



TESTIMONY OF:

**Yung-Mi Lee – Supervising Trial Attorney
Criminal Defense Practice
BROOKLYN DEFENDER SERVICES**

**Presented before
The New York City Council
Committee on the Justice System
Oversight Hearing on Preparing for the Implementation of Bail, Speedy Trial, and
Discovery Reform
May 1, 2019**

My name is Yung-Mi Lee. I am a Supervising Trial Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS) provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support. We represent approximately 25,000 people each year who are arrested in Brooklyn and whose cases will be greatly affected by the criminal justice reforms due to become effective on January 1, 2020. I thank the New York City Council Committee on the Justice System and, in particular, Chair Lancman, for holding this oversight hearing on preparations for the implementation of bail, speedy trial, and discovery reform.

BDS commends the New York State Assembly, Senate and Governor for the transformative criminal justice reforms included in the budget. 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, private attorneys, bar associations, advocates, and people 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.

With these amendments to the bail, discovery, and speedy trial laws, many more 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 these reforms requires police to issue appearance tickets as opposed to immediately incarcerating people charged with low-level offenses. Now, many more of our clients 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 a person 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 Council for shedding light on this process.

Implementing Bail Reform

It is no secret that thousands of New Yorkers suffer the brutality of Rikers Island every year simply because they are poor and cannot afford bail. This includes people with serious mental illness, people who are medically fragile, young people, elderly, people with disabilities, pregnant women and many more people who have specific needs that cannot be met in a jail. One of the starkest realities is that the vast majority of people on Rikers are Black or Latinx. This is largely due to the fact that those arrested in New York City are primarily of people of color. Because so many people who are arrested are also very poor, low bail amounts notoriously impact people of color. It is no surprise that 89% of the people held on \$1,000 or less fall within this category. Pre-trial detention is an insidious and incredibly harmful practice which destroys people instantly through job loss, loss of stable housing, mental and physical health deterioration. This happens before a person has been convicted of any crime and these devastating outcomes survive even when the person is never convicted, which happens a very high percentage of the time.

Bail is also a way in which people are coerced into accepting a plea deal because they want to get out of jail or at least have a certain ending to the horrible nightmare of Rikers Island. In some cases the coercion is a collateral impact of not being able to afford bail. But in many cases, bail is intentionally used by prosecutors and judges to create pressure on people to plead guilty and keep the wheels of the criminal justice system moving. It is with great relief and hope that we view these reforms because we know, better than anyone save those who have personally suffered, what the horrible costs of this system have been.

The bail reform legislation included in this year's New York State budget will go a long way towards overhauling a broken system of pre-trial incarceration. Courts would be prohibited from setting money bail or ordering a person remanded in the vast majority of criminal cases. Instead, the new law allows for an expansion of pre-trial services and requires certain supports to help ensure people can make their court appearances. If money bail is to be set, courts must impose a minimum of three forms, one of which must be partially secured or unsecured bond. Courts must also consider the ability to pay and undue hardship when money bail is set. The new legislation also mandates law enforcement to issue desk appearance tickets (DATs) in many misdemeanors and E felonies. This means that many people will never see the inside of a jail cell, a dramatic change from the current process.

Given that these individuals would be released on January 1, 2020, or never jailed in the first place, we support a quick transition where NYPD, prosecutors and courts should implement the bail reform statute immediately.

We also urge the Council to assure that pre-trial services are funded instantly so they can support these changes as soon as possible by giving judges the help they need to release most people immediately, especially those who will be guaranteed release in January. We also ask that the Council hold NYPD accountable to issuing appearance tickets in more cases, something they are statutorily allowed to do now but not mandated. The Council should monitor the City's overall adherence to the clear objectives of this legislation—first and foremost, decarceration—while also being vigilant about minimizing other forms of supervision, onerous conditions, and invasive surveillance. It is essential that New York City continue to reduce arrests as well as expand decriminalization and consider additional initiatives needed to end mass incarceration in New York State. In addition, we urge the Council to reinvest savings from reduced incarceration in supporting communities most harmed by the criminal legal system. While it is essential to ensure that services and programs are made available to people who have been arrested to avoid pre-trial incarceration, it is also important that the City offer meaningful services for people who reside in communities that have been targets of over-policing while also reducing the use of police and arrest to solve problems related to poverty and trauma.

Pretrial Jailing Hurts Families and Communities

Pretrial jailing imposes a wide range of devastating costs to New York's families and communities. These costs begin with the need to post bail or pay for someone's release from jail after their arrest. When they cannot afford bail, families have to pay to stay in contact with their loved ones for phone calls and transportation to visit. On top of these direct costs, families must replace lost income, child support, and other financial contributions when a wage-earner or caretaker is incarcerated. Finally, incarceration also takes a toll on family members' physical and mental health, education outcomes, and other measures of well-being.

Pretrial Jailing Hurts People

Jail conditions pose a serious, and too often deadly, threat to incarcerated people. The New York State Commission of Correction found that in six different deaths across five different New York county jails, there were "egregious lapses in medical care." More recently, people across the country watched in horror as the people incarcerated in Brooklyn's Metropolitan Detention Center banged on the walls to protest their lack of heat, electricity and basic medical care during the coldest days of the winter – a reality that is tragically common in local jails across the state. Perhaps the best known story of the trauma caused by pretrial jailing is that of Kalief Browder, who took his own life after three years as an innocent teenager on Rikers Island. Efforts to protect public safety must also address the acute and grave risks that incarceration pose to the safety and well-being of the thousands of New Yorkers locked inside.

Pretrial Jailing Distorts Justice

A summary of analyses included in a 2015 report by the VERA Institute of Justice found defendants detained before trial were far more likely to accept harsher plea deals and receive prison or jail sentences. Of all those who receive prison and jail sentences, those who were incarcerated pre-trial received sentences that were, on average, three times longer. 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.”

Every day that goes by without implementing bail reform, hundreds of New Yorkers get sent to jail. Their lives are upended, they face serious physical abuse, lose jobs, housing and family connections, and they receive inadequate medical and psychiatric care. New York City and all court actors must build on the work of the Legislature and Governor by ending mass jailing.

Preventing Mass Surveillance

One concerning element of the new bail statute is the allowance for electronic monitoring (EM), or what some have called electronic shackling, as a form of pre-trial supervision. Importantly, people facing charges cannot be made to pay for EM under the new law, and the use of EM would be subject to the release protections of Criminal Procedure Law 180.80 and 170.70. Also, it would not be permitted in cases where the top charge is only a misdemeanor, with the exception of cases involving allegations of domestic violence and sex offense crimes. Still, there is a real risk that mass surveillance, coupled with restrictive and ultimately punitive conditions, replaces mass jailing, with the same racial and economic disparities. EM raises privacy concerns because it can be used to track an individual’s movements which have nothing to do with its intended use, namely, as a way to ensure court attendance. It also provides a way for law enforcement and possibly private corporations to collect and store data for years – well beyond the life of a criminal case. Finally, given the risk of malfunctions as well as subjective determinations as to what constitutes a violation, re-incarceration can occur instantaneously and broadly. While defendants cannot be charged for EM, each and every case in which it is ordered will cost taxpayers. Private corporations that feed on the criminal legal system will profit. Use of EM should be limited to a very narrow set of cases in which a person would otherwise be in jail, or else it will undermine the promise of reform.

Implementing Discovery Reform

The criminal discovery reform legislation included in this year’s New York State budget generally requires all evidence and information in a criminal case to be turned over within 15 days of arraignment and on an ongoing basis and mandates that prosecutors make these disclosures prior to the expiration of any plea offer. Early and complete disclosure promotes fairness in the criminal justice system. Prosecutors and law enforcement will no longer have to decide whether any information constitutes Brady or exculpatory evidence. Instead, they will have to be comprehensive in turning over such information regardless of whether they believe such information is relevant. As such, the law does not limit discovery to any specified list of discoverable items, though one is included in the law to help ensure compliance. A party can

request and a court can order disclosure even if it is not specified within the law. The reform also allows for the defense to adequately investigate a case so that even if items are not within the control or possession of the prosecutor, the defense can still move to preserve evidence or a crime scene and the defense can subpoena any additional items.

The importance of discovery is highlighted by special provisions requiring sanctions and remedies for non-compliance. These remedies or sanctions include adjournments, reopened hearings, adverse inferences, excluded or precluded evidence, mistrials, or dismissal, depending on the possible impact of the discovery violation. Without a certification of compliance (that discovery is complete), the prosecutor will not be able to announce ready for trial, under New York's speedy trial statute, CPL §30.30.

Prosecutors throughout the state and most parts of the city have withheld discovery claiming public safety or witness safety concerns. While witness safety concerns are valid in a very small subset of cases, the new law allows prosecutors to move for protective orders as needed. The importance of discovery is manifested by the statute's requirement that courts balance the need for disclosure with any legitimate need to protect witnesses or evidence and so the new legislation allows for limited redactions by allowing disclosure only to a the defense attorney and agents but no one else.

In Brooklyn, unlike most of the rest of the state, the Kings County District Attorney's has a longstanding policy to provide discovery to the defense on an ongoing basis in most cases, thus debunking the myth that most cases raise witness safety or intimidation concerns. This policy has improved outcomes and streamlined cases.

However, because District Attorneys have not been statutorily required to turn over all discovery in a timely manner, the decision as to whether or not discovery should be withheld is within their control as opposed to a neutral arbiter, a judge. The first day of a criminal prosecution can derail a person's life, and that is why discovery at the earliest possible moment is critical. The new legislation directs prosecutors to turn over all evidence as soon as is practicable, but *no later than* 15 days after arraignment. In other words, we hope that prosecutors will be able turn over many documents and reports in their file at the first appearance, also known as criminal court arraignments, including police reports, complaint room screening sheets (also known as Early Case Assessment Bureau reports), photographs, video recordings and witness and complainant statements.

The statute also recognizes that people should make decisions about guilty pleas not only voluntarily, but also knowingly. That means that, at least seven days prior to the expiration of a plea offer, prosecutors must turn over, in addition to the aforementioned items, any written or record defendants' statements, grand jury testimony, names and contact information for law enforcement personnel involved in the case, names and contact information for witnesses, expert opinion and scientific reports and evidence, electronic recordings, exculpatory evidence, evidence that tends to negate guilt, evidence that reduces the seriousness of the charged crime or might reduce a sentence, summaries of all promises or inducements offered to people who may be called as witnesses, and more. I cannot overstate the importance of having early access to these items to review them with our clients and advise them on plea offers that may

fundamentally impact them for the rest of their lives, whether due to a period of incarceration, a permanent criminal record, or more.

Many of these items will require the NYPD to provide evidence to prosecutors that, under the existing discovery regime, would often never actually be made available to the defense. Prosecutors will now be required to make efforts to communicate with NYPD to preserve and obtain documents and physical evidence. There is a due diligence requirement built into the statute. This free flow of information between the prosecutor and law enforcement is essential for discovery reform and compliance. The City Council must ensure that NYPD is compliant and assists the prosecution with this process.

Implementing Speedy Trial Reform

The speedy trial amendments seek to strengthen a defendant's right to a speedy trial. Far too many cases languish and congest court calendars even though they will never go to trial. Thus, even Vehicle and Traffic infractions are subject to speedy trial dismissals. Courts will also be required to evaluate any statements of readiness to determine actual readiness. The amendments go even further in seeking to curb the practice of illusory statements of readiness: any statement of unreadiness in court which follow an off calendar statement of readiness will also require courts to determine whether the unreadiness was the result of exceptional circumstance. Only upon a finding of an exceptional circumstance can the court exclude time from the speedy trial calculation.

The amendments also allow appellate courts to review any adverse decisions – even after a guilty plea. Thus, a defendant who feels that he or she was wrongly denied his or her right to a speedy trial can seek further review.

Further, as with discovery reform, the speedy trial amendments ensure that a prosecutor cannot announce ready unless full compliance with discovery has occurred. This amendment serves to incentivize prosecutors to turn over discovery as soon as possible so that cases do not languish.

Tracking and Reporting Data

One area in which the Council could be helpful in implementation of pre-trial reforms is ensuring uniform and comprehensive public reporting on the use of appearance tickets versus arrests; bail setting, including the amount and form; and pre-trial conditions of release, including electronic monitoring.

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.