



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

**Scott Hechinger – Senior Staff Attorney, Criminal Defense Practice
*BROOKLYN DEFENDER SERVICES***

Presented before

The New York City Council Committee on Fire and Criminal Justice Services

**In relation to Int. 1531-2017, Int. 1541-2017, 1561-2017, Int. 1576-2017 & Int.
1581-2017**

May 2, 2017

I. Introduction

My name is Scott Hechinger and I am a Senior Staff Attorney at Brooklyn Defender Services. BDS provides multi-disciplinary and client-centered criminal, family and immigration defense, civil legal services, social work support and advocacy to more than 30,000 indigent Brooklyn residents every year. Over the last six years, I have represented thousands of clients facing misdemeanor and felony charges, from arraignment to trial. I see the consequences of bail and the administration of bail first hand, day in and out.

BDS deeply appreciates the work of council members on the Committee on Fire and Criminal Justice Services to minimize the criminal justice system's reliance on pre-trial detention and bail. I am grateful to be here to give voice to the experience of my clients and my fellow practitioners and add support to the practical and productive process-oriented reform proposals being considered today.

II. Background

“Will I be going home?”

Those are often the first words I hear my client say when I meet them behind the arraignment courtroom, bars or glass separating us. I first try to deflect and talk about the allegations and find out more about them, their story, their community ties, what brought them there.

But I can only deflect for so long. For most of my clients, the answer is “no, you’re not going home. Not if bail is set, at least.”

No matter the important process reform proposals being discussed today, when bail is set, most of clients will face the hell that is Rikers. That is because most of my clients cannot afford any amount of bail or the amount of bail set by judges. They will lose jobs. They will lose housing. They will leave those in need of caretaking without caretakers. They’ll miss medical necessities. And they ultimately will also have worse case outcomes.

Yet for those who may be able to afford some amount of bail, all too often the answer to that first question is also “no.” Not because of their inability to pay. But because of flaws in NYPD, court, and DOC processes that operate as barriers to accessibility and transparency. Flaws that undermine the purpose of New York’s bail statute: “to improve the availability of pre-trial release.”¹

Financial conditions of release are on their face obviously unfair, but they also make for astoundingly poor public policy. It costs New York City taxpayers approximately \$247,000 a year (nearly a \$677 day) to keep someone incarcerated in Department of Correction (DOC) custody.² Research has shown that spending even two days incarcerated during the pendency of a case can increase the likelihood of a harsher sentence, can cause a permanent decrease in employment prospects, promote future criminal behaviors and have long-lasting negative health implications.

New York’s multi-layered bureaucracy and flawed practices involved in the process of the payment of bail results in individuals being unnecessarily sent to Rikers Island when bail could be paid prior to leaving criminal court, and/or held far longer once there.

Brooklyn Defender Services supports the proposals before this committee today, with some recommendations for increasing impact. Together, these proposals would:

¹ *People ex rel. McManus v. Horn*, 18 N.Y.3d 660 (2012).

² Independent Commission on New York City Criminal Justice and Incarceration Reform, *A More Just New York City* (2017), available at <https://static1.squarespace.com/static/577d72ee2e69cfa9dd2b7a5e/t/58f67e6846c3c424ad706463/1492549229112/Lippman+Commission+FINAL+4.18.17+Singles.pdf>.

- Enhance accessibility, making it easier for individuals and families to secure timely pre-trial release, preferably before ever entering Rikers Island;
- Reduce unnecessary obstacles that now stand in the way of individuals and families who may be able to afford bail from paying it; and
- Promote transparency around the system of pre-trial detention by providing better information on the payment of bail to loved ones and by reporting outcomes so that law and policymakers can work toward reducing the numbers of those detained pre-trial.

III. Bills

a. ***Intro No. 1531-2017*** - in relation to requiring the department of correction to efficiently facilitate the processing of bail payments

BDS strongly supports the introduction of this bill which would require DOC to accept cash bail payments immediately and continuously after a person is admitted to the custody of the DOC. The bill also requires that the Department release inmates within two hours of payment. The bill also requires DOC to accept cash bail at the courthouse if there is not another location within one half mile of the courthouse.

Once bail is set at arraignments and the NYPD transfers custody to DOC in criminal court, bail cannot be paid until the person is first transported to Rikers, processed, and admitted, a process which often takes upwards of twelve hours. Until then, the person is “in transit.” Family members are forced to continuously check back in at bail windows, or online, to see when their loved one has finally made it through intake so they can finally post bail at that time, an arduous and time consuming process. For individuals with jobs, children and other family obligations, and those who live far away from Court, Rikers, or a Rikers borough facility, this means that bail usually will not get paid until sometime the following day. A person is thus forced unnecessarily to spend the night at Rikers, in intake, where there are no beds, no showers or access to medical staff. This bill would allow family members and others to pay bail while a person is “in transit” and begin the process of getting their loved one released from custody.

Yet in BDS’s experience, *even after bail is finally paid*, it takes clients *a minimum of ten hours* to be released from DOC custody. ***Indeed, we recently had a case where a client was not released for more than 27 hours.***

Our client, who I will call Mr. B, was incarcerated at Brooklyn Detention Complex in February 2017. In early February he was transported to Brooklyn Supreme Court where he was placed in a room with another inmate in the Brooklyn Supreme Court “pens” on the third floor. He fell asleep on a bench and awoke to the other inmate sexually assaulting him. He immediately reported the assault to his attorney. After court, he verbally reported the incident to a DOC captain and requested to make a written report. He was not able to get an officer’s attention so he resorted to cutting his wrist, which

finally prompted him to be seen by mental health and medical staff and file an incident report for the sexual assault.

Mr. B's defense attorney was able to get into contact with Mr. B's family, all of whom live in Ohio. Despite the distance and significant hardship, the family got the money together to pay a bail bondsman to bail Mr. B out and get him out of custody nearly three weeks after the sexual assault. However, the bail bonds agent paid the bail on the instant case, but not the \$1 bail on a separate case. The bail bondsman told the family he would not pay the \$1 bail unless they paid him an additional \$125, which the family could not afford, so Mr. B remained in custody until the next day in late February, when our jail services social worker was able to go to Brooklyn Detention Complex to pay the \$1 at 9 am.

Bail was officially paid by 11:10 am after a two-hour process, yet Mr. B was not released for another 27 hours. BXDC did not even transfer Mr. B from his housing unit to intake until 11 pm, 12 hours after bail was paid. They then said he needed to be cleared by mental health before being released. DOC transferred Mr. B from intake to the clinic at BKDC at 4 am the following day. He waited several hours before being seen by mental health staff and was later discharged from DOC custody at 2 pm, 27 hours after bail was paid.

This bill is a critical step forward if the end result is that people like Mr. B are released in two hours, as compared to 27, but we fear that the bill will only function as designed if DOC is held accountable in instances where they fail to comply. As currently written, there is no enforcement mechanism or cause of action for defendants who are not released within the two hour period. Without these protections, we believe that DOC will not have an incentive to change current practice.

We are also concerned that section (b) of the statute, as currently written, could be used to allow Mr. B to be held for 27 hours, as he was here, when mental health issues are implicated. It is not uncommon, in our experience, for abuse and assault experienced in detention to be the catalyst for mental health problems. However, a person who has paid bail to escape abuse should not be held even longer than someone who was not. We are not suggesting that someone who is experiencing an intense and immediate psychotic episode be released to the streets (there is already a competency process in place to handle cases like this), but we do want to point out the potential for abuse in the bill as currently written. If facts like Mr. B's never see the light of day, these instances of abuse will continue to occur. In short, we need to have a review process for DOC decisions to hold city agencies accountable in individual cases where injustices occur.

*b. **Intro No. 1541-2017** – to permit the delay of the formal admission of inmates to the custody of the department of correction in order to facilitate the posting of bail*

BDS supports the introduction of this bill that would authorize DOC, in their discretion, to hold someone for no more than 12 hours to allow the person's family or friends to come to the courthouse to pay bail and avoid DOC detention altogether. The bill, however, effectively precludes delay in felony cases and DWIs.

While most of our clients cannot afford any significant amount of bail, we do have some clients who would be able to pay bail if they had sufficient time. More time is critical for our clients as bail payers often do not yet know about the arrest at the time of arraignment, work full time jobs and cannot just leave work, live far away, need to cobble together funds from family and friends, or need to secure the help of a bail bondsmen. Currently, when bail is set, we as public defenders have to scramble to delay the transfer of custody from NYPD to DOC, but the success of the request depends on factors outside of our control: the mood of NYPD personnel, the number of individuals in the holding pen, the Rikers bus schedule, or the time of day. In any case, thirty minutes is the norm and three hours is the absolute maximum delay now allowed before an individual is transported to Rikers.

We believe that 12 hours would, in some cases, be sufficient time to prevent unnecessary incarceration in DOC custody.

The permissive language in this statute would not require DOC to comply with the outlines proscribed, but it would require DOC to report on how often they voluntarily comply with the statute. Thus we support this bill with the understanding that it appears to be intended to function more as a voluntary pilot program than as a bill to actually facilitate the posting of bail.

We recommend amending the bill to actually require DOC to comply rather than permit them to delay transportation at their discretion. We also recommend amending the language in 1(a)(2) so that it is more clear; the current language is confusing.

The bill also leaves unanswered questions. How would this proposal work in night arraignments? Is this only for people who are arraigned during the day? Delay is "not permissible" for anyone who has bail set in an amount of \$10,000 or more: essentially all felony cases. Given that the vast majority of cases where bail is set involve felonies – not misdemeanors, why was this particular threshold selected? Moreover, bail in the amount of \$10,000 or more is usually paid using bail bondsmen, a more time consuming process. If the purpose of the bill is to serve as a pilot experiment, then many of these issues could be ironed out over the coming months. But we recommend that the Council consider all of the language carefully before signing anything into law.

*c. **Intro No. 1561-2017** - in relation to requiring the department of correction to facilitate the posting of bail or bond*

BDS supports hiring someone to work in DOC to assist inmates to pay bond. Critically, this bill would ensure that a bail facilitator meet with inmates within 48 hours of

admission to DOC custody and provide inmates with key information, including the amount of their bail or bond, their NYSID and other identifying information, and options for bail payment.

We strongly recommend that the bail facilitator position not be staffed by a corrections officer, but instead by a non-profit or other independent entity to improve collaboration and trust between the eligible person fighting for their release and the bail facilitator. We also request that there be a facilitator for each facility, as moving between the various facilities presents many challenges.

We also wonder how the facilitator will work with bond companies. Bond agents use a host of abusive practice to prey on those in need of their services. These practices have flourished unchecked. The bail facilitator should be trained to know the legal obligations of bail bonds companies and help mediate and advocate for the incarcerated person and their family.

*d. **Intro No. 1576-2017** - in relation to requiring the New York City police department to permit arrestees to access contact information*

BDS supports this bill and has long called on the NYPD and court staff to allow detained individuals access to contact information in their phones. Now more than ever, individuals do not remember phone numbers of loved ones, friends, and family. Cell phone contact lists and speed dials have overtaken memories.

Without contact information, there is no way for defenders or the client to make contact with anyone who may be able to pay bail for the client, or simply support him or her in arraignments, which would strengthen defense counsel's application for release. In addition, without contact information, the Criminal Justice Agency (CJA) will have a difficult time verifying community contacts, and for purposes of the delay proposals outlined in **Intro No. 1541-2017** neither DOC nor the CJA will be able to make "direct contact with a person who reports that he or she will post bail"

We would recommend amending the language to ensure that arrestees are able to look at their own phones and write down the numbers themselves. As currently written, the bill would allow the officer to record the contact information for the detained person. We are concerned that this language would facilitate infringement of our clients' Fourth Amendment right to be free of unlawful searches and seizures. It would be improper for officers to use this well-intentioned and long overdue policy change to violate the warrant requirement and inspect the contents of our clients' phones in the hopes of finding incriminating evidence.

There is an existing workable model for this procedure at the Red Hook Community Justice Court. There, a detained individual's personal effects, including their wallet, keys and cell phone, are transported from the 72nd, 76th, and 78th precincts to the courthouse in a manila envelope along with the defendant. While in the pens at Red Hook awaiting

arraignments, the individual, with the assistance of court officers, is generally permitted to pull up the contact information for a few individuals to allow them to provide verifiable contact information to the CJA and to the court to make a stronger argument for release on recognizance.

Furthermore, transporting a person's personal effects in a manila envelope to the courthouse means that a person may then have the means to pay bail with cash or credit card in his wallet. However, even if the person has access to his debit or credit card, under current practice, he cannot actually use the ATM to withdraw money because there are no ATMs located in the pens and staff refuse to escort our clients to the ATM in the courthouse.

- e. ***Intro No. 1581-2017*** - *in relation to requiring the mayor's office of criminal justice (MOCJ) to post public information regarding posting bail in courtrooms*

BDS supports this bill, which would require MOCJ to work with the Office of Court Administration (OCA) to display information regarding posting bail conspicuously in all locations in courthouses. Information shall include how to determine the amount and type of bail ordered and all processes required to post bail, including where and how to post bail.

We recommend providing the public with more information, including the maximum fee that a bondsman can charge and other information about bail bonds to limit the abusive practices that bail bonds agents engage in as a matter of course. Rather than recreating the wheel, in addition to posting clear information about the processes required to post bail in the courthouse, we recommend that MOCJ distribute a resource called "Bail's Set...What's Next?" created by the Center for Urban Pedagogy in partnership with the Brooklyn Community Bail Fund.³

IV. Additional Action Needed

These bills are an important step in ensuring that people who may be able to pay bail are in fact able to pay bail and avoid unnecessary and harmful pre-trial detention. However, there is still more that we must do if the City is committed to substantially limiting pre-trial detention sufficiently to close Rikers Island.

- a. *We must hold DOC accountable if they fail to comply with these proposed laws.*

These bills must include a cause of action or sanctions if DOC fails to follow its legislative mandate. Without a consequence, we have little hope for the kind of systematic change that closing Rikers Island requires.

³ Available at http://welcometocup.org/Store?product_id=141.

- b. We must hold prosecutors and judges accountable for relying solely on cash bail and commercial bond as forms of relief, even though New York law provides courts other options*

The express purpose of bail is to enable the pretrial liberty of all defendants, regardless of their financial means. For this reason, New York Criminal Procedure Law Article 520 authorizes multiple forms of bail other than cash and bond to fulfill its purpose of not conditioning liberty on the defendant's ability to pay money upfront. Yet New York judges uniformly neglect to consider non-monetary forms of bail. Instead, judges are firmly entrenched in the culture of setting only bond or cash, the two most restrictive forms of bail. The City must work with judges and prosecutors to encourage them to allow for unsecured appearance bonds and other bail alternatives that are actually within a person's reach.

- c. We must make it possible for a people to pay bail for themselves if they have the money*

Practically, if a person can pay bail for herself, she should be able to do so. She therefore needs access to both her wallet (with her credit or debit card and/or cash) and an ATM.

- i. For a person detained in the pens at the courthouse:

Currently, a person's personal effects including wallet, keys, MetroCard (and even critical assistive devices such as canes, walkers and crutches⁴) remain back at the precinct and do not travel with the accused to arraignments. Even if she is allowed to take her debit card with her, staff will not escort her to an ATM while in custody, and there are no ATMs located in the pens. While these bills address the ability of family and friends to pay bail, they do nothing to help people pay their own bail. If the point of bail is to set an amount that a person can actually afford to ensure their return to court, then we must allow people who *can* pay to do so on their own. Moreover, Unsecured Appearance Bonds, an authorized alternative form of bail that would allow a defendant to be released upon the promise to pay a set amount if he or she does not come back to court, are never ordered, despite the requests and best efforts of public defenders.

- ii. People who are already in DOC custody at a DOC facility:

People who are incarcerated can pay bail through their commissary account, but if they have a credit card/benefit card in their property with DOC, they cannot access it nor use it themselves to pay their bail. This becomes a huge obstacle for people who do not have family or community support who can help pay. We recommend that people be allowed to access their personal effects so that they can pay their own bail and be released.

⁴ See BDS's June 23, 2016 City Council testimony on access to court facilities for people with disabilities, available at <http://bds.org/wp-content/uploads/06.23.2016-BDS-Testimony-City-Council-Committees-on-Disability-Mental-Health-Legal-Services.pdf>.

V. Conclusion

These bills demonstrate the Council's commitment to making our bail system fairer and more just, a critical component to reducing pre-trial detention and ending the horror that is Rikers Island. BDS looks forward to working with the Council to achieve our shared goals. Please do not hesitate to reach out to me with any questions about these or other issues at (718) 254-0700 (ext. 276) or shechinger@bds.org.