TESTIMONY OF:

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Presented before

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Committees on Criminal Justice and the Justice System

Oversight Hearing:

'Why does the City make it so hard to post bail?'

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My name is Catherine Gonzalez and I am a Staff Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy in nearly 35,000 cases in Brooklyn every year. I thank the New York City Council Committees on Criminal Justice and the Justice System, and in particular Chairs Keith Powers and Rory Lancman, for this opportunity to testify on obstacles to release for the people we represent who *are* able to afford to pay bail. The vast majority of people for whom bail is set cannot afford the amount and form sought by prosecutors and set by judge – a critical injustice that we and many others are working to end in court and through the State Legislature – but even those who do have the resources to pay often cannot do so in a timely manner because of inexcusable bureaucratic obstacles.

Background

Last year, heeding the call from public defenders and others, the Council introduced a package of legislation intended to enhance the accessibility of paying bail, reduce unnecessary obstacles, and promote transparency for bail-payers and policymakers. At a May 2, 2017 hearing on the bills, my BDS colleague Scott Hechinger testified in strong support of these bills and offered some amendments that were ultimately adopted.[1] We continue to appreciate the Council's work on these critical issues. However, one issue we raised was left unaddressed: None of the bills contained any enforcement mechanisms or cause of action for people who, after their bail is paid, are not released within the timeframe required by Intro 1531A-2017. As we noted then, "Without these protections, we believe that the New York City Department of Correction (DOC) will not have an incentive to change current practice." Unfortunately, our fears have borne out.

While exact figures are not available, we know that many New Yorkers have spent hours or days in jail, amidst a well-documented culture of violence and deprivation, while presumed innocent and *after* loved ones manage to pay bail, or attempt to do so, in violation of the 2017 laws. Of the 93 people bailed out by the Bronx Freedom Fund from January through March of 2018, 62% were not released within the required 5-hour timeframe, according to their recent report. From April 2018 through September 2018, when the law required people to be released within 4 hours of bail being paid, more than three-quarters (76%) of the 238 people they bailed out were not released within this timeframe. It remains unclear how many people are now being released within 3 hours of bail being paid, as required under the full implementation of the new law which commenced on October 1 of 2018, but we know from experience many have been left behind.[2]

SYSTEMIC REFORMS REQUIRED TO PREVENT HUMAN "ERRORS"

One fundamental problem that plagues the bail system in New York City is human error. On a near daily basis, people we represent and their families struggle to raise the funds necessary to post bail or bond, only to discover that the bail amount that DOC has recorded does not match the amount that the judge ordered. The errors generally take three forms: First, DOC staff at the bail window provide misinformation. Second, DOC staff regularly record the wrong bail amount in its system entirely, leaving detained people or their advocates no recourse other than to resolve the error before posting bail or bond. Third, even when DOC's internal system is accurate, errors run rampant in the public-facing "inmate lookup," rendering bail essentially inaccessible if a person's family needs to rely on a bondsman or nonprofit bail fund to post bail or bond, who, themselves, rely on this look-up. Any legitimacy of our pre-trial justice system is categorically undermined in cases where the courts' orders are modified by clerical errors that mean the difference between incarceration and liberty.

People whose bail or bond amount is improperly recorded in the DOC system rely on our office to advocate on their behalf for the court-ordered amount to be reflected in this system, which is far from straightforward. Because the court records the bail amount on the securing order that is handed to DOC officers in the courtroom, defense attorneys are sent scrambling, seeking "proof"

[1] On June 21, 2017, the Council passed Int. 1531A, Int. 1541A, Int. 1561A, Int. 1576A, and Int. 1581A, all of which were signed by Mayor Bill de Blasio the following month.
[2] George Joseph, DESPITE NEW RULES, NYC IS STILL JAILING PEOPLE LONG AFTER THEY POST BAIL, The Appeal, Nov. 26, 2018 at https://theappeal.org/despite-new-rules-nyc-is-still-jailing-people-long-after-they-post-bail/.

from the court of a bail amount, while DOC already has that documentation in hand. Court staff regularly tell us that they have provided that documentation to the DOC officers in the courtroom and there is no other order available. Resolving these errors often takes multiple calls and written advocacy to the court DOC, BOC, and even the Mayor's office. The holiday season exacerbates these problems, when the courts and DOC administrative offices are closed and no higher-up is available to sign off on the resolved error. People are regularly locked up for days or weeks beyond when they or their loved ones are able to pay and/or have paid bail.

Those clients whose bail is properly recorded in the internal DOC system but improperly reported in the "inmate look-up" face a variation of this often insurmountable hurdle. Families and friends pool their resources to post bond, only to be rejected by a bondsman who claims that they did not provide collateral for the full bond amount. Advocates arrange for charitable bail funds to post bail or bond with clients, only to have the process delayed when the amount online does not match what the advocate said. Again, without a copy of the documentation that the court provided to DOC, we and the people we represent have no choice but to seek correction of the error on DOC's public look-up. Yet correcting these errors often proves even more difficult, as DOC represents that they have the correct amount in their internal database so there will be no problem if the bail bonds agent comes to pay. Until we can persuade the agency to correct the public-facing website, however, bail bond agents often refuse to even try to pay the true amount, leaving people confined in jail cells for what amounts to a typo.

This pattern of errors takes other forms as well. Just last week, the public "inmate lookup" showed that a person represented by BDS had a warrant from parole that would prevent his release even if he posted bail. Following multiple calls and emails, DOC and the New York City Board of Correction (BOC) over a weekend, the DOC general counsel's office eventually said that there was no parole hold and the notation on the public facing system would not prevent the client's release. Nonetheless, the error was never addressed.

Staff from the Mayor's Office of Criminal Justice and the Mayor's Office of Immigrant Affairs have assisted us in individual cases, but the City should identify point people at DOC whom defense attorneys can call at all hours, including on holidays, when our clients' liberty is beholden to correcting a clerical error of any kind.

ABSURD OBSTACLES TO SECURING LIBERTY WITH MORE THAN ONE OPEN CASE

One the biggest challenges in securing a person's release from pre-trial detention arises when they have two or more open cases in different courts. Often, people will be detained on one-dollar bail on one case to receive "jail credit" while detained on bail for another case. However, once they are able to secure release on that latter case while in one court, perhaps through a loved one paying the bail on it or because the court simply releases that person, they cannot simply pay the dollar bail for the other case if it is in a different court. This is true both for cases in different boroughs and for cases within a single borough but in both Criminal and Supreme Courts. Instead, people are returned to jail, after which they may pay the dollar bail or a loved one may post in the court of jurisdiction. This is because they are deemed by DOC to be "in transit" rather than at the courthouse. (This is not an issue if all open cases are in the same court.) If DOC used a fully electronic database, this totally absurd problem would mostly be resolved,

but they rely on fax machines – and, we add - those machines sometimes break down. However it is achieved, DOC should be compelled to accept bail payments for any case in any criminal court at any criminal court, regardless of the amount. Int. 1531A-2017 should have addressed this issue, but perhaps because subdivision c says "or" rather than "and," new legislation may be necessary to clarify DOC's obligation.

CREDIT CARD BAIL STILL UNAVAILABLE IN SUPREME COURTS ACROSS NYC

Inexplicably, credit card bail remains unavailable in all five Supreme Courts in New York City. We understand these courts lack credit card machines. When a person is in Supreme Court, a family member cannot use a credit card to bail that person out. Instead, they must wait for that person to be returned to DOC custody. The Legislature authorized this form of bail in 1986.[3] More than three decades later, it remains out of reach in the cases for which the highest bail amounts are generally set. This must change.

FAILURE TO ACCEPT BAIL PAYMENTS WHILE PEOPLE ARE "IN TRANSIT" ON NON-ARRAIGNMENT COURT DATES

Int. 1531A-2017 requires DOC to accept cash bail payments "immediately and continuously after an inmate is admitted to the custody of the department, except on such dates on which an inmate appears in court other than an arraignment in criminal court." Simply put, in the 21st century, the City of New York should be able to process bail payments whenever families or other loved ones are able to remit them and DOC should be able to release people within the law's allotted three hours. This loophole allows DOC to not accept bail when the individual is in court. As stated above, if bail is paid in court on one case, there is no other way to pay bail until that individual is returned to their DOC facility – even if the bail amount is one dollar.

CLIENT STORIES

<u>DOC Staff Misallocation</u>

Prosecutors sought and a judge set bail on Miguel in the amount of $5,000 bond or $2,500 cash or credit card, which is just over the state-imposed cap on charitable bail funds, and well beyond what Miguel and his family could ever afford. This was Miguel's first arrest, so he very clearly had no record of failing to appear. After pursuing every legal avenue to get his bail amount reduce, his attorney finally succeeded in persuading a judge to reset it at $1,500 and then immediately requested the Brooklyn Community Bail Fund interview Miguel. Already, he had spent ten days in jail. Unfortunately, the bail fund could not gain access to Miguel at Brooklyn House because DOC was short-staffed for the Thanksgiving holiday. [Note: NYC DOC already has an exceptionally high officer-to-incarcerated person ratio, so we would not advocate for hiring more staff but rather allocating them more effectively.] After they were finally able to

[3] Insha Rahman, Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts (Vera Inst. of Justice 2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/against-the-odds-bail-reform-new-york-city-criminal-courts/legacy_downloads/Against_the_Odds_Bail_report_FINAL3.pdf.

interview him, they paid his bail and he was released; he spent a full 16 days incarcerated and missed both Thanksgiving and the following weekend, and all while presumed innocent.

Errors in DOC's Database

John was arraigned on a Saturday night on 3 dockets. On Tuesday, his BDS attorney was able to get his bail reduced from $6,000 to $2,002. This was the difference between Rikers and Freedom for John, because his family could afford the premium and collateral for the new amount, if a bail bonds agent would post the bond. His BDS attorney advocated with DOC to update their system as soon as possible to reflect the new reduced bail because that is what bail bonds agents typically rely on. Because Thanksgiving was the following day, many staff at DOC were out of the office and nobody seemed to know who could fix this problem. Finally, the attorney got through to a person who was able to assist and, on Friday, DOC's system showed the correct bail amount and a bail bonds agent was willing to post it. That day, the family returned to the bail bonds agent, who said he tried to post the bond, but because the courtroom was closed at the time, John's file had to be sent to arraignment, and the court staff apparently would not do it. After additional hurdles, the agent was finally able to post the bond that Sunday, and John was released on Monday. John spent almost an entire week in jail because the system and its many actors failed him.

On a Wednesday, the Court ordered James detained on $500 bail/$500 bond. When his mother attempted to pay his bail, she was told the amount was $500,000, a thousand times what the judge ordered. DOC's database reflected $500,000 bail, seemingly an unintentional typo from $500 bail/$500 bond. Even though WebCrims showed the proper amount, DOC refused to make any adjustments without a revised securing order from the court. Following advocacy with MOCJ, the court issued a new securing order on Friday morning.

Randy was held on $3,501 bail/$7,001 bond. Because of an error entering the bond amount, the public facing system reflected $3,501 bail or $7,501 bond, $500 more in bond than the court ordered. Randy's family raised the premium and collateral for the ordered bond, but the bondsman refused to try to post bond because of the discrepancy in the system. DOC acknowledged the proper amount and that the public system reflected an error but refused to provide documentation to give the bondsman or a timeline for fixing the entry. The error was eventually resolved following advocacy with the court clerk, DOC headquarters, and the facility and the bondsman posted bail on Randy's behalf.

This pattern of errors takes other forms as well. DOC refuses to honor non-cash forms of bail or includes nonexistent "holds" on the public "inmate lookup."

George has never been on parole, but when his attorney checked the public lookup to confirm the bail amount, it showed a warrant from parole. Although the bail amount was correct, the DOC lookup showed that if bail was posted he would still be held because of a parole warrant. Calls to DOC's Legal Division and Custody Management went unanswered and our office sent a letter accompanied by George's RAP sheet showing that he was never on parole. After the Board of Correction responded by email, Custody Management responded saying that the error was resolved. The public-facing lookup was never fixed and still reflects that parole warrant. In this case, bail was set so high that George and his loved ones will likely never be able to pay it, but

if, for example, the courts or the Legislature were to end wealth-based pre-trial detention, DOC might still keep people like George locked up because of errors like this one.

Lack of Understanding by DOC Staff

The judge in Henry's case determined that Henry could satisfy bond with a personal appearance assurance. Henry signed the papers and the judge determined that bond was satisfied on a Friday. When Henry returned to Rikers, DOC staff told him that they did not understand the paperwork and refused to release him. At the request of Henry's attorney, the court clerk faxed documentation saying that Henry had satisfied his bond, but DOC still refused to release Henry. After a weekend of calls and letters to DOC's Legal Division and the Mayor's Office of Criminal Justice, Henry was finally released on Monday evening, three days after the court determined that he had satisfied his bond.

DOC Staff Do Not Understand and Follow 'Sanctuary City' Policy

BDS has had a number of other instances in which staff at the bail window have given incorrect information regarding ICE detainer requests to clients' family members who are trying to post bail. In each case, we have been able to clear up the issue with some advocacy by BDS attorneys, but the DOC bail window staff is apparently unaware of New York's detainer discretion policy, resulting in delays of the release of our immigrant clients. That said, our staff has raised this issue with the Mayor's Office of Immigrant Affairs and they have been very responsive. We have not encountered this issue since July of this year, and we hope to never do so again. Nonetheless, we want to flag it for the Council to monitor.

Ramon was detained at Brooklyn House on bail for pending charges. On a Thursday, his family tried twice to pay bail at Brooklyn House and was turned away because they told him there is an "ICE warrant." An immigration detainer is not a warrant and Ramon was not subject to being held for ICE under New York City's Detainer Discretion Law. A BDS Padilla attorney tried to correct the issue by calling DOC and the family returned on Friday afternoon to pay bail. On Friday, the family was told a third time that the bail window would not accept their bail because there was a hold. Ramon had no previous criminal convictions (and therefore no parole holds) or cross-county warrants; this was his first arrest and it was clearly an issue of the staff at the bail window not understanding the DOC detainer discretion law. BDS staff then advocated with the Mayor's Office of Immigrant Affairs and the Department of Corrections to correct the error. Ramon's sister was finally able to pay bail late in the evening on Friday and he was woken up at 2:30 a.m. on Saturday, detained until 6am, and then finally released on Saturday.

NYPD Continuing to Deny Access to Phone Contacts

In contravention of the spirit, if not the letter, of Int. 1576A-2017, the NYPD continues to routinely deny people in their custody access to their cell phone contacts, which often include loved ones who may be able to show up to support them in court and, if needed, pay their bail. That bill contained many exceptions that could be eliminated or at least narrowed, as it seems few if any of our clients are currently getting access to their phones.

William was arrested and had his phone and wallet confiscated by the police. He could not remember his mom's phone number to ask her to pay his bail. Finally, his mother tracked down his BDS attorney by calling the court and was able to pay his bail, but not until after he had been incarcerated for several days. (His attorney had already sent an investigator to find her, too, but this all could have been obviated if William had access to his contacts.)

ADDITIONAL ACTION NEEDED

Ultimately, New York State and City must end wealth-based detention, eliminate racial disparities in all facets of the criminal legal system, and substantially decarcerate to achieve equal justice. The commercial bail industry and all profit motives in the system must be abolished. While we fight alongside allies across the state toward these ends, it is critical that the people we represent and their families have the best possible shot at securing liberty and deference to their presumption of innocence.

The 2017 laws were an important step toward ensuring that people who may be able to pay bail are in fact able to pay bail and avoid additional 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.

1. *We must hold DOC accountable when they fail to comply with these proposed laws.*

These 2017 laws should be amended to include a cause of action and other sanctions if DOC fails to follow their legislative mandate. Without a consequence, we have little hope for the kind of systematic change that justice requires.

2. *We must hold prosecutors and judges accountable for relying solely on cash bail and commercial bond as the keys to freedom, as New York Legislators intentionally provided courts with 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. The stated goal of bail reform in 1970, in which these forms were created, was "reduce the un-convicted portion of our jail population."[4] Yet New York judges nearly 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 or partially-secured appearance bonds that are actually within a person's reach.

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

[4] Insha Rahman, Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts (Vera Inst. of Justice 2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/against-the-odds-bail-reform-new-york-city-criminal-courts/legacy_downloads/Against_the_Odds_Bail_report_FINAL3.pdf.

For a person detained in the holding cells at the courthouse: Currently, a person's personal effects including wallet, keys, MetroCard (and even critical assistive devices such as canes, walkers and crutches[5]) often remain back at the precinct and rarely travel with her to her 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 holding cells. Most ATMs have withdrawal limits that are too low for cash bail, anyway, but premiums for commercial bonds may be in reach. 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.

People who are already in 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. *Revoke operating licenses from bail bonds companies that exploit marginalized consumers in violation of the law.*

While the challenges of paying bail directly through the City are important, we note that most people who pay bail do so through bail bond agencies. The families and other loved ones of the people we represent continue to be exploited by these companies. Much of this exploitation is both legal and inherent to the industry and our criminal legal system's reliance upon it, but key elements violate longstanding consumer protection laws. First and foremost, bail bond agencies continue to charge illegal fees and premiums. We appreciate the Council's recent legislation to better inform consumers and strengthen the City's enforcement efforts, but more is needed. The City and State must shut down and prevent from reopening bail bond agencies that overcharge people. Another major widespread industry problem involves delays in actually securing people's release, often until a later court date at which they would be released, anyway; this practice is of questionable legality and the City and State should investigate further.

BDS SUPPORTS INT. 0944-2018

Int. 0944, sponsored by Councilmember Rory Lancman, would require DOC to notify, verbally and in writing, defense attorneys, court personnel and the incarcerated people themselves when that person is detained solely on a bail amount of one dollar within 24 hours. BDS supports this bill and we note that we are currently exploring ways in which statutory bail reform at the state level could obviate the practice of "dollar bail." There should be a mechanism by which people can get "jail credit" on a case without this clerical trick and, in the meantime, it should either be automatically paid or people should be allowed to pay it on their own as soon as they are released on the unaffordable bail case.

[5] *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.

BDS SUPPORTS INT. 1199-2018

Int. 1199, sponsored by Councilmember Keith Powers, would remove the 2.49% fee charged on credit card payments of cash bail made using the online bail payment system, and would also remove the 8% fee charged on credit card payments made in person in DOC facilities. This bill would also require the Department of Corrections to add an option to make online bail payments by direct deposit or electronic check. BDS supports this legislation, which ends an inexcusable two forms of wealth extraction from the people we represent and their families and communities. We note that the 3% fee for using credit cards to pay bail at the courthouse would remain under this law and we ask the City to call on the State to remove this fee, as well. We also note that we are exploring ways in which statutory bail reform at the state level could remove credit card payments as a "form" of bail available to the court and instead make all forms of money bail payable by credit card. While a very small portion of people for whom bail is set in New York City have the means to pay bail by credit card, all of those who are able should be provided with that option.

CONCLUSION

This hearing demonstrates 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 continuing to work with the Council to achieve our shared goals. Please do not hesitate to reach out to Jared Chausow, Senior Policy Specialist, with any questions about these or other issues at (718) 254-0700 (ext. 380) or jchausow@bds.org.