

## PRELIMINARY RECOMMENDATIONS ON BAIL REFORM

**Office of Council Member Rory I. Lancman  
Chair, Committee on Courts & Legal Services**

Our city deserves a bail system that (1) ensures that defendants return for court appearances; (2) keeps us safe; (3) does not punish people for their poverty; (4) is not racially discriminatory; (5) doesn't distort case outcomes; and (6) runs efficiently.

In the 23,000 non-felony cases where bail was set in 2013, nearly 16,000 (69%) had bail set at \$1,000 or less. 87% of these defendants were unable to pay this modest sum at arraignment, and 48% never made bail at all.<sup>1</sup> Those who were able to make bail spent a median of five days at Rikers Island -- even though 46% of all pre-trial detainees will be acquitted, have their cases dismissed or receive a sentence without any jail time (not even time served).<sup>2</sup> Black and Hispanic defendants were more likely to be detained at arraignment (remanded without bail, or be unable to make bail) than white defendants,<sup>3</sup> and black and Hispanic residents comprised 89% of pre-trial detainees held on bail of \$1,000 or less.<sup>4</sup> Defendants detained pre-trial are nearly twice as likely to be convicted, are less likely to have charges reduced and are more likely to be sentenced to prison.<sup>5</sup> And pre-trial detention is massively expensive: it costs nearly \$170,000 to detain an inmate for one year on Rikers Island<sup>6</sup> and approximately \$125 million a year to incarcerate defendants unable to pay bail.<sup>7</sup>

---

<sup>1</sup> MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2013, 30 (2014) (hereinafter "CJA ANNUAL REPORT 2013"), available at:

[http://www.nycja.org/lwdcms/doc-view.php?module=reports&module\\_id=1410&doc\\_name=doc](http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=1410&doc_name=doc).

<sup>2</sup> MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES, 59 (2007), available at:

[http://www.nycja.org/lwdcms/doc-view.php?module=reports&module\\_id=669&doc\\_name=doc](http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=669&doc_name=doc).

<sup>3</sup> BESI KI KUTATELADZE ET AL., VERA INSTITUTE OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN, 3 (2014), available at:

<http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf>.

<sup>4</sup> JAMIE FELLNER, HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY, 48 (2010), available at

[http://www.hrw.org/sites/default/files/reports/us1210webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf)

<sup>5</sup> MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, A DECADE OF BAIL RESEARCH IN NEW YORK CITY, 116, 118 (2012) (hereinafter "CJA DECDE OF BAIL RESEARCH"), available at <http://static1.squarespace.com/static/546cc3c3e4b0e3dbf861c974/t/54906416e4b02102b7c91376/1418748950483/CJA+-+DecadeBailResearch12.pdf>.

<sup>6</sup> THE CITY OF NEW YORK INDEPENDENT BUDGET OFFICE, NEW YORK CITY BY THE NUMBERS, <http://ibo.nyc.ny.us/cgi-park2/?p=516>

<sup>7</sup> The City of New York Independent Budget Office, Letter to Council Member Melissa Mark-Viverito, September 11, 2014.

<http://www.ibo.nyc.ny.us/iboreports/pretrialdetainneltrsept2011.pdf>

Indeed, bail forms the shaky foundation on which Rikers Island rests. According to the Department of Corrections, on any given day about 78% of Rikers' approximately 10,000 inmates are pre-trial detainees. Of the approximately 72,700 admissions to Rikers Island in 2014, 53% of inmates (about 38,000) were detained solely because they couldn't pay bail; 14% (about 10,000) couldn't pay bail of \$1,000 or less -- and about 3,400 couldn't pay bail of \$500 or less!<sup>8</sup>

Given these shocking statistics, it is imperative that we reform our system to reduce the burden on indigent defendants, their communities, and taxpayers, while simultaneously ensuring the system is doing an effective job of keeping our community safe. We provide the following recommendations below:

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

Data compiled by the New York City Criminal Justice Agency ("CJA") shows that 84% of defendants released pre-trial attend all scheduled proceedings.<sup>9</sup> Of the 16% that do miss an appearance, the majority return voluntarily to court within thirty days, leaving the adjusted failure to appear rate (also called the wilful failure to appear rate) at about 6-7%.<sup>10</sup> Further, CJA data shows that severity of the crime or criminal history do not correlate with failure to appear rates.<sup>11</sup>

Though NYC's failure to appear rates are low overall, we potentially recommend the following to reduce them further:

- Considering other methods to inform defendants of their court appearances, such as e-mail for those with access and reminder calls to primary contacts for those who themselves live unstable, lives in addition to the robocalls, wake-up calls on court dates as well as text messages that CJA currently uses as reminders;
- Researching whether providing childcare options in court would reduce failure to appear rates;

---

<sup>8</sup> Information from DOC, obtained June 9, 2015. The Criminal Justice Agency calculates the data differently, finding the problem to be even more acute: in 2013 for alleged misdemeanants, 17% (about 13,500) were held due to bail of \$1,000 or less, and about 6,300 misdemeanants were held due to bail of \$500 or less. *CJA Annual Report 2013*, Exhibit 18); Admissions figures from DEPARTMENT OF CORRECTIONS, MAYOR'S MANAGEMENT REPORT - FY2013, 20 (2014), available at <http://www.nyc.gov/html/doc/downloads/pdf/MMR-FY2013.pdf>.

<sup>9</sup> CJA DEACDE of BAIL RESEARCH, *supra* note 5 at 96.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 97.

- Evaluating whether stronger consequences for willful failure to appear -- such as Queens' aggressive prosecution of bail jumping -- would reduce failure to appear rates further; and
- Ensuring that expansion of non-profit bail funds and Supervised Release Programs do not come at the expense of failure to appear rates.

## **(2) How can the current bail system be improved to keep us safer?**

Currently, New York is one of only four states bail nationwide that does not allow judges to consider dangerousness in bail decisions,<sup>12</sup> though there is widespread belief that judges do consider public safety in setting bail. Given this, it is important to consider whether the bail system is effective in keeping us safe. For example, a 2001 CJA study of defendants released pre-trial found that 17% of defendants were re-arrested before the disposition of their case, with 10% of these defendants (or 1.7% overall) arrested for a violent felony.<sup>13</sup> Similarly, a study of CJA's Supervised Release Program in Queens found that approximately 23% of defendants were re-arrested predisposition, though 70% of these arrests were for misdemeanor or lesser offenses.<sup>14</sup>

To ensure the bail system keeps our community safe, we potentially recommend:

- Adding public safety considerations as a factor to the bail statute, to bring New York in-line with the rest of the country, to bring the practice of considering dangerousness out into the open, and to ensure that dangerous criminals with money and know-how are not released pre-trial;
- As part of this change, providing strict limitations on who may be remanded due to public safety concerns (for example, only defendants charged with violent felonies) as well as ample due process protection (for example, a hearing and decision made on the record, and a high bar for standard of proof);
- If this change occurs, evaluating court and detention data periodically to ensure that dangerousness is not being used to increase rates of pretrial detention for offenders overall (particularly given judge's understandable desire to keep our communities safe and ensure that no one they release re-offends in a violent manner);

---

<sup>12</sup> CJA DEACDE OF BAIL RESEARCH, *supra* note 5 at 26.

<sup>13</sup> QUDSIA SIDDIQI, NEW YORK CITY CRIMINAL JUSTICE AGENCY, PRE-TRIAL RE-ARRESTS FOR VIOLENT FELONY OFFENSES, 2, 4 (2008), available at: 2, 4, <http://issuu.com/csdesignworks/docs/researchbrief16>

<sup>14</sup> MARI CURBELO ET AL., NEW YORK CITY CRIMINAL JUSTICE AGENCY, QUEENS SUPERVISED RELEASE: A BRIEF PROGRAM DESCRIPTION, 7 (2013) <http://www.kccba.org/CLE%205-23-13/CJA%20Research%20Brief.pdf>

- Researching whether there are any data-driven models to predict a defendant's probability of re-arrest or future dangerousness; and
- Studying the tactics Washington D.C. has used to achieve such a low re-arrest rate -- in Washington D.C. 88% of defendants remained arrest-free while in the community pending trial, and 99% were not rearrested for violent crime<sup>15</sup> -- and evaluating whether similar programs can be implemented in NYC.

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

Data from CJA shows that in 2013, 85% of non-felony defendants were unable to make bail set at \$500 and under at arraignment,<sup>16</sup> and therefore are detained on Rikers for a median stay of five days.<sup>17</sup> 46% of these defendants never made bail at all pre-disposition.<sup>18</sup> Data from Department of Corrections shows that overall approximately 53% of inmates on Rikers are pretrial detainees held due to their inability to pay bail.<sup>19</sup>

To reduce this glaring inequity in our system, we potentially recommend:

- Mandating in the bail statute that judges offer at least three forms of bail. Given the two most common forms of bail, cash and commercial bond, are the most onerous, any third type selected would be inherently less burdensome for defendants to pay and would hopefully reduce pretrial detention;
- Requiring that courts inquire into defendants' financial circumstances before setting bail, as provided in the current bail statute,<sup>20</sup> and potentially limiting bail based on income parameters to ensure defendants aren't incarcerated solely due to poverty;
- Expanding supervised release programs, while simultaneously ensuring that these programs do not net-widen and enroll defendants who would have previously been released without any supervision or monetary conditions; and
- Researching Washington, D.C.'s success in eliminating monetary bail almost entirely and using its extensive supervised release program as a model.

---

<sup>15</sup> PRETRIAL SERVICES AGENCY, FREEDOM AND MONEY - BAIL IN AMERICA, <http://www.psa.gov/?q=node/97>.

<sup>16</sup> CJA ANNUAL REPORT 2013, *supra* note 1 at 30.

<sup>17</sup> CJA DECDE OF BAIL RESEARCH, *supra* note 5 at 108.

<sup>18</sup> CJA ANNUAL REPORT 2013, *supra* note 1 at 30.

<sup>19</sup> Information provided by Department of Corrections on June 9, 2015.

<sup>20</sup> C.P.L. § 510.30(2)(a)(ii) (The court must consider and take into account the defendant's "employment and financial resources").

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

Data from a Vera Institute of Justice study of Manhattan cases found that for all offenses black and Latino defendants were more likely to be detained at arraignment (remanded or have bail set, but not met),<sup>21</sup> and data from Human Rights Watch finds that black and Latino defendants comprise 89% of pre-trial detainees held on bail of \$1,000 or less.<sup>22</sup>

To combat these racial disparities we potentially recommend:

- Increasing the diversity of the staff of our courts, district attorney's officers, and public defenders to reduce possibilities of inherent bias; and
- Requiring all actors in the justice system to undergo implicit bias training, as Manhattan D.A. Cy Vance committed to.

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

Research from CJA finds that defendants detained pre-trial are more likely to be convicted, less likely to have their charges reduced and more likely to be sentenced to prison.<sup>23</sup> Research from other jurisdictions also finds that defendants detained pretrial have higher recidivism rates.<sup>24</sup> Those detained pretrial are at a serious disadvantage when it comes to defending their cases.

To mitigate this disadvantage, we potentially recommend:

- Ensuring that defendants detained on Rikers Island have greater access to and opportunities to consult with their attorneys; and
- Reducing pretrial detention overall to ensure that innocent defendants are not pleading guilty to end their pretrial incarceration.

#### **(6) How can the current bail system be made more administratively efficient?**

---

<sup>21</sup> KUTATELADZE ET AL., *supra* note 3 at 3.

<sup>22</sup> FELLNER, *supra* note 4 at 48.

<sup>23</sup> CJA DEACDE OF BAIL RESEARCH, *supra* note 5 at 116, 118..

<sup>24</sup> CHRISTOPHER T. LOWENKAMP ET AL., THE HIDDEN COSTS OF PRETRIAL DETENTION, ARNOLD FOUNDATION 3 (2013), available at:

[http://www.amoldfoundation.org/sites/default/files/pdf/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://www.amoldfoundation.org/sites/default/files/pdf/LJAF_Report_hidden-costs_FNL.pdf).

Our system of pretrial detention is massively expensive, as data from NYC's Independent Budget Office finds it costs almost \$170,000 per year to incarcerate someone on Rikers Island.<sup>25</sup> The process of paying bail is also cumbersome and slow for the family and friends of detained defendants. Currently, if a judge sets bail in cash or commercial bond, and the family has the money, a family member can pay at arraignment (credit cards are only accepted in rare situations when judges set credit card bail). If the family is unable to make bail at arraignment, the defendant is sent on the next bus to Rikers. Once a defendant is on Rikers, bail can no longer be posted at a courthouse, nor is there a way to pay bail online or by the phone. People posting bail must travel to Rikers, the Manhattan Detention Center or the Vernon C. Bain Correctional Center (located in the Bronx) to pay bail, often forcing them to miss work or have to pay for childcare, and the process of posting bail takes over 5 hours

Given the huge expense to taxpayers of incarcerating defendants and the adverse impact pretrial detention has on defendants, their families and their communities, it is imperative that we remove any bureaucratic hurdles that currently prevent families from paying bail.

To do so, we potentially recommend:

- DOC and the courts should partner to create a website that would allow cash bail to be paid online, either as a cash transfer from a bank account, or using a provider such as Venmo or Paypal;
- DOC should work to reduce the processing time for bail, as it currently takes an average of 4-5 hours for the defendant's file to be faxed from Rikers to the cashier (even if the cashier is also at Rikers); and
- DOC and CJA should work to expand the existing Bail Expediting Program (BEX) and to try and hold defendants at the courthouse for even longer than they are currently held (which even under the BEX program may only be a few hours).

--end--

---

<sup>25</sup> THE CITY of NEW YORK INDEPENDENT BUDGET OFFICE, NEW YORK CITY BY THE NUMBERS, <http://ibo.nyc.ny.us/cgi-park2/?p=516>