The New Age of Criminal Justice: Review, Revisions and Reform

Criminal Justice Section
Co-Sponsored by the Committee on Mandated Representation

January 24, 2018

New York Hilton Midtown

NYC

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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 or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

Accessing the Online Electronic Course Materials

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

The course materials may be accessed online at: **<<www.nysba.org/CRIMAM18Materials**

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **<Criminal Justice Section Annual Meeting 2018**
Date: January 24, 2018 Location: New york Hilton Midtown, NYC

Evaluation: www.nysba.org/am2018-CRI0
This evaluation survey link will be emailed to registrants following the program.

Total Credits: **3.0 New York CLE credit hours**

Credit Category:
2.0 Areas of Professional Practice
1.0 Ethics and Professionalism

This course is approved for credit for **experienced attorneys only**. This course is not transitional and therefore will not qualify for credit for newly admitted attorneys (admitted to the New York Bar for less than two years).

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff

2) Complete and return a **Verification of Presence form** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Verification of Presence form certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also listed above.

Additional Information and Policies

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).

NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING 2018

Criminal Justice Section

co-sponsored by the Committee on Mandated Representation

The New Age of Criminal Justice: Review, Revisions and Reform

January 24, 2018 | New York Hilton Midtown | NYC

3.0 Total Credits: 1.0 Ethics | 2.0 Professional Practice (Non-Transitional)

Program
9:00 am – 12:05 pm
Beekman, 2nd Floor

Awards Luncheon
12:30 pm to 2:00 pm
Sutton North, 2nd Floor

SECTION CHAIR
Tucker C. Stanclift, Esq.
Stanclift Law PLLC, Queensbury

PROGRAM CO-CHAIRS
David L. Cohen, Esq.
Law Office of David L. Cohen, Esq., Kew Gardens
Richard D. Collins, Esq.
Collins Gann McCloskey & Barry PLLC, Mineola

9:00 am – 9:10 am
Welcoming Remarks
Tucker C. Stanclift, Esq., Section Chair, Stanclift Law PLLC, Queensbury
Richard D. Collins, Esq., Program Co-Chair, Collins Gann McCloskey & Barry PLLC, Mineola

9:10 am – 10:00 am
Practical Ethical Implications of New York Court of Appeals Decisions: What Just Happened, What's Happening Now, and What's About to Happen
An appellate review of the latest decisions focusing on Ineffective Assistance of Counsel cases that either have just been decided or are pending. How can defense lawyers avoid being labeled ineffective? Important information for defense trial lawyers, prosecutors, appellate lawyers and the judiciary.

Speaker:
Robert S. Dean, Esq., Center for Appellate Litigation, New York City

10:00 am – 10:50 am
New York Legislative Revisions
- Raising the Age: What it means and how it works.
- Sealing: What do lawyers, prosecutors and judges need to know about the new CPL Section 160.59?
- Photo Identifications: The steps that must be followed to establish admissibility.
- Recording Confessions: Best practices and required procedures.

Panelists:
David L. Cohen, Esq., Law Office of David L. Cohen, Esq., Kew Gardens
Robert J. Masters, Esq., Queens County District Attorney's Office, Kew Gardens
Hon. Barry Kamins, Aidala, Bertuna & Kamins P.C., New York City

10:55 am to 11:05 am
Break

11:05 am to 12:05 pm
Proposed Bail Reform
A balanced panel from diverse perspectives will examine the bail system and how it may or may not benefit from an overhaul of the criminal justice policies currently under consideration such as "risk to public safety" and the use of pretrial risk assessment tools. Among the issues to be discussed:
- Whether the proposed reforms disproportionately disadvantage people of color and the poor;
- Whether the bail system forces many people facing nonviolent or low-level charges to remain in jail when they could be released and the need for education regarding alternative forms of bail;
- Whether the system has contributed to jail overcrowding, with an increasing number of people spending longer periods behind bars without being convicted of a crime;

- How to maximize appearance rates while minimizing both intrusions to defendants' liberty and pretrial crime;
- Whether requiring a defendant to pay for his or her freedom violates the promise of equal access to justice under the U.S. Constitution.

Panel Chair:
Andrew Kossover, Esq., Chair of NYSBA Committee on Mandated Representation, Ulster County Public Defender, Kossover Law Offices LLP, New Paltz

Panelists:
Hon. Matthew J. D'Emic, Administrative Judge, Kings County Supreme Court (Criminal Term), Brooklyn
Hon. J. Anthony Jordan, Esq., District Attorney, Washington County, Fort Edward
Sean Hill, Esq., Senior Legal Fellow, Katal Center for Health, Equity, and Justice, New York City
Insha Rahman, Esq., Project Director, Vera Institute of Justice, New York City
Michael C. Green, Esq., Executive Deputy Commissioner, New York State Division of Criminal Justice Services, Albany

12:30 – 2:00 pm
Luncheon and Awards Ceremony
Speaker: Michael C. Green, Esq., Executive Deputy Commissioner, New York State Division of Criminal Justice Services, Albany

Michael Green will receive the Section's Award for Outstanding Contribution in the Field of Criminal Justice Legislation

Criminal Justice Section Awards to be Presented at Annual Meeting

Charles F. Crimi Memorial Award
Elkan Abramowitz, Esq., Morvillo Abramowitz Grand Iason & Anello P.C., New York City

Outstanding Contribution in the Field of Criminal Law Education
Hon. William C. Donnino, Nassau County Supreme Court Justice, Mineola

Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System
Hon. Jenny Rivera, New York State Court of Appeals, Albany

Outstanding Contribution in the Field of Criminal Justice Legislation
Michael C. Green, Esq., Executive Deputy Commissioner, New York State Division of Criminal Justice Services, Albany

The Michele S. Maxian Award for Outstanding Public Defense Practitioner
Justine (Tina) M. Luongo, Esq., Attorney-in-Charge, Criminal Practice, The Legal Aid Society, New York City

Criminal Justice Section Awards to be Presented at 2018 Spring Meeting

David S. Michaels Memorial Award
Glenn A. Garber, Esq., Glenn A. Garber, PC, New York City

Outstanding Contribution to the Bar and the Community
Hon. Craig D. Hannah, Buffalo City Court Judge, Buffalo

Outstanding Prosecutor
Thomas P. Zugibe, Esq., Rockland County District Attorney, New City

Register Online www.nysba.org/AM2018 | **Get Social: #NYSBA18**

IMPORTANT INFORMATION

Under New York's MCLE rule, this program has been approved for a total of 3.0 credit hours (1.0 in Ethics and 2.0 in Professional Practice) for experienced attorneys only. This program will NOT qualify for credit for newly-admitted attorneys because it is not a basic practical skills program.

Discounts and Scholarships: New York State Bar Association members and non-members may apply for a discount or scholarship to attend this program, based on financial hardship. This discount applies to the educational portion of the program only. Under this policy, any member of our Association or non-member who has a genuine basis for their hardship, if approved, can receive a discount or scholarship, depending on the circumstances. Request for discounts or scholarships must be received prior to January 12, 2018. For more details, please contact Catheryn Teeter in writing at New York State Bar Association, One Elk Street, Albany, New York 12207 or cteeter@nysba.org.

Accommodations for Persons with Disabilities: NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Catheryn Teeter at 518-487-5573 or cteeter@nysba.org.

For overnight room accommodations, please call the New York Hilton Midtown at 1-800-445-8667 and identify yourself as a member of the New York State Bar Association or on the web at **www.nysba.org/am18accomm**. The rate will be based on room selection (single/double occupancy) and arrival/departure dates with additional taxes and hotel fees. The discounted rate for January 21st and January 22nd is $179 per night. The discounted rate for January 23rd through January 28th is $229 per night. A rate of $209 will be offered to those with overlapping dates. Reservations must be made by December 29, 2017.

For questions about this specific program, please contact Catheryn Teeter at 518-487-5573. **For registration questions only, please call the Member Resource Center at 800-582-2452. Fax registration form to 518-463-5993.**

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

JOIN OUR SECTION

☐ As a NYSBA member, **PLEASE BILL ME $35 for Criminal Justice Section dues.** (law student rate is FREE)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Criminal Justice Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:

MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

JOIN A CRIMINAL JUSTICE SECTION COMMITTEE(S)

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ Appellate Practice (CRIM1200)
___ Awards (CRIM4000)
___ Bail Reform (CRIM5900)
___ Brady (CRIM5500)
___ Cameras in the Courtroom Task Force (CRIM6100)
___ Clemency Volunteers (CRIM6000)
___ Continuing Legal Education (CRIM1020)
___ Correctional System (CRIM1400)
___ Defense (CRIM1700)
___ Diversity (CRIM5200)
___ Ethics and Professional Responsibility (CRIM1800)
___ Judiciary (CRIM4800)
___ Law School Student (CRIM5600)
___ Legal Representation of Indigents in the Criminal Process (CRIM2400)
___ Legislation (CRIM1030)
___ Membership (CRIM1040)
___ Prosecution (CRIM3000)
___ Publications (CRIM6200)
___ Sealing (CRIM5100)
___ Sentencing and Sentencing Alternatives (CRIM3200)
___ Sentencing Reform (CRIM5000)
___ Town and Village Justice Courts (CRIM5700)
___ Vehicle and Traffic Law (CRIM4200)
___ White Collar Crime (CRIM5800)
___ Wrongful Convictions (CRIM4900)

2018 MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2010 and prior	$275
Attorneys admitted 2011-2012	185
Attorneys admitted 2013-2014	125
Attorneys admitted 2015 - 3.31.2017	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2010 and prior	$180
Attorneys admitted 2011-2012	150
Attorneys admitted 2013-2014	120
Attorneys admitted 2015 - 3.31.2017	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2016

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Practical Ethical Implications of New York Court of Appeals Decisions: What Just Happened, What's Happening Now, and What's About to Happen

Robert S. Dean, Esq.
Center for Appellate Litigation, NYC

PRACTICAL ETHICAL IMPLICATIONS OF NY COURT OF APPEALS DECISIONS: WHAT JUST HAPPENED, WHAT'S HAPPENING NOW, AND WHAT'S ABOUT TO HAPPEN

I. Decided Cases With Ethical Implications

People v. Marcus D. Hogan

Decided February 18, 2016, 26 N.Y.3d 779

ISSUE PRESENTED: Whether a defense lawyer's refusal to timely facilitate a defendant's appearance before the grand jury is, per se, ineffective assistance of counsel.

HOLDING: No. The decision regarding whether to testify before the grand jury is not fundamental but, rather, is a strategic one requiring the expert assistance of counsel. So the decision whether the client should testify in the grand jury belongs to the lawyer, not the defendant. (Even if the lawyer failed to effectuate his client's grand jury testimony due to a screw-up rather than deliberate strategy choice, it would not constitute IAC absent a showing of prejudice, e.g., the defendant would not have been indicted had he testified.)

TAKEAWAY: The Court reasoned that, while there might be advantages to testifying in the grand jury, there are potential serious downsides, as any seasoned criminal defense lawyer knows. But the same is true as to the four classic fundamental decisions that do belong to the defendant, not the attorney: (1) whether to plead guilty or go to trial; (2) whether to waive a jury; (3) whether to testify at trial; and (4) whether to take an appeal. (Although merely filing a notice of appeal has no downside.) The Court thus falls back on labeling the right to testify in the grand jury a "limited statutory right." The Court notes, for what it's worth, that "the better practice may be for counsel to consult with his or her client" about testifying in the grand jury, but he or she does not have to do even that.

People v. Mario Arjune

Decided November 20, 2017, __N.Y.3d__, 2017 WL 5557924

ISSUE PRESENTED: Whether a writ of error coram nobis, alleging ineffective assistance of counsel depriving a defendant of his right to

appeal, lies against trial counsel for - - after filing a notice of appeal - - failing to advise his client about his right to appeal or explain how to get appellate counsel assigned, thus resulting in the eventual dismissal of the appeal for failure to prosecute. (Here, retained counsel filed a notice of appeal on behalf of his intellectually disabled and now-indigent client, but did nothing more - he did not advise his client of his right to poor person relief or to counsel, nor explain how to go about obtaining either, and he did not advise him of the benefits of appealing and consequences of failing to do so. When the People moved to dismiss for failure to perfect, counsel neglected to take any action although he had been served with their motion and thus must have known the appeal would likely be dismissed.)

HOLDING: By a 5 to 2 vote, there is no right to counsel under the 6th Amendment or the State Constitution, to assist an indigent defendant in preparing a poor person application to get counsel assigned to represent him on appeal. Once a notice of appeal is filed, retained or assigned trial counsel has no constitutional obligation to assist the defendant, and may constitutionally do nothing. In dissent, Judge Rivera pointed out, correctly, that the representation fell below what was required by Appellate Division rules in every department and relevant bar association standards. Counsel was thus ineffective, in the dissent's view. Judge Wilson joined that opinion and also separately dissented on the ground that, in his view, counsel is required under current United States Supreme Court case law to assist the defendant in this regard.

TAKEAWAY: Although a lawyer who abandons a client this way has committed malpractice, violated Appellate Division rules, and violated every relevant bar association standard – and may be subject to disciplinary action – he has not violated State or Federal right-to-counsel provisions, according to the majority. The defendant thus has no recourse on a writ of error coram nobis to revive his appeal. The tenor of this decision is consistent with the dismissive posture that the Court has historically taken with regard to the right to effective assistance of counsel on a criminal appeal.

People v. Howard S. Wright

Decided July 1, 2015, 25 N.Y.3d 769

ISSUE PRESENTED: Whether defense counsel was ineffective for failing to object to the prosecutor's summation, in which the prosecutor repeatedly suggested that DNA evidence directly linked defendant to the murder, when it did not.

HOLDING: Yes. Because the prosecutor's summation misrepresentations are part of a pattern "far afield from acceptable argument," the People's case is circumstantial, the damage to the defense substantial, and there is no possible explanation for not objecting. Although the DNA linkage to the defendant was weak, the prosecutor aggressively and repeatedly argued that the linkage was "conclusive."

TAKEAWAY: This result is an outlier, based upon an unusual confluence of circumstances. Almost invariably, the Court deems the failure to object as non-IAC, as the Court's opinion acknowledges. Excusable reasons for not objecting are a reluctance to bring attention to "one slightly off comment," or where the comments "had little or no impact on the defense." See also, People v. Anderson, 29 N.Y.3d 69 (2017) (failure to object to prosecutor's PowerPoint summation not IAC as the PowerPoint was not improper); People v. King, 27 N.Y.3d 147 (2016) (failure to object to inflammatory comments could have been part of a reasonable strategy to allow the prosecutor to alienate the jury with his "boorish" comments); People v. Nicholson, 26 N.Y.3d 813 (2016) (failure to object not IAC since prosecutor's comments, while arguably inappropriate, were not "sufficiently egregious"); People v. Gross, 26 N.Y.3d 689 (2016) (non-objection to prosecutor's summation may have been strategic). Nonetheless, the volume of such cases decided by the Court, and the number of dissents from affirmances suggest that trial defense counsel should take the obligation to object to bad summations seriously. And many bad prosecutor summations would generate a reversal in the Appellate Division if the issue were preserved.

People v. Leroy Savage Smith

Decided November 20, 2017, __N.Y.3d__, 2017 WL 5574395

ISSUE PRESENTED: Whether a trial court may summarily deny a request for new counsel on the eve of trial, or must make a minimal inquiry under *People v. Sides* (75 NY2d 822), where defendant alleges ineffective assistance of counsel as the basis for the substitution. Although its opinion did not include the defendant's specific allegations, defendant said his Onondaga County 18-B attorney failed to contact any of the exculpatory witnesses he named or do any investigation into the assault where he claimed self-defense. Defendant also said that his attorney told him that there was no money to hire and investigator to do so, thus implicating *Hinton v Alabama* (571 US __; 134 S Ct 1081 [2014]). Despite such allegations, the Fourth Department, citing *People v Porto* (16 NY3d

93) found that Mr. Smith "failed to proffer specific allegations of a seemingly serious request that would require the court to engage in a minimal inquiry."

HOLDING: The Court simply "agree[d] with the defendant that the trial court failed to adequately inquire into his "seemingly serious request[]" to substitute counsel." Without mentioning any of the facts, if thus held that the trial court abused its discretion in conducting no inquiry.

TAKEAWAY: Neither the Fourth Department nor the Court of Appeals mentioned any of the defendant's specific allegations in coming to opposite conclusions, thus providing future litigants with no insight as to what specific complaints a defendant might make to trigger the need for an inquiry. Both courts did this on purpose (see the Webcast or Transcript of the October 12, 2017, oral argument on the Court's website).

People v. Prince Clark

Decided December 20, 2016, 28 N.Y.3d 556

ISSUE PRESENTED: Was trial counsel ineffective for pursuing an ID defense per his client's instructions, rather than a justification defense, even though counsel believed the evidence supported justification.

HOLDING: No, because each defense theory had problems with it, and at least the ID defense aimed for an acquittal on all counts. Objectively, therefore, going with an ID defense was a reasonable strategic decision.

TAKEAWAY: This decision seemingly conflicts with People v. Colville, 20 N.Y.3d 20 (2012), also an allocation-of-decision-making case, which held that whether to ask for a lesser included offense was a strategic decision for counsel, not a decision that is left to the client. In both Clark and Colville, the recitation of facts makes clear that counsel ceded the decision to the client. In Clark, however, the claim is not that counsel was ineffective pursuing an ID defense, but

for not also pursuing a justification defense that he believed the evidence warranted. Since a successful justification defense would have left the defendant with a second-degree assault conviction, the wisdom of raising it in the alternative was not clear. The Clark case is probably an outlier; counsel would be well-advised to adhere to Colville.

II. All Criminal NYCA Cases Pending Decision

NOTE: Cases With Ethical Implications Are In Bold

People v. Otis Boone

AD2 order dated June 24, 2015, affirming the judgment of conviction as modified. Decision below: 129 AD3d 1099, 11 NYS3d 687. Rivera, J., granted leave December 22, 2015. Reargued October 17, 2017.

ISSUE PRESENTED: The court's denial of the defense request to charge on cross-racial identification. (Assigned counsel: Leila Hull & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Dwight Smith

AD1 order dated August 25, 2016, reversing judgment of conviction and dismissing the indictment with leave to re-present. Decision below: 143 AD3d 31, 37 NYS3d 4. Kapnick, J. (AD dissenter), granted leave to People September 29, 2016. Argued November 14, 2017.

ISSUES PRESENTED: (1) The validity of the appeal waiver; (2) Whether the complete denial of the defendant's requests for a lawyer during pretrial proceedings concerning a DNA test violated defendant's right to counsel; (3) Dismissal of the indictment as the proper remedy. (Assigned counsel for defendant: Matthew Bova & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Jude Francis

AD1 order dated January 27, 2016, affirming SORA risk-level adjudication. Decision below: 137 AD3d 91, 25 NYS 3d 221. Court of Appeals granted leave June 9, 2016. Argued January 2, 2018.

8

ISSUE PRESENTED: Whether a defendant's prior YO adjudication may be considered in determining the defendant's SORA risk-level designation. (Assigned counsel: Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Casimiro Reyes

AD2 order dated March 16, 2016, modifying judgment of conviction. Decision below: 137 AD3d 1060, 27 NYS3d 220. Garcia, J., granted leave to People January 25, 2017. Argued January 3, 2018.

ISSUE PRESENTED: The sufficiency of the evidence of second-degree conspiracy. The Second Department held the evidence insufficient, even though the defendant was present at gang meetings where the plan to commit arson was discussed and knew the details of the plan. (Assigned counsel for the defendant: Seymour James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

People v. Douglas McCain

AT2 order dated December 31, 2015, affirming judgment of conviction. Decision below: 50 Misc. 3d 132(A), 2015 WL 9694118. Stein, J., granted leave August 5, 2016. Argued January 4, 2018.

ISSUE PRESENTED: Whether the misdemeanor complaint was jurisdictionally defective, in charging PL 265.01 (2) (possession of a dangerous knife with intent to use unlawfully), when it alleged that defendant possessed a "razor knife" clipped to his pants pocket and told the arresting officer he possessed the knife "for protection"; the Appellate Term's use of the presumption in PL 265.15 (4) to sustain the count.

People v. Albert Edward

AT1 order dated March 22, 2016, affirming judgment of conviction. Decision below: 51 Misc. 3d 36, 29 NYS3d 82. DiFiore, Ch. J., granted leave July 13, 2016. Argued January 4, 2018.

ISSUE PRESENTED: Whether the allegations in the accusatory instrument charging defendant with fourth-degree weapon possession (PL 265.01 [2]) (possession of a "dangerous knife" with intent to use unlawfully) were legally insufficient where defendant possessed a "box cutter" that he said he used on the train for protection.

(Assigned counsel: Seymour James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

People v. Reginald Wiggins

AD1 order dated October 6, 2016, affirming judgment of conviction. Decision below: 143 AD3d 451, 39 NYS3d 395. Moskowitz, J. (AD dissenter), granted leave January 3, 2017. Argued January 9, 2018.

ISSUE PRESENTED: Whether the six-year pre-trial delay deprived the defendant, a teenager incarcerated since age 16 at Rikers Island, of his constitutional right to a speedy trial. (Assigned counsel: Ben Schatz & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Dennis O'Kane

Albany County Court order dated September 14, 2015, reversing judgment of conviction. Abdus-Salaam, J., granted leave August 1, 2016. Argued January 10, 2018.

ISSUES PRESENTED: (1) Whether trial counsel was ineffective for consenting to inflammatory annotations on the verdict sheet, resulting in reversible error. (2) Whether County Court improperly reached the issue sua sponte.

People v. Joseph Sposito

AD3 order dated June 9, 2016, affirming judgment of conviction and denial of CPL 440.30 motion for DNA testing, but reversing denial of IAC-440.10 without a hearing. Decision below: 140 A.D.3d 1308, 32 NYS3d 736. Pigott, J., granted leave November 10, 2016. Argued January 10, 2018.

ISSUES PRESENTED: (1) Whether trial counsel was ineffective for, inter alia, waiving a Huntley hearing without reviewing the confession. (2) Whether the motion for DNA testing was properly denied.

People v. Michael Johnson

AD2 order dated May 18, 2016, affirming judgment of conviction. Decision below: 139 AD3d 967, 34 NYS3d 62. Hall, J. (AD dissenter), granted leave August 5, 2016. To be argued February 6, 2018.

ISSUES PRESENTED: (1) Whether the defendant's post-arrest statements were voluntary, even though there was a 33-hour delay between arrest and arraignment, where the People produced no evidence that defendant was provided with food, water, or bathroom access during this period. (2) The denial of a missing witness charge as to the complainant's son, an eyewitness. (3) The denial of a mistrial in response to improper testimony. (4) Delayed disclosure of Rosario material. (Assigned counsel: De Nice Powell & Lynn W.L. Fahey, Appellate Advocates, 111 John Street, 9th Floor, NYC 10038.)

People v. Nicolas Brooks

AD1 order dated December 22, 2015, affirming judgment of conviction. Decision below: 134 AD3d 574, 23 NYS3d 26. Pigott, J., granted leave July 1, 2016. To be argued February 7, 2018.

ISSUES PRESENTED: (1) Whether the trial court erred in granting the People's motion for a Frye hearing to challenge the defense expert witness, where the proposed testimony did not involve novel science. (2) Whether the trial court erred in restricting the defense expert's opinion as to cause of death. (3) Testimony by friends of the victim as to her hearsay statements about what a bad boyfriend the defendant was.

People v. Raymond Crespo

AD1 order dated November 10, 2016, reversing judgment of conviction. Decision below: 144 AD3d 461, 40 NYS3d 423. Stein, J., granted leave to People March 6, 2017. To be argued February 8, 2018.

ISSUE PRESENTED: Whether the trial court erred in summarily denying the defendant's unequivocal requests to go pro se, just because they were made after the start of jury selection. (Assigned counsel for defendant: Ben Schatz and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Spence Silburn

AD2 order dated December 14, 2016, affirming judgment of conviction. Decision below: 145 AD3d 799, 43 NYS3d 461. Stein, J., granted leave March 20, 2017. To be argued February 8, 2018.

ISSUES PRESENTED: (1) Whether the trial court violated defendant's right to self-representation by denying his request to proceed pro se with standby counsel. (2) Whether the trial court

properly denied the admission of defendant's psychiatric history into evidence, on the ground that no notice of his intent to present psychiatric evidence had been filed (CPL §250.10), even though defendant sought to introduce such evidence solely to show that defendant's statements to the police were not knowing and voluntary. (Assigned counsel: Alexis A. Ascher & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Rafael Perez

AD1 order dated August 4, 2016, modifying judgment of conviction by remanding for a YO determination, and otherwise affirming the judgment of conviction. Decision below: 142 AD3d 410, 37 NYS3d 243. Gische, J. (AD dissenter), granted leave November 29, 2016. (Taken off SSM.) To be argued February 13, 2018.

ISSUES PRESENTED: (1) Whether police officers on a vertical patrol in a NYCHA building were justified in stopping and ultimately frisking a man who merely sought to avoid contact with them. (2) Whether a Rudolph resentencing unsequences a defendant for predicate felony adjudication purposes. (Assigned counsel: Seymour James, Jr., Legal Aid Society Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Teri W.

AD1 order dated September 29, 2017, affirming judgment of conviction. Decision below: 142 AD3d 924, 37 NYS3d 890. DiFiore, Ch. J., granted leave December 30, 2016. To be argued February 14, 2018.

ISSUE PRESENTED: The defendant was adjudicated a youthful offender for first-degree sexual abuse. Whether the court properly imposed a 10-year term of probation rather than a 5-year term (see People v. Gray, 2 AD3d 275). (Assigned counsel: Seymour James, Jr., Legal Aid Society Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Mark Nonni

AD1 order dated November 5, 2015, affirming judgment of conviction. Decision below: 135 AD3d 52, 20 NYS3d 345.

Manzanet-Daniels, J. (AD dissenter), granted leave March 17, 2016.

ISSUES PRESENTED: (1) Did the court violate O'Rama when it failed to alert counsel to the contents of the substantive jury notes, either prior to bringing the jury in, or after. (2) Did the police, who were investigating a burglary report which contained no description of the suspect, have a "founded suspicion" that the defendant was involved in the burglary based merely on his presence near the burglary scene? Alternatively, did the police constitutionally search inside the defendant's pocket after detaining him? (Assigned counsel: Matthew Bova & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.) (Leave also granted to co-defendant, Lawrence Parker.

People v. Kerri Roberts

AD1 order dated April 7, 2016, modifying judgment of conviction by vacating and dismissing identity theft conviction and otherwise affirming. Decision below: 138 AD3d 461, 29 NYS3d 305. Pigott, J., granted leave to People November 1, 2016.

ISSUE PRESENTED: The sufficiency of the evidence of identity theft, where the defendant used the victim's personal information, but did not assume her identity. (Assigned counsel for defendant: John Vang and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Terri J. Rush

AD4 order dated March 24, 2017, affirming judgment of conviction. Decision below: 148 AD3d 1601, 51 NYS3d 290. Stein, J., granted leave August 7, 2017. (New leave grant.)

ISSUES PRESENTED: (1) Whether the phrase "assumes the identity of another person" is a discrete element of identity theft. (2) Whether the deprivation of a public trial during the seating of the first 21 prospective jurors for voir dire was too trivial to warrant reversal.

(Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Matthew Kuzdzal

AD4 order dated November 18, 2016, reversing judgment of conviction. Decision below: 144 AD3d 1618, 42 NYS3d 507. Peradotto, J. (AD dissenter), granted leave to People February 16, 2017.

ISSUE PRESENTED: Whether the trial court erred in summarily refusing to make inquiry of two jurors overheard making disparaging comments about the defendant during a court recess.

People v. Twanek Cummings

AD1 order dated December 8, 2016, affirming judgment of conviction. Decision below: 145 AD3d 490, 43 NYS3d 293. Fahey, J., granted leave March 31, 2017.

ISSUE PRESENTED: Whether the substituted trial judge not only lacked the power to overrule his predecessor in admitting a hearsay accusation against appellant, but whether the substituted judge's ruling that the hearsay qualified as an excited utterance constituted error - which, in the context of this circumstantial case on the perpetrator's identity, warrants reversal of the judgment. (Assigned counsel: Susan Salomon and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. William Harris

AT2 order dated November 28, 2016, affirming judgment of conviction. Decision below: 53 Misc.3d 153 (A), 2016 WL 7164870. Fahey, J., granted leave March 13, 2017.

ISSUE PRESENTED: Whether the court's refusal to allow summations at the conclusion of a bench trial in a local criminal court (CPL §350.10 (3)(c)) violated the defendant's right to the effective assistance of counsel and the right to present a defense.

People v. Akeem Wallace

AD4 order dated February 10, 2017, affirming judgment of conviction. Decision below: 147 AD3d 1494, 47 NYS3d 603. Lindley, J. (AD dissenter), granted leave February 10, 2017.

ISSUE PRESENTED: Whether the "place of business" exception of PL §265.03(3) should apply to a McDonald's restaurant manager who brought an unlicensed handgun to work and accidentally shot himself in the leg, in a situation where employees were prohibited from bringing firearms to work.

People v. Bryan Henry

AD2 order dated November 16, 2016, modifying judgment of conviction by reversing conviction for murder and related counts, suppressing statements to law enforcement related to the murder, and ordering a new trial on those counts, while affirming on a fifth-degree marijuana possession count. Decision below: 144 AD3d 940, 41 NYS3d 527. Stein, J., granted leave to People April 13, 2017.

ISSUES PRESENTED: (1) Where defendant was represented by counsel on a marijuana possession charge, whether the suppression of a subsequent statement to police when he was later arrested on a related matter (robbery) could be reviewed by the Appellate Division. (It said no, citing People v. Concepcion, 17 NY3d 192.) And (2), whether, since the uncounseled interrogation of defendant about the robbery was improper, the interrogation about a murder related to the robbery must be suppressed. (The Appellate Division yes, citing People v. Grant, 91 NY2d 989.) (Assigned counsel for defendant: Judah Maltz, 125-10 Queens Blvd., Suite 12, Kew Gardens, NY 11415.)

People v. Sergey Aleynikov

AD1 order dated January 24, 2017, reversing order setting aside the guilty verdict for the unlawful use of scientific material (PL §165.07). Decision below: 148 AD3d 77, 48 NYS3d 9. Fahey, J., granted leave April 20, 2017.

ISSUE PRESENTED: Sufficiency of the evidence. Defendant created a digital copy of his employer's secret high frequency source code and saved it to a German server, and shared it with a new employer, a potential competitor. Did he make a "tangible reproduction or representation" of the code, despite the fact that the reproduction remained digital and was not reduced to paper? The Appellate Division said yes. Did he intend to "appropriate" the property by "permanently" exercising control over it, as opposed to merely borrowing it? The Appellate Division said yes.

People v. Saylor Suazo

AD1 order dated January 3, 2017, affirming judgment of conviction. Decision below: 146 AD3d 423, 45 NYS3d 31. DiFiore, Ch.J., granted leave June 15, 2017.

ISSUE PRESENTED: Whether defendant was entitled to jury trial, under the 6th Amendment and the New York State Constitution, even though charged with a Class B misdemeanor, since conviction would result in deportation, making the charge a "serious" one. (Assigned counsel: Mark Zeno and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Brian Hakes

AD3 order dated October 20, 2016, reversing probation revocation, and remanding. Decision below: 143 AD3d 1054, 39 NYS3d 299. DiFiore, Ch.J., granted leave to People April 21, 2017.

ISSUE PRESENTED: Whether County Court had the authority to require defendant to pay for an electronic monitoring program (SCRAM bracelet) as a condition of his probation. (Assigned counsel for defendant: Kathryn Friedman, C/O The Sage Law Firm Group, P.O. Box 200, 465 Grant Street, Buffalo, N.Y. 14213).

People v. Frederick Diaz

AD1 order dated April 13, 2017, reversing SORA level-three risk adjudication and annulling the sex-offender adjudication. Decision below: 150 AD3d 60, 50 NYS3d 388. Court of Appeals granted leave to People June 27, 2017.

ISSUES PRESENTED: Defendant had a 1989 Virginia murder conviction for killing his 13 year old sister, a crime for which there was no sexual component. After being paroled, he was required to register in Virginia under its "Sex Crimes & Crimes Against Minors Registry Act." Upon his move to New York, where only sex offenders have to register, was he required to be adjudicated a sex offender? (Assigned counsel for defendant: Abigail Everett & Robert

S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Donald Odum

AT1 order dated December 23, 2016, affirming suppression of evidence of refusal to take a breathalyzer test and the subsequent test results. Decision below: 54 Misc. 3d 128(A); 2016 WL 7434671. Fahey, J., granted leave to People June 13, 2017.

ISSUE PRESENTED: Whether the defendant's consent to take the breathalyzer test was involuntary, where the officer inaccurately told the defendant that if he refused to take the test, then his license would be suspended and his refusal would be used against him in court; more than two hours has passed since the defendant's arrest when this warning was given. (Assigned counsel: V. Marika Meis, The Bronx Defenders, 360 East 161st Street, Bronx, N.Y. 10451).

Matter of Gonzalez v. Annucci

AD3 order dated March 23, 2017, reversing, in part, dismissal of Article 78 petition brought by sex offender kept in prison beyond his CR date, based on SARA restrictions. Decision below: 149 AD3d 256, 50 NYS3d 597. Cross-appeals. Court of Appeals granted leave to petitioner June 22, 2017; appeal taken as of right by respondent Annucci, by virtue of two-judge dissent.

ISSUES PRESENTED: (1) Whether DOCCS has a responsibility to substantially assist inmate, prior to release to the community, in obtaining SARA-compliant RTF housing. (2) Whether the question was mooted out by inmate's ultimate release. (Assigned counsel for Gonzalez: Abigail Everett & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Theodore Wilson

AD2 order dated February 1, 2017, affirming judgment of conviction. Decision below: 147 AD3d 793, 45 NYS3d 800. Rivera, J., granted leave June 20, 2017.

ISSUES PRESENTED: (1) The sufficiency of the evidence of depraved indifference. (2) The court's response to a jury note. (Assigned counsel: Mark W. Vorkink & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Princesam Bailey

AD1 order dated March 21, 2017, affirming judgment of conviction. Decision below: 148 AD3d 547, 50 NYS3d 53. Fahey, J., granted leave June 29, 2017.

ISSUES PRESENTED: (1) Whether a juror who yelled at defense counsel for using a racial epithet as a strategy in cross-examination rendered the juror "grossly unqualified," and whether the court should have made an individual inquiry of the juror. (2) The admission of extensive gang-related testimony. (Assigned counsel: Christina Swarns, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Ali Cisse

AD1 order dated April 6, 2017, affirming judgment of conviction. Decision below: 149 AD3d 435, 53 NYS3d 614. Fahey, J., granted leave August 23, 2017. (SSM.)

ISSUES PRESENTED: Rikers Island phone calls: (1) Did the introduction of wiretapped Rikers calls violate state and federal wiretapping laws [18 USC 2511, PL 250.05] because (a) notice of wiretapping does not equal "consent" to wiretapping, and (b) a person does not "consent" to wiretapping if he is not informed that the calls will be turned over to the prosecutor. (2) Did the Rikers statement constitute "interrogation" since the defendant, isolated on the island, had only one communication option with family and friends - - a "tapped" call, or was it "involuntary" (CPL 60.45[2]) since his ability to make a choice whether to speak was undermined by lack of alternatives (3) Was the trial court allowed to accept a partial verdict absent a "declaration" from the jury that it had reached one (CPL 310.70 [1]). (Assigned counsel: Matthew Bova & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Emmanuel Diaz

AD2 order dated April 19, 2017, affirming judgment of conviction. Decision below 149 AD3d 974, 53 NYS3d 94. Hall, J. (AD dissenter), granted leave August 3, 2017. (SSM.)

ISSUES PRESENTED: (1) Rikers calls- Whether defendant's calls from Rikers Island were improperly admitted into evidence in the absence of his consent to release the recordings to the prosecution.

(2) IAC on the grounds that defense counsel failed to request the affirmative defense to first-degree robbery. (Assigned counsel: Dina Zloczower & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Steven Myers

AD4 order dated December 23, 2016, affirming judgment of conviction. Decision below: 145 AD3d 1596, 45 NYS3d 745. Rivera, J., granted leave July 28, 2017.

ISSUE PRESENTED: Whether the waiver of indictment was valid in the absence of an on-the-record colloquy in open court, since the court's written order approving the waiver stated that defendant had executed it in open court. (Assigned counsel: John A. Cirando, 101 South Salina St., Suite 1010, Syracuse, NY 13202.)

People v. Damian Jones

AD1 order dated April 4, 2017, affirming judgment of conviction. Decision below: 149 AD3d 407, 52 NYS3d 83. Garcia, J., granted leave August 14, 2017.

ISSUE PRESENTED: Whether, under New York's enterprise corruption statute, a "criminal enterprise" must have a governing system of authority or leadership structure (Penal Law Article 460). (Assigned counsel: Christina Swarns, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Jakin Grimes

AD4 order dated March 24, 2017, denying writ of error coram nobis. Decision below: 148 AD3d 1724, 49 NYS3d 326. Wilson, J., granted leave August 17, 2017.

ISSUE PRESENTED: Whether an attorney's failure to file a criminal leave application to the New York Court of Appeals from an adverse decision of the intermediate appellate court constitutes ineffective assistance of counsel under the State constitution. (Assigned counsel on coram: Joseph C. Perry, C/O Baker Botts LLP, 30 Rockefeller Plaza, NYC 10122.)

People v. Rohan Manragh Jr.

AD2 order dated May 3, 2017, affirming judgment of conviction. Decision below: 150 AD3d 762, 51 NYS3d 431. Fahey, J., granted leave August 23, 2017.

ISSUE PRESENTED: Whether, by pleading guilty, the defendant forfeited his claim on appeal that the prosecutor failed to inform the grand jury of defendant's request to call a witness to testify. (Assigned counsel: Thomas E. Scott, 115 Broadhollow Road, Suite 250, Melville, NY 11747.

People v. Rodney Watts

AD1 order dated March 23, 2017, affirming judgment of conviction. Decision below: 148 AD3d 678, 48 NYS3d 602. Wilson, J., granted leave October 6, 2017.

ISSUE PRESENTED: Scope of Penal Law §170.10(1). Whether a ticket to a concert or basketball game constitutes a "deed, will, codicil, contract, assignment, commercial instrument, credit card or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status." The People argued below that such tickets were subsumed by the secondary "or other instrument," clause, and alternatively, that the tickets represented a contract. The Appellate Division adopted the former position in its decision, holding that event tickets are instruments which purport to "evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status." (Assigned counsel: Arielle Reid & Robert S. Dean Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Steven Baisley

AT 9 & 10 order dated May 23, 2017, reversing justice court order dismissing the accusatory instrument. Decision below: 55 Misc. 3d 148(A), 58 NYS3d 875, 2017 WL 2380728. Stein, J., granted leave September 11, 2017.

ISSUE PRESENTED: Whether the Family Court Act sections 156 and 411 are jurisdictional bars to the criminal prosecution of the charges of non-support of a child in the second degree (PL 260.05[2]) and criminal contempt in the second degree (PL 215.30[3]), where the lawful mandate of the court allegedly being resisted or disobeyed involves a Family Court order of child support. (Assigned counsel: Richard L. Herzfeld, 112 Madison Avenue, 8th Floor, NYC 10016)

People v. Timothy Martin

AD1 order dated February 21, 2017, affirming judgment of conviction. Decision below: 147 AD3d 587, 48 NYS3d 54. Rivera, J., granted leave September 28, 2017.

ISSUE PRESENTED: Whether the defendant's admission to the police that he lived in the apartment that was the subject of a search warrant for drugs was admissible at trial under the pedigree exception to the Miranda requirement, even though it was the product of custodial interrogation that was likely to elicit an incriminating response. (Assigned counsel: Samuel Steinbock-Pratt & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Roque Silvagnoli

AD1 order dated June 6, 2017, reversing judgment of conviction. 151 AD3d 443, 57 NYS3d 127. Mazzarelli, J. (AD dissenter), granted leave to People August 29, 2017.

ISSUE PRESENTED: The propriety of a detective questioning a defendant in a homicide investigation (in which he was not represented by counsel) about a drug charge in which he was represented by counsel. The majority reversed and suppressed the statement, since the questioning about the drug case, although "brief and flippant," was not "discrete and fairly separable" from the homicide investigation. (Assigned counsel for defendant: Seymour W. James, The Legal Aid Society, 199 Water Street, NY, NY 10005.)

People v. Natascha Tiger

AD2 order dated March 1, 2017, reversing denial of CPL 440.10 motion and remanding for a hearing on the motion. Garcia, J., granted leave to People August 15, 2017.

ISSUES PRESENTED: (1) Whether a freestanding claim of actual innocence is cognizable under CPL 440.10 (1)(h). (2) Whether a defendant who has pleaded guilty may assert a freestanding actual innocence claim.

People v. Domingo Ricart

AD1 order dated August 1, 2017, reversing judgment of conviction and dismissing the indictment. Decision below: 153 AD3d 421, 60 NYS3d 30. Webber, J. (AD dissenter), granted leave to People October 3, 2017. (SSM.)

ISSUE PRESENTED: CPL §30.30. Whether an adjournment was excludable as an "exceptional circumstance," when the People failed to exercise due diligence by not co-ordinating with their witness before he went on vacation to the Dominican Republic. (Assigned counsel for the defendant: Jan Hoth & Robert S. Dean Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Steven Berrezueta

AT1 order dated May 12, 2017, affirming judgment of conviction. Decision below: 53 Misc.3d 143(A), 57 NYS3d 676, 2017 WL 2101804. DiFiore, Ch. J., granted leave October 25, 2017. (SSM.)

ISSUES PRESENTED: (1) Whether the evidence was insufficient to convict defendant of attempted fourth-degree weapon possession (PL 110/265.01(1); PL 265.00(4) (defining a switchblade as "any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife")) where the device used to open the knife was located on the blade, not the handle; (2) whether the accusatory instrument was facially insufficient to charge defendant with switchblade possession where it described the device used to the open the knife as on a "portion of the blade of the knife protruding from the handle of the knife." (Assigned counsel: Siobhan C. Atkins & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

ETHICAL SCENARIOS (NYSBA)

PROBLEM # 1

You are assigned to represent the defendant at the time of his arraignment on a felony complaint. The DA serves grand jury notice, and as per your invariable practice, you serve cross grand jury notice. After the arraignment, your client tells you he does want to testify in the grand jury. However, when the DA later notifies you of the date and time of the grand jury presentation, you tell her, without consulting your client, that the client will not be testifying in the grand jury after all; you have decided that it is not in the client's best interests. At the arraignment on the indictment, your client is furious with you.

Did you do anything wrong?

PROBLEM # 2

As retained counsel, you arrange an extremely good plea bargain for your client–10 years flat. As part of the bargain, your client has to waive his right to appeal, which he does.

A week later, the client calls you from Downstate Correctional Facility and asks you to file a notice of appeal on his behalf. Although the client never completely paid you and you were retained for the trial only, you file a notice of appeal on his behalf and send a copy to the client. A few months later, the client, now at Attica, calls again and says he cannot afford to hire a lawyer to do the appeal, and asks what he should do.

What do you do?

PROBLEM # 3

You are retained to represent a defendant on an appeal to the Appellate Division, First Department, from a second-degree murder conviction. After your opening brief is filed, the client informs you that he has run out of money and cannot pay you the rest of the retainer. Nonetheless, after the prosecutor files their brief, you put in a reply brief and then orally argue the case. When the affirmance comes down, you send the decision to the client and tell him that your services are now at an end. Thirty-five days after the date of the decision, the client calls you from prison and asks that you file an application with the New York Court of Appeals for permission to appeal to that court. Your retainer agreement specifically excluded appeals to the Court of Appeals.

What do you do?

PROBLEM # 4

You have just sat down after summing up to the jury. The trial assistant is now summing up, and her summation is flamboyant and hard-hitting. Although many of her comments appear to be over-the-top, you do not object at any point.

Which, if any, of the following are legitimate reasons not to have objected:

1. You were so relieved to be done with your own summation that you were not really listening.

2. The trial assistant did not object to <u>your</u> summation, so you thought you would return the favor.

3. You believe it is discourteous to object to an adversary's summation.

4. Having tried many cases before this judge, you know she does not appreciate it when lawyers object to their adversary's summations.

5. You could clearly see that the trial assistant's verbiage was alienating the jury, so why stop a good thing?

6. You did not want to legitimize these particular arguments in the jury's mind by registering objections.

7. You thought that, in the context of this case, the comments were not actually improper.

<u>PROBLEM # 5</u>

Your client, a lawful permanent resident, is charged in New York City Criminal Court with a third-degree assault, a Class A misdemeanor. You correctly advise the client that a conviction after trial would result in deportation, and that, moreover, even a plea down to the crime offered by the People, attempted first-degree assault, would result in deportation. The client elects to go to trial. Just prior to trial, the People, as they commonly do, reduce the count to attempted third-degree assault, thus depriving your client of his statutory right to a jury trial. (In New York City, there is no statutory right to a jury trial for a Class B misdemeanor.)

You would much rather try the case before a jury. What do you do?

Ultimately, you proceed to a bench trial. After the conclusion of the evidence, and the denial of your motion for a trial order of dismissal, you ask to sum up, but the trial judge

tells you that she is “waiving summation” and proceeding right to verdict.

What do you do?

PROBLEM # 6

The defendant is charged with committing first-degree assault in Onondaga County. He is represented by an attorney from the Assigned Counsel Plan. After a number of adjournments, the case is finally on for trial. A panel of jurors is on their way for the start of jury selection, and prosecution witnesses have been flown in from out of state. The defendant, who has never previously complained about his lawyer, now tells the judge that he wants a different lawyer assigned, because this lawyer had not done any investigation into his claim of self-defense, had not interviewed any of the numerous witnesses to the event, and had told him that there was no money available to hire investigators.

How should the judge respond?

PROBLEM # 7

You represent the defendant at trial as retained counsel. There is a guilty verdict, and the client is sentenced to State prison. The client’s family never finished paying you the last $10,000 that they owe you, as they’ve run out of money.

A year later, you get a call from an appellate public defender now representing your client on appeal, asking you for a copy of your file, and even volunteering to pick it up, do the photocopying himself, and return it to you. Your trial file is in storage, and it will cost you a $75 fee to retrieve it.

What do you tell him?

New York Legislative Revisions

David L. Cohen, Esq.
Law Office of David L. Cohen, Esq., Kew Gardens

Robert J. Masters, Esq.
Queens County District Attorney's Office, Kew Gardens

Honorable Barry Kamins
Aidala, Bertuna & Kamins P.C., NYC

RICHARD D. COLLINS+
MARC C. GANN*
GERARD C. McCLOSKEY
DAVID J. BARRY

ZEENA J. ABDI
PHILIP P. NASH
JONATHAN P. MANFRE

+Also member PA, MA, TX and D.C. Bars
*Also member MD Bar

COLLINS GANN
McCLOSKEY & BARRY PLLC
ATTORNEYS AT LAW
Dedicated Legal Counsel Since 1990

Of Counsel
ALAN H. FELDSTEIN^
Tel: (818) 508-1820

ANSANELLI LAW GROUP, LLP
Tel: (631) 598-0337

TAMA BETH KUDMAN ≠
Tel: (561) 472-0811

^Member CA Bar only
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A Second Chance for Our Clients: Sealing Criminal Records

Rick Collins, Esq. & Phil Nash, Esq.

NYSBA CJS
January 24, 2018

1. Nassau Lawyer article
2. NY Criminal Procedure Law § 160.58
3. CPL § 160.58 overview
4. NY Criminal Procedure Law § 160.59
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Criminal Record Sealing: The Time Has Come

By Rick Collins

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We live in an age of divided politics, where the Left and the Right seem like they cannot bridge the chasm on even minor issues, let alone many of the more serious issues facing our country. So, when politicians from opposite sides of the aisle who do not see eye-to-eye on almost *anything* come together to introduce legislation in Congress, it is noteworthy. What issue can bring both sides together? For Republican Senator Rand Paul of Kentucky and Democratic Senator Cory Booker of New Jersey, that issue is the sealing or expungement of criminal records relating to nonviolent offenses.[1]

After a person is convicted of a crime, either via plea or after trial, the judge imposes sentence and the defendant then serves that sentence, whether it is a period of incarceration, a term of probation, or the performance of community service. What happens next, however, is that reentry into productive society is hampered by the easy discoverability of a criminal conviction as part of a routine background check. As a result, those with convictions are chronically unemployed or underemployed, with a percentage needing taxpayer-subsidized assistance to survive.[2] Recognizing that a criminal conviction presents countless obstacles including hurdles to employment, education, and housing,[3] these federal legislators from both sides of the aisle are sponsoring a "second chance" bill to lessen the collateral consequences of a federal criminal conviction.[4]

[1] REDEEM Act, S. 827, 115th Cong. (2017).
[2] John Malcolm & John-Michael Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, The Heritage Found. Legal Memorandum No. 200 (Mar. 7, 2017), *available at* https://goo.gl/hyq6CR.
[3] *Id.*
[4] S. 827.

Sealing in New York

At the state level, the same issue bounced around Albany for many years, with the support of the Nassau County Bar Association and the New York State Bar Association (NYSBA). As Co-Chair of the NYSBA Criminal Justice Section's Sealing Committee, I helped draft the Report and Recommendations on criminal record sealing that was adopted as NYSBA policy in 2012.[5] For five years, I was part of a broader coalition in support of various record sealing bills that were introduced in Albany, but none passed . . . until now.

In April, New York joined the ranks of many states nationwide by enacting a broad criminal record sealing statute: Criminal Procedure Law section 160.59.[6] The far-reaching impact of this change in the law, which becomes effective in October, will improve the lives of thousands of ex-offenders and their families.

Prior to section 160.59, the state's only sealing law was limited to circumstances in which the person completed a judicially sanctioned substance abuse treatment program as part of his or her sentence.[7] That sealing law contains a "spring-back provision," so if sealing is granted on a case but the person is subsequently rearrested on new charges, the sealed records are no longer deemed sealed.[8] That law does not extend the benefit of record sealing beyond those who struggled with drug or alcohol addiction and sought proper treatment as a condition of their sentence. Possession crimes, non-violent offenses, or a first-time DWI conviction would remain forever a part of a person's record. No matter how many years passed without any new contact with the criminal justice system, there was no mechanism under the law to seal these convictions from public view. As a result, thousands of non-

[5] N.Y. State Bar Ass'n, Sealing Records of Conviction Regarding Certain Crimes (2012), *available at* https://goo.gl/R0aSfM.
[6] At the time of this article's publishing, the law has not been printed in an official reporter, but is available online at https://goo.gl/schQPF.
[7] Crim. Proc. Law § 160.58.
[8] The records will remain sealed if the new charges result in a dismissal or noncriminal disposition.

violent first time offenders in New York lived with the stigma of a criminal conviction, even decades after their sentence concluded and their debt to society was paid.

Section 160.59, passed as part of the 2017–18 budget negotiations, changes that and expands criminal record sealing to many non-violent crimes, both misdemeanors and felonies. Violent offenses and sex offenses are excluded from eligibility, as are people with two or more felony convictions or more than two misdemeanor convictions. The law permits two eligible offenses to be sealed, but not more than one eligible felony offense may be sealed. Sealing eligibility begins ten years from the date that sentence was imposed (the time is tolled if the person is incarcerated), provided there have been no new convictions since then.[11]

The Mechanics and Effects of Sealing

To start the sealing process, the law directs that an application be filed with the court, addressed to the judge who oversaw sentencing. Should that judge no longer be on the bench, then the application is to be filed with the supervising judge. A copy must be served on the local District Attorney, and the prosecutor is given 45 days to file an opposition. If the DA's office opposes, then the judge must conduct a hearing.[12]

Every sealing application must include a sworn statement by the applicant detailing the reasons why the court should exercise its discretion and grant sealing. This statement is the applicant's chance to explain how living with the stain of a criminal conviction has negatively impacted his or her life, and also to demonstrate the extent of the positive changes that have been made over the years. Diplomas, employment history, character reference letters, and other "supporting documentation" are permitted to be included as exhibits. The applicant's statement, along with any exhibits, should aid the judge in

[11] Crim. Proc. Law § 160.59(2)(a), (3)(h), (5).
[12] *Id.* § 160.59(2)(c), (d).

determining the character of the applicant and the important effect that sealing would have on productive reintegration into society.[15]

If sealing is granted, then the conviction and any records related to that conviction are sealed and would only be made available to law enforcement in select circumstances. The new law does not contain a "spring back provision," so a subsequent conviction would not reopen previously sealed cases. The practical effect of sealing is that the conviction would no longer appear on a background check and information related to the conviction does not have to be disclosed when applying for employment, housing, or educational opportunities.[18] It is as if the sealed record never happened, and the applicant can finally close that chapter in his or her life.

The Federal REDEEM Act

Senators Paul and Booker seek to bring a similar "second chance" opportunity to the federal level through the Record Expungement Designed to Enhance Employment Act of 2017, or "REDEEM Act."[19] There is no current federal statute that allows for the sealing of federal convictions. The REDEEM Act would change that, and would give those convicted of nonviolent crimes the chance to petition the court to have their records sealed.

Speaking in support of the legislation, Senator Paul said, "The biggest impediment to civil rights and employment in our country is a criminal record. Our current system is broken and has trapped tens of thousands of young men and women in a cycle of poverty and incarceration. Many of these young people could escape this trap if criminal justice were reformed, if records were expunged after time served, and if non-violent crimes did not become a permanent blot preventing employment."[21]

[15] *See id.* § 160.59(2)(b)(v), (7).
[18] *Id.* § 160.59(8), (9).
[19] REDEEM Act, S. 827, 115th Cong. (2017).
[21] Press Release, Senator Cory Booker, U.S. Senators Booker and Paul Introduce Legislation Calling for Criminal Justice Reform (July 8, 2014), https://www.booker.senate.gov/?p=press_release&id=100.

The bill directs the judge considering a sealing application to weigh the interest of public knowledge and safety, plus the government's interest in maintaining the accessibility of the protected information, against the conduct and demonstrated desire of the petitioner to be rehabilitated and positively contribute to the community, and the interest of the petitioner in having the protected information sealed. Additionally, the law would specifically direct the court to consider the impact a conviction has on the petitioner to secure and maintain employment.[23]

The REDEEM Act would incentivize states to create sealing laws in line with the federal statute by prioritizing those states in certain grant applications. The law would similarly incentivize states to increase the age of criminal responsibility to 18.[25] This would be good news for New York, now that its laws have been changed.

Criminal Procedure Law section 160.59 comes after years of tireless work by members of many organizations and individuals. The sponsors—Democratic New York State Assemblyman Joseph R. Lentol and Republican State Senator Patrick M. Gallivan—reached across the aisle to get the job done. The new law will have profound beneficial effects on people throughout New York whose lives have been derailed by the lasting impact of a criminal record. The same opportunity is sorely needed at the federal level to permit thousands more to put their convictions behind them. With Rand Paul and Corey Booker agreeing on an issue, this is clearly an idea whose time has come.

Rick Collins is the NCBA Vice-President. A former prosecutor, he practices criminal defense in multiple jurisdictions as a principal in Collins Gann McCloskey & Barry PLLC. He acknowledges the contributions of NCBA member Philip Nash, Esq. in preparing this article.

[23] S. 827 § 2(a).
[25] *Id.* § 6.

160.58 Conditional sealing of certain controlled substance, marihuana or specified offense convictions.

§ 160.58 Conditional sealing of certain controlled substance, marihuana or specified offense convictions.

1. A defendant convicted of any offense defined in article two hundred twenty or two hundred twenty-one of the penal law or a specified offense defined in subdivision five of section 410.91 of this chapter who has successfully completed a judicial diversion program under article two hundred sixteen of this chapter, or one of the programs heretofore known as drug treatment alternative to prison or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision, and has completed the sentence imposed for the offense or offenses, is eligible to have such offense or offenses sealed pursuant to this section.

2. The court that sentenced the defendant to a judicially sanctioned drug treatment program may on its own motion, or on the defendant's motion, order that all official records and papers relating to the arrest, prosecution and conviction which resulted in the defendant's participation in the judicially sanctioned drug treatment program be conditionally sealed. In such case, the court may also conditionally seal the arrest, prosecution and conviction records for no more than three of the defendant's prior eligible misdemeanors, which for purposes of this subdivision shall be limited to misdemeanor offenses defined in article two hundred twenty or two hundred twenty-one of the penal law. The court may only seal the records of the defendant's arrests, prosecutions and convictions when:

(a) the sentencing court has requested and received from the division of criminal justice services or the Federal Bureau of Investigation a fingerprint based criminal history record of the defendant, including any sealed or suppressed information. The division of criminal justice services shall also include a criminal history report, if any, from the Federal Bureau of Investigation regarding any criminal history information that occurred in other jurisdictions. The division is hereby authorized to receive such information from the Federal Bureau of Investigation for this purpose. The parties shall be permitted to examine these records;

(b) the defendant or court has identified the misdemeanor conviction or convictions for which relief may be granted;

(c) the court has received documentation that the sentences imposed on the eligible misdemeanor convictions have been completed, or if no such documentation is reasonably available, a sworn affidavit that the

sentences imposed on the prior misdemeanors have been completed; and

(d) the court has notified the district attorney of each jurisdiction in which the defendant has been convicted of an offense with respect to which sealing is sought, and the court or courts of record for such offenses, that the court is considering sealing the records of the defendant's eligible misdemeanor convictions. Both the district attorney and the court shall be given a reasonable opportunity, which shall not be less than thirty days, in which to comment and submit materials to aid the court in making such a determination.

3. At the request of the defendant or the district attorney of a county in which the defendant committed a crime that is the subject of the sealing application, the court may conduct a hearing to consider and review any relevant evidence offered by either party that would aid the court in its decision whether to seal the records of the defendant's arrests, prosecutions and convictions. In making such a determination, the court shall consider any relevant factors, including but not limited to: (i) the circumstances and seriousness of the offense or offenses that resulted in the conviction or convictions; (ii) the character of the defendant, including his or her completion of the judicially sanctioned treatment program as described in subdivision one of this section; (iii) the defendant's criminal history; and (iv) the impact of sealing the defendant's records upon his or her rehabilitation and his or her successful and productive reentry and reintegration into society, and on public safety.

4. When a court orders sealing pursuant to this section, all official records and papers relating to the arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court shall be sealed and not made available to any person or public or private agency; provided, however, the division shall retain any fingerprints, palmprints and photographs, or digital images of the same.

5. When the court orders sealing pursuant to this section, the clerk of such court shall immediately notify the commissioner of the division of criminal justice services, and any court that sentenced the defendant for an offense which has been conditionally sealed, regarding the records that shall be sealed pursuant to this section.

6. Records sealed pursuant to this subdivision shall be made available to:

(a) the defendant or the defendant's designated agent;

(b) qualified agencies, as defined in subdivision nine of section eight hundred thirty-five of the executive law, and federal and state law enforcement agencies, when acting within the scope of their law enforcement duties; or

(c) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the person has made application for such a license; or

(d) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however, that every person who is an applicant for the position of police officer or peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto.

7. The court shall not seal the defendant's record pursuant to this section while any charged offense is pending.

8. If, subsequent to the sealing of records pursuant to this subdivision, the person who is the subject of such records is arrested for or formally charged with any misdemeanor or felony offense, such records shall be unsealed immediately and remain unsealed; provided, however, that if such new misdemeanor or felony arrest results in a termination in favor of the accused as defined in subdivision three of section 160.50 of this article or by conviction for a non criminal offense as described in section 160.55 of this article, such unsealed records shall be conditionally sealed pursuant to this section.

- CPL § 160.58 - 2009 statute enacted to aid only those whose drug or alcohol addiction led them to commit crimes.
    - Applicant must have completed a “judicially sanctioned” drug treatment program
    - under-utilized statute
    - If granted, records conditionally sealed
        - “spring-back provision”
        - effectively placing the person on lifetime probation to retain the sealed status

160.59 Sealing of certain convictions.

§ 160.59 Sealing of certain convictions.

1. Definitions: As used in this section, the following terms shall have the following meanings:

(a) "Eligible offense" shall mean any crime defined in the laws of this state other than a sex offense defined in article one hundred thirty of the penal law, an offense defined in article two hundred sixty-three of the penal law, a felony offense defined in article one hundred twenty-five of the penal law, a violent felony offense defined in section 70.02 of the penal law, a class A felony offense defined in the penal law, a felony offense defined in article one hundred five of the penal law where the underlying offense is not an eligible offense, an attempt to commit an offense that is not an eligible offense if the attempt is a felony, or an offense for which registration as a sex offender is required pursuant to article six-C of the correction law. For the purposes of this section, where the defendant is convicted of more than one eligible offense, committed as part of the same criminal transaction as defined in subdivision two of section 40.10 of this chapter, those offenses shall be considered one eligible offense.

(b) "Sentencing judge" shall mean the judge who pronounced sentence upon the conviction under consideration, or if that judge is no longer sitting in a court in the jurisdiction in which the conviction was obtained, any other judge who is sitting in the criminal court where the judgment of conviction was entered.

1-a. The chief administrator of the courts shall, pursuant to section 10.40 of this chapter, prescribe a form application which may be used by a defendant to apply for sealing pursuant to this section. Such form application shall include all the essential elements required by this section to be included in an application for sealing. Nothing in this subdivision shall be read to require a defendant to use such form application to apply for sealing.

2. (a) A defendant who has been convicted of up to two eligible offenses but not more than one felony offense may apply to the court in which he or she was convicted of the most serious offense to have such conviction or convictions sealed. If all offenses are offenses with the same classification, the application shall be made to the court in which the defendant was last convicted.

(b) An application shall contain (i) a copy of a certificate of disposition or other similar documentation for any offense for which the defendant has been convicted, or an explanation of why such certificate or other documentation is not available; (ii) a sworn statement of the

defendant as to whether he or she has filed, or then intends to file, any application for sealing of any other eligible offense; (iii) a copy of any other such application that has been filed; (iv) a sworn statement as to the conviction or convictions for which relief is being sought; and (v) a sworn statement of the reason or reasons why the court should, in its discretion, grant such sealing, along with any supporting documentation.

(c) A copy of any application for such sealing shall be served upon the district attorney of the county in which the conviction, or, if more than one, the convictions, was or were obtained. The district attorney shall notify the court within forty-five days if he or she objects to the application for sealing.

(d) When such application is filed with the court, it shall be assigned to the sentencing judge unless more than one application is filed in which case the application shall be assigned to the county court or the supreme court of the county in which the criminal court is located, who shall request and receive from the division of criminal justice services a fingerprint based criminal history record of the defendant, including any sealed or suppressed records. The division of criminal justice services also shall include a criminal history report, if any, from the federal bureau of investigation regarding any criminal history information that occurred in other jurisdictions. The division is hereby authorized to receive such information from the federal bureau of investigation for this purpose, and to make such information available to the court, which may make this information available to the district attorney and the defendant.

3. The sentencing judge, or county or supreme court shall summarily deny the defendant's application when:

(a) the defendant is required to register as a sex offender pursuant to article six-C of the correction law; or

(b) the defendant has previously obtained sealing of the maximum number of convictions allowable under section 160.58 of the criminal procedure law; or

(c) the defendant has previously obtained sealing of the maximum number of convictions allowable under subdivision four of this section; or

(d) the time period specified in subdivision five of this section has not yet been satisfied; or

(e) the defendant has an undisposed arrest or charge pending; or

(f) the defendant was convicted of any crime after the date of the entry of judgement of the last conviction for which sealing is sought; or

(g) the defendant has failed to provide the court with the required

sworn statement of the reasons why the court should grant the relief requested; or

(h) the defendant has been convicted of two or more felonies or more than two crimes.

4. Provided that the application is not summarily denied for the reasons set forth in subdivision three of this section, a defendant who stands convicted of up to two eligible offenses, may obtain sealing of no more than two eligible offenses but not more than one felony offense.

5. Any eligible offense may be sealed only after at least ten years have passed since the imposition of the sentence on the defendant's latest conviction or, if the defendant was sentenced to a period of incarceration, including a period of incarceration imposed in conjunction with a sentence of probation, the defendant's latest release from incarceration. In calculating the ten year period under this subdivision, any period of time the defendant spent incarcerated after the conviction for which the application for sealing is sought, shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration.

6. Upon determining that the application is not subject to mandatory denial pursuant to subdivision three of this section and that the application is opposed by the district attorney, the sentencing judge or county or supreme court shall conduct a hearing on the application in order to consider any evidence offered by either party that would aid the sentencing judge in his or her decision whether to seal the records of the defendant's convictions. No hearing is required if the district attorney does not oppose the application.

7. In considering any such application, the sentencing judge or county or supreme court shall consider any relevant factors, including but not limited to:

(a) the amount of time that has elapsed since the defendant's last conviction;

(b) the circumstances and seriousness of the offense for which the defendant is seeking relief, including whether the arrest charge was not an eligible offense;

(c) the circumstances and seriousness of any other offenses for which the defendant stands convicted;

(d) the character of the defendant, including any measures that the defendant has taken toward rehabilitation, such as participating in treatment programs, work, or schooling, and participating in community service or other volunteer programs;

(e) any statements made by the victim of the offense for which the defendant is seeking relief;

(f) the impact of sealing the defendant's record upon his or her

rehabilitation and upon his or her successful and productive reentry and reintegration into society; and

(g) the impact of sealing the defendant's record on public safety and upon the public's confidence in and respect for the law.

8. When a sentencing judge or county or supreme court orders sealing pursuant to this section, all official records and papers relating to the arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court shall be sealed and not made available to any person or public or private agency except as provided for in subdivision nine of this section; provided, however, the division shall retain any fingerprints, palmprints and photographs, or digital images of the same. The clerk of such court shall immediately notify the commissioner of the division of criminal justice services regarding the records that shall be sealed pursuant to this section. The clerk also shall notify any court in which the defendant has stated, pursuant to paragraph (b) of subdivision two of this section, that he or she has filed or intends to file an application for sealing of any other eligible offense.

9. Records sealed pursuant to this section shall be made available to:

(a) the defendant or the defendant's designated agent;

(b) qualified agencies, as defined in subdivision nine of section eight hundred thirty-five of the executive law, and federal and state law enforcement agencies, when acting within the scope of their law enforcement duties; or

(c) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the person has made application for such a license; or

(d) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however, that every person who is an applicant for the position of police officer or peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto; or

(e) the criminal justice information services division of the federal bureau of investigation, for the purposes of responding to queries to the national instant criminal background check system regarding attempts to purchase or otherwise take possession of firearms, as defined in 18 USC 921 (a) (3).

10. A conviction which is sealed pursuant to this section is included within the definition of a conviction for the purposes of any criminal proceeding in which the fact of a prior conviction would enhance a penalty or is an element of the offense charged.

11. No defendant shall be required or permitted to waive eligibility for sealing pursuant to this section as part of a plea of guilty,

sentence or any agreement related to a conviction for an eligible offense and any such waiver shall be deemed void and wholly unenforceable.

CPL 160.59 EXCLUDIBLE FELONIES

PL 130.20 Sexual Misconduct; PL 130.25 Rape 3°; PL 130.30 Rape 2°; PL 130.35 Rape 1°; PL 130.40 Criminal Sexual Act 3°; PL 130.45 Criminal Sexual Act 2°; PL 130.50 Criminal Sexual Act 1°; PL 130.52 Forcible Touching; PL 130.53 Persistent Sexual Abuse; PL 130.55 Sexual Abuse 3°; PL 130.60 Sexual Abuse 2°; PL 130.65 Sexual Abuse 1°; PL 130.65-a Aggravated Sexual Abuse 4°; PL 130.66 Aggravated Sexual Abuse 3°; PL 130.67 Aggravated Sexual Abuse 2°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°; PL 130.85 Female Genital Mutilation; PL 130.90 Facilitating a Sex Offense with a Controlled Substance; PL 130.91 Sexually Motivated Felony; PL 130.95 Predatory Sexual Assault; PL 130.96 Predatory Sexual Assault Against a Child

PL 263.05 Use of a Child in a Sexual Performance; PL 263.10 Promoting an Obscene Sexual Performance by a Child; PL 263.11 Possessing an Obscene Sexual Performance by a Child; PL 263.15 Promoting a Sexual Performance by a Child; PL 263.16 Possessing a Sexual Performance by a Child; PL 263.30 Facilitating a Sexual Performance by a Child w/ a Controlled Subs. or Alcohol

PL 125.10 Criminally Negligent Homicide; PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.12 Vehicular Manslaughter 2°; PL 125.13 Vehicular Manslaughter 1°; PL 125.14 Aggravated Vehicular Homicide; PL 125.15 Manslaughter 2°; PL 125.20 Manslaughter 1°; PL 125.21 Aggravated Manslaughter 2°; PL 125.22 Aggravated Manslaughter 1°; PL 125.25 Murder 2°; PL 125.26 Aggravated Murder; PL 125.27 Murder 1°; PL 125.40 Abortion 2°; PL 125.45 Abortion 1°; PL 125.50 Self-Abortion 2°; PL 125.55 Self Abortion 1°; PL 125.60 Issuing Abortion Articles

A Class A felony offense.

Class B violent felony offenses: PL 110/125.25 Attempted Murder 2°; PL 110/135.25 Attempted Kidnapping 1°; PL 110/150.20 Attempted Arson 1°; PL 125.20 Manslaughter 1°; PL 125.22 Aggravated Manslaughter 1°; PL 130.35 Rape 1°; PL 130.50 Criminal Sexual Act 1°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 120.10 Assault 1°; PL 135.20 Kidnapping 2°; PL 140.30 Burglary 1°; PL 150.15 Arson 2°; PL 160.15 Robbery 1°; PL 230.34(5)(a)&(b) Sex Trafficking; PL 255.27 Incest 1°; PL 265.04 Criminal Possession of a Weapon 1°; PL 265.09 Criminal Use of a Firearm 1°; PL 265.13 Page 3 of 3 Criminal Sale of a Firearm 1°; PL 120.11 Aggravated Assault upon a Police Officer or a Peace Officer; PL 120.07 Gang Assault 1°; PL 215.17 Intimidating a Victim or Witness 1°; PL 490.35 Hindering Prosecution of Terrorism 1°; PL 490.40 Criminal Possession of a Chemical Weapon or Biological Weapon 2°; PL 490.47 Criminal Use of a Chemical Weapon or Biological Weapon 3°;

Class C violent felony offenses: An attempt to commit any of the Class B violent felony offenses listed above; PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.21 Aggravated Manslaughter 2°; PL 130.67 Aggravated Sexual Abuse 2°; PL 120.08 Assault on a Peace Officer, Police Officer, Fireman or Emergency Medical Services Professional; PL 120.09 Assault on a Judge; PL 120.06 Gang Assault 2°; PL 121.13 Strangulation 1°; PL 140.25 Burglary 2°; PL 160.10 Robbery 2°; PL 265.03 Criminal Possession of a Weapon 2°; PL 265.08 Criminal Use of a Firearm 2°; PL 265.12 Criminal Sale of a Firearm 2°; PL 265.14 Criminal Sale of a Firearm with the Aid of a Minor; PL 265.19 Aggravated Criminal Possession of a Weapon; PL 490.15 Soliciting or Providing Support for an Act of Terrorism 1°; PL 490.30 Hindering Prosecution of Terrorism 2°; PL 490.37 Criminal Possession of a Chemical Weapon or Biological Weapon 3°;

Class D violent felony offenses: An attempt to commit any of the Class C violent felony offenses listed above; PL 120.02 Reckless Assault of a Child; PL 120.05 Assault 2°; PL 120.18 Menacing a Police Officer or Peace Officer; PL 120.60 Stalking 1°; PL 121.12 Strangulation 2°; PL 130.30 Rape 2°; PL 130.45 Criminal Sexual Act 2°; PL 130.65 Sexual abuse 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°; PL 130.66 Aggravated Sexual Abuse 3°; PL 130.90 Facilitating a Sex Offense with a Controlled Substance; PL 135.35 (3)(a)&(b) Labor Trafficking; PL 265.02 (5), (6), (7), (8), (9) or (10); PL 265.11 Criminal Sale of a Firearm 3°; PL 215.16 Intimidating a Victim or Witness 2°; PL 490.10 Soliciting or Providing Support for an Act of Terrorism 2°; PL 490.20 Making a Terroristic Threat; PL 240.60 Falsely Reporting an Incident 1°; PL 240.62 Placing a False Bomb or Hazardous Substance 1°; PL 240.63 Placing a False Bomb or Hazardous Substance in a Sports Stadium or Arena, Mass Transportation Facility or Enclosed Shopping Mall; PL 405.18 Aggravated Unpermitted Use of Indoor Pyrotechnics 1°;

Class E violent felony offenses: PL 110/265.02 (5), (6), (7), or (8) Attempted Criminal Possession of a Weapon 3° as a lesser included offense of that section as defined in CPL 220.20; PL 130.53 Persistent Sexual Abuse; PL 130.65-a Aggravated Sexual Abuse 4°; PL 240.55 Falsely Reporting an Incident 2°; PL 240.61 Placing a False Bomb or Hazardous Substance 2°;

A conviction for PL 105.10 Conspiracy 4°; PL 105.13 Conspiracy 3°; PL 105.15 Conspiracy 2°; or PL 105.17 Conspiracy 1°; when the crime conspired to commit is one of the charges listed in this section.

A conviction that requires registration as a sex offender.

Criminal Certificate of Disposition Request Form for CPL 160.59 Sealing Application

To: _____ **Court**
Number & Street: _____
City, State & Zip: _____
Phone: _____

NOTE: The name, address and phone number of the court can be found by selecting the County and Court Type in the Court Locator at: http://www.nycourts.gov/courts/index.shtml

Please complete the information below to request a criminal Certificate of Disposition for your CPL 160.59 sealing application. You may either bring your completed form to the court in person, or you may mail the completed form to the court. A fee of five ($5) dollars is required in courts located outside the City of New York, and a fee of ten ($10) dollars is required in courts located within the 5 boroughs of the City of New York. When delivering your request in person, you may pay in cash or by certified check or money order, and you must provide a valid photo ID. When mailing your request, you must pay by certified check or money order (do not send cash in the mail), and the form must be notarized below.

Requestor Information (only the defendant or the defendant's agent may use this form to request a Certificate of Disposition)	
	Date of Request:
Requestor	Name:
	Address:
	Phone:
	Email:
Role	I am the Defendant
	I am the Defendant's Agent (must provide notarized authorization from the defendant)
Receipt	Please mail to the above address (must provide self-addressed stamped envelope)
	I will pick up at court when notified
For Court Use Only	☐ Certificate of Disposition fee paid Cash Certified Check # Money Order #
	☐ Proper ID provided (specify):
	☐ Written authorization provided (for Defendant's Agent only)
	☐ Self-addressed stamped envelope provided (for request to receive Certificate of Disposition by mail only)

Defendant Information			
Name	First:	Middle:	Last:
AKA(s)			
Date of Birth			
Sex	Male Female Unknown		

Case Identifiers (provide as much information as you can)				
Docket, Indictment, SCI or IDV Number				
Arrest Number				
Order of Protection Number				
Certificate of Disposition Number				
Criminal Justice Tracking Number (CJTN)				
Complaint Number				
Ticket Number				
Other Identifiers (provide other identifiers if known)				
NYSID Number				
Partial Docket Number				
Motorist ID Number				
Arrest Date		or Date Range	from	to
Incident Date		or Date Range	from	to
Address				
License Plate Number				
Charges				
Other				

NOTE: Form MUST be notarized when submitting a request by mail.

_____
Signature of Requestor

Sworn to before me this ___
day of _____, 20____

_____
Notary Public

In the Matter of the Application of:

❶Name: _____

❷AKA(s): _____

Notice of Motion and Affidavit in Support Sealing Pursuant to CPL 160.59

❸NYSID: _____

❹Motorist ID #: (VTL Crimes) _____

❺DOB: _____

This is a Notice of Motion for sealing New York State convictions pursuant to Criminal Procedure Law (CPL) 160.59. The applicant moves to seal the following case(s):

❻ Docket, Indictment, or SCI Number	❼ Court Name	❽ Conviction Charge	❾ Law/Section/Subsection	❿ Conviction Date	⓫ Sentence Date	⓬ Sentence Term	⓭ Release Date from any incarceration

ATTACHMENTS:

⓮Applicant attaches the following documents in support of the request for sealing (applicant may attach documents related to reasons why the case(s) should be sealed, including evidence of rehabilitation, letters of recommendation, employment status, etc.):

1. Affidavit in Support of Sealing Pursuant to CPL 160.59 [see page 2].
2. Affidavit of Service on the District Attorney [see page 3].
3. Certificate of Disposition for each conviction for which I am requesting sealing.
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

APPLICANT UNDERSTANDS THE FOLLOWING PROCEDURES AND REQUIREMENTS OF THIS MOTION :

If applicant is applying to seal two cases, this motion must be filed in the court where the most serious conviction was entered. If both cases involve convictions of the same class (e.g., two class A misdemeanors or two class B misdemeanors), the motion must be filed in the court where the more recent conviction was entered.

A copy of this Notice of Motion and all supporting documents must be served on the District Attorney of each county where a conviction listed above was entered.

The District Attorney has 45 days after being served with this Notice of Motion to consider whether to consent to the sealing or to oppose the sealing.

If the District Attorney opposes the sealing, the court will conduct a hearing and consider any evidence offered by either party that would aid the court in deciding whether to seal your convictions.

Before deciding this motion, the law requires the court to have a fingerprint-based criminal history report (rap sheet), which will include any sealed or suppressed cases and any criminal history information that occurred in jurisdictions outside of New York. By filing this Notice of Motion, you are agreeing to be fingerprinted if required. When the motion is filed, the clerk of the court will provide instructions if you must be fingerprinted.

Affidavit in Support of Sealing Pursuant to CPL 160.59

The applicant states the following facts upon information and belief that they are true:

⓯I was convicted of a crime or crimes in no more than two criminal transactions in New York State or elsewhere, and no more than one of those criminal convictions includes a conviction for a felony offense. I do not have any open or pending criminal charges against me.

⓰I am not applying to seal any of the following offenses:

a. a sex offense defined in article one hundred thirty of the Penal Law;
b. an offense defined in article two hundred sixty-three of the Penal Law;
c. a felony offense defined in article one hundred twenty-five of the Penal Law;
d. a violent felony offense defined in section 70.02 of the Penal Law;
e. a class A felony offense defined in the Penal Law;
f. a felony offense defined in article one hundred five of the Penal Law where the underlying offense is not an eligible offense;
g. an attempt to commit an offense that is not an eligible offense if the attempt is a felony; or,
h. an offense for which registration as a sex offender is required pursuant to article six-C of the correction law.

⓱It has been over 10 years since I was sentenced for my most recent case. I did not count any jail or prison time I served after being sentenced in calculating the 10-year period.

Moreover, the applicant, having been sworn, says:

I have attached a copy of a certificate of disposition or other similar documentation for each conviction listed above, or an explanation of why such certificate or other documentation is not available.

⓲I ***have*** ***have not*** filed any other application to seal a conviction pursuant to either CPL 160.58 or CPL 160.59. If I did file another application, I have attached it to this motion.

⓳I ***do*** ***do not*** intend to file any other application to seal an eligible conviction pursuant to either CPL 160.58 or CPL 160.59. If I do intend to file another application, the following conviction is the one I will ask to have sealed:

Docket/Indictment/SCI Number(s)	Court Name	Conviction Charge	Law/Section/Subsection	Charge Weight	Conviction Date	Sentence Date	Sealing Section
							CPL 160.58 CPL 160.59

⓴The court, in its discretion, should grant this application for sealing pursuant to CPL 160.59 for the following reasons (you must specify your reasons, which may include information about positive steps you've taken since your conviction – add additional pages if necessary):

_____.

_____
Signature of Applicant

Street Address: _____
City, State & Zip: _____
Phone (optional): _____
Email (optional): _____

Sworn to before me this ____
day of _____, 20____.

_____
Notary Public

Affidavit of Service

STATE OF NEW YORK
COUNTY OF _____

The undersigned, being sworn, says:

_____, is over 18 years of age and resides at:
[name of person serving/mailing]

_____.
[address of person serving/mailing]

That on _____, deponent served the within **Notice of Motion and Affidavit in Support of Sealing Pursuant to CPL 160.59** and the following supporting documents:
[date of service/mailing]

_____

upon the District Attorney(s) of the following county/counties: _____
[name(s) of county/counties]

at the following address(es): _____

_____.
[address(es) of District Attorney's office(s)]

Select one:

by mailing a complete copy in a properly stamped and addressed envelope at the post office or official depository of the United States Postal Service.

by personally delivering a complete copy to the District Attorney's Office.

_____
Signature of person serving/mailing

Sworn to before me this ____
day of _____, 20____.

_____
Notary Public

NOTE: ***If service was made upon more than one District Attorney's office, and service was made on different dates or by different people, attach separate Affidavits of Service.***

INSTRUCTIONS

The instruction for each number below refers to the corresponding number in the **Notice of Motion and Affidavit in Support Sealing Pursuant to CPL 160.59** form. For additional help, and to find a fillable version of this form online, go to the Unified Court System's website at http://www.nycourts.gov/forms/index.shtml

❶ Enter your full legal name.

❷ Enter any names you are also known as (AKA) in addition to your legal name. If you used a different name than your legal name on a case you are applying to seal, make sure you also list that name.

❸ Enter your New York State Identification Number (NYSID). This number can be found on the Certificate of Disposition you obtained from the court where your conviction occurred.

❹ If you were convicted of a crime under the Vehicle and Traffic Law (VTL), enter your Motorist ID from your driver's license. (You will know that it is a Vehicle and Traffic Law charge if it says VTL in the conviction description on your Certificate of Disposition from the court.) If you do not have a VTL charge, you are not required to enter your Motorist ID.

❺ Enter your date of birth.

❻ Enter the court's docket number if you were convicted and sentenced in a city, town or village court, or enter the indictment/SCI number if you were convicted and sentenced in a supreme or county court. The case number will be in the Certificate of Disposition you get from the court.
NOTE: If you were convicted of a charge in another case that was part of the same incident, enter the information for #6 to #13 for the related case in the same row. (e.g., You were arrested for DWI and Unauthorized Use of a Vehicle, and both crimes occurred from the same incident. You were convicted for a misdemeanor DWI in the City Court, but you were convicted for a felony Unauthorized Use of a Vehicle in the County Court.)

❼ Enter the name of the court where you were convicted and sentenced. The name of the court will be on the Certificate of Disposition you get from the court.

❽ Enter the name of the charge for which you were convicted and sentenced (e.g., Petit Larceny, or Burglary 3°, or Criminal Possession of a Controlled Substance 7°, etc.). The name of the conviction will be in the Certificate of Disposition you get from the court. If the Certificate of Disposition lists more than one charge in the same case, list the most serious charge.
For example:
- If you were sentenced for an A misdemeanor and a B misdemeanor, enter the A misdemeanor.
- If you were sentenced for a felony and a misdemeanor, enter the felony.
- If you were sentenced for a C felony and an E felony, enter the C felony.
- If you were sentenced for two charges of the same weight (e.g., two A misdemeanors), enter the first charge listed in the Certificate of Disposition.

❾ Enter the law, section and subsection, if any, of the charge for which you were convicted and sentenced. The law, section and subsection will be in the Certificate of Disposition you get from the court.
For example:
- PL 155.30(1)
- PL 220.03
- VTL 1192 (2-a)

❿ Enter the date you were convicted. This is the date that you entered a plea or were found guilty after a trial. The conviction date will be in the Certificate of Disposition you get from the court.

⓫ Enter the date you were sentenced. (Some people are convicted and sentenced on the same date. Others are convicted and come back to court at a later date for sentencing.) The sentence date will be in the Certificate of Disposition you get from the court.

⓬ Enter the sentence you received. The sentence will be in the Certificate of Disposition you get from the court.
For example:
- Conditional discharge
- 5 years probation
- 60 days jail and 3 years probation
- 6 months jail
- 1-3 years state prison

⓭ If you served any time in jail or state prison after you were sentenced, enter the date you were released. If you did not serve any time in jail or state prison after you were sentenced, leave this blank.

⓮ Documents in support of sealing:

1. Affidavit in Support of Sealing Pursuant to CPL 160.59 [page 2 of this form]. The purpose of the affidavit is to provide additional information to support your motion for sealing. Make sure it is completed and attached.
2. Affidavit of Service [page 3 of this form]. The law requires you to provide a copy of your motion and supporting papers to the District Attorney in the county where you were convicted and sentenced before you file them with the court. If you are applying to seal two cases, and you were convicted and sentenced in different counties, you must send copies to the District Attorney in BOTH counties.
   NOTE: If you served two different District Attorneys, and they were served on different dates and/or by different people, you must complete and attach a separate Affidavit of Service (page 3) for each.
3. Certificate of Disposition. You must attach a Certificate of Disposition for each conviction that you are asking the court to seal. To get a Certificate of Disposition, you must contact the court where you were convicted and sentenced. If you are applying to seal two cases, you must get a Certificate of Disposition for each case. If you cannot get a Certificate of Disposition, you must attach an explanation why a Certificate of Disposition is not available. Further information about getting a Certificate of Disposition is available on the court's website.

4.-10. If you have any additional documents evidencing your rehabilitation, you should attach them. These can include documents such as a certificate of relief from civil disabilities, verification of employment, community service, volunteer or charity work; educational transcripts; letters of recommendation or commendation from employers, teachers/professors, community leaders, charitable organizations; certificates of successful completion of a drug or alcohol treatment program, etc. You are not required to submit additional supporting documents.

⓯ You are telling the court that you have not been convicted in more than two criminal cases, and that no more than one of those cases was a conviction for a felony charge.

⓰ If you were convicted of any of the crimes listed below, you are not eligible for sealing the conviction pursuant to CPL 160.59. (check your Certificate of Disposition to verify that it does not include any of the following charges). You are telling the court that you are not moving to seal any of the following:

a. PL 130.20 Sexual Misconduct; PL 130.25 Rape 3°; PL 130.30 Rape 2°; PL 130.35 Rape 1°; PL 130.40 Criminal Sexual Act 3°; PL 130.45 Criminal Sexual Act 2°; PL 130.50 Criminal Sexual Act 1°; PL 130.52 Forcible Touching; PL 130.53 Persistent Sexual Abuse; PL 130.55 Sexual Abuse 3°; PL 130.60 Sexual Abuse 2°; PL 130.65 Sexual Abuse 1°; PL 130.65-a Aggravated Sexual Abuse 4°; PL 130.66 Aggravated Sexual Abuse 3°; PL 130.67 Aggravated Sexual Abuse 2°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°; PL 130.85 Female Genital Mutilation; PL 130.90 Facilitating a Sex Offense with a Controlled Substance; PL 130.91 Sexually Motivated Felony; PL 130.95 Predatory Sexual Assault; PL 130.96 Predatory Sexual Assault Against a Child

b. PL 263.05 Use of a Child in a Sexual Performance; PL 263.10 Promoting an Obscene Sexual Performance by a Child; PL 263.11 Possessing an Obscene Sexual Performance by a Child; PL 263.15 Promoting a Sexual Performance by a Child; PL 263.16 Possessing a Sexual Performance by a Child; PL 263.30 Facilitating a Sexual Performance by a Child with a Controlled Substance or Alcohol

c. PL 125.10 Criminally Negligent Homicide; PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.12 Vehicular Manslaughter 2°; PL 125.13 Vehicular Manslaughter 1°; PL 125.14 Aggravated Vehicular Homicide; PL 125.15 Manslaughter 2°; PL 125.20 Manslaughter 1°; PL 125.21 Aggravated Manslaughter 2°; PL 125.22 Aggravated Manslaughter 1°; PL 125.25 Murder 2°; PL 125.26 Aggravated Murder; PL 125.27 Murder 1°; PL 125.40 Abortion 2°; PL 125.45 Abortion 1°; PL 125.50 Self-Abortion 2°; PL 125.55 Self-Abortion 1°; PL 125.60 Issuing Abortion Articles

d. Class B violent felony offenses:
   PL 110/125.25 Attempted Murder 2°; PL 110/135.25 Attempted Kidnapping 1°; PL 110/150.20 Attempted Arson 1°; PL 125.20 Manslaughter 1°; PL 125.22 Aggravated Manslaughter 1°; PL 130.35 Rape 1°; PL 130.50 Criminal Sexual Act 1°; PL 130.70 Aggravated Sexual Abuse 1°; PL 130.75 Course of Sexual Conduct Against a Child 1°; PL 120.10 Assault 1°; PL 135.20 Kidnapping 2°; PL 140.30 Burglary 1°; PL 150.15 Arson 2°; PL 160.15 Robbery 1°; PL 230.34(5)(a)&(b) Sex Trafficking; PL 255.27 Incest 1°; PL 265.04 Criminal Possession of a Weapon 1°; PL 265.09 Criminal Use of a Firearm 1°; PL 265.13

Criminal Sale of a Firearm 1°; PL 120.11 Aggravated Assault upon a Police Officer or a Peace Officer; PL 120.07 Gang Assault 1°; PL 215.17 Intimidating a Victim or Witness 1°; PL 490.35 Hindering Prosecution of Terrorism 1°; PL 490.40 Criminal Possession of a Chemical Weapon or Biological Weapon 2°; PL 490.47 Criminal Use of a Chemical Weapon or Biological Weapon 3°;

Class C violent felony offenses:

An attempt to commit any of the Class B violent felony offenses listed above; PL 125.11 Aggravated Criminally Negligent Homicide; PL 125.21 Aggravated Manslaughter 2°; PL 130.67 Aggravated Sexual Abuse 2°; PL 120.08 Assault on a Peace Officer, Police Officer, Fireman or Emergency Medical Services Professional; PL 120.09 Assault on a Judge; PL 120.06 Gang Assault 2°; PL 121.13 Strangulation 1°; PL 140.25 Burglary 2°; PL 160.10 Robbery 2°; PL 265.03 Criminal Possession of a Weapon 2°; PL 265.08 Criminal Use of a Firearm 2°; PL 265.12 Criminal Sale of a Firearm 2°; PL 265.14 Criminal Sale of a Firearm with the Aid of a Minor; PL 265.19 Aggravated Criminal Possession of a Weapon; PL 490.15 Soliciting or Providing Support for an Act of Terrorism 1°; PL 490.30 Hindering Prosecution of Terrorism 2°; PL 490.37 Criminal Possession of a Chemical Weapon or Biological Weapon 3°;

Class D violent felony offenses:

An attempt to commit any of the Class C violent felony offenses listed above; PL 120.02 Reckless Assault of a Child; PL 120.05 Assault 2°; PL 120.18 Menacing a Police Officer or Peace Officer; PL 120.60 Stalking 1°; PL 121.12 Strangulation 2°; PL 130.30 Rape 2°; PL 130.45 Criminal Sexual Act 2°; PL 130.65 Sexual abuse 1°; PL 130.80 Course of Sexual Conduct Against a Child 2°; PL 130.66 Aggravated Sexual Abuse 3°; PL 130.90 Facilitating a Sex Offense with a Controlled Substance; PL 135.35 (3)(a)&(b) Labor Trafficking; PL 265.02 (5), (6), (7), (8), (9) or (10); PL 265.11 Criminal Sale of a Firearm 3°; PL 215.16 Intimidating a Victim or Witness 2°; PL 490.10 Soliciting or Providing Support for an Act of Terrorism 2°; PL 490.20 Making a Terroristic Threat; PL 240.60 Falsely Reporting an Incident 1°; PL 240.62 Placing a False Bomb or Hazardous Substance 1°; PL 240.63 Placing a False Bomb or Hazardous Substance in a Sports Stadium or Arena, Mass Transportation Facility or Enclosed Shopping Mall; PL 405.18 Aggravated Unpermitted Use of Indoor Pyrotechnics 1°;

Class E violent felony offenses:

PL 110/265.02 (5), (6), (7), or (8) Attempted Criminal Possession of a Weapon 3° as a lesser included offense of that section as defined in CPL 220.20; PL 130.53 Persistent Sexual Abuse; PL 130.65-a Aggravated Sexual Abuse 4°; PL 240.55 Falsely Reporting an Incident 2°; PL 240.61 Placing a False Bomb or Hazardous Substance 2°;

e. A Class A felony offense (abbreviated on your Certificate of Disposition as “AF”).

f. A conviction for PL 105.10 Conspiracy 4°; PL 105.13 Conspiracy 3°; PL 105.15 Conspiracy 2°; or PL 105.17 Conspiracy 1°; when the crime you conspired to commit is one of the charges listed in this section.

g. An attempt to commit a crime is displayed on your Certificate of Disposition as “Attempted” and will have the number 110 displayed before the section and subsection (e.g., Attempted Robbery 2°; PL 110-160.10). If it is a felony level offense, the charge weight will be BF, CF, DF or EF.

h. A conviction that requires you to register as a sex offender.

⓱ Your most recent conviction and sentence must be more than ten years ago. However, if you were in jail or prison after you were sentenced, that time does not count. For example, your last conviction was 11 years ago and you served 2 years in state prison (11 – 2 = 9), that is only 9 years and you will not qualify for sealing for another year.

⓲ If you have filed another application for conditional sealing pursuant to CPL 160.58 or sealing pursuant to CPL 160.59 with this court or any other court, attach a copy of that application regardless of whether it was granted, denied or is still pending.

⓳ If you are going to file another application for conditional sealing pursuant to CPL 160.58 or sealing pursuant to CPL 160.59 with this court or any other court, list the cases that you intend to include in the application and indicate the sealing section for which you intend to apply.

⓴ You must tell the court why you believe your prior convictions should be sealed. This is your opportunity to tell the court why sealing your convictions is in the interest of justice, such as participating in treatment programs, work or schooling, or participating in community service or other volunteer programs. If you need more space, continue your comments on a separate sheet of paper.

New York State District Attorney's Offices by County

County	Address 1	Address 2	Room/Suite Floor	City/Town	State	Zip Code
Albany County District Attorney's Office	Albany County Judicial Center	6 Lodge Street		Albany	NY	12207-2111
Allegany County District Attorney's Office	7 Court Street		Room 333	Belmont	NY	14813-1044
Bronx County District Attorney's Office	198 E. 161st Street		4th Floor	Bronx	NY	10451-3536
Broome County District Attorney's Office	George Harvey Justice Building	45 Hawley Street	4th Floor	Binghamton	NY	13902-3722
Cattaraugus County District Attorney's Office	Cattaraugus County Center	303 Court Street		Little Valley	NY	14755-1028
Cayuga County District Attorney's Office	95 Genesee Street			Auburn	NY	13021-3698
Chautauqua County District Attorney's Office	1 N. Erie Street			Mayville	NY	14757-1000
Chemung County District Attorney's Office	226 Lake Street	P.O. Box 588		Elmira	NY	14902-0588
Chenango County District Attorney's Office	26 Conkey Avenue	P.O. Box 126	2nd Floor	Norwich	NY	13815-0126
Clinton County District Attorney's Office	Clinton County Government Center	137 Margaret Street	Suite 201	Plattsburgh	NY	12901-0059
Columbia County District Attorney's Office	325 Columbia Street			Hudson	NY	12534-1902
Cortland County District Attorney's Office	Cortland County Courthouse	46 Greenbush Street	Suite 102	Cortland	NY	13045-2765
Delaware County District Attorney's Office	1 Courthouse Square		Suite 5	Delhi	NY	13753-1600
Dutchess County District Attorney's Office	236 Main Street			Poughkeepsie	NY	12601-3102
Erie County District Attorney's Office	25 Delaware Avenue			Buffalo	NY	14202-3926
Essex County District Attorney's Office	7559 Court Street	P.O. Box 217		Elizabethtown	NY	12932-0217
Franklin County District Attorney's Office	355 West Main Street		Suite 466	Malone	NY	12953-1855
Fulton County District Attorney's Office	County Office Building	223 West Main Street		Johnstown	NY	12095-2309
Genesee County District Attorney's Office	1 West Main Street			Batavia	NY	14020-2019
Greene County District Attorney's Office	411 Main Street			Catskill	NY	12414-1363
Hamilton County District Attorney's Office	P.O. Box 277	White Birch Lane		Indian Lake	NY	12842-0277
Herkimer County District Attorney's Office	301 N. Washington Street		Suite 2401	Herkimer	NY	13350-1299
Jefferson County District Attorney's Office	175 Arsenal Street			Watertown	NY	13601-2563
Kings County (Brooklyn) District Attorney's Office	350 Jay Street			Brooklyn	NY	11201-2900
Lewis County District Attorney's Office	7660 North State Street			Lowville	NY	13367-1562
Livingston County District Attorney's Office	Livingston County Courthouse	2 Court Street		Geneseo	NY	14454-1048
Madison County District Attorney's Office	Veteran's Memorial Building	P.O. Box 578		Wampsville	NY	13163-0578
Monroe County District Attorney's Office	47 S. Fitzhugh Street			Rochester	NY	14614-1414
Montgomery County District Attorney's Office	58 Broadway	P.O. Box 1500		Fonda	NY	12068-1500
Nassau County District Attorney's Office	262 Old Country Road		2nd Floor	Mineola	NY	11501-4251
New York County (Manhattan) District Attorney's Office	1 Hogan Place			New York	NY	10013-4311
Niagara County District Attorney's Office	Niagara County Courthouse	175 Hawley Street	3rd Floor	Lockport	NY	14094-2740
Oneida County District Attorney's Office	235 Elizabeth Street			Utica	NY	13501-2201
Onondaga County District Attorney's Office	505 S. State Street		4th Floor	Syracuse	NY	13202-2183
Ontario County District Attorney's Office	Ontario County Courthouse	27 N. Main Street	3rd Floor	Canandaigua	NY	14424-1447
Orange County District Attorney's Office	40 Matthews Street			Goshen	NY	10924-1964
Orleans County District Attorney's Office	13925 State Route 31		Suite 300	Albion	NY	14411-9385
Oswego County District Attorney's Office	Public Safety Center	39 Churchill Road		Oswego	NY	13126-6671
Otsego County District Attorney's Office	197 Main Street			Cooperstown	NY	13326-1128
Putnam County District Attorney's Office	40 Gleneida Avenue			Carmel	NY	10512-1705
Queens County District Attorney's Office	125-01 Queens Boulevard		Suite 7	Kew Gardens	NY	11415-1514
Rensselaer County District Attorney's Office	Rensselaer County Courthouse	80 2nd Street		Troy	NY	12180-4098

Richmond County (Staten Island) District Attorney's Office	130 Stuyvesant Place		Suite 602	Staten Island	NY	10301-1900
Rockland County District Attorney's Office	1 South Main Street		Suite 500	New City	NY	10956-3539
Saratoga County District Attorney's Office	25 West High Street			Ballston Spa	NY	12020-1963
Schenectady County District Attorney's Office	Schenectady County Courthouse	612 State Street	3rd Floor	Schenectady	NY	12305-2112
Schoharie County District Attorney's Office	157 Depot Lane	P.O. Box 888	2nd Floor	Schoharie	NY	12157-0888
Schuyler County District Attorney's Office	105 9th Street			Watkins Glen	NY	14891-1435
Seneca County District Attorney's Office	44 West Williams Street			Waterloo	NY	13165-1338
St. Lawrence County District Attorney's Office	48 Court Street			Canton	NY	13617-1197
Steuben County District Attorney's Office	3 East Pulteney Square			Bath	NY	14810-1510
Suffolk County District Attorney's Office	William J. Lindsay County Complex	77 Veterans Memorial Highway		Hauppauge	NY	11788
Sullivan County District Attorney's Office	Sullivan County Courthouse	414 Broadway		Monticello	NY	12701-1380
Tioga County District Attorney's Office	20 Court Street			Owego	NY	13827-1792
Tompkins County District Attorney's Office	320 North Tioga Street			Ithaca	NY	14850-4206
Ulster County District Attorney's Office	Ulster County Courthouse	275 Wall Street		Kingston	NY	12401-3817
Warren County District Attorney's Office	1340 State Route 9			Lake George	NY	12845-3434
Washington County District Attorney's Office	Municipal Center - Building B	383 Broadway		Fort Edward	NY	12828-1001
Wayne County District Attorney's Office	Hall of Justice	54 Broad Street		Lyons	NY	14489-1199
Westchester County District Attorney's Office	111 Dr. Martin Luther King, Jr. Boulevard		3rd Floor	White Plains	NY	10601-2500
Wyoming County District Attorney's Office	Wyoming County Courthouse	147 North Main Street		Warsaw	NY	14569-1123
Yates County District Attorney's Office	415 Liberty Street			Penn Yan	NY	14527-1122

RICHARD D. COLLINS+
MARC C. GANN*
GERARD C. McCLOSKEY
DAVID J. BARRY

ZEENA J. ABDI
PHILIP P. NASH
JONATHAN P. MANFRE

+Also member PA, MA, TX and D.C. Bars
*Also member MD Bar

COLLINS GANN
McCLOSKEY & BARRY PLLC
ATTORNEYS AT LAW

Dedicated Legal Counsel Since 1990

Of Counsel
ALAN H. FELDSTEIN^
Tel: (818) 508-1820

ANSANELLI LAW GROUP, LLP
Tel: (631) 598-0337

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^Member CA Bar only
≠ Member NY, NJ and FL Bars

Learn if you qualify to have your record sealed.
Consult with an attorney to confirm eligibility

STEP 1
Convicted of more than 1 felony?

If no, go to Step 2
If yes, ineligible

STEP 2
Convicted of more than 2 misdemeanors?

If no, go to Step 3
If yes, ineligible

STEP 3
Convicted of a violent crime, sex offense, Class A felony, or other ineligible offenses?
If no, go to Step 4.
If yes, ineligible

STEP 4
Required to register as a sex offender?

If no, go to Step 5
If yes, ineligible

STEP 5
Is it less than 10 years since the date of sentence (or release from incarceration)?

If no, go to Step 6
If yes, ineligible

STEP 6
Convicted of a crime after the conviction you're trying to seal (including out-of-state)?

If no, go to Step 7
If yes, ineligible

STEP 7

Are there any pending charges against you?

If no, eligible
If yes, ineligible

ELIGIBLE FOR SEALING

New York Legislative Revisions

Hon. Barry Kamins
Aidala, Bertuna & Kamins P.C., NYC

New York Law Journal

'U.S. v. Wade' Turns 50: New Era in Eyewitness Identification

Criminal Law and Procedure columnist Barry Kamins writes: Long before the term "wrongful conviction" became commonplace, the U.S. Supreme Court in 1967 noted the conclusion by one commentator that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors that all other factors combined." Fifty years later, New York is about to embark on a new era of eyewitness identification.

By Barry Kamins | June 02, 2017

Fifty years ago, on June 12, 1967, the U.S. Supreme Court decided the *Wade-Gilbert-Stovall* trilogy and expressed its concerns about the possibility and dangers of suggestive identification procedures. *U.S. v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967). Long before the term "wrongful conviction" became commonplace, the court noted the conclusion by one commentator that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors that all other factors combined." *U.S. v. Wade*, 388 at 229 (quoting Patrick Wall, "Eye-Witness Identification in Criminal Cases").

Fifty years following *Wade*, New York is about to embark on a new era of eyewitness identification. Effective July 1st, newly enacted legislation will permit evidence that a witness identified the defendant from a photograph provided, however, that a "blind" or "blinded" identification procedure was utilized. In addition, the New York Court of Appeals will decide shortly whether trial courts must include a cross-racial identification charge unless the parties agree that no cross-racial identification has occurred. *People v. Boone*, 129 A.D.3d 1099 (2d Dept. 2015), leave granted.

Following on the heels of the *Wade* trilogy, the legislature enacted Criminal Procedure Law §710.20(6) to meet the concerns expressed by the Supreme Court. Under that statute, a defendant can raise a constitutional challenge to suggestive pre-trial confrontations. The essential goal of the statute "is to enable pre-trial judicial scrutiny of state sponsored identification procedures" and "to assess whether the results, by virtue of undue suggestions, are too unreliable to be admitted at trial." Hibel, "New York Identification Law," at §1-6.

Independent of any constitutional concerns, New York has maintained an evidentiary rule—and was the only state to do so—that does not permit evidence that, prior to trial, a witness identified the defendant from a photograph. This evidentiary rule has existed statutorily for 90 years.

In *People v. Caserta*, 19 N.Y.2d 18 (1966), the Court of Appeals explained the twin rationales for the exclusion of such evidence. First, the court was concerned that jurors may draw the likely inference that the defendant had been previously arrested from the fact that the police were in possession of the defendant's photograph. Indeed, the court referred to the source of these photographs as the "rogues gallery."

The second rationale for the rule was a concern that photographs were a more suggestive, if not less reliable, means of identification. As the court noted, photographs are sometimes of poor or uneven quality and easily distorted. Such photographs could depict a dated or distorted image of a suspect and render any identification unreliable.

The prohibition against prior photo identification evidence was not absolute. For example, defense counsel could open the door to such evidence should counsel mislead a jury by creating an inaccurate impression that a witness was unable to identify, or had not identified, the defendant prior to trial. In addition, should a defendant refuse to participate in a corporeal lineup, evidence of a pre-trial photographic lineup would be admissible. *People v. Perkins*, 15 N.Y.3d 200 (2010). If a witness's testimony was challenged as a recent fabrication, evidence of a prior photographic identification would be admissible as a recent fabrication on the condition that the identification predated the motive to testify. Finally, a *defendant* could choose to waive the protection of the *Caserta* rule by eliciting testimony about a prior photographic identification with the intention of establishing that a witness had been mistaken.

Over the last decade, the *Caserta* rule has been re-examined and debated by numerous groups addressing the causes of wrongful convictions. The Innocence Project noted that the scientific and psychological literature shows that witnesses tend to be committed to their initial identification even if that identification is mistaken. A photo array is often the first identification procedure and, therefore, it was seen as critical that the reliability of that procedure be improved.

In the last legislative session, prosecutors sought to overturn the *Caserta* rule in exchange for the imposition of procedures that would make identifications at photo arrays more reliable. Various defense groups advocated for changes in the procedure—some arguing for several mandatory reforms while others were willing to accept the "blinded" procedure as the only quid pro quo.

The new legislation, (L. 2017, Ch. 59, effective July 1, 2017), does not make mandatory many of the reforms sought by some groups. What is an essential element of the legislation, however, is the required use of "blind" or "blinded" procedures. It has been documented that the state of mind of the administrator conducting a photo array might contribute to the suggestiveness of the procedure. Administrators who know the identity of the suspect in the array may inadvertently or intentionally influence the witness's identification. Conversely, an administrator who does not know the identity of the suspect is unlikely to steer the witness to the suspect through verbal or nonverbal cues.

A "blind" procedure is one in which the administrator does not know the identity of the suspect. A "blinded" procedure is one in which the administrator does not know the location of the suspect's photo in the array.

If an administrator utilizes either a "blind" or "blinded" procedure, the prosecutor will now be permitted to offer testimony that the witness identified the defendant's photograph on a prior occasion as the perpetrator of the crime. This will constitute evidence-in-chief, thus overruling *Caserta*, and it will make New York the twenty-second state to utilize blinded identification procedures.

The failure to utilize a "blind" or "blinded" procedure will only affect the admissibility of testimony regarding a prior photographic identification. It cannot constitute a legal basis to suppress other identification evidence pursuant to CPL §710.20(6).

The legislation also requires the Division of Criminal Justice Services to promulgate a number of written best practices for photo and corporeal (live lineup) identification procedures that must be disseminated to police agencies around the state. In addition, the Division of Criminal Justice Services must develop a training program regarding these best practices. It is important to note, however, that these procedures are not mandatory and should law enforcement not utilize them, evidence of a prior photographic identification will still be admissible provided, of course, that a "blind" or "blinded" photo array was utilized.

A number of these best practices are critical to the fairness and accuracy of identification procedures. For example, the method of selecting fillers for a live lineup or photo array affects the reliability of any identification. The Innocence Project has noted that administrators frequently select fillers for identification procedures by attempting to match *the appearance of the suspect.* This is problematic: "When fillers are selected that do not resemble the *witness's* description, this can cause the suspect to stand out because of the composition of the lineup." "Eyewitness Identification Reform," Innocence Project, at 2 (emphasis added).

Another best practice calls for the documentation of a witness's confidence in his or her identification at the time an identification is made. It is important to record a witness's initial level of confidence because "information provided to a witness after an identification suggesting that the witness selected the right person can dramatically, yet artificially, increase the witness's confidence in the identification. Id. at 4. Further, research has disproved any correlation between a witness's level of confidence at *trial* and the witness's accuracy of the identification. See Hibel, supra at §6.02.

Other best practices include the documentation of identification procedures and the nature of instructions given to a witness before conducting a photographic array or live lineup.

With the enactment of this legislation, New York has entered a new era of eyewitness identification. It remains to be seen whether law enforcement agencies will aggressively utilize the best practices identified in the legislation so that identification procedures will be even more reliable and accurate. In addition, will the police forgo the use of traditional, corporeal identifications in favor of photo arrays? In the end, a picture may indeed be worth more than a thousand words.

New York Law Journal

Expanding the 'Wade' Hearing: New Police Identification Protocols

Criminal Law and Procedure columnist Barry Kamins reviews the new best practices for identification procedures by witnesses, which reflect the results of substantial scientific research in the area of memory, perception and recall.

Case Digest Summary

Criminal Law and Procedure columnist Barry Kamins reviews the new best practices for identification procedures by witnesses, which reflect the results of substantial scientific research in the area of memory, perception and recall.

Barry Kamins (NYLJ/Rick Kopstein)

The law has begun to catch up with the science of memory and perception. In June, the Division of Criminal Justice Services (DCJS) promulgated a significant number of new protocols for photographic and corporeal (live lineup) identification procedures. These procedures were disseminated to all police departments around the state and their presence or absence will now be the subject of the pre-trial *Wade* hearing, during which defense counsel can raise a constitutional challenge to suggestive pre-trial confrontations.

The protocols were the result of recent legislation, (L.2017, Ch. 59, eff. July 1, 2017), discussed in the prior column, permitting evidence at trial that a witness identified a suspect from a photograph. Such evidence will only be admissible if a “blind” or “blinded” identification procedure was utilized. The legislation overruled a 90-year-old evidentiary rule in New York that had precluded such evidence as part of a prosecutor’s evidence-in-chief.

Although prosecutors will now have an additional opportunity to offer evidence at trial linking a defendant to the crime, they will also have an additional obligation—at the *Wade* hearing—to establish that the “blind” array was lawfully conducted and not suggestive. At a *Wade* hearing, while a defendant has the ultimate burden to prove that a pre-trial identification was unduly suggestive, the People have the burden of going forward with proof that the identification procedure was non-suggestive. *People v. Chipp*, 75 N.Y.2d 327 (1990).

The legislation also required DCJS to promulgate a number of best practices for photo and corporeal identification procedures. These protocols were subsequently established by DCJS and intended to meet the needs of all police departments in New York regardless of size or resource limitations.

These best practices incorporate many years of scientific research on memory and interview techniques. They focus on seven critical aspects of administering photo arrays: selection of fillers; inviting a witness to view an array; instructions to the witness prior to viewing an array; administering the procedure; post-viewing questions of the witness; documentation of the procedure; and speaking with the witness after the procedure.

Significantly, these protocols are not mandatory, and should law enforcement not utilize them, evidence of a prior photographic identification will still be admissible provided, of course, that a “blind” or “blinded” photo array was utilized.

In a “blind” procedure, the administrator does not know the identity of the suspect. Two people are required to conduct a blind array—one to assemble the array and one to administer it.

In a “blinded” procedure, while the administrator may know who the suspect is, by virtue of the procedure’s administration, the administrator does not know the suspect’s position in the array until the procedure is completed. This can be accomplished in several ways. An array can be assembled by someone, other than the administrator, and then placed in an unmarked folder for the administrator. This is known as the “two-person shuffle.” Or the administrator can create multiple arrays in which the suspect’s position is different in each; each array is in a separate sealed envelope. The witness then selects one of the envelopes to use as the array. This is known as the “one-person shuffle.” Regardless of which procedure is used, the administrator should be positioned in such a way so that he is not in the witness’s line of sight during the viewing of the array.

With respect to the selection of fillers, the new protocols suggest that a description of the perpetrator, given by the witness, be taken into account when selecting fillers to be used in the array. A witness’s description of the perpetrator can be relevant to the suggestiveness inquiry. Prosecutors and defense counsel will argue whether the composition of an array unfairly highlighted a defendant based upon the witness’s description. “The court, for its part, must evaluate the suggestiveness of the pre-trial identification procedure both in light of *and* in spite of the witness’s description.” New York Identification Law, Hibel, at 4-16.

The protocols discuss what the police should say to a witness when inviting him or her to view an array. For example, a police officer should *not* tell the witness whether or not a person is in custody or whether the police have any corroborating evidence, e.g., a confession or physical evidence. The police should merely advise the witness that they intend to conduct an identification procedure without saying anything about the suspect.

Once the witness has arrived at the police facility, the protocols discuss the nature of the instructions that should be given to the witness. Initially, the witness should be told that the perpetrator may or may not be in the array and that the witness should not assume that the administrator knows who is the perpetrator.

The witness must also be instructed about the quality of the photographs in the array. For example, the witness should be told that individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change. In addition, the true complexion of a person may be lighter or darker than shown in the photograph. The witness will be told to ignore any markings that may appear on the photographs.

Finally, the witness should be told that every witness who makes an identification will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind.

After viewing a “blind” or “blinded” photo array, the witness will be asked whether he/she recognized anyone and, if so, what photograph was recognized. In addition, the witness will be asked “from where do you recognize the person in the photograph?” Finally, the witness will be asked to describe his or her level of confidence, e.g., “Without using a number, how sure are you?”

The protocols suggest certain best practices with regard to documenting the procedure. Unless the witness objects at the outset, the entire identification procedure should be memorialized using audio or video recording. This may not be possible if there are equipment issues or the police believe that a recording would jeopardize the safety of a witness. The memorialization should include any physical or verbal reaction to the array as well as a confidence statement by the witness.

Once the identification is concluded and documented, the administrator should not make any comment to the witness that would suggest that the witness had identified the correct suspect.

A few observations can be made about the new protocols. The “blind” procedure requires the use of two individuals while the “blinded” procedure, using the “one-person shuffle,” only requires one administrator. Thus the “blinded” array will be easier for law enforcement to administer and may become the default method for the police. In addition, the police may decide not to conduct corporeal lineups at all since photo arrays are much easier to administer. As a result, in a case without any independent forensic evidence, a conviction could rest solely upon a single photo identification.

The above protocols reflect the results of substantial scientific research in the area of memory, perception and recall as they relate to eyewitness identification. As mentioned earlier, they are not mandatory and the failure to utilize them will not mandate the suppression of a pre-trial identification. As many police agencies around the state begin to utilize them, however, they will undoubtedly become standardized procedures involving pre-trial identification.

These new procedures for law enforcement personnel in New York reflect a national trend of state-based eyewitness identification reform. “The Promises and Pitfalls of State Eyewitness Identification Reforms,” 104 Ky. L.J. 99 (2016). Many of these reforms embrace the current state of scientifically accepted identification research. For example, in *State v. Henderson*, 27 A.3d 872 (2011), the New Jersey Supreme Court used its supervisory powers to direct law enforcement to adopt best practices based on the scientific research of the last three decades. Supreme Court Justice Sonia Sotomayor recently noted that a vast body of scientific literature, i.e., more than 2,000 studies, has reinforced the concern expressed by the court a half-century ago that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. *Perry v. New Hampshire*, 565 U.S. 228 (2012) (dissenting opinion); *U.S. v. Wade*, 388 U.S. 218, 229. In promulgating new protocols, New York has taken one more step to ensure the fairness of statewide identification procedures.

New Criminal Justice Legislation

By Barry Kamins

This article contains an annual review of new legislation amending the Penal Law, Criminal Procedure Law and other related statutes. The discussion that follows will primarily highlight key provisions of the new laws and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting the governor's signature and, of course, the reader must check to determine whether a bill is ultimately signed or vetoed by the governor.

Substantive Legislation in the Budget Bill

There were four substantive pieces of legislation that were enacted as part of this year's budget bill: evidence of identification by photographs; videotaping of confessions; raising the age of criminal responsibility; and sealing of prior convictions.

Identification by Photograph

Effective July 1, 2017, a witness can now testify during trial that he identified a suspect from a photograph.[1] Such evidence, however, will only be admissible if a "blind" or "blinded" identification procedure was utilized. Those terms will be defined below.

Prior to enacting this legislation, New York had maintained an evidentiary rule – the only state to do so – that did not permit evidence that, prior to trial, a witness had identified the defendant from a photograph. This evidentiary rule existed statutorily for 90 years.

In *People v. Caserta*,[2] the Court of Appeals explained the twin rationales for the exclusion of such evidence. First, the Court was concerned that jurors may draw the likely inference that the defendant had been previously arrested from the fact that the police were in possession of the defendant's photograph. Indeed, the Court referred to the source of these photographs as the "rogues' gallery."

The second rationale for the rule was a concern that photographs were a more suggestive, if not less reliable, means of identification. As the Court noted, photographs are sometimes of poor or uneven quality and easily distorted. Such photographs could depict a dated or distorted image of a suspect and render any identification unreliable.

The prohibition against prior photo identification evidence was not absolute. For example, defense counsel could open the door to such evidence should counsel

Hon. Barry Kamins is a retired Supreme Court Justice, author of *New York Search and Seizure* (Lexis-Nexis 2017) and a partner in Aidala, Bertuna & Kamins. He is an adjunct professor of law at Brooklyn Law School where he teaches New York Criminal Procedure.

mislead a jury by creating an inaccurate impression that a witness was unable to identify, or had not identified, the defendant prior to trial. In addition, should a defendant refuse to participate in a corporeal lineup, evidence of a pre-trial photographic lineup would be admissible.[3] If a witness's testimony was challenged as a recent fabrication, evidence of a prior photographic identification would be admissible as a recent fabrication on the condition that the identification predated the motive to testify. Finally, a *defendant* could choose to waive the protection of the *Caserta* rule by eliciting testimony about a prior photographic identification with the intention of establishing that a witness had been mistaken.

Over the last decade, the *Caserta* rule was re-examined and debated by numerous groups addressing the causes of wrongful convictions. The Innocence Project noted that scientific and psychological literature shows that witnesses tend to be committed to their initial identification even if that identification is mistaken. A photo array is often the first identification procedure and, therefore, it was seen as critical that the reliability of that procedure be improved.

In the last legislative session, prosecutors sought to overturn the *Caserta* rule in exchange for the imposition of procedures that would make identifications at photo arrays more reliable. Various defense groups advocated for changes in the procedure – some arguing for several mandatory reforms while others were willing to accept the "blinded" procedure as the only *quid pro quo*.

The new legislation does not make mandatory many of the reforms sought by some groups. What is an essential element of the legislation, however, is the required use of "blind" or "blinded" procedures.

In a "blind" procedure, the administrator does not know the identity of the suspect. Two people are required to conduct a blind array – one to assemble the array and one to administer it.

In a "blinded" procedure, while the administrator may know who the suspect is, by virtue of the procedure's administration, the administrator does not know the suspect's position in the array until the procedure is completed. This can be accomplished in several ways. An array can be assembled by someone, other than the administrator, and then placed in an unmarked folder for the administrator. This is known as the "two-person shuffle." Or the administrator can create multiple arrays in which the suspect's position is different in each; each array is in a separate sealed envelope. The witness then selects one of the envelopes to use as the array. This is known as the "one-person shuffle." Regardless of which procedure is used, the administrator should be positioned in such a way so that he or she is not in the witness's line of sight during the viewing of the array.

The above procedures were mandated based on the scientific literature that established certain principles relating to the role of an administrator conducting a photo array. It has been documented that the state of mind of the administrator might contribute to the suggestiveness of a photo array. Administrators who know the identity of the suspect in the array may inadvertently or intentionally influence the witness's identification. Conversely, an administrator who does not know the identity of the suspect is unlikely to steer the witness to the suspect through verbal or nonverbal cues.

If an administrator utilizes either a "blind" or "blinded" procedure, the prosecutor will now be permitted to offer testimony that the witness identified the defendant's photograph on a prior occasion as the perpetrator of the crime. This will constitute evidence-in-chief, thus overruling *Caserta*, and it will make New York the 22nd state to utilize blinded identification procedures.

The failure to utilize a "blinded" procedure will only affect the admissibility of testimony regarding a prior photographic identification. It cannot constitute a legal basis to suppress other identification evidence pursuant to CPL § 710.20(6).

The legislation also required the Division of Criminal Justice Services (DCJS) to promulgate a number of written best practices for photo and corporeal (live lineup) identification procedures that must be disseminated to police agencies around the state. It is important to note that these procedures are not mandatory and should law enforcement not utilize them, evidence of a prior photographic identification will still be admissible provided, of course, that a "blind" or "blinded" photo array was utilized.

In June, DCJS promulgated these procedures and disseminated them to all police departments around the state. These best practices incorporate many years of scientific research on memory and interview techniques. They focus on seven critical aspects of administering photo arrays: selection of fillers; inviting a witness to view an array; instructions to the witness prior to viewing an array; administering the procedure; post-viewing questions of the witness; documentation of the procedure; and speaking with the witness after the procedure.

Seven Aspects of Administering Photo Arrays

With respect to the selection of fillers, the new protocols suggest that a description of the perpetrator, given by the witness, be taken into account when selecting fillers to be used in the array. A witness's description of the perpetrator can be relevant to the suggestiveness inquiry. Prosecutors and defense counsel will argue whether the composition of an array unfairly highlighted a defendant based upon the witness's description. "The court, for its part, must evaluate the suggestiveness of the pre-trial identification procedure both in light of *and* in spite of the witness's description."[4]

The protocols discuss what the police should say to a witness when inviting him or her to view an array. For example, a police officer should *not* tell the witness

whether a person is in custody or whether the police have any corroborating evidence, e.g., a confession or physical evidence. The police should merely advise the witness that they intend to conduct an identification procedure without saying anything about the suspect.

Once the witness has arrived at the police facility, the protocols discuss the nature of the instructions that should be given to the witness. Initially, the witness should be told that the perpetrator may or may not be in the array and that the witness should not assume that the administrator knows the identity of the perpetrator.

The witness must also be instructed about the quality of the photographs in the array. For example, the witness should be told that individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change. In addition, the true complexion of a person may be lighter or darker than shown in the photograph. The witness will be told to ignore any markings that may appear on the photographs.

Finally, the witness should be told that every witness who makes an identification will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind.

After viewing a "blind" or "blinded" photo array, the witness will be asked whether he or she recognized anyone and, if so, what photograph was recognized. In addition, the witness will be asked "from where do you recognize the person in the photograph?" Finally, the witness will be asked to describe his or her level of confidence, e.g., "without using a number, how sure are you?"

The protocols suggest certain best practices with regard to documenting the procedure. Unless the witness objects at the outset, the entire identification procedure should be memorialized using audio or video recording. This may not be possible if there are equipment issues or the police believe that a recording would jeopardize the safety of a witness. The memorialization should include any physical or verbal reaction to the array as well as a confidence statement by the witness.

Once the identification is concluded and documented, the administrator should not make any comment to the witness that would suggest that the witness identified the correct suspect.

A few observations can be made about the new protocols. The "blind" procedure requires the use of two individuals while the "blinded" procedure, using the "one-person shuffle," only requires one administrator. Thus the "blinded" array will be easier for law enforcement to administer and may become the default method for the police. In addition, the police may decide not to conduct corporeal lineups at all since photo arrays are much easier to administer. As a result, in a case without any independent forensic evidence, a conviction could rest solely upon a single photo identification.

The above protocols are not mandatory and a failure to utilize them will not mandate the suppression of a pre-trial identification. As many police agencies around the state begin to utilize them, however, they will undoubtedly become standardized procedures of pre-trial identification.

New procedures for law enforcement personnel in New York reflect a national trend of state-based eyewitness identification reform.

A National Trend

These new procedures for law enforcement personnel in New York reflect a national trend of state-based eyewitness identification reform.[5] Many of these reforms embrace the current state of scientifically accepted identification research. For example, in *State v. Henderson*,[6] the New Jersey Supreme Court used its supervisory powers to direct law enforcement to adopt best practices based on the scientific research of the last three decades. Supreme Court Justice Sonia Sotomayor recently noted that a vast body of scientific literature has reinforced the concern expressed by the court a half-century ago that eyewitness misidentification is the single greatest cause of wrongful conviction in this country.[7]

Video Recording of Custodial Interrogations

A second substantive enactment in the budget bill requires the video recording of custodial interrogations by a public servant at a detention facility when the interrogation involves certain enumerated felonies.[8]

A "detention facility" is defined as any location where an individual is being held in connection with criminal charges that have been or may be filed. The statute expressly includes a police station, correctional facility, holding facility for prisoners and a prosecutor's office. The recording must include the entire custodial interrogation, including the administration of *Miranda* warnings and the waiver of such rights.[9]

The video recordings are required only when the interrogation involves one of 19 enumerated felonies. They fall within the following categories: any A-1 felony other than a controlled substance felony under Article 220 of the Penal Law; any Class B violent offense under

Article 125 of the Penal Law (homicide); any Class B violent felony offense under Article 130 of the Penal Law (sex offense); and the A-II felonies of predatory sexual assault (PL § 130.95 and § 130.96). As a result, the statute does not apply to certain significant felonies, including second-degree rape and first-degree robbery.

The statute excuses the failure to record a statement for "good cause" by the prosecutor and lists 10 examples of what would constitute good cause. The excuses fall into several general categories: where the failure to record is beyond the control of the People; where the recording would jeopardize the safety of any person or reveal the identity of a confidential informant; or where a suspect refuses to be interrogated if the interrogation is recorded.[10] The list is not exhaustive.

The prosecutor has the burden of establishing good cause for the failure to record the interrogation. Should a court find, however, that there was not good cause for failing to record, the court may not suppress a confession or statement based solely on that ground. A court shall consider the failure to record as a factor, but not as the sole factor, in determining whether such confession shall be admissible at trial. At the defendant's request, the court must instruct the jury that the People's failure to record may be weighted as a factor, but not as the sole factor, in determining whether a statement was voluntarily made, or was made at all.[11]

Raising the Age of Criminal Responsibility

The third new law raises the age of criminal responsibility in New York.[12] As of October 1, 2018, all 16-year-olds and, on October 1, 2019, all 17-year-olds with a few exceptions, will no longer be criminally responsible for misdemeanors – those charges will now be handled in Family Court where the individual may be adjudicated a "juvenile delinquent." The only exception is where the misdemeanor is either accompanied by a felony charge, is the result of a guilty plea in satisfaction of felony charges, or falls under the Vehicle and Traffic Law. In those instances, the misdemeanor charges will remain in the local criminal court. In addition, traffic infractions and stand-alone violations will continue to be adjudicated in local criminal courts.

The adjudication of felonies for this age group is more complicated. All felony cases will originate in a newly established Youth Part in the Superior Court in each county, presided over by Family Court judges who will receive specialized training in juvenile justice and adolescent development.[13]

A 16-year-old or 17-year-old who is charged with a felony under the new law is designated an "adolescent offender" (AO) and, upon arrest, the AO will be arraigned in the Youth Part.[14] Thus, individuals in this age group will bypass the local criminal court completely unless they are arrested at a time when the Youth Part is not in session, e.g., at night or on the weekend. At those times, the AO must be arraigned before special "accessible magistrates" designated by the presiding justice of each Appellate Division. These magistrates must be specially trained in juvenile justice and adolescent development and, presumably, current local criminal court judges would fill the role of "accessible magistrates."[15]

Once an adolescent offender is arraigned in the Youth Part, there is a provision for the case to be removed to Family Court where the individual could be adjudicated a "juvenile delinquent." Whether a case is removed depends on the severity of the offense.

When an adolescent offender is charged with any crime *other* than (1) a class A (non-drug) felony; (2) a violent felony; or (3) a felony for which a juvenile offender would be criminally responsible under CPL § 1.20(42), the statute comes close to a presumption in favor of a removal to Family Court.

The statute provides that the case "shall" be removed to Family Court *unless* the prosecutor files a motion within 30 days of the arraignment to prevent the removal. Ultimately, the court shall grant the motion for removal unless it determines that "extraordinary circumstances" exist that prevent the transfer to Family Court. The statute does not define "extraordinary circumstances."[16]

When an adolescent offender is charged with a class A (non-drug) felony or a violent felony, the court must adjourn the case no later than six calendar days after the arraignment. At the second appearance, the court must review the accusatory instrument to determine whether the case should be removed to Family Court. In order for the prosecutor to prevent the removal he or she must prove by a preponderance of the evidence that one of the following is established in the accusatory instrument: (1) the defendant caused "significant physical injury" (not defined) to a non-participant in the offense; (2) the defendant displayed a firearm, shotgun, rifle, or deadly weapon; or (3) the defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual contact or sexual contact.[17]

If the prosecution satisfies its burden, the case remains in the Youth Part and the defendant is prosecuted as an adult. Should the defendant be convicted, the court "shall consider the age of the defendant in exercising its discretion at sentencing."[18]

Under the new statute, *juvenile offenders* are arraigned in the Youth Part after their arrest and thus bypass the local criminal court unless the Youth Part is not in session.[19] The procedures for removing juvenile offenders to Family Court remains the same as under the prior statute although the numbering of the sections has changed.[20]

It should be noted that juvenile offenders and adolescent offenders who are not removed to Family Court are prosecuted as adults in the Youth Part. Nonetheless, they are still eligible for youthful offender treatment.

Finally, adolescent offenders who are held on bail prior to a conviction will no longer be held on Riker's

Island as of October 1, 2018. Each county must provide a "detention center for older youth."[21] An adolescent offender sentenced to an indeterminant or determinate sentence will be committed to the Department of Corrections and Community Supervision for placement in an adolescent offender facility.

Expansion of New York's Sealing Statute

The fourth substantive change in the budget bill is an expansion of New York's sealing statute that aligns this state with a majority of other states in addressing the collateral consequences of past convictions. A new section, Criminal Procedure Law § 160.59, applies to all offenders (adults, adolescent offenders and juvenile offenders) who have past convictions.[22] It is the first time New York will seal prior convictions – the current law only sealed violations and dismissed cases.

Under the new statute, an application can be made to seal up to two convictions, only one of which can be a felony. To qualify for sealing, at least 10 years must have elapsed from the date of sentence or the release from incarceration, whichever comes later.[23] The application must be made to the sentencing judge and if the applicant has two convictions, the application must be made to the judge who presided over the higher classification of crime. If the two crimes are misdemeanors, the application must be made to the judge who sentenced the defendant on the later date.

If the prosecutor objects to the application, he or she has 45 days to file an objection and a court can conduct a hearing to make a determination. Pursuant to the statute, the court must consider any relevant factors including the impact of sealing upon the defendant's reentry or rehabilitation as well as the impact on public safety and the public's confidence.[24]

Certain convictions are not eligible for sealing, including violent felonies, sex offenses under Article 130 of the Penal Law, homicides, A felonies, and an offense for which registration as a sex offender is required.[25]

The new sealing statute is different from the current sealing statutes (CPL §§ 160.50 and 160.55). First, unlike the current statutes, the new law permits the Department of Criminal Justice Services to retain the fingerprints and photographs of the defendant. In addition, the new law permits a number of "qualified agencies," including prosecutors' offices, to have access to these records.

Finally, a defendant cannot be required to waive the right to apply for sealing as part of any plea agreement.[26] In addition, an inquiry about a prior sealed conviction will constitute an unlawful discriminatory practice.[27]

Other Legislation

Aside from the budget bill, the legislature enacted a number of individual bills addressing criminal justice issues. As usual, the legislature amended the definition of certain crimes and increased penalties of others. It should be noted that for the second year in a row, Governor Cuomo vetoed a bill that would have amended the definition of a gravity knife. Over the past 14 years, more than 65,000 New Yorkers have been arrested for possession of a gravity knife, making this one of the most prosecuted crimes.

A gravity knife is "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device."[28] The knife was originally designed for use by paratroopers in World War II who needed to cut themselves free from a parachute that had become tangled in a tree or other obstruction. The knife could be opened by using one hand; the user pointed the knife downward and the blade became free from the force of gravity and the flick of the wrist.

The law, which was enacted in 1958, has been criticized as being too broad in that it has been enforced against large groups of individuals who use these knives every day as part of their trade. Law enforcement officials, however, caution that these knives present a threat to safety and that there are many alternative instruments that can be used by tradespeople including the widely used utility knife with a half-inch blade and the standard folding knife.

The governor vetoed last year's bill because, in his opinion, the bill would have potentially legalized all folding knives and placed a burden on law enforcement to determine the design attributes of each knife. This year in vetoing the bill, the Governor found that while it did succeed in removing any ambiguity in the definition of a gravity knife, "it did so in a way that would essentially legalize all folding knives."[29] This, he said, would have resulted in greater confusion among law enforcement and knife owners.

The legislature has responded to an increase of bomb threats against Jewish community centers, by adding "community center" to the definition of "public place." As a result, a person who makes a bomb threat against a community center can now be convicted of the felonies of Placing a False Bomb and Falsely Reporting an Incident.[30] In addition, the legislature closed a loophole that had existed in enforcing the crime of Obstructing a Firefighting Operation. The law has been expanded to protect a firefighter who is performing emergency medical care on a sick or injured person.[31]

In another amendment, the legislature has eliminated the inconsistent regulation of "sparkling devices" throughout New York State. A new law authorizes the sale of "sparkling devices" outside of cities with a population of one million or more, exempting them from the definition of "fireworks" and "dangerous fireworks."[32] Finally, illegal deer poaching is now a misdemeanor, punishable by up to a year in jail.[33]

As part of the budget bill, New York State will reimburse all counties for improvements in indigent defense

services. This builds upon a 2014 settlement in which the state agreed to settle a class-action lawsuit[34] that accused the state of failing to provide adequate representation to indigent defendants in five counties (Suffolk, Washington, Ontario, Onondaga and Schuyler). The settlement committed the state to pay for improved services to indigent defense systems in those counties, but did not address New York's other 57 counties.

Under the new legislation, the Office of Indigent Legal Services must provide a statewide plan to provide for the following: ensuring that defendants are represented by counsel at arraignment; reducing caseloads for public defenders; and improving the resources available to attorneys representing indigent defendants. In addition, the state will provide up to $250 million over six years to pay for the implementation of these reforms.[35]

A "transportation network company," such as Uber, Lyft, etc., cannot employ an individual who is a registered sex offender.

Procedural Changes

A number of procedural changes were enacted in the last legislative session. In 2016, the legislature enacted a bill establishing requirements for law enforcement agencies with respect to sexual offense evidence kits. This year the legislature has enacted several amendments that clarify last year's bill.

First, it was clarified that the requirements apply to police and prosecutorial offices. Second, agencies are required to develop a DNA profile when the biological evidence obtained is eligible for comparison to the federal CODIS database. The agencies are also required to take an inventory of the kits and submit the inventory to the New York State Division of Criminal Justice Services. The agencies will also have less time to submit these kits for analysis; the time has been shortened from 180 days to 30 days. Failure to comply with the time frames for submission and testing, however, will not be grounds for suppression of evidence under Criminal Procedure Law § 710.20. Finally, the effective date of most of these changes was extended to one year after it becomes law.[36]

Under current law, a pre-sentence investigation report may be waived by the parties when a sentence of felony probation is to be imposed. A new law now also permits a waiver of the report when a conditional discharge is to be imposed.[37] Another new law would require police officers investigating a vehicular accident to request that all operators of the motor vehicles involved in the accident submit to a field sobriety test where a person was seriously injured or killed as a result of the accident. The request must be made if the police officer has reasonable grounds to believe that the operator committed a "serious traffic violation," defined as operating a vehicle in violation of enumerated sections of the Vehicle and Traffic Law. These violations include driving with a suspended license, leaving the scene of an accident, speeding, and reckless driving. A motorist who refuses to take the test would be subject to a suspension of his or her license.[38]

Another procedural change is designed to facilitate the appeal from a court that is not designated a court of record. These courts do not utilize stenographers to make records of the proceedings. As a result, an appeal is heard on a record pieced together by means of (1) "an affidavit of errors" prepared by the appellant and (2) a summary of the facts made by the judge. A decade ago the Office of Court Administration installed electronic recording devices in these courts. Nonetheless, the Court of Appeals recently held that a transcript derived from an electronic recording of the proceedings is not an acceptable substitute for the filing of an affidavit of errors.[39] In order to provide an appellant sufficient time to obtain the transcript of the electronic recording, an amendment extends the time to file a Notice of Appeal from 30 to 60 days.[40]

Finally, the legislature has concluded that the felony of animal fighting is a heinous crime that remains largely undetectable. As a result, it has added this crime to the list of designated crimes eligible for an application for an eavesdropping or video surveillance warrant.[41]

Sex Offenders

Several new laws will affect sex offenders. First, a "transportation network company," such as Uber, Lyft, etc., cannot employ an individual who is a registered sex offender.[42] Second, the Division of Criminal Justice Services must notify the appropriate law enforcement agency within two business days (rather than 48 hours) if a registered sex offender changes residence or enrolls in an institution of higher learning.[43]

Crime Victims

Victims of crimes will benefit from several new laws. Initially, the court system will make available translation services to all Family and Supreme Courts to assist in the translation of orders of protection where the person protected by the order has limited English proficiency or has a limited ability to read English.[44] In addition, victims of domestic violence can now make an application in County and Family Court, in addition to Supreme Court, for an order separating their voting registration records and any other records from records available to the public.[45]

Under a new law, prosecutors must provide the Board of Parole with a copy of the written notice it provides crime victims regarding the disposition of a criminal case and the victim's right to be heard by the board. This will enable the board to contact crime victims about the status of a parolee's hearing.[46] Finally, crime victims will now be compensated for transportation costs associated with any appearance in a criminal case from an arraignment through post-trial hearings.[47] In addition, reimbursement for crime scene cleanup expenses will now be paid to additional members of a victim's family.[48]

inmate to have bail posted, if the delay is requested by a pretrial services agency.[55]

Second, the Department of Corrections will begin accepting cash bail payments online, beginning on April 1, 2018, and once cash bail is posted an inmate must be released within five hours (beginning on October 1, 2017); four hours (beginning on April 1, 2018); and three hours (beginning on October 1, 2018).[56]

Finally, where a defendant is held on bail, the Department of Corrections shall ensure that a "bail facilitator" meets with an inmate within 48 hours of admission to a facility. The facilitator must explain to the inmate how to post bail or bond, the fees that may be collected by bail bond companies and must assist the inmate with any reasonable measures related to the posting of bail.[57] ■

The legislature has enacted a new law that permits an inmate to call his or her family within 24 hours of arriving at a new facility.

Prisoners

Several new laws will impact prisoners. Recognizing that inmates are routinely transferred from one facility to another for a variety of reasons, the legislature has enacted a new law that permits an inmate to call his or her family within 24 hours of arriving at a new facility.[49] The Parole Board will now be required to post its administrative appeal decisions online within 60 days of its determination.[50] Finally, last year a new law authorized the use of a qualified interpreter at parole hearings where an inmate does not speak English or speaks English as a second language. This year, an amendment requires the interpreter to be appointed by the New York State Office of General Services.[51]

Extending Laws

A number of laws scheduled to sunset this year have been extended. For example, Kendra's Law was extended until June 20, 2022; it established a statutory framework for court-ordered assisted outpatient treatment of individuals with mental illness.[52] A number of laws had their expiration dates extended from September 1, 2017 to September 1, 2019: numerous sentencing laws as well as laws relating to inmate work-release programs, electronic court appearances in designated counties, and the use of closed-circuit television for certain child witnesses.[53] Finally, certain sections of the Arts and Cultural Law, relating to the resale of tickets to places of entertainment, have been extended until June 20, 2018.[54]

New York City Local Laws

The New York City Council has enacted a number of local laws designed to facilitate the posting of bail and the release of inmates. First, in any case where less than $10,000 bail is set, the New York City Department of Corrections may delay the transportation of the defendant to a correctional facility for four to 12 hours to permit the

1. 2017 N.Y. Laws ch. 59 (amending Penal Law § 60.30), eff. July 1, 2017.
2. *People v. Caserta*, 19 N.Y.2d 18 (1966).
3. *People v. Perkins*, 15 N.Y.3d 200 (2010).
4. *New York Identification Law*, Hibel, at 4–16.
5. "*The Promises and Pitfalls of State Eyewitness Identification Reforms*," 104 Ky. L.J. 99 (2016).
6. *State v. Henderson*, 27 A.3d 872 (2011).
7. *Perry v. New Hampshire*, 565 U.S. 228 (2012) (*dissenting opinion*); *U.S. v. Wade*, 388 U.S. 218, 219.
8. 2017 N.Y. Laws ch. 59 (amending Penal Law § 60.45).
9. Amending Penal Law § 60.45(3).
10. Amending Penal Law § 60.45(3).
11. Amending Penal Law § 60.45(3)(d).
12. 2017 N.Y. Laws ch. 59, eff. October 1, 2018 and October 1, 2019.
13. Criminal Procedure Law § 722.10 (CPL).
14. CPL § 1.20(44).
15. CPL §§ 722.20 and 722.21.
16. CPL § 722.23(1).
17. CPL § 722.23(2).
18. Penal Law § 60.10(a).
19. CPL § 722.20.
20. *Id.*
21. Correction Law § 40(2).
22. 2017 N.Y. Laws ch. 59, eff. October 7, 2017; ch. 60.
23. CPL § 160.59(5).
24. CPL § 160.59(7).
25. CPL § 160.59(1).
26. CPL § 160.59(11).
27. Executive Law § 296 (16).
28. Penal Law § 260.00(5).
29. Governor's veto message, No. 171.

30. 2017 N.Y. Laws ch. 167, eff. November 12, 2017 (amending Penal Law § 240.00).
31. 2017 N.Y. Laws ch. 124, eff. November 1, 2017 (amending Penal Law § 195.15).
32. S. 724, awaiting the governor's signature.
33. S. 387, awaiting the governor's signature.
34. *Hurrell-Harring v. New York*, 15 N.Y.3d 8 (2010).
35. 2017 N.Y. Laws ch. 59.
36. S. 980, awaiting the governor's signature.
37. 2017 N.Y. Laws ch. 194, eff. August 21, 2017 (amending CPL § 390.20).
38. S. 5562, awaiting the governor's signature.
39. *People v. Smith*, 27 N.Y.3d 643 (2016).
40. 2017 N.Y. Laws ch. 195, eff. October 20, 2017 (amending CPL § 460.10).
41. A.2806, awaiting the governor's signature.
42. 2017 N.Y. Laws ch. 60, eff. July 1, 2017 (amending CPL § 700.05).
43. 2017 N.Y. Laws ch. 17, eff. January 27, 2017 (amending Correction Law § 168-j).
44. 2017 N.Y. Laws ch. 55, eff. July 19, 2017 (amending Judiciary Law § 212).
45. S.6749, awaiting the governor's signature.
46. 2017 N.Y. Laws ch. 193, eff. August 21, 2017 (amending CPL § 440.50).
47. S.338, awaiting the governor's signature.
48. 2017 N.Y. Laws ch. 117, eff. January 21, 2018 (amending Executive Law § 624).
49. 2017 N.Y. Laws ch. 254, eff. September 21, 2017.
50. S.3982, awaiting the governor's signature.
51. 2017 N.Y. Laws ch. 9, eff. March 8, 2017 (amending Executive Law § 259-i).
52. 2017 N.Y. Laws ch. 67.
53. 2017 N.Y. Laws ch. 55.
54. 2017 N.Y. Laws ch. 68.
55. Local Law 1541, eff. September 20, 2017.
56. Local Law 1531, eff. October 1, 2017.
57. Local Law 1561, eff. January 18, 2018.

NEW YORK STATE | Division of Criminal Justice Services

ANDREW M. CUOMO
Governor

MICHAEL C. GREEN
Executive Deputy Commissioner

MEMORANDUM

TO: New York State Criminal Justice Executives

FROM: Mike Green
Executive Deputy Commissioner

DATE: June 21, 2017

SUBJECT: Identification Procedures: Photo Arrays and Line-ups Model Policy, Protocol and Forms

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Effective July 1, 2017, pursuant to recent changes in Criminal Procedure Law (60.25 & 60.30) - New York will join 49 other states by allowing certain photo identification evidence to be admitted at trial in a criminal case. The law recognizes that eyewitness identification evidence, if properly gathered, can serve as important and reliable evidence to convict the guilty or, if unfairly or improperly gathered, can be a factor to contribute to the wrongful conviction of an innocent. Thus the law now permits what is often the most reliable form of eyewitness identification evidence – a photo identification resulting from a procedure conducted shortly after the crime. But the law also recognizes the need to protect against even inadvertent error in gathering identification evidence - thus requiring as a condition of admissibility that the procedure be conducted in one of two specified ways. This statute also required the Division of Criminal Justice Services (DCJS) to promulgate standardized and detailed written protocols for the administration of both photo array and line-up identification procedures.

By way of background, in 2015 the Municipal Police Training Council (MPTC) adopted a model policy – developed from input of key stakeholders and based on best practices – to provide guidance to law enforcement agencies on the process of conducting photo array and line-up identification procedures. The recent statutory change, as referenced previously, will now permit the prosecution to introduce testimony of photo identification evidence in the direct case **so long as the procedure is conducted in a blind or blinded manner.**

To implement this change in law, the original MPTC model policy was revised at the Council's 228th meeting on June 7, 2017 to provide further guidance on conducting legally sufficient identification procedures. It was also adopted by DCJS as the standardized protocol and forms for the administration of photo array and live line-up identification procedures pursuant to Executive Law 837 subdivision 21. Furthermore, the statute amended section 840 of the Executive Law requiring the MPTC to implement a training program for all current and new police officers on these established protocols.

This training is currently under development and will be announced and made available to agencies in the near future.

The work completed by DCJS and MPTC takes into account the varying sizes and resources of New York State law enforcement agencies. Per statute the policy and protocol is grounded in evidence-based principles. It provides best practices for each step of the process ranging from selection of fillers and witness invitation through documentation of the procedure and communication with the witness once the procedure has been completed. It was again reviewed by an experienced panel of criminal justice professionals to ensure that it provides best practices for the use of identification evidence, while being mindful of the realities faced by law enforcement and prosecutors.

Please note that failure to comply with the protocol cannot constitute the sole legal basis for suppression per Criminal Procedure Law 710.20(6), but admissibility of evidence of an identification procedure using a photo array will minimally require a blind or blinded procedure (Criminal Procedure Law 60.25 & 60.30).

Questions regarding the model policy, protocol and forms, or the upcoming online training should be directed to Senior Training Technician (Police) Michael Puckett at (518) 497-4917 or via e-mail at michael.puckett@dcjs.ny.gov. You may also download the document by clicking on or visiting the following link: https://goo.gl/sWQNmb.

Identification Procedures: Photo Arrays and Line-ups

Municipal Police Training Council Model Policy

and

Identification Procedures Protocol and Forms

Promulgated by the
Division of Criminal Justice Services
Pursuant to Executive Law 837 (21)

June 2017

NEW YORK STATE | Division of Criminal Justice Services | Municipal Police Training Council

80 South Swan Street, Albany, New York 12210

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Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

The Identification Procedures: Photo Arrays and Line-ups Model Policy is intended to allow for the individual needs of each of the police departments in New York State regardless of size or resource limitations. This model policy has been promulgated as the protocol and forms by DCJS pursuant to subdivision 21 of section 837 of the Executive Law of New York.

The Municipal Police Training Council (MPTC) approved the model policy in June 2017.

Acknowledgements

The District Attorney's Association of the State of New York "Photo Identification Guidelines", the District Attorney's Association of the State of New York "Line-up Procedure Guidelines", the International Association of Chiefs of Police "Eyewitness Identifications Model Policy", the National Academy of Sciences report titled: "Identifying the Culprit: Assessing Eyewitness Identification", and the recommendations made by the New York State Justice Task Force in their document titled: "Recommendations for Improving Eyewitness Identifications" served as a basis for this model policy.

The New York State Division of Criminal Justice Services (DCJS) acknowledges the extensive work done by the following associations and agencies:

District Attorney's Association of the State of New York

New York State Association of Chiefs of Police

New York State Police

New York City Police Department

New York State Sheriff's Association

New York State Office of Victim Services

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

I Purpose

Executive Law §837 subdivision 21 directs the Division to establish a standardized protocol and forms for the administration of photo array and live lineup identification procedures, and this document was developed to meet that requirement. This protocol is grounded in evidence-based principles and is intended to meet the needs of all police departments in New York State regardless of size or resource limitations.

In 2017 New York State's Criminal Procedure Law (CPL) was amended to permit the admissibility of photo array evidence where the procedures were conducted with safeguards to ensure accuracy. As a result of these changes, the prosecution is permitted to introduce testimony in a direct case by the person who made a photo identification – **so long as the procedure is conducted in a blind or blinded manner.** The protocols outlined here were developed to further structure the administration in a method and manner designed to ensure fair and reliable eyewitness identification procedures.

The Municipal Police Training Council has not only endorsed this protocol and forms, but also has implemented an online training program for all current and new police officers pursuant to subdivision 4 of section 840 of the Executive Law. All police agencies should have written policies that guide the administration of eyewitness identification procedures that comply with the CPL sections discussed herein. Policies based on these protocols will meet this requirement.

II Definitions

A. **Photo array**: A collection of photographs that are shown to a witness to determine if the witness can recognize a person involved with the crime.

B. **Line-up**: A collection of individuals, organized in a row, who are shown to a witness to determine if the witness can recognize a person involved with the crime.

C. **Suspect**: Person the police believe has committed the crime.

D. **Filler:** A person, other than the suspect, who is used in either a live line-up or a photo array.

E. **Administrator:** The person who is conducting the identification procedure.

F. **Blind Procedure:** An identification procedure where the administrator does not know the identity of the suspect.

G. **Blinded Procedure:** An identification procedure where the administrator may know who the suspect is, but by virtue of the procedure's administration, the administrator does not know where the suspect is in the array viewed by the

witness. This procedure is designed to prevent the administrator from being able to inadvertently provide cues to the witness.

H. **Confidence Statement:** A statement from an eyewitness immediately following their identification regarding their confidence or certainty about their identification. The witness should be asked to provide their level of certainty in their own words as opposed to using a numerical scale.

III Photo Arrays

A. Selection of fillers

1. Fillers should be similar in appearance to the suspect in the array.

2. While ensuring that the array is not unduly suggestive, the original description of the suspect should be taken into account when selecting fillers to be used.

3. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.

4. An administrator should not use a filler if the administrator is aware that the filler is known to the witness.

5. There should be at least five fillers, in addition to the suspect.

6. Only one suspect should be in each array.

7. If there is more than one suspect, then different fillers should be used in separate arrays for each suspect.

8. Photo quality, color and size should be consistent. Administrators should ensure that the photos do not contain any stray markings or information about the subject. Color and black and white photos should not be mixed.

9. Any identifying information contained on any of the photos should be covered and those areas of the other photos used should be similarly covered.

B. Inviting the witness to view the array

1. When a suspect is known and the investigator calls a witness to arrange for the viewing of a photo array, the investigator should simply advise the witness that he/she intends to conduct an identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: “We’d like you to come in to view a photo array in connection with the crime committed on (*date and location*).”

2. The investigator should avoid addressing whether or not a person is in custody.

3. Investigators should give no opinion on their perception of the witness's ability to make an identification.

4. Investigators should not inform the witness about any supporting evidence such as confessions, other identifications, or physical evidence that may have been obtained.

5. Witnesses should be prevented from speaking to the victim and any other witnesses about the identification procedure when they arrive to view the array.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.

2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.

3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) the witness is being asked to view the photo array to see if the witness recognizes anyone involved with the crime.

4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:

   a. The perpetrator may or may not be pictured.

   b. Do not assume I know who the perpetrator is.

   c. I want you to focus on the photo array and not to ask me or anyone else in the room for guidance about making an identification during the procedure.

5. Instructions to the witness about the quality of the photographs.

a. Individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.

b. Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.

c. Pay no attention to any markings that may appear on the photos, or any other differences in the type or style of the photographs.

6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind. Inform the witness that this question is not intended to suggest how certain or uncertain he/she might be about an identification. Every witness who makes an identification is asked this question.

7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.

8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.

a. The witness should sign the form indicating their consent or lack of consent.

b. If the witness does not consent, the officer should not record the procedure.

D. Administering the procedure

1. Photo arrays must always be conducted using either a “blind procedure” or “blinded procedure”. A “blind” procedure is preferable, where circumstances allow and it is practicable.

2. If the procedure is blinded, the administrator should handle and display the array so that the administrator does not know suspect’s position in the array until the procedure has completed.

3. Two methods that can be used to successfully accomplish a blinded procedure are:

a. "Two person shuffle" – the array is assembled by someone other than the administrator and then it is placed into an unmarked folder for the administrator.

b. "One person shuffle" – multiple arrays are created by the administrator and the suspect's position is different in each. Three sealed envelopes containing the arrays are provided to the witness who selects one to use. The envelopes should be identical and free of any markings. The witness should sign and date the two unused envelopes across the seal. These envelopes should also be preserved.

4. Regardless of the method of administration that is to be used, the administrator should be positioned in such a way so that they are not in the witness' line of sight during the viewing of the array. Where practicable, the administrator should still be able to view the witness and hear what they say.

5. If there are multiple witnesses viewing the array, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.

6. The witnesses must view the array separately. Multiple copies of the same array may be used for the same suspect for each new witness viewing the array.

7. To protect the integrity of the identification procedure, the administrator must remain neutral so as not to, even inadvertently, suggest a particular photograph to the witness.

8. Attention should be given to the location of the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.

9. Generally, it is not advisable for a witness to be involved in multiple procedures involving the same suspect.

E. Post viewing questions

1. After viewing the array ask the witness the following questions:

a. Do you recognize anyone?

b. If so, what number photograph do you recognize?

c. From where do you recognize the person?

2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.

3. Confidence Statement

   a. Ask the witness to describe his/her certainty about any identification that is made.

   b. Ask the witness to use his/her own words without using a numerical scale. For example, say, "Without using numbers, how sure are you?"

F. Documentation

1. Document any changes made to any of the photographs used.

2. Document where the procedure took place, who was present, the date and time it was administered.

3. Preserve the photo array in the original form that was shown to each witness.

4. Each witness should complete a standardized form after viewing the array and the actual array used should be signed and dated by each witness.

5. Recording the Procedure

   a. The entire identification procedure should be memorialized and documented. Where practicable and where the witness' consent has been gained the procedure should be memorialized using audio or video recording.

   b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented on a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.

   c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to:

      (i) If it is law enforcement's belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant;

(ii) recording equipment malfunctions;

(iii) recording equipment is not available because it was otherwise being used;

(iv) the identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy;

(v) inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel; or

(vi) a lack of consent from the witness.

6. Any physical or verbal reaction to the array should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.

7. The confidence statement should be documented verbatim.

8. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide this notice could prevent its use in court.

G. Speaking with the witness after the procedure

1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.

2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.

3. The administrator should not comment or make gestures on the identification itself by saying things such as: “Great job” or “We knew you would recognize him” or even nodding his/her head in agreement.

4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.

H. All members who will be involved in the administration of a photo array shall receive training on how to properly administer photo arrays.

IV Live Line-ups

A. Selection of fillers

1. Fillers should be similar in appearance to the suspect in the line-up.

2. While ensuring that the array is not unduly suggestive, the original description of the suspect should be taken into account when selecting fillers to be used.

3. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.

4. An administrator should not use a filler if the administrator is aware that the filler is known to the witness

5. Where practicable there should be five fillers, in addition to the suspect, but in no case, should there be less than four fillers used.

6. Only one suspect should appear per line-up.

7. If necessary, all members of the line-up should be seated to minimize any differences in height.

8. If there is more than one suspect, then different fillers should be used in separate line-ups for each suspect.

9. The suspect should be allowed to pick his position within the line-up. If a prior identification was made using a photo array that number should be avoided unless insisted upon by the suspect.

10. The fillers must be instructed not to speak with each other or make unnecessary gestures. All members of the line-up should be instructed to remain still, hold the placard, and look forward unless instructed otherwise by the security officer.

B. Inviting the witness to view the line-up

1. When an investigator calls a witness to arrange for the witness to view a line-up, the investigator should simply ask the witness to come in for the identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: “We’d like you to come in to view a line-up in connection with the crime you witnessed on (*date and location*).”

2. Investigators should give no opinion on their perception of the witness’ ability to make an identification.

3. The investigator should avoid addressing whether or not a person is in custody.

4. Investigators should not inform the witness about any supporting evidence such as confessions, other IDs, or physical evidence that may have been obtained.

5. Witnesses should be prevented from speaking to the victim or any other witnesses about the identification procedure when they arrive to view the line-up.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.

2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.

3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) the witness is being asked to view the line-up to see if the witness recognizes anyone involved with that crime

4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:

   a. The perpetrator may or may not be present.

   b. Do not assume I know who the perpetrator is.

   c. I want you to focus on the line-up and not to ask me or anyone else in the room for guidance about making an identification during the procedure.

   d. Individuals presented in the line-up may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.

5. Instructions to the witness about line-up members moving, speaking, or changing clothing:

    a. Consideration should be given to telling the witness that the line-up members can be asked to speak, move or change clothing, if requested.

    b. If one line-up member is asked to speak, move, or change clothing then all the line-up members will be asked to do the same.

6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind. Inform the witness that this question is not intended to suggest how certain or uncertain he/she might be about an identification. Every witness who makes an identification is asked this question.

7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.

8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.

    a. The witness should sign the form indicating their consent or lack of consent.

    b. If the witness does not consent, the officer should not record the procedure.

D. Administering the procedure

1. Where practicable, taking into account resource limitations, a blind procedure should be used to conduct and administer a line-up, but is not required.

2. After the instructions are given, the administrator – whether the procedure is to be conducted blind or not – should stand away from the witness during the line-up, in a neutral manner, while still being in a position to observe the witness. The key is for the administrator to stand outside the witness' line of sight while the witness is viewing the line-up. This will reduce any inclination by the witness to look at the administrator for guidance.

3. Generally, it is not advisable for a witness to be involved in multiple procedures involving the same suspect.

4. Witnesses must view the line-up separately.

5. If there are multiple witnesses viewing the line-up, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.

6. The position of the suspect should be moved each time the line-up is shown to a different witness, assuming the suspect and/or defense counsel agree.

7. Attention should be given to the selection of a neutral location for the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.

8. The security officer who is monitoring the suspect and fillers in the line-up room should remain out of view of the witness. This will eliminate the potential for any claims of inadvertent suggestions by the security officer and it also removes the potential for distracting the witness as the line-up is being viewed.

E. Post-viewing questions

1. After viewing the line-up the witness should be asked:

   a. Do you recognize anyone?

   b. If so, what is the number of the person that you recognize?

   c. From where do you recognize the person?

2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.

3. Confidence statement

   a. Ask the witness to describe his/her certainty about any identification that is made.

   b. Ask the witness to use his/her own words without using a numerical scale. For example, say, "Without using numbers, how sure are you?"

F. Documenting the procedure

1. Recording the Procedure

a. The entire identification procedure should be memorialized and documented. Where practicable and where the witness' consent has been gained the procedure should be memorialized using audio or video recording.

b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented by the use of a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.

c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to:

(i) If it is law enforcement's belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant;

(ii) recording equipment malfunctions;

(iii) recording equipment is not available because it was otherwise being used;

(iv) the identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy.

(v) inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel; or

(vi) a lack of consent from the witness.

d. The line-up should be preserved by photograph. The witness should sign the photograph to verify that it is the line-up that he or she viewed.

2. Any physical or verbal reaction to the line-up should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.

3. The confidence statement should be documented verbatim.

4. Document where the procedure took place, who was present, the date and time it was administered.

5. Anything the line-up members are asked to do (e.g., speak, move, or change clothing) must be documented.

6. Document all people in the viewing room with the witness and the line-up room with the suspect.

7. Document the officer or person who escorts the witnesses to and from the line-up room.

8. Document requests made by the defense counsel and whether they were granted, and if not, why not. Reasonable requests from defense counsel should be honored and documented. Any defense request for a change in the line-up that is not, or cannot be, honored must also be documented.

9. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide notice of the identification could prevent its use in court.

G. Defendant's right to counsel

1. There are circumstances where during a line-up a suspect may have a defense attorney present.

2. Investigators should consult with their District Attorney's Office for guidance regarding a defendant's right to counsel.

3. When in attendance, the defense attorney must be instructed not to speak in the viewing room when the witness is present.

H. Speaking with the witness after the procedure

1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.

2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.

3. The administrator should not comment or make gestures on the identification itself by saying things such as: "Great job" or "We knew you would recognize him" or even nodding their head in agreement.

4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.

I. All members who will be involved in the administration of a live line-up shall receive training on how to properly administer line-ups.

LINE-UP FORM

WITNESS INSTRUCTIONS

READ THE FOLLOWING TO THE WITNESS <u>PRIOR</u> TO SHOWING THE LINE-UP

- With your consent, the procedure may be recorded using video or audio.
- Do you consent to recording? Video and Audio Audio Only No Initial: _____
- As part of our on-going investigation into a crime that occurred at (*location*) on (*date*) you are about to view a line-up. (*Use similarly neutral language to invite witness to the identification procedure.*)
- You will look through a one-way mirror and see six people in the line-up. They will not be able to see you.
- There will be a number associated with each person on the other side of the mirror.
- Take whatever time you want to view the line-up.
- The perpetrator may or may not be present.
- Do not assume I know who the perpetrator is.
- I want you to focus on the lineup and not look to me or anyone else in the room for guidance about making an identification during the procedure.
- Individuals presented in the line-up may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
- Members of the line-up can be requested to speak, move, or change clothing.
- If one line-up member is asked to speak, move, or change clothing, then all the line-up members will be asked to do the same.
- If you do make an identification I will ask you to describe your level of confidence about that identification using your own words, without the use of numbers. This question is not intended to suggest how certain or uncertain you might be about an identification. Every witness who makes an identification is asked this question.
- After you have had an opportunity to view the line-up I will ask you the following questions:
    1. Do you recognize anyone?
    2. If you do, what is the number of the person you recognize?
    3. From where do you recognize the person?
    4. **ONLY IF AN ID IS MADE:** Without using numbers, how sure are you?
- I may ask follow up questions.
- The investigation will continue regardless of whether or not you make an identification.
- **<u>DO NOT</u> discuss with other witnesses what you see, say or do during this procedure.**

WITNESS MUST SIGN

The above instructions have been read to me. _____ Date:_____

THIS PAGE OF THE FORM **MUST NOT** BE SHOWN TO THE WITNESS

LINE-UP CASE INFORMATION SHEET

Complaint or Case Report #:_____ Crime Date & Location: _____

Line-up Date: _____Time: _____ Location: _____

Crime Committed: _____Witness' Name: _____

Was Witness Transported? Yes □ No □

Transporting Officer: _____

Rank: _____ Command: _____ ID #: _____

Line-up Administrator: _____

Rank: _____ Command: _____ ID #: _____

Investigating Officer: _____

Rank: _____ Command: _____ ID #: _____

Security Officer: _____

Rank: _____ Command: _____ ID #: _____

Asst. District Attorney Present? Yes □ No □

Name of ADA: _____ Phone #: _____

Interpreter Present? Yes □ No □ Name: _____

Was the procedure video recorded? Video Only □ Audio & Video □ Audio Only □ No □

Line-up photograph taken? Yes □ No □ Witness initialed? Yes □ No □

Position	Name	Number Held	Age	Height	Weight
1					
2					
3					
4					
5					
6					

Suspect's name:_____ D.O.B. _____ Position:_____

Comments: _____

_____

Signature of Administrator: _____ Date: _____

LINE-UP FORM

RUNNING THE LINE-UP AND RESULTS

Witness:_____ Administrator: _____

Instructions to the administrator conducting the line-up:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure. When inviting the witness, avoid addressing whether or not a person is in custody.
- After instructing the witness, stand away and out of the witness' line of sight, while still being able to observe and hear the witness.
- Where practicable and where consent has been given, video or audio record the entire procedure.
- If video or audio recording obtain consent from the witness.
- A photo should be taken of the line-up and the witness should sign the photo to attest that it represents the line-up that they viewed.
- Introduce by name all individuals present in the viewing room to the witness.
- Tell the witness when the identification procedure will begin, (e.g. "You will now look through the one way mirror.")
- If there is a need to have a line-up member speak, move, change clothing, or some other activity, then all the line-up members must do the same activity.
- Complete the entire CASE INFORMATION SHEET that accompanies this form.

AFTER THE WITNESS HAS VIEWED THE LINE-UP, ASK THE FOLLOWING QUESTIONS

☐ Did you recognize anyone in the line-up? _____

- **If the answer to the preceding question is negative, STOP and go to the signature line.**
- **If the answer is positive, proceed to the next question:**

☐ If so, what is the number of the person that you recognize? _____

☐ From where do you recognize that person? _____

Record the words and gestures of the witness: _____

_____

CONFIDENCE STATEMENT

Without using numbers, how sure are you? _____

_____

Date: _____ Time: _____ Witness Signature: _____

LINE-UP FORM

SUSPECT'S COUNSEL SHEET

Suspect's attorney present? Yes □ No □

Suspect's attorney: _____ Telephone: _____

The suspect's attorney was instructed ***not*** to speak while in the viewing room with the witness.

Yes □ No □

If suspect's attorney makes requests about the line-up, record the request and whether the request was agreed to or refused:

1. Request: _____

   Agreed □ Refused □

   Reason for refusal? _____

   _____

2. Request: _____

   Agreed □ Refused □

   Reason for refusal? _____

   _____

3. Request: _____

   Agreed □ Refused □

   Reason for refusal? _____

   _____

PHOTO ARRAY FORM

WITNESS INSTRUCTIONS

READ THE FOLLOWING TO THE WITNESS <u>PRIOR</u> TO SHOWING THE PHOTO ARRAY

- With your consent, the procedure may be recorded using video or audio.
- Do you consent to recording? Video and Audio Audio Only No Initial: _____
- As part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) you will view a photo array. (*Use similarly neutral language to invite witness to the identification procedure.*)
- It consists of six photographs of individuals. Each photograph has a number underneath the photograph.
- Take whatever time you want to view the photo array.
- The perpetrator may or may not be pictured.
- Do not assume that I know who the perpetrator is.
- I want you to focus on the photo array and not look to me or anyone else in the room for guidance about making an identification during the procedure.
- Individuals presented in the photo array may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
- Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.
- Pay no attention to any markings that may appear on the photos, or any other difference in the type or style of the photographs.
- If you do make an identification I will ask you to describe your level of confidence about that identification using your own words. This question is not intended to suggest how certain or uncertain you might be about an identification. Every witness who makes an identification is asked this question.
- After you have had an opportunity to view the photo array I will ask you the following questions:
    1. Do you recognize anyone?
    2. If you do, what is the number of the photograph you recognize?
    3. From where do you recognize the person?
    4. **ONLY IF AN ID IS MADE:** Without using numbers, how sure are you?
- I may ask follow up questions.
- The investigation will continue regardless of whether or not you make an identification.
- **<u>DO NOT</u> discuss with other witnesses what you see, say or do during this procedure.**

WITNESS MUST SIGN

The above instructions have been read to me. _____ Date:_____

THIS PAGE OF THE FORM **MUST NOT** BE SHOWN TO THE WITNESS

PHOTO ARRAY CASE INFORMATION SHEET

Complaint or Case Report #:_____ Crime Date & Location: _____

Photo Array Date: _____Time: _____ Location: _____

Crime Committed: _____Witness' Name: _____

Was Witness Transported? Yes □ No □

Transporting Officer: _____

Rank: _____ Command: _____ ID #: _____

Photo Array Administrator: _____

Rank: _____ Command: _____ ID #: _____

Investigating Officer: _____

Rank: _____ Command: _____ ID #: _____

Interpreter Present? Yes □ No □ Name: _____

Was the procedure video recorded? Video Only □ Audio & Video □ Audio Only □ No □

The original photo array MUST be preserved.
Attach a copy of the photo array to this form and provide the information below, if available.

Position	Name	NYSID (where applicable)	Date of Photo
1			
2			
3			
4			
5			
6			

Suspect's name:_____ D.O.B. _____ Position: _____

Was any photo altered? Yes □ No □

If yes, which? _____

Describe the alteration: _____

Comments: _____

Signature of Administrator: _____ Date: _____

PHOTO ARRAY FORM

SHOWING THE PHOTO ARRAY

Witness:_____ Administrator: _____

Procedure conducted: □ blind □ blinded

If blinded, indicate method: □ One-person shuffle □ Two-person shuffle □ Other: _____

Instructions to the administrator showing the photo array:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure. When inviting the witness, avoid addressing whether or not a person is in custody.
- Provide the photo array(s) in an envelope or folder (or in three sealed envelopes if using the "one person shuffle" method) when handing it to the witness.
- Stand out of the witness' line of sight, where practical, but still observe the witness as the witness views the photo array.
- Where practicable and where consent has been given, video or audio record the entire procedure.
- If video or audio recording, obtain consent from the witness.
- Complete the entire CASE INFORMATION SHEET that accompanies this form.

AFTER THE WITNESS HAS VIEWED THE ARRAY, ASK THE FOLLOWING QUESTIONS

□ Did you recognize anyone in the photo array? _____

- **If the answer to the preceding question is negative, STOP and go to the signature line.**
- **If the answer is positive, proceed to the next question:**

□ If so, what is the number of the photograph that you recognize? _____

□ From where do you recognize that person? _____

Record the words and gestures of the witness: _____

_____

_____

CONFIDENCE STATEMENT

Without using numbers, how sure are you?_____

_____

_____

Date: _____ Time: _____ Witness Signature: _____

Proposed Bail Reform

Andy Kossover, Esq. (Moderator)
Ulster County Public Defender, Kossover Law Offices LLP, New Paltz

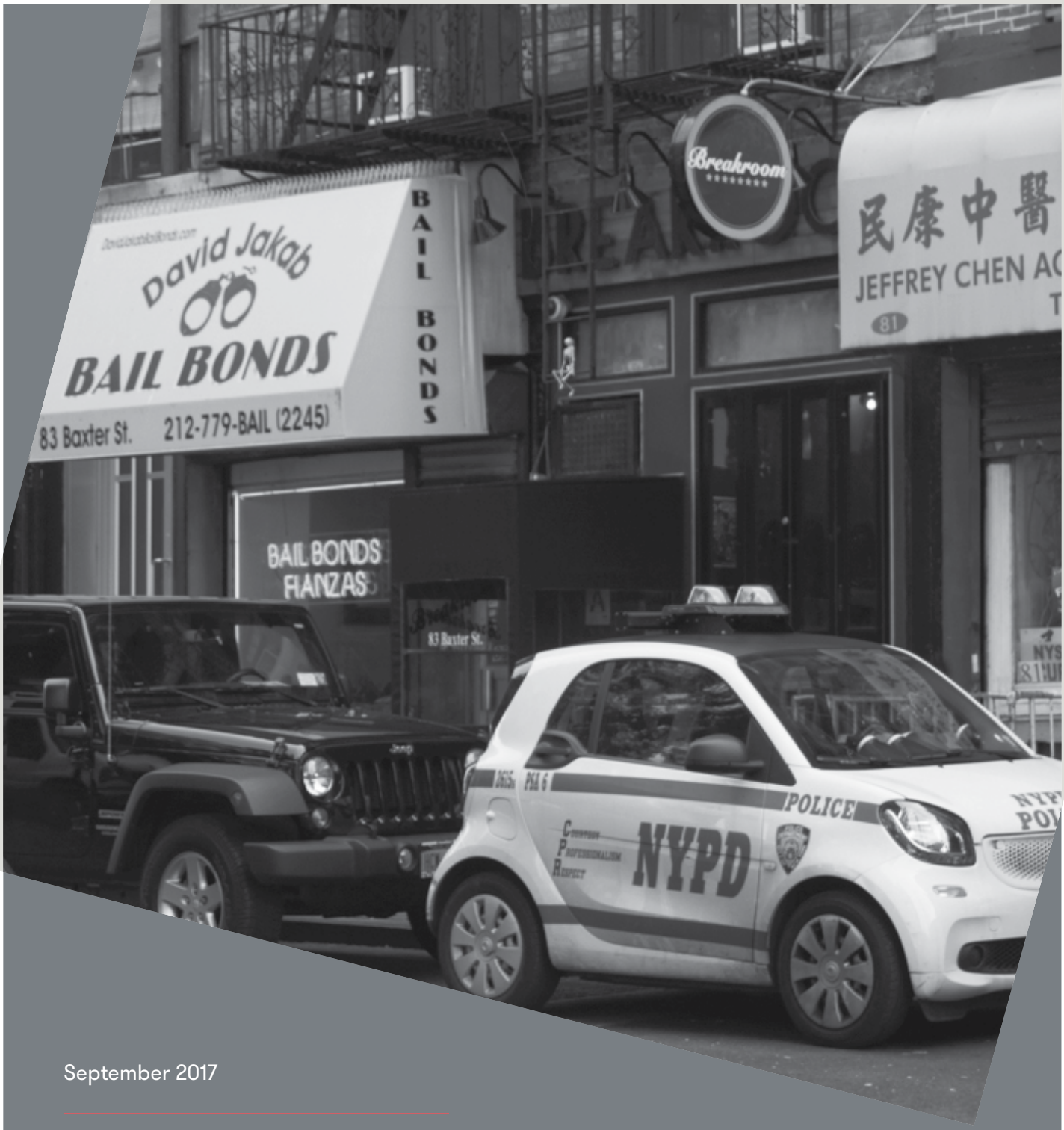
Hon. Matthew J. D'Emic
Administrative Judge, Kings County Supreme Court (Criminal Term), Brooklyn

J. Anthony Jordan, Esq.
District Attorney, Washington County District Attorney's Office, Fort Edward

Sean Hill, Esq.
Katal Center for Health, Equity, and Justice, NYC

Insha Rahman, Esq.
Vera Institute of Justice, NYC

Michael C. Green, Esq.
Executive Deputy Commissioner
New York State Division of Criminal Justice Services, Albany



September 2017

Against the Odds

Experimenting with Alternative Forms of Bail in New York City's Criminal Courts

Vera
INSTITUTE OF JUSTICE

Insha Rahman

From the Director

"Judge, if you set that amount of bail the odds are my client won't make it."

Those words are uttered frequently by defense attorneys in arraignment courts throughout New York City. Annually, almost 50,000 admissions to the jails at Rikers Island and across the city are for those held pretrial because they cannot afford the bail set in their case.

Under New York law, the use of bail doesn't have to be this onerous. Judges may opt to set bail from nine forms, including bail that requires a deposit of no more than 10 percent of the total amount, or bail that requires no upfront payment at all. Although these "alternative" forms of bail—known as partially secured and unsecured bonds, respectively—have been available for decades, they remain underutilized in the courts, where judges traditionally set bail in the form of cash or an insurance company bail bond.

Why aren't alternative forms of bail used more widely and what would happen if they were? In partnership with the Office of Court Administration, Vera explored these questions in a three-month experiment designed to promote the use of alternative forms of bail in New York City arraignment courts. The results of that effort are documented in this report, along with insights about the procedural challenges associated with these forms of bail and recommendations to improve their use.

Up against a mandate in the next decade to close Rikers Island and to cut the average daily jail population by half, improving the bail system is critical to criminal justice reform in New York City. While there is movement afoot to eliminate money bail altogether, this experiment demonstrates that significant progress can be made right now, under the current law, to reduce the power of money as a determinant of liberty. The 99 cases that comprise the cohort of this project tell a fascinating story about the possibility of culture change in the use of bail in the city's criminal courts, and demonstrate the potential of alternative forms of bail to serve as one more tool to make the bail system fairer.

Today, the number of people incarcerated in New York City's jails is at an all-time low, as is its crime rate, with several thousand fewer arrests this year compared to last. New York City has already demonstrated that less incarceration can equal *more* public safety, yet we cannot stop there. In the months since this project's inception, more stakeholders already have become aware of these forms of bail and efforts are underway to increase their use. We hope this report contributes to the growing knowledge about alternatives to traditional bail and reinforces what recent research demonstrates all too clearly—money alone should not determine a person's pretrial liberty.

Nicholas R. Turner
President and Director
Vera Institute of Justice

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Executive summary

Statistics show that money bail is unaffordable and out of reach for many New Yorkers. Even though the median bail amount on felony cases in New York City is $5,000—and even lower—at $1,000, on misdemeanor cases – over 7,000 people are detained pretrial at Rikers Island and other New York City jails on any given day because they cannot make bail.

Under New York law, the use of bail doesn't have to be this burdensome. In setting bail, judges have nine forms to choose from, including "alternative" forms such as partially secured or unsecured bonds, that require little to no upfront payment to secure a person's pretrial release. The traditional practice in the courts, however, is to ignore these options and impose only the two most onerous forms of bail to make: cash bail and insurance company bail bond.

The Vera Institute of Justice (Vera) launched a three-month experiment in New York City arraignment courts to examine what would happen if alternative forms of bail were used more often. In what kinds of cases might judges be willing to set these forms of bail? In what amounts? What impact would these alternatives have on a person's ability to make bail? What other pretrial outcomes might be expected?

Drawing from a cohort of 99 cases in which an unsecured or partially secured bond was set, these cases were tracked over a nine- to 12-month period to document bail-making, court appearance, pretrial re-arrest, and final case disposition. Interviews were conducted with judges, defenders, and court staff to better understand the results and develop recommendations for improving the use of bail in New York City.

The results were promising. Sixty-eight percent of the cohort made bail, and an additional 5 percent were released on recognizance. The use of alternative forms of bail in the cohort was not limited to low-level offenses or certain types of offenses. Approximately 54 percent of cases had a top charge of a felony, and the cohort—felonies and misdemeanors—spanned the gamut from drug possession, larceny, and robbery, to assault, criminal contempt, and weapons possession. Those released had a combined court appearance rate of 88 percent and a rate of pretrial re-arrest for new felony offenses of 8 percent. When released pretrial, the majority of cases resolved in a disposition less serious than the initial top charge at arraignment, with

fully one-third ending in dismissal and another 19 percent ending in a non-criminal conviction.

Ninety-nine cases out of the thousands where bail is set is a miniscule number in the larger scheme of New York City's bail system, yet this experiment illustrates the possibility of meaningful culture change.

The recommendations in this report offer strategies to increase and ease the use of alternative forms of bail:

- stakeholders should be educated about them;
- the associated paperwork and procedures to set these forms of bail should be simplified;
- they should be set routinely as an option in addition to traditional forms of bail; and
- when bail is set, it should be done with an individualized inquiry into a person's ability to pay.

Introduction

Every day in New York City, people who have been arrested are brought before a judge to hear the formal charges filed against them by the state. This is the process of arraignment, which typically occurs within 24 hours after arrest.[1] At arraignment, if the case is not resolved with a dismissal or a plea, the judge must make a decision—to release a person on his or her own recognizance pending trial, or to set bail—a sum of money intended to serve as collateral. Although New York law allows judges to opt from nine forms of bail—some less burdensome than others—in practice, they select only two forms: cash bail and insurance company bail bonds.[2]

Out of the nine forms of bail available, these "traditional" forms of bail—those used most commonly—are the most difficult for individuals and their families to afford. Cash bail requires a full payment of money up front to the courts, which is returned to the payer at the end of the case minus a small administrative charge if a guilty plea or conviction is secured. An insurance company bail bond requires a person to pay a 10 percent premium and other nonrefundable fees to a for-profit bail bond company, and to satisfy conditions such as obtaining multiple payers and proof of employment. Many New Yorkers cannot meet the financial and other demands of these traditional forms of bail. As a result, when bail is set, slightly less than half of all defendants make bail before the end of their cases.[3] Instead, they remain detained pretrial at Rikers Island or other city jails, such as the Brooklyn Detention Complex; the Vernon C. Bain Center, colloquially known as "the Barge" or "the Boat"; or the Manhattan Detention Complex, often called "the Tombs."

Partially secured and unsecured bonds are alternative forms of bail that are as legitimate under New York law as the traditional bail options. Alternative forms of bail are also easier to afford, as they do not require people to put up large amounts of money or to pay nonrefundable premiums and fees. Yet in setting bail on more than 40,000 cases annually, judges in New York City rarely impose these alternatives.[4] This is despite a 2012 ruling from New York's highest court that judges are required to impose at least two forms of bail so that a person may choose whichever option is less onerous.[5]

In a moment of intense focus on bail reform nationally and locally, Vera partnered with the New York State Office of Court Administration on a

three-month experiment in arraignment courts across New York City to promote the use of alternative forms of bail and explore these questions: What would happen if partially secured and unsecured bonds were used more often? In what kinds of cases might judges be willing to set these forms of bail? If set, what impact would these alternatives have on a person's ability to make bail? What rates of appearance at future court dates or re-arrest pending trial could be expected? How would these cases resolve?

The project had three objectives:

- to educate judges and defense attorneys about alternative forms of bail and combat the overall lack of awareness about how to request, or set, a partially secured or unsecured bond;
- to create a cohort of cases in which these forms of bail were set and to analyze their outcomes, including bail-making, court appearance, pretrial re-arrest, and case disposition; and
- to develop a better understanding of why alternative forms of bail have rarely been used, what about the cases in the cohort inspired a different approach, and what efforts are needed going forward to promote the use of these forms of bail more widely.

This report documents the results and offers some recommendations for reform. Although the results provide some valuable insights, it is important to note their limitations. Because the project was not designed as a research study, the cases in the cohort are not necessarily representative of the typical cases on which judges set bail. Due to the lack of a control group, the data comparisons offered in this report between alternative and traditional forms of bail for pretrial outcomes on bail-making, failure to appear, and re-arrest rates are illustrative only, and not conclusive. It is important not to overstate these as findings or draw generalized inferences from this project. What the results in this report do offer, however, are insights into the reasons why alternative forms of bail have historically been underutilized, how their greater use might impact pretrial detention rates and pretrial measures of success, and some steps that can be taken to increase their use in New York City arraignment courts.

How bail typically operates in New York City

Under New York law, the purpose of bail is to guarantee a person's appearance at subsequent court dates after an arrest.[6] The prevailing logic is that a financial stake hanging over a person's head serves as an incentive to appear in court or risk forfeiting that money. The request for bail comes initially from the prosecutor's office, with an assistant district attorney making a recommendation for a particular bail amount to be set based on the nature of the charges, the person's criminal history, any outstanding warrants, and other factors like ties to the community and employment status. When a person before the court is facing serious charges, has a long criminal record, or has a warrant history of missed court appearances, the amount of bail requested by the district attorney's office tends to increase.[7] The prosecution's bail request acts as an anchor, increasing the likelihood that the court will set bail, often at amounts beyond the reach of average New Yorkers.[8] In New York City, more than 50 percent of people cannot pay the bail amount imposed by the court, even though bail is set at lower amounts, on average, compared to other jurisdictions nationwide: the median bail amount set in New York City for misdemeanors is $1,000 and, for felonies, $5,000.[9] That many people cannot afford bail in the amount of $1,000, let alone $5,000, demonstrates New Yorkers' limited economic resources to make bail.[10]

Juan Gonzalez's case illustrates how the bail process typically works in New York City.[11] Juan found himself in handcuffs and under arrest when he tried to break up a brawl at the bar where he worked. After waiting in a cell for almost 24 hours until he met the public defender assigned to his case, he learned he was charged with felony assault. The public defender told him that based on experience the prosecutor would likely seek $15,000 bail, and the judge would likely set bail at $10,000.

Juan didn't have $10,000. He doubted his mother had that money either, but was sure she could come up with 10 percent of the amount and go to a bail bond company. His lawyer informed him that in addition to paying the 10 percent premium, Juan would also need at least one or two family members employed full-time to agree to sign for the bond and to show paystubs or tax returns. The public defender called Juan's mom, who in turn called his brother, uncle, and three other family members. Within a half hour, all six of them were at the courthouse, waiting anxiously for Juan to appear in front of the judge.

At the bail hearing, the prosecutor argued that bail should be set at $15,000 because Juan presented a flight risk, the assault charges were serious, he had a prior misdemeanor assault conviction, and recently had been arrested for theft of services—entering the subway without paying the fare—for which he had failed to complete his required two days of community service. Juan's lawyer argued for his release, detailing the circumstances of the brawl and his client's attempts to intervene. The public defender explained that the misdemeanor assault conviction was from five years prior, when Juan was 17 years old, and that he had successfully completed three years of probation and received youthful offender status. He further told the judge that Juan wasn't able to finish the community service on the recent arrest for jumping the turnstile because he had started working full-time and would have lost his job had he taken time off. The public defender pointed out Juan's family members in the courtroom, indicating Juan's strong ties to his community.

Nevertheless, the judge set bail at $7,500 insurance company bail bond or $5,000 cash. In practice, this ruling required Juan and his family either to pay more than $750 in non-refundable premiums and miscellaneous fees to a for-profit bail bond company, or to deposit $5,000 cash up front with the court. His family couldn't afford $5,000 in cash and, although his brother and uncle had $750 and were willing to sign for a bail bond, they couldn't find a bail bond company to underwrite the bond as neither Juan's brother, uncle, nor other family members were employed full-time. Despite potentially having a good defense at trial, Juan remained in jail for six weeks until he pled guilty to a misdemeanor and was released.

Filled with individuals like Juan Gonzalez who are unable to make bail, Rikers Island and other New York City jails face a crisis.[12] Upwards of 75 percent of people there on any given day are detained pretrial because they cannot make bail.[13] Almost half of those who enter are released from jail within seven days or less, illustrating the high levels of churn.[14] But although thousands of New Yorkers cycle quickly through the city's jails, another 10 percent of the jail population remains detained for at least six months, many for longer, awaiting resolution of their criminal cases.[15] The case of Kalief Browder, a 16-year-old arrested and held at Rikers Island for three years until his case was dismissed, brought into stark relief some of the most harmful consequences of bail and pretrial detention.[16]

New York's alternative forms of bail

Bail wasn't intended to work this way. Historically, the purpose of bail was to *increase* pretrial release and to guard against unnecessary pretrial detention. (See "Why bail reform matters" on page 9.) However, the practical effect of requiring cash bail or bond fees and premiums to be paid in exchange for pretrial release is that many people, despite being presumed innocent, remain in jail while awaiting trial because they do not have enough money to make bail.

Almost 50 years ago, the New York State Legislature recognized the need for an alternative:

> On the one hand, a judge may commit the defendant to prison or fix bail—which may well be beyond the defendant's means. On the other, he may release the defendant upon his own recognizance. In many instances, none of these decisions seems attractive or satisfactory. With this in mind, the proposal inserts two intermediate devices, one termed an "unsecured bail bond" and the other a "partially secured bail bond."[17]

In 1970, the legislature reformed the state's bail laws to allow judges to consider less restrictive forms of bail than cash. The express objective of bail reform was to "reduce the un-convicted portion of our jail population."[18] In addition to prescribing cash bail and insurance company bail bonds, New York State Criminal Procedure Law §520.10 allowed for an additional seven alternative forms of bail, most of them secured or unsecured variations of surety or appearance bonds.[19]

For people held on bail, these alternative forms provide options as to who can pay bail for them, in what form, and in what amount. The first distinction is between surety and appearance bonds. A *surety bond* requires the payer—called the "obligor" in the statute—to be someone other than the defendant, although a defendant may serve as one of two or more obligors. An *appearance bond* requires the defendant to be the sole person paying the bond. The second distinction is between secured, partially secured, and unsecured bonds. A *secured bond* requires those responsible for the bond to deposit personal or real property with the court, while a *partially secured bond* requires a money deposit of no more than 10 percent of the bond, although a judge may set a lesser amount. An *unsecured bond*, in contrast, requires no deposit of either property or money, but simply a promise to be liable for the full amount of the bond if the person fails to appear at subsequent court dates and bail is forfeited.

To see how these alternative forms of bail would play out in practice, consider again the case of Juan Gonzalez. If the judge had still set bail at $7,500

bond or $5,000 cash, but set the form of bail as a partially secured bond, Juan and his family would only have had to deposit $750—money that would be returned to them at the end of the case if he appeared for all his court dates.[20] If the judge had set an unsecured bond, Juan and his family wouldn't have needed to make any deposit at all, allowing him to walk out of the courtroom after his arraignment on a promise that they would pay the full amount of the bond only if he failed to appear in court. In setting either alternative form of bail, the obligors—in this case, his family members—would still swear, under oath, to be liable for the full $7,500 and complete paperwork attesting to their liability. But Juan Gonzalez likely would not have spent the night—much less six weeks—in jail.

Why bail reform matters

Historically, the purpose of bail was to facilitate pretrial release.[a] Bail originated as a sorting mechanism to release those individuals likely to return to court during the pendency of their case and detain those who posed too high of a flight risk. However, over time, the shift from the use of personal sureties and unsecured bonds to cash bail and bail bonds issued by for-profit companies resulted in the disparity we see today—hundreds of thousands of people in jail awaiting trial and unable to afford their freedom, while those wealthy enough to make bail are set free.[b]

In 1961, troubled by how many men and women they saw in pretrial detention when they visited a Manhattan jail, Louis Schweitzer and Herbert Sturz started the Manhattan Bail Project. Over three years, the Bail Project interviewed thousands of defendants in Manhattan Criminal Court and recommended release on recognizance to the presiding judge if the person demonstrated he or she was not a flight risk based on employment history, local community ties, and past criminal record.[c] Data from the experiment showed that 98 percent of individuals released returned to court, and were 250 percent more likely to be acquitted at the end of their cases than those who remained in jail on bail. Building on the success of the Manhattan Bail Project's findings, Congress passed the Bail Reform Act of 1966 to revise bail practices so that people "were not needlessly detained . . . regardless of financial status."[d]

Despite these efforts, the use of bail and rates of pretrial detention across the United States continued to rise, especially in smaller jurisdictions.[e] The result is the current system, in which almost 450,000 presumptively innocent individuals are held in jail nationwide on any given day simply because they cannot afford their bail.[f] Recent research has shown that the effects of unnecessary pretrial detention defy conventional wisdom that incarceration equals public safety—even short stays in jail can lead to increased rates of failure to appear and recidivism.[g]

The failings of pretrial justice over the past five decades have galvanized efforts at bail reform among the courts, criminal justice stakeholders, and advocates, based on many of the same lessons learned from the Manhattan Bail Project. Nationally, litigation challenging the use of bail schedules has resulted in several jurisdictions reconsidering their use of bail in low-level and misdemeanor cases.[h] Recent reforms to the New Jersey bail system have yielded a dramatic reduction in the use of cash bail.[i] In New York City, many new initiatives provide an alternative to traditional bail.[j] For example, nonprofit charitable bail funds in the Bronx and Brooklyn pay bail for people held in jail on misdemeanor charges where bail is set at $2,000 or less.[k] Building on the success of the bail funds, the New York City Council approved funding for a bail fund in all five boroughs to be launched in 2017.[l] Another citywide program, called Supervised Release, began in March 2016. It provides pretrial supervision to 3,000 people annually who are at risk of having bail set.[m]

The fundamental problem with cash bail is this: How can it be that two otherwise similarly-situated individuals, with the same charges, criminal histories, and circumstances, face radically different fates based simply on their wealth? Collectively, recent bail reform efforts have shown that people do not need their own money at stake to return to court, and that money as the determinant of pretrial liberty is neither effective nor fair.

Experimenting with alternative forms of bail: How it worked

Project impetus: Why are alternative forms of bail underutilized?

Despite being legitimate forms of bail, judges rarely if ever set an unsecured or partially secured bond in New York City courts.[21] There are several theories as to why. In some cases, particularly those involving serious charges, judges may use cash bail as a means to secure pretrial detention in the absence of a preventive detention statute by setting bail out of reach. In other instances, judges may simply be unaware of the options to use less restrictive forms of bail.[22]

Many judges, especially those newer to the bench, are unaware that these forms of bail exist under New York law, or have never seen them imposed when bail is set in the courts. As one judge noted, "It's just part of the culture—cash or bond? When I became a judge, it's just what everyone was using."[23] Another judge recounted, "I've rarely been asked to consider an alternative form of bail. The first time I was asked to set a partially secured bond, I hesitated because I was unfamiliar with the paperwork or the process."[24] This lack of familiarity is especially common in arraignments, where by custom the most recently elected or appointed criminal court judges are assigned.

The burden does not lie solely with the bench. Judges rarely receive requests from defense attorneys to set alternative forms of bail, and most judges are unlikely to go against custom and impose a form of bail that was not requested. Many defense attorneys are unaware that partially secured or unsecured bonds are available under New York law, or do not know the procedure and paperwork required to secure them. As one prominent public defender wrote, "I am the first to admit that until a few years ago, I had never really looked at the bail statute. I certainly never asked a judge to set a form of bail other than cash or insurance company bond."[25]

To request one of these alternative forms of bail—a partially secured or unsecured bond—the Office of Court Administration requires at least one person paying to agree to sign paperwork and swear under oath to be

liable. That person must be able to demonstrate that he or she has a source of income and will pay the full amount if bail is forfeited.

Both judges and attorneys may be deterred from using partially secured or unsecured bonds at arraignments because of the complexity of the paperwork required and the time needed to complete it and take the necessary testimony from obligors. Three different forms must be completed to secure an alternative form of bail. The *bail bond* form states the type of bail set, the amount of bail, and the names of the responsible parties. If the bond is secured, the bail bond form lists the property posted and, if the bond is partially secured, the amount deposited. A *justifying affidavit* must also be completed for each person responsible for the bond, and requires information about their place of residence, employment, and income. The third form, *undertaking to answer*, must also be completed for each responsible party, and requires each to swear under oath to be responsible for the person's appearance in court and liable for the full amount of bail if he or she fails to appear and bail is forfeited.

Project design and queries: What if alternative forms of bail were used more?

This experiment was conducted in criminal court arraignments in Manhattan, Queens, Brooklyn, and the Bronx over a three-month period. A total of 99 cases were identified from arraignment court calendars where an unsecured or partially secured bond had been set. Those cases were tracked over a nine- to 12-month period after arraignment to document bail-making, court appearance, pretrial re-arrest, and final case disposition.

Educating stakeholders about alternative forms of bail. Before the project period began, Vera trained defense attorneys at every public defender office in Manhattan, Queens, Brooklyn, and the Bronx on how to request partially secured and unsecured bonds at arraignments.[26] Attorneys from these offices are present at arraignments in all five boroughs and collectively handle the vast majority of cases arraigned in New York City.[27] Public defenders who attended the trainings were educated on New York's bail statute, including the nine forms of bail, and trained on following the procedure and completing the paperwork required for requesting an alternative form of bail. The training included time for discussion to share borough-specific strategies to

increase the likelihood that arraignment judges would set partially secured and unsecured bonds. Vera staff shared training materials and a short guide to alternative forms of bail during the trainings, which were also disseminated by e-mail to all attorneys in each of the offices.

Choosing and tracking a cohort. During the three-month project period, Vera, in collaboration with the New York State Office of Court Administration, reviewed the daily arraignment court calendars in Brooklyn, Manhattan, Queens, and the Bronx to flag cases in which an alternative form of bail was set. From December 2015 through March 2016, 99 cases were identified in which judges granted an unsecured or partially secured bond option in addition to traditional forms of bail. Prior to the project, court staff in arraignments routinely noted on the arraignment court calendar the outcome of every case heard during the shift, including information as to type and amount of bail set, and whether bail was made at arraignment. During the project period, court staff were instructed to note if a judge set an unsecured bond by listing "USB" next to that case, or "PSB" for a partially secured bond.

A daily review of completed court calendars identified all cases marked with "USB" and "PSB," which were then added to the project cohort. After documenting the docket numbers, defendant names, top charge, and other identifying information, Vera requested data from the Office of Court Administration on bail-making, future court appearances, case dispositions, and new arrests within the five boroughs for those cases. Vera's analysis of that data is documented below.

Baseline comparison data. No control group exists as the project was not designed to be a research study. Given this limitation, generalized inferences from the results in this report cannot be made.[28] There is, however, readily available data that provides a valuable baseline comparison of key pretrial outcomes in New York City that can be used for illustrative comparisons on bail-making, failure to appear, and pretrial re-arrest rates. The New York City Criminal Justice Agency (CJA) documents overall outcomes for all criminal court cases arraigned in New York City. Vera compared data from the project cohort on bail-making and failure to appear in court to citywide data in CJA's 2015 Annual Report.[29] Vera also compared re-arrest data to a 2009 CJA study on pretrial re-arrest rates.[30]

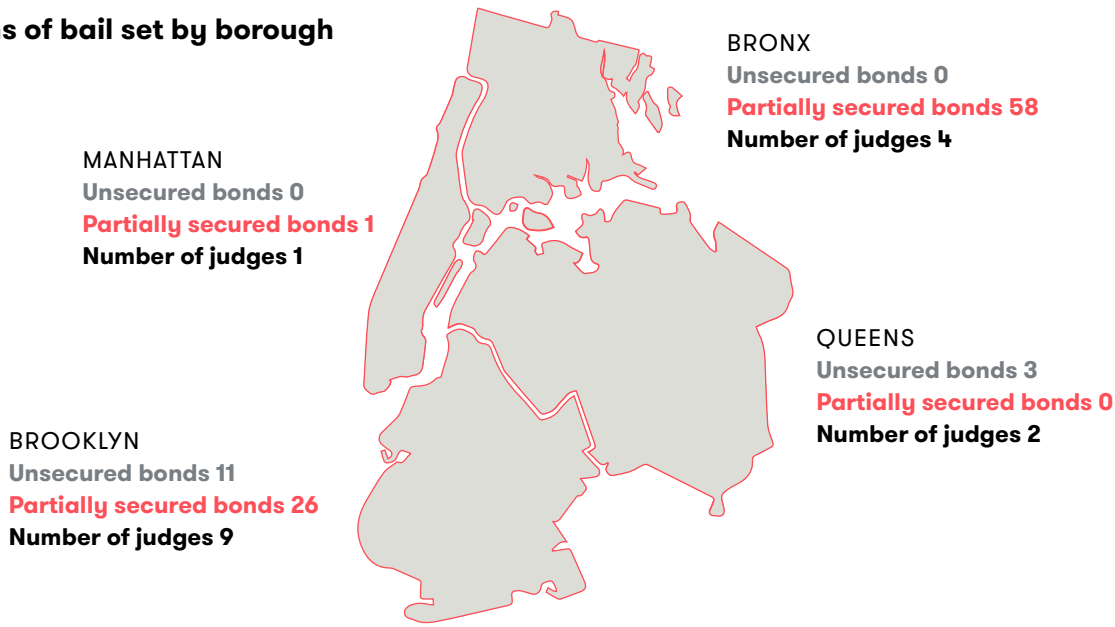
Data analysis

The 99 cases that were evaluated were tracked for a nine- to 12-month period following arraignment to document appearance at future court dates, often scheduled six to 12 weeks apart, and to allow time for the majority of cases in the cohort to resolve. Vera staff obtained and analyzed case outcome data for the cases along the following measures: failure to appear, pretrial re-arrest, and ultimate case dispositions. From interviews with stakeholders, including judges, defenders, and court staff, Vera also gathered qualitative information to better understand why an alternative form of bail had been granted.

In all cases in the cohort, an alternative form of bail was set *in addition to* traditional bail options, such as cash or an insurance company bail bond.[31] Although this does not conclusively rule out the possibility that defendants in any of the cases in the cohort would otherwise have been released on recognizance but for the setting of an alternative form of bail, it suggests that bail would likely have been set in these cases regardless.

Figure 1

Alternative forms of bail set by borough



Bail setting by borough and type of bond

By far the greatest use of partially secured and unsecured bonds during the project was in Brooklyn and the Bronx. Although each of the four boroughs included in the demonstration project had at least one case in which an alternative form of bail was set, and 16 judges set a partially secured or unsecured bond at least once, 96 percent of all cases (95 cases) came from these two boroughs. As shown in Figure 1 on page 13, in the cases studied, judges set an unsecured bond in 15 percent (14 cases), and a partially secured bond in the remaining 85 percent (85 cases).

Forms of bail set by charge and offense type

Vera analyzed the use of alternative forms of bail for cases in the cohort by charge as shown in Figure 2.[32] Notably, the use of partially secured and unsecured bonds was not limited to only low-level offenses. More than half of the cases examined had a top charge of a felony—29 percent nonviolent

Figure 2

Alternative forms of bail set by charge level

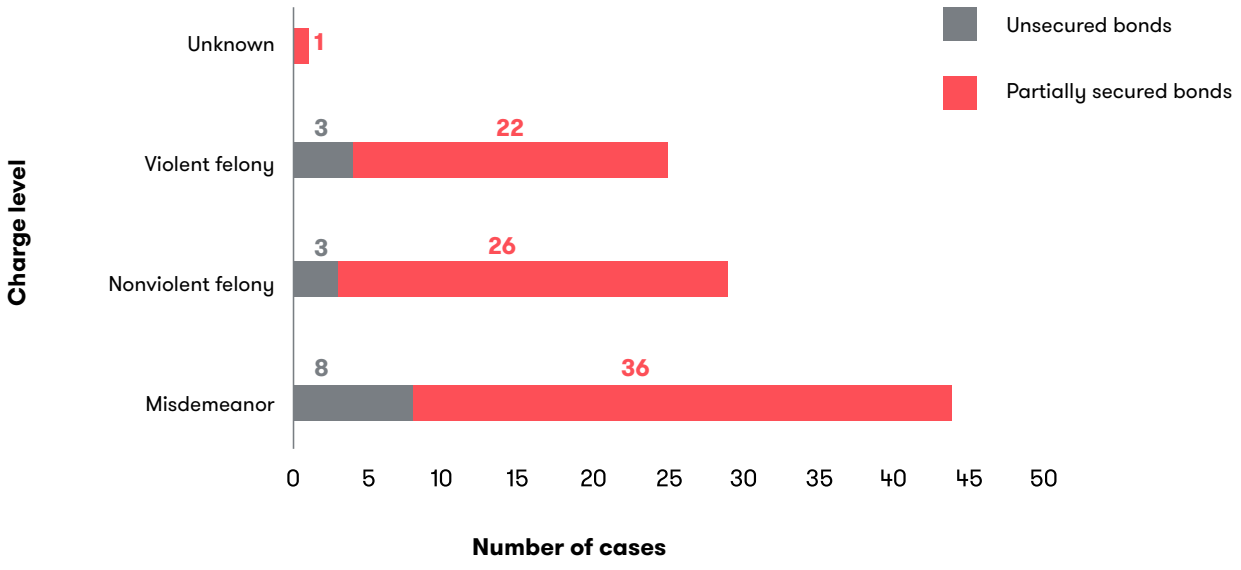
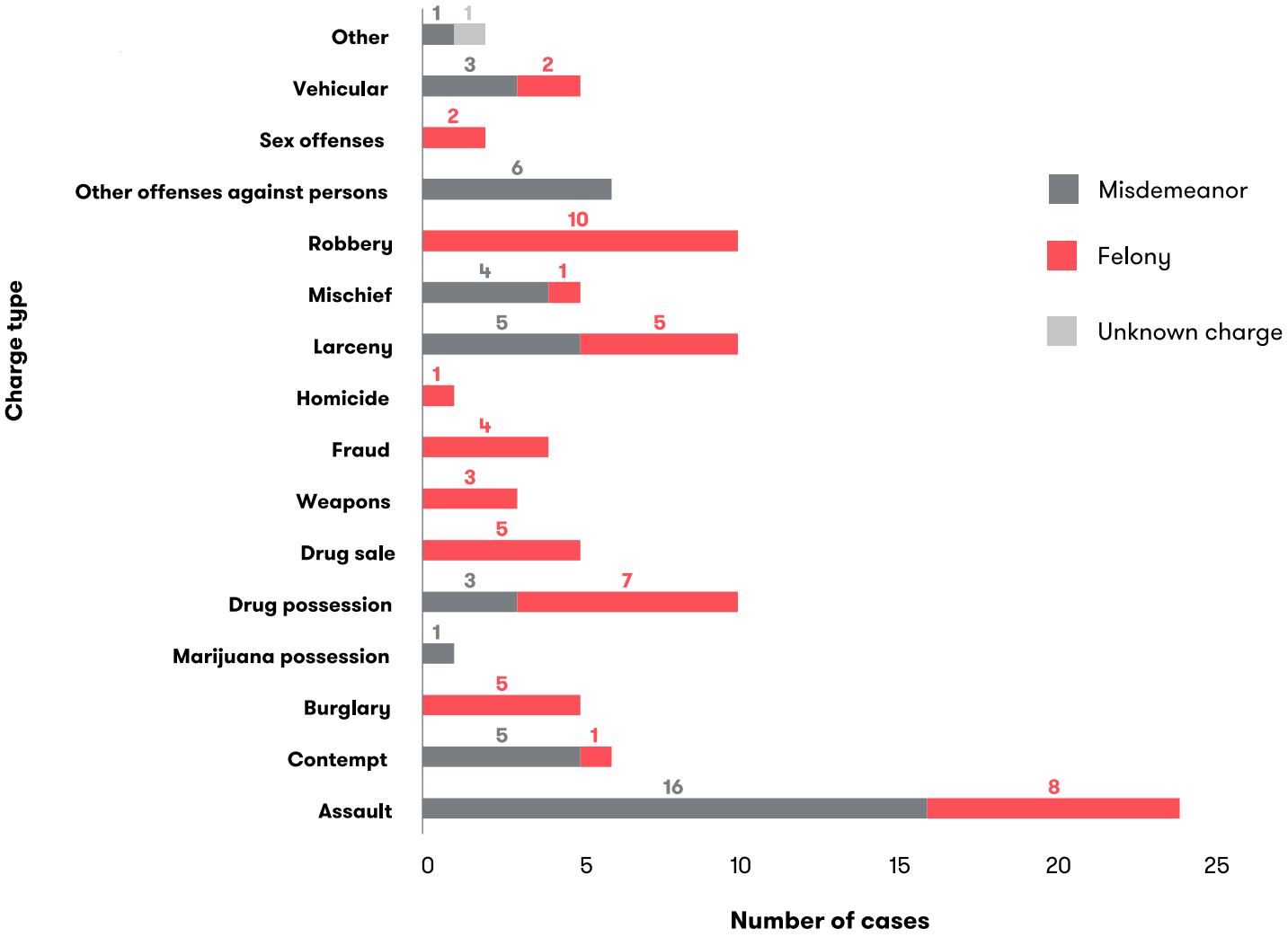


Figure 3

Alternative forms of bail set by offense type

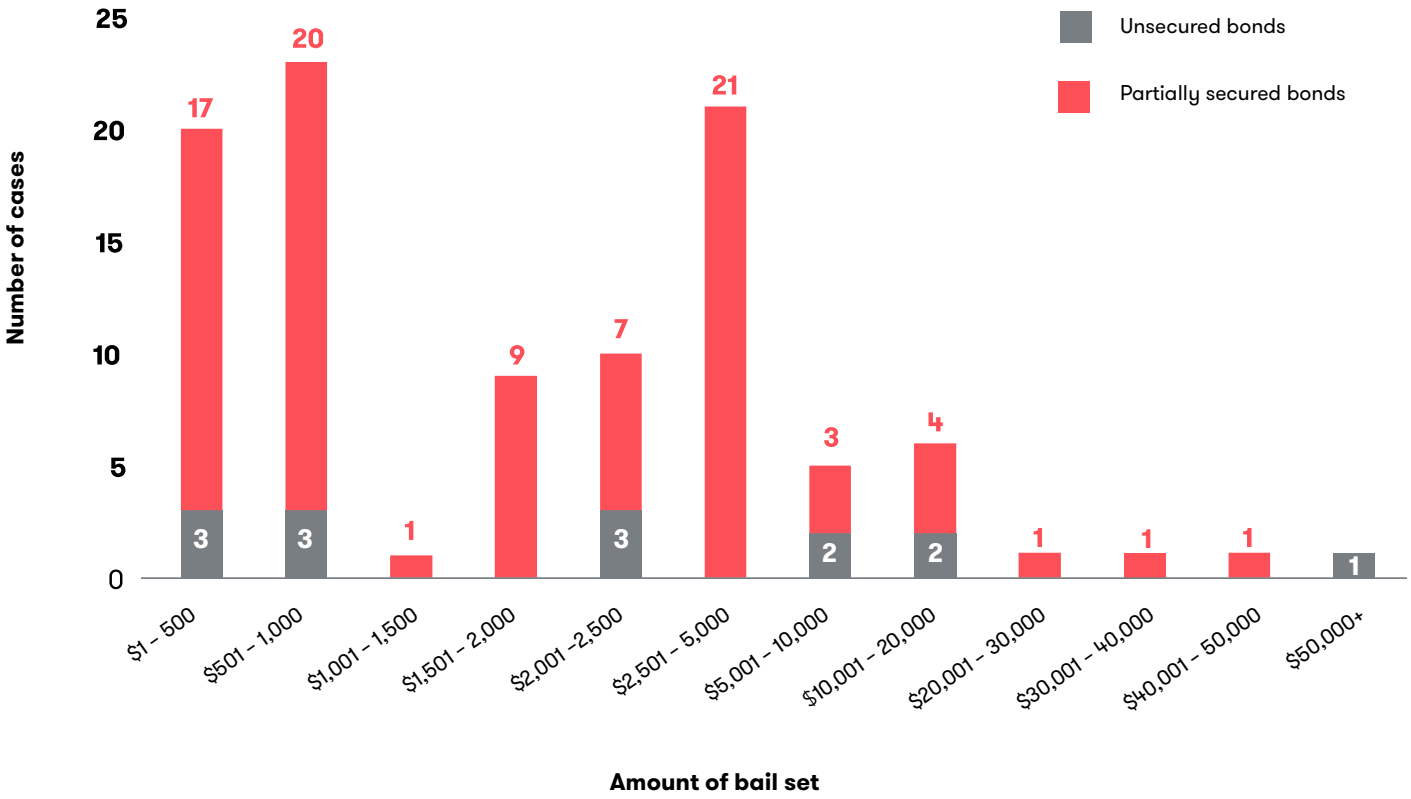


felonies (29 cases) and 25 percent violent felonies (25 cases). Forty-four percent had a top charge of a misdemeanor (44 cases).

The range of types of cases in which an alternative form of bail was set was similarly broad. Although felony and misdemeanor assault charges by far comprised the greatest number of cases in which an alternative form of bail was set, as shown in Figure 3, overall these forms of bail were set in cases as varied as vehicular offenses, drug sales, and weapons offenses.

Figure 4

Amounts of bail set when an alternative form used



Bail amounts

Vera also tracked the amount of bail set in the 99 cases. During trainings with public defenders at the outset of the project, several attorneys expressed concern that even if judges were willing to set unsecured or partially secured bonds, they would only do so at higher than typical amounts. As one defense attorney noted, "If a judge traditionally sets $500 bail that my client can't pay, and instead sets a partially secured bond of $5,000, then there's no difference in outcome."[33] According to CJA, in New York City, the median bail amount for a misdemeanor is $1,000 and, for a felony, $5,000.[34] The cases in which a partially secured and unsecured bond were set did not deviate significantly from these baseline comparisons. As shown in Figure 4, while 15 percent of cases (15 cases) had a bond amount set higher than the New York City average for felonies, 43 percent (43 cases) had bail set at $1,000 or less.

Table 1

Bail-making when alternative forms used

Outcome	Overall	Unsecured bond	Partially secured bond
Rates of bail made when an unsecured and partially secured bond was set	68%	100%	64%
Number released on bail when an unsecured or partially secured bail was set	68 out of 99	14 out of 14	54 out of 85
Number released on recognizance after arraignment	5 out of 99	0 out of 14	5 out of 85

Bail-making rates

Vera also analyzed the rate at which bail was made in the cases in which an alternative form was set. As shown in Table 1, 68 percent of people made bail overall (68 cases). Because no deposit is required, where an unsecured bond was set, 100 percent of individuals were immediately released at arraignment (14 cases). Bail was made in 64 percent of cases where a partially secured bond was set (54 cases), predominantly at arraignment or within one week post-arraignment. In 6 percent of cases in which a partially secured bond was set, bail was not made but the individual was released on recognizance with no bail at a post-arraignment court date (5 cases).[35]

As a baseline comparison, the overall citywide average of bail-making at arraignment is 11 percent, with bail being made immediately in 10 percent of felony cases and 13 percent of non-felony cases.[36] When bail is set, in 12 percent of both felony and non-felony cases individuals are released on recognizance at a court date after arraignment without posting bail.[37] In an additional 34 percent of felony and 32 percent of non-felony cases, bail is made post-arraignment. Citywide, individuals in the remaining 45 percent of felony and 43 percent of misdemeanor cases do not make bail at any point prior to disposition.[38]

Table 2

Time until bail made when a partially secured bond was set

Outcome	Misdemeanors	Nonviolent felonies	Violent felonies
Made bail at arraignment	16	8	4
Made bail within one week	4	6	7
Made bail between one and two weeks	2	1	1
Made bail between two and three weeks	3	0	1
Made bail within one month or after	0	0	1
Did not make bail	11	9	6
Bail not made but later released	1	2	2

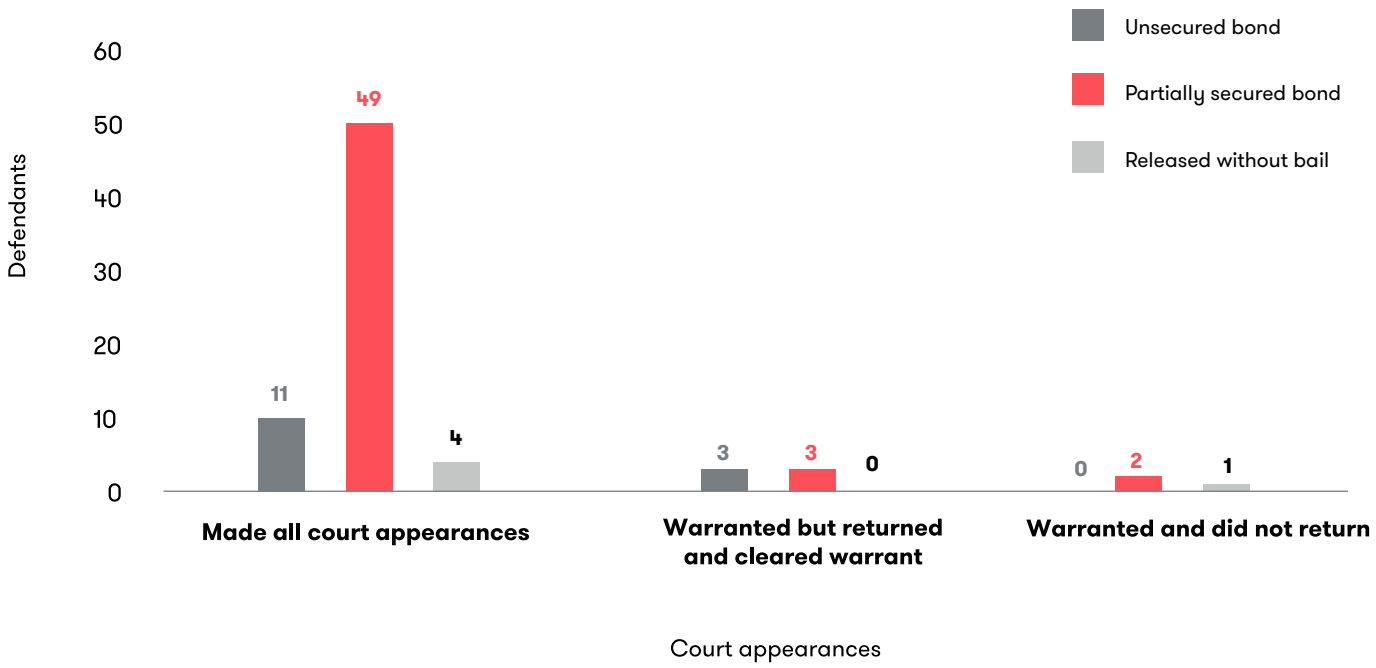
In looking at the 54 cases in which a partially secured bond was set *and* bail was made, 52 percent made bail immediately at arraignment (28 cases). An additional 31 percent made bail within one week after arraignment (17 cases). In line with other known statistics about bail-making in New York City, rates of making bail dropped off significantly after the first week.[39] Despite an alternative form of bail being set, almost one-third of all individuals in the cases studied did not make bail before disposition (26 cases). (See Table 2.)

Impact on case outcomes

The experiment sought to measure the impact of alternative forms of bail on individual case outcomes over time. For the 73 cases in which people were released because they either made an alternative form of bail or were released on recognizance post-arraignment, Vera tracked pretrial failure to appear, new arrests while cases were pending, and final case dispositions. By the time the final data was compiled in February 2017, more than 90 percent of all cases in the dataset had been resolved.

Figure 5

Failure to appear at future court dates by type of release



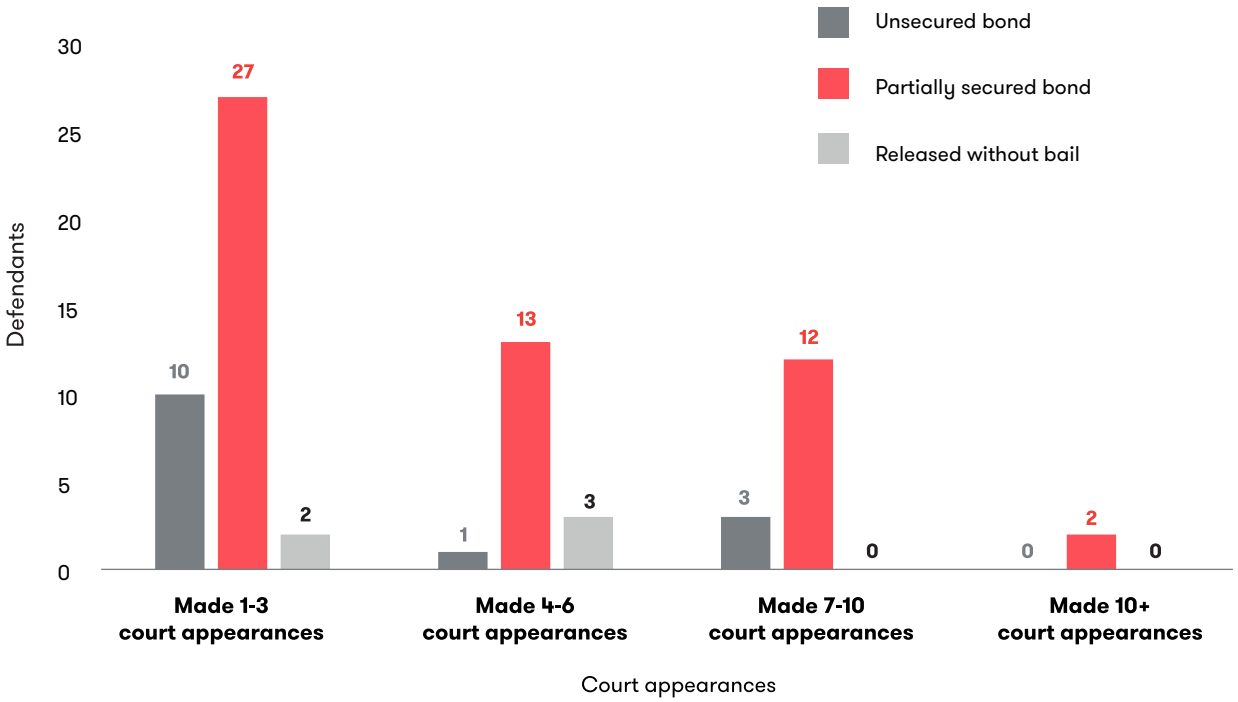
Failure-to-appear rates

Failure-to-appear (FTA) rates measure whether a person returns to court as required for subsequent appearances after release on recognizance or making bail. In New York City, if a person does not appear in court on a scheduled court date, a judge may issue a bench warrant for the person's arrest.[40] If the person is released on bail, a bench warrant will result in bail being forfeited unless the person returns to court and provides a satisfactory explanation for the failure to appear.[41] In practice, judges may "stay" a bench warrant if a person does not appear in court on a scheduled court date but his or her lawyer provides an explanation for the failure to appear. In these instances, no bench warrant is issued and bail is not forfeited despite the defendant's non-appearance in court.

Warrants were counted any time a bench warrant was issued, including in cases in which a bench warrant was issued for a missed court appearance but the defendant returned to court voluntarily within a short time after and bail was ultimately not forfeited. "Stayed" bench warrants were not counted in this analysis, as technically no failure to appear or forfeiture of bail occurred. Overall, the FTA rate for cases in the cohort was 12 percent. (See Figure 5.) One hundred percent of people who were

Figure 6

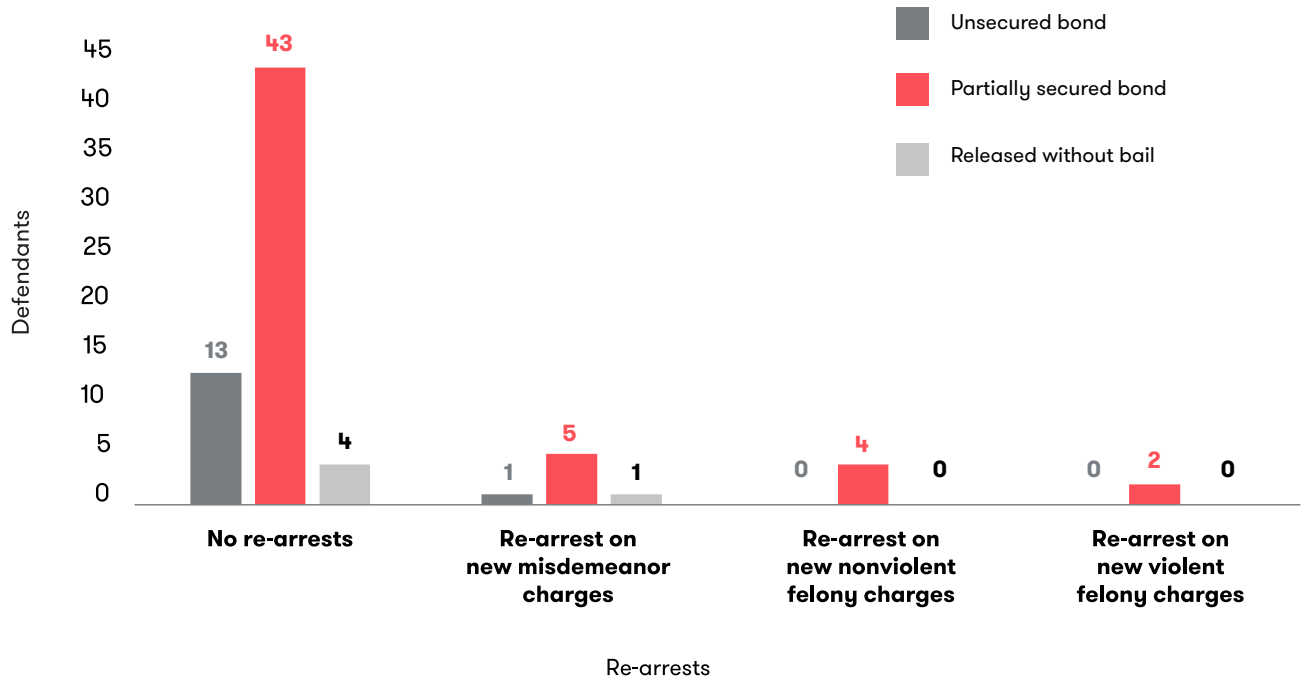
Number of court appearances made by type of release



either released or made bail on violent felony charges, including robbery and assault, made all court appearances. The FTA rate for people who were either released or made bail on nonviolent felony charges, such as drug possession or drug sale, was higher than the overall average for the cohort.[42] In six cases, people warranted at least once during the pretrial period but returned to court and were continued on bail. In three cases, individuals had warranted and had not returned to court. As a baseline comparison, these FTA rates closely mirror those in the cases analyzed by CJA in published citywide statistics on post-arraignment court appearance rates. Overall, the citywide average rate of failure to appear is 11 percent in felony cases and 14 percent in non-felony cases.[43]

A significant number of individuals in the cohort made several court appearances during the tracking period. Approximately one-half of the 73 cases were resolved within one to three court appearances after arraignment. In 17 cases, people appeared in court at least seven times or more within the tracking period. (See Figure 6.)

Figure 7
Pretrial re-arrest by type of release



Rates of re-arrest

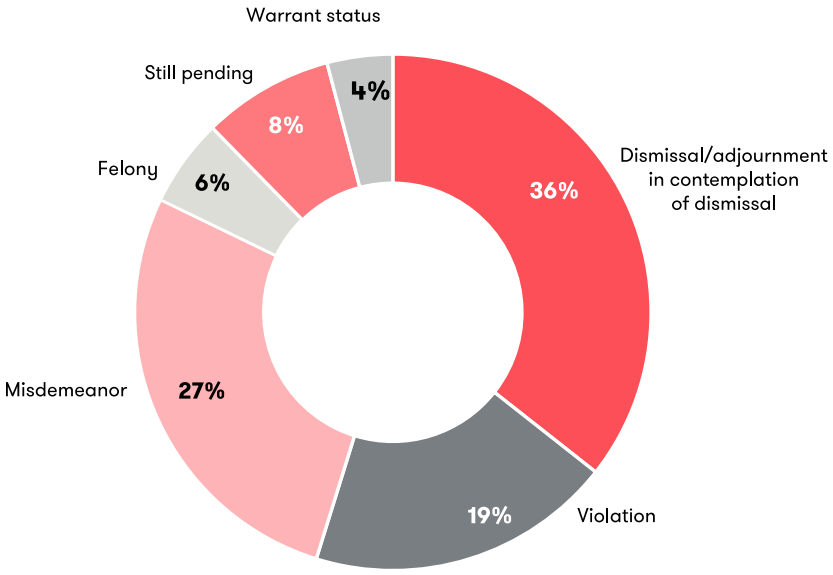
For all 73 cases in which the person was released or made bail, any re-arrest for a new misdemeanor, nonviolent felony, or violent felony offense was tracked in the Office of Court Administration's CRIMS database.[44] Overall, the re-arrest rate for any new offense was 18 percent. Nine percent of individuals had a new arrest on a misdemeanor charge, 5 percent on a nonviolent felony, and 3 percent on a violent felony offense. (See Figure 7.) As a baseline comparison, these rates of pretrial re-arrest are comparable to those published by CJA in a 2009 study, where overall pretrial re-arrest rates were 18 percent of individuals who were released on recognizance or made bail.[45]

Case disposition

Case dispositions were tracked for all 73 cases in the cohort where bail was made or the person was released. (See Figure 8.) Slightly over one-third (26 cases) resulted in a dismissal or an adjournment in contemplation of dismissal, known colloquially as an "ACD," where charges are ultimately dismissed after a period of six to 12 months.[46] Another 19 percent (14 cases) resolved with a violation plea, which is a non-criminal class of offenses under New York law that does not result in a criminal conviction or a permanent record. Twenty-

Figure 8

Case dispositions



seven percent of cases (20 cases) resolved in a misdemeanor conviction, while only 6 percent of cases (4 cases) resolved in a felony conviction. At the time of data analysis, 8 percent of cases (6 cases) were still pending, and 4 percent (3 cases) were in warrant status where the defendant hadn't appeared at a scheduled court date or at a date thereafter.

Overall themes and takeaways

The baseline comparison of pretrial measures of success between traditional forms of bail, as reported by CJA in bail-making, failure to appear, and pretrial re-arrest, and the alternative forms used in the experiment, suggest promising results and the need for a deeper, more methodologically rigorous study. A closer look at the cases generated as a result of the project also uncovered some interesting trends.

Notable trends

Alternative forms of bail were used in a wide range of cases. Courts set alternative forms of bail in a wide range of cases, both by level of offense and offense type. Judges did not limit the use of partially secured and unsecured bonds to only low-level cases—approximately half of the cases in the cohort involved felony-level charges. Moreover, a significant number

of the cases examined would not have been eligible for other existing bail initiatives in New York City, such as supervised release or the charitable bail funds. (See "Why bail reform matters" on page 9.) More than half involved a top charge of a felony, making them ineligible for a charitable bail fund; and at least one-third were excluded by charge from supervised release, which does not accept violent felony offenses or any charges where the allegations involve domestic violence or sexual misconduct.

In serious cases where pretrial release is appropriate but release on recognizance is not granted, alternative forms of bail may be a promising alternative. Judges, particularly when granting partially secured bonds, may feel confident that there is still "skin in the game." As one judge noted, "You could go with a 'more traditional' low cash bond, with an amount of $1,000 bond or $500 cash, but then you realize they would not be able to make it. The defense attorney tells you, 'Judge, they have $100.' Under those circumstances, I was very open-minded in the right case. That $100 to one family might be like $100,000 to another family. It might be more than enough to secure my confidence that this person would come back to court on the next date."[47]

The majority of cases in which bail was made resolved in a dismissal or a low-level disposition. Another notable trend was that the majority of cases resolved in a disposition far less serious than a felony charge, even though half of all cases involved a top charge at arraignment of a nonviolent or violent felony. Fully a third of all cases where a partially secured or unsecured bond were made resulted in an outright or delayed dismissal, and almost half resolved with a conviction of a violation, or a misdemeanor-level charge. In contrast, fully 100 percent of cases in the cohort that were not released resolved in a misdemeanor or felony disposition. (See Figure 8 on page 22.)

The disposition outcomes of the project cohort closely resemble overall case outcomes in New York City where, according to the most recent annual report from the New York City Criminal Courts, approximately 42 percent of arraignments resolve in either an ACD or an outright dismissal.[48] What is notable about the project cohort of cases compared to the overall citywide numbers is that all defendants in cases in the project cohort had bail set, while the vast majority of defendants included in the citywide numbers were released on recognizance. Given recent studies that document the negative impact of bail on case dispositions, this trend in overall case dispositions suggests that setting an unsecured or partially secured bond instead of, or in addition to, a traditional form of bail may lessen the deleterious effect of bail on final case outcomes by increasing rates of pretrial release and removing the pressure to resolve a case with a guilty plea.[49] This possibility merits further study.

Factors influencing adoption of alternative forms of bail

The cases in which an alternative form of bail was granted were unique. Those instances in which a judge agreed to a partially secured or unsecured bond were cases that stood out in some way from the usual thrum—a case where the person accused had a particularly compelling story, or the facts were unusual, or an attorney made an especially forceful argument on the record on behalf of the client. In one case in Brooklyn, for example, a defense attorney reported that an unsecured bond was set only after he made an extensive record and spent several minutes describing to the court the unique circumstances that led to his client being arrested and charged with a violent robbery offense.[50] Another defense attorney noted, "Setting an alternative form of bail is great in theory, but if it's in an amount that isn't reflective of a person's actual financial circumstances it's not that helpful. Judges who have set partially secured or unsecured bonds often do so because the defense lawyer has presented a fuller picture of their client, their family, and their financial resources."[51]

Compared to the usually rushed three or four minutes most cases last in arraignment, with only cursory information given about the circumstances of the person accused, the level of detail provided in cases where an alternative form of bail was set may have influenced the judge to depart from imposing traditional cash or an insurance company bail bond. These cases often involved a more extensive back-and-forth and discussion of a person's circumstances, including financial ability to make bail, than is usually done at arraignment. As one judge described, "I like the process where you bring the surety up and you put the surety under oath. It adds gravity to the situation. When I set a partially secured bond, I almost invariably talk to the defendant and the family about losing that money. There's more in that circumstance because you have a family member saying, 'You better come back. I took an oath for you.'"

Partially secured bonds could be used as an alternative to insurance company bail bonds. Partially secured bonds are seen by some judges as an effective alternative to insurance company bail bonds. Most such bail bonds require obligors to demonstrate full-time employment through paystubs and tax returns. Other sources of income, such as from public assistance or disability payments, are often not accepted. Nor will many bail bond companies underwrite low bails, especially those set at $1,000 or less, as they are not profitable for the company. Partially secured bonds operate almost like insurance company bail bonds, except that the 10 percent deposit is

refundable, meaning a person who makes all appearances loses no money. One judge equated partially secured bonds as the functional equivalent of an insurance company bail bond: "If we do a typical bail bond, there's a private bond company and they're responsible for the paperwork. With a partially secured bond, the company is taken out of the mix and it's the court that works with the defense to prepare the paperwork."[52]

Two judges, one in Brooklyn and the other in the Bronx, were primarily responsible for the 99 cases in the project where an alternative form of bail was set. One noted that the reason he began to set partially secured bonds was that it was increasingly requested by defense attorneys. He said, "What initially happened is that a partially secured bond was requested. I gave it thought and I did it. Initially, I met some resistance to completing the paperwork. It's more work for the defense attorney and for the court. But any time you're doing something new or different it takes time. Culture change. You can do it but it takes time."[53]

Recommendations

The results of this experiment suggest that if New York City courts opted more frequently for alternative forms of bail, they could potentially reduce the use of pretrial detention without compromising other important considerations of compliance with court appearances and public safety. However, the challenge will be to make the process by which these forms of bail are requested and set easier, and to educate and encourage both the judiciary and the defense bar to actively embrace them.[54] Vera spoke with judges, defense attorneys, and court staff to better understand the barriers to using alternative forms of bail and to develop strategies for their increased use at arraignment, resulting in the following recommendations.

Educate stakeholders about alternative forms of bail

Increasing outreach to key stakeholders so that they can develop comfort and familiarity with these forms of bail—and their potential to increase pretrial release without compromising failure to appear or public safety—is

critical to promoting their use. One of the judges involved in the project used his experience in setting alternative forms of bail as a guide for training other judges citywide, and the Office of Court Administration has included alternative forms of bail as part of their judicial seminar curriculum.

Simplify the paperwork required

One deterrent to requesting a partially secured or unsecured bond is the complexity of the paperwork required to secure them. Even in cases where the eligibility criteria for issuing an alternative form of bail is met—willing sureties present in court, proof of income, money in hand to pay the deposit amount—most of the time no request for these forms of bail is ever made. In part that is because of the logistics of completing the paperwork. It takes, on average, at least 10 to 15 minutes to complete the forms. This process becomes onerous for attorneys and court staff during a busy arraignment shift, especially if multiple defendants are making requests for alternative forms of bail. To make the process easier, courts should simplify the paperwork. In lieu of the currently required three forms, the necessary information could be organized into a clear and simple double-sided single page specific to the type of bail being requested—partially secured, unsecured, or secured.

Allow an alternative form of bail to be routinely set as a third option

Judges in New York are already required to set at least two forms of bail to give defendants and their families the option to make bail in the least onerous form. Typically, judges opt for cash up front or commercial bonds. In cases where an insurance company bail bond is set, one option is to automatically set a partially secured bond as a third option. A partially secured bond option would allow obligors to demonstrate their liability to the court for the full amount of bail with non-traditional sources of income typically not accepted by private bail bond companies. Moreover, unlike for-profit bond companies, courts are not dissuaded from using partially secured bonds in cases where low bail is set.

Introduce an independent assessment of ability to pay

The mere act of requesting an unsecured or partially secured bond prompted a more thorough hearing in court of the circumstances of the case. In many cases where an alternative form of bail was set, either the defense attorney offered or the judge requested some information about ability to pay bail—why the person could not make cash bail or afford a commercial bond, and if there were any family members or friends who could serve as obligors. In cases where release on recognizance is not appropriate, the courts should consider introducing an independent assessment at arraignment of a person's ability to pay bail. That assessment would consist of an interview with the defendant to gather information about income, financial obligations, and potential obligors. The assessment would then provide the court with a recommendation for how much bail should be set and in what form.

Conclusion

Ninety-nine cases out of a total of several thousand where bail is set is a miniscule number in the larger scheme of New York City's court system. Yet this small cohort tells a fascinating story of how a change in practice can potentially have a significant impact on reducing the use of pretrial detention without compromising public safety or rates of court appearance.

In a time where the larger mandate is to close Rikers Island and reduce the city's average daily jail population by half, using alternative forms of bail is one of many strategies that judges should have in their wheelhouse. Even with such alternatives, the role of money in our justice system still lurks within this endeavor. Is there a place for it? And if so, what should that place be? In the long term, our courts must grapple with and address those larger normative questions. In the short term, although money is still a factor in release, alternative forms of bail require the courts to truly consider a person's individual circumstances at the decision point of pretrial release. The move towards a more considered decision to detain or release may result in more equitable release determinations in which money is not the sole factor impacting a person's pretrial liberty.

Endnotes

1 New York City also offers an alternative route to arraignment. Upon arrest, an officer has the discretion to issue a Desk Appearance Ticket (DAT) if the arrest charge is a violation, misdemeanor, or an eligible class E felony offense. When a DAT is issued, the person avoids being transported to central booking immediately after arrest. Instead, he or she is released from the precinct and given a date to appear for arraignment within the next several weeks. By New York Police Department policy, DATs may only be issued if the person arrested has no outstanding warrants and can provide state-issued identification at the time of arrest. In 2015, approximately 70,000 DATs were issued out of a total of more than 300,000 arrests. See New York City Criminal Justice Agency (CJA), *Annual Report 2015* (New York: CJA, 2016), 26. According to official statistics from the Office of Court Administration, in 2015 the New York City courts arraigned 314,815 cases, including DATs. See Criminal Court of the City of New York, *Annual Report 2015* (New York: Office of the Chief Clerk of the New York City Criminal Court, 2016), 7, https://perma.cc/NX5E-RD3E.

2 The bail statute itself uses the term "insurance company bail bond" to connote those bonds underwritten and proffered by private, for-profit companies. N.Y. Criminal Procedure Law §520.10(1)(b). These types of bonds are colloquially called "commercial bonds" and the companies that underwrite them "private bond companies" or "for-profit bond companies." The terms are used interchangeably in this report.

3 CJA, *Annual Report 2015* (New York: CJA, 2016), at 30. CJA interviews people arrested in the criminal courts in all five boroughs and generates a risk score for that person's likelihood of appearance in court based on their current residence, employment, contact information, and past criminal history. That risk score tells the arraignment judge whether the person has a low, medium, or high risk of failure to appear. CJA also collects data from arraignments on bail setting, bail-making, and failure to appear. According to its 2015 annual report, 60 percent of cases arraigned continued past arraignments. Ibid. at 17. The bail-making statistics above apply only to cases where bail was set that continued past arraignments.

4 Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (New York: Human Rights Watch, 2010), 17, https://perma.cc/ZK2D-743R. The one exception is the use of credit card to pay bail, which has become more common since the New York State Office of Court Administration issued a directive governing its use in 2013. See Mary T. Phillips, *New York's Credit Card Bail Experiment* (New York: CJA, 2014), https://issuu.com/csdesignworks/docs/creditcardbail14/1?e=2550004/9230440.

5 *People ex rel. McManus v. Horn*, 18 N.Y.3d 660 (2012).

6 See N.Y. Criminal Procedure Law §510.30 (application for recognizance or bail; rules of law and criteria controlling determination).

7 For more on how prosecutors choose bail amounts, See Fellner, *The Price of Freedom* (New York: Human Rights Watch, 2010), at 41-46.

8 Ibid. at 41-42.

9 CJA, *Annual Report 2015*, 22. In comparison, the average amount of bail nationally for felony cases nearly doubled between 1992 and 2006 from $25,400 to $55,500. Justice Policy Institute, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* (Washington, DC: Justice Policy Institute, 2012), 10, http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf. Bail is also set less often in New York City compared to other cities across the United States. See New York City Mayor's Office of Criminal Justice, "Safely Reducing the New York City Jail Population," https://perma.cc/L5M2-YJZ2. Moreover, of the approximately 150,000 cases in New York City that continue past arraignments in a given year, nearly seven out of 10 individuals are released on recognizance (ROR) without any type of financial condition imposed. See Mary T. Phillips, *A Decade of Bail Research in New York City* (New York: CJA, 2012), 32.

10 To the extent that full-time employment or participation in education or a training program is a meaningful proxy for economic opportunity, only 46 percent of men and 38 percent of women assessed by CJA at the time of arrest reported having a full-time job or being engaged in training or school. CJA, *Annual Report 2015*, 9.

11 Based on a true account of an arrest and arraignment proceeding in Bronx Criminal Court, as narrated by the lawyer assigned to the case. Details have been changed to protect privacy.

12 See Nick Pinto, "The Bail Trap," *New York Times Magazine*, August 13, 2015, https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html.

13 New York City Mayor's Office of Criminal Justice, "Safely Reducing the New York City Jail Population," https://perma.cc/L5M2-YJZ2. This includes approximately 650 of the 10,000 people held daily at city jails who are there pending trial on misdemeanor charges. Ibid.

14 Ibid.

15 Ibid.

16 Jennifer Gonnerman, "Three Years on Rikers Without Trial," *New Yorker*, October 6, 2014, http://www.newyorker.com/magazine/2014/10/06/before-the-law.

17 Temporary Commission on Revision of the Penal Law and Criminal Code, *Proposed New York Criminal Procedure Law* (New York: West Publishing Co., 1969), Section 5, https://perma.cc/3VM5-FRLN.

18 Ibid. The law's drafters provided a hypothetical to illustrate the utility of alternative forms of bail: "[A] young man charged with burglary who has previously been embroiled with the law but resides in the community and whose father is a reputable person long employed in the same position at a fairly moderate but adequate salary. Here, a judge not inclined to release the defendant on his own recognizance doubtless would, under present law, fix bail, and in a fairly substantial and possibly burdensome amount . . . If so authorized, however, he might well be satisfied to release the defendant upon his father's undertaking to pay $1,000 (possibly accompanied by a $100 deposit) in the event of the defendant's failure of appearance."

19 N.Y. Criminal Procedure Law §520.10. The forms of bond now allowed include:
- Secured surety bond
- Secured appearance bond
- Partially secured surety bond
- Partially secured appearance bond
- Unsecured surety bond
- Unsecured appearance bond

The State Legislature also amended this section in 1986 to authorize bail to be posted by credit card.

20 In New York City courts, when cash bail or a deposit is posted on a partially secured bond, that full amount is returned at the end of a case, minus a 3 percent administrative fee when the case ends in a violation, misdemeanor, or felony conviction. A recent proposal by the New York City Council, the Mayor's Office of Criminal Justice, and other city agencies seeks to end the practice of taking a 3 percent fee in cases where bail is posted and all court appearances have been made. See New York City Council, "Speaker Melissa Mark-Viverito to Introduce Department of Correction Reform Package," press release (New York City: New York City Council, September 12, 2016), https://perma.cc/22WC-XPPU.

21 Fellner, 2010, 17.

22 Ibid.

23 Interview with sitting Criminal Court judge, December 9, 2016.

24 Interview with sitting Criminal Court judge, July 24, 2017.

25 Justine Olderman, "Fixing New York's Broken Bail System," *City University of New York Law Review* 16, no. 1 (2012), 9-20, http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1319&context=clr.

26 The trainings were led by a Vera staff member who was a former public defender, and some of the trainings provided Continuing Legal Education credits to attorneys who attended. A total of nine trainings were conducted overall—at each borough office of the Legal Aid Society, and at The Bronx Defenders, Brooklyn Defender Services, the Neighborhood Defender Service of Harlem, and New York County Defender Services.

27 The Legal Aid Society, Bronx Defenders, Brooklyn Defender Services, Neighborhood Defender Service of Harlem, and the New York County Defender Services assign attorneys to arraignment parts across the five boroughs in New York City. With the exception of arraignments in Staten Island, these attorneys are present in arraignment courts seven days a week, 16 hours a day, including weekends and holidays. In FY2017, these indigent services providers represented more than 350,000 cases. See The Council of the City of New York, *Report of the Finance Division on the Fiscal 2018 Preliminary Budget* (New York: NYC City Council, 2017), 5, https://perma.cc/UJ3D-YXTP.

28 Some other limitations about the results should be noted. The information gathered from court calendars to identify cases in which a partially secured or unsecured bond was set relied on the accuracy of the entries in those calendars. Moreover, the information available on the calendars and from a match with the Office of Court Administration's court records database, called CRIMS, did not include age, race/ethnicity, or any other demographic information, nor did it include prior warrant or criminal history information about the individuals for whom an alternative form of bail was set, two factors which tend to bear heavily on the bail decision.

29 CJA, *Annual Report 2015*. For purposes of this project, Vera assumed based on anecdotal knowledge of bail setting practices in New York City that only traditional forms of bail were set in the cases reported by CJA, and that a partially secured or unsecured bond was the form of bail made in the cases tracked in the cohort. See Fellner, 2010, 17 (discussing customary practices in bail setting among city judges). An additional assumption was made that individuals in the cases in the project cohort would not

have been released on recognizance prior to the project, thus resulting in "net-widening."

30 Qudsia Siddiqi, *Research Brief: Pretrial Failure Among New York City Defendants* (New York: CJA, 2009), 3, https://perma.cc/G9JX-CPNN.

31 In all cases where an unsecured or partially secured bond was set, that option was a third (or even fourth) alternative to traditional cash bail, insurance company bail bond, or, in a limited number of cases, credit card bail.

32 For one case in which a partially secured bond was set, the top charge was missing in the dataset.

33 Interview with defense attorney, Brooklyn, New York, March 9, 2017.

34 CJA, *Annual Report 2015*, 22.

35 These are individuals who do not make bail but are released at a court date following arraignment because the district attorney does not yet have the necessary evidence to move forward on misdemeanor charges, or has not secured an indictment from the grand jury on felony charges. See N.Y. Criminal Procedure Law §170.70 (release of defendant upon failure to replace misdemeanor complaint by information) and §180.80 (proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition).

36 CJA, *Annual Report 2015*, 30. Percentages in the CJA report may not total 100 percent because of rounding. Ibid. at 31.

37 See footnote 35. N.Y. Criminal Procedure Law §170.70 (release of defendant upon failure to replace misdemeanor complaint by information) and §180.80 (proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition).

38 CJA, *Annual Report 2015*, 30. The CJA reports data on cases where bail is set at arraignment. The CJA data cited in this report combines overall bail-making on all cases—felonies and nonfelonies—at three junctures: at arraignment, post-arraignment, and when bail is not made prior to disposition. In addition to those measures, of cases where bail is initially set at arraignment, approximately 12 percent of felonies and 11 percent of nonfelonies are released on recognizance after arraignment. Those statistics were not included in the numbers cited in this report.

39 See New York City Mayor's Office of Criminal Justice, "Safely Reducing the New York City Jail Population," https://perma.cc/L5M2-YJZ2. Seventy-five percent of all individuals who make bail when it is set make bail within 0-6 days of arraignment.

40 A bench warrant is a judicial order that informs law enforcement and other authorities that a defendant can be taken into custody for a missed court appearance or another failure to comply with a judicial order. See Criminal Procedure Law §530.70 (order of recognizance or bail; bench warrant).

41 See N.Y. Criminal Procedure Law §540.10 (forfeiture of bail; generally).

42 During stakeholder interviews, both judges and defense attorneys were asked about the high rate of FTA for individuals charged with felony drug offenses compared to individuals charged with other offenses. Anecdotally, both judges and defenders noted that people arrested on felony drug offenses may often struggle with other challenges that impact court appearance, such as substance use disorders and housing instability.

43 CJA, *Annual Report 2015*, 33.

44 The CRIMS database only allowed for re-arrest information to be gathered for cases that were open or that resulted in a misdemeanor or felony conviction. Any arrests that resulted in a dismissal or a favorable, non-criminal disposition were not captured in the re-arrest statistics. Moreover, the CRIMS database only tracks arrests within the five boroughs of New York City, so any potential arrests outside that area were not captured.

45 Qudsia Siddiqi, *Pretrial Failure Among New York City Defendants* (New York: CJA, 2009), 3.

46 See N.Y. Criminal Procedure Law §170.55 (adjournment in contemplation of dismissal); and §170.56 (adjournment in contemplation of dismissal in cases involving marijuana).

47 Interview with sitting Criminal Court judge, December 9, 2016.

48 Criminal Court of the City of New York, *Annual Report 2015* (New York: Office of the Chief Clerk of the New York City Criminal Court, 2016), 17.

49 For research on the impact of bail and pretrial detention on case outcomes, see Paul Heaton, Sandra Mayson, and Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," *Stanford Law Review* 69, no. 3 (2017), 711-794; and Timothy R. Schnacke, Michael R. Jones, and

Claire M. B. Brooker, *The History of Bail and Pretrial Release* (Maryland: Pretrial Justice Institute, 2010), 1-5.

50 Interview with defense attorney, Brooklyn, New York, March 9, 2017.

51 Interview with defense attorney, Bronx, New York, December 16, 2016.

52 Interview with sitting Criminal Court judge, December 9, 2016.

53 Ibid.

54 Though prosecutors were not included in this project, because of their primary influence on bail requests such education and outreach should include district attorney offices as well.

"Why bail reform matters" (page 9)

[a] Timothy R. Schnacke, Michael R. Jones, and Claire M. B. Brooker, *The History of Bail and Pretrial Release* (Maryland: Pretrial Justice Institute, 2010), 1-5.

[b] For an overview of historical underpinnings of bail and its current use in the United States, see John Jay College of Criminal Justice and Prisoner Reentry Institute, *Pretrial Practice: Rethinking the Front End of the Criminal Justice System* (New York: John Jay/PRI, 2016), 15-17, https://perma.cc/9UED-5TX5.

[c] Joel L. Fleishman, J. Scott Kohler, and Steven Schindler, *Casebook for the Foundation: A Great American Secret: How Private Wealth is Changing the World* (New York: Public Affairs, 2007), 81-83.

[d] Bail Reform Act of 1966, 18 U.S.C. §§3146-3151.

[e] See Jacob Kang-Brown and Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America* (New York: Vera Institute of Justice, 2017), 9-13, https://perma.cc/234F-MVK7.

[f] Prison Policy Initiative, "Mass Incarceration: The Whole Pie 2017," https://perma.cc/74JQ-XLAF.

[g] On the negative public safety consequences of even short terms of pretrial detention, see Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (New York: Laura and John Arnold Foundation, 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf. On incarceration and public safety generally, see Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer* (New York: Vera Institute of Justice, 2017), https://perma.cc/K5P8-L529.

[h] See, e.g., O'Donnell v. Harris County, Texas, No. 4:16-CV-01414 (S.D. Tex. December 16, 2016,) at 94, https://perma.cc/SX97-F9TX (holding that bond schedule that made no individualized determination of ability to pay violated constitutional rights of poor defendants). See also the work of Civil Rights Corps, a nonprofit organization that has filed lawsuits challenging the use of money bail and wealth-based pretrial detention policies, http://www.civilrightscorps.org/.

[i] For an overview of these reforms, see New Jersey Courts, *Criminal Justice Reform: Report to the Governor and Legislature* (Trenton, NJ: New Jersey Courts, 2016), 1, http://www.judiciary.state.nj.us/courts/assets/criminal/2016cjrannual.pdf.

[j] New York City Mayor's Office of Criminal Justice, *Justice Brief: The Jail Population—Recent Declines and Opportunities for Further Reductions* (New York: Mayor's Office of Criminal Justice, 2017), 15-18, https://perma.cc/CEG3-RFD6.

[k] See the work of the Brooklyn Community Bail Fund, https://brooklynbailfund.org/, and the Bronx Freedom Fund, http://www.thebronxfreedomfund.org/. These two organizations were established under the New York State Charitable Bail Act of 2012, which allows nonprofit funds to operate as bail payment agents without charging a premium or fee for their services. See Office of the Governor of the State of New York, "Governor Cuomo Signs Legislation to Help Low-Income Defendants Meet Bail Requirements," press release (Albany, NY: Office of the Governor of NY, July 18, 2012), https://perma.cc/KWC3-WBP6.

[l] See John Surico, "New York City is Creating a Bail Fund to Help People Get Out of Jail," Vice News, June 29, 2015, https://perma.cc/RW9B-B2KS.

[m] Cindy Redcross, et al., *New York City's Pretrial Supervised Release Program: An Alternative to Bail* (New York: MDRC/Vera, 2017), https://perma.cc/LLX8-AEH9.

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Credits

 An electronic version of this report is available at www.vera.org/against-the-odds.

The Vera Institute of Justice is a justice reform change agent. Vera produces ideas, analysis, and research that inspire change in the systems people rely upon for safety and justice, and works in close partnership with government and civic leaders to implement it. Vera is currently pursuing core priorities of ending the misuse of jails, transforming conditions of confinement, and ensuring that justice systems more effectively serve America's increasingly diverse communities. For more information, visit www.vera.org.

For more information about this report, contact Insha Rahman, project director, at irahman@vera.org.

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Vera INSTITUTE OF JUSTICE

Vera Institute of Justice
233 Broadway, 12th Fl
New York, NY 10279
T 212 334 1300
F 212 941 9407

Washington DC Office
1111 14th St., NW, Ste 920
Washington, DC 20005
T 202 465 8900
F 202 408 1972

New Orleans Office
546 Carondelet St.
New Orleans, LA 70130
T 504 593 0936

Los Angeles Office
707 Wilshire Blvd., Ste 3850
Los Angeles, CA 90017
T 213 223 2442
F 213 955 9250

Bail and Pretrial Justice in New York State:

Trends, Data, and Opportunities for Reform

Insha Rahman, Esq.
Project Director
Vera Institute of Justice
irahman@vera.org
(212) 376-3046

Vera

Overview

Trends

- New York City is no longer the driver of pretrial incarceration across the state
- Misdemeanor pretrial detention is more prevalent outside of New York City

Use of bail

- Statewide comparisons of bail amounts from a one-day snapshot

Opportunities for reform

- Using alternative forms of bail
- Addressing resources and providing due process at arraignments

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Trends

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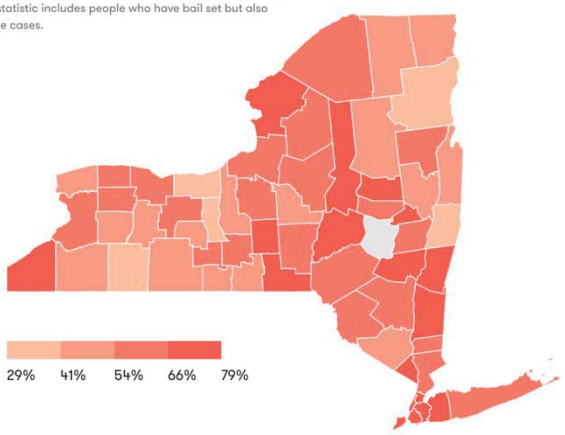
The geography of pretrial detention in New York

Pretrial population

The pretrial population shows the percentage of the average daily census that is in jail because they have had bail set and have not made bail. The statistic includes people who have bail set but also have another hold, such as a warrant or multiple cases.



Source: New York State Division of Criminal Justice Services, 2016

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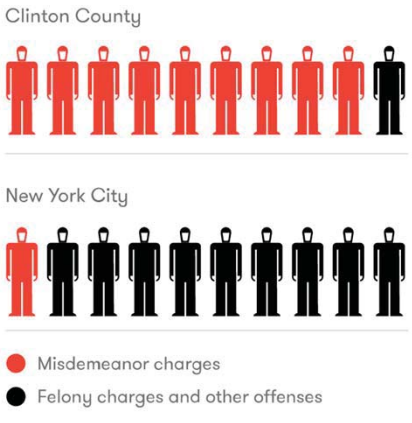
Comparing misdemeanor jail incarceration



Why people are in jail varies depending on where you are.

In Clinton County, for example, nine out of 10 people in jail are there on misdemeanor charges.

In New York City, by contrast, only one out of 10 people in jail are there on misdemeanor charges even though misdemeanors make up two-thirds of all arrests in the city.

Source: Vera analysis of U.S. Bureau of Justice Statistics Annual Census of Jails data, 2015

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Use of bail

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Setting of bail

People held on misdemeanors with bail set at $1,000 or less:

- **72%** Monroe County
- **32%** New York City
- **27%** Onondoga County
- **10%** Chautauqua County

People held on felonies with bail set at $10,000 or more:

- **42%** Monroe County
- **68%** New York City
- **58%** Onondoga County
- **82%** Chautauqua County

County by county, bail amounts on misdemeanor and felony charges vary tremendously.

Seven in 10 people held on misdemeanors in Monroe County have bail set at $1,000 or less, compared to one in 10 in Chautauqua County.

That variation in bail holds for more serious offenses. In Monroe County, four in 10 people held on felony charges have bail set at $10,000 or higher, compared to eight in 10 in Chautauqua County.

Source: Vera analysis of bail amounts from a one-day snapshot of publicly available bail data, November 2017

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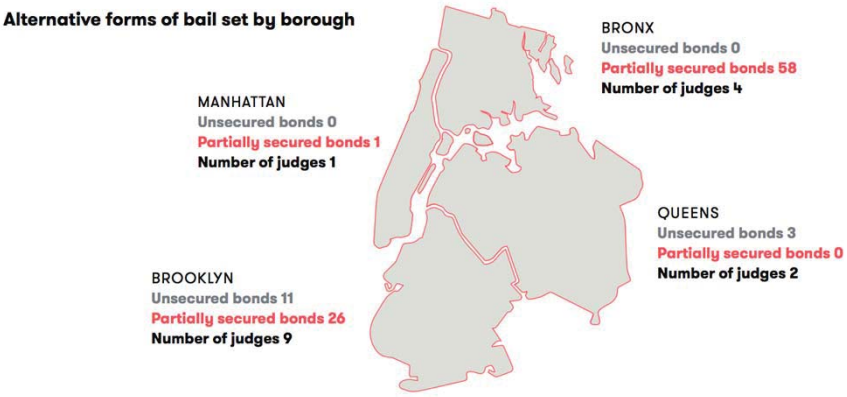
Opportunities for reform: bail alternatives

Vera

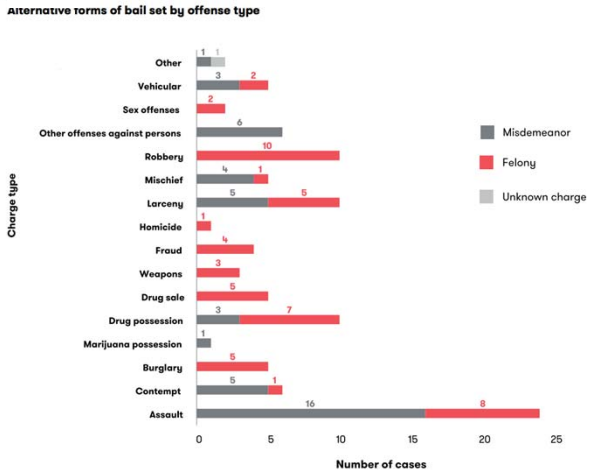
Using alternative forms of bail



Source: Vera Institute of Justice, *Against the Odds: Experimenting with Alternative Forms of Bail*, September 2017

Vera

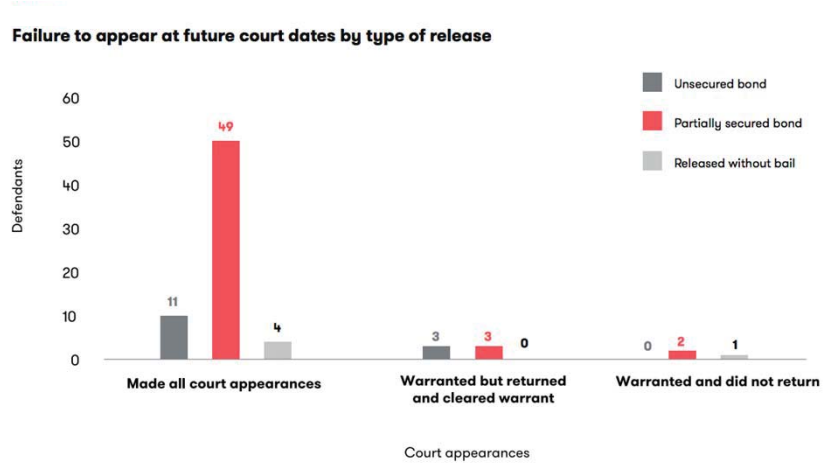
Use of alternative forms of bail by charge



Source: Vera Institute of Justice, *Against the Odds: Experimenting with Alternative Forms of Bail*, September 2017

Vera

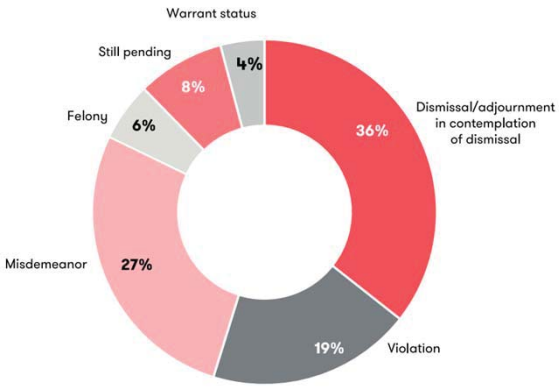
Court appearance rates



Source: Vera Institute of Justice, *Against the Odds: Experimenting with Alternative Forms of Bail*, September 2017

Vera

Case dispositions



Source: Vera Institute of Justice, *Against the Odds: Experimenting with Alternative Forms of Bail*, September 2017

Vera

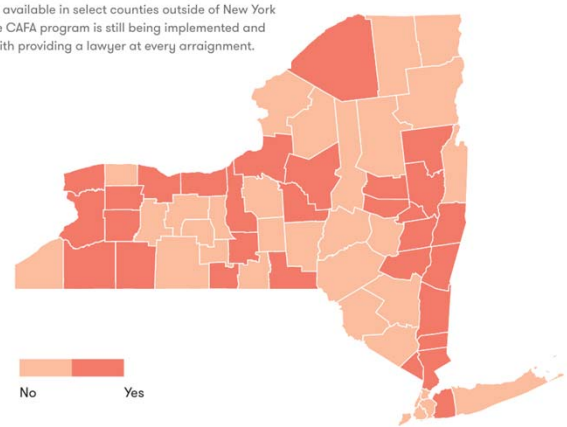
Opportunities for reform: due process

Vera

Access to counsel

Counsel at First Appearance

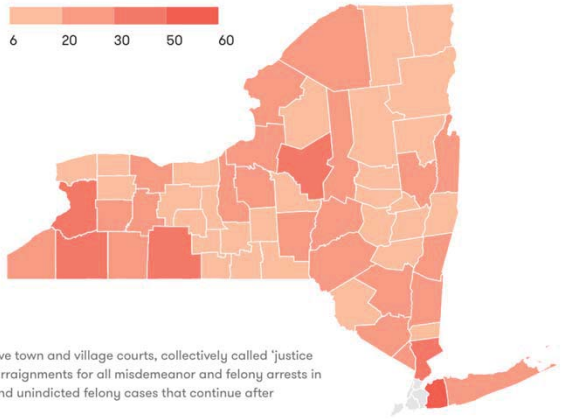
The Counsel at First Appearance program is available in select counties outside of New York City to provide a lawyer at arraignment. The CAFA program is still being implemented and counties are at various stages of progress with providing a lawyer at every arraignment.



Source: New York State Office of Indigent Legal Services, 2017

Vera

Due process and centralized arraignments



Town and village courts

Counties outside of New York City have town and village courts, collectively called 'justice courts,' which have jurisdiction over arraignments for all misdemeanor and felony arrests in the county, and hear misdemeanor and unindicted felony cases that continue after arraignment.

Source: New York State Office of Indigent Legal Services and Office of Court Administration, 2017

Vera

Additional resources on New York bail reform

Independent Commission on New York City Criminal Justice and Incarceration Reform, "A More Just New York City," April 2017, morejustnyc.org

Vera Institute of Justice, "Empire State of Incarceration: Correcting the Overuse of Jail," December 2017, www.vera.org/state-of-incarceration

Vera Institute of Justice, "Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts," September 2017, www.vera.org

Crime and Justice Institute, "Assessment of Pretrial Services in New York State," June 2014, http://www.criminaljustice.ny.gov/opca/pdfs/NYS-Pretrial-Release-Report-7-1-2014.pdf

Criminal Justice Agency, "A Decade of Bail Research in New York City," August 2012, www.nycja.org/library

Human Rights Watch, "The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City," December 2010, www.hrw.org

Letter to Cuomo

Sean Hill, Esq.
Senior Legal Fellow,
Katal Center for Health, Equity, and Justice, NYC

To: **Governor Andrew Cuomo**
From: **Over 100 Community & Advocacy Groups across New York State**
Re: **Bail Reform in New York**
Date: **Submitted November 2017, new signatories added December 2017**

Dear Governor Cuomo,

We are aware that your administration is exploring bail reform as outlined in your previous State of the State addresses. As advocates for criminal justice reform, we share your desire to reduce New York's pretrial detention population.

While we urge your administration to take decisive action to reduce the State's pretrial detention population, we are deeply concerned about efforts to amend the existing bail statute to require that judges consider a person's risk of future dangerousness. **We, the undersigned organizations, are united in the belief that: we do not have to add dangerousness to New York's bail statute to reduce our pretrial detention population; the use of risk assessment instruments to predict dangerousness will further exacerbate racial bias in our criminal justice system; and the use of these instruments will likely lead to increases in pretrial detention across the state.**

Adding dangerousness is both counterproductive and unnecessary to the aim of decarceration. New York should, instead, build on existing law and implement changes to reduce pretrial detention statewide. New York's bail statute was specifically crafted to accomplish significant reductions in our pretrial detention population. Our statute, however, is not currently used to its full potential. Efforts in New York City to bring down the jail population and increase rates of pretrial release show what is possible within the context of current law. Rather than amend the statute to include dangerousness, your administration should encourage judges to fully implement our existing law. Comprehensive reform must (1) ensure strict limitations on the use of pretrial detention, (2) eliminate race- and wealth-based disparities, and (3) ensure individualized justice and thoughtful detention decisions through robust due process.

"Dangerousness" Risk Assessments Are Ineffective, Exacerbate Racial Disparities, and Will Likely Increase New York's Jail Population

At a time when the public and policymakers have prioritized reducing the State's jail population, we should reject the inclusion of additional reasons to jail presumptively innocent people. We should, instead, seek a comprehensive approach to bail reform that will strengthen due process, ensure careful and thoughtful determinations about the use of pretrial detention, and guarantee reductions in its use.

New York does not currently allow judges to consider the risk of future dangerousness in making bail determinations. This makes our bail statute one of the most progressive in the country. In fact, the Legislature specifically considered and rejected adding dangerousness to New York's bail statute when it was drafted,[i] based largely on concerns that such determinations would be too speculative and would disproportionately impact low-income communities of color.[ii] Those concerns are still valid today.

Adding considerations of dangerousness to the New York bail statute—coupled with the introduction of actuarial risk assessment instruments (RAIs)—might seem to offer a ready-made solution to the problems facing New York. New Jersey, for example, has experienced a reduction in its pretrial detention rates following recent reforms. However, there are important differences in criminal procedure and practice that do not guarantee New York would experience similar reductions. In New Jersey, pretrial detention decisions are reached only after a rigorous evidentiary hearing held within days of a defendant's first appearance. People accused of crimes have a robust right to discovery in advance of these hearings, ensuring that important evidence is turned over early and often, and they also have meaningful speedy trial rights if detention is ordered. In New York, on the other hand, evidence can be withheld from someone accused of a crime until the day of trial, and cases can drag on for months or even years in certain counties. The new pretrial discovery rule announced by Judge DiFiore is intended to address the lack of meaningful discovery under New York law, but is insufficient to ensure fairness and due process. RAIs are ultimately not a panacea or substitute for the hard work of creating more due process, more safeguards, and more alternatives to jail. Too often, these tools are expected to accomplish difficult culture changes inside our courts, but they can easily move culture to a worse, rather than better, position on pretrial release.

Dangerousness RAIs in no way guarantee reductions in the State's jail population, and there is good reason to believe that they would increase reliance on pretrial detention. A soon-to-be-published study by Professor Megan Stevenson of Antonin Scalia Law School at George Mason University finds that Kentucky's adoption of a new RAI "had negligible effects on the overall release rate, [failure to appear] rate, [and] pretrial rearrest rate."[iii] A separate report found that Lucas County, Ohio, actually saw its pretrial detention rates *increase* and the rate at which people plead guilty at first appearance *double* since implementing a dangerousness RAI.[iv] Adding dangerousness to New York's bail statute could very well lead to increases in the State's jail population, particularly on Rikers Island in New York City.

Further, RAIs present a false promise that we can accurately predict the future dangerousness of people charged with crimes. We can't—and attempts to do so will harm low-income communities and communities of color, while likely increasing local jail populations. Studies have shown that, **among people released pretrial, only 1.9% are actually re-arrested for violent felonies**.[v] While sensational cases in the media might suggest otherwise, **instances of re-arrest for violent felonies in New York are equally rare.**[vi] In turn, the ability of RAIs to predict the risk of violent crime accurately is exceedingly limited. Even among people labeled "high risk," rates of re-arrest for violent felonies are exceptionally low—well under 10%.[vii] Even on their own terms, they are of limited utility.

The inability of RAIs to accurately predict dangerousness is particularly troubling given that studies have shown that even facially neutral RAIs will inevitably place more people of color in "high risk" categories, mathematically guaranteeing that there will be a disproportionate number of "false positives" among people of color.[viii] Racial disparities of this type are hard-wired into RAI algorithms, with some studies finding that "bias in criminal risk scores is mathematically inevitable."[ix] This means that there will be a larger share of people of color who will *not* be re-arrested, but who will nonetheless be categorized as "high risk," leading to disproportionate rates

of pretrial incarceration and negative case outcomes. This would present a significant step backward in addressing structural racism in New York's criminal justice system.

RAIs are only as good as the data that goes into them; yet every one of these tools that is currently in use relies on data derived from a broken and discriminatory criminal justice system that disproportionately targets and harms people of color. This data is often outdated and incomplete, and based on arrest information rather than the outcome or facts of individual cases. Where initial inputs are tainted by structural racism, the resulting tools will inevitably reflect and exacerbate those disparities. Laurel Eckhouse, with the Human Rights Data Analysis Group, succinctly states this problem: "Inputs derived from biased policing will inevitably make black and Latino defendants look riskier than white defendants to a computer. As a result, data-driven decision-making risks exacerbating, rather than eliminating, racial bias in criminal justice."[x] For this reason, it is particularly concerning that any dangerousness RAI would necessarily draw on data from the era of Stop and Frisk and Broken Windows policing in New York City—as well as from statewide data that has been shaped by one of the great shames of our state, the Rockefeller Drug Laws. While those laws have been reformed, the legacy of their discriminatory impact carries on.

Finally, dangerousness RAIs are inconsistent with principles of transparency and individualized justice. RAIs, driven by opaque and often proprietary computer algorithms, present a complete "black box" to the public and, more importantly, to people charged with crimes whose futures would be determined by their results. More fundamentally, RAIs, particularly those that try to predict dangerousness, undermine the criminal justice system's commitment to individualized justice. RAIs tell us nothing about the specific person that they score, but instead rely on historical group data—the past conduct of other people—to place individuals into broad risk categories. The categories and labels these instruments produce could tremendously influence and change judicial behavior, and introduce biased data that undermines the presumption of innocence. At best, it is an open question whether risk assessments can exist in harmony with basic constitutional principles. This is particularly troubling in light of both our limited ability to predict future behavior with real accuracy and the potential for exacerbating racial disparities.

The primary goals of any bail reform effort should be reducing and limiting the use of pretrial detention and increasing fairness. Adopting dangerousness and RAIs would be a step in the opposite direction. We firmly believe that the existing bail statute's focus on ensuring people's return to court is appropriate and that there is no pressing or legitimate need to change the underlying considerations driving pretrial detention decisions.

The Current Bail Statute Already Provides Tools to Shrink Jail Populations and Reduce Reliance on Money in Our Pretrial Detention System

New York's bail statute, enshrined in Criminal Procedure Law §§ 500-540, includes a total of nine forms of bail and requires judges to consider a person's ability to pay when setting bail. Despite the menu of options available to judges, and a mandate to set *at least* two forms of bail, judges almost exclusively rely on the two forms of bail that can be the most difficult for people to afford—cash bail and insurance company bond—and rarely inquire into a person's ability to pay. This contradicts the core objective of the statute, which was specifically intended to reduce pretrial detention rates by creating four new forms of bail that would require little to no money be

deposited in order for a person to be released.[xi] One such form, an unsecured bond, requires no upfront cash payment and has been shown to be as effective as secured bonds in ensuring that a person comes to future court dates.[xii] For over thirty years, Madison County judges routinely approved unsecured bonds for bail in a highly successful process with a local community organization. Greater reliance on these bonds could end our two-tiered system, in which the rich go free and the poor do not, and would not require changing our existing statute.

All of these issues can be addressed under the *existing* bail statute by:

- Educating stakeholders, raising awareness of additional forms of bail, and encouraging judges to set alternative forms of bail that are less onerous than insurance company bonds;
- Simplifying the associated paperwork and procedures required for alternative forms of bail;
- Ensuring that courts are conducting the mandatory inquiry into a person's ability to pay before selecting a form of bail;
- Encouraging judges to impose the least onerous conditions necessary to ensure a person returns to court; and
- Holding the bail bond industry accountable through robust regulation and intensive oversight.

New York already has one of the most progressive bail statutes in the country. Your administration should take steps to ensure that it is used to its full capacity.

There Should Be Strict Limitations on the Use of Pretrial Detention and Individualized Justice Should Be Strengthened

We urge your administration to take the best of the existing bail statute and build on it. To fully realize the reduction in the State's jail population we all hope to see, we should: (1) strictly limit the use of pretrial detention, (2) mandate individualized justice and thoughtful detention decisions, and (3) work to eliminate race- and wealth-based disparities. Adoption of dangerousness RAIs will not achieve these goals. A more comprehensive approach to structural bail reform must embrace the following principles:

- New York must eliminate pretrial detention and money bail for all misdemeanors and nonviolent felonies and create a presumption of release for violent felonies.
- Pretrial conditions, including detention, must be determined through individualized evidentiary hearings held immediately after a person's first court appearance. On the record, judges must detail: why bail was set, why the amount and form of bail was selected, and why the individual will be able to gain release with the conditions that have been set. Judges must regularly revisit detention decisions whenever a person remains incarcerated over an extended period of time.
- For-profit bail bonds must be eliminated. Commercial bail bonds are a particularly onerous form of bail, and the only type of bail that requires consumers pay an upfront, non-refundable fee that families lose no matter the outcome of the case. An estimated $14 to $20 million in legally charged fees were paid to for-profit bail bond companies in New York City in 2016, alone.[xiii] This estimate does not even account for illegal fees that families are often charged or for the collateral that is withheld by bondsmen.

- If money bail is set, courts must set the amount and form at a level the person can afford.
- The state must track and regularly report on racial disparities in pretrial detention decisions in every county.

These are just the starting points for a discussion on true pretrial justice reform. Comprehensive reform will require stronger discovery laws, to ensure the prosecution cannot withhold evidence from the defense until the day of trial. It will also require robust speedy trial laws, to ensure no person is incarcerated for years before the resolution of their case.

Conclusion

There is a growing consensus in New York that we must close jails, eliminate racial disparities and wealth-based detention, and redirect resources to initiatives that support and build communities. Dangerousness and RAIs will not achieve these goals. A more comprehensive approach is needed. **We would welcome the opportunity to work with you on developing a plan of action to safeguard constitutional rights, reduce jail populations, and build communities. Thank you for considering our views.**

Sincerely,
Listed in alphabetical order by org name
131 Signatories as of 2:20 pm on 12/18/2017

- **5 Boro Defenders** (NYC)
- **Albany County Public Defender**
- **Allegany/Cattaraugus Legal Services, Inc.**, Annette Harding
- **Allegany County Public Defender**
- **Alliance for Quality Education** (Statewide)
- **Alliance of Families for Justice** (Harlem, Albany, and Statewide)
- **American Friends Service Committee** (Statewide)
- **Amistad Long Island Black Bar Association**
- **Antiracist Alliance** (Statewide)
- **Association of Legal Aid Attorneys – UAW Local 2325** (NYC)
- **Bernard Harcourt**, Professor of Law & Professor of Political Science, Columbia University
- **BOOM!Health** (Bronx)
- **BronxConnect (Urban Youth Alliance)**
- **Bronx Defenders**
- **Bronx Freedom Fund**
- **Brooklyn Community Bail Fund**
- **Brooklyn Defender Services**
- **Brooklyn Law School National Lawyers Guild**
- **The Brotherhood/Sister Sol** (NYC & National)
- **CAAAV Organizing Asian Communities** (NYC)
- **Campaign for Alternatives to Isolated Confinement** (NYC)
- **Capital Area Against Mass Incarceration**
- **Center for Appellate Litigation** (NYC)
- **Center for Community Alternatives, Inc.** (Syracuse & NYC)

- **Center for Family Representation**
- **Center for Law and Justice** (Albany)
- **Challenging Incarceration** (Statewide)
- **Chemung County Public Advocate's Office**
- **Chief Defenders Association of New York**, Mark Williams
- **Child Welfare Organizing Project** (NYC)
- **Citizen Action of New York** (Statewide)
- **Columbia County Public Defender**, Robert Linville
- **Common Justice** (Brooklyn & the Bronx)
- **Community Service Society of New York**
- **DAYLIGHT** (NYC)
- **Decarcerate Tompkins County**
- **Defending Rights & Dissent** (National)
- **Discovery for Justice** (Bronx & Statewide)
- **Drive Change** (NYC)
- **El Centro del Inmigrante** (NYC)
- **Enlace**
- **Erie County Bar Association Assigned Counsel Program**
- **Families Together in New York State**
- **The Fortune Society** (NYC)
- **Genesee County Public Defender**, Jerry Ader
- **Grand St. Settlement** (Lower East Side)
- **Harm Reduction Coalition** (Statewide & National)
- **The Homeless and Travelers Aid Society of the Capital District, Inc.**
- **Housing Works** (Statewide & National)
- **Human Rights Watch** (US Program), John Raphling
- **Immigrant Defense Project** (NYC)
- **Innocence Project** (Statewide)
- **The Interfaith Center of New York**
- **Interfaith Impact of New York State**
- **International Concerned Family and Friends of Mumia Abu-Jamal**
- **Jewish Voice for Peace – New York City**
- **Jews for Racial & Economic Justice** (NYC)
- **Justice and Unity for the Southern Tier** (Binghamton)
- **JustLeadershipUSA** (NYC & National)
- **Katal Center for Health, Equity, and Justice** (Albany & Statewide)
- **Labor-Religion Coalition of New York State**
- **LatinoJustice PRLDEF** (National)
- **Legal Action Center** (Statewide)
- **The Legal Aid Society** (NYC)
- **Legal Aid Society of Nassau County**, N. Scott Banks
- **Legal Aid Society of Westchester County**
- **The LGBT Bar Association of Greater New York**
- **LGBTQ Community for Racial Justice** (Hudson Valley)
- **LPS/LIFE Progressive Services Group, Inc.** (Mount Vernon)
- **Madison County Bail Fund, Inc.**, Marianne Simberg
- **Make the Road New York** (Statewide)

- **Middle Collegiate Church** (NYC)
- **Mid Hudson Jews for Racial Justice** (Statewide)
- **Milk Not Jails** (Statewide)
- **Mobilization for Justice** (NYC)
- **NAACP Legal Defense Fund** (National)
- **Nassau County Criminal Courts Bar Association**
- **Nassau County Jail Advocates**
- Second Chance Committee, **National Action Network** (NYC)
- **National Alliance on Mental Illness, NAMI-NYS (Criminal Justice)**
- **National Alliance on Mental Illness, NAMI-Huntington**
- **Neighborhood Defender Service of Harlem**
- **New York City Books Through Bars**
- **New York City Jails Action Coalition**
- **New York Civil Liberties Union**
- **New York Communities for Change**
- **New York County Defender Services**
- **New York Harm Reduction Educators** (NYC)
- **New York State Association of Criminal Defense Lawyers,** John Wallenstein
- **New York State Council of Churches** (Statewide)
- **New York State Prisoner Justice Network** (Albany & Statewide)
- **NYU Black Allied Law Students Association**
- **NYU Law Prison Reform & Education Project (PREP)**
- **The Office of the Appellate Defender** (NYC)
- **One Thousand Arms**
- **Onondaga County Bar Association Assigned Counsel Program, Inc.**, Kathleen Dougherty
- **Partnership for the Public Good** (Buffalo)
- **Peace and Justice Task Force of the Unitarian Church of All Souls** (New York)
- **Peer Network of New York** (Statewide)
- **Policing and Social Justice Project, Brooklyn College**
- **Presbytery of New York City Justice Ministries**
- **Prison Action Network** (Statewide)
- **Prisoners' Rights Task Force** (Buffalo)
- **Prison Families Anonymous** (Long Island)
- **Queens Law Associates**
- **Queer Detainee Empowerment Project** (Statewide)
- **Release Aging People in Prison/RAPP Campaign** (Statewide)
- **Rikers Debate Project**
- **Second Chance Reentry, Inc.** (Long Island)
- **Social Responsibilities Council of Albany Unitarian Universalists**
- **Southern Tier AIDS Program** (Ithaca)
- **St. Ann's Corner of Harm Reduction** (Bronx)
- **STEPS to End Family Violence** (NYC)
- **Steuben County Office of the Public Defender**
- **Showing Up for Racial Justice** (NYC)
- **Syracuse Jail Ministry**, Keith Cieplicki
- **Tompkins County Assigned Counsel Program**
- **Ulster County Public Defender**

- **United Voices of Cortland**
- **Urban Justice Center** (NYC)
- **VOCAL-NY**
- **VOICE-Buffalo**
- **Washington Heights CORNER Project**
- **Washington Square Legal Services Bail Fund**
- **Wayne County Public Defender**, James Kernan
- **WESPAC Foundation** (Westchester)
- **The West Side Commons** (NYC)
- **Women & Justice Project**
- **Woodstock Jewish Congregation Task Force to End the New Jim Crow**
- **Working Families Party**
- **Youth Represent** (NYC)

For more information, or to be added as a signatory, please contact:
Sean Hill II, Esq. | Senior Legal Fellow | *shill@katalcenter.org* | 347.921.0826

[i] David Burnham, "State Unit Drops Detention Plan," *The New York Times* (Sept. 3, 1969), *available at* http://query.nytimes.com/mem/archive/pdf?res=9405EFDF1031EE3BBC4B53DFBF668382679EDE.

[ii] Aryeh Neir and Neil Fabricant, "NYCLU Legislative Memorandum #20" (Feb. 6, 1969), *available at* http://www.nycourts.gov/library/nyc_criminal/penal-law-bartlett/099.pdf.

[iii] Megan Stevenson, "Assessing Risk Assessment," 54, *George Mason University Law and Economics Research Paper Series* (Forthcoming, 2017) (acknowledging the use of risk assessment instruments *before* the state shifted to use of the Arnold Foundation's RAI, the Public Safety Assessment).

[iv] Human Rights Watch, "Not in it for Justice," 99-100 (April 11, 2017), *available at* https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly.

[v] Baughman, Shima Baradaran and McIntyre, Frank, "Predicting Violence," 527, *Texas Law Review*, Vol. 90 (2012), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1756506.

[vi] 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,"12, *NYC Criminal Justice Agency* (January 2009), *available at* https://goo.gl/WK2813 (finding that, in their 2001 at-risk sample, only 3% of accused people were re-arrested for a violent offense).

[vii] For example, the Laura and John Arnold Foundation found that only 8.6% of people flagged as "significantly more likely to commit an act of violence if released before trial" by their RAI (the Public Safety Assessment) were actually arrested for a new violent crime. *See* Laura and John Arnold Foundation, "Results from the First Six Months of the Public Safety Assessment-Court in Kentucky" (July 2014), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf.

[viii] *See* Julia Angwin et al., "Machine Bias," *ProPublica* (May 23, 2016), *available at* https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

[ix] Julia Angwin & Jeff Larson, "Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say," *ProPublica* (Dec. 30, 2016), *available at* https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say.

[x] Laurel Eckhouse, "Big data may be reinforcing racial bias in the criminal justice system," *The Washington Post* (Feb. 10, 2017), *available at* https://www.washingtonpost.com/opinions/big-data-may-be-reinforcing-racial-bias-in-the-criminal-justice-system/2017/02/10/d63de518-ee3a-11e6-9973-c5efb7ccfb0d_story.html?utm_term=.e78f54f265d9.

[xi] "Proposed New York Criminal Procedure Law: 1969 Bill," XVIII, *available at* http://www.nycourts.gov/library/nyc_criminal/penal-law-bartlett/196.pdf.

[xii] "Brief of Pretrial Justice Institute and the National Association of Pretrial Services Agencies…", 9-12, *Walker v. City of Calhoun,* Docket No. 16-10521 (Aug. 18, 2016).

[xiii] Brooklyn Community Bail Fund, "License & Registration Please…", 2, *available at* https://static1.squarespace.com/static/5824a5aa579fb35e65295211/t/594c39758419c243fdb27cad/1498167672801/NYCBailBondReport_ExecSummary.pdf.

New York State Bar Association

2018 Annual Meeting

Materials for Panel Discussion on Bail Reform

Wednesday, January 24, 2018

Michael C. Green, Esq., Executive Deputy Commissioner,

NYS Division of Criminal Justice Services, Albany, NY

New York State Pretrial Release Decisions and Bail Outcomes

- The Division of Criminal Justice Services (DCJS) conducted an analysis of pretrial release outcomes at local criminal court arraignments using a data file provided by the Office of Court Administration (OCA). The analysis included arraignments held for felony and finger-printable misdemeanor arrests for the 18-month period between January 2016 and June 2017. The OCA files were matched to DCJS computerized criminal history records as part of the analysis.

- More than 400,000 arraignments were included in the analysis, which was based on the Criminal Records Information Management System (CRIMS) records for New York City and the Universal Case Management System (UCMS) records in the rest of state. Due to the limited availability of data on pretrial release outcomes outside of New York City, there are some limitations to the analysis:

    - Town and Village Courts do not use the CRIMS or the UCMS system, so information on arraignments held in these courts are not included. About 45% of local arraignments outside of New York City are held in Town and Village Courts, so a significant percentage of the pretrial release decisions outside of New York City are not known. Statewide, Town and Village Courts represent about 20% of the total local court arraignments.

    - Because the rollout of UCMS to City and County Courts outside of New York City was underway at the time the file was prepared, data was not available for several large-volume courts outside of NYC (such as Rochester and Suffolk county) and only limited cases were available for other large courts. The following non-NYC courts each had 1,000 or more cases included: Nassau District Court, Buffalo, Syracuse, Utica, Troy, Newburgh, Kingston, Binghamton, Middletown, Cortland, Saratoga Springs, and Poughkeepsie.

- Overall, local arraignments held between January 2016 and June 2017 for all New York City Criminal Courts and 51 non-NYC District and City Criminal Courts were included in the analysis.

- In New York City, about 28% of the cases were disposed at arraignment, with no pretrial release decision made. These cases are not included in this analysis of pretrial release outcomes.

- Information on pretrial release outcomes included:

    - Release on Recognizance (ROR)
    - Release Under Supervision (RUS)
    - Bail set and made at arraignment (within 2 days)
    - Bail set but not made at arraignment
    - Remand

- The OCA files with pretrial release outcomes were matched to DCJS computerized criminal history records to include defendant information such as age, race and gender, as well as current charges, criminal history and bench warrant history.

The tables in the attached analysis (Slides 3,11, 13 and Tables 1 and 2) show annual numbers of pretrial release outcomes that were estimated based on 2016 reported arraignments. All non-NYC annual estimates as well as reported outcomes exclude Town and Village Court activity. The outcomes shown on slides 6 – 14 are based on bail outcomes within 5 days of arraignment.

ROR Rates are much greater in NYC than non-NYC.

- In New York City, 72% of defendants were released on their own recognizance (ROR), compared to a 47% ROR rate in non-NYC. (Slides 1 and 2)

Bail is imposed more frequently in non-NYC.

- Bail was set in 42% of non-NYC cases and 25% of NYC cases. (Slides 1 and 2)

It can take several days to make bail, and most cases who have bail set have not made bail 5 days after arraignment.

- When bail was set in NYC, 88% were unable to pay the day of arraignment. After 2 days, 77% were still detained; after 5 days, 69% remained detained. (Slide 3)

- In non-NYC, 77% were not able to pay at arraignment, with 70% detained after 2 days, and 64% still detained after 5 days. (Slide 3)

The median bail amount is $2,500. (Slide 5)

Many defendants who do post bail still end up detained for at least several days.

- 69% of NYC cases and 64% of non-NYC cases with bail set had still not paid bail 5 days after arraignment. (Slide 6)

- Even for defendants with the lowest bail amounts - $500 or less – a large proportion are not able to pay. (Slide 6)

Overall, 82% of NYC cases and 68% of non-NYC are released to the community within 5 days of arraignment.

- The majority of defendants not released were held due to nonpayment of bail. (Slide 7)

Release decisions and ROR rates vary by charge type and by region.

- In NYC, 10% of misdemeanors, 35% of nonviolent felonies and 46% of violent felonies were detained due to inability to pay bail. (Slide 9)

- In non-NYC, 21% of misdemeanors, 37% of nonviolent felonies and 52% of violent felonies were detained due to inability to pay bail. (Slide 10)

There is racial disparity in pretrial release rates, with black defendants released at the lowest rates.

- Pretrial release rates in NYC were higher among whites (85%) than among blacks (79%) or Hispanics (82%). (Slide 12)
- In non-NYC, release rates were higher among whites (73%) than among blacks (61%) or Hispanics (69%). (Slide 14)

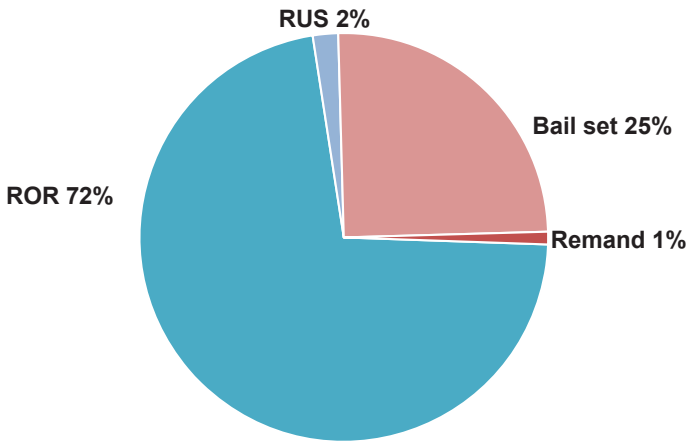
A large number of defendants are held for misdemeanors and nonviolent felonies.

Tables 1 and 2 show annual estimates of pretrial outcomes broken out by race and crime type. This includes the estimated number of defendants who pay bail and are released at arraignment, 1-2 days after arraignment, or after 3-5 days. The highlighted column shows the number who are still unable to pay after 5 days:

- In NYC, an estimated 12,100 misdemeanant defendants, and 9,600 nonviolent felony defendants were held due to inability to pay bail, representing 74% of the 29,300 held. The vast majority (80%) were black or Hispanic.
- In non-NYC, an estimated 14,400 misdemeanant defendants, and 9,100 nonviolent felony defendants were held due to inability to pay bail, representing 84% of the 27,900 held. A total of 51% were black or Hispanic. (Does not include Town and Village court cases.)

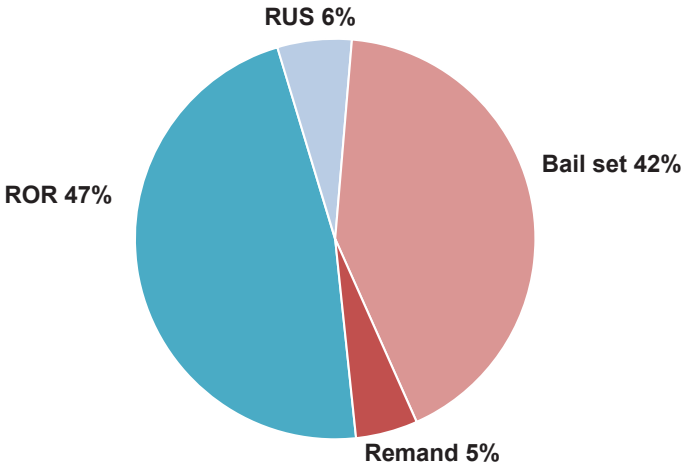
1

NYC Pretrial Release Decisions



2

Non-NYC Pretrial Release Decisions



3

Percent of Bail-Not Paid Among Bail-Set Cases

	Bail Set		Bail Set/ Not Paid At Arraignment		Bail Set/ Not Paid within 2 days of arraignment (cumulative)		Bail Set/ Not Paid within 5 days of arraignment (cumulative)	
NYC								
Total	42,200	100%	37,000	88%	32,600	77%	29,300	69%
Misdemeanor	18,600	100%	15,700	84%	13,600	73%	12,100	65%
Non Violent Felony	13,200	100%	11,900	90%	10,600	80%	9,600	73%
Violent Felony	10,500	100%	9,500	90%	8,500	81%	7,600	72%
Non-NYC								
Total	43,300	100%	33,500	77%	30,100	70%	27,900	64%
Misdemeanor	22,800	100%	17,000	75%	15,400	68%	14,400	63%
Non Violent Felony	14,300	100%	11,300	79%	10,000	70%	9,100	64%
Violent Felony	6,300	100%	5,300	84%	4,800	76%	4,400	70%

* Based on study outcomes applied to 2016 arraignments.

4

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5

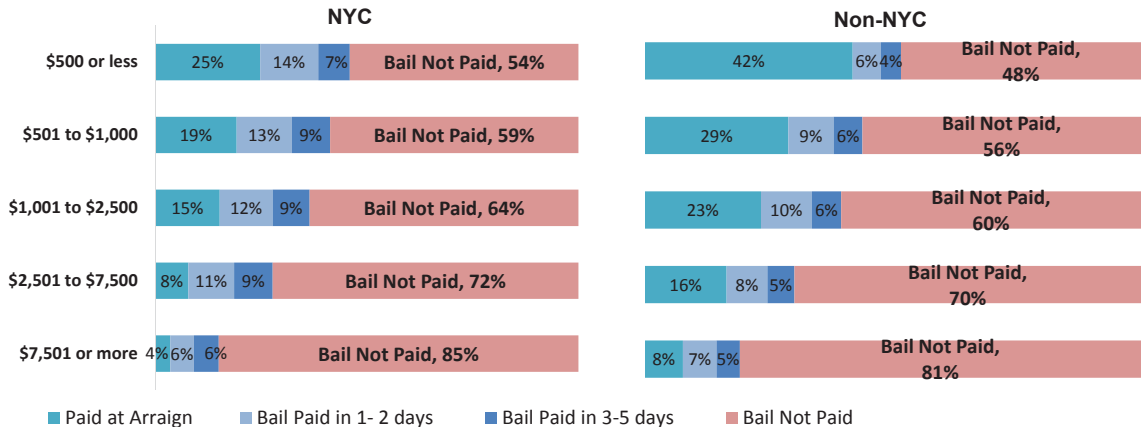
Bail Amounts Set

Bail Amount (US Dollars)	NYC	Non-NYC
$500 or less*	14%	20%
$501 to $1,000	19%	13%
$1,001 to $2,500	23%	20%
$2,501 to $7,500	21%	23%
$7,501 or more	23%	24%
Total	100%	100%
Median Bail Amount	$2,500	$2,500

* Excludes cases where bail was set at $1.

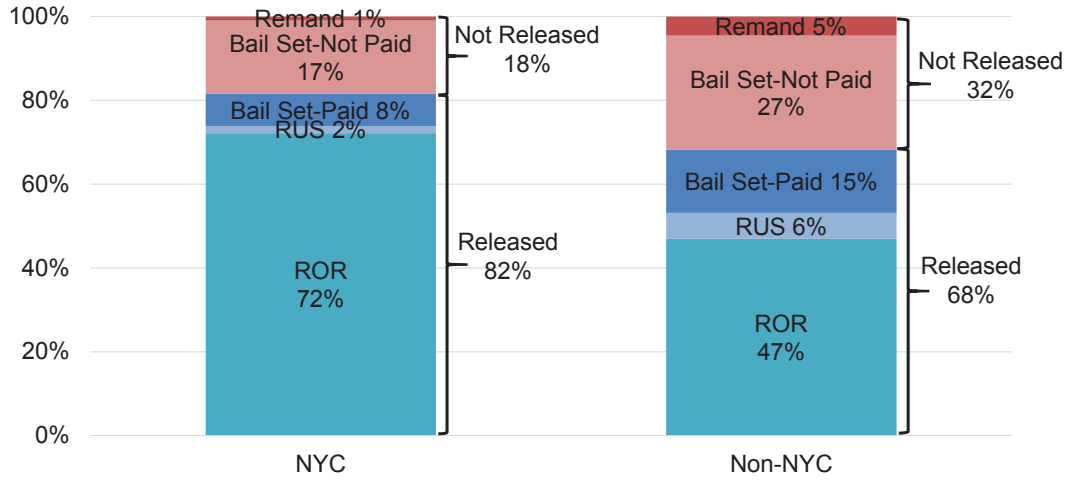
6

Among Cases with Bail Set: 69% of NYC Cases and 64% of Non-NYC Cases Do Not Pay Bail within 5 days of Arraignment



7

Current Pretrial Release Outcomes - Total Felony and Misdemeanors



Based on bail paid/ not paid within five days of arraignment.

8

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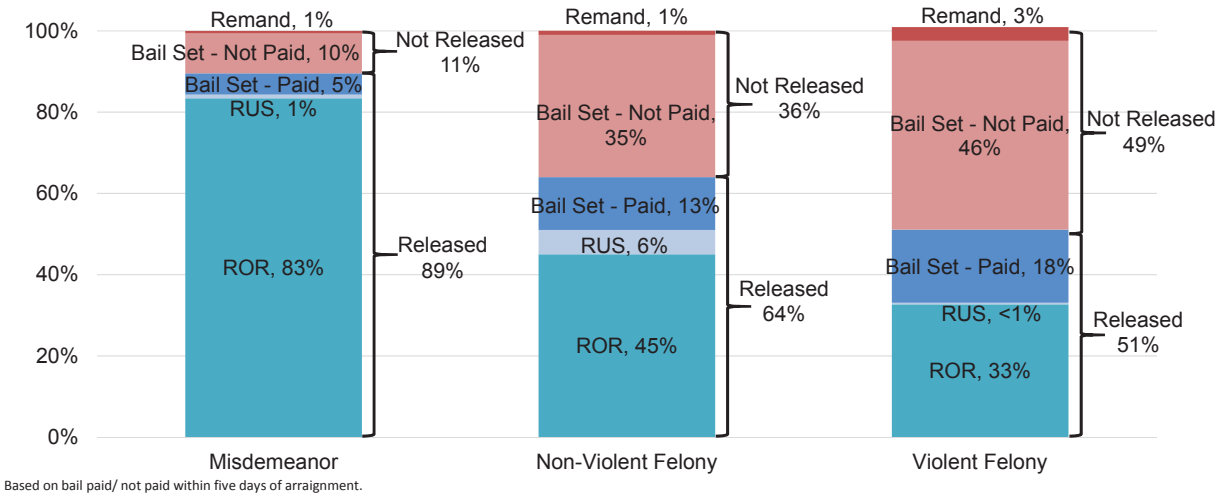
9

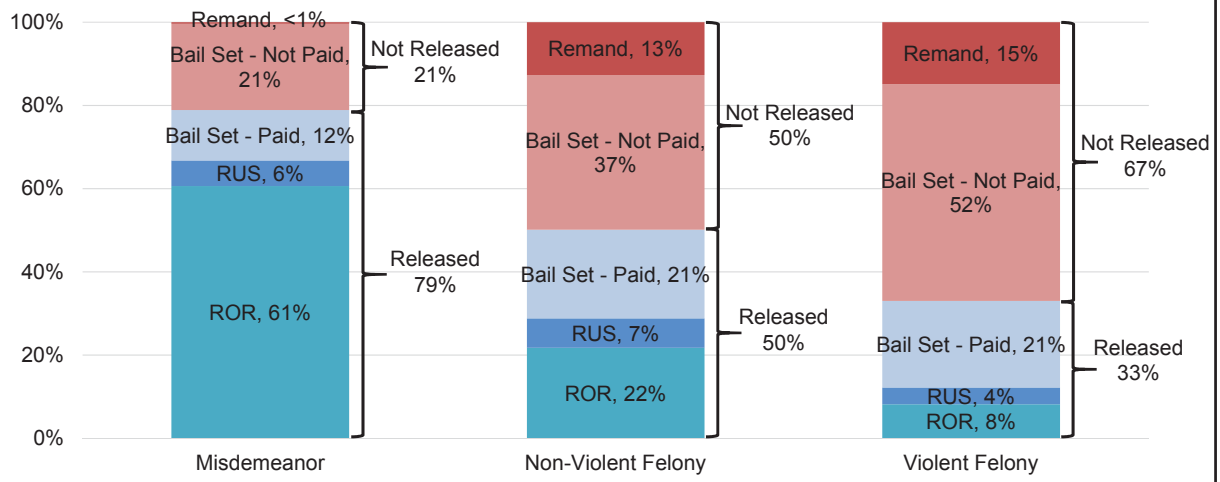
NYC Pretrial Release Outcomes by Charge Type



Based on bail paid/ not paid within five days of arraignment.

10

Non-NYC Pretrial Release Outcomes by Charge Type



Based on bail paid/ not paid within five days of arraignment.

11

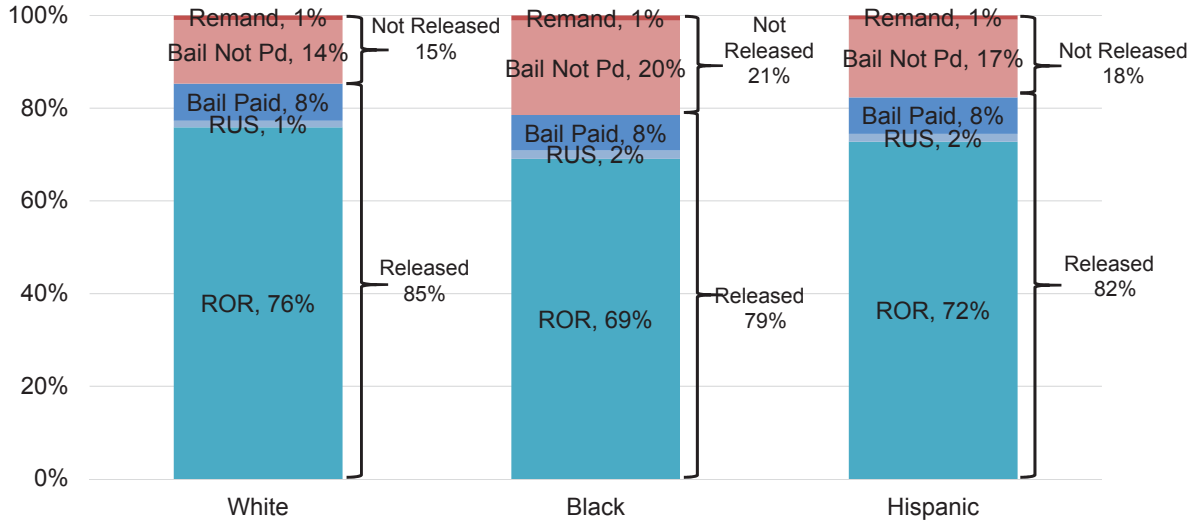
NYC Estimated Annualized Outcomes by Race*

	White	Black	Hispanic	Other	Total
Not Released to Community					
Remanded without Bail	200	900	500	100	1,700
Bail Set - Not Paid within 5 days of Arraignment	2,800	16,300	9,300	900	29,300
Total - Not Released	3,000	17,200	9,800	1,000	31,000
Released to Community					
Bail Set - Paid within 5 days of Arraignment	1,600	6,100	4,400	800	12,900
RUS	300	1,400	1,000	100	2,800
ROR	15,400	55,200	41,000	9,300	120,900
Total - Released to Community	17,300	62,700	46,400	10,200	136,600
Total	20,300	79,900	56,200	11,200	167,600

* Based on study outcomes applied to 2016 arraignments.

12

NYC Pretrial Release Outcomes by Race



Based on bail paid/ not paid within five days of arraignment.

13

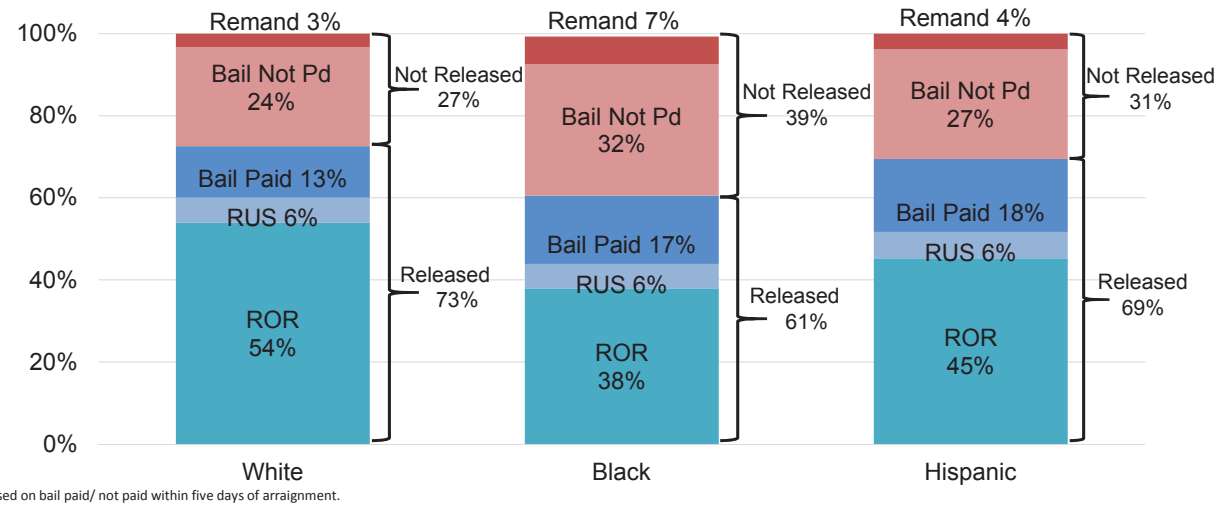
Non-NYC Estimated Annualized Outcomes by Race*

	White	Black	Hispanic	Other	Total
Not Released to Community					
Remanded without Bail	1,600	2,500	500	100	4,700
Bail Set - Not Paid within 5 days of Arraignment	11,200	12,100	3,900	700	27,900
Subtotal - Not Released	12,800	14,600	4,400	800	32,600
Released to Community					
Bail Set - Paid within 5 days Arraignment	5,900	6,200	2,500	800	15,400
RUS	2,900	2,200	900	400	6,400
ROR	25,100	14,100	6,500	2,400	48,100
Subtotal - Released to Community	33,900	22,500	9,900	3,600	69,900
Total	46,700	37,100	14,300	4,400	102,500

* Excludes arraignments held in Town & Village courts. Based on study outcomes applied to 2016 arraignments.

14

Non-NYC Pretrial Release Outcomes by Race



Based on bail paid/ not paid within five days of arraignment.

Table 1. NYC: Estimated Annual Pretrial Outcomes at Local Arraignments								
	ROR	RUS	Bail Paid At Arraignment	Bailed Paid within 1-2 Days	Bail Paid within 3-5 Days	Bail Not Paid	Remand	Total
Misdemeanor	103,000	1,200	2,900	2,100	1,600	12,100	800	123,700
White	13,500	200	500	200	200	1,400	100	16,100
Black	46,500	600	1,200	1,000	800	6,700	500	57,300
Hispanic	35,300	400	1,000	800	500	3,600	200	41,800
Other	7,700	0	200	100	100	400	<100	8,500
Non-Violent Felony	12,600	1,600	1,200	1,300	1,000	9,600	300	27,600
White	1,400	100	200	100	100	1,000	100	3,000
Black	5,900	800	500	600	500	5,100	100	13,500
Hispanic	4,000	600	400	500	400	3,200	100	9,200
Other	1,300	100	100	100	<100	300	0	1,900
Violent Felony	5,300	0	1,100	1,000	800	7,600	550	16,300
White	500	0	200	100	<100	400	<100	1,200
Black	2,800	0	500	500	500	4,500	300	9,100
Hispanic	1,700	0	300	300	300	2,500	200	5,300
Other	300	0	100	100	<100	200	<100	700
Total	120,900	2,800	5,200	4,400	3,300	29,300	1,700	167,600
White	15,400	300	900	400	300	2,800	200	20,300
Black	55,200	1,400	2,200	2,100	1,800	16,300	900	79,900
Hispanic	41,000	1,000	1,700	1,600	1,100	9,300	500	56,200
Other	9,300	100	400	300	100	900	100	11,200

Table 2. Non-NYC: Estimated Annual Pretrial Outcomes at Local Arraignments

	ROR	RUS	Bail Paid At Arraignment	Bailed Paid within 1-2 Days	Bail Paid within 3-5 Days	Bail Not Paid	Remand	Total
Misdemeanor	42,100	4,250	5,800	1,600	1,050	14,400	300	69,500
White	22,300	1,900	2,500	600	500	6,700	200	34,700
Black	12,000	1,500	2,000	700	400	5,500	100	22,200
Hispanic	5,800	600	1,000	200	100	1,900	0	9,600
Other	2,000	250	300	100	<100	300	0	3,000
Non-Violent Felony	5,300	1,700	3,100	1,300	850	9,100	3,150	24,500
White	2,500	800	1,100	400	300	3,400	1,100	9,600
Black	1,800	600	1,300	600	400	4,100	1,700	10,500
Hispanic	600	200	500	200	100	1,300	300	3,200
Other	400	100	200	100	<100	300	<100	1,200
Violent Felony	700	450	900	500	300	4,400	1,250	8,500
White	300	200	300	100	100	1,100	300	2,400
Black	300	100	400	300	100	2,500	700	4,400
Hispanic	100	100	200	100	100	700	200	1,500
Other	<100	<100	<100	<100	<100	100	<100	200
Total	48,100	6,400	9,800	3,400	2,200	27,900	4,700	102,500
White	25,100	2,900	3,900	1,100	900	11,200	1,600	46,700
Black	14,100	2,200	3,700	1,600	900	12,100	2,500	37,100
Hispanic	6,500	900	1,700	500	300	3,900	500	14,300
Other	2,400	400	600	100	100	700	100	4,400

Excludes arraignments held in Town & Village courts.

Speaker Biographies

DAVID LOUIS COHEN, ESQ.

Biography

David Louis Cohen has been a well-known and respected criminal defense attorney for more than forty years. The thousands of cases he has handled include homicide, mortgage fraud, tax fraud, Medicaid fraud, insurance fraud, enterprise corruption, internet gambling, driving while intoxicated and most other major crimes. He has tried more than three hundred cases in Federal and State Courts.

David Louis Cohen obtained a Bachelor of Science Degree from the New York University School of Business and a Juris Doctor Degree from Brooklyn Law School. From 1971 to 1974, he was a Staff Attorney with the Criminal Defense Division of the Legal Aid Society of the City of New York. In 1975, he opened his own private practice concentrating on the aggressive defense of those accused of crimes in both Federal and State Courts.

In 1980, David Louis Cohen was elected to the New York State Assembly. He served on the Codes Committee which has jurisdiction over all criminal justice legislation. He left the Assembly in 1982, and since 1995, has served as Counsel to Assembly member Joseph R. Lentol, chair of the Codes Committee.

David Louis Cohen is a Past President of the Queens County Bar Association and the Queens County Criminal Courts Bar Association. He was a founding member of the New York State Association of Criminal Defense Attorneys. Currently he is a member at large of the Executive Committee of the New York State Bar Association. David Louis Cohen is the Executive Committee's liaison to the New York State Bar Association's Criminal Justice Section and was a member of the Task Force on Wrongful Convictions; and the Special Committee on Criminal Discovery. David has been designated by the New York State Bar Association to serve on the Board of Directors of Prisoners Legal Services. David Louis Cohen has also been appointed to the Chief Judge's Criminal Discovery Committee. David also serves as a member of the Grievance Committee of the Second, Eleventh, and Thirteenth Judicial Districts.

David Louis Cohen was an Adjunct Professor at the Intensive Trial Advocacy Program of the Hofstra University Law School. He is member of the faculty of the New York State Bar Association's Trial Advocacy Academy held at Cornell Law School. He has participated in training programs conducted by the Legal Aid Society Criminal Defense Division and the Office of the District Attorney of Queens County. He has also lectured on various criminal defense issues before numerous bar associations.

David Louis Cohen is admitted to practice in New York State, the United States District Courts for the Southern, Eastern and Northern Districts of New York, the Supreme Court of the United States and the United States Court of Appeals for the Fourth Circuit.

ROBERT S. DEAN, ESQ.
Biography

Robert S. Dean is the Attorney-in-Charge of the Center for Appellate Litigation, a 40-lawyer not-for-profit group representing indigent criminal defendants on appeal and in post-conviction proceedings. He has also taught appellate advocacy and post-conviction remedies at the NYU School of Law and Brooklyn Law School. A graduate of NYU Law School, with over 40 years of experience as an appellate public defender, he has personally briefed and argued over 350 cases in New York's intermediate appellate courts, more than 35 cases in the New York Court of Appeals, and one winning case in the United States Supreme Court (Cruz v. New York). He is a principal author of the West Book New York Pretrial Criminal Procedure, first and second editions. He was most recently chair of the Committee on Criminal Courts at the New York City Bar Association. He is Chair of the Appellate Practice Section of the State Bar Association's Criminal Justice Section Executive Committee, and Vice Chair of the State Bar's Committee on Mandated Representation. He is on the board of the Chief Defenders Association of New York. In January 2013 he received the State Bar Criminal Justice Section's Award for Outstanding Appellate Practitioner.

HON. MATTHEW J. D'EMIC
Biography

Judge Matthew D'Emic was appointed to the bench in 1996. In 2014 he was appointed Administrative Judge for Criminal Matters in Kings County Supreme Court. In addition to his administrative duties, Judge D'Emic presides over the Brooklyn Domestic Violence Court and Brooklyn Mental Health Court.

Judge D'Emic is a member of the New York State Judicial Committee on Women in the Courts and the New York State Judicial Committee on Elder Justice. He is a past chair of the Brooklyn Supreme Court Gender Fairness Committee and a past chair of the Alternatives to Incarceration and Diversion Committee of the American Bar Association. Judge D'Emic served on the Steering Committee of Mayor Bloomberg's Citywide Justice and Mental Health Initiative and Mayor DeBlasio's Behavioral Health and Criminal Justice Task Force. He is a commissioner of the New York City Commission on New York City Criminal Justice and Incarceration Reform.

Judge D'Emic has been recognized for his work in domestic violence and mental health and frequently lectures on these topics. He is also an adjunct professor at Brooklyn Law School.

MICHAEL C. GREEN, ESQ.

Biography

In March of 2012 Governor Cuomo appointed Mr. Green to the position of Executive Deputy Commissioner of the New York State Division of Criminal Justice Services. From this post Green leads the agency responsible for many key parts of the criminal justice system in New York, including the State's DNA database, Criminal History Repository and Sex Offender Registry. Green's duties also include serving as chair of the New York State Commission on Forensic Science, and as a member of the New York State Sentencing Commission and the New York State Justice Task Force. Major initiatives Green is leading at DCJS include GIVE (Gun Involved Violence Elimination) working with local law enforcement to address shootings with evidence based strategies and an emphasis on procedural justice, the redesign of ATI funding to incorporate evidenced based principles to the delivery of ATI services funded by the state, expansion of the state's network of Crime Analysis and Real Time Crime Centers and implementation of Raise the Age legislation. Under his leadership in 2017 DCJS was named the number one large employer to work for in the Capital Region by the Albany Times Union based on employee surveys.

Prior to joining DCJS, Green served for 25 years in the Monroe County District Attorney's Office, including eight years as the elected District Attorney. In 2007 Governor Spitzer appointed Green to the Sentencing Reform Commission. In 2008, Green was appointed to the New York State Juvenile Justice Task Force by Governor Paterson. Mr. Green was named 2009 Prosecutor of the Year by the New York Prosecutors Training Institute. In 2011 the District Attorney's Association of the State of New York awarded District Attorney Green their Distinguished Service Award and in 2012 he received the prestigious Hogan award from the association recognizing a "lifetime of distinguished and honorable service."

Mr. Green has served as an adjunct professor in the Criminal Justice Department at Rochester Institute of Technology. He has served as faculty for the National College of District Attorneys at the National Advocacy Center and has lectured for the New York Prosecutors Training Institute.

SEAN HILL, ESQ.
Biography

Sean Hill joined the Katal Center as a Senior Legal Fellow in the Summer of 2017, to address and advance speedy trial and bail reform across New York. Prior to joining Katal, Sean was a Senior Staff Attorney with the legal non-profit, Youth Represent, where he represented formerly-incarcerated youth in both the criminal and civil matters interfering with their successful re-entry. Through a 2013 Equal Justice Works Fellowship, he also started Youth Represent's Family Stability Project, which expanded the law office's legal practice to various Family Court matters.

Sean is a member of the New York State Bar Association's Family Law Section, and was awarded its annual fellowship in 2015. He has been a member of the Law4BlackLives Steering Committee since 2015, and the co-chair of the National Conference of Black Lawyers - New York Chapter since 2016. Sean is a 2012 graduate of Harvard Law School, where he was an active member of the Black Law Students Association (BLSA) and student government.

HON. J. ANTHONY JORDAN, ESQ.

Biography

Tony Jordan received his Bachelor's Degree in Business with a concentration in Finance from the University of Notre Dame in 1986. After graduation Tony worked in Banking in Corporate Lending before going to Law School. Tony earned his law degree, graduating Magna Cum Laude from the University of Pennsylvania School of Law in 1995. He was a partner in Jordan & Kelly LLC until December 2013. He is admitted in New York, Delaware and Pennsylvania.

Tony from the Town of Jackson was first elected Washington County District Attorney in November 2013 and was re-elected to a second term in November 2017. Tony was elected to serve on the District Attorneys Association of the State of New York's Board of Directors in January 2017 and elected Vice-President in July 2017. In December of 2017 Tony was appointed by Chief Judge Janet DiFiore to serve as a member of the New York State Permanent Commission on Sentencing.

Additionally, he has been appointed to assist the New York State Association of Counties in developing a plan for all Counties to address challenges and recover costs associated with implementation of the Raise the Age initiative and was recently appointed to assist the Governor's Office in exploring changes to the Pre-sentence incarceration of individuals charged with crimes in New York by exploring differences between Counties upstate and New York City.

Prior to being elected as District Attorney, he served as a New York State Assemblyman since January 2009 serving as Minority Leader Pro Temp.

Tony resides in Jackson with his wife Wendy and their 4 children.

HON. BARRY KAMINS

Biography

The Honorable Barry Kamins is a retired Supreme Court Judge. Before his retirement he was Administrative Judge of the Criminal Court of New York City, Administrative Judge for Criminal Matters for the Second Judicial District and Chief of Policy and Planning for the New York Court System. He was appointed a Criminal Court Judge by Mayor Michael Bloomberg on September 11, 2008 and was elevated to Acting Supreme Court Justice on May 6, 2009. Judge Kamins was elected a State Supreme Court Justice on January, 1, 2013.

Judge Kamins is an Adjunct Professor at Brooklyn Law School where he teaches New York criminal practice. He is the author of New York Search and Seizure and writes the Criminal Law and Practice column for the New York Law Journal.

From 1969 to 1973, Judge Kamins served as an Assistant District Attorney in Kings County where he was Deputy Chief of the Criminal Court Bureau. Before serving as a judge, he was a partner in Flamhaft Levy Kamins Hirsch & Rendeiro LLP

Judge Kamins is former President of the Association of the Bar of the City of New York and formerly chaired the Advisory Committee on Criminal Law and Procedure for the Chief Administrative Judge of New York. He is a past Chair of the New York State Permanent Sentencing Commission. Judge Kamins is past Chairman of the Grievance Committee of the 2nd and 11th Judicial Districts. In addition, he is a former member of the New York State Continuing Legal Education Board. He is currently a member of the New York Law Journal Board of Editors and a member of the Board of Trustees on the Historical Society of the Courts of New York State. He chaired the State Bar's Task Force on Wrongful Convictions and a former member of the Justice Task Force dealing with wrongful convictions.

Judge Kamins lectures extensively on criminal law for the Office of Court Administration and to prosecutors and defense attorneys. Over the years, he has been appointed by the courts to serve on several committees dealing with problems in the criminal justice system; the Commission on the Future of Indigent Defense Services; the Commission on Drugs and the Courts; the Committee to Promote Public Trust and Confidence in the Legal System; the Committee on Guidelines for Representation of Indigent Defendants' the New York Task Force on Procession Civilian Complaints by the New York City Criminal Court; and the Assigned Counsel Plan Advisory Committee of the Appellate Division, Second Department.

He received a B.A. from Columbia College and a J.D. from Rutgers University Law School.

Bar Admissions
-New York, 1969

Education
-Rutgers School of Law - Camden, Camden, New Jersey - J.D.
-Columbia College - B.A.

ANDREW KOSSOVER, ESQ.

Biography

Andrew Kossover, a partner in Kossover Law Offices (New Paltz), is Chair of the New York State Bar Association's Committee on Mandated Representation and a member of the Executive Committee of the Criminal Justice Section. He is immediate Past-President and current Legislative Co-Chair of the New York State Association of Criminal Defense Lawyers. He is also Ulster County's part-time Chief Public Defender. Andy attended SUNY Buffalo and Vermont Law School. He began the practice of law under the auspices of the Criminal Defense Division of the Legal Aid Society of New York (Kings County).

In 1984, Andy relocated from New York City to the Hudson River Valley. He was appointed by the late Governor Mario Cuomo to the Board of Visitors of the Hudson River Psychiatric Center. Mr. Kossover is the former law clerk for then Ulster County Family Court Judge Karen K. Peters (recently retired as Presiding Judge of the Appellate Division, Third Department). Mr. Kossover is a former President of the Ulster County Bar Association and former member of the Board of Directors of the New York State Defenders Association.

Mr. Kossover is also a member of the adjunct faculty at the State University of New York at New Paltz where he has taught such courses as Criminal Law and Introduction to Law. He has lectured at Bard College and the United States Military Academy at West Point. From 2003 to 2013, he served as a member of the Committee on Character and Fitness for the Third Judicial District.

Immediate Past-Chief Judge of New York's Court of Appeals, Jonathan Lippman, appointed Mr. Kossover to the New York State Justice Task Force on Wrongful Convictions. Chief Judge Lippman, in appointing Mr. Kossover, referred to "Mr. Kossover's experience, insight, and expertise as valuable attributes that will assist the Task Force in achieving its important goals."

ROBERT J. MASTERS, ESQ.
BIOGRAPHY

After graduating from St. John's University and St. John's University School of Law, Bob Masters worked as a law clerk for various Judges of the Criminal Term of the Supreme Court in both Queens and Kings Counties. Since 1990, Bob has been an Assistant District Attorney in Queens County, and has worked primarily on homicide cases since 1992.

Since 1993, Bob has held various administrative posts within the District attorney's Office and since 2012, he has been the Executive Assistant District attorney for Legal Affairs, supervising all appellate matters, as well as office training. Bob is the Chair of the District Attorney's Committee on Professional Standards and is the District Attorney's liaison to all law enforcement agencies.

During his tenure in the District Attorney's Office, Bob has handled dozens of homicide cases, as well as long term investigations into narcotics enterprises and their related murders. Additionally, Bob has specialized in handling homicides in which psychiatric defenses are interposed.

Among the high-profile cases handled by Bob was the trial of Patrick Bannon for the murder of Police Officer Paul Heidelberger, the trial of serial-killer Heriberto Seda, the "Zodiac Killer" of the 1990's as well as the prosecutions of the infamous "Wendy's Massacre," in which five fast food employees were murdered and the capital trial of John Talor resulted in the jury's imposition of the death penalty. The prior prosecution of Taylor's mentally retarded accomplice, Craig Godineaux, resulted in the imposition of five consecutive life sentences. Bob is currently assigned to the prosecution team for the accused murderer of NYPD Detective Brian Moore.

Bob has also been designated as a Special Assistant District Attorney in both Franklin County and Suffolk County to assist those offices in conducting complex litigation. He is also a founding member of the District attorneys' Association Of New York's Best Practices Committee and its Ethics Advisory Group, as well as its Legislative and Mutual assistance Committees.

Bob has previously served as an adjunct faculty member at St. John's University School of Law and has lectured frequently throughout the state on many trial practice and ethical issues.

INSHA RAHMAN, ESQ.
Biography

Insha leads Vera's work on bail reform, pretrial justice, and jail reduction in New York. She has led research on the use of bail in New York City criminal court arraignments, jail trends across New York State, and regularly presents to advocates, judges, defense attorneys, and prosecutors on bail reform, pretrial justice, and reducing jail incarceration. From 2016-2017, Insha served as staff to the Independent Commission on New York City Criminal Justice & Incarceration Reform, a blue ribbon commission chaired by former Chief Justice Jonathan Lippman of the Court of Appeals to study Rikers Island and criminal justice reform in New York City. She has been quoted as an expert on bail reform in the *Nation*, *City and State*, *New York Times*, NPR, and PBS's MetroFocus, among other outlets. She serves as a board member of the New York Civil Liberties Union and the Brooklyn Community Bail Fund.

Prior to joining Vera, Insha was a public defender at The Bronx Defenders for five years, where she tried numerous bench and jury trials and led trainings for incoming lawyers on trial practice. Insha also worked at the Center for Alternative Sentencing and Employment Services, a Vera spin-off that provides alternatives to incarceration for youth and people with mental illness, and, prior to law school, at Vera's Center on Immigration and Justice. She holds a J.D. from the City University of New York School of Law and a B.A. in Africana Studies from Vassar College.