



**BROOKLYN  
DEFENDER  
SERVICES**

## **MEMORANDUM OF SUPPORT**

### **Bail Reform**

#### ***A.10137A (Walker)***

May 29, 2018

Brooklyn Defender Services (BDS) strongly supports A.10137A, a bill to reform the bail system. BDS provides multi-disciplinary and client-centered criminal defense, family defense, immigration and other civil legal services, social work support and tools for self-advocacy to more than 30,000 indigent Brooklyn residents every year. Over the past 22 years we have represented close to half a million people in criminal matters in Kings County, New York.

The amended version of this bill now includes more robust due process protections for accused people facing bail or remand. The amendments were drafted in response to concerns from public defenders and others to limit the likelihood of people being held in on bail or remand on insufficient evidence, such as in the tragic case of Kalief Browder. For all of the reasons listed below, we strongly support A.10137A.

#### **I. THE PROBLEM**

Tens of thousands of New Yorkers<sup>1</sup> suffer the brutality of Rikers Island every year simply because they are poor and cannot afford bail. They include people with serious mental illness, people who are medically fragile, and young people. The vast majority are people of color, including 89% of those held on \$1,000 or less.<sup>2</sup> Each day of incarceration increases the likelihood of job loss, loss of shelter or apartment placement, mental and physical health deterioration, and even death. Many suffer the torture of solitary confinement while still “presumed innocent.”

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<sup>1</sup> According to NYC Department of Corrections (DOC), over 58,000 people were admitted to DOC custody in 2017; between 78% and 82% of these people were jailed awaiting trial.

<sup>2</sup> Jamie Fellner, *The Price of Freedom* (Human Rights Watch, 2010).

Millions of dollars are wasted on detaining harmless people, further destabilizing their lives, families, and communities.<sup>3</sup> That money should be invested in meeting the needs of the communities from which criminal justice-involved people come by providing jobs, affordable and supportive housing, mental health services, school facility upgrades, and community centers.

Bail deprives poor people of the right to a fair trial. Pre-trial detention has been proven to distort case outcomes, as detained defendants who are inhibited from participating in their own defense and desperate to return to their families, jobs, and homes will accept far worse plea deals saddling them with a criminal record whether or not they are innocent, just to be released from Rikers with a sentence of “time served.”<sup>4</sup>

People whose families or friends can afford to pay bail are also harmed. The current money bail system facilitates profiteering by commercial bail companies that siphon money from poor families in times of crisis. Predatory bail companies ring every courthouse and jail and operate with nearly no oversight. They regularly take money from our clients’ families in the form of premiums, collateral, and numerous illegal but unregulated fees and fail to deliver on their end of the deal, either by waiting many days to bail a client out of jail or by returning clients to custody for arbitrary “violations.” Together with bounty hunters, they function as privatized and unaccountable law enforcement agents. NYS Department of Financial Services (DFS) has taken no disciplinary actions against bail companies for any specific consumer abuses since December 2013.<sup>5</sup> Even when the law is followed, defendants and their families and support networks, mostly those in the poorest communities, must spend large sums—money that could be used for food, rent, tuition and more.

In general, New York State law permits bail to be set only in the minimum amount necessary to ensure a defendant’s future appearances in court.<sup>6</sup> However, it is an open secret that the courts, prompted by District Attorneys, regularly use bail to ensure preventive detention, often even for misdemeanors in most counties.

Ultimately, New York should live up to the American ideal of presumed innocence and end pre-trial detention for all but the most serious cases. Bail reform is one critical step to making that a reality.

## II. CLIENT STORIES<sup>7</sup> – REAL PEOPLE SUFFER UNDER THE CURRENT STATE OF THE LAW

### a. *Charles – Received Plea Offer with Longer Jail Time Because He Was Already Incarcerated*

Charles was arraigned in 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

<sup>3</sup> According to the NYC Independent Budget Office, the cost of incarceration in City Jails was \$167,731 per person per year in 2012. More recently, NYC Comptroller Stringer calculated this cost at \$112,665, and noted it had increased 17% over the previous fiscal year.

<sup>4</sup> Ram Subramanian et al., *Incarceration’s Front Door: The Misuse of Jails in America* (VERA 2015)

<sup>5</sup> New York State Department of Financial Services, <http://www.dfs.ny.gov/insurance/das-dfs.htm>; Accessed August 26, 2015

<sup>6</sup> CPL § 510.30, *Sardino v. State Commission on Judicial Conduct*, 58 NY2d 286, 289 (1983) (citing C.P.L. § 510.30(2)(a)).

<sup>7</sup> Names changed to protect client confidentiality.

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. 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.”

b. *Octavius – Adolescent Receives Criminal Record Despite Illegal Search*

Octavius was 18 years-old and employed part-time when he was arrested for marijuana possession following an illegal search by NYPD. A judge set unreachable bail because he 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.

c. *Amber – Made Homeless After Arrest for a Non-Criminal Violation*

Amber was 50 years-old and lived in a three-quarter 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.

All of these clients are people of color.

### III. A.10137 – MEANINGFUL BAIL REFORM

The objective and litmus test of any bail reform proposal must be substantial decarceration. New York must work to end wealth-based detention and the reliance on detention which only results in forced guilty pleas, unnecessary convictions, and the never-ending cycle of incarceration. We need effective procedural protections for people who are detained to ensure that those who are innocent, or are not likely to flee, are released as quickly as possible. We need non-monetary conditions of release that do not impose undue burdens on defendants, and do not siphon scarce financial resources from low-income communities into the coffers of for-profit entities, or any other entities.

A.10137 includes the essential components of real and meaningful bail reform.

- Severely limits the types of cases in which bail is allowed and requires that if bail is set, the court must order at least 3 forms of bail.
- Creates a broad rule requiring the release or “release under non-monetary conditions” of all people charged with misdemeanors and felonies that do not involve actual and serious violence.
- Stipulates that a defendant does not have to pay for their non-monetary conditions of release and that all pre-trial services and electronic monitoring must be government agencies or non-profits.
- Clarifies that people accused of crimes have the right to counsel at arraignment when a judge will decide their liberty pre-trial.

Enactment of A.10137A will make New York a more fair, safe, and just state for all.

#### IV. COMMERCIAL BAIL INDUSTRY

One highlight of this legislation is that it should effectively sideline the predatory commercial bail industry by requiring judges to offer either unsecured or partially-secured bonds when bail is set. These forms of bail, which have been explicitly authorized under New York State law for four decades yet are almost never offered by judges, require either no upfront payment or an upfront payment directly to the court which is returnable upon completion of a case, rather than forcing defendants and their families to pay non-refundable premiums to for-profit bail bonds and likely face additional exploitation. BDS believes additional statutory legislation is needed to ensure that this industry is categorically abolished, as it has been in other states. *That is why we strongly support A10394-Blake/S8146-Benjamin and urge that it be included in any bail reform initiative.*

#### V. CONCLUSION

Our current bail system undermines the legitimacy of our criminal justice system. Worse than a warehouse for the poor, detention on Rikers Island is largely a penalty for poverty. Likewise, the racial disproportionalities inherent in the modern criminal justice system make fundamental reform one of the central civil rights concerns of our time. Across the country, courts are striking down money bail as a violation of the Equal Protection clause of the U.S. Constitution. The right to pretrial freedom that is inherent to a presumption of innocence is also a matter of basic fairness and human rights. Notions of justice are eroded by a process that creates a two-tiered criminal justice system with a fast lane for those with means and a quagmire for those without. Even if it were somehow fair, there is no evidence that money bail is more effective at securing a defendant's appearance in court than unsecured bonds.

Thus, reform is necessary and urgent. We call on the legislature to pass and the Governor to sign comprehensive bail reform this session.

**Questions?** Contact Andrea Nieves, Senior Policy Attorney, at [anieves@bds.org](mailto:anieves@bds.org) or 718-254-0700 ext. 387.