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Hearing Examining the Adequacy of ATI's and Pre-Trial Services

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My name is Catherine Gonzalez. I am a Senior Attorney specializing in Padilla representation in the Criminal Defense Practice at Brooklyn Defender Services (BDS), one of the largest legal service providers in Brooklyn. BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and tools for self-advocacy for over 30,000 clients in Brooklyn every year. I thank the New York State Assembly Committees on Codes and Correction and, in particular, Chairs Joseph Lentol and David Weprin, for holding this hearing examining the adequacy of ATI's and pre-trial services in light of recently enacted criminal justice reforms.

BDS commends the New York State Assembly, Senate, and Governor for enacting transformative criminal justice reforms last session. These reforms go a long way towards correcting the unfair pre-trial justice system that currently exists, in which people languish in jail because they cannot afford bail, awaiting trial or considering a plea offer without access to police reports, witness statements, and other basic information needed to defend themselves. I also want to recognize the tremendous work of countless public defenders, advocates, and people and families impacted by the criminal justice system and their families, all of whom organized and advocated across the state for several years to make these reforms a reality.

Background

Two key pillars of our democracy are the right to liberty and a fair trial. For decades, New York state has deprived people of these fundamental rights, based solely on their inability to afford bail. While people with means are able to pay their bail and defend themselves from a position of

freedom, those who do not have the money are forced to suffer immeasurable harm in jails — without the ability to meaningfully engage in their defense and facing extreme pressure to plead guilty regardless of guilt or innocence. This appalling injustice has disproportionately impacted Black and Latinx people and people in poverty across the state.

This pretrial jailing crisis has been made worse because of New York's archaic discovery law, which allows prosecutors to withhold crucial evidence from a person facing allegations and their defense attorney until and unless a person chooses to go to trial. 95% of cases end in a plea deal, so the vast majority of people may never see all the evidence in their case and, in fact, are forced to make life-altering decisions about whether to accept plea offer while effectively "blindfolded." Many New Yorkers have been jailed for months or even years while presumed innocent and fighting the charges against them. But even one day in jail can totally derail a person's life: they can lose their jobs and housing; and the state may take their children away.

The pretrial jailing crisis has destroyed people's lives. It has also disproportionately impacted Black and Latinx New Yorkers. In New York City, close to 90% of those jailed pre-trial are Black and/or Latinx, despite making up only 50% of the general population. In other parts of the state, more than 60% of the pre-trial population is Black and/or Latinx, despite making up only 30% of the general population.

These jailing policies have torn families and communities apart and forced tens of thousands of people with mental health, substance use and housing needs into jails instead of providing them with support or treatment every year. This crisis has also cost taxpayers a fortune — without improving public safety. In fact, recent studies show that pretrial detention actually increases the likelihood that a person will be rearrested because it worsens the root drivers of harm and crime: poverty, trauma, housing instability, unmet mental health and health needs and untreated substance use disorders. Decades of data and experience show us that more incarceration does not lead to more public safety. For example, crime rates — including rates of serious crime — have plummeted in New York City over the last few decades. At the same time, incarceration rates have also been decreasing substantially. That is why continuing this positive trend — and expanding it throughout the state — by passing bail and discovery reform was so important. That is why New Yorkers across the state, including anti-violence organizations, survivors of jails and prisons, public defenders, grassroots groups, faith communities, and many others came together to advocate for reform.

Heeding this call, legislators and the Governor initiated a process involving substantial input from all stakeholders, from prosecutors to formerly incarcerated New Yorkers, and ultimately enacted pre-trial justice reforms. With the amendments to the bail, discovery, and speedy trial laws taking effect on January 1, 2020, most people who are arrested will be guaranteed release rather than incarceration and will have all the evidence and information related to their case.

An important provision in the new laws requires police to provide appearance tickets as opposed to immediately incarcerating people charged with low-level offenses. Now, many more people will never set foot in a jail cell, a vast departure from today's reality. Given the devastating impact that even 24 hours in jail can have on a person, particularly a young person or someone with a health condition, this change exemplifies the profound improvements to justice in New

York. All that said, the efficacy of these reforms will depend on implementation and, for that reason, I am grateful to the Assembly for its oversight of pre-trial services.

I cannot emphasize enough how necessary bail reform was in New York. For years, as defenders, we have witnessed the destabilizing effects of incarceration on individuals, their families and even whole communities – particularly Black and/or Latinx communities. Bail has been used as a mechanism to detain individuals and to punish them before any adjudication of guilt or innocence. All too often, bail is used to force guilty pleas and to perpetuate the lifelong collateral effects of having a criminal record. Even with ban the box legislation, people with criminal records face serious obstacles obtaining employment, housing and, sometimes, even appropriate diversion programs.

The false narratives pushed by the District Attorneys Association of New York (DAASNY) in local newspapers only highlight the lack of insight and their unwillingness to address the underlying problems associated with bail and mass incarceration. Referring to new bail laws as "catch and release," they expose their racism and disdain for vulnerable New Yorkers, viewing them as animals in need of being trapped. Now they only want to further dehumanize the people we represent by undoing New York's progress. We must not let that happen.

Pre-Trial Jailing's Distortion of Justice

A summary of analyses included in a 2015 report by the VERA Institute of Justice found defendants jailed before trial were far more likely to accept harsher plea deals and receive prison or jail sentences.[1] Of all those who receive prison and jail sentences, people who were incarcerated pre-trial received sentences that were two to three times longer than those who were released pending trial.[2] The Bureau of Justice Assistance, a division of the U.S. Department of Justice, has found that "[t]hose who are taken into custody are more likely to accept a plea and are less likely to have their charges dropped."[3] We know from New York State Division of Criminal Justice Services data that most people — more than 90% — of people return to court even when they are released without any monetary or non-monetary conditions. We also know that most people who are able to fight their cases while free from jail obtain fairer results and often can avoid further incarceration and destabilization in their lives.

The Paramount Importance of Full Pre-Trial Liberty

As New York State moves toward ending mass incarceration, it is critically important that we do not replace it with mass supervision. The best alternative to incarceration is freedom, dignity, and access to affordable housing and healthcare, including mental health and substance use disorder treatment, in stable, well-resourced communities. Courts should release people on their own recognizance (ROR) in the vast majority of cases, as already happens in New York City.

[1] Ram Subramanian et al., Incarceration's Front Door: The Misuse of Jails in America (VERA Inst. of Justice 2015), available at http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf.
[2] Christopher T. Lowenkamp, Ph.D., Marie VanNostrand, Ph.D. & Alexander Holsinger, Ph.D., Investigating the Impact of Pretrial Detention on Sentencing Outcomes (Laura & John Arnold Found. 2013), Investigating the Impact of Pretrial Detention on Sentencing Outcomes.
[3] Lindsey Devers, Ph.D. , Plea and Charge Bargaining Research Summary (U.S. Dep't of Justice Bureau of Justice Assistance 2011), available at https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

Onerous pre-trial release conditions can cause serious harm to people and families, obstructing child care, employment, and more. Our experience affirms research showing that the vast majority of people appear in court without any obligations beyond those of the extant case because they have an interest in addressing the charges against them. Likewise, re-arrest on serious charges is rare. ROR should be the default in all cases, unless specific conditions are needed to ensure a person returns to court.

People Return to Court Without Conditions

Our state is fortunate to have empirical data to guide the way forward. The Brooklyn Community Bail Fund (BCBF) paid bail for nearly 5,000 people who would otherwise have been jailed for their poverty and, in many cases, coerced to plead guilty, regardless of guilt or innocence, just to get free. Instead, they were free to fight their cases while at liberty. BCBF clients were three times as likely to have favorable case outcomes. That means fewer lives and families derailed by incarceration and criminal records. That means far greater chances at positive outcomes in education, employment, housing, and health. All this, and 95% of the people whose bail they paid returned for all of their court dates.[4] Other bail funds across the state have had similar success, from Columbia County to Suffolk to Tomkins and Syracuse. This is achieved through support, not punitive measures. Bail funds provide court reminders and help connect people to needed social services. Importantly, the new bail law requires that courts similarly issue appearance reminders, a tool backed by research.

Protections Against Overuse of Release Conditions

Crucially, the new bail statute includes substantial protections against the overuse of release conditions. It requires that pre-trial services be available regardless of charge, that courts make individualized determinations on the least restrictive conditions necessary to ensure a person returns to court, and that people facing charges not be compelled to pay for any pre-trial services. In addition, given the elevated harms associated with electronic monitoring, also known as e-shackling, the law prohibits its imposition on people facing only misdemeanor charges, except for those facing misdemeanor sex offense or domestic violence charges. In addition, time spent on EM counts as time in custody for release deadlines under the criminal procedure laws, and limits it to 60 days, unless it is renewed after a de novo hearing. Still, policymakers and court actors must be vigilant to ensure that people who would appear in court on their own, which again includes the vast majority of those facing charges, are ROR'd and not subject to, for example, regular check-ins that could force them to miss school or work or childcare obligations, or EM which could stigmatize them and invite government surveillance into their private visits to doctors or therapists.

Pre-Trial Services and Release Conditions Must be Individually-Tailored

Alternative to Incarceration programs (ATIs) have played a leading role in reducing the numbers of jail and prison sentences and accelerating decarceration in New York City and other parts of the state, but we caution that blanket policies and programs are inappropriate for legally innocent people facing mere criminal allegations. Just as it is problematic for a "Corrections" agency to be

[4] Our Results - Brooklyn Community Bail Fund, available at https://brooklynbailfund.org/our-results-1.

tasked with correcting those who have not been found guilty of any wrongdoing, counties and cities across the state should not be relying on pre-trial programs to impose behavioral changes. Studies have also shown that intensive supervision can also result in higher rates of failure for those who are low risk and need little to no monitoring.[5]

Rather, pre-trial services and Alternative to Detention (ATD) programs can and should be used, under the law, to provide individualized support to help ensure New Yorkers make their court appearances and, in certain cases, offer voluntary programming to address the underlying challenges people may be facing. In our experience, court-involved people need essentially what all people need: stable housing, access to quality healthcare, and jobs. Many need treatment for substance use disorder, and we find they respond better when there is no court mandate or threat of sanctions. Mass supervision with generalized conditions of release and programs that are not individually tailored to meet people's needs, or that set people up to fail, would be a waste of resources. People facing charges and taxpayers alike benefit from courts' and pretrial services programs' individualized assessments and targeted supports.

Currently at BDS, attorneys and social workers work together and, at times, in conjunction with Brooklyn Justice Initiative's Supervised Release Program. Those clients who need services are referred to and voluntarily participate in programs designed to address their individual needs. Knowing that the program they enter is voluntary and also confidential ensures a higher success rate. People are more inclined to enter into and remain in treatment when they can do so on their own terms. Even without having to acknowledge guilt or innocence, these individuals still choose to avail themselves of assistance when it is offered to them.

The Need for More Quality ATDs

ATIs and ATDs are an integral part of the criminal justice system. As public defenders we are invested in comprehensive representation of our clients and that includes not only investigating the allegations against them but also investigating how or why our client ended up in the criminal legal system. Our attorneys work closely with social workers and other experts to examine our clients' social histories to determine if there is a history of substance abuse, physical abuse, mental illness, or developmental disorders. Identifying these issues is essential to working out the appropriate resolution to the case.

Incarcerating someone with mental health needs, substance use disorder, or a developmental disability will do nothing to address these underlying challenges. Oftentimes people end up being arrested as a result of undiagnosed and untreated illnesses, disabilities, or addiction. ATI and ATD programs can provide services to people outside of the jail or prison context in order to prevent further incarceration. They can provide counseling and treatment, assist people in finding employment, stable housing, and connect them with additional resources in their community. These can amount to longer term solutions, where a period of incarceration may likely only worsen peoples' conditions.

[5] Marie VanNostrand, Kenneth J. Rose, and Kimberly Weibrecht, State of the Science of Pretrial Release Recommendations and Supervision (Rockville, MD: Pretrial Justice Institute, 2011), 28, available at https://perma.cc/3DMM-S92S.

New York City is well-situated with ATDs and ATIs relative to many other parts of the state, but still more program space is needed. In particular, there is inadequate residential program space for people with serious mental illness and substance use disorder, with a long waitlist for these programs and extremely limited numbers of beds. Such programs are not appropriate for the majority of the people we represent, but some who have a diagnosis of a serious mental illness and face long prison sentences benefit from long-term residential options and more should be funded and made available. Moreover, people with developmental disorders or cognitive issues are almost entirely without ATD or programming options. The Mental Health Court program in Brooklyn only recently started accepting clients with developmental disabilities, and on a very limited basis. People with traumatic brain injuries or dementia are left without options. Lastly, our female clients are dramatically underserved by ATIs and other programming, especially if they have children. Some initiatives, such as the Women's Prison Association, focus primarily on assisting women who have had contact with the criminal justice system. The Women's Project places womxn in housing and outpatient or inpatient mental health and/or substance use programs as needed, with trauma-informed services. Yet there is a real need for more of these programs.

All that said, in New York City and elsewhere, the Osborne Association and the Fortune Society both run effective ATDs and ATIs, providing job training, resume building, referrals for mental health services, and more. The Center for Alternative Sentencing & Employment Services (CASES) is also an effective ATI program that serves primarily young people charged with felonies. These programs can serve as models as new programs are developed across the state, including in New York City.

Funding and Resources Outside the Criminal Legal System Are Most Effective

Hundreds of years of racism and the legacy of slavery, Jim Crow, and legal discrimination still manifest throughout our society, as Nikole Hannah-Jones' 1619 Project in *the New York Times* recently illustrated. Ultimately, the solution to mass incarceration, or the New Jim Crow, lies not in simply reforming or scaling back the punishment paradigm, but in fundamentally reorienting our policies to promote equity and well-being for those failed by the status quo. For example, ending fare evasion arrests and exorbitant summonses can and should happen immediately, but the more comprehensive solution is to make public transit completely free, at least for people in poverty. Resources allocated to punishing people must be reinvested toward that supporting them. Likewise, ending pre-trial detention in the vast majority of cases is a historic step in the right direction, and New York must now act decisively to address social problems before they appear in criminal court. That means working toward guaranteed housing, healthcare, and jobs. As a start, people in the communities we serve would benefit from job training programs and job placement programs that actually pay a living wage so they can care for themselves and their families while they pursue a life of greater economic stability and success. In addition to drawing down jail budgets, for example, the New York City Council can look toward shifting funds from the NYPD's $5.58 billion budget toward community-based resources, given that arrests have fallen by 40% from 2008 to 2018.[6]

[6] New York State Div. of Criminal Justice Services, Adult Arrest: 2009 - 2018, available at https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf.

Prosecutors Must Uphold the Law, Not Subvert it

Certain prosecutors across the state are engaging in a two-pronged attack intended to undo New York's progress: fear-mongering and misinformation in the media, and trainings for prosecutors on a series of tactics to subvert the new bail and discovery laws. In fact, these tactics were shamelessly outlined in a manual published by DAASNY's New York Prosecutors Training Institute and in a publicly-available podcast they released.[7] The new bail and discovery laws were carefully crafted with the input of stakeholders across the state to advance real public safety and justice. It is the responsibility of prosecutors to uphold the law, not seek to undermine it.

Tactics to Subvert the Law

Most relevant to this hearing, the Nassau County prosecutor conducting the training in the podcast advises requiring people released with conditions to call into court daily. This is because the new bail law prohibits pre-trial jailing in most cases except when a person willfully and persistently fails to appear in court and, the prosecutor suggests, forgetting such a phone call could meet this criterion. This tactic seems designed to trap our most vulnerable neighbors, including people who lack a cellphone or run out of minutes. Pre-trial services must be designed to support people remaining at liberty until and unless they are convicted of a crime and sentenced to jail or prison, not ensnare people back into the mass-jailing crisis that inspired reform. You may read about other such tactics, which do not relate so closely to this hearing, in a *City & State* article entitled "DAs trained how to keep people in jail despite new bail law."[8]

Unfair and Baseless Media Attacks

A recent spate of media attacks on the new pre-trial justice laws, led by the New York Post, reveal widespread misunderstanding and, it would seem, a disinformation campaign led by DAASNY and police. The Post ran three separate inflammatory articles lamenting the supposed price tag of New York City's Supervised Release program, specifically decrying gift cards for food, cellphones, and baseball tickets purchased by a donor some years ago that have been provided to young people who make their court dates. Despite the fact that this program has been providing services for close to three years, the Post made it front-page "news" and accompanied it with these alarmist editorials. The real scandal is paying $832 per day to jail a legally innocent person in a brutal penal colony whose staff often fail to even bring them to court when empirical data show Supervised Release with $10 gift cards for food actually works. These are not mere incentives; they help people meet their needs and address the underlying challenges that may have led them into the criminal legal system. As but one example, the cellphones are used to enable people to receive court reminders.

[7] Jeff Coltin, DAs Trained How to Keep People in Jail Despite New Bail Law, City & St. New York, Oct. 28, 2019, available at https://www.cityandstateny.com/articles/politics/new-york-state/das-trained-how-to-keep-people-in-jail-despite-new-bail-law.html.
[8] Ibid.

Conclusion

Lawmakers should be proud of the historic pre-trial reforms enacted last session and we thank you for this hearing to ensure successful implementation of the new laws. All New Yorkers will benefit from major improvements to fairness and public safety. We look forward to continuing to work with you to ensure effective use of pre-trial services and ATIs and to win additional reforms to make our criminal legal system more fair and just.

Thank you for your consideration of our comments. If you have any questions, please contact Jared Chausow in my office at jchausow@bds.org or (718) 254-0700 Ext. 382.