TESTIMONY OF:

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BROOKLYN DEFENDER SERVICES

Presented before
The New York City Council Committee on Courts and Legal Services
Oversight Hearing on
Examining Speedy Trial in New York City Courts
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My name is Yung-Mi Lee. I am a Supervising Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS). I have practiced as a criminal defense attorney in New York and New Jersey for over 22 years. I currently represent misdemeanor and felony clients in Brooklyn criminal and Supreme Court.

BDS provides innovative, multi-disciplinary, and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for 45,000 clients in Brooklyn every year. We thank the City Council Committee on Courts and Legal Services for the opportunity to testify about speedy trial and case processing delays in New York City.

To limit case processing times in New York City, the City Council should:

1. Support statewide legislative efforts to amend Criminal Procedure Law § 30.30;
2. Support statewide discovery reform and work with the Mayor's Office of Criminal Justice and local District Attorneys' offices to encourage prosecutors to turn over all of the evidence in a case to the defense as soon as they receive it;
3. Continue to support efforts to reform our bail system;
4. Work with the NYPD to arrest fewer people accused of low-level offenses.

We make all of these recommendations with the caveat that we believe that cases can move more quickly through the system but they must not do so at the expense of our clients'

constitutional rights. New York City's public defender offices are models for the rest of the country because of the high quality of services that we provide our clients, thanks in large part to substantial funding from the City. Any proposed reforms must be carefully scrutinized to ensure that they do not sacrifice the quality of that representation simply to make the system move more quickly. That being said, we believe that there are a multitude of changes that can take place that would benefit both the overall system and our clients. Unfortunately, the vast majority of these reforms must occur in Albany.

Client Stories

Our clients' stories illustrate the role that speedy trial violations, discovery delays, bail, and court delays harm poor people of color facing criminal charges in Brooklyn.

***Speedy trial issues* - Mr. A** was arrested on a domestic violence charge. The judge issued a full order of protection which required him to stay away from the mother of his child. Prior to his arrest, Mr. A took care of the baby during the day so that his domestic partner could work. With a full order of protection, Mr. A. could not easily show up and take over the care of the baby. The prosecutor filed a DIR (Domestic Incident Report) to convert the complaint to an information and thus keep the case "alive" by answering "ready" for trial. However, the complaining witness had no interest in prosecuting the case and immediately went to the district attorney's office and signed a waiver of prosecution. However, due to the speedy trial statute and court adjournments, the DA's office was able to keep the case alive for many months. In this particular case, the Assistant District Attorney simply answered "not ready" on every hearing and trial date and asked for a 5-7-day adjournment. Due to court congestion, the court adjourned the case for more than a month on each adjourn date. Thus, the People accrued only a short amount of speedy trial time but were able to extend the order of protection for much longer than the 90 days of speedy trial time. Troublingly, the prosecutor knew that the family did not wish to proceed with the case but chose to continue prosecuting even though the prosecution and repeated court dates harmed Mr. A, his partner, and his child.

***Discovery issues* - Mr. D**, a client who suffered from mental illness, was charged with attempted murder. The client had a strong self-defense claim because he reported to his attorney that he was attacked by several men. He remembered seeing a bystander witness but the defense, despite diligent investigation, was unable to corroborate our client's claims independently. Because this was a Brooklyn case, we were lucky to have the DA turn over many pages of discovery, including the grand jury minutes, in the early days of the case. However, because New York does have a state statute mandating that prosecutors turn over all evidence as soon as they receive it, the Assistant District Attorney did not turn over an additional police report that corroborated that the client had acted in self-defense until close to trial. Soon after, a disposition allowing for the client's release was made. Had the prosecutor turned over the information in a timely manner, the proper disposition could have been resolved much earlier, saving state resources and ensuring a more just outcome.

***Discovery issues* - Mr. W** was charged with possession of a residue amount of a controlled substance. Unfortunately, due to the fact that he already had a criminal record, the judge set bail and refused to set a 170.70 or lab conversion date. Upon eventually receiving discovery, the attorney saw that the lab report detected no controlled substance. The lab report had a date that preceded our client's court date. Instead of advancing the case and moving for a dismissal which would have resulted in the client's immediate release, the ADA waited several more days for his court date. This unnecessary punishment could have been avoided had the judge simply released the client and allowed for a 170.70 date.

***Bail-Related Issues* - Mr. C** was arraigned in March of 2015 for possession of a controlled substance after allegedly being caught with drug residue. The Assistant District Attorney on the case admitted on the record that she had thought he was out on bail and planned to offer him an A Misdemeanor and time served, but upon learning that he was incarcerated, changed her offer to an A Misdemeanor and six months on Rikers. *As noted above, this is an extremely common and well-documented phenomenon, unique in this instance only because the prosecution was compelled by the court to say: "We do sometimes make offers whether or not the Defendant is incarcerated or if they have been released from incarceration."*

***Bail-Related Issues* - Mr. O** was 18 years-old and employed part-time when he was arrested for marijuana possession following a possibly illegal search by NYPD. A judge set unreachable bail because our client had failed to do two days of community service on an earlier marijuana case. He pled guilty to a marijuana misdemeanor a few days later to get out of jail. This gave him a criminal record and makes him ineligible for some forms of federal financial aid.

***Bail-Related Issues* - Ms. A** was 50 years-old and lived in a three-quarters house, with no previous criminal record, when she was arrested for drinking a can of beer outside her house and had an open warrant from a 2012 child endangerment case she thought had been dismissed. She has no children. Bail was set and she spent 5 days in jail before pleading guilty to child endangerment charges to secure her release. Now she has a criminal record and lost her place in the house.

<u>Recommendations:</u>

1. **Reform Criminal Procedure Law § 30.30**

BDS Statistics:

It is an open secret that prosecutors use court delays to extract plea agreements from defendants.

- The average length of time from arraignment until disposition for BDS felony clients was 464 days in 2015, up from the City average of 380 days in 2008. Indicted felony clients must return to court an average of 11.47 times over the course of their case.

- BDS misdemeanor clients faced an average of 120 days between arraignment and disposition with an average of 3.54 court dates in 2015.

- In 2015, 4,515 BDS clients pleaded guilty to a misdemeanor charges at arraignment – either giving them a new criminal record or adding to an old one – in exchange for their freedom after learning that bail was likely to be set and having no way to pay.

- At any given time, BDS has approximately 1,000 clients awaiting trial or resolution of their cases on Rikers, many of them for failure to meet bail amounts of less than $5,000.

Issue:

The U.S. and New York Constitutions provide criminal defendants with the right to a speedy trial. Yet the current iteration of New York's "Speedy Trial" Law (C.P.L. §30.30) subverts justice and the Constitution by allowing prosecutors and the courts to delay cases for months or years at a time to the detriment of defendants and the community. Reforming C.P.L. § 30.30 is necessary to promote justice by reducing the amount of time that defendants spend on Rikers Island or returning to court for cases that linger for months or years.

While incarcerated pre-trial at Rikers, our clients are subject to all manner of undue and excessive punishment, including lack of access to health care and mental health services, physical and sexual violence[1], job loss, eviction, interrupted education, and the torture of solitary confinement. Parenting defendants may lose custody of their children, some of whom must enter the foster care system because their parent cannot make bail.

Non-detained BDS clients fighting their cases are also harmed by delay. These are clients who were released on their own recognizance or were able to post bail. Our clients spend months or years with charges pending over them, inhibiting their ability to obtain a job or housing. Some clients lose their jobs because of either the pending charges or because they missed work due to court dates or pre-trial detention. Those with more flexible jobs or employers have to miss work, often well over a dozen times during the duration of their case, resulting in lost wages.

Remedy:

BDS strongly supports Kalief's Law, S. 5988A (Squadron)/A. 8296A (Aubry), which would amend Section 30.30 of the Criminal Procedure Law (C.P.L. §30.30) to require prosecutors to prove readiness for trial by certifying compliance with disclosure requirements.

[1] A recent lawsuit brought by the Legal Aid Society against the City of New York about deplorable conditions on the Island's facilities, which was joined by the U.S. Department of Justice and finally settled in June of this year, shed light on the routine and institutionalized culture of rape, sexual assault and beatings of inmates at the hands of corrections officers and other inmates.

Long delays by the prosecution and the courts serve no legitimate purpose and ultimately diminish the integrity of our court system. Kalief's Law would amend C.P.L. §30.30 to limit delays, resulting in a swifter resolution for defendants and witnesses and cost-savings for the courts and community. Too many people have been harmed by a system characterized by delay, inefficiency and abuse. Kalief's Law is an important step towards advancing the cause of justice in New York.

Recommendations:

City Council should publicly support Kalief's law, passing a resolution calling on the New York State Legislature to pass and the Governor to sign, legislation to amend the Criminal Procedure Law Article 30.30.

2. Discovery Reform

Issue:

New York State has some of the most restrictive discovery laws in the nation, resulting in court inefficiencies, longer pre-trial detention, and wrongful convictions. Our current discovery statute, C.P.L. 240, passed by the state legislature in 1979, does not require disclosure of critical evidence until a jury has been sworn, directly implicating the ability of people accused of crimes and their attorneys to investigate the allegations and defend themselves. It is no surprise that this "trial by ambush" practice has led to a slew of well-documented wrongful convictions in New York, with new exonerations every year.

The majority of states and urban centers across the country have passed open file discovery laws over the past 40 years. Broad discovery is provided to defendants in major cities such as Los Angeles, Chicago, Philadelphia, Miami, Detroit, Boston, Phoenix, Charlotte, Denver, Seattle, San Diego and Newark. New Jersey enacted expedited and liberalized criminal discovery in 1973; Florida in 1968. Texas (2014) and North Carolina (2004) enacted open discovery statutes, and Ohio (2010) made its fairly broad discovery rules even more broad. No state that has enacted more open discovery rules has later gone back to impose restrictive ones.

Brooklyn-Specific Concerns:

People charged with crimes in Brooklyn are more fortunate than the accused in other parts of the state, but because the local prosecutors are not statutorily required to turn over discovery as they would be in most other states, our clients still suffer. The Kings County District Attorney's Office has an official "Discovery by Stipulation" policy. In lieu of written

motion practice, prosecutors provide discovery to the defense on an ongoing basis.[2] However, this practice is not uniformly practiced in all cases. In some – more serious - cases, we must still engage in omnibus motions. Even in those cases where the DA consents to DBS, in my experience, delays still occur in turning over discovery to the defense greatly increase the length of my cases in Brooklyn. It can take months for prosecutors to turn over critical information such as police reports, DNA and ballistics evidence, grand jury minutes, search warrant materials and *Rosario*[3] material.

We also urge the NYPD and our local DA's to turn over lab reports in a speedy manner in the interest of justice. In our experience, especially, in residue cases and pill cases, there is a high likelihood of the lab reports showing NO controlled substances. **Mr. W's** case is a not uncommon example of a case where, even though the NYPD believed a substance to be drugs, subsequent testing showed that the substance was not drugs, resulting in the prosecution and detention of innocent people. Even worse are the thousands of innocent people who plead guilty every year in cases where subsequent testing would prove their innocence simply because the judge will not grant bail and they want to get off of Rikers Island and be reunited with their families or return to their jobs.

Remedy:

The solution to New York's discovery issues is already available. The New York State Bar Association (NYSBA) brought together a diverse committee of judges, law professors and lawyers to examine the statute and propose changes. Their 2015 report[4] provides a model for reform that should be adopted by the state legislature to bring New York's discovery requirements in line with the rest of the nature.

Recommendations:

City Council should pass Res. 430-2014 (King), a resolution calling on the New York State Legislature to pass and the Governor to sign, legislation to amend the Criminal Procedure Law Article 240 and replace it with a law mandating early, open, and automatic pre-trial discovery. Passage of the resolution would send a strong message to the legislature of the urgency of reform.

City Council should also work with the Mayor's Office of Criminal Justice and local prosecutors to encourage those in boroughs with outdated and draconian policies to turn over discovery in its entirety as soon as they obtain it. Justice demands nothing less.

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[2] New York County Lawyers' Association, *Discovery in New York Criminal Courts: Survey Report & Recommendations* (2006), available at https://www.nycla.org/siteFiles/Publications/Publications227_0.pdf.
[3] Rosario material includes any statements of a witness who will testify at trial. Police forms that summarize a witness statement, a signed statement by a witness, and paperwork prepared by a testifying police officer are examples of Rosario materials. Under CPL 240, Rosario material must be given to the defense before the opening statements at trial. *See People v. Rosario*, 9 NY2d 286 (N.Y. 1961).
[4] New York State Bar Association, *Report of the Task Force on Discovery* (2015), available at https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54572.

3. Bail Reform

BDS Statistics:

BDS clients who are incarcerated pre-trial face significantly harsher consequences than their similarly situated counterparts who are able to make bail.

- BDS tracked 1,137 misdemeanor cases where bail was set on our clients in 2015. Of this group, the vast majority (948) were held on $2,000 or less. Of those held on $2,000 or less, 69 percent eventually pled guilty; of the control group at liberty, just 38 percent pled guilty and only 6.6 percent pled guilty to a misdemeanor.
- **An incarcerated client was nine times more likely to plead guilty to a crime than one who was released.** Overall, for the group of clients held in on bail, 38 percent had cases resolved by dismissal, or a plea to a violation or ACD, compared to 88 percent of "out" clients.
- Only one case involving an incarcerated misdemeanor client went to trial – a staggering statistic considering that the purpose of bail is to secure a person's appearance at trial.

Current Reforms in New York City:

Supervised Release

Next month, the City intends to expand an existing supervised release program to supervise 3,000 eligible defendants safely in the community. BDS has been involved in the planning of the citywide program during monthly meetings organized by MOCJ. In 2015, the average daily population in City jails was 11,400, of whom approximately 80 percent were incarcerated pre-trial.[5] Unfortunately, this new program will fall short in clearing city detention facilities of defendants imprisoned because they cannot afford bail.

Bail Review and Training of Judges:

A new bail review part opened up in Brooklyn in December 2015. The designated Bail Review Part in Kings County Supreme Court reviews applications pursuant to CPL § 530.30 for matters in which the defendant remains in custody after the CPL§ 170.70 day court appearance. At the CPL§ 170.70 day appearance, defense counsel may request bail review and the Criminal Court judge will schedule a hearing for that purpose in Supreme Court. For cases in which defense counsel waives the defendant's appearance, bail review is scheduled in Supreme Court three (3) business days later. If defense counsel asks for the defendant to be produced, the bail review appearance may take longer schedule**.**

Judges across the state are being retrained to encourage them to apply less onerous forms of bail than secured money bail, which already exist in the New York statute, yet are almost

[5] New York City Department of Correction

never used. Criminal court judges in Brooklyn have received training in this subject, but we have not yet seen significant changes in the courtroom. Even though our attorneys consistently request judges in arraignment to utilize one of the alternative forms of bail, judges continue to set money bail.

Bail Funds

The Brooklyn Community Bail Fund has played an important role in limiting the effects of pre-trial detention in Brooklyn. Since the Bail Fund began operating in April 2015 they have already bailed out over 300 clients. They have a 97% return rate, meaning that only a handful of bail fund clients have failed to appear in court after the bail fund posted their bail. We are pleased that the City plans to institute a bail fund that may further increase the numbers of people who will avoid pre-trial detention, with all its inclusive harms, and save the City the cost of housing them. However, bail funds are statutorily limited to misdemeanor cases where bail is set at $2000 or less. Bail funds, then, are a mere band-aid to the broader systemic injustices created by money bail.

Remedy:

BDS believes additional reforms are required to improve access to equal justice in New York, though such reforms require a change in state law. Ultimately, we believe that money bail should be abolished, as it is inherently discriminatory and there is no evidence that it is more effective at securing court appearances than non-monetary alternatives.

For that reason, BDS strongly supports S. 6061 (Gianaris) / A. 8551 (O'Donnell), which would end financial conditions for pre-trial release and require specific evidence-based methods to secure defendants' return to court. BDS is working with Senator Gianaris to ensure that the bill will accomplish its stated goal of ending the use of money bail in New York State.

Recommendations:

City Council should publicly support S. 6061/A. 8551, passing a resolution calling on the New York State Legislature to pass and the Governor to sign, legislation to abolish money bail in New York State.

The City should expand the Supervised Release program to cover more clients and limit the numbers of persons detained on Rikers Island pre-trial.

BDS recommends a more expansive use of the bail review part to include not just 170.70 cases, but also all misdemeanor cases where bail is set at arraignments.

Finally, we encourage the courts and OCA to provide the necessary training to all court staff to handle the paperwork that must be filled out when unsecured or partially secured bonds

are set. With better training and more widespread use, any concerns about slowing down the arraignment parts should disappear.

4. Arrest fewer people for low-level offenses

The main reason that New York's courts are clogged and fraught with delay is because we arrest too many low-level cases, the majority of which plead out at arraignments. New York City police officers made 221,851 misdemeanor arrests in 2014, according to New York State Division of Criminal Justice Services data.[6] Each of these arrests costs the City $1,750.[7]

In New York City alone, there are nearly 10,000 laws, violations, rules, and codes that a person might break, and the NYPD initiates approximately 1 million punitive interactions with residents every year. Almost none of these interactions have anything to do with serious crime. About half result in summonses. Of arrests, just 25 percent are related to felonies. Between 2001 and 2013 there were nearly 7 million summonses issued in New York City, compared to 5 million 'stop-and-frisks' during the same period. In 2014, tickets for jaywalking were up about 275 percent.[8] By limiting the number of low-level cases that clog our court system and divert resources away from public safety issues and violent crime, the City could save tremendous resources that could then be invested in housing, education or public works projects.

Recommendations:

The City should take the following concrete steps to limit arrests and stops for low-level offenses.

1) *Abolish unconstitutional and illegal arrest quotas;*
2) *Fund a study to assess the NYPD's use of arrests for quality of life offenses and the cost of such arrests on public safety;*
3) *Work with Speaker Mark-Viverito and former Chief Judge Lippman to assess the feasibility of limiting pre-trial detention and shutting down Rikers Island.*

Conclusion

[6] Victoria Bekiempis, *Why do NYC's minorities still face so many misdemeanor arrests?, NEWSWEEK,* Feb. 28, 2015, available at http://www.newsweek.com/nypd-race-arrest-numbers-309686.
[7] Police Reform Organizing Project, *Over $410 Million Per Year: The Human and Economic Cost of Broken Windows Policing in NYC*, available at http://www.policereformorganizingproject.org/cost-broken-windows-policing/#sthash.Y3L5lU4C.dpbs.
[8] Natasha Velez, Rebecca Harshbarger and Jennifer Bain, "Cops put brakes on ticketing cyclists, target jaywalkers," NY POST, Dec. 22, 2014, available at http://nypost.com/2014/12/22/cops-put-brakes-on-ticketing-cyclists-target-jaywalkers/.

Justice delayed is justice denied, as the experience of our clients and attorneys bears out. Today's hearing is an important step in shedding light on these important issues. Councilmember Lancman's op-ed on speedy trial delays in the New York Law Journal is also a welcome addition to the conversation. Something is fundamentally wrong with our justice system when poor defendants go to jail and suffer dramatically adverse case outcomes compared with those who have the funds to purchase their liberty. BDS is grateful to the Committee on Courts and Legal Services for the opportunity to share our experiences and make recommendation to improve case processing delays in New York City criminal and supreme courts. We look forward to working with City Council to encourage the state legislature to act quickly to address these critically important issues.