo, Director of Licensing Services
(518) 473-9299
jacqueline.catalfamo@dfs.ny.gov

Dianne Burke, Assistant to the Director of Licensing Services
(518) 473-9299
dianne.burke@dfs.ny.gov

In addition to getting a CBO certificate, all staff who intend to post bail for clients must be licensed as bail bond agents by the New York Department of Financial Services. Even the director or officer who fills out the CBO application must apply separately for an individual bail bond agent license.

Before beginning the bail bond agent licensing process, you may want to contact Licensing Services to alert them to an incoming application. Applications may take several months, and you may need to make a few reminder phone calls to DFS to expedite the process.

There are a few steps to apply for a bail bond agent license:

1. **Take the New York State Bail Bond Agent Exam** (available on the exam website as Series 10-59) and receive a passing grade of 60% or higher.

The sixty-question multiple choice exam is administered through PSI Exams. To register, use the PSI website (www.psiexams.com) or call 1-800-733-9267. Exams can be scheduled a week or two in advance on a computer testing center in your city and cost $49. For a list of the material included in the exam, see the PSI Candidate Information Bulletin, which lists various statutes,

vocabulary and legal terms that you should be familiar with. Make sure to save the grade report that is generated at the testing site, since it's required for your application.

2. **Complete the paper application.** After you pass the exam, you will be mailed an application. **[Appendix F]** In addition to completing the application, which you will need to have notarized, you must also provide:

   Fingerprints processed through MorphoTrust USA. See the instructions in Part III for processing fingerprints through MorphoTrust.

   A **background check report**. Background checks can be initiated through www.backgroundreport.com using your social security number and address, and can be completed within a day. The report should be printed and attached to the application.

   Two notarized character references. Forms for the character references will be provided with the application. Your references must have known you for at least five years, and they can't be related to you.

   Two passport photos.

   A surety bond for $5000.

   How do I get a surety bond?

   The bond will be for $5000, meaning that the insurer must pay $5000 if the applicant violates the terms of his or her license. Your organization doesn't need to pay $5000; the cost of the bond will usually be under $200.

   If you have an insurance broker, they can help you find a surety company; otherwise, a starting place would be to inquire with established companies like State Farm, The Hartford, Nationwide and Allied Insurance. The bond will be issued in the name of the applicant, so part of the process will be a credit check of the applicant.

   Before you send in your application, make sure that you have both the bond itself and the surety acknowledgment (a notarized statement from the company that is executing the bond). The surety bond must be sent to the Attorney General's office before the application will be processed, so if the paperwork is not submitted correctly the entire licensing process will be delayed.

The bail fund will also have to submit **notice informing DFS of an additional employee**. An officer of the bail fund will need to sign off on the application. (It's not a problem if the applicant and the bail fund officer are the same person.)

3. **Mail in your application.** Before mailing your application you may want to contact DFS and ask them to review a copy of your surety paperwork. You can also ask to whose attention the application should be sent. This will generally be either to Dianne Ellis or Kathy Grand (see contact information below).

After DFS receives your application and your surety is approved, you will be appointed an examiner. This examiner will contact you by e-mail and mail in order to schedule an interview. Before the interview is scheduled, you may have to provide additional information, including:

State and federal tax returns for the current year and two previous years (or W-2/1099)

Copies of any **professional licenses or registration**

4. Attend your DFS interview. Once the examiner has all the requested paperwork, he or she will schedule the interview. The interview may be scheduled as soon as two weeks after the paperwork is received.

Bring **two forms of government ID** to the interview.

At the interview, be prepared to answer questions about the following:

Employment history of officers and/or employees
Funding of the charitable bail organization
Source of operating budget
Source of bail money
Receipt of any local, state or federal money
Salary of all employees, officer and executives
Policy and procedures of your charitable bail organization
Procedures by which clients are chosen
Procedures for posting bail
Whether money will ever be expected of clients and/or their families
Whether the client's family is liable for bail funds if the client fails to appear

If the interviewers have no objection to your application, they will submit a memo afterwards reflecting their approval to DFS. Your license will be available 3-7 days afterward.

You will have to check the website to be sure your license has been issued. When you see your name, print out a physical copy from the DFS web site.

V. Establish bail fund policies and procedures.

There are certain limits on the activities of a licensed charitable bail organization. When creating policies and procedures for your bail fund, keep in mind the following:

Charitable bail organizations may only deposit bail in the amount of $2000 or less. They may provide all or part of a defendant's bail obligation.

Charitable bail organizations may only deposit bail for clients charged with one or more misdemeanors.

Charitable bail organizations may not execute any bond for a defendant.

CBOs CANNOT:

Post bail in a felony case

Charge fees

Post bond

Charitable bail organizations may not receive compensation or charge a premium for bail assistance.

Charitable bail organizations may only deposit bail in one county *unless* the organization operates in New York City, in which case it may operate in all five counties.

Other important things to consider related to your bail fund's operations include:

Criteria for eligibility. Your organization may wish to establish internal criteria for eligibility more restrictive than the statutory criteria (which specify only that the top charge be a misdemeanor and bail be no greater than $2000). Established criteria will help standardize decisions about posting bail for clients.

Referral process. Establish a means by which bail fund staff will learn about potentially eligible clients. You may have to decide whether staff will be in the courthouse or reachable by phone, e-mail or otherwise. Will staff be able to interview clients or access their files before posting bail? Determine how and when this will happen.

Location(s) where bail will be posted. Determine all court offices and correctional facilities where bail may be posted and each of their required procedures.

Form by which bail will be posted. Different agencies require different forms of bail. Find out from the court clerk's office and correctional facilities whether they take cash, money orders, certified bank checks, and/or cashiers' checks. Find out also to whom checks should be written.

Procedures for tracking funds. Maintain records of the all bail funds posted and refunded. Determine, if possible, how many clients can be assisted with existing funds.

Follow-up and support mechanisms. Determine how staff will follow up with clients to ensure their appearance in court. Options to consider include regular phone calls, in-person meetings, assistance with transportation costs and childcare, and connection with social services.

It is our hope at The Bronx Freedom Fund that the combined efforts of community and nonprofit bail funds can impact the lives of people caught in the criminal justice system, and be a model for change in bail and pretrial detention across the country. We wish you the best of luck in establishing a charitable bail organization. If you have any questions about this guide or about the licensing process in general, please contact:

The Bronx Freedom Fund

360 E. 161st St.
Bronx, NY 10451
(347) 842-1263
thebronxfreedomfund.org

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Written Comments of The Bronx Defenders

Justine Olderman, Managing Director of the Criminal Defense Practice
Robyn Mar, Director of Early Advocacy
Noelle Turtur, Project Associate

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"

June 17, 2015

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

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[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.

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[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.

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[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.

A Decade of Bail Research in New York City

Mary T. Phillips, Ph.D. (2012)

The most important findings are brought together from numerous reports published by CJA between 2004 and 2011 as part of a project to examine the bail system in New York City. New material includes a comparison of New York City with other large U.S. cities, as well as updated release and bail data for cases of defendants arrested in 2010.

Factors Influencing Release and Bail Decisions in New York City. Part 1: Manhattan

Mary T. Phillips, Ph.D. (2004)

Results from research on release and bail decisions are presented for Manhattan in the first of a three-part series. Data were collected during 2002 and 2003 from courtroom observations of Criminal Court arraignments in Manhattan and Brooklyn. Multivariate analyses found that the prosecutor's bail request was the most important factor influencing release and bail decisions.