TESTIMONY OF:

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BROOKLYN DEFENDER SERVICES

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Committee on Courts and Legal Services

Committee on Fire and Criminal Justice Services

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My name is Lisa Schreibersdorf. I am the Executive Director of Brooklyn Defender Services (BDS). BDS provides innovative, multi-disciplinary, and client-centered criminal, family and immigration defense, civil legal services, social work support, reentry services, reentry assistance and advocacy to more than 45,000 indigent Brooklyn residents every year. We would like to thank the City Council for their on-going efforts to reform bail and incarceration practices in the City, and specifically would like to thank the Committees on Fire and Criminal Justice and Courts and Legal Services for holding this hearing today.

Background

The use of financial conditions for pre-trial release discriminates against the poor and leads to unnecessary pretrial detention. Finally, after four decades of soaring jail and prison populations, there is now a bipartisan national consensus that too many people are incarcerated in the United States, and for too long. The racial disproportionalities inherent in the modern criminal justice system, stake this as one of the central civil rights concerns of our time, from both a Constitutional perspective of Equal Protection and the right to pretrial freedom the more universal framework 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.

The statutory underpinnings of the modern bail system are older than the United States itself. Historically, conditions of release have served three main goals: return to court, public safety and protecting individual liberty. More recently, the Federal Bail Reform Act of 1966 prompted many states to pass laws authorizing release on recognizance for nearly all defendants and established risk of failure to appear as the only consideration for conditions of release. The New York State legislature, in 1970, attempting to address many of the same problems we are discussing today, added alternative forms of bail to the statute, such as the availability of partially secured and unsecured surety and appearance bonds, and further required judges to consider people's ability to pay; however, these alternatives are rarely used. Likewise, the federal Bail Reform Act of 1984 amended the 1966 law to allow jurisdictions to consider risks to public safety in release decisions, but this did not provoke local changes. Despite no technical consideration for public safety, it is common knowledge that judges do, indeed, set bail in New York City based on presumed risk to public safety, and for the sole purpose of detention. Because this is done outside an actual legal rubric there exists no accountability or oversight, which leaves the process unfair, opaque, and perhaps unlawful. **Nevertheless, the current statute, if applied correctly, can meet the needs of the state and the City.**

When determining release conditions the Court may consider only certain factors related to securing the defendant's appearance in court, such as: character, reputation and mental condition; employment and financial resources; family ties and length of residence in the community; criminal record; juvenile or youthful offender record; and previous failures to appear. The weight of the evidence and possible sentence to be imposed should the case end in conviction can also

be considered, and judges must base their decision on the risk they perceive of a particular defendant failing to return to court. Judges have at their disposal nine methods to secure return to court: cash bail, insurance company bond, secured surety bond, secured appearance bond, partially secured surety bond, partially secured appearance bond, unsecured surety bond, unsecured appearance bond.

Although Courts might use the least restrictive means possible to secure return, it is the experience of Brooklyn Defender Services that judges overwhelmingly rely only on the two MOST restrictive options: Cash Bail and Insurance Bond. According to the Criminal Justice Agency, judges in New York City, in general, do not consistently appear to have a familiarity with the many forms of bail they are authorized to set – such as unsecured bonds. They may not be aware of the research that exists to identify predictors of failure to appear; for example, research from other jurisdictions indicate that unsecured bonds are as effective at inducing return as secured bonds, all while leading to vastly reduced pre-trial incarceration. However, these types of conditions are rarely seen in New York City courts. There is rarely, if ever, an interrogation into the financial resources of a particular defendant in an effort to understand what amount of bail might be securable for that person. In reality, bail amounts are typically linked to charge severity, rather than risk of failure to appear in court. A recent BDS case highlights this issue.

> GP: A client was accused of driving with a suspended license and the judge set $750 as a condition of release. The defense attorney, who had previously conferenced with the defendant's family, explained that the family was in court and was able to post $700 for his release. The judge was unmoved, and said she had already made her decision.

While financial conditions of release are on their face obviously unfair, they also make for astoundingly poor public policy as they by definition lead to an overuse of the most costly resource in the Criminal Justice System: local jail beds. It costs New York City taxpayers approximately $170,000 per year (nearly $500 a day) to keep someone incarcerated at Department of Correction (DOC) custody. Not jailing those who are accused of a misdemeanor and cannot afford $1,000 bail or less would save New York City millions of dollars every year.

We applaud Mayor Bill de Blasio for the attention he has paid recently to lengthy stays on Rikers Island, but submit that the vast majority of pretrial detention involve shorter periods in custody, which nevertheless remain disruptive and in need of urgent reforms. Research has shown that spending even two days incarcerated during the pendency of a case can increase the likelihood of a harsher sentence, can cause a permanent decrease in employment prospects, promote future criminal behaviors and have long-lasting negative health implications.

Pre-trial jail is often just an early step on a slippery slope to more lasting involvement with the criminal justice system. We thank the City Council for taking up this important issue today.

The Problem

In 2012 there were 345,017 prosecuted arrests in New York City, affecting predominantly people of color: 49 percent of defendants in criminal cases that year were Black and 33 percent were Latino. Just 12 percent were White, despite this demographic making up the majority of the population in our City as a whole. About 80 percent of people arrested in Brooklyn will be represented by a public defender due to indigence.

The average case has changed since the mid-1990s when felonies and index crimes were a larger percentage of the public defense caseload. Now half of cases that result in jail time in New York City involve misdemeanors or lesser charges. Last year, there were approximately 95,000 cases in Brooklyn, 80 percent of which were misdemeanors, violations or infractions. There were 11,206 cases involving only violations or infractions, more than 6,000 of which were consumption of alcohol cases. Citywide, roughly 20 percent of cases involve an injury to a person and about 3 percent of cases involve weapons. According to the CJA, for about half cases where the defendant is detained and the top charge is a misdemeanor or lower level charge, the only time spent incarcerated is during pre-trial detention. This suggests a punishment disproportionate to the offense. Citywide, bail was set on 241 cases where the top-charge was a violation or infraction – not even a crime.

About half of our cases in Brooklyn are disposed of at arraignments. Of the rest, roughly 68 percent of the time our clients are released on their own recognizance (ROR) while 31 percent of cases involve some kind of financial conditions for release. Overall bail was set in roughly 15,000 cases in Brooklyn in 2012. In non-felony cases, 72 percent had bail set at less than $1,000. Nearly 90 percent of non-felony defendants cannot afford $1,000 bail and will be incarcerated as a result, on average for around two weeks. Between 20 and 25 percent of people charged with felonies are able to post bail of that amount at arraignments, while just 13 to 15 percent of misdemeanants are able to post at that time. Even with bail of $500 or less, 23 percent of people charged with felonies and 43 percent of those charged with lesser infractions were in jail for the entire duration of their case. Overall, citywide, in 44 percent of felony cases and 47 percent of misdemeanor cases, people are held for the duration of their pre-trial experience. At BDS we often ask judges for reductions to financial conditions after a client has spent a significant time incarcerated; by this time, it is clear that they are unable to pay. Typically judges ignore these pleas, suggesting that there has not been a change in circumstances such that bail should be reduced. To us, this can be viewed as intentional detention of presumably innocent defendants. District attorneys never stipulate to a bail reduction despite an ethical commitment to seeking justice.

The Negative Impacts of Pre-trial Detention

Roughly 75 percent of people on any given day at Rikers Island are there in pretrial detention – presumed innocent under the law and ostensibly waiting for their day in court. The vast majority of these are incarcerated solely because they are too poor to buy their way out. This pay-to-play

reality has significant negative impacts to individuals, families, communities and to New York City as a whole.

In 2013, Brooklyn Defender Services arraigned 26,650 individuals on top-count misdemeanor charges; of these, 51 percent (13,507) had their cases disposed of at arraignments through guilty pleas, dismissals or ACDs (adjournment in contemplation of dismissal). The breakdown was: 6,886 ACDs; 628 outright dismissals; 4,310 guilty pleas to lesser, non-criminal violations or infractions; 269 other types of dispositions.

Another group of 1,416 clients plead guilty to a misdemeanor charges at arraignment – either giving them a new criminal record or adding to an old one – in exchange for their freedom after learning that bail was likely to be set and having no way to pay. Of these clients, 428 accepted pleas that included brief jail sentences.

Financial conditions – almost all either cash bail or insurance bond – were set in 14 percent of the remaining cases that did not dispose at arraignments, and BDS tracked 1,325 of these. Of this group, 940 were never able to afford bail, and 870 were held on $2,000 or less. Of those held on $2,000 or less, 92 percent eventually plead guilty; of the control group at liberty, just 40 percent pled guilty and only 7.5 percent pled guilty to a misdemeanor. An incarcerated client was nine times more likely to plead guilty to a crime than one who was released. Overall, for the group of clients held in on bail, 38 percent had cases resolved by dismissal, or a plea to a violation or ACD, compared to 88 percent of "out" clients. Zero cases of incarcerated clients went to trial – a staggering statistic considering that the purpose of bail is to secure a person's appearance at trial.

There is a saying in our office that these statistics bear out: if you are in you stay in and if you are out you stay out. National statistics show the same: when controlling for other indicators such as severity of the charges, being incarcerated during the pendency of disposition inevitably leads to less favorable outcomes. 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." Numerous analyses included in a report by the VERA Institute of Justice, as well as the experiences of BDS clients, affirms this finding. Moreover, research shows that, of those defendants who accept plea deals, those who are detained before trial were far more likely to accept harsher plea deals and receive prison or jail sentences. In addition, of all those who receive prison and jail sentences, those who were incarcerated pre-trial receive sentences that are, on average, three times longer.

It should be obvious that anybody who has experienced even a couple of days in Rikers Island, and who faces the prospect of weeks, months or years inside awaiting trial, is far more likely to accept a plea that involves an admission of guilt than somebody who is free until trial, regardless of whether or not they are in fact guilty.

The following are a few stories of BDS clients that demonstrate how bail exacts guilty pleas from poor people.

TB: A thirty-five year-old Black male, on social security disability assistance. He had a youthful offender record, which was sealed, and had successfully completed a five-year probation period. He returned from two month trip visiting family in the mid-west to fabricated revenge allegations by a former girlfriend. Despite no previous warrants, he had bail set at a level he could not afford. Once in jail he no longer had access to his phone, which would have enabled him to contact his alibi and prove his innocence. After two weeks in jail, he pled guilty to harassment violation. He's currently appealing the conviction.

CO: 18 year-old Black male employed part-time. He was arrested for marijuana possession following a possibly illegal search by NYPD. A judge set unreachable bail because CO 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.

MA: A 50 year-old Black woman who lived in a three-quarters house; she had no previous criminal record. 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.

Negative impact on people's lives

Following a series of public hearings on the topic over the past year, City Council no doubt has a firm grasp on the negative consequences of even short jail stays: loss of job, housing, educational options, and custody of children; problems related to immigration status; complications due to criminal record in addition to the dangerous and at times deadly conditions of the jails themselves. Further, people denied release pre-trial are unable to play a significant role in their own defense.

The separation and stigma resulting from periods of incarceration break down the social ties that many see as the truest predictor for positive behavior. Time spent in jail exponentially exacerbates the already chaotic lives of our clients. Losing a family member to the jail system can easily throw an entire family into chaos through lost wages, inability to share childcare or parental care responsibilities and psychological distress. Even in cases where families are able to secure some bail money, this often starves the light bill, food money, or other essential expenses. Due to the enforcement practices of the New York City Police Department, these significant financial pressures are brought to bear on only a select number of neighborhoods, leaving entire communities in deficit.

Paying bail, in addition to being a costly process, is also time-consuming and frustrating. It can take as long as five hours for our clients to pay bail at Department of Correction facilities. The

process is confusing, and relies on archaic technology, which creates additional lags. Some people remain in jail that would otherwise be free because this process is so challenging.

Specific responses to Council's questions:

1. **How can the current bail system be improved to ensure that more defendants attend scheduled court appearances?**

This is really the wrong question. There is no real "failure to appear" problem in New York City. The true purpose of bail of any type is to ensure the defendant appears for trial. In our current criminal justice system, there are very few trials and almost all cases are resolved by way of plea bargaining. Defendants are required to appear in court every three weeks or once per month until there is a satisfactory plea bargain, which can take many months and even years. If you discount the non-appearance of someone who could not get child care, had no carfare, arrived late or had other life-related reasons to miss one of many court appearances, there is almost no chance of someone absconding.

The concept of cash bail is that if the defendant's friend or family member will lose money if the defendant fails to show up, the defendant will be more likely to appear. Our experiences with the bail fund, which eliminates this particular incentive, show this rationale to be seriously flawed. In essence, defendants show up to court because they are prepared to face the consequences of their actions, wish to fight to prove their innocence or simply because they know this is what they are required to do. Most people who are not incarcerated during the pendency of the case are not facing any chance of a jail sentence and are not afraid to come to court. Most of our clients come to court in the hopes of resolving the case. It is only because of the court delays that a small percentage of our clients eventually miss a court date.

One group of clients who more often miss court appearances are those that are drug abusers, alcoholics or mentally ill. In these cases, the reason for missing the appearance has nothing whatsoever to do with bail. The use of bail to ensure that someone with a disease that impairs their thinking makes a few court appointments is a serious concern that should be addressed by the City Council on behalf of its constituents.

If there is one thing that could be done by this body, it would be to recommend some changes in court procedures that would improve the likelihood of productive court dates and reduce the number of people who get fired from jobs or miss important school exams due to an endless stream of court dates. That alone would reduce the non-appearance rate. The City Council could recommend the following actions that could be accomplished through simple changes in procedure. The City Council could fund a small pilot project where some of these procedures could be attempted.

- Allow for a striated series of times at which defendants are required to appear. Currently all court appearances are at 9:30 even though there are 100 people on the calendar. If there were four separate times during the day, 9:30, 11:00, 2:30 and 3:30, our clients and attorneys would have much less wait time and be able to schedule their court appearances more efficiently. A mother who needs to pick up her children at school might pick 9:30, whereas a day laborer might ask for 3:30.
- Have a hotline for rescheduling court dates. In criminal court, where there are thousands of people appearing over the course of the year and hundreds every day, most for relatively minor charges, we should create an environment that allows for someone to be sick or respond to emergencies in their life rather than coming to court, as long as there is someone they can call to reschedule. Currently, if someone calls their attorney, we cannot ethically say anything other than that we will tell the judge. In many cases, the judge will issue a warrant even when there is an explanation.
- Fund CJA to do more outreach to anyone who misses a court date, including interfacing with the defendant's attorney to coordinate a good date to come in to vacate the warrant.
- Provide carfare. It would surprise you to know that hundreds of people miss court appearances almost entirely because they do not have carfare. We have clients walking hours to get to court. In the winter, this may not even be feasible.
- Provide child care services so parents can bring a small child to court with them.
- Encourage prosecutors to resolve misdemeanor cases early with non-criminal dispositions as often as possible. Almost any time a client is offered a plea bargain where they will not have a criminal record, we find that the client would prefer to accept that then return to court numerous times. Most of the time, after numerous court appearances, these offers will be made and we will accept them. At least in some instances, the DA's office could have a policy of resolving more cases with a non-criminal disposition of an ACD or Disorderly Conduct plea at arraignment or at the first appearance after arraignment. These resolutions do not create collateral consequences like deportation or loss of employment. Most clients would accept those offers. This would reduce the backlog in criminal court, automatically reducing the wait time for defendants and increasing appearances.
- Encourage courts to excuse defendants from some court appearances. If our clients were excused every other appearance (we would still appear as their attorney for those for which they are excused), it would allow the times they do appear to be more productive. This would make the calendar move more quickly in court and have another effect, which would be to reduce waiting time for everyone. Fewer court appearances will result in fewer reasons to miss a court date.

2. How can the current bail system be improved to keep us safer?

Almost any person on a first arrest or a non-violent crime should have the right to be free before they are convicted. This is true in Federal Court and in other court systems throughout the United States. This makes the system fairer and keeps incarceration as a solution only in cases

where no other penalty is adequate. Every person who spends time in jail due to a failure to post bail is at an increased risk of committing a violent crime in the future. Much like veterans who return from war with PTSD, our clients have severe responses to the violence and horror of incarceration on Rikers Island. The single most important thing that can be done is to eliminate money bail for misdemeanor cases entirely and reduce the number of people facing this trauma.

3. **How can the current bail system be improved so defendants are not punished for their poverty?**

Courts should use forms of bail that do not require assets—such as personal recognizance bonds.

4. **How can the current bail system be reformed to remove racially discriminatory outcomes?**

Racial disparities begin at arrest and get exacerbated as the case progresses. Every decision made is more likely to further harm a person of color yet act as a potential off-ramp for a white person. We need to emphasize these points and affirmatively hold the decision-makers responsible for understanding implicit bias and taking measures to reduce its effect. Hold district attorneys and judges accountable for racially disparate outcomes. At a minimum, the use of cash bail and insurance company bonds as the only forms of bail is itself guaranteed to result in racially disparate outcomes and must be stopped. The use of alternative forms of bail and greater trust in black and Hispanic people to come to court must be part of the culture of the courts.

5. **How can the current bail system be improved so as not to distort case outcomes?**

End financial conditions of release in most cases.

6. **How can the current bail system be made more administratively efficient?**

It's hard to imagine a more inefficient system than housing tens of thousands of people accused of low level crimes so far away from any services, including the court house. A great many number of defendants spend months shuttling back and forth between Rikers Island and various Court houses.