



**BROOKLYN
DEFENDER
SERVICES**

MEMORANDUM OF SUPPORT

Comprehensive Bail Reform

A.9955 (Quart)

S.3579A (Gianaris)/A.5033A (O'Donnell)

April 16, 2018

Brooklyn Defender Services (BDS) strongly supports the comprehensive bail reform legislation included in the Assembly's criminal justice reform package (A. 9955 Quart) and the Senate Democratic Conference criminal justice reform package (A.5033A-O'Donnell/S. 3579- A Gianaris). While there are many strong provisions in the FY19 Executive Budget Proposal bail bill, we cannot support the bill in its current form because of certain provisions that would represent a step backwards from reform. If these harmful provisions were eliminated or amended, we would reconsider our support at that time.

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.

I. THE PROBLEM

Tens of thousands of New Yorkers¹ 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.² Every day incarcerated 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."

¹ 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.

² 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.³ 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.”⁴

Together, the current cash bail system facilitates profiteering by commercial bail companies that syphon 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 unregulated, unrestricted 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.” As bounty hunters, they function as privatized and unaccountable law enforcement agents. NYS Department of Financial Services (DFS) has taken only two disciplinary actions against bail companies statewide since December 2013.⁵

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.⁶ However, it is an open secret that the courts, prompted by District Attorneys, regularly use bail to ensure preventive detention, often for misdemeanors.

Even when people can pay bail, they are harmed. Defendants and their families and support networks, mostly those in the poorest communities, must spend large sums in bail premiums and other compensation—money that could be used for food, rent, tuition and more.

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 STORIES⁷ – REAL PEOPLE SUFFER UNDER THE CURRENT STATE OF THE LAW

a. *Charles – Received Longer Jail Time Plea Offer Because 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

³ According 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.

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

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

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

⁷ 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-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 kids. 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. CONCERNS WITH THE PROPOSAL IN THE FY19 EXECUTIVE BUDGET – ARTICLE VII LEGISLATION

The Governor’s FY19 Executive Budget bail proposal included some critical reforms but falls short of garnering our support. Brooklyn Defender Services opposes this proposal unless critical amendments are made.

Most problematically, the Governor’s bail proposal grants unprecedented and unilateral power to prosecutors to detain people for five (5) days before a judge will be allowed to hear a bail application. The unchecked power to detain will inevitably lead to abuse. Judges must maintain discretion over all detention decisions so that detention is used sparingly. We strongly believe that even when a judge does order detention, a hearing must be held within 48 hours. Under the Governor’s proposal, a person could be held for up to five days before seeing a judge and gaining the right to release. Five days of preventive detention can lead to the loss of employment or housing; the loss of children; missed days of school; and the disruption of medical treatment. Nobody should be detained for more than 48 hours without an evidentiary hearing being held.

The Governor’s proposal also allows for a presumption of indefinite preventive detention in a broadly defined class of cases, including misdemeanors. For example, anyone charged with domestic violence could be detained without bail, even in a misdemeanor case involving an overblown argument between a mother and her child, where the mother is pleading for her son’s release. If someone is charged with a low-level misdemeanor charge, such as marijuana possession, and during the pendency of their case they are re-arrested for another misdemeanor, such as jumping a subway turnstile, they could also be held in without bail by the prosecutor and judges would not have the power to release them for five days. Allowing preventive detention for misdemeanor re-arrests would be particularly devastating for low-income communities of color that disproportionately experience stop-and-frisk tactics and

“quality of life” policing, which result in high rates of arrests for low-level allegations. *There must be no presumption of detention. The prosecution must show by clear and convincing evidence that preventative detention is necessary in every case.* The Governor’s proposed presumption of detention wrongly places the burden on the accused.

The Governor’s proposal may allow for preventive detention in cases deemed “violent” under the law but that do not involve actual acts of violence. There are many such offenses in the penal law. Notably, Kalief Browder was charged with Robbery in the Second Degree, which is a “violent felony offense,” despite the fact that nobody was hurt. His case did not involve an act of violence. Under the Governor’s proposal, anyone charged with a case involving a serious act of violence can be subjected to preventive detention; this language is not defined in his proposal but may include cases like Kalief’s.

Lastly, the Governor’s bail proposal eliminates existing speedy trial provisions and provides unnecessary loopholes to detain an individual indefinitely. There must be strict speedy trial release provisions for those preventatively detained. Additionally, the exception to the release provision for risk to an identifiable person must be eliminated, as the exception swallows the rule. The release provisions must have teeth if they are to be effective.

The speedy trial release times fail to distinguish amongst the different classes of violations and crimes. Theoretically, under the governor’s proposal, a person charged with even a B misdemeanor could end up serving 6 months in detention even though the maximum jail penalty is 90 days. The time periods must be shortened and must mirror the current speedy trial release provisions. The release times must be shortened, particularly for misdemeanors and violations. The provisions mandating release for misdemeanors and violations must be shortened to mirror the current statute’s rules requiring the release of people accused of A misdemeanors within 30 days, B misdemeanors within 15 days, and violations within 5 days.

When taken as a whole, the Governor’s bail proposal will therefore not likely reduce pre-trial detention because it would grant prosecutors new unchecked powers to keep people incarcerated. We will continue to oppose passage of the Governor’s bail proposal so long as these problematic, and likely unconstitutional, provisions remain.

IV. TRUE BAIL REFORM SOLUTIONS IN THE SENATE AND ASSEMBLY

The objective and litmus test of any bail reform proposal must be substantial decarceration. New York should 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 people 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 syphon scarce financial resources from low-income communities into the coffers of for-profit entities, or any other entities.

Both the Senate and the Assembly have introduced proposals that would go a long way in reducing the scope of mass incarceration and limiting harm to poor communities and communities of color. Brooklyn Defender Services strongly supports both A.9955 (Quart) and S.3579A (Gianaris)/A.5033A (O’Donnell).

a. A.9955 (Quart)

A.9955 includes the essential components of real and meaningful bail reform.

- Clarifies that people accused of crimes have the right to counsel at arraignment when a judge will decide their liberty pre-trial.
- 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.
- Requires that a defendant does not have to pay for his or her non-monetary conditions of release and that all pre-trial services and electronic monitoring must be government agencies or non-profits.
- Requires that if bail is set, the court must order at least 3 forms of bail.
- Ensures that constitutional requirements of due process are met in those limited cases involving serious and actual violence.

b. S.3579A (Gianaris)/A.5033A (O'Donnell)

This bill contains the same essential components as the Assembly bill but goes a step further in many key aspects. The bill:

- Eliminates cash bail entirely
- Narrows the category of crimes that are eligible for detention to those that are the most serious and involve actual violence. It also requires that prosecutors demonstrate in a robust individualized hearing that there is clear and convincing evidence that pretrial detention is necessary because the defendant is evidenced to be at high risk of intentional flight
- Require the collection and reporting of data to support compliance and transparency

Enactment of either A.9955 or S.3579A/A.5033A will make New York a more fair, safe, and just state for all.

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 morality 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.

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