

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND DEPARTMENT

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 THE PEOPLE OF THE STATE OF NEW YORK :  
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 EX. Rel. PHILIP DESGRANGES, ESQ. ON :  
 BEHALF OF CHRISTOPHER KUNKELI :  
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 Petitioner, :  
 :  
 v. :  
 :  
 ADRIAN BUTCH ANDERSON, Dutchess County :  
 Sheriff, :  
 :  
 Respondent. :  
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**VERIFIED PETITION  
FOR WRIT OF  
HABEAS CORPUS**

App. Div. Docket No.  
2018-346

The People of the State of New York, upon the relation of Philip Desgranges, Esq., the attorney for petitioner Christopher Kunkeli, make this petition on behalf of the petitioner and respectfully state:

**PRELIMINARY STATEMENT**

1. This habeas corpus proceeding challenges the pretrial detention of Petitioner Christopher Kunkeli solely because he is too poor to pay the \$5,000 bail set in his criminal case. Mr. Kunkeli is accused of shoplifting a vacuum cleaner from Target in the Town of Poughkeepsie, Dutchess County. At his arraignment, the judge set \$5,000 bail and \$10,000 bond without considering his ability to pay those amounts and, when he could not pay, ordered that he be jailed in the sheriff's

custody. Mr. Kunkeli is one of the thousands of indigent New Yorkers each year who, though presumed innocent, are jailed because of their inability to pay bail in violation of the United States and New York State Constitutions.<sup>1</sup>

2. The U.S. Supreme Court has held that no person may be imprisoned solely because of their indigence because doing so violates that individual's equal protection and due process rights. This Supreme Court decision rests on the fundamental principle that there can be no equal justice under law if an individual's right to freedom turns on their ability to purchase it.

3. Consistent with this principle, New York's bail statute affords judges the option of setting less restrictive forms of bail to secure a defendant's return to court without depriving him his freedom because of his indigence. Most counties in the state, including Dutchess, also afford judges the added option of releasing defendants under the pretrial supervision of the county or a non-profit agency.

4. Despite Supreme Court precedent, and despite the availability of less restrictive alternatives to traditional bail, judges throughout New York routinely jail pretrial defendants solely because of their inability to pay the two most restrictive forms of bail: cash bail and insurance company bond. In Dutchess County, where the petitioner is jailed, the problem is particularly stark. The jail has become so

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<sup>1</sup> For ease of reference, this petition uses the term "bail" to encompass both bail and bond, except when necessary to distinguish the two. The New York Criminal Procedure Law does the same. *See* CPL § 500.10 (9).

overcrowded that the county has resorted to jailing individuals in large trailers. Pretrial detainees account for the vast majority of those incarcerated; in 2016, they comprised 71% of the jail's average daily population. Over the last eight years, pretrial detainees have languished in jail for an average of 41 days solely because they are unable to pay bail. The majority of these individuals, over 60% percent, were charged with misdemeanors or violations.

5. Mr. Kunkeli is charged with petit larceny, a misdemeanor crime of poverty, and has been confined for nearly three months in jail, where he will remain until his case is resolved. In violation of Mr. Kunkeli's equal protection and due process rights, the presiding judge in his case set bail that resulted in his pretrial detention without regard to whether Mr. Kunkeli could pay and to whether less restrictive alternatives would adequately assure his return to court. Because his detention is illegal, Mr. Kunkeli seeks his immediate release and declaratory judgment to end this widespread practice of jailing the indigent solely because they are unable to pay bail.

### **PARTIES**

6. Petitioner Christopher Kunkeli is a 32-year-old mechanic who is detained pretrial in the Dutchess County jail. He is held there pursuant to Judge Paul Sullivan's (hereinafter the "presiding judge") securing orders (exhibit 1) committing him to the custody of the Dutchess County Sheriff because Mr. Kunkeli was unable

to post bail. Mr. Kunkeli is charged with committing petit larceny, a class A misdemeanor (*See* Accusatory Instrument, exhibit 2).

7. The respondent Adrian Butch Anderson is the Dutchess County Sheriff. As the Sheriff, he has custody over the petitioner pursuant to the presiding judge's securing orders.

### **BACKGROUND**

#### ***It is Illegal to Jail Individuals Solely Because of their Indigence***

8. "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception" (*United States v Salerno*, 481 US 739, 755 [1987]). The right to freedom before trial is a fundamental right that is entitled to special protection under the law (*People ex rel. Wayburn v Schupf*, 39 NY2d 682, 686-87 [1976]). That freedom protects against punishment before conviction and allows the accused to adequately prepare his defense (*Stack v Boyle*, 342 US 1, 4 [1951]).

9. An individual's fundamental right to freedom cannot turn on whether he has the money to purchase it (*Bearden v Georgia*, 461 US 660, 672-73 [1983]). When states have denied individuals their fundamental rights solely because of their indigence, the Supreme Court has rejected such discrimination as unconstitutional. (*Id.*)

10. The purpose of bail is not to keep people who lack money in pretrial

detention (*Stack*, 342 US at 4-5 [1951]). Its purpose is to create a financial incentive for defendants who are conditionally released to show up for their court appearances. (*Id.*) If the defendant’s return to court can be assured, then both the government and the defendant share an interest in his freedom before trial. (*United States v Barber*, 140 US 164, 167 [1891].) Nonetheless, bail has in practice resulted in the rampant pretrial detention of defendants solely because of their indigence.<sup>2</sup>

11. This problem has plagued our criminal justice system for decades. In 1964, then-Attorney General Robert F. Kennedy remarked, “[e]very year, thousands of persons are kept in jail for weeks and even months following arrest. They are not proven guilty. They may be innocent. They may be no more likely to flee than you or I. But they must stay in jail because, bluntly, they cannot afford to pay for their freedom.”<sup>3</sup>

### ***The Federal Government Prohibits the Illegal Detention of the Indigent***

12. In the 1960s, the nation experienced what Attorney General Kennedy called “a widespread awakening to the need for bail reform.”<sup>4</sup> Congress passed the Bail Reform Act of 1966, which codified a presumption in favor of pretrial release and gave federal judges the option to impose non-monetary conditions of release,

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<sup>2</sup> Ram Submaranian et al., Vera Institute for Justice, *Incarceration’s Front Door: The Misuse of Jails in America* at 29 (2015) (excerpted) (exhibit 3).

<sup>3</sup> Robert F. Kennedy, Att’y Gen. of the United States, U.S. Dep’t of Justice, Address to the Criminal Law Section of the American Bar Association at 3, (Aug. 10, 1964) (exhibit 4).

<sup>4</sup> *Id.*

like pretrial supervision.<sup>5</sup> This legislation marked the first change to the federal bail system since the country's founding.<sup>6</sup>

13. Next, with the Bail Reform Act of 1984, Congress took another significant step by prohibiting courts from imposing “a financial condition that results in the pretrial detention of the person.”<sup>7</sup> Since then, the federal government has dramatically reduced its reliance on cash bail and insurance company bond.<sup>8</sup> According to a recent study, unsecured bond (i.e., a promise to return to court that if broken triggers a payment to the court) is now the most common type of pretrial release condition imposed by federal district courts.<sup>9</sup>

14. Despite the example set by the Bail Reform Act of 1984, most state and local jurisdictions, including New York, continued to impose bail that results in the pretrial detention of the indigent. Decades later, in 2011, Attorney General Eric Holder observed that, “nearly two thirds of all inmates who crowd our county jails [. . .] are defendants awaiting trial” who are incarcerated “because they simply

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<sup>5</sup> Bail Reform Act of 1966, Public Law 89-465, at 214 (exhibit 5).

<sup>6</sup> *See id.*

<sup>7</sup> Federal Bail Reform Act of 1984, 18 U.S.C. §§ 3142 (c) (2) (2006). The American Bar Association recommends that all judicial officers abide by this standard. *See ABA Standards for Criminal Justice, Pretrial Release* at 10-1.4 (e) (3 ed 2007) (excerpted) (exhibit 6) (“The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay.”).

<sup>8</sup> Thomas H. Cohen, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal Courts, 2008-2010* at 5 (Nov. 2012) (exhibit 7) (showing that among federal defendants released pretrial, 39% were released on unsecured bond and 32% on their own recognizance; only 27% were required to pay a financial bond).

<sup>9</sup> *Id.* at 5, 16.

cannot afford to post the bail required.”<sup>10</sup>

### ***The Need for Bail Reform: An Emerging Consensus across the Country***

15. States, counties, and cities throughout the country have recently begun to overhaul their pretrial practices to prevent jailing individuals solely because of their indigence. The states of Maryland, Colorado, Kentucky, New Mexico, New Jersey, the city of New Orleans, and Cook County, Illinois have all enacted significant reforms to their bail practices.

16. The Maryland Court of Appeals in 2017 unanimously approved proposed rule changes that required judges to consider a defendant’s ability to pay bail and to not set a financial condition of release “in form or amount” if it “results in the pretrial detention of the defendants solely because the defendant is financially incapable of meeting that condition.”<sup>11</sup> Kentucky reformed its bail procedures in 2011 by creating a presumption of release for low- and mid-risk defendants and requiring that judges who set financial conditions for release explain why.<sup>12</sup> Colorado changed its pretrial statute in 2013 by creating a presumption of release on least-restrictive conditions “to avoid unnecessary pretrial incarceration.”<sup>13</sup>

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<sup>10</sup> Eric Holder, Att’y Gen. of the United States, U.S. Dep’t of Justice, Speech at the National Symposium on Pretrial Justice at 1-2, (June 1, 2011) (exhibit 8).

<sup>11</sup> MD Rule 4-216(b)(2), and Rule (e)(1)(A) (exhibit 9); *see also* Ovetta Wiggins and Anne Marimow, *Maryland’s Highest Court Overhauls the State’s Cash-Based Bail System*, Washington Post, (February 7, 2017), (exhibit 10).

<sup>12</sup> Ky. Rev. Stat. Ann. § 431.066(3)-(4).

<sup>13</sup> Colo. Rev. Stat. Ann. § 16-4-103(4)(a), (c).

17. New Mexico approved a constitutional amendment in 2016 prohibiting the detention of defendants “solely because of financial inability to post money or property bond.”<sup>14</sup> New Jersey in 2017 began implementing its new pretrial system under which defendants who do not present a substantial risk based on a risk-assessment tool score will be released on conditions monitored by pretrial services.<sup>15</sup>

18. The City of New Orleans passed a new ordinance in 2017 requiring that all individuals arrested for misdemeanor offenses (with the exception of four offenses), be released on their own recognizance.<sup>16</sup> For anyone arrested for the four offenses, courts can only impose bail if the defendant has “the present ability to pay the amount set.”<sup>17</sup> The Circuit Court of Cook County, Illinois issued an order “intended to ensure that no defendant is held in custody prior to trial solely because the defendant cannot afford to post bail.”<sup>18</sup> The order required that, before setting bail, judges find that no other condition of release will assure the defendant’s return to court and that “the defendant has the present ability to pay the amount necessary to secure his or her release on bail.”<sup>19</sup>

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<sup>14</sup> N.M. Const. art. II, § 13.

<sup>15</sup> Hon. Stuart Rabner, Chief Justice, New Jersey Supreme Court, *Bail Reform in New Jersey, Trends in State Courts: Fines, Fees, and Bail Practices* at 27-29 (2017) (exhibit 11). *See also* N.J. Stat. Ann. § 2A:162-17.

<sup>16</sup> The four offenses are battery, possession of a weapon, impersonating an officer, and domestic violence. *See* Chapter 54, Section 23 of the Criminal Code (exhibit 12).

<sup>17</sup> *See id.*

<sup>18</sup> General Order No. 18.8 A, Procedures for Bail Hearings and Pretrial Release (exhibit 13).

<sup>19</sup> *See id.* at ¶ 7 (a)-(b).

19. While many reforms have been spurred by legislative bodies or by the judiciary, some have followed litigation. The Supreme Court has not specifically addressed the constitutionality of jailing someone because of their inability to pay bail. But the state high courts and federal circuit courts that have addressed the issue have said that jailing individuals solely because of their inability to pay bail would be unconstitutional.<sup>20</sup>

### *New York's Bail Statute, an Unrealized Promise*

20. New York's bail statute was adopted in 1970, on the tail end of the bail reform movement sweeping the country. Before its adoption, the state legislature in 1961 established a commission to study the state's criminal procedure laws and propose recommendations to modernize them.<sup>21</sup> After years of studying and holding public hearings, the commission proposed wide-ranging changes, including to New York's bail statute.<sup>22</sup> Under the bail statute, judges must consider "the kind and degree of control or restriction that is necessary to secure [a defendant's] court attendance when required." (CPL § 510.30 [2] [a].) The new law, according to the commission, was designed to "reduce the unconvicted portion of our jail population"

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<sup>20</sup> See the memorandum of law for petitioner.

<sup>21</sup> Nelson A. Rockefeller, Governor, Memorandum filed with Senate Bill 7276 and Senate Bill 9069 (1971) (exhibit 14).

<sup>22</sup> Commission on Revision of the Penal Law and Criminal Code, Memorandum in Support of Explanation of Proposed Criminal Procedure Law, Memorandum in Support and Explanation of Proposed Criminal Procedure Law, S. Int. 7276, A. Int. 4561, 10 (March 1970) (exhibit 15).

by creating less restrictive options to secure a defendant's future court attendance.<sup>23</sup>

21. The statute affords judges with the option of imposing nine forms of bail, ranging from the traditional, restrictive forms of cash bail and insurance company bond to the less restrictive forms of unsecured bond and partial secured bond. (CPL § 520.10 [1].) With unsecured bond, the defendant or his guarantor signs a contract promising to pay a sum of money if the defendant fails to appear in court.<sup>24</sup> With partial secured bond, the defendant or his guarantor deposit a “fractional sum of money fixed by the court, not to exceed ten percent of the” bond amount.<sup>25</sup>

22. In misdemeanor cases, defendants have a right to release on recognizance or release on the condition they pay bail (CPL §§ 530.20 [1]; 530.40 [1]). In felony cases, the judge also has the option of ordering remand, meaning detaining the defendant in jail until his case is resolved. (CPL §§ 530.20 [2] [b]; 530.40 [4].)

23. To determine the “kind and degree of control or restriction” needed to secure a defendant's court attendance, the statute instructs judges to consider a list of factors, including the defendant's financial resources. (CPL § 510.30 [2] [a].)

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<sup>23</sup> Commission on Revision of the Penal Law and Criminal Code, Memorandum in Support of Explanation of Proposed Criminal Procedure Law, Memorandum in Support and Explanation of Proposed Criminal Procedure Law, S. Int. 7276, A. Int. 4561, 10 (March 1970) (exhibit 15).

<sup>24</sup> *Id.*

<sup>25</sup> *See id.*

Although the statute lists financial resources as a factor, it does not require that judges determine whether defendants can afford to pay the bail amounts set. And there is little to no evidence that judges actually consider the defendant's ability to pay.<sup>26</sup> Making matters worse, judges generally set the two most restrictive forms of bail resulting in the pretrial detention of thousands of indigent New Yorkers each year.<sup>27</sup>

24. New York's bail statute, once enacted with great promise, has not fulfilled its intended purpose. Because of this failure, some defender organizations have begun initiatives to systematically challenge every bail decision before this Court.<sup>28</sup> The judicial reluctance to use the non-traditional forms of bail frustrates the purpose of the statute.

25. This reluctance is perplexing because studies have shown that less restrictive forms of bail—unsecured bond and partially secured bond—are as effective as secured bond (i.e., cash bail or insurance company bond) at assuring a defendant's return to court. For instance, in one of the most comprehensive studies on unsecured bonds, the Pretrial Justice Institute collected data on 1,970 defendants

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<sup>26</sup> See Jonathan Lippman, Independent Commission on Criminal Justice, *A More Just New York City* at 44 (April 2017) (excerpted) (exhibit 16) (“There is precious little evidence that either prosecutors or judges consider a person's ability to pay bail, even though New York's bail statute requires that the ‘financial resources’ of the defendant be taken into account.”).

<sup>27</sup> See *id.*; see also Nick Pinto, *The Bail Trap*, *The New York Times Magazine*, at 3-4, August 16, 2015 (exhibit 17).

<sup>28</sup> Ian Macdougall, *The Failure of New York's Bail Law*, *The Atlantic* at 2 (Nov. 24, 2017) (exhibit 18).

booked into ten county jails over a ten-month period in Colorado and found that unsecured bond was just as, if not more, effective than secured bond across all risk levels.<sup>29</sup> Another study conducted by the Bureau of Justice Statistics found that federal defendants released from 2008-2010 on unsecured bond had a 2% overall failure to appear rate.<sup>30</sup> In a Vera Institute for Justice study involving the use of partially secured and unsecured bond in New York City,<sup>31</sup> the failure to appear rates were 12%<sup>32</sup> – much lower than the 14% City failure to appear rates for secured bond.<sup>33</sup>

26. Dissatisfied with the status quo of New York’s bail system, which “fails to recognize that freedom before trial should be the rule, not the exception,” Governor Andrew Cuomo announced this month his intention to introduce legislation fix the state’s “two-tiered system that puts an unfair burden on the economically disadvantaged.”<sup>34</sup>

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<sup>29</sup> Michael R. Jones, Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* at 6 (Oct. 2013) (exhibit 19). A Maryland study reported similar outcomes, finding that Baltimore failure to appear rates were 6.3% for defendants released on unsecured bond, compared to 6.5% for defendants released on secured bond. Arpit Gupta et al., Maryland Office of the Public Defender, *The High Cost of Bail: How Maryland’s Reliance on Money Bail Jails the Poor and Costs the Community Millions* at 4, 14 (June 2016) (exhibit 20).

<sup>30</sup> Cohen at 16, *supra* n. 8.

<sup>31</sup> 86 of the cases analyzed used partially secured bond; 13 used unsecured. Insha Rahman, Vera Institute of Justice, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City’s Criminal Courts* at 19, (Sept. 2017) (exhibit 21).

<sup>32</sup> *Id.*

<sup>33</sup> New York City Criminal Justice Agency (“CJA”), *Effects of Release Type on Failure to Appear* at 25 (2011) (excerpted) (exhibit 22).

<sup>34</sup> New York Office of Governor Andrew M. Cuomo, *Governor Cuomo Unveils 22<sup>nd</sup> Proposal of*

### ***Dutchess County’s Bail Practices Result in Widespread Illegal Detentions***

27. Dutchess County has a 257-bed jail located in the city of Poughkeepsie.<sup>35</sup> As of August 1, 2017, the jail had a total population of 485 individuals housed either in the jail itself or large nearby trailers, which the county refers to as “temporary pods.”<sup>36</sup> Although the county plans to build a new jail twice the size of its current capacity, Sheriff Anderson has already said that a jail with approximately 570 beds will be overcrowded the day that it opens.<sup>37</sup> Swelling jail populations, consisting primarily of pretrial detainees, is not a problem unique to Dutchess County.<sup>38</sup> But Dutchess County has struggled with jail overcrowding for decades.<sup>39</sup>

28. Data obtained from the county jail spanning the eight-year period of 2010-2017 reveal that Dutchess County judges routinely commit individuals to jail for long periods solely because of their inability to pay bail. Between 2010 and 2017, of all pre-trial detainees with bail set in their case, 74% (13,701 individuals) spent at least one night in jail, 46% (8,507 individuals) spent at least one week in

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*2018 State of the State: Restoring Fairness in New York’s Criminal Justice System* at 2, (Jan. 3, 2018), (exhibit 23).

<sup>35</sup> Patricia R. Doxey, *Dutchess County’s New Jail Could Be too Small, Sheriff Warns*, Daily Freeman (Aug. 1, 2017) (exhibit 24).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Eric Jankiewicz, *Rural America’s Jail Dilemma*, The Crime Report (July 6, 2017) (exhibit 25).

<sup>39</sup> See Doxey, *Dutchess County’s New Jail Could Be too Small, Sheriff Warns*.

jail, and 27% (5,007 individuals) spent at least one month in jail.<sup>40</sup> Of pre-trial detainees with a bail set in their case who spent at least one night in jail, the average length of stay was 41 days.<sup>41</sup> The majority of these individuals were charged with low-level offenses.<sup>42</sup> Sixty percent had a misdemeanor as their most serious charge (for whom the average length of stay was 32 days and the average bail amount was \$9,517), and 3% had a violation as their most serious charge (for whom the average length of stay was 16 days and the average bail amount was \$3,081).<sup>43</sup> For those charged with a disorderly conduct violation, the average length of stay was 21 days.<sup>44</sup>

29. Between 2010 and 2017, judges committed 684 pretrial detainees to jail on \$500 bail or less for one week or more, 262 detainees for one month or more, and 83 detainees for 90 days or more.<sup>45</sup> On \$1,000 bail or less, judges committed 1,395 pretrial detainees to jail for one week or more, 555 detainees for one month or more, and 170 detainees for 90 days or more.<sup>46</sup> On \$2,500 bail or less, judges committed 2,338 pretrial detainees to jail for one week or more, 999 detainees for one month or more, and 285 for 90 days or more.<sup>47</sup> Of the 583 pre-trial detainees who spent 180

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<sup>40</sup> Affidavit of Michelle Shames In Support of Petition for Writ of Habeas Corpus for Christopher Kunkeli (“Shames Aff.”), at ¶ 9.

<sup>41</sup> Shames Aff. at ¶ 12.

<sup>42</sup> Shames Aff. at ¶ 10.

<sup>43</sup> Shames Aff. at ¶¶ 10, 13, 15.

<sup>44</sup> Shames Aff. at ¶ 16.

<sup>45</sup> Shames Aff. at ¶ 17.

<sup>46</sup> Shames Aff. at ¶ 18.

<sup>47</sup> Shames Aff. at ¶ 19.

days or more awaiting trial behind bars, 14% had a bail of \$2,500 or less and 10% had a bail of \$1,000 or less.<sup>48</sup>

30. For the first half of 2017, the number of jail admissions was up 9% from the previous year.<sup>49</sup> The top charge driving jail admissions is petit larceny, a crime of poverty, while the second leading charge is misdemeanor criminal possession of a controlled substance.<sup>50</sup> Over the eight-year period between 2010 and 2017, one-fifth of *all* pre-trial detainees were admitted with either petit larceny or misdemeanor criminal possession of a controlled substance as their most serious charge.<sup>51</sup>

31. The county's dilemma of an overcrowded jail filled with pretrial detainees is striking given the pretrial release services available to its judges. For decades, the county's probation office has had a pretrial services unit, which expanded the kind of pretrial restrictions available for judges to secure a defendant's return to court. Among the available options, judges can order that a defendant: (1) be released on the condition that he report regularly to probation; (2) be released under more restrictive supervision of probation; and (3) be released under electronic ankle monitoring.<sup>52</sup>

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<sup>48</sup> Shames Aff. at ¶ 20.

<sup>49</sup> Gary E. Christensen, *Dutchess County Jail Admissions, Releases, and Recidivism, January – August 2017*, Dutchess County Criminal Justice Council, Sept. 2017 (exhibit 26).

<sup>50</sup> *Id.*

<sup>51</sup> Shames Aff. at ¶ 14.

<sup>52</sup> See Pretrial Release Services of Dutchess County, Division of Criminal Justice Services, (exhibit 27); see also *Alternatives to Incarceration, Support Services, & Bail Options Manual*, 3<sup>rd</sup> Edition, Dutchess County Criminal Justice Council, (March 17, 2016) (exhibit 28).

32. According to data obtained from the county's probation office, pretrial release services in the county are more effective than traditional bail at ensuring a defendant's future court appearance. During the eight-year period of 2010-2017, defendants released on the county's pretrial release services had a 4.8% failure to appear rate.<sup>53</sup> Such a low failure to appear rate is consistent with data collected by the state Division of Criminal Justice Services, which showed a 3.1% failure to appear rate among 44,098 defendants released on pretrial services in 40 New York counties.<sup>54</sup> These failure to appear rates for defendants on pretrial release services are much less than the New York City failure to appear rates of 14% for secured bond.<sup>55</sup>

### **PETITIONER'S FACTS AND PROCEDURAL HISTORY**

33. Christopher Kunkeli is a 32-year-old from LaGrange, Dutchess County, where he has lived his whole life. He is a mechanic by trade, and before his incarceration was steadily employed, earning a salary of about \$1,000 per month. Mr. Kunkeli shares a basement apartment in LaGrange with a friend. He pays \$200

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<sup>53</sup> Shames Aff. at ¶ 22.

<sup>54</sup> New York State Division of Criminal Justice Services, *Pretrial Services Programs* (2010), available at <http://www.criminaljustice.ny.gov/opca/pdfs/pretrialservices2010annualrpt.pdf> (accessed Jan. 5, 2018) (data included forty counties, all outside of New York City). Pretrial services in New York City have achieved similarly low 4.2% failure to appear rate. See Freda F. Solomon & Russell F. Ferri, New York City Criminal Justice Agency, *Community Supervision as a Money Bail Alternative: The Impact of CJA's Manhattan Program on Legal Outcomes and Pretrial Misconduct* at 16 (Apr. 2016) (exhibit 29).

<sup>55</sup> CJA, *Effects of Release Type on Failure to Appear* at 25.

towards the \$400 monthly rent, and uses the remainder of his income to cover other living expenses.

34. On October 10, 2017, Mr. Kunkeli was arrested in the Town of Poughkeepsie for allegedly shoplifting a vacuum cleaner from Target valued at \$599.99. (*See* exhibit 2.) Mr. Kunkeli spent the night in a holding cell and was arraigned on October 11. (*See* arraignment tr, exhibit 30.)

35. In court, Mr. Kunkeli was appointed a public defender because he is indigent. At his arraignment the presiding judge, his public defender, and a police officer were present. No prosecutor was present. Based on the arraignment transcript, it appears that an off-the-record request for bail was made. Mr. Kunkeli's public defender objected to that request.<sup>56</sup> (*See* tr at 2, lines 20-24, exhibit 33.) The presiding judge then set \$5,000 bail and \$10,000 bond, which is where Mr. Kunkeli's bail is currently set. (*See* tr at 2-3, lines 25-2.) The presiding judge did not inquire into whether Mr. Kunkeli could pay those amounts. (*See* tr 2-3.) The presiding judge did not explain why he thought the set bail and bond amounts were necessary to assure his future court appearance. *Id.* The presiding judge did not consider alternative forms of bail or pretrial services or explain why such less restrictive alternatives would not adequately assure Mr. Kunkeli's return to court. *Id.*

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<sup>56</sup> According to the transcribing service, the courtroom microphone is near the presiding judge and not defense counsel, which explains why the defense counsel's statements are at times hard to hear, are marked "indiscernible," and at times appear incomplete, while the presiding judge's statements are not.

36. Although Mr. Kunkeli has been arrested before, (*see* Criminal History Record, exhibit 31), upon information and belief he failed to attend a court appointment only twice. As his public defender told the presiding judge, Mr. Kunkeli may have been incarcerated on another charge at the time of at least one missed court appointment. (*See* tr at 2, lines 21-24.)

37. When Mr. Kunkeli could not afford to pay the set bail or bond amounts, the presiding judge ordered that he be committed to the custody of the county sheriff. (*See* securing order dated 10-11-17, exhibit 1.) Following each of Mr. Kunkeli's court appearances, the presiding judge ordered that Mr. Kunkeli return to jail in the sheriff's custody. (*See* securing orders, exhibit 1.) Mr. Kunkeli has been in jail for nearly three months now. If he were free, it would take Mr. Kunkeli months to save \$5,000 to pay his bail. And he certainly cannot earn and save that kind of money while sitting in jail.

38. Mr. Kunkeli spent the holidays in jail away from his family. He misses his sisters and his parents, and he cannot wait until he is free so he can see them again. He loves watching sports with his friends, especially football, and he hopes he will be set free from jail soon so he can watch the National Football League playoffs and eventually the Super Bowl.

### **JURISDICTION AND VENUE**

39. This habeas proceeding arises under Article I, Section 4 of the New

York State Constitution and Article 70 of the New York Civil Practice Law and Rules (“CPLR”). Habeas corpus is proper to remedy an illegal detention resulting from the deprivation of a constitutional right. (*People ex rel. Keitt v McMann*, 18 NY2d 257, 263 [1966].)

40. The Court has original jurisdiction over controversies involving the infringement of petitioner’s constitutional rights. (*People ex rel. Klein v Krueger*, 25 NY2d 497, 503 [1969]; *see also People ex rel. Peters v Cyrta*, 36 AD2d 637, 637-38 [2d Dept 1971].)

41. This Court has jurisdiction to order the release of the petitioner pursuant to CPLR § 7010 (a). A court or judge of the United States does not have exclusive jurisdiction to order the petitioner released.

42. This Court has jurisdiction to order declaratory judgment pursuant to CPLR §§ 3001; 411; 5011 and pursuant to the Court’s discretion. (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931].)

43. Venue is proper in the Appellate Division of the Second Department pursuant to CPLR § 7002 (b) (2) because the petitioner is detained within the Second Department. The petitioner seeks the intervention of the Appellate Division of the Second Department because this proceeding presents an important, recurring, purely legal question, the resolution of which does not depend on questions of fact.

44. This Court has jurisdiction to issue an order to show cause why the

petitioner should not be released because the petitioner waives production of his person. (CPLR § 7003.)

45. The petitioner has never before petitioned for a writ of habeas corpus. In addition, the petitioner has not appealed the presiding judge's securing order.

### **CLAIMS**

Petitioner's detention is illegal for the following reason:

46. Petitioner's pretrial incarceration on unaffordable bail without any on-the-record inquiry by the presiding judge into his ability to pay, consideration of alternatives to the unfordable bail, and a finding and explanation that no less restrictive alternative would reasonably assure his return to court violates the petitioner's rights under the Equal Protection and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Articles 1, §§ 6, 11 of the New York Constitution.

### **REQUESTS FOR RELIEF**

WHEREFORE, the petitioner respectfully requests that this Court:

47. Issue an order to show cause why this Court should not grant the relief requested herein.

48. Declare that that it is presumptively impermissible under equal protection and due process to incarcerate an indigent pretrial defendant solely because he or she is unable to pay bail. Incarceration is impermissible unless the

bail-setting court, on the record, (a) inquires into whether the defendant has the financial resources to pay and, if the defendant does not, (b) explains how bail was calculated and why that amount is necessary, (c) determines that, and explains why, no less restrictive form of financial bail and alternatives to bail would reasonably assure the defendant's return to court, and (d) explains why the risk of flight is so great that nothing short of pretrial detention will reasonably assure the defendant's return to court.

49. Declare that, because the presiding judge failed to adhere to the constitutional requirements in the preceding paragraph, the petitioner's pretrial detention solely because of his inability to pay bail violates his equal protection and due process rights under the Fourteenth Amendment of the United States Constitution and under the New York Constitution.

50. Order the Respondent to the release of the petitioner forthwith on the basis of the presiding judge's failure to adhere to the constitutional requirements in paragraph 48. In the alternative, this Court may return the matter to the presiding judge for disposition consistent with the above declaratory judgment pursuant to its declaratory judgment authority. (CPLR §§ 3001; 3017 [a]).

51. Order that the petitioner be paroled pursuant to CPLR § 7009 (e) pending the final disposition of this proceeding.

52. Order any other relief that the Court deems necessary and proper.

53. If this case becomes moot because the petitioner is released from jail or for another other reason, (a) grant an exception to mootness, (b) convert this habeas petition to an Article 78 petition for declaratory judgment, and (c) issue the declaratory relief requested in paragraph 48, and 49.<sup>57</sup>

---

<sup>57</sup> The petitioner refers the Court to his memorandum of law in support of this petition for his explanation as to why the mootness exception is appropriate in this case.

Dated: January 8, 2018  
New York, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Philip Desgranges', is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that loops back to the right.

Philip Desgranges  
Kristen Burzynski  
Mariana Kovel  
Christopher Dunn  
Arthur Eisenberg  
NEW YORK CIVIL LIBERTIES UNION  
FOUNDATION  
125 Broad Street, 19th Floor  
New York, New York 10004  
Tel: (212) 607-3300

On the petition: Nina Monfredo

## EXHIBIT LIST

The following exhibits are true copies of the documents indicated. They are incorporated by reference into this petition.

- Exhibit 1 Christopher Kunkeli's Securing Orders
- Exhibit 2 Christopher Kunkeli's Accusatory Instrument
- Exhibit 3 *Incarceration's Front Door: The Misuse of Jails in America* (2015) (excerpted)
- Exhibit 4 Robert F. Kennedy's Address to the Criminal Law Section of the American Bar Association (Aug. 10, 1964)
- Exhibit 5 Bail Reform Act of 1966, Public Law 89-465
- Exhibit 6 *ABA Standards for Criminal Justice: Pretrial Release*, 3rd Edition (2007) (excerpted)
- Exhibit 7 *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* (2012)
- Exhibit 8 Eric Holder's Speech at the National Symposium on Pretrial Justice (June 1, 2011)
- Exhibit 9 Maryland Rules of Procedure - Rule 4-216
- Exhibit 10 Maryland's Highest Court Overhauls the State's Cash-Based Bail System (Feb. 7, 2017)
- Exhibit 11 *Bail Reform in New Jersey, Trends in State Courts: Fines, Fees, and Bail Practices* (2017)
- Exhibit 12 Criminal Code Chapter 54 Section 23
- Exhibit 13 General Order Number 18.8 A, Procedures for Bail Hearings and Pretrial Release
- Exhibit 14 Memorandum Filed with Senate Bill 7276 and Senate Bill 9069 (1971)

- Exhibit 15 Memorandum in Support and Explanation of Proposed Criminal Procedure Law, S. Int. 7276 A. Int 4561 (March 1970)
- Exhibit 16 *A More Just New York City* (April 2017) (excerpted)
- Exhibit 17 *The Bail Trap* (Aug. 16, 2015)
- Exhibit 18 *The Failure of New York's Bail Law* (Nov. 24, 2017)
- Exhibit 19 *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (Oct. 2013)
- Exhibit 20 *The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions* (June 2016)
- Exhibit 21 *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts* (Sept. 2017)
- Exhibit 22 *Effects of Release Type on Failure to Appear* (2011) (excerpted)
- Exhibit 23 *Governor Cuomo Unveils 22nd Proposal of 2018 State of the State: Restoring Fairness in New York's Criminal Justice System* (Jan. 3, 2018)
- Exhibit 24 *Dutchess County's New Jail Could Be too Small, Sheriff Warns* (Aug. 1, 2017)
- Exhibit 25 *Rural America's Jail Dilemma* (July 6, 2017)
- Exhibit 26 *Dutchess County Jail Admissions, Releases, and Recidivism, January – August 2017* (Sept. 2017)
- Exhibit 27 Pretrial Release Services of Dutchess County, New York State Division of Criminal Justice Services
- Exhibit 28 Alternatives to Incarceration, Support Services, & Bail Options Manual, 3rd Edition (excerpted)
- Exhibit 29 Community Supervision as a Money Bail Alternative: The Impact of CJA's Manhattan Supervised Release Program on Legal Outcomes and Pretrial Misconduct
- Exhibit 30 Transcript of Christopher Kunkeli's Arraignment

Exhibit 31 Christopher Kunkeli's Criminal History Record

**VERIFICATION**

STATE OF NEW YORK     )  
COUNTY OF NEW YORK ) ss

Philip Desgranges, an attorney admitted to the practice of law in the State of New York, affirms under the penalties of perjury:

1. I am an attorney at the New York Civil Liberties Union and am the relator in this habeas corpus proceeding. I am an attorney for Petitioner Christopher Kunkeli and am authorized to file this petition for a writ of habeas corpus on his behalf.
2. I have read the foregoing petition and know its contents.
3. The statements in the petition are true to my knowledge, except as to any statements alleged on information and belief, and as to those statements, I believe them to be true.

  
Philip Desgranges

Dated:       January 8, 2018  
              New York, NY

Sworn and subscribed to me this  
8 day of January, 2018.

  
NOTARY PUBLIC

**KRISTEN ALEEN BURZYNSKI**  
Notary Public, State of New York  
Reg. No. 02BU6364474  
Qualified in Kings County County  
Commission Expires 09/18/2021

# Exhibit 1

STATE OF NEW YORK  
COUNTY OF DUTCHESS  
TOWN OF POUGHKEEPSIE

**SECURING ORDER**

DATE OF BIRTH 03/02/85  
17100258

THE PEOPLE OF THE STATE OF NEW YORK  
v.

Christopher Kunkeli

The above named defendant having appeared before the undersigned on a (ACCUSATORY INSTRUMENT)/  
(WARRANT), charging the defendant with the most serious offense of Petit Larceny  
in violation of Section 155.25 Sub Div \_\_\_\_\_ of the Penal Law a  
(Class A Felony/Misd) (Violation) (Infraction)

AND (Check one box only)

further court attendance being required on the 9 day of January 2018,  
at 4:30 (AM/PM) before the Town Court of Poughkeepsie;

OR  the matter having been transferred for action of the Grand Jury

Now therefore it is ORDERED that the defendant be

RELEASED: (Check one box only)

on bail fixed in the amount of \$ \_\_\_\_\_ and received by this Court;

OR  Other (Explain) \_\_\_\_\_

OR  REMANDED to the custody of the County Sheriff/Commissioner of Correction  
until his appearance is required as set forth, (Check one box only)

OR  until bail is posted in the amount of \$ 5000 CASH OR \$ 10,000 BOND \_\_\_\_\_; specify type

OR  without bail

**SPECIAL ORDERS/INSTRUCTIONS**

CPL 730 (competency) Exam ordered (UCS#16-A Attached)

Dated: 12/19/17

**Paul O. Sullivan**  
TOWN JUSTICE

  
JUDGE or JUSTICE

**RELEASE INFORMATION**

It is hereby ORDERED that the defendant (Check one box only)

be released from custody having been CONVICTED of the most serious offense of \_\_\_\_\_  
in violation of Section \_\_\_\_\_ Sub Div \_\_\_\_\_ of the \_\_\_\_\_  
Law a (Class \_\_\_\_\_ Misd) (Violation) (Infraction) AND SENTENCED TO TIME SERVED;

OR  be released from custody (OTHER)

DATED: \_\_\_\_\_

(PRINT OR TYPE NAME)

JUDGE OR JUSTICE

STATE OF NEW YORK  
COUNTY OF DUTCHESS  
TOWN OF POUGHKEEPSIE

**SECURING ORDER**

DATE OF BIRTH 3/2/85  
17100758

THE PEOPLE OF THE STATE OF NEW YORK  
v.

Christopher Kunkeli

The above named defendant having appeared before the undersigned on a (ACCUSATORY INSTRUMENT)/ (WARRANT), charging the defendant with the most serious offense of Petit Larceny in violation of Section 155.25 Sub Div \_\_\_\_\_ of the Penal Law a (Class A Felony/Misd) (Violation) (Infraction)

AND (Check one box only)

further court attendance being required on the 19 day of December 2017, at 4:30 (AM/PM) before the Town Court of Poughkeepsie;

OR  the matter having been transferred for action of the Grand Jury

Now therefore it is ORDERED that the defendant be

RELEASED: (Check one box only)

on bail fixed in the amount of \$ \_\_\_\_\_ and received by this Court;

OR  Other (Explain) \_\_\_\_\_

OR  REMANDED to the custody of the County Sheriff/Commissioner of Correction until his appearance is required as set forth, (Check one box only)

OR  until bail is posted in the amount of \$ 5000 CASH OR \$ 10,000 BOND \_\_\_\_\_; specify type

OR  without bail

**SPECIAL ORDERS/INSTRUCTIONS**

CPL 730 (competency) Exam ordered (UCS#16-A Attached)

Dated: 12/15/2017

Paul O. Sullivan  
TOWN JUSTICE

[Signature]  
JUDGE or JUSTICE

**RELEASE INFORMATION**

It is hereby ORDERED that the defendant (Check one box only)

be released from custody having been CONVICTED of the most serious offense of \_\_\_\_\_ in violation of Section \_\_\_\_\_ Sub Div \_\_\_\_\_ of the \_\_\_\_\_ Law a (Class \_\_\_\_\_ Misd) (Violation) (Infraction) AND SENTENCED TO TIME SERVED;

OR  be released from custody (OTHER)

DATED: \_\_\_\_\_

\_\_\_\_\_  
(PRINT OR TYPE NAME)

\_\_\_\_\_  
JUDGE OR JUSTICE

STATE OF NEW YORK  
COUNTY OF DUTCHESS  
TOWN OF POUGHKEEPSIE

**SECURING ORDER**

DATE OF BIRTH 03/02/85  
17100258

THE PEOPLE OF THE STATE OF NEW YORK  
v.

Christopher Kunkeli

The above named defendant having appeared before the undersigned on a (ACCUSATORY INSTRUMENT)/  
(WARRANT), charging the defendant with the most serious offense of Petit Larceny  
in violation of Section 155.25 Sub Div \_\_\_\_\_ of the Penal Law a  
(Class A Felony/Misd) (Violation) (Infraction)

AND (Check one box only)

further court attendance being required on the 5 day of November 2017,  
at 4:30 (AM/PM) before the Town Court of Poughkeepsie;

OR  the matter having been transferred for action of the Grand Jury

Now therefore it is ORDERED that the defendant be

RELEASED: (Check one box only)

on bail fixed in the amount of \$ \_\_\_\_\_ and received by this Court;

OR  Other (Explain) \_\_\_\_\_

OR  REMANDED to the custody of the County Sheriff/Commissioner of Correction  
until his appearance is required as set forth, (Check one box only)

OR  until bail is posted in the amount of \$ 5,000 CASH OR \$ 10,000 BOND \_\_\_\_\_; specify type

OR  without bail

**SPECIAL ORDERS/INSTRUCTIONS**

CPL 730 (competency) Exam ordered (UCS#16-A Attached)

Dated: 11/14/17

Paul O. Sullivan  
TOWN JUSTICE

[Signature]  
JUDGE or JUSTICE

**RELEASE INFORMATION**

It is hereby ORDERED that the defendant (Check one box only)

be released from custody having been CONVICTED of the most serious offense of \_\_\_\_\_  
in violation of Section \_\_\_\_\_ Sub Div \_\_\_\_\_ of the \_\_\_\_\_  
Law a (Class \_\_\_\_\_ Misd) (Violation) (Infraction) AND SENTENCED TO TIME SERVED;

OR  be released from custody (OTHER)

DATED: \_\_\_\_\_

(PRINT OR TYPE NAME)

JUDGE OR JUSTICE

STATE OF NEW YORK  
COUNTY OF DUTCHESS  
TOWN OF POUGHKEEPSIE

**SECURING ORDER**

DATE OF BIRTH

3/2/55

17100758

THE PEOPLE OF THE STATE OF NEW YORK  
v.

Christopher Kunkeli

The above named defendant having appeared before the undersigned on a (ACCUSATORY INSTRUMENT)/ (WARRANT), charging the defendant with the most serious offense of  Petit Larceny in violation of Section 155.25 Sub Div \_\_\_\_\_ of the  Penal Law a (Class  A Felony/Misd) (Violation) (Infraction)

AND (Check one box only)

further court attendance being required on the  14  day of  NOV   ~~October~~  20 17 , at  4:30  (AM/PM) before the  Town  Court of  Poughkeepsie ;

OR  the matter having been transferred for action of the Grand Jury

Now therefore it is **ORDERED** that the defendant be

**RELEASED:** (Check one box only)

on bail fixed in the amount of \$ \_\_\_\_\_ and received by this Court;

OR  Other (Explain) \_\_\_\_\_

OR  **REMANDED** to the custody of the County Sheriff/Commissioner of Correction until his appearance is required as set forth, (Check one box only)

OR  until bail is posted in the amount of \$  5000  CASH OR \$  10,000  BOND \_\_\_\_\_; specify type

OR  without bail

**SPECIAL ORDERS/INSTRUCTIONS**

CPL 730 (competency) Exam ordered (UCS#16-A Attached)

Dated:  10/17/17

**Paul O. Sullivan**  
TOWN JUSTICE

  
JUDGE or JUSTICE

**RELEASE INFORMATION**

It is hereby **ORDERED** that the defendant (Check one box only)

be released from custody having been **CONVICTED** of the most serious offense of \_\_\_\_\_ in violation of Section \_\_\_\_\_ Sub Div \_\_\_\_\_ of the \_\_\_\_\_ Law a (Class \_\_\_\_\_ Misd) (Violation) (Infraction) **AND SENTENCED TO TIME SERVED;**

OR  be released from custody (OTHER)

DATED: \_\_\_\_\_

\_\_\_\_\_  
(PRINT OR TYPE NAME)

\_\_\_\_\_  
JUDGE OR JUSTICE

STATE OF NEW YORK  
COUNTY OF DUTCHESS  
TOWN OF POUGHKEEPSIE

**SECURING ORDER**

DATE OF BIRTH 3/2/85

THE PEOPLE OF THE STATE OF NEW YORK  
V.

Christopher Hempeli

The above named defendant having appeared before the undersigned on a (ACCUSATORY INSTRUMENT)/  
(WARRANT), charging the defendant with the most serious offense of Aggravated Assault  
in violation of Section 160.50 Sub Div \_\_\_\_\_ of the \_\_\_\_\_ Law a  
(Class \_\_\_\_\_ Felony/Misd) (Violation) (Infraction)

AND (Check one box only)

further court attendance being required on the 12 day of Oct 2017  
at Y&C (AM/PM) before the \_\_\_\_\_ Court of \_\_\_\_\_;

OR  the matter having been transferred for action of the Grand Jury

Now therefore it is ORDERED that the defendant be

RELEASED: (Check one box only)

on bail fixed in the amount of \$ \_\_\_\_\_ and received by this Court;

OR  Other (Explain) \_\_\_\_\_

OR  REMANDED to the custody of the County Sheriff/Commissioner of Correction  
until his appearance is required as set forth, (Check one box only)

OR  until bail is posted in the amount of \$ 5,000 CASH OR \$ 10,000 BOND \_\_\_\_\_ specify type

OR  without bail

**SPECIAL ORDERS/INSTRUCTIONS**

CPL 730 (competency) Exam ordered (UCS#16-A Attached)

Dated: 10/11/17

Paul O. Sullivan

TOWN JUSTICE

[Signature]  
JUDGE or JUSTICE

**RELEASE INFORMATION**

It is hereby ORDERED that the defendant (Check one box only)

be released from custody having been CONVICTED of the most serious offense of \_\_\_\_\_  
in violation of Section \_\_\_\_\_ Sub Div \_\_\_\_\_ of the \_\_\_\_\_  
Law a (Class \_\_\_\_\_ Misd) (Violation) (Infraction) AND SENTENCED TO TIME SERVED;

OR  be released from custody (OTHER)

DATED: \_\_\_\_\_

(PRINT OR TYPE NAME)

JUDGE OR JUSTICE

# Exhibit 2

TOWN OF POUGHKEEPSIE POLICE DEPARTMENT

INFORMATION
Title of Accusatory Instrument

Town Court Dist. Atty.
Defendant Agency File

STATE OF NEW YORK
COUNTY OF DUTCHESS
TOWN OF POUGHKEEPSIE, NY

TOWN COURT
TOWN OF POUGHKEEPSIE

THE PEOPLE OF THE STATE OF NEW YORK
against

Name CHRISTOPHER KUNKELI Address 4 Lafayette Court, Poughkeepsie, NY DOB 03-02-85
Name Address DOB
Name Address DOB
Name Address DOB

ACCUSATION

BE IT KNOWN THAT, by this INFORMATION

Matthew Gentile of, Street 2001 South Road
COMPLAINANT

Town Poughkeepsie County Dutchess State New York
City Village

being the Complainant herein, says that on October 10, 2017, at about 5:54pm at

Target, 2001 South Road, Poughkeepsie in the Town of Poughkeepsie, County of Dutchess, State of New York
accuses CHRISTOPHER KUNKELI

the above named defendant, with having committed
the offense(s) of Petit Larceny (Shoplifting)

in violation of Section 155.25, Subdivision, of the
PENAL LAW Law of the State of New York, a Class A MISDEMEANOR

FACTS

TO WIT: That the said defendant, did steal property, consisting of: A Dyson Vacuum valued at \$599.99 with
the intent to permanently deprive another of that property or to appropriate the same for him/herself or a third
person, and wrongfully took, obtained or withheld such property by, selecting it from the shelf, then passing
all points of sale without permission from the owner, Target, or paying for same.

Right to Counsel
2 calls
Preliminary Hearing
Jury Trial
Bill of Particulars
Non-jury Trial
Written Deposition
Copy of Charges

The above allegations of fact are made by the Complainant herein on direct knowledge\* and/or upon information and belief
with the sources of Complainant's information and the grounds for his belief being.\*

WHEREFORE, Complainant prays that a warrant be issued for the arrest of the said
IN WITNESS WHEREOF, an Appearance Ticket has been issued to said
directing him to appear before this Court at, on the day of

NOTE: FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A MISDEMEANOR
PURSUANT TO SECTION 210.45 OF THE PENAL LAW.

Matthew Gentile

Sworn to before me this day of, 19
Signature
Title

# Exhibit 3

# Incarceration's Front Door: The Misuse of Jails in America

FEBRUARY 2015

CENTER ON SENTENCING AND CORRECTIONS



Ram Subramanian • Ruth Delaney • Stephen Roberts • Nancy Fishman • Peggy McGarry

## FROM THE PRESIDENT

*Incarceration's Front Door* addresses what is arguably one of the chief drivers of difficulty in our troubled criminal justice system: jails.

The report's encyclopedic examination of jail use—who's in jail and the myriad paths leading there—is meant to inform. But it should also unnerve and incite us to action. As Vera's president, I observe injustice routinely. Nonetheless even I—as this report came together—was jolted by the extent to which unconvicted people in this country are held in jail simply because they are too poor to pay what it costs to get out. I was startled by the numbers of people detained for behavior that stems primarily from mental illness, homelessness, or addiction. I was dismayed by how even a brief stay in jail can be destructive to individuals, their families, and entire communities. And I've been at this work for a while now.

I suspect that many readers will come to this report thinking that jail is reserved only for those too dangerous to be released while awaiting trial or those deemed likely to flee rather than face prosecution. Indeed, jails are necessary for some people. Yet too often we see ordinary people, some even our neighbors, held for minor violations such as driving with a suspended license, public intoxication, or shoplifting because they cannot afford bail as low as \$500. Single parents may lose custody of their children, sole wage-earners in families, their jobs—while all of us, the taxpayers, pay for them to stay in jail.

*Incarceration's Front Door* reviews the research and interrogates the data from a wide range of sources to open a window on the widespread misuse of jails in America. It also draws on Vera's long experience in the field and examples from jurisdictions of different sizes and compositions to suggest how the negative consequences of this misuse can be mitigated. Indeed, this report marks a bittersweet homecoming for Vera as our very first project was The Manhattan Bail Project, which showed that many, if not most, people accused of committing a crime can be relied on to appear in court without having to post bail or be held until trial. The lessons we learned and shared in 1961 have not stuck nearly enough.

As the report makes clear, jails are all around us—in nearly every town and city. Yet too few of us know who's there or why they are there or what can be done to improve them. I hope that *Incarceration's Front Door* provides the critical insight to inspire you to find out more.



Nicholas Turner  
President and Director  
Vera Institute of Justice

# Contents

- 4 Gateway to the criminal justice system
- 7 Decades of growth
- 11 Portrait of the jailed
- 12 Costs and consequences
- 18 Six key decision points that influence the use and size of jails
  - 20 Arrest
  - 25 Charge
  - 29 Pretrial release and bail
  - 36 Case processing
  - 38 Disposition and sentencing
  - 41 Reentry and community supervision
- 46 Conclusion
- 48 Endnotes

Vera's experience in post-Katrina New Orleans demonstrates that reform is possible but requires thorough data analysis, collaborative and productive relationships with community leaders and elected officials, and early positive outcomes demonstrating enhanced justice, efficiency, and public safety.

<sup>a</sup> Katy Reckdahl, "Orleans Parish Prison Size Recommendation Issued," *The Times Picayune* November 19, 2010.

<sup>b</sup> Vera Institute of Justice, *A Report Submitted to the Criminal Justice Committee of the New Orleans City Council* (New York, NY: Vera Institute of Justice, 2007).

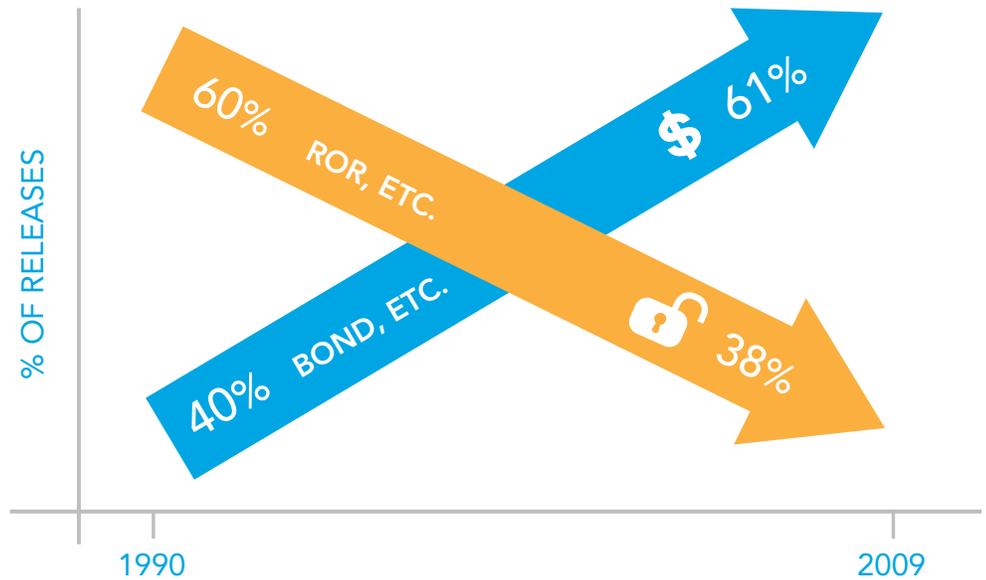
## PRETRIAL RELEASE AND BAIL

Once a person has been arrested, there is a presumption that the person will be released pending the outcome of his or her case, unless the individual poses a danger to persons or property or seems likely to flee.<sup>87</sup> In some jurisdictions, police commanders have the authority to release people directly from the station house using a bail schedule. In most places, however, the bail or release decision is made by a judge, magistrate, or bail commissioner. These officers of the court have considerable discretion in evaluating the person's circumstances and making decisions about release. They can set conditions or require assurances, such as bail, to facilitate release whenever possible.<sup>88</sup> The presumption that defendants should be released unless they present a clear danger or pose a flight risk to avoid prosecution is rooted in the principle that people are innocent until proven guilty and should be treated as such. Actual pretrial release practices, however, are at odds with this fundamental principle, as illustrated by the fact that today six out of 10 people in jail are detained pretrial.<sup>89</sup>

In 1990, most felony defendants who were freed from jail pending the resolution of their cases were released on non-financial conditions (comparable national data on misdemeanor defendants are not available).<sup>90</sup> Nearly 20 years later, in 2009 (the latest year for which data are available), those released on their own recognizance (also referred to as ROR) made up only 23 percent of all felony defendants released pretrial.<sup>91</sup> While an additional 15 percent were released on other types of non-financial bail, the remaining 61 percent of defendants were required to post financial bail, either by providing the whole or a portion of the total amount or equivalent collateral, or by hiring a bail bondsman to post the sum in the form of a private surety bond for a non-refundable fee.<sup>92</sup> Among 2009 felony cases, private surety bonds accounted for four out of five releases that involved money and close to half of all releases.<sup>93</sup> In addition to requiring bail more frequently, judges also increased bail amounts. The average bail amount in felony cases increased 43 percent (in constant dollar values) between 1992 and 2009, from \$38,800 to \$55,400.<sup>94</sup> As a result of these factors, more and more defendants remain in jail simply because they cannot pay their way out.

## Financial and non-financial release conditions

Felony defendants who were freed from jail pending the resolution of their cases were more likely to have been released on recognizance or other non-financial conditions in 1990 than in 2009 and were more likely to have been released on private bonds or other financial conditions in 2009 than in 1990.



In the years since Vera launched The Manhattan Bail Project in 1961—the nation’s first experiment with pretrial services—numerous studies have pointed to the same, highly reliable indicators associated with success or failure on release during the pretrial period (i.e., whether or not defendants stay out of trouble or show up to court when required).<sup>95</sup> In particular, community ties through family and work are strong predictors of success, while a record of prior convictions, especially felonies, a history of juvenile arrests, and a history of failure to appear in court are associated with failure.<sup>96</sup> Even for those with some risk of failure, the chance of success can be improved and the risk mitigated with additional support and supervision in the community. Noticeably missing from either list is the financial means to pay bail, which is not a strong predictor of pretrial success (defined as remaining arrest-free during the pretrial period and appearing at scheduled court dates).<sup>97</sup> Indeed, as bail amounts increased, pretrial failure rates remained steady at about 30 percent.<sup>98</sup>

Putting this research into practice is within the reach of most jurisdictions.<sup>99</sup> Using these risk factors—and any others chosen by the court—the court or pretrial services agency administers the assessments. These typically involve gathering information on the defendant’s criminal history as well as requesting personal information (e.g., length of residence at current address, current employment status, etc.) from the defendant and verifying it through phone calls.

## WHAT IS RISK ASSESSMENT?<sup>a</sup>



The foundation of good criminal justice and correctional practices is the administration of a validated risk or risk and needs assessment tool to defendants and offenders. Risk assessment instruments measure the likelihood that a person will reoffend if or when released into the community. Needs assessments identify a person's criminogenic needs—that is, personal deficits and circumstances known to predict criminal activity if not changed.

Today's assessment tools measure *static* (those things that can't be changed, such as age, criminal history, etc.) and *dynamic* (those that can, such as drug addiction, anti-social peers, etc.) risk factors, criminogenic needs, and strengths or protective factors present in a person's behavior, life, or history. There are a variety of assessment tools available for different purposes. Some are proprietary while others are available at no cost. Whatever tool is used in whatever context, states and counties must validate them using data from their own populations.

Assessment tools are used to some degree in all states and in many counties at a number of decision points in the criminal justice process and in a variety of settings. Judges and releasing authorities use information from assessment tools to guide decisions regarding pretrial release or detention and release on parole; corrections agencies use them for placement within correctional facilities, assignment to supervision level or to specialized caseloads, and for recommendations regarding conditions of release. Since the best tools evaluate the person's dynamic or changeable risk factors and needs, they should be re-administered routinely to determine whether current supervision or custody levels and programming are still appropriate.

A 2012 survey conducted by Vera found that a majority of community supervision agencies and releasing authorities routinely utilize assessment tools. Responses from 72 agencies across 41 states indicated that 82 percent of respondents regularly assessed both risk and need. While these self-reported numbers may be inflated, the responses do show correctional agency awareness of the importance of assessments.

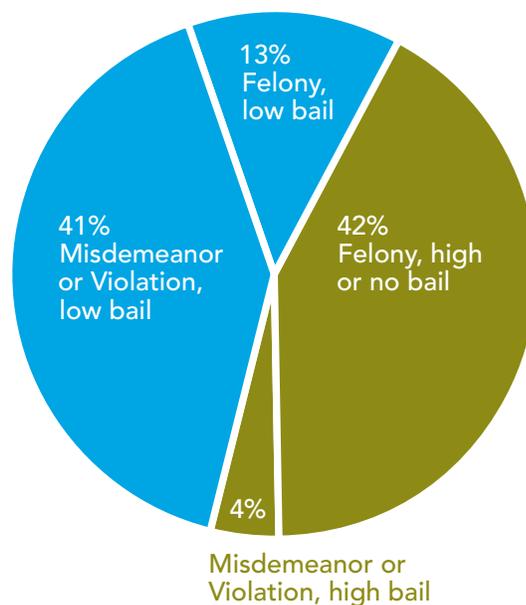
<sup>a</sup> Adapted from Peggy McGarry et al., *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* (New York, NY: Vera Institute of Justice, 2013), p. 16.

Each factor of the collected information is assigned a numerical score weighted to its relevance to pretrial failure. The greater the association of the factor with pretrial failure, the higher the score assigned to it.<sup>100</sup>

## What's keeping them in?

In this view of 2013 New York City jail data, more than 50% of jail inmates held until case disposition remained in jail because they couldn't afford bail of \$2,500 or less. Most of these were misdemeanor cases.

Low bail = \$2,500 or less.



Despite the predictive accuracy of risk assessments, few of the more than 3,000 court systems in the United States rely on these tools to make decisions about pretrial release. Some jurisdictions have implemented bail schedules in the interest of standardizing bail amounts. These link bail amounts to the severity of the initial charge, with criminal charge serving as a proxy for risk of re-arrest and flight, and the bail amount meant to mitigate that risk.<sup>101</sup> Unfortunately, the severity of the initial charge(s)—a decision entirely within the discretion of the prosecutor—has not been shown to be a good predictor of public safety or appearance in court. And this practice can lead to some serious unintended consequences for both individuals and public safety: low-risk defendants who cannot afford to post bail linger in jail, while some high-risk defendants are released because they can afford a large bail amount.<sup>102</sup>

Money, or the lack thereof, is now the most important factor in determining whether someone is held in jail pretrial. Almost everyone is offered monetary bail, but the majority of defendants cannot raise the money quickly or, in some cases, at all. Many who cannot make bail initially will be released at some point pending trial. However, 38 percent of felony defendants will spend the entirety of their pretrial periods in jail.<sup>103</sup> Yet, only one in ten of these defendants is detained because he or she is denied bail. The rest simply cannot afford the bail amount the judge sets.<sup>104</sup> For example, in New York City in 2013, 54 percent of jail inmates held until their cases had been disposed remained in jail because they could not afford bail of \$2,500 or less—with 31 percent of the non-felony defendants held on bond amounts of \$500 or less.<sup>105</sup>

*Money, or the lack thereof, is now the most important factor in determining whether someone is held in jail pretrial.*

## FACILITATING PRETRIAL RELEASE



**Risk assessment.** Kentucky has a single statewide agency that assesses all defendants using a locally validated risk assessment instrument. In recent years, the court has released 70 percent of all defendants pretrial, with only four percent requiring bail.<sup>a</sup> Outcomes for people released without monetary bail in Kentucky are far better than for those released nationally with such bail. In Kentucky, just eight percent of defendants at liberty in the community were rearrested during the pretrial period and 10 percent missed a court date.<sup>b</sup> Among people released on bail nationwide, 16 percent were rearrested and 17 percent missed a court date.<sup>c</sup>

**Early bail hearings.** A growing number of jurisdictions are moving to hold most bail hearings within 24 hours of arrest—a move that is crucial given recent research that shows long-term outcomes are considerably worse for defendants held in jail longer than 24 hours, even if they are later released.<sup>d</sup> There are two ways to achieve this: holding bail hearings within 24 hours of arrest and authorizing pretrial services agencies to release defendants assessed as low risk. In Delaware, magistrates work around the clock to review cases and make initial bail determinations (in part by using a risk assessment instrument) within the first 24 hours of arrest.<sup>e</sup> In Connecticut, the pretrial services agency assesses and releases low-risk defendants at their discretion, reporting an 11 percent failure to appear rate among those released.<sup>f</sup>

**Pretrial supervision.** Developing the capacity to monitor and assist defendants during the pretrial period makes it possible for judges and other court officers who make release and detention decisions to release higher-risk people who would otherwise be detained pending trial. The work with defendants typically involves establishing specific parameters for their behavior during the pretrial period and linking them with service providers in the community to help them address longstanding problems and remind them about upcoming court dates.<sup>g</sup> Washington, DC's Pretrial Services Agency (DCPTS) has a very robust release and supervision program: 85 percent of defendants are released on ROR or with conditions supervised by DCPTS—and of that 85 percent, in 2012, just 11 percent were rearrested while released, and 11 percent failed to appear.<sup>h</sup>

In 2006, Cocinino County, Arizona found that about 23 percent of the jail population were defendants who were detained after failing to appear at scheduled court dates. The county tested several court reminder systems for defendants who received citations in the field. The failure to appear rate was reduced from 25 percent in the control group to six percent in the reminder

*Judges need not rely on bail. There are other options for the safe release of many more defendants either on their own recognizance or with the aid of special conditions and supervision.*

group when the caller spoke directly to the defendant, 15 percent when a message was left with another person, and 21 percent when a message was left on an answering service.<sup>i</sup> In this and other areas, research shows that tailoring release conditions to a defendant's circumstances both facilitates release and increases success during the pretrial period.<sup>j</sup>

<sup>a</sup> Tara Boh Klute and Mark Heyerly, *Report on Impact of House Bill 463: Outcomes, Challenges and Recommendations* (Frankfurt, KY: Pretrial Services, Administrative Office of the Courts, 2012).

<sup>b</sup> *Ibid.*

<sup>c</sup> Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009-Statistical Tables* (Washington, DC: Bureau of Justice Statistics, Department of Justice, 2013)

<sup>d</sup> Laura and John Arnold Foundation, *Research Summary: Pretrial Criminal Justice Research* (New York, NY: Laura and John Arnold Foundation, 2013).

<sup>e</sup> Alan Davis, *Legal Memorandum No. 11-294* (Georgetown, DE: Delaware Justice of the Peace Courts, 2011).

<sup>f</sup> See State of Connecticut, Judicial Branch, *Adult Services Bail Intake/Assessment Procedures 4.1* (Connecticut: Court Support Services Division, 2013); James Carrollo, bail regional manager, Adult Probation and Bail Services, Connecticut Court Support Services Division, telephone interview by Vera, on April 8, 2014).

<sup>g</sup> Donna Makowiecki and Thomas J. Wolf, "Enter...Stage Left...U.S. Pretrial Services," *Federal Probation* 71, no. 2 (2007): 7-9; see also William Henry, "The Pretrial Services Act: 25 Years Later," *Federal Probation* 71, no. 2 (2007): 16.

<sup>h</sup> Pretrial Services Agency of the District of Columbia, *Congressional Budget Justification and Performance Budget Request, Fiscal Year 2014* (April 2013), 7.

<sup>i</sup> Marie VanNostrand, Kenneth Rose, and Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision* (Washington, DC: Pretrial Justice Institute, 2011), 17-19.

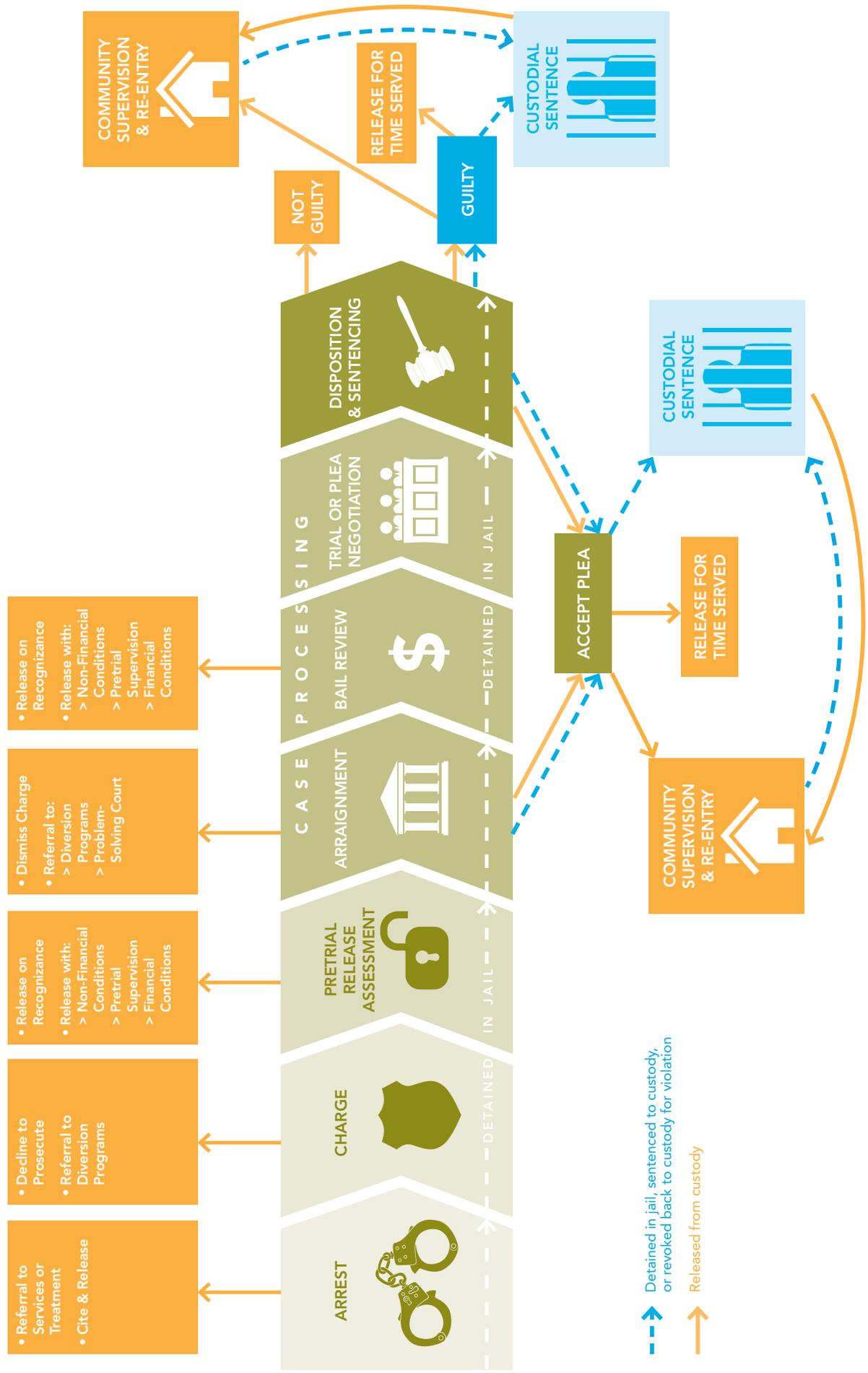
<sup>j</sup> *Ibid.*, pp. 27-29.

As this illustrates, bail amounts are not set in relation to an individual's ability to pay. This fact hurts some groups more than others, given socio-economic disparities in the United States.<sup>106</sup> A recent study shows that although black men are detained pretrial at higher rates than white men or black or white women, bail amounts are not set higher for them.<sup>107</sup> Rather, as stated above, black men appear to be caught in a cycle of disadvantage: incarcerated at higher rates and, therefore, more likely to be unemployed and/or in debt, they have more trouble posting bail.

When out-of-reach bail amounts are combined with overloaded courts, a situation arises in which defendants can spend more time in jail pretrial than the longest sentence they could receive if convicted.<sup>108</sup> These cases, in particular, turn our ideals about justice upside down. Sentenced to "time served" and released, the system punishes these individuals while they are presumed to be innocent, and then releases them once they are found guilty.

Building on the broad discretion judges have in deciding whether or not to release someone pretrial and the sizeable body of evidence about how to set release conditions, judges need not rely on bail. There are other options for the safe release of many more defendants either on their own recognizance or with the aid of special conditions and supervision. These options, deployed under the umbrella term of pretrial services, require jurisdictions to develop the capacity to conduct formal risk assessments, to speed the time from arrest to initial bail hearing, and to invest in pretrial supervision resources to enable the non-financial release of those deemed too high a risk for ROR. Most important, the success of pretrial services depends on the trust of and appropriate use by the court or its designees.

# Diversion and release opportunities during the typical criminal case trajectory



# Conclusion

Jails matter. Yet against a national backdrop of declining crime rates, most of the debate about incarceration in recent years has focused on prisons. A significant body of research shows that our reliance on incarceration as a primary crime control policy has had only a marginal impact on public safety. As a result, there is an emerging consensus that it has not been worth the fiscal and human costs. The role that local jails play in this story has not, until recently, garnered similar attention or analyses. That is starting to change and the new focus could not be timelier. With nearly 12 million annual admissions—almost 19 times those to state and federal prisons—jails have an impact that is both far-reaching and profound.

*The misuse of jails is neither inevitable nor irreversible.*

While jails serve an important function in local justice systems—primarily to hold people who are deemed, by reliable means, unlikely to appear in court or likely to reoffend if released while their cases are processed—this is no longer exclusively what jails are or whom they hold. With so many people cycling through them—some many times over—jurisdictions need to ensure that jails, while doing their part to keep the public secure, take seriously their responsibility to treat those in their custody with dignity, in settings that are safe, healthy, and able to help people return quickly to their communities or adjust to serving their sentences elsewhere. As this report has documented, this is not necessarily what jails do today.

The misuse of jails is neither inevitable nor irreversible. But to chart a different course will take leadership and vision. No single decision or decision maker in a local justice system determines who fills the local jail. While some jurisdictions have made strides in developing, implementing, and evaluating off-ramps from the path that leads to the jailhouse door, change at one point in the system will have limited impact if other key actors and policies pull in the opposite direction. To both scale back and improve how jails are used in a sustainable way, localities must engage all justice system actors in collaborative study and action. Only in this way can jurisdictions hope to make the systemic changes needed to stem the tide of people entering jails and to shorten the stay for those admitted.

## ENDNOTES

- 1 For the number of jail jurisdictions, see Todd D. Minton and Daniela Golinelli, *Jail Inmates at Midyear 2013 - Statistical Tables* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2014), 1; for the average daily jail population in 2013 see Minton and Golinelli, 2014, 6; for population data from the 2010 census see U.S. Census Bureau, *State and Country Quickfacts - Detroit, Michigan*, <http://quickfacts.census.gov/qfd/states/26/2622000.html>, and U.S. Census Bureau, *State and Country Quickfacts - San Francisco, California*, <http://quickfacts.census.gov/qfd/states/06/0667000.html>.
- 2 For the 2013 jail admissions data see, Minton and Golinelli, 2014, 4; for population data from the 2010 census see U.S. Census Bureau, *State and Country Quickfacts - Los Angeles, California*, <http://quickfacts.census.gov/qfd/states/06/0644000.html>; and U.S. Census Bureau, *State and Country Quickfacts - New York, New York*, <http://quickfacts.census.gov/qfd/states/36/3651000.html>. For annual admissions to state and federal prisons, see E. Ann Carson, *Prisoners in 2013* (Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2014).
- 3 For comparison incarceration rates, see International Centre for Prison Studies, "World Prison Brief," [http://www.prisonstudies.org/highest-to-lowest/prison-population%20total?field\\_region\\_taxonomy\\_tid=All&=Apply](http://www.prisonstudies.org/highest-to-lowest/prison-population%20total?field_region_taxonomy_tid=All&=Apply).
- 4 Although not explicitly articulated in the Constitution, the presumption of innocence is regarded as a crucial element of the constitutional right to due process under the law and "a basic component of a fair trial under our system of criminal justice." See *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The primary import of this presumption today is the allocation of the burden of proof in criminal trials. See *Bell v. Wolfish* 441 U.S. 520, 533 (1979). According to this legal doctrine, prosecutors are required to prove guilt beyond a reasonable doubt. See *Coffin v. United States*, 156 U.S. 432, 460 (1895) and *Kentucky v. Whorton*, 441 U.S. 786, 790 (1979) (Stewart, J., dissenting). At common law, the presumption of innocence had a wider meaning. It also protected defendants during the time between charge and conviction, ensuring that most individuals would remain at liberty prior to trial and that those individuals unable to make bail and held in pretrial detention were not there to be punished, but merely held in safe and humane custody in order to return them to court for trial. See William Blackstone, *Commentaries on the Laws of England*, Vol. IV, 297 (1765). Regarding the protections the presumption has historically implied during the pretrial period, until relatively recently U.S. law largely conformed with the common law, since bail was presumed in all non-capital cases. See *Judiciary Act of 1798*, 1 Stat. 73 §33 (1798). With statutory changes between the 1960s and 1980s, however, public safety considerations are now taken when judges make pretrial release and detention decisions. See *Bail Reform Act 1966* and *Bail Reform Act 1984*. For defendants held in jail prior to trial—whether for failure to post bail or due to a potential risk posed to the community—the presumption continues to protect against the consideration of pretrial detention as evidence of guilt. See *Wolfish*, 441 U.S. at 533. For reports on jail conditions of confinement, see for example, Roy L. Austin, deputy assistant attorney general, U.S. Department of Justice, Civil Rights Division, to George Touart, interim county administrator, and Sheriff David Morgan, Escambia County, Pensacola, FL, *Re: Investigation of the Escambia County Jail*, May 22, 2013; Grace Chung Becker, acting assistant attorney general, U.S. Department of Justice, Civil Rights Division, and Patrick J. Fitzgerald, United States attorney, Northern District of Illinois, to Todd H. Stroger, president, Cook County Board, and Thomas Dart, sheriff, Cook County, Chicago, IL, *Re: Cook County Jail, Chicago, IL*, July 11, 2008; Loretta King, acting assistant attorney general, U.S. Department of Justice, Civil Rights Division, to Marlin N. Gusman, criminal sheriff, Orleans Parish, New Orleans, LA, *Re: Orleans Parish Prison System, New Orleans, Louisiana*, September 11, 2009; Jocelyn Samuels, acting assistant attorney general, U.S. Department of Justice, Civil Rights Division, and Preet Bharara, United States attorney, Southern District of New York, to Mayor Bill de Blasio, Commissioner Joseph Ponte, NYC Department of Correction, and Zachary Carter, Corporation Counsel of the City of New York, New York, *Re: CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island*, August 4, 2014; and Jonathan Smith, chief, U.S. Department of Justice, Civil Rights Division, Special Litigation Section, and André Birotte, Jr., United States Attorney, Central District of California, to Anthony Peck, deputy county counsel, Monterey Park, CA, and Stephanie Jo Reagan, principal deputy county counsel, Los Angeles County Department of Mental Health, Los Angeles, CA, *Re: Mental Health Care and Suicide Prevention Practices at Los Angeles County Jails*, June 4, 2014.
- 5 Doris J. James, *Profile of Jail Inmates, 2002*, (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2004), 3.
- 6 19,903 of 43,456 cases that resulted in jail time were for misdemeanors or less. See New York City Criminal Justice Agency, *Annual Report 2013* (New York: New York City Criminal Justice Agency, 2014), 30.
- 7 Traffic and vehicular charges made up 26 percent (161,000) of all charges. See Vera Institute of Justice, *Los Angeles County Jail Overcrowding Reduction Project* (Los Angeles, CA: Vera Institute of Justice, 2011), xv. This study was done prior to the enactment of the *Public Safety Realignment Act* (AB 109) of 2011 which transferred a large number of convicted felony offenders in state prison or on parole to the authority of California's 58 counties. For recent research on the impact of AB 109 on jail populations, see Magnus Lofstrom and Steven Raphael, *Impact of Realignment on County Jail Populations* (San Francisco, CA: Public Policy Institute of California, 2013).
- 8 For example, at least 29 states have taken steps to reform mandatory penalties since 2000, and many more in the last few years have taken steps to expand community-based sentencing options, such as drug treatment probation programs targeting high-risk, previously prison-bound drug-addicted offenders or reclassifying offenses by creating more gradation in felony levels per type of criminal offense or lowering low-level crimes from felonies to misdemeanors. For more information regarding recent state sentencing and corrections reforms, see for example, Adrienne Austin, *Criminal Justice Trends: Key Legislative Changes in Sentencing Policy, 2001-2010* (New York, NY: Vera Institute of Justice, 2010); Lauren-Brooke Eisen and Juliene James, *Reallocating Justice Resources: A Review of State 2011 Sentencing Trends* (New York, NY: Vera Institute of Justice, 2012); Ram Subramanian and Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences* (New York, NY: Vera Institute of Justice, 2014); Ram Subramanian and Rebecka Moreno, *Drug War Détente? A Review of State-level Drug Law Reform* (New York, NY: Vera Institute of Justice, 2014); and Ram Subramanian and Rebecka Moreno, *Recalibrating Justice: A Review of 2013 State Sentencing and Corrections Trends* (New York, NY: Vera Institute of Justice, 2014). Also see Alison Lawrence, *Trends in Sentencing and Corrections: State Legislation* (Washington, DC: National Conference of State Legislatures, 2013); Nicole D. Porter, *The State of Sentencing 2013: Developments in Policy and Practice* (Washington, DC: The Sentencing Project, 2014); and Nicole D. Porter, *The State of Sentencing 2012: Developments in Policy and Practice* (Washington, DC: The Sentencing Project, 2013).
- 9 For information about the impact of the fiscal crisis and low crime rates on sentencing and corrections, see Ram Subramanian and Rebecca Tublitz, *Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections* (New York, NY: Vera Institute of Justice, 2012), 20. Also see Alison Shames and Michael Woodruff, *The Continuing Fiscal Crisis in Corrections: Setting A New Course* (New York, NY: Vera Institute of Justice, 2010), 4.
- 10 For results of public opinion polls which show that most Americans support alternatives to incarceration for nonviolent offenses, see Pew Center on the States, *Public Opinion on Sentencing and Corrections Policy in America* (Washington, DC: The Pew Charitable Trusts, 2012), also see Jill Mizell, *An Overview of Public Opinion and Discourse on Criminal Justice Issues* (New York, NY: The Opportunity Agenda, 2014), 19-22. For research demonstrating that community-based drug treatment programs, for example, are more effective than incarceration for drug offenders, see S. Aos et al., *Washington's Drug Offender Sentencing Alternative: An Evaluation of Benefits And Costs* (Olympia, WA: Washington State Institute for Public Policy, 2005); M. Finigan et al., *The Impact of a Mature Drug Court over 10 Years of Operation:*

- Recidivism and Costs* (Portland, Oregon: NPC Research, Inc., 2007); S. B. Rossman et al., *The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts* (Washington, DC: Urban Institute, Justice Policy Center, 2011); and E.L. Seigny, B.K. Fuleihan, and F.V. Ferdik, "Do drug courts reduce the use of incarceration?: A meta-analysis," *Journal of Criminal Justice*, 41, no.6 (2013): 416-425. For research that demonstrates that community-based sanctions are more effective than incarceration for certain types of offenders more generally, see for example, Christopher T. Lowenkamp and Edward J. Latessa, "Understanding the Risk Principle: How and Why Correctional Interventions Harm Low-Risk Offenders," *Topics in Community Corrections* (Washington, DC: National Institute of Corrections, 2004).
- 11 For 1983 admissions, see Craig A. Perkins, James J. Stephan, and Allen J. Beck, *Jails and Jail Inmates 1993-94*, (Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 1995), 13. For 2013 admissions, see Minton and Golinelli, 2014, p.4.
  - 12 David E. Olson and Koert Huddle, "An Examination of Admissions, Discharges & the Population of the Cook County Jail, 2012", *Social Justice*, Paper 16 (2013), [http://ecommons.luc.edu/social\\_justice/16/](http://ecommons.luc.edu/social_justice/16/)
  - 13 Mayor's Task Force on Behavioral Health and the Criminal Justice System, *Action Plan* (City of New York: Mayor Bill de Blasio, 2014), 6, <http://nyc.gov/BHTF>.
  - 14 For 1983 jail population, see Allen J. Beck, *Profile of Jail Inmates 1989*, (Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 1991), 3. For 2013 jail population, see Minton and Golinelli, 2014, p.6.
  - 15 For 1993 rate, see Perkins, Stephan, and Beck, 1995, p. 2. For 2007 rate, see Minton and Golinelli, 2014, p.6.
  - 16 Minton and Golinelli, 2014, p.6.
  - 17 Uniform Crime Reporting Statistics - *UCR Data Online*, <http://www.ucrdatatool.gov/>. The violent crime rate decreased from 758 to 387 and the property crime rate decreased from 5,140 to 2,859.
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  - 20 Authors' approximations based on data from Beck, 1991, p. 7; and Minton and Golinelli, 2014, p. 6. To approximate length of stay (LOS) from aggregate annual admissions (ADM) and average daily populations (ADP), we used the formula  $LOS = ADP/(ADM/365)$ . The numbers are intended to illustrate the trend more than precise estimates.
  - 21 The percentage is a weighted average for those with and without mental illness who abused drugs or alcohol from Doris J. James and Lauren Glaze, *Mental Health Problems of Prison and Jail Inmates* (Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2006), 5-6.
  - 22 Caroline Wolf Harlow, *Education and Correctional Populations* (Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2003), 2.
  - 23 Authors' calculations based on Minton and Golinelli, 2014, p. 2; and Bureau of the Census, "U.S. Census QuickFacts," <http://quickfacts.census.gov/qfd/states/00000.html>. Using racial breakdowns of jail populations and U.S. Census figures from 2010, we determined that African Americans are jailed at a rate of 751 per 100,000 and whites are jailed at a rate of 168 per 100,000.
  - 24 Minton and Golinelli, 2014, p. 7; and Bureau of the Census, "U.S. Census QuickFacts" at <http://quickfacts.census.gov/qfd/states/00000.html>.
  - 25 Authors' calculations based on New York City Independent Budget Office, *NYC's Jail Population: Who's There and Why?* (New York: New York City Independent Budget Office, 2012), <http://ibo.nyc.ny.us/cgi-park2/?p=516>; and Bureau of the Census, "U.S. Census QuickFacts," <http://quickfacts.census.gov/qfd/states/00000.html>. The population of the Rikers Island jail is 57 percent black, 33 percent Latino, and 7 percent white. The population of New York City is 22 percent black, 29 percent Latino, and 33 percent white.
  - 26 J. Blecher, "Are jails replacing the mental health system for the homeless mentally ill?," *Community Mental Health Journal* 24, no. 3 (1988): 185-95; D. Shenson, N. Dubler, and D. Michaels, "Jails and prisons: The new asylums?," *American Journal of Public Health* 80, no. 6 (1990): 655-694. For history of the deinstitutionalization of the mentally ill generally, see Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s* (Chicago: University of Chicago Public Law & Legal Theory Working Paper No. 335, 2011). Also see Richard G. Frank and Sherry A. Glied, *Better But Not Well: Mental Health Policy in the United States since 1950* (Baltimore, MD: The Johns Hopkins University Press, 2006).
  - 27 Henry J. Steadman, F.C. Osher, et al., "Prevalence of Serious Mental Illness Among Jail Inmates," *Psychiatric Services* 60, no. 6, (June, 2009): 761; and although women still make up a relatively small proportion of the jail population—14 percent in 2013— their share has been steadily increasing, up from 11 percent since 2000, Minton and Golinelli, 2014, p. 7.
  - 28 James and Glaze, 2006, p. 1. Symptoms of a mental disorder were based on criteria specified in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV). For a general discussion of mental illness in jails, see Travis, Western, and Redburn, 2014.
  - 29 H. Richard Lamb and Linda Weinberger, "The Shift of Psychiatric Inpatient Care From Hospitals to Jails and Prisons," *Journal of the American Academy of Psychiatry and the Law Online* 33, no. 4 (2005): 529, 531. Also see H. Richard Lamb, Linda Weinberger, and Walter DeCuir, "The Police and Mental Health," *Psychiatric Services* 53, Issue 10 (2002): 1266, 1269 at <http://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.53.10.1266>.
  - 30 James and Glaze, 2006, p. 9.
  - 31 David H. Cloud, Ernest Drucker, Angela Browne, and Jim Parsons, "Public Health and Solitary Confinement in the United States," *American Journal of Public Health*.
  - 32 Vera Institute of Justice, *Los Angeles County Jail Overcrowding Reduction Project* (Los Angeles, CA: Vera Institute of Justice, 2011), xix.
  - 33 For 1982 expenditures, see Tracey Kyckelhahn, *Justice Expenditures and Employment, FY 1982-2007* (Washington, DC: Department of Justice, 2011), 6; for 2011 expenditures, see Tracey Kyckelhahn, *Local Government Corrections Expenditures, FY 2005-2011*, (Washington, DC: Department of Justice, Bureau of Justice Statistics, 2013), 1-4, 7. The 2011 report shows local expenditures on corrections as \$7,068 million in 1982 (in 2007 dollars) and the 2013 report shows local expenditures on corrections to be \$26,400 million in 2011 (in 2011 dollars). When both figures are adjusted to constant 2011 dollars, the increase is about 235 percent.
  - 34 A. L. Solomon, *Life after lockup: Improving reentry from jail to the community* (Washington, DC: Urban Institute, Justice Policy Center, 2008), 15-24.

- 35 Kyckelhahn, 2013, p. 4.
- 36 State funds and other sources of revenue, including fines and fees, may cover a small percentage of operating costs. Barbara Krauth and Karin Stayton, *Fees Paid by Jail Inmates: Fee Categories, Revenues, and Management Perspectives in a Sample of U.S. Jails* (Washington, DC: U.S. Department of Justice, National Institute of Corrections, 2005), 2-4, 6-7, 15-17, 36-38, 40-41.
- 37 Christopher Lowenkamp, Marie VanNostrand, and Alexander M. Holsinger, *The Hidden Costs of Pretrial Detention* (New York, NY: The Laura and John Arnold Foundation, 2013), 11. Lowenkamp et al.'s research in this area does not explore the causes of these negative outcomes. One, as yet untested, hypothesis could be that detained low- and moderate-risk individuals suffer the same over-programming consequences as low- and moderate-risk probationers and parolees who recidivate at higher rates when they receive overly-intensive supervision as compared to those who receive supervision matched to their assessed risk. For research on assessed risk and intervention level, see D.A. Andrews and James Bonta, *The psychology of criminal conduct* (Albany, NY: Lexis Nexis/Anderson Pub. Research, 2010) on the negative impact of high-intensity supervision and interventions with low- and medium-low risk probationers and parolees.
- 38 See Lowenkamp, VanNostrand, and Holsinger, 2013, p. 10-11; John S. Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger Pub. Co., 1979); and Malcolm Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court*, (New York: Russell Sage Foundation, 1979). For a comprehensive review of current research, see Jeffrey David Manns, *Liberty Takings: a Framework for Compensating Pretrial Detainees* (Cambridge, MA: Harvard Law School, John M. Olin Center for Law, Economics, and Business, 2005); and The Pretrial Justice Institute, *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process*, (Washington, DC, Pretrial Justice Institute/MacArthur Foundation 2012).
- 39 Goldkamp, 1979; Feeley, 1979; and Manns, 2005.
- 40 For racial breakdowns of jail populations, see Minton and Golinelli, 2014, p. 6. For racial breakdowns of the general population, see U.S. Census QuickFacts, <http://quickfacts.census.gov/qfd/states/00000.html>.
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- 46 Robert Brame, Shawn Bushway, Ray Paternoster, Michael Turner, "Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23," *Crime and Delinquency*, 60(3), (2014), 1.
- 47 Tina Frierburger and Carly Hilinski. "The Impact of Race, Gender, and Age on the Pretrial Decision," *Criminal Justice Review* 35(3), (2010), 330.
- 48 American Civil Liberties Union, *Racial Disparities in Sentencing: Hearing on Reports of Racism in the Justice System of the United States*. (Washington, DC: American Civil Liberties Union, 2014), 1-3.
- 49 Barbara Krauth and Karin Stayton, pp. 7-35.
- 50 These fees include medical visits (including pharmacy prescriptions, eye care, and dental), telephone use, per diem/pay to stay, booking, photocopying, barber/hair care, bonding, escort/transportation, notary, laundry, check-processing, detoxification at intake, substance abuse testing, substance abuse treatment, weekend programs, electronic monitoring, community service, GED testing, jail industries/jobs programs, work release, vocational aptitude testing, and day reporting. See Krauth and Stayton, 2005, pp. 7-35.
- 51 See American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors Prisons* (New York, NY: American Civil Liberties Union, 2010), 6-8; and Council on State Governments, *Repaying Debts* (Washington, DC: Council of State Governments and the Bureau of Justice Assistance, 2007), 7-8. Also see, A. Bannon, M. Nagrecha, and R. Diller, *Criminal Justice Debt: a Barrier to Reentry* (New York, NY: Brennan Center for Justice, 2010), 7-10.
- 52 Bannon, Nagrecha, and Diller, 2010, p.10.
- 53 Council on State Governments, *Repaying Debts* (Washington, DC: Council of State Governments and the Bureau of Justice Assistance, 2007), 2.
- 54 In addition, more and more employers are conducting criminal background checks as part of their hiring processes. Some surveys suggest that 90 percent of employers conduct such checks, and they are not always limited to convictions. NELP found that in one survey, over 90 percent of employers reported requiring criminal background checks as a part of hiring decisions. They may also inquire about previous arrests or criminal charges, regardless of the outcome. See Michelle Natividad Rodriguez and Maurice Emsellem, *65 Million Need not Apply: The Case for Reforming Criminal Background Checks for Employment* (Washington, DC: The National Employment Law Project, 2011), 1.
- 55 Bannon, Nagrecha, and Diller, 2010, p.13.
- 56 See American Civil Liberties Union, 2010, p. 5; Council on State Governments, 2007 p. 3; Bannon, Nagrecha, and Diller, 2010, pp. 19-26; Douglass Evans, *The Debt Penalty—Exposing the Financial Barriers to Offender Reintegration* (New York, NY: Research and Evaluation Center, John Jay College of Criminal Justice, City University of New York, 2014), 1.
- 57 *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983).
- 58 Bruce Western and Becky Pettit, *Collateral Costs: Incarceration's Effect on Economic Mobility* (Washington, DC: the Pew Charitable Trusts, 2010), 11.
- 59 When an individual enrolled in Medicaid is detained, the majority of states terminate Medicaid benefits, despite federal guidance that allows for the suspension of Medicaid for individuals involved in the criminal justice system whose eligibility for the program is not linked to Supplemental Security Income. See Anita Cardwell and Meaghan Gilmore, *County Jails and the Affordable Care Act: Enrolling Eligible Individuals in Health Coverage* (Washington, DC: National Association of Counties, 2012), 3.
- 60 Each federal program has different eligibility criteria in relation to prison or jail stays. See Social Security Administration, *What Prisoners Need to Know* (Washington, DC: Social Security Administration, 2010), <http://www.ssa.gov/pubs/EN-05-10133.pdf>; U.S. Department of Veterans Affairs, "Incarcerated Veterans," <http://www.benefits.va.gov/persona/veteran-incarcerated.asp>.

- 61 See Corrinne A. Carey, *No second chance: People with criminal records denied access to public housing* (New York, NY: Human Rights Watch, 2004), 3, <http://www.hrw.org/reports/2004/usa1104/usa1104.pdf>; and Stephen Metraux, Caterina Roman, and Richard Cho, "Incarceration and Homelessness," (Washington DC: National Symposium on Homelessness Research, 2007), 9.
- 62 A survey found that 63 percent of homeless formerly incarcerated people in Baltimore, MD surveyed had owned or rented a home prior to incarceration, but only 29 percent owned or rented a home after release. The survey does not distinguish between jail and prison, but notes that 41 percent of respondents were incarcerated for a year or less. See Center for Poverty Solutions, *Barriers to Stability: Homelessness and Incarceration's Revolving Door in Baltimore City* (Baltimore, MD: Open Society Foundations, 2003), 14-15.
- 63 See Greg A. Greenberg and Richard Rosenheck, "Jail Incarceration, Homelessness, and Mental Health: A National Study," *Psychiatric Services* 59, no. 2 (2008): 170-177; National Association of Counties, Corporation for Supportive Housing, *Supportive Housing for Justice-Involved Frequent Users of County Public Systems* (Washington, DC.: National Association of Counties, 2013), 3.
- 64 More than half (53 percent) of female jail inmates reported having a current medical problem, compared to about a third (35 percent) of male jail inmates. See Laura M. Maruschak, *Medical Problems of Jail Inmates*, (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2006), 1, <http://www.bjs.gov/content/pub/pdf/mpji.pdf>.
- 65 See Richard G Frank and Sherry A. Glied, *Better But Not Well: Mental Health Policy in the United States since 1950* (Baltimore, MD: Johns Hopkins University Press, 2006); Kathleen N. Ly et al., "The increasing burden of mortality from viral hepatitis in the United States between 1999 and 2007," *Annals of Internal Medicine* 156, no. 4 (2012): 271-278; Jessica R. MacNeil, Mark N. Lobato, and Marisa Moore, "An unanswered health disparity: tuberculosis among correctional inmates, 1993 through 2003," *American Journal of Public Health* 95 no. 10 (2005): 1800; Marushka L. Silveira, 2006, p. 1.
- 66 Nicholas Freudenberg, "Jails, prisons, and the health of urban populations: A review of the impact of the correctional system on community health" *Journal of Urban Health: Bulletin of the New York Academy of Medicine* 78, no. 2 (2011): 214-235.
- 67 Dora M. Dumont et al., "Public health and the epidemic of incarceration," *Annual Review of Public Health* 33 (2012): 331-333; Andrew P. Wilper et al., "The health and health care of US prisoners: results of a nationwide survey," *American Journal of Public Health* 99, no. 4 (2009): 666-672; Sasha Abramsky and Jamie Fellner, *Ill-Equipped: US Prisons and Offenders with Mental Illness* (New York: Human Rights Watch, 2003), 16, 22, 40.
- 68 Nicholas Freudenberg, Jessie Daniels, Martha Crum, Tiffany Perkins, and Beth E. Richie, "Coming Home From Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families and Communities," *American Journal of Public Health*. 95 (2005): 1725.
- 69 In 2005, 79 percent of women in jail were mothers, with nearly 250,000 children between them. See Susan McCampbell, *The Gender-Responsive Strategies Project: Jail Applications* (Washington, DC: National Institute of Corrections, US Department of Justice, 2005), 2, 4.
- 70 Steve Christian, *Children of Incarcerated Parents* (Washington, DC: National Council of State Legislatures, 2009), 5.
- 71 Todd Clear's research looks at the impact of incarceration on communities, including high rates of community members in both jail and prison. Todd R. Clear, "The Effects of High Imprisonment Rates on Communities," *Crime and Justice* 37, no. 1 (2008): 97-132, 114-117. Also see Andrew Petteeruti and Nastassia Walsh, *Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies* (Washington DC: Justice Policy Institute, 2008), 18-20; and Nancy G. La Vigne, Pamela Lachman, Shebani Rao, Andrea Matthews. *Stop and Frisk: Balancing Crime Control with Community Relations* (Washington, DC: Urban Institute, 2014): 20-21.
- 72 Todd R. Clear, *Imprisoning communities: How mass incarceration makes disadvantaged neighborhoods worse* (Oxford: Oxford University Press, 2007).
- 73 James Austin and Michael Jacobson, *How New York City Reduced Mass Incarceration: A Model for Change?* (New York, NY: Vera Institute of Justice, 2013), 25.
- 74 State laws allow citation and release primarily in response to traffic violations, infractions, low-level misdemeanors, and sometimes low-level felonies. Louisiana, Oregon, and New York, for example, offer this for some felonies. Both state laws and departmental policies range widely in terms of presuming or allowing this practice. There are states and/or municipalities, for example, that list specific crimes for which a citation is the presumed response, absent mitigating circumstances, while others provide no guidance at all. See National Conference of State Legislatures, *Citation in Lieu of Arrest* (2013)
- 75 *Ibid.* With varying degrees of formality, officers consider an array of factors, including whether the suspect seems to pose a danger to persons or property and the person's criminal record, including any outstanding warrants; whether or not the suspect and any family members reside locally and the suspect's employment status and other possible ties to the community as indicators of the likelihood that the person will appear in court; and whether the suspect is under the influence of drugs or alcohol or appears to be mentally ill. See for example, Mary T. Phillips, *The Past, Present, and Possible Future of Desk Appearance Tickets in New York City*, (New York: New York City Criminal Justice Agency, 2014). In some small jurisdictions, the police may also require the person to post a small amount of bail to create an incentive for the person to appear in court for arraignment.
- 76 The practice of "for-profit" or "quota" policing can result in unlawful stops, summonses, and arrests. Quotas are requirements that an officer issue a certain number of violations within a specific timeframe and are sometimes imposed to accrue court fines and fees from defendants to help reduce budgetary deficits in cities or counties. See for example, New York Civil Liberties Union report "NYCLU Lawsuit Challenges Primitive Quota System in Bronx Precinct" (New York, NY: New York Civil Liberties Union, 2012), <http://www.nyclu.org/news/nyclu-lawsuit-challenges-punitive-quota-system-bronx-precinct>. While it still remains a practice in some jurisdictions, there has been much investigation and litigation in jurisdictions across the United States, including in Georgia, New Jersey, Illinois, and New York, regarding the illegality of violations and ticket quotas. See for example, *Fraternal Order of Police, Lodge 1 v City of Camden*, Civ. No 10-1502 (D.N.J. Sep. 26, 2013); Plaintiff's Complaint, *Craig Matthews v City of New York, Raymond Kelly*, 12 Civ.1354 (S.D.N.Y. filed Feb. 23, 2012).
- 77 For research on civil forfeiture, see Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic, and Scott Bullock, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (Washington, DC: Institute for Justice, March 2010) <http://www.ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture-4>; J. Worrall, and T. Kovandzic, "Is Policing For Profit? Answers from Asset Forfeiture" *Criminology and Public Policy* 7 (2008): 219-244; and John L. Worrall, "Addicted to the Drug War: The Role of Civil Asset Forfeiture as Budgetary Necessity in Contemporary Law Enforcement" *Journal of Criminal Justice* 29 (2001): 171-187. For an example of press coverage about Missouri, see Radley Balko, "How Municipalities in St. Louis County, MO., Profit From Poverty," *Washington Post*, September 3, 2014.
- 78 Authors' calculation from Bureau of Justice Statistics, *Jail Inmates 1984* (Washington, DC: US Department of Justice, Bureau of Justice Statistics, 1986), 2; and Snyder and Mulako-Wangota, 2013. In 1983 there were 11.7 million arrests and 6 million jail admissions.
- 79 Authors' calculation from Minton and Golinelli, 2014, p. 4; and Snyder and Mulako-Wangota, 2013. In 2012 there were 12.2 million arrests and 11.6 million jail admissions.
- 80 For the analysis of 17 state courts, see Robert LaFountain et al., *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* (Washington DC: National Center for State Courts, 2012), 24. For the analysis of misdemeanor arrests in New York City, see Preeti

- Chauhan et al., *Trends in Misdemeanor Arrests in New York* (New York: John Jay College of Criminal Justice, 2014).
- 81 The arrest rate for drug crimes peaked in 2006. See Howard N. Snyder and Joseph Mulako-Wangota, Bureau of Justice Statistics. With underlying data from the FBI's Uniform Crime Reporting (UCR) Program, U.S. drug arrest estimates were generated using the Arrest Data Analysis Tool at <http://www.bjs.gov>.
- 82 The U.S. Constitution affords defendants adversarial safeguards in criminal proceedings including a timely judicial determination of probable cause as a pre-requisite to detention under the Fourth Amendment. See *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Similarly, under the Sixth Amendment the Court found that there must be a reasonable time between arrest and arraignment. See *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972). These holdings have been codified under Federal Rule of Criminal Procedure 5.1, which states that a person arrested in the United States must be presented "without unnecessary delay" to a magistrate or judge. See Fed. Rules Cr. Proc. Rule 5, 18 U.S.C.A., FRCRP Rule 5. The Supreme Court subsequently found that in order to satisfy *Gerstein's* promptness requirement, a jurisdiction that chooses to combine probable cause determinations with other pretrial proceedings must do so as soon as is reasonably feasible, but no later than 48 hours after arrest. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). States that combine "probable cause determinations" with initial court appearances have interpreted "unnecessary delay" to mean no more than 48 hours. See Pen C §825; CCP §§134-135; Govt C §§6700, 6706; *People v Lee* 3 CA3d 514, 521 (1970). Despite the Supreme Court's 48 hour mandate, many jurisdictions provide a 72-hour window for arraignment. Typically state statutes do not permit law enforcement to detain a person for more than 72 hours before arraignment and others comport with the Supreme Court mandate of 48 hours and some even fewer. For example, in New York and Washington, DC, statute requires 24 hours and in California legislature interprets "unnecessary delay" as no more than 48 hours, not including holidays. See Kimyetta R. Robinson, *From Arrest to Appeal: A Guide to Criminal Cases in The New York State Courts* (New York, NY: The Fund for Modern Courts, 2005), 12; also see Washington, DC Super. Ct. R. Crim. P. 5(c).—a defendant has the right to an immediate probable cause determination; Pen C §825; CCP §§134-135; Govt C §§6700, 6706. *People v Lee* 3 CA3d 51 (1970). However, while courts have found that unreasonable pre-arraignment detention is unconstitutional, there is no remedy for the violation.
- 83 See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), "In our system, so long as prosecutor has probable cause to believe that the accused committed offense defined by statute, decision whether to prosecute, and what charge to file or bring before a grand jury, and generally rests entirely in his discretion." However, "a prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." See *U.S. v. Goodwin*, 457 U.S. 368 (1982). Also see, for example, *Hassan v Magistrates Court*, 191 N.Y.S. 2<sup>nd</sup> 238, 243 (Sup. Ct. 1959), "Just because a crime has been committed, it does not follow that there must necessarily be a prosecution for it lies with the district attorney to determine whether the acts which may fall within the literal letter of the law should as a matter of public policy not be prosecuted." Additionally, recognizing the prosecution's broad enforcement and discretionary power, the American Bar Association created a rule in its Model Rules for Professional Responsibility to guide prosecutors' duties. See Model Rules of Professional Conduct Rule 3.8 (2005).
- 84 For examples of recent state reforms that expand deferred prosecution programs out of concern about collateral consequences of criminal convictions see Ram Subramanian and Rebecka Moreno, *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009-2014* (New York, NY: Vera Institute of Justice, 2014).
- 85 For information on the history of risk assessment in criminal justice, see D.A. Andrews, James Bonta, and J. Stephen Wormith, "The Recent Past and Near Future of Risk and/or Need Assessment," *Crime & Delinquency* 52, no. 1 (2006): 7-27.
- 86 National Association of Pretrial Services Agencies, *Promising Practices in Pretrial Diversion* (Washington, DC: National Association of Pretrial Services Agencies, 2010).
- 87 Broadly, bail refers to conditions put upon an accused person to ensure that, if released from custody, he or she reappears for trial. See *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.") While the Eighth Amendment prohibits excessive bail, the Constitution does not create an absolute right to bail. See *United States v. Salerno*, 481 U.S. 739, 754-55 (1987). Presently, there is a presumption towards releasing people pending trial. However, if an individual is deemed to pose a safety risk or flight risk, then pretrial detention is allowed. See *Salerno*, 418 U.S. at 751 (Government's interest in public safety can outweigh an individual's liberty interest.) The decision whether or not to release a defendant is usually made first at arraignment or another initial court appearance, and can be revisited multiple times during the movement of a case through the courts.
- 88 For example, under Federal bail law, see 18 U.S.C. § 3142, as amended in 1984, courts can deal with an individual charged with a crime pending trial in several ways. If a judicial officer can determine that the individual doesn't pose a safety or flight risk, the individual should be released upon his or her own recognizance, or after promising to pay money for failure to appear: see § 3142(b). Second, if the judicial officer feels more safeguards are necessary to ensure either the individual's reappearance or to ensure the safety of the community, the court can impose further conditions (for example, compliance with a curfew, electronic monitoring, or prohibitions on firearm possession): see § 3142(c). Determinations for either outcome are made by considering the nature of the offense, the weight of evidence against the individual, the history and character of the individual, and whether the individual poses a significant risk to the community: see § 3142(g). Alternatively, an individual may be temporarily detained in order to facilitate the revocation of any other conditional release he or she may be under—for example, if the individual is on probation, parole, or awaiting trial for another offense: see § 3142(d). However, temporary detention is only triggered if an individual poses a flight or safety risk: see § 3142(d)(2). Finally, only some individuals can be detained until trial. Those charged with crimes of violence, certain drug offenses, certain repeat offenses, and offenses carrying maximum life sentences trigger the ability for the court to hold a hearing to determine whether indefinite detention is warranted: see § 3142(f). Additionally, individuals whose pose a significant flight risk or are likely to obstruct justice or threaten witnesses are also eligible for indefinite detention. *Ibid.* Typically, at the hearing, the government must show, by clear and convincing evidence, that no conditions of release can reasonably assure the safety of the community. However, certain charges—including certain drug offenses, certain acts of terrorism, and many offenses involving a minor victim—carry a presumption of detention that the defendant must rebut: see § 3142(e). At the state level, bail laws vary. For an overview of differences among state bail laws, see Pretrial Justice Institute's "Matrix of Bail Laws," <http://www.pretrial.org/wpfb-file/matrix-of-state-bail-laws-april-2010-pdf/>.
- 89 Minton and Golinelli, 2014, p.1.
- 90 Pheny Z. Smith, *Felony Defendants in Large Urban Counties, 1990* (Washington, DC: Bureau of Justice Statistics, Department of Justice, 1993), 8; and Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009-Statistical Tables* (Washington, DC: Bureau of Justice Statistics, Department of Justice, 2013), 1.
- 91 Reaves, 2013, p.15.
- 92 *Ibid.*
- 93 *Ibid.* A surety bond is an agreement between the court and a third person (the surety) to pay a certain amount if the defendant named in the agreement fails to appear in court. The bond may be secured, requiring an actual payment of the sum or some portion of it in court pending the appearance of the defendant, or unsecured, requiring only the promise to pay if the defendant doesn't appear. Private surety agents, known as bail bondsmen, charge a nonrefundable fee in exchange for paying or

- promising to pay the amount necessary to get someone out of jail. They may also require some kind of collateral from the defendant that will be forfeited if he or she fails to show up for court dates. Some states, most recently Kentucky, have outlawed private for-profit sureties.
- 94 Reaves, 2013, p. 19; Brian A. Reaves and Paul Smith, *Felony Defendants in Large Urban Counties, 1992* (Washington, DC: Bureau of Justice Statistics, Department of Justice, 1995), 20. The 1992 mean bail (\$25,400) is shown in 2009 dollars.
- 95 See Marion Katsive, *New Areas for Bail Reform: A Report on the Manhattan Bail Reevaluation Project* (New York, NY: Vera Institute of Justice, 1968). See generally Kristin Bechtel, Christopher T. Lowenkamp and Alex Holsinger, "Identifying the Predictors of Pretrial Failure: A Meta-Analysis" *Federal Probation* 75, no. 2 (2011).
- 96 Bechtel, Lowenkamp, and Holsinger, 2011, pp.1-2.
- 97 Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* (Washington, DC: Justice Policy Institute, 2012), 3-4, 21-22.
- 98 Reaves, 2013, pp. 15, 20.
- 99 Donna Makowiecki and Thomas Wolf, "Enter...Stage Left...U.S. Pretrial Services," *Federal Probation* 71, no. 2: 7-9; also see William Henry, "The Pretrial Services Act: 25 Years Later," *Federal Probation* 71, no. 2 (2007): 16.
- 100 Bechtel, Lowenkamp and Holsinger, 2011.
- 101 For example, see the Los Angeles County 2011 Felony Bail Schedule, [http://www.metalaw.us/resource/Bail%20Schedule\\_Infractions\\_Misdemeanors.pdf](http://www.metalaw.us/resource/Bail%20Schedule_Infractions_Misdemeanors.pdf); and see Pretrial Justice Institute, *Rational and Transparent Bail Decisions: Moving from a Cash-based to a Risk-based Process* (Washington, DC: Pretrial Justice Institute, 2012) 18-42; Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Option* (Washington, DC: Pretrial Justice Institute, 2013).
- 102 Timothy Schnacke, *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial* (Washington, DC: National Institute of Corrections, U.S. Department of Justice, 2014) 30-39.
- 103 Reaves, 2013, p. 15.
- 104 *Ibid.*
- 105 13,352 felony defendants (including remands) and 10,868 non-felony defendants were not released prior to disposition. 3,407 non-felony defendants with bonds of \$500 or less were not released prior to disposition. See New York Criminal Justice Agency, *New York Criminal Justice Agency Annual Report* (New York: Criminal Justice Agency, 2013), 30.
- 106 Frierburger and Hilinski, 2010, p. 330.
- 107 *Ibid.*
- 108 Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (New York, NY: Human Rights Watch, 2010), 27-30.
- 109 Vera Institute of Justice, *Los Angeles County Jail Overcrowding Reduction Project*, 68.
- 110 *Ibid.*
- 111 The Sixth Amendment of the U.S. Constitution provides that in "all criminal prosecutions, the accused shall enjoy the right to a speedy trial." This same protection is also embodied in the Fourteenth Amendment's due process clause. In 1974, the Speedy Trial Act 18 U.S.C. §§ 3161-3174—later amended in 1979—set forth time limits for completing federal prosecutions providing for dismissal of the criminal action if there are delays without good cause. Each state has its own speedy trial provision, embodied in legislation, court rulings, or both.
- 112 A recent *New Yorker* essay tells the story of one young man who spent three years in jail, missing both his junior and senior years in high school and insisting on his innocence, before the Bronx district attorney dismissed the charges against him. See Jennifer Gonnerman, "Before the Law: A boy was accused of taking a backpack. The courts took the next three years of his life," *The New Yorker*, October 6, 2014. According to a *New York Times* investigation, he is just one of many defendants whose cases are stalled in the Bronx courts. See William Glaberson, "Faltering Courts Mired in Delays," *The New York Times*, April 13, 2013, <http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html>. Also see William Glaberson's four-part report, "Justice Denied: Inside the Bronx's Dysfunctional Court System," *The New York Times*, April 13, 14, 15 and 30, 2013.
- 113 Marie VanNostrand, *New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce Jail Population* (Trenton, NJ: Drug Policy Alliance, 2013), 14.
- 114 See note 80. Also, see Jenny Roberts, "Crashing the Misdemeanor System," *Washington and Lee Law Review* 70 (2013) and Jenny Roberts, "Why Misdemeanors Matter: Defining Effective Advocacy in Lower Criminal Courts," *U.C. Davis Law Review* 45 (2011).
- 115 The Bronx Defenders Fundamental Fairness Project, *No Day in Court: Marijuana Possession Cases and the Failure of the Bronx Criminal Courts* (Bronx, NY: The Bronx Defenders, 2013).
- 116 After arraignment, for example, a criminal case will typically include a preliminary meeting between the two sides to see whether the case can be resolved short of having a trial. For felonies, in some jurisdictions a grand jury will be convened to examine the evidence and determine whether charges should be brought. There will also likely be pretrial hearings, some which will deal with procedural or constitutional issues related to the evidence procured by law enforcement and depending on the outcome, a judge may decide to alter course. The judge may require more information, another hearing, may bind the case over on different charges, or reduce or dismiss the charges. If convicted, there is usually a gap in time between conviction and sentencing, in part because the sentencing judge may require a report about the defendant to inform the sentencing decision—a report that is typically put together by the court's probation department. Sometimes the victim and character witnesses might be called to the judge in determining an appropriate sentence.
- 117 Vera Institute of Justice, *Los Angeles County Jail Overcrowding Reduction Project* (2011), 71.
- 118 See note 121. Also, *ibid.*, p. 70.
- 119 See William Glaberson for example, "For 3 Years After Killing, Evidence Fades as a Suspect Sits in Jail," *The New York Times* April 15, 2013 <http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html>.
- 120 More than 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas. See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, Table 5.22.2010, <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>; and S. Rosenmerkel, M. Durose, and D. Farole, *Felony Sentences in State Courts, 2006—Statistical Tables* (Washington, DC: Bureau of Justice Statistics, 2009), 1; also see Lindsey Devers, *Plea and Charge Bargaining: Research Summary* (Washington, DC: Bureau of Justice Assistance, 2011), 1. For a brief discussion on the relative power prosecutors have in plea bargaining see Rodney J. Uphoff, "The Criminal Defense Lawyer As Effective Negotiator: A Systemic Approach" *Clinical Law Review* 2 (1995): 73, 88-89 & n. 63 (1992).
- 121 See for example *People v. Llovett*, N.Y.L.J., Apr. 24, 1998 (Kings Cty. Crim. Ct.) which found that "many of the pleas of guilty to misdemeanors were by defendants who could achieve their freedom only by pleading guilty. (Plead guilty and get out, maintain your innocence and remain incarcerated in lieu of bail.) Thus if all defendants had the economic wherewithal to make bail, it is clear that many

- fewer...would plead guilty to misdemeanors." Also see Gerard E. Lynch, "Our Administrative System of Criminal Justice," *Fordham Law Review* 66 (1998): 2117, 2146 ("Pleading guilty at the first opportunity in exchange for a sentence of 'time [already] served' is often an offer that cannot be refused.")
- 122 James J. Stephan and Louis W. Jankowski, *Jail Inmates*, 1990, (Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 1991), 2.
- 123 Minton and Golinelli, 2014, p.7.
- 124 See Subramanian and Moreno, 2014, p. 11.
- 125 For a discussion of treatment matching and dosage strategies that incorporate criminogenic risk and needs assessments, see April Pattavina and Faye S. Taxman, *Simulation strategies to reduce recidivism: Risk need responsivity (RNR) modeling for the criminal justice system* (New York, NY: Springer, 2013).
- 126 These strategies have not been without criticism. Advocates for health-based approaches to addiction argue that drug courts have made the criminal justice system more punitive toward addiction by penalizing relapse with incarceration and dropping from programs those who are not able to abstain from drug use for a sufficient period of time as determined by a judge. See Drug Policy Alliance, *Drug Courts Are Not the Answer: Toward a Health-Center Approach to Drug Use* (New York, NY: Drug Policy Alliance, 2011), 16. Critics have also pointed to a phenomenon known as 'net widening,' which refers to "well-meaning police officers and prosecutors arrest[ing] and charging[ing] more offenders under the assumption that something worthwhile could happen to such offenders once they were in the penal system and eligible for drug court rehabilitation," Joel Gross, "The Effects of Net-Widening on Minority and Indigent Drug Offenders: A Critique of Drug Courts," *University of Maryland Law Journal of Race, Religion, Gender and Class* 10 (2010): 161, 167. They note that many of those individuals are low-level offenders—often with no criminal record and no record of addiction—who might have otherwise not been brought into the system. See Eric Miller, "Drug Courts and Judicial Interventionism," *Ohio State Law Journal* 65 (2004): 1483, 1569. Mental health advocates have put forth similar arguments regarding mental health courts. See, e.g., Susan Stefan & Bruce J. Winick, "A Dialogue on Mental Health Courts," *Psychology, Public Policy & Law* 11 (2005): 507.
- 127 Christopher T. Lowenkamp and Edward J. Latessa, "Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders," *Topics in Community Corrections*, Annual Issue (2004).
- 128 See Peggy McGarry et al., *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* (New York, NY: Vera Institute of Justice, Center on Sentencing and Corrections, July 2013), 12. See also, Lowenkamp and Latessa, 2004.
- 129 McGarry et al., 2013, pp. 15-19.
- 130 For information about jail reentry challenges, see Talia Sandwick et al., *Making The Transition: Rethinking Jail Reentry in Los Angeles County* (New York, NY: Vera Institute of Justice, 2013); Amy L. Solomon et al., *Life After Lockup: Improving Reentry from Jail to the Community* (Washington, DC: Urban Institute Justice Policy Center, 2008); Jim Parsons, "Addressing the Unique Challenges of Jail Reentry" in *Offender Reentry: Rethinking Criminology and Criminal Justice*, edited by Matthew S. Crow and John Ortiz Smykla (Burlington, MA: Jones & Bartlett Learning, 2014).
- 131 American Civil Liberties Union, 2010, p. 73; and Bannon, Nagrecha, and Diller, 2010, p. 11. See also Alexes Harris, Heather Evans, and Katherine Beckett, "Drawing blood from stones: Legal debt and social inequality in the contemporary United States," *American Journal of Sociology*, 115 no. 6 (2014): 1782-1785; and Douglas Evans, Douglas, *The Debt Penalty — Exposing the Financial Barriers to Offender Reintegration* (New York, NY: Research & Evaluation Center, John Jay College of Criminal Justice, City University of New York, 2014), 8-9.
- 132 American Civil Liberties Union, 2010, p. 22. Bannon, Nagrecha, and Diller, 2010, p. 24.
- 133 *Ibid*, p. 23.

# Acknowledgments

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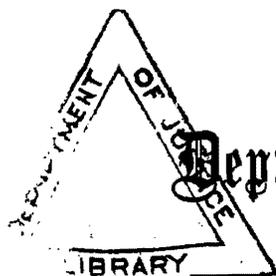
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# Exhibit 4



# Department of Justice

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ADDRESS BY ATTORNEY GENERAL ROBERT F. KENNEDY  
TO THE CRIMINAL LAW SECTION  
OF THE AMERICAN BAR ASSOCIATION  
AMERICANA HOTEL  
NEW YORK CITY  
2 p.m., August 10, 1964

Mr. Bellows, Mr. Freund, and members of the Criminal Law Section:

It is an honor to appear before such a distinguished group of attorneys, a group which has done so much -- and can do so much more to bring our society closer to the ideal of criminal justice. It is a particular pleasure to come here at the suggestion of a man who has been both a symbol and a generator of the concern our society should devote to this subject -- James V. Bennett.

I knew of Jim Bennett's reputation as a man of rare compassion, intelligence and skill when I came to the office of Attorney General. Working with him, since then, I have repeatedly learned how fully that reputation is deserved. He has made the Federal Bureau of Prisons a proud and able service and he has made a great contribution to the entire field of criminal justice. Now that he is about to retire as Director of the Bureau of Prisons, after nearly 28 years, he richly deserves our warmest tribute.

As I approach the end of four years as Attorney General, this is a time for me to do a little looking back, also, on the work of the Department of Justice in the area of criminal law and criminal justice. Because of what I saw as counsel of the Senate Rackets Committee, one of my principal concerns when I became Attorney General was the rapid growth of racketeering and organized crime, particularly in the labor-management field.

The concept of racketeering as big business dates back at least as far as 1929 when one well-known citizen declared:

"The American system of ours, call it Americanism, call it capitalism, call it what you like, gives each and every one of us a great opportunity if we only seize it with both hands and make the most of it."

While that philosophy may be spotless, its author was Al Capone. And in the 35 years since then, too many "independent businessmen" have sought literally to make the most of it.

My predecessor, Attorney General William Rogers, began an effort against organized crime and proposed legislation to enlarge the Federal Government's ability to act. In this administration, we sought to enlarge on that base and to build an effective anti-racketeering campaign.

We secured passage of three previously proposed anti-crime measures and four new ones. We quadrupled the size of our organized crime force and established units in the field. And we developed a new system of cooperation among the 26 different Federal Law Enforcement Agencies.

The impact of these efforts cannot easily be measured. Racketeering continues and will always continue and the strength of any program is not what has been done, but what continues to be done. We know, however, that the number of convictions we have secured -- for public corruption, narcotics, gambling, labor-management offenses and other types of racketeering -- has increased more than seven times.

The growing corrosion of labor-management relationships was particularly disturbing. We now have prosecuted officers and employees of 54 different unions as well as 30 businessmen and firms. To date, juries have convicted 110 officers, members or associates of one union, the Teamsters, for bribery, extortion, embezzlement, fraud, and other charges.

This record was compiled because of the energy and resourcefulness of many men in many agencies and it is a record of which I -- and they -- are proud. In the past three years, the FBI, with which the principal investigative responsibility rests, has greatly increased the number of agents assigned to penetration of the rackets. The information and momentum gained in the past three years should carry this whole effort forward in future years.

A second major concern of mine -- and of many others in the Department of Justice -- when I became Attorney General was with the way poor or penniless defendants were treated in our courts. This was not a new problem. It was in the 18th Century that Oliver Goldsmith observed, gloomily, "Laws grind the poor, and the rich men rule the law."

And in the United States, thoughtful men have sought to insure equal justice for the poor man ever since a group of German immigrants in New York began the first Legal Aid Society, in 1876.

So the problem is not new. What is new, however, is the spirit in which we approach it now. We live in a time of growing concern all over the country that the scales of our legal system measure justice, not wealth.

And it has been my hope that we could bring new energies to this momentum and find solutions to the problem.

Thus, early in 1961, I appointed a group of distinguished legal figures to a Committee on Poverty and the Administration of Federal Criminal Justice, chaired by Professor Francis Allen. One of the important areas this committee dealt with was the fairness both to the defendant and to the attorney, of appointing unpaid counsel to represent indigent defendants.

There have been experiences all over the country like that of the young Detroit attorney, in practice for himself, who was appointed to a case which took 10 weeks to try. By the end of that time, he had to spend all his weekends selling real estate to try to cover his office expenses.

A system which regularly makes such demands of lawyers is unfair to the legal profession. It is unjust to the indigent defendants whom it is intended to benefit. Several recent studies show that the thousands of defendants with appointed counsel enter guilty pleas much more often than those with their own attorneys. They stand less chance of getting the charges against them dismissed. If they go to trial, they have less chance of acquittal. And, if convicted, they have less chance of securing probation.

The Allen Committee proposed answers to this problem of representation and these proposals were embodied in legislation sent to Congress by President Kennedy. That legislation -- the Criminal Justice Act of 1964 -- was passed by both the House and Senate last Friday and it will shortly be signed into law by President Johnson.

We can share in satisfaction and pride at the enactment of this unparalleled legislation. Proposed by the administration, its enactment owes much to the tireless efforts of you of the A.B.A. It is a great step forward. It is also a great challenge.

Now, it is up to the Bar in every community to see that this act becomes more than a pay bill for attorneys. It is up to the Bar to establish standards insuring that appointed attorneys now will not merely be compensated, but that they will provide competent defense.

And even with such execution of the Criminal Justice Act, it cannot, even at best, solve some of the other difficult problems faced by the poor in the courts. One of the plainest of these problems is bail. Its legitimate purpose of insuring that defendants appear for trial has been distorted into systematic injustice. Every year, thousands of persons are kept in jail for weeks and even months following arrest. They are not proven guilty. They may be innocent. They may be no more likely to flee than you or I. But they must stay in jail because, bluntly, they cannot afford to pay for their freedom.

Countless cases illustrate the point. Daniel Walker of Glen Cove, New York, was arrested on suspicion of robbery and spent 55 days in jail for want of bail. Meanwhile, he lost his job, his car was repossessed, his credit was destroyed, and his wife had to move in with her parents. Later, he was found to be the victim of mistaken identity and released. But it took him four months simply to find another job.

The lesson, in short, is that the present bail system exacts an incalculable human price. And it is an unnecessary price. Repeated recent studies demonstrate that there is little -- if any -- relationship between appearance at trial and ability to post bail. The pioneering work of the Vera Foundation here in New York has disclosed that only 1 percent of persons released on recognizance have failed to appear for trial. This compares with a 3 percent default rate for those out on bail.

We have been deeply concerned about the effect of bail on the poor man. The Allen Committee looked into the question extensively. It recommended that release on recognizance be increased wherever possible at the Federal level and we have followed that recommendation.

In March, 1963, shortly after receiving the Committee's recommendations, I instructed all United States Attorneys to recommend that every possible defendant be released without bail. In the first year afterwards, such releases tripled. The default rate, 2.5 percent, is about the same as that for those released on bail.

We are expanding this effort. So is Congress. Senators Ervin of North Carolina and Johnston of South Carolina held hearings on Federal Bail Reform Legislation last week. But even at best, reform of the Federal Bail System affects only a relatively small number of defendants. The much larger problem is that of bail in state and local courts and we have sought to provide advice and assistance to them.

One of the results of our effort was to sponsor, with the Vera Foundation, The National Bail Conference, held in Washington last May. Many of you know about it -- or even attended. This three-day conference attracted 400 judges, prosecutors, professors, defense attorneys, police officials, and even bail bondsmen from all over the country.

The conference has set in motion a widespread awakening to the need for bail reform. Requests for information and assistance have poured in to us, and programs or plans are now in motion in dozens of cities. But even this is only a beginning. These projects need informed assistance and the responsibility of the Bar is large.

All these problems -- such as competent representation and an unjust bail system -- require the wholehearted involvement of the legal profession. Starting with law students and reaching to the topmost ranks of our largest law firms. As we see ourselves as leaders in the arena of public affairs,

as officers of our courts, and as agents of justice, so it is our clear responsibility to work for solutions to these problems -- and the larger problems which underlie them.

I say "Our responsibility" advisedly, because I do not believe it is the responsibility of private attorneys alone. I believe that the Department of Justice must play an important role. In George Orwell's world of the future, the Ministry of Hate was called the Ministry of Love and the Ministry of War was called the Ministry of Peace. It must be our purpose in government, with your help, to insure that the department over which I preside is more than a Department of Prosecution and is, in fact, the Department of Justice.

Our continuing and increasing efforts on behalf of the poor defendant are a beginning. But there remains much work -- and great work -- to be done. These efforts need to be continued systematically. They need to be enlarged in the Federal System. They need to be explained and displayed to local law enforcement authorities. And there are other concepts which need to be explored -- such as the use of the summons instead of arrest.

Thus, I am pleased to announce to you the establishment of a new office within the Department of Justice, to deal with all these concerns, and to announce the appointment of Professor James Voremberg, of the Harvard Law School, to head this office.

Professor Voremberg is an authority in this field. He will continue his teaching duties at Harvard, but he will be assisted by a staff of full-time attorneys in this new office. We intend that this office will deal with the whole spectrum of the criminal process, from arrest to rehabilitation. We intend that it will deal with social problems that affect the criminal process, such as narcotics, or juvenile delinquency, or the right of privacy. We want it to be a voice inside the Department and a forum outside the Department. Perhaps above all, it is our hope that this Office of Criminal Justice will be only the first step in dealing with what I believe is one of the most aggravating problems of criminal law, the wide -- and widening gulf -- between law enforcement officials on the one side and other legal figures concerned with protecting the rights of the individual on the other.

Differences of opinion between these schools are not only helpful, but desirable, for the dialogue can be creative. But there is little creativity in the present dialogue.

For years now, the dispassionate figure of blind justice has been treated to a singular debate between the two schools. One side expresses its logic in such phrases as "coddling of criminals" or "knee-jerk sob sisters." Then, in ringing rebuttal from the other side, come such phrases as "savage police brutality" or "hanging judge."

The heat of this debate might be entrancing if it were not for the urgency of the problems which it obscures. The present problems of the field of criminal law are deep and serious. The application of criminal law to an increasingly concentrated, complicated urban society affects the lives of every citizen. But because the debate has become so emotionally polarized, there is no common ground for communication or understanding.

There are those quick to criticize the police -- without even attempting to comprehend their large responsibility and the difficult conditions under which police often must work. And there are dedicated police officials who believe that the courts are letting them down by erecting all kinds of technical hurdles that interfere with law enforcement.

This inability for those on one side to understand the problems of the other side is typified in a story told by Herbert J. Miller, the able and energetic Assistant Attorney General in charge of our Criminal Division. He was at a meeting of a committee recommending changes in the criminal rules. One of the changes, supported by most members of the committee, would have compelled the Government to disclose the names of any informers prior to trial. When he went to the next meeting, Miller took along pictures of the sadistically-beaten corpses of 15 informers in narcotics cases whose identity had been discovered by the defendants. The rule change proposal was withdrawn.

I mean no criticism of prosecutors or professors or policemen or of either side of this debate. But I do mean to condemn the emotional obstacles all of us have allowed to develop, obstacles which block intelligent -- and perhaps even fruitful -- appraisal of the problems. I became familiar with these obstacles soon after becoming Attorney General, in connection with wire-tapping. Wire-tapping is a subject of the deepest concern to me. I do not believe in it. But I also believe we must recognize that there are two sides to the argument.

We sought to do so in the Department of Justice by proposing revision of the present law on wire-tapping. That law is widely acknowledged to be ineffective. It is not preventing widespread and indiscriminate wire-tapping, nor is it aiding law enforcement. Our effort was to bridge the gap.

We wrote a legislative proposal forbidding all wire-tapping, except that by law enforcement officials in connection with a small number of specified crimes. This exception was rigidly fenced in by a number of safeguards, administered by the courts and Congress. In my view, this was an excellent bill, balancing the need to protect individual privacy with the needs of law enforcement.

And yet, once introduced, discussion of the merits of the measure was instantly submerged in a flood of criticism so emotional and so bitter that rational debate is, at least so far, impossible. I found that many of the critics had not even bothered to read the bill. And I was interested by the fact that the American Civil Liberties Union strenuously opposed it, while the A.C.L.U.'s own President, former Attorney General Biddle, testified in favor of it.

Our new Office of Criminal Justice can serve as a meeting ground for more profitable appraisal of this and other issues, so that each side may better understand the outlook and the practical problems faced by the other. Even if no consensus resulted, better understanding alone is a goal worth seeking.

However, such a task deserves even greater attention. Lack of understanding rests, at least in part, on lack of information. Crime in an industrialized, urban society is a quite different problem than it was in the simpler, rural society from which many of our legal rules developed. What we have discovered about the injustices of the bail system is an example. Yet too little has been done to collect and evaluate data about the present operation of our criminal laws.

The time has come for another Wickersham Commission -- another comprehensive survey designed to study and strengthen enforcement of and obedience to criminal law all over the country. The Wickersham Commission report had a marked effect on criminal law for many years. There are similar rewards to be gained from a new effort.

We should also consider formulating a permanent method to achieve these objectives. In the past, research in the field of criminal law has been left to the law schools, universities, and foundations. Perhaps no more is needed. But it is very possible that our laws and our society would benefit from a coordinated approach such as a National Institute of Criminal Justice, patterned after the National Health Institutes.

It is my conviction that the large contribution which now must be made to the field of criminal law is to achieve the communication which such organizations may help provide. But they can only help. The form is not the solution. Better understanding and greater communication will not be achieved by an adversary procedure of emotional arguments. The problem will not be solved by annual meetings. The problem will not be solved by an Office of Criminal Justice. Nor will it be solved by a Commission or by an Institute. It can be solved only by the larger institution to which we all belong, the American legal community. The responsibility rests, as it should, on each of us as lawyers.

No generation of lawyers has yet failed its responsibility to the law or to our society. The role of the lawyer in De Tocqueville's time prompted him to say that "I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people."

Let us today continue to accept that challenge, whether in private practice or public service. Let us see to it that for all our citizens, criminal law means criminal justice.

# Exhibit 5

## Public Law 89-465

June 22, 1966  
[S. 1357]

## AN ACT

To revise existing bail practices in courts of the United States, and for other purposes.

Bail Reform Act  
of 1966.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Bail Reform Act of 1966".

SEC. 2. The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

62 Stat. 821;  
68 Stat. 747.

SEC. 3. (a) Chapter 207 of title 18, United States Code, is amended by striking out section 3146 and inserting in lieu thereof the following new sections:

**"§ 3146. Release in noncapital cases prior to trial**

"(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

"(1) place the person in the custody of a designated person or organization agreeing to supervise him;

"(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

"(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

"(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

"(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

"(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

"(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

“(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available, any other judicial officer in the district may review such conditions.

“(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: *Provided*, That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

“(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

“(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

#### “§ 3147. Appeal from conditions of release

“(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to section 3146(d) or section 3146(e) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

“(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a). The appeal shall be determined promptly.

#### “§ 3148. Release in capital cases or after conviction

“A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose

a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: *Provided*, That other rights to judicial review of conditions of release or orders of detention shall not be affected.

**“§ 3149. Release of material witnesses**

“If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

**“§ 3150. Penalties for failure to appear**

“Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than \$5,000 or imprisoned not more than five years, or both, or (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both, or (3) if he was released for appearance as a material witness, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

**“§ 3151. Contempt**

“Nothing in this chapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

**“§ 3152. Definitions**

“As used in sections 3146–3150 of this chapter—

“(1) The term ‘judicial officer’ means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the District of Columbia Court of General Sessions; and

“(2) The term ‘offense’ means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.”

(b) The analysis of chapter 207 of title 18, United States Code, is amended by striking out the last item and inserting in lieu thereof the following:

“3146. Release in noncapital cases prior to trial.

“3147. Appeal from conditions of release.

“3148. Release in capital cases or after conviction.

“3149. Release of material witnesses.

“3150. Penalties for failure to appear.

“3151. Contempt.

“3152. Definitions.”

SEC. 4. The first paragraph of section 3568 of title 18, United States Code, is amended to read as follows:

74 Stat. 738.

"The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term 'offense' means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress."

SEC. 5. (a) The first sentence of section 3041 of title 18, United States Code, is amended by striking out "or bailed" and inserting in lieu thereof "or released as provided in chapter 207 of this title".

62 Stat. 815.

(b) Section 3141 of such title is amended by striking out all that follows "offenders," and inserting in lieu thereof the following: "but only a court of the United States having original jurisdiction in criminal cases, or a justice or judge thereof, may admit to bail or otherwise release a person charged with an offense punishable by death."

(c) Section 3142 of such title is amended by striking out "and admitted to bail" and inserting in lieu thereof "who is released on the execution of an appearance bail bond with one or more sureties".

(d) Section 3143 of such title is amended by striking out "admitted to bail" and inserting in lieu thereof "released on the execution of an appearance bail bond with one or more sureties".

(e) (1) The heading to chapter 207 of such title is amended by striking out "BAIL" and inserting in lieu thereof "RELEASE".

(2) The table of contents to part II of such title is amended by striking out "207. Bail" and inserting in lieu thereof "207. Release".

SEC. 6. This Act shall take effect ninety days after the date on which it is enacted: *Provided*, That the provisions of section 4 shall be applicable only to sentences imposed on or after the effective date.

Effective date.

Approved June 22, 1966.

Public Law 89-466

AN ACT

To amend title 38, United States Code, to increase dependency and indemnity compensation in certain cases.

June 22, 1966  
[H. R. 3177]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That subsection 412(b), title 38, United States Code, is amended to read as follows:

"(b) In any case where the amount of dependency and indemnity compensation payable under this chapter to a widow who has children is less than the amount of pension which would be payable to (1) such widow, or (2) such children if the widow were not entitled, under chapter 15 of this title had the death occurred under circumstances authorizing payment of death pension, the Administrator shall pay dependency and indemnity compensation to such widow in an amount equal to such amount of pension."

Veterans.  
Dependency and  
indemnity compen-  
sation.  
75 Stat. 566.

38 USC 501 et  
seq.

Approved June 22, 1966.

# Exhibit 6

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**ABA Standards for Criminal Justice**  
*Third Edition*

**Pretrial Release**

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**ABA Standards for Criminal Justice**  
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Standards approved by ABA House of Delegates: February 2002

Commentary completed: March 2007

**Standard 10-1.4 Conditions of release**

(a) Consistent with these Standards, each jurisdiction should adopt procedures designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond. Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case reasonably to ensure appearance at court proceedings, to protect the community, victims, witnesses, or any other person, and to maintain the integrity of the judicial process. Whenever possible, methods for providing the appropriate judicial officer with reliable information relevant to the release decision should be developed, preferably through a pretrial services agency or function, as described in Standard 10-1.10.

(b) When release on personal recognizance is not appropriate reasonably to ensure the defendant's appearance at court and to prevent the commission of criminal offenses that threaten the safety of the community or any person, constitutionally permissible non-financial conditions of release should be employed consistent with Standard 10-5.2.

(c) Release on financial conditions should be used only when no other conditions will ensure appearance. When financial conditions are imposed, the court should first consider releasing the defendant on an unsecured bond. If unsecured bond is not deemed a sufficient condition of release, and the court still seeks to impose monetary conditions, bail should be set at the lowest level necessary to ensure the defendant's appearance and with regard to a defendant's financial ability to post bond.

(d) Financial conditions should not be employed to respond to concerns for public safety.

(e) The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.

(f) Consistent with the processes provided in these Standards, compensated sureties should be abolished. When financial bail is imposed, the defendant should be released on the deposit of cash or securities with the court of not more than ten percent of the amount of the bail, to be returned at the conclusion of the case.

***History of Standard***

This Standard is an expanded version of Second Edition, Revised Pretrial Release Standard 10-1.3. It contains a new provision explicitly precluding the use of financial conditions in response to concerns for public safety.

***Related Standards***

ABA, Standards for Criminal Justice, Defense Function Standard (3d ed. 1993), 4-3.5(j)

NAC, Corrections (1973), 4.4

NAC, Courts (1973), 4.6

NAPSA, Standards for Pretrial Release (2004), 1.4

NCCUSL, Uniform Rules of Criminal Procedure (1987), 341

NDAA, National Prosecution Standards (1991), 45.1(c)(2); 45.1(c)(3); 45.5; 45.6

***Commentary******Standard 10-1.4(a)***

This Standard calls upon jurisdictions to make a reality of the presumption in favor of release on personal recognizance by establishing procedures that will promote such release. It also recognizes that there are circumstances when release on personal recognizance may not be appropriate and emphasizes the desirability of jurisdictions developing methods to ensure that judicial officers have reliable information relevant to the release decision. The Standard recommends that jurisdictions use pretrial services programs to acquire and present the information to the judicial officer, as described in more detail in Standard 10-1.10.

***Standard 10-1.4(b)***

If the judicial officer determines that outright release on the defendant's own recognizance is not appropriate, consideration should next be given to release on non-financial conditions. Standard 10-5.2 sets forth a wide range of non-financial conditions that may be imposed depending on the circumstances of a particular case.

***Standard 10-1.4(c)***

This Standard greatly restricts, though it does not entirely eliminate, recourse to financial conditions of release. It authorizes such conditions only when non-financial conditions are insufficient to provide reasonable assurance of the defendant's appearance in court. When financial

conditions are warranted, the least restrictive conditions principle requires that unsecured bond be considered first. If the court finds that unsecured bond is not sufficient, it may require the defendant to post bail; however, the bail amount must be within the financial reach of the defendant and should not be at an amount greater than necessary to assure the defendant's appearance in court.

*Standard 10-1.4(d)*

This Standard strongly emphasizes the principle that financial bail is not an appropriate response to concerns that the defendant will pose a danger if released. Such concerns are appropriately addressed through a special hearing process to determine whether a person will be detained, pursuant to Standards 10-5.8 through 10-5.10. Money bail should not be used for any reason other than to respond to a risk of flight. The practice of setting very high bail in situations where the defendant is regarded as posing a risk of dangerousness is explicitly proscribed by this Standard.

*Standard 10-1.4(e)*

This Standard prohibits the imposition of financial conditions that the defendant cannot meet.<sup>16</sup> The intent behind this limitation is to ensure that financial bail serves only as an incentive for released defendants to appear in court and not as a subterfuge for detaining defendants. Detention should only result from an explicit detention decision, at a hearing specifically designed to decide that question, not from the defendant's inability to afford the assigned bail.

*Standard 10-1.4(f)*

The plain language of the First Edition and Second Edition, Revised Pretrial Release Standards that "compensated sureties should be abolished" is retained and included here as an important principle relating to the determination of pretrial release for reasons that are basically similar to those articulated in previous editions.<sup>17</sup> However,

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<sup>16</sup> Cf. 18 U.S.C. § 3142(c)(2) (stating that "the judicial officer may not impose a financial condition that results in the pretrial detention of the person"); D.C. Code Ann. § 23-1321(c)(3) (stating that the judicial officer may not impose a financial condition to assure the safety of a person or the community but "may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person").

<sup>17</sup> The First Edition Pretrial Release Standard 10-5.4 commentary noted that "the professional bondsman is an anachronism in the criminal process.

additional language in those earlier editions concerning regulation of sureties "pending abolition" has been deleted so as to leave no doubt as to the imperative nature of the recommendation that they be abolished.

There are at least four strong reasons for recommending abolition of compensated sureties. First, under the conventional money bail system, the defendant's ability to post money bail through a compensated surety is completely unrelated to possible risks to public safety. A commercial bail bondsman is under no obligation to try to prevent criminal behavior by the defendant. Second, in a system relying on compensated sureties, decisions regarding which defendants will actually be released move from the court to the bondsmen. It is the bondsmen who decide which defendants will be acceptable risks—based to a large extent on the defendant's ability to pay the required fee and post the necessary collateral. Third, decisions of bondsmen—including what fee to set, what collateral to require, what other conditions the defendant (or the person posting the fee and collateral) is expected to meet, and whether to even post the bond—are made in secret, without any record of the reasons for these decisions. Fourth, the compensated surety system discriminates against poor and middle-class defendants, who often cannot afford the non-refundable fees required as a condition of posting bond or do not have assets to pledge as collateral. If they cannot afford the bondsman's fees and are unable to pledge the collateral required, these defendants remain in jail even though they may pose no risk of failure to appear in court or risk of danger to the community.<sup>18</sup>

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Close analysis of his role indicates he serves no major purpose that could not be better served by public officers at less cost in economic and human terms." The commentary for the Second Edition, Revised, Pretrial Release Standard 10-5.5 states that "the commercial bond business has been one of the most tawdry parts in the criminal justice system. . . . Even if bonding agents were effective in returning absconding defendants, however, it is questionable policy for the criminal justice system to rely heavily on them."

<sup>18</sup> There have been numerous critiques of the compensated surety system, dating back to at least the 1920s. See, e.g., Roscoe Pound and Felix Frankfurter, eds., *Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio* (Cleveland: The Cleveland Foundation, 1922; reprinted, Montclair, NJ: Patterson Smith, 1968), pp. 290-292; Arthur L. Beeley, *The Bail System in Chicago* (Chicago: University of Chicago Press, 1927); Caleb Foote, "Compelling Appearance in Court: Administration of Bail in Philadelphia," 102 *University of Pennsylvania Law Review* 1031 (1954); Note, "A Study of the Administration of Bail in New York City," 106 *University of Pennsylvania Law Review* 693 (1958); Daniel J. Freed and Patricia M. Wald, *Bail in the United States: 1964* (Washington, D.C.:

The experience of jurisdictions in which bondsmen have been completely or substantially eliminated—including Kentucky, Wisconsin, Oregon, Illinois, and the District of Columbia—demonstrates that the replacement of professional bondsmen with responsible pretrial services programs and pretrial release decision-making can produce a fairer and more effective pretrial release process.<sup>19</sup> Although there may be political and practical difficulties associated with eliminating compensated sureties, their role is neither appropriate nor necessary and the recommendation that they be abolished is without qualification.

The deposit bail system, which has been used in Kentucky, Illinois, and Oregon for many years, requires a defendant to deposit cash or securities equal to a fixed percentage of the bond amount (usually ten percent) with the court. If, at the conclusion of the case, the defendant has made the required court appearances, the deposit is returned

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U.S. Department of Justice and The Vera Foundation, Inc., 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (New York: John Wiley and Sons, 1968); Paul Wice, *Freedom for Sale: A National Study of Pretrial Release* (Lexington, MA: D.C. Heath and Co., 1974); John S. Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger, 1979); M.L. Kaufman, "An Analysis of the Powers of Bail Bondsmen and Possible Routes to Reform," 15 *New York Law School Journal of Human Rights* 287 (1999); F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (New York: Praeger, 1991). Devine has noted that many countries with a common law tradition have acted to prevent the development of a commercial bail system, adopting either civil or criminal remedies to obstruct its development, viewing compensated bail as "perverting the course of justice." *Id.* at 201.

<sup>19</sup> The states of Kentucky and Wisconsin have prohibited the use of compensated sureties. See KY Rev. Stat. 431.510; WI Stat. 969.12. In Illinois and Oregon there is simply no statutory authorization for release on surety bail, but the statutes of these states do authorize deposit bail. See IL Stat. Ch. 725/110-7; WI Stat. 961.01. The D.C. statute (D.C. Code Ann. Tit 11 sec. 2105) does not explicitly prohibit compensated surety bail, but it provides for a very broad range of conditions of release and—like these Standards—allows detention only after a showing by the prosecution that release of the defendant would pose a substantial risk of flight or threat to community safety or to the integrity of the court process that cannot be met through imposition of conditions on the defendant's release. Additionally, the District of Columbia has a strong and effective pretrial services agency that provides supervision of defendants who are conditionally released.

(possibly reduced by the amount of a small service charge).<sup>20</sup> If the defendant has not made the required appearances, the deposit is forfeited and the balance is due.

**Standard 10-1.5 Pretrial release decision may include diversion and other adjudication alternatives supported by treatment programs**

**In addition to employing release conditions outlined in Standard 10-1.4, jurisdictions should develop diversion and alternative adjudication options, including drug, mental health, and other treatment courts or other approaches to monitoring defendants during pretrial release.**

***History of Standard***

This Standard incorporates a reference to pretrial diversion from Second Edition, Revised Standard 10-1.1. However, rather than providing for conditional release pending diversion “to further the rehabilitation needs of some defendants and to divert them from criminal prosecution,” it encourages development of diversion and alternative adjudication options as “approaches to monitoring defendants during pretrial release.”

***Related Standards***

ABA, Standards for Criminal Justice, Prosecution Function (3d ed. 1993), 3-3.8

ABA, Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999), 14-4.1

NDAA, National Prosecution Standards (1991), 45.1(c)(2)

***Commentary***

This Standard calls upon jurisdictions to take advantage of the growing numbers and types of alternatives to adjudication that

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<sup>20</sup> Imposition of a small service charge on the amount of the deposit was upheld by the U.S. Supreme Court in *Schilb v. Kuebel*, 404 U.S. 357 (1971). In that case, the amount of the service charge was ten percent of the deposit (or one percent of the total bail amount), as provided under the Illinois statute authorizing use of deposit bail.

# Exhibit 7



# Pretrial Release and Misconduct in Federal District Courts, 2008-2010

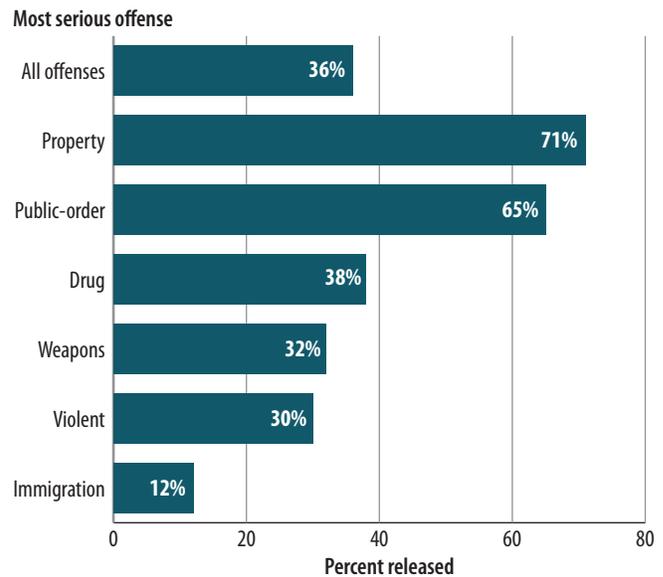
Thomas H. Cohen, Ph.D., *BJS Statistician*

During fiscal years 2008 through 2010, 36% of the 283,358 defendants in cases disposed in federal district courts were released prior to case adjudication. The percentages of pretrial release ranged from 12% for defendants brought into federal courts for immigration violations to 71% for defendants charged with property offenses (figure 1). Nineteen percent of released defendants committed some form of pretrial misconduct, and technical violations accounted for 90% of these pretrial violations.

Data for the Bureau of Justice Statistics' (BJS) Federal Justice Statistics Program (FJSP) were provided by the Administrative Office of the U.S. Courts' (AOUSC) Office of Probation and Pretrial Services Automated Case Tracking System (PACTS). The PACTS data cover various aspects of pretrial release in federal district courts, including the decision to release or detain a defendant, the different mechanisms of release or detention, and the behavior of defendants while on pretrial release. The PACTS data analyzed for this report include defendants whose cases were disposed by the federal courts for the combined fiscal years of 2008 to 2010.

**FIGURE 1**

**Defendants released pretrial for cases disposed in federal district courts, by offense type, FY 2008-2010**



Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008-2010.

## HIGHLIGHTS

- Thirty-six percent of defendants in cases disposed in federal courts from 2008 to 2010 were released pretrial.
- Federal courts released 10% of noncitizen defendants identified as illegal aliens, compared to 43% of legal aliens and 55% of U.S. citizens.
- Twenty-four percent of these defendants were released at the time of their initial appearance, while another 12% were detained and then released at subsequent court events, including detention or bond hearings.
- Nonfinancial methods, including release on personal recognizance or unsecured bond, accounted for 73% of pretrial releases in federal courts.
- Ninety-one percent of detained defendants were held on either court-ordered detention or because they could not meet certain conditions set by the court.
- Of defendants released pretrial, 79% were released with conditions, including travel restrictions, substance abuse treatment requirements, weapons restrictions, or promises to remain employed or seek employment.
- About half (51%) of defendants with no prior arrest history were released pretrial, compared to 34% of defendants with 2 to 4 prior arrests and 21% of defendants with more than 10 prior arrests.
- Nineteen percent of defendants released pretrial committed some form of pretrial misconduct.
- Technical violations were committed by 17% of defendants released prior to case disposition, while 1% of released defendants failed to make court appearances and 4% were rearrested for new offenses.

The PACTS data provide important information about pretrial release and misconduct in the nation's federal courts. These data do not cover pretrial release in state courts. In an effort to provide comprehensive information on pretrial release, this report compares several aspects of the pretrial process in federal and in state courts. While no statistical series have national level estimates of pretrial release and

misconduct in state courts, BJS has sponsored the State Court Processing Statistics (SCPS) project, which examines pretrial release and misconduct for felony cases filed in the nation's 75 most populous counties. Therefore, the SCPS data are referenced in this report when comparing state and federal pretrial statistics. (See *Methodology* for more information about the SCPS.)

## Pretrial release and detention in the federal criminal justice system

Before 1966, the federal courts relied almost exclusively on financial bond. In a bond system, persons accused of criminal conduct can remain free pending case disposition by posting a bond, usually property or money, as a guarantee that they will make all court appearances. In most situations, defendants will post a percentage of the bond set with a bail bondsman or with the court through a deposit bond program. Congress enacted the Bail Reform Act of 1966 to reform federal pretrial practices and minimizing the use of financial bond. The act mandated that any defendant charged with noncapital offenses in federal courts be released on either their own recognizance or an unsecured appearance bond (see *Methodology*). In cases that required additional supervision, the court could impose other conditions necessary to assure that a defendant made all court appearances.

The Bail Reform Act of 1984 (18 U.S.C. Section 3141) further codified the pretrial release process. According to the act, when defendants first appear before a judicial officer they may be 1) released on personal recognizance or unsecured bond, 2) released subject to conditions imposed by the court, 3) temporarily detained to permit deportation, exclusion, or the revocation of previously granted conditional release, or 4) detained pending the outcome of a detention hearing. At a detention hearing, the government is required by the act to prove by clear and convincing evidence that no condition of release would reasonably ensure that the defendant would appear for trial and not pose a risk to the community. The Bail Reform Act of 1984 also expanded the scope of factors that federal courts could consider when making pretrial release decisions to include the degree of dangerousness a defendant poses to the community.

**Defendants charged with property or public-order offenses were more than 5 times more likely to be released pretrial than immigration defendants**

For the combined fiscal years of 2008 through 2010, 36% of defendants whose cases were disposed in federal courts were released pretrial (table 1). The percentages of defendants released pretrial varied across the major federal offense categories. Seventy-one percent of property and 65% of public-order defendants were released prior to case adjudication, while less than two-fifths of defendants charged with drug offenses (38%) and about a third charged with weapons (32%) or violent offenses (30%) received a pretrial release. Of all the major federal offense categories, immigration defendants had the lowest likelihood of being released pretrial (12%). The low rate of pretrial release for immigration defendants was due to 91% of these defendants being illegal aliens, which the federal courts typically do not release (not shown in table).

**More than half of violent and drug defendants released pretrial were initially detained and then released at subsequent proceedings**

The initial appearance represents the first time that a defendant charged with a federal offense appears before a federal judicial officer, typically a magistrate judge. During the initial appearance, the defendant can either be released pretrial or detained for additional hearings. For those defendants not released at the initial appearance, pretrial release can occur at subsequent events, including detention or bond hearings, or the defendant can be held for the duration of the entire case. For fiscal years 2008 through 2010, 24% of defendants were released at the time of their initial appearance, while 12% were detained and then released at subsequent hearings.

Defendants charged with violent and drug offenses were more likely to be released after a period of detention than released at their initial appearance. Among violent defendants, 16% were released after a period of detention

**TABLE 1**  
**Defendants released pretrial for cases disposed in federal district courts, by offense type and stage of appearance, FY 2008–2010**

Most serious offense charged	Number of defendants	Percent released	Percent of defendants released at—	
			Initial appearance <sup>a</sup>	Subsequent hearings <sup>b</sup>
All offenses	283,358	36%	24%	12%
<b>Violent</b>	8,979	30%	13%	16%
<b>Property</b>	44,305	71%	59%	12%
Fraudulent	36,618	69%	58%	12%
Other	7,687	78%	66%	11%
<b>Drug</b>	84,436	38%	18%	20%
Trafficking	71,904	37%	17%	20%
Other	12,532	42%	24%	17%
<b>Public-order</b>	23,014	65%	53%	13%
Regulatory	3,786	74%	60%	14%
Other	19,228	64%	51%	13%
<b>Weapons</b>	22,325	32%	17%	15%
<b>Immigration</b>	97,635	12%	7%	5%

Note: Released defendants include defendants who were never detained and those who were also detained for part of the pretrial period. Detail may not sum to total due to missing information for offense type, which was available for 99.1% of defendants.

<sup>a</sup>Includes the first hearing that an accused defendant receives in federal court.

<sup>b</sup>Includes detention hearings, bond hearings, or releases that occurred at any time after initial appearance.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

and 13% were released at initial appearance. Among defendants charged with a drug offense, 20% were released after being detained and 18% were released at initial appearance. In comparison, defendants charged with property or public-order offenses were at least four times more likely to be released at the initial appearance than they were to be detained and then subsequently released. Of property defendants released pretrial, 59% were released at the initial appearance, while 12% were first detained and then released. A similar pattern held for public-order defendants, with 53% being released at initial appearance and 13% being released after a period of detention.

## 58% of defendants were released pretrial in state courts in the 75 most populous counties, compared to 36% in federal courts

State data on pretrial release differ in important ways from federal data. Unlike federal data, which represents the entire universe of cases disposed in federal courts, data on pretrial release at the state level are derived from a sample of defendants charged with a felony offense in May 2006 in 40 of the nation's 75 most populous counties. (See *Methodology*.)

In addition, cases filed in federal and state courts in large counties differed in composition. Immigration constituted a major offense category in the federal system, with 35% of federal defendants charged with immigration violations (**table 2**). Although illegal aliens can be brought into state courts on other offense charges, only federal courts have the authority to adjudicate offenses involving the enforcement of the nation's immigration laws. Therefore, immigration offenses are not a case type reported at the state level.

Compared to federal courts, the percentage of defendants charged with violent or property offenses was also higher in state courts in large counties. Violent (23%) and property offenses (29%) comprised about half of felony defendants in the 75 most populous counties. In comparison, violent (3%) or property (16%) offenses comprised slightly less than a fifth of defendants in federal district courts.

Regardless of the differences between state and federal courts, it is informative to compare federal and state data on pretrial release. Federal courts released a higher percentage of defendants charged with property offenses (71%) than state courts in large counties (59%). Defendants charged with public-order offenses had the same percentage of pretrial release (65%) in both state and federal courts. However, a higher percentage of state defendants in large counties were released pretrial when charged with drugs (60%), weapons (56%), and violent (52%) offenses, compared to federal pretrial release percentages for drugs (38%), weapons (32%), and violent (30%) offenses.

**TABLE 2**

**Defendants released pretrial for cases in federal courts and in state courts in the 75 most populous counties, by most serious offense charged**

Most serious offense charged	Federal defendants, 2008–2010 <sup>a</sup>		State defendants, 2006 <sup>b</sup>		Percent of defendants released pretrial	
	Number	Percent	Number	Percent	Federal	State
All offenses	280,694	100%	58,100	100%	36%	58%
Violent	8,979	3%	13,295	23%	30%	52%
Property	44,305	16	16,948	29	71	59
Drug	84,436	30	21,232	37	38	60
Public-order	23,014	8	4,667	8	65	65
Weapons	22,325	8	1,958	3	32	56
Immigration	97,635	35	~	~	12	~

Note: Excludes 2,664 federal defendants with unknown offense charges.

<sup>a</sup>Includes all felony and misdemeanor defendants with known offense types whose cases were disposed in federal district courts from fiscal years 2008 to 2010.

<sup>b</sup>Includes a sample of defendants charged with a felony offense in 40 of the nation's 75 most populous counties in May 2006.

~Not applicable for state court data.

Sources: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010; Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2006*, NCJ 228944, May 2010.

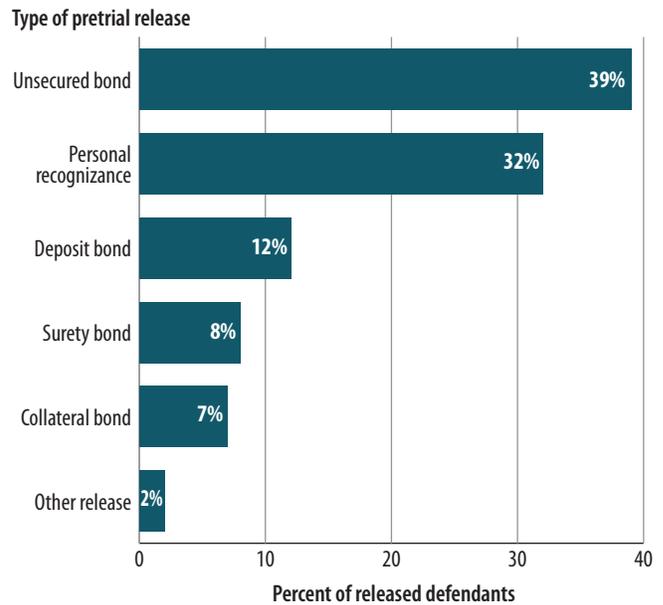
### Nearly three-quarters of federal defendants released pretrial paid no financial bond upon release

From 2008 to 2010, 27% of defendants released pretrial for cases disposed in federal courts were required to pay a financial bond in order to secure that release (table 3). All other releases were through nonfinancial methods, including unsecured bond (39%) or personal recognizance (32%). The use of financial bond varied by offense type, with about two-thirds of released immigration (66%) and over a quarter (29%) of released drug defendants required to post a financial bond to receive pretrial release. In comparison, less than 20% of released defendants charged with property (18%), weapons (17%), public-order (14%), or violent (12%) offenses were required to pay a financial bond.

### 8% of all defendants released pretrial in federal courts used bail bondsmen

The two most common forms of pretrial release in the federal system were unsecured bond and release on personal recognizance, which together accounted for 71% of defendants released pretrial in the federal courts (figure 2). Defendants requiring a financial bond accounted for 27% of all pretrial releases, with 12% posting a deposit bond, 8% using a surety bond (i.e., bail bondsman), and 7% using a collateral bond. In comparison, more than half (55%) of defendants released pretrial in the nation's 75 most populous counties in 2006 were required to post some form of financial bond as part of their release conditions. Defendants released pretrial in these state courts were about five times more likely than those in federal courts to use the services of a commercial bond agent to secure pretrial release (not shown in table). (For more information on state-level data, see *Methodology*.)

**FIGURE 2**  
Types of pretrial release for cases disposed in federal district courts, FY 2008–2010



Note: Includes defendants who were never detained and those who were also detained for part of the pretrial period.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

**TABLE 3**  
Types of pretrial release for cases disposed in federal district courts, by offense type, FY 2008–2010

Most serious offense charged	Number of released defendants <sup>a</sup>	Percent released on—			
		Financial bond <sup>b</sup>	Unsecured bond	Personal recognizance	Other release
All offenses	101,608	27%	39%	32%	2%
Violent	2,668	12%	34%	53%	2%
Property	31,329	18%	47%	34%	1%
Fraudulent	25,375	21	48	31	1
Other	5,954	7	40	50	3
Drug	31,881	29%	41%	30%	1%
Trafficking	26,677	29	42	28	1
Other	5,204	24	35	39	3
Public-order	15,057	14%	39%	45%	3%
Regulatory	2,818	19	43	36	1
Other	12,239	12	38	47	3
Weapons	7,127	17%	46%	36%	1%
Immigration	11,935	66%	16%	10%	8%

Note: Detail may not sum to total due to missing information for offense type. Information on offense type available for 98.4% of released defendants. Excludes 14 defendants for whom type of release could not be determined.

<sup>a</sup>Includes defendants who were never detained and those who were also detained for part of the pretrial period.

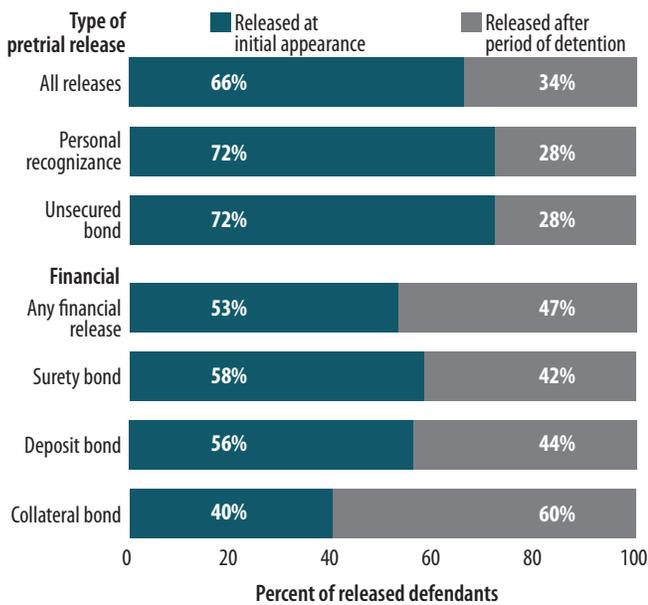
<sup>b</sup>Includes defendants released through deposit, collateral, or surety bond.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

**About half of federal defendants released on financial bond were detained at the initial appearance and then subsequently released**

Among federal defendants released through financial bond from 2008 to 2010, 53% were released at the initial appearance hearing, while 47% were detained and then released at subsequent hearings (figure 3). In comparison, 72% of defendants released through nonfinancial methods, including unsecured bond or personal recognizance, were released at the initial appearance.

**FIGURE 3**  
**Defendants released at initial appearance and released after period of detention for cases disposed in federal district courts, by type of pretrial release, FY 2008–2010**



Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

**9% of detained defendants were held because they could not meet the financial bond**

Ninety-one percent of detained defendants in the federal courts were held either by order of the court (57%) or for other nonfinancial reasons (34%) (table 4). Court-ordered detentions involve cases in which the court mandates that a defendant be held for the entire duration of the case. Other detentions typically involve instances in which the defendant remains detained because the defendant was unable to meet certain conditions set by the court. Defendants detained because they could not meet the monetary bond set by the court accounted for 9% of federal pretrial detentions. In comparison, 86% of defendants detained pretrial in the nation’s 75 most populous counties in 2006 were held because they could not make the financial bond set by the court (not shown in table).

**TABLE 4**  
**Type of pretrial detention for cases disposed in federal district courts, by offense type, FY 2008–2010**

Most serious offense charged	Number of detained defendants <sup>a</sup>	Percent detained on—		
		Financial bond	Court-ordered detention	Other detention <sup>b</sup>
All offenses	180,309	9%	57%	34%
Violent	6,258	2%	65%	33%
Property	12,582	7%	60%	33%
Fraudulent	11,061	8	60	32
Other	1,521	2	62	36
Drug	52,302	4%	70%	26%
Trafficking	45,085	4	71	25
Other	7,217	4	62	34
Public-order	7,667	3%	60%	37%
Regulatory	925	6	57	37
Other	6,742	2	60	37
Weapons	15,115	2%	66%	32%
Immigration	85,453	14%	47%	39%

Note: Detail may not sum to total due to missing information for offense type. Information on offense type available for 99.5% of detained defendants. Excludes 1,427 defendants who were not released but whose type of detention could not be determined.

<sup>a</sup>Includes defendants who were detained for the entire pretrial period.

<sup>b</sup>Includes defendants on temporary pretrial detention and defendants detained because they were unable to meet certain nonfinancial conditions set by the court.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

**Approximately 8 out of 10 released defendants were released with pretrial conditions**

The Bail Reform Act of 1984 allows federal courts to impose conditions of release on defendants released pretrial, which are administered by a pretrial services agency (see text box below). From 2008 to 2010, federal courts attached conditions to 79% of defendants released prior to case disposition (table 5). The federal courts mandated conditional release for 90% or more of released violent, drug, and weapons defendants and imposed conditions on about 80% of released defendants charged with property or public-order offenses. Of released defendants charged with immigration violations, 37% received release conditions.

**TABLE 5**  
**Pretrial conditions imposed on defendants released for cases disposed in federal district courts, by offense type, FY 2008–2010**

Most serious offense charged	Number of released defendants*	Percent of defendants with conditional release
<b>All offenses</b>	101,622	79%
<b>Violent</b>	2,668	90%
<b>Property</b>	31,332	80%
Fraudulent	25,378	82
Other	5,954	76
<b>Drug</b>	31,887	91%
Trafficking	26,683	92
Other	5,204	86
<b>Public-order</b>	15,058	79%
Regulatory	2,818	78
Other	12,240	79
<b>Weapons</b>	7,127	95%
<b>Immigration</b>	11,939	37%

Note: Detail may not sum to total due to missing information for offense type. Information on offense type available for 98.4% of released defendants.

\*Includes defendants who were never detained and those who were also detained for part of the pretrial period.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

**Administering Federal Pretrial Services**

The Federal Pretrial Services Act of 1982 established pretrial services programs for defendants prosecuted in federal district courts (18 U.S.C. Section 3152-3155). As of 2010, more than 22 of the 93 federal judicial districts have separate pretrial service offices headed by a chief pretrial services officer, while the remaining federal judicial districts use federal probation officers to administer pretrial services.

The primary duties of federal pretrial service officers include conducting investigations of persons charged with federal offenses and supervising defendants released into

their custody. Pretrial investigation involves examining the defendant’s background to determine whether to recommend that the court release or detain the defendant.

Defendants under pretrial supervision are typically required to report to a pretrial service officer on a regular basis or reside in a community treatment facility or halfway house. Pretrial service officers can also be involved in providing employment, medical, legal, or social services to supervised defendants.

Source: Cadigan, T.P. (2007). Pretrial services in the federal system: impact of the Pretrial Services Act of 1982, *Federal Probation*, 71(2), pp 10–15.

Among federal defendants released with pretrial conditions from 2008 to 2010, 99% had a travel restriction, while 72% were required to receive substance abuse treatment, 62% had a weapons restriction, and 49% promised to remain employed or seek employment during the pretrial period (table 6). The types of conditions imposed were often related to a defendant's arrest charges. For example, released defendants charged with drug offenses were more likely to receive mandated substance abuse treatment (89%) than released defendants charged with public-order (59%) or property (56%) offenses. A similar pattern held for weapons defendants released with pretrial conditions. Eighty-seven percent of these defendants had a weapons restriction.

Among all other offense types, the percentage with weapons restrictions did not exceed 75%.

Among felony defendants released pretrial in the nation's 75 most populous counties in 2006, 12% were released with pretrial conditions, including participation in a pretrial diversionary program or drug monitoring or treatment. In some jurisdictions, defendants released through surety bond also had pretrial conditions attached to the release. An estimated 6% of felony defendants released through a surety bond in large urban counties in 2006 had conditions attached to the release, including pretrial monitoring (not shown in table).

**TABLE 6**  
Types of pretrial conditions imposed on defendants released for cases disposed in federal district courts, by type of offense, FY 2008–2010

Most serious offense charged	Number of defendants with conditional release*	Conditions imposed on defendants with conditional release					
		Travel restrictions	Substance abuse testing or treatment	Weapon restrictions	Employment restrictions	Home detention/ electronic monitoring	No contact with victim
All offenses	80,302	99%	72%	62%	49%	32%	29%
Violent	2,402	98%	78%	70%	46%	40%	53%
Property	25,203	99%	56%	50%	44%	24%	24%
Fraudulent	20,680	99	54	50	44	25	25
Other	4,523	99	63	51	43	20	22
Drug	28,966	99%	89%	70%	54%	36%	31%
Trafficking	24,490	99	89	72	55	37	32
Other	4,476	99	92	59	48	36	28
Public-order	11,851	99%	59%	53%	39%	37%	26%
Regulatory	2,199	99	54	50	41	25	24
Other	9,652	99	60	54	38	40	27
Weapons	6,740	99%	88%	87%	54%	37%	25%
Immigration	4,384	100%	61%	70%	66%	25%	37%

Note: Excludes released defendants without pretrial conditions. Detail may not sum to total due to missing information for offense type.

\*Includes defendants who were never detained and those who were also detained for part of the pretrial period.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

## Length of pretrial detention

The U.S. Marshals Service's Office of the Federal Detention Trustee (OFDT) provides information on the average amount of time a defendant is detained from arrest to case adjudication or deportation from the U.S. According to the OFDT, the average amount of time in detention for defendants booked on federal charges increased from 112 days (3.7 months) in 2008 to 121 days (4.0 months) in 2010 (table 7).

In 2010, defendants booked on drugs, weapons, or violent offenses spent on average more than 6 months in custody. In comparison, defendants booked on immigration offenses, or violations of probation, parole, or pretrial release conditions, or those held as material witnesses remained in custody for an average of 3 months or fewer. The OFDT also reported that about 27% of defendants booked by U.S. Marshals were ordered detained for 5 days or fewer in 2010 (not shown in table). (For more information about the OFDT, see <http://www.justice.gov/ofdt/index.html>.)

**TABLE 7**  
Average length of stay in detention for persons booked by the U.S. Marshals Service, by offense at booking, FY 2008–2010

Offense at booking	Average length of stay in detention		
	2008	2009	2010
All offenses <sup>a</sup>	112 days	114 days	121 days
Violent	192	233	206
Property	120	95	96
Drugs	197	238	226
Other	127	111	117
Weapons	197	222	218
Immigration	72	82	86
Supervision <sup>b</sup>	82	72	79
Material witness	36	37	39
Not reported	51	28	63
Number of persons booked	188,806	211,986	221,681

<sup>a</sup>Includes persons for whom the offense at booking was not reported or was unknown.

<sup>b</sup>Includes parole, supervised release, and probation violations.

Sources: U.S. Marshals Service, Prisoner Tracking System, FY 2008–2010, and <http://www.justice.gov/ofdt/detention.htm>.

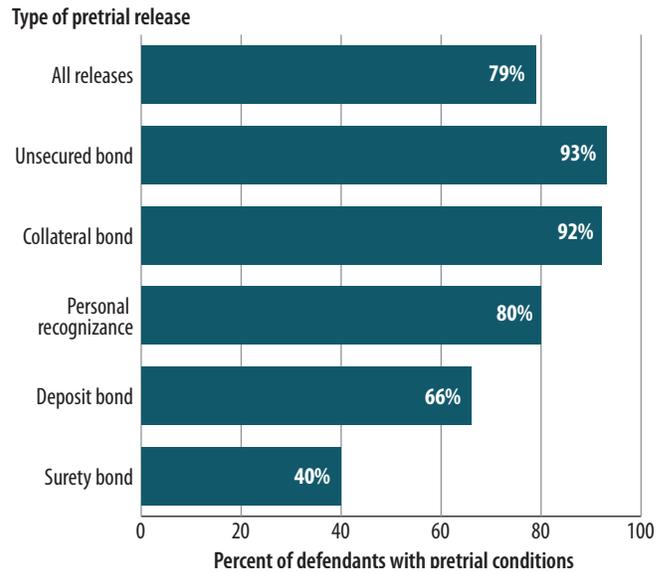
**Federal defendants released on financial bond received pretrial conditions less frequently than defendants released through nonfinancial means**

From 2008 to 2010, federal courts imposed conditions on 64% of defendants released through financial bond (not shown in figure). Among the types of financial release, 40% of defendants with a surety bond release and 66% of defendants with a deposit bond release received pretrial conditions (figure 4). In comparison, 80% of defendants released on personal recognizance and 93% of defendants released on unsecured bond received pretrial conditions.

**Percentages of pretrial release were lower for defendants with serious or lengthy criminal histories**

When making a determination regarding the eligibility of a defendant for pretrial release, federal law requires that the judicial officer (i.e., district court judge or magistrate) consider the defendant’s criminal history, including record of court appearances. The federal data show that the rate of pretrial release declined with the severity of a defendant’s criminal history. About half (51%) of defendants with no prior arrest history were released pretrial, compared to 34% of defendants with 2 to 4 prior arrests and 21% of defendants with more than 10 prior arrests (table 8). The nature of a

**FIGURE 4**  
Pretrial conditions imposed on released defendants for cases disposed in federal district courts, by type of pretrial release, FY 2008–2010



Source: Administrative Office of the U.S. Courts, Office Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

**TABLE 8**  
Defendants released pretrial for cases disposed in federal district courts, by criminal history and most serious offense charged, FY 2008–2010

Criminal history	All offenses		Percent released, by most serious offense charged					
	Total	Percent released*	Violent	Property	Drug	Public-order	Weapons	Immigration
<b>All defendants</b>	283,358	36%	30%	71%	38%	65%	32%	12%
<b>Number of prior arrests</b>								
None	74,879	51%	52%	75%	38%	80%	51%	20%
1	35,503	42	44	77	49	70	55	12
2 to 4	64,034	34	33	74	46	61	46	10
5 to 10	59,089	27	21	64	36	47	32	10
11 or more	49,408	21	11	46	23	36	19	11
<b>Number of prior convictions</b>								
None	109,294	48%	47%	75%	42%	77%	51%	18%
1	44,737	35	36	76	47	65	47	10
2 to 4	69,785	28	24	68	38	51	34	10
5 to 10	43,278	23	15	52	26	39	24	10
11 or more	15,819	20	9	42	20	34	17	11
<b>Nature of prior convictions</b>								
Misdemeanor conviction only	52,008	41%	42%	79%	54%	77%	53%	10%
Felony conviction	121,611	23	12	55	27	35	25	10
Nonviolent	27,091	28	21	61	40	50	37	12
Drug	44,225	23	17	56	28	40	31	9
Violent	50,295	19	9	47	22	25	21	9
<b>Prior failure to appear</b>								
None	237,169	37%	33%	73%	40%	69%	37%	12%
1	20,073	31	23	61	34	45	25	13
2 or more	25,671	27	16	54	28	45	20	12

Note: Detail may not sum to total due to missing information for defendant criminal history. Information on the number of prior felony arrests or convictions, nature of prior convictions, and failure to appear history available for 99.8% of released defendants.

\*Includes defendants who were never detained and those who were also detained for part of the pretrial period.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

defendant's criminal history also influenced the probability of pretrial release. Forty-one percent of defendants with prior misdemeanor convictions were released pretrial, while 23% of defendants with prior felony convictions were released prior to case disposition. In addition, pretrial misconduct history correlated with the pretrial release decision. Thirty-seven percent of defendants with no history of missed court appearances were released pretrial, while 27% of defendants with two or more prior failure-to-appear events received a pretrial release.

Criminal history was also related to the stage in which a defendant was released pretrial. Nearly 30% of defendants with no prior convictions were released pretrial after a period of detention. In comparison, 46% for defendants with more than 10 prior convictions were released pretrial after being detained (not shown in table).

Similar to the federal system, many state courts have established specific criteria to consider when setting release conditions, including the defendant's criminal background. Data examining felony defendants processed in the nation's 75 most populous counties in 2006 illustrate how release rates vary according to a defendant's criminal history. Among these state courts, nearly three-quarters (74%) of

defendants with no prior convictions were released pretrial, while about two-fifths (39%) of defendants with five or more prior convictions were released prior to case adjudication (not shown in table).

### Nearly two-thirds of whites, less than half of blacks, and a fifth of Hispanics secured pretrial release

Among all racial and ethnic categories of defendants released pretrial, higher percentages of Asian/Pacific Islander (66%) and white non-Hispanic (65%) defendants were released in the federal system from 2008 to 2010, compared to American Indian/Alaska Native (54%), black non-Hispanic (43%), or Hispanic (20%) defendants (table 9). In general, Hispanic defendants had the lowest rates of pretrial release and were less likely to be released than white defendants for all major federal offense categories. Black defendants were also less likely than white defendants to be released pretrial for all major federal offense categories. The differences in pretrial release rates between black and white defendants were particularly large for drug offenses, as white defendants (60%) were more than one and a half times more likely to receive a pretrial release than black defendants (36%).

**TABLE 9**  
**Defendants released pretrial for cases disposed in federal district courts, by demographic characteristics, citizenship status, and most serious offense charged, FY 2008–2010**

Demographic characteristic and citizenship status	All offenses		Percent released, by most serious offense charged					
	Total	Percent released <sup>a</sup>	Violent	Property	Drug	Public-order	Weapons	Immigration
All defendants	283,358	36%	30%	71%	38%	65%	32%	12%
<b>Sex</b>								
Male	243,863	31%	26%	66%	34%	63%	30%	11%
Female	39,121	65	62	80	62	80	71	34
<b>Age</b>								
17 or younger	339	50%	67%	74%	28%	^	^	28%
18–19	6,513	37	43	57	43	66%	36%	17
20–29	97,829	31	32	62	37	62	27	11
30–39	95,175	31	23	65	35	59	30	11
40 or older	83,118	47	31	80	42	71	44	15
<b>Race/ethnicity</b>								
White <sup>b</sup>	60,427	65%	30%	82%	60%	73%	46%	41%
Black/African American <sup>b</sup>	54,346	43	22	76	36	57	27	34
Hispanic/Latino	155,036	20	23	48	26	49	24	11
American Indian/Alaska Native <sup>b</sup>	4,049	54	42	78	62	58	35	53
Asian/Pacific Islander <sup>b</sup>	5,569	66	42	78	59	76	41	52
<b>Citizenship status</b>								
U.S. citizen	148,348	55%	31%	82%	47%	69%	34%	59%
Legal alien	15,100	43	35	71	30	60	39	46
Illegal alien	116,321	10	5	28	5	21	5	8

Note: Detail may not sum to total due to missing information for demographic characteristics and citizenship status. Race/ethnicity excludes defendants classified as other race. Information on race and ethnicity was available for 99.0% of defendants, sex was available for 99.9%, age was available for 99.9%, and citizenship status was available for 98.7%.

^Too few cases to provide a reliable rate.

<sup>a</sup>Includes defendants who were never detained and those who were also detained for part of the pretrial period.

<sup>b</sup>Excludes persons of Hispanic or Latino origin.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

State-level data on pretrial release across racial and ethnic categories varied less than federal data. In the nation's 75 most populous counties through the combined years from 1990 through 2004, black defendants (62%) were released at statistically similar percentages as white defendants (68%), while Hispanics had a lower likelihood of pretrial release (55%) (not shown in table).

**A greater percentage of females were released pretrial than males**

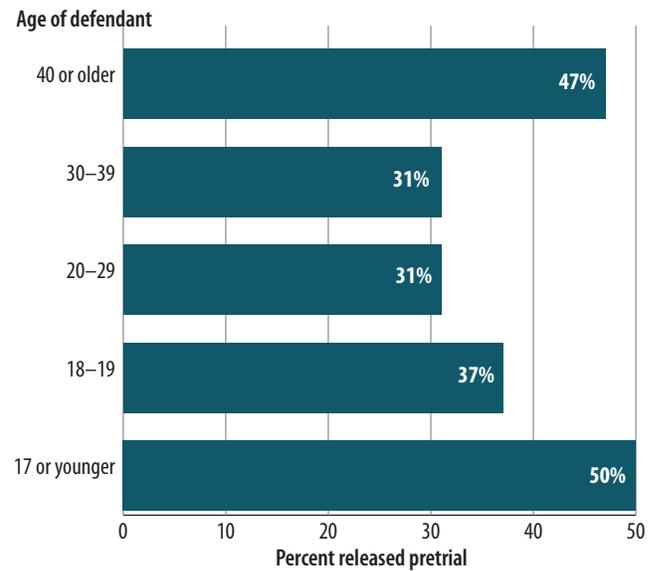
Female defendants (65%) were released more frequently than males (31%) in the federal courts from 2008 to 2010. This remained consistent across all major federal offense categories. At the state level, females (74%) were more likely to be released than males (60%) in the nation's most populous counties from 1990 to 2004 (not shown in table).

**Defendants ages 18 to 39 were less likely to be released than those age 17 or younger or age 40 or older**

The likelihood of pretrial release and defendant age had a curved relationship, as a greater percentage of younger and older defendants were released pretrial than defendants in the middle age ranges. For example, 50% of defendants age 17 or younger were released pretrial, compared to 31% of defendants ages 20 to 39 (figure 5). Defendants age 40 or older were released at higher rates (47%) than defendants ages 18 to 39.

The curved pattern of pretrial release (i.e., declining for defendants in the middle age ranges and then rising for those age 41 or older) did not hold for defendants charged with violent or immigration offenses. For the violent offense category, defendants ages 17 or younger were two times more likely to be released (67%), compared to defendants age 40 or older (31%). The percentage of immigration defendants released pretrial was relatively low regardless of the defendant's age.

**FIGURE 5**  
Percent of defendants released pretrial for cases disposed in federal district courts, by age of defendant, FY 2008–2010



Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

**U.S. citizen defendants were more than 5 times more likely than noncitizen illegal alien defendants to be released pretrial**

Overall, the federal courts released 10% of noncitizen defendants identified as illegal aliens. In comparison, 43% of legal aliens and 55% of U.S. citizens received a pretrial release prior to case disposition. Percentages of pretrial release for illegal alien defendants exceeded 20% for some offense categories, including property (28%) and public-order (21%) offenses. For the remaining offense categories, however, less than 10% of defendants identified as illegal aliens were released prior to case disposition.

**Among all defendants, black and American Indian/Alaska Native defendants had more serious criminal histories than white defendants**

Factors courts were required by the 1984 Bail Reform Act to consider for pretrial release, including criminal history and citizenship status, varied across racial and ethnic categories. For example, black and American Indian/Alaska Native defendants generally had more extensive criminal histories than white defendants. During the combined period from 2008 through 2010, 61% of black and 43% of American Indian/Alaska Native defendants had five or more prior arrests, compared to 36% of whites (table 10). Moreover, a higher percentage of black (46%) and American Indian/Alaska Native (33%) defendants had a prior violent felony conviction compared to white (27%) defendants.

Hispanics and whites had relatively similar criminal backgrounds. For instance, a similar percentage of whites (43%) and Hispanics (41%) had no history of prior convictions when they were brought into the federal courts.

**About three-quarters of all Hispanic defendants were non-U.S. citizen illegal aliens**

A defendant's citizenship status constitutes another important factor that federal courts consider when making pretrial release decisions. Ninety percent of noncitizen illegal alien defendants were detained pretrial (not shown in table). Almost three-quarters of Hispanic defendants in the federal courts were non-U.S. citizen illegal aliens, while a fifth of Hispanic defendants in federal courts had U.S. citizenship. In comparison to Hispanic defendants, 95% or more of white, American Indian/Alaska Native, and black defendants were U.S. citizens. Asian/Pacific Islander defendants were the only other race category in which sizable minorities of defendants were either noncitizen legal aliens (26%) or illegal aliens (13%).

**TABLE 10**  
**Race and ethnicity of defendants for cases disposed in federal district courts, by criminal history and citizenship status, FY 2008–2010**

Criminal history and citizenship status	White*	Black/African American <sup>a</sup>	Hispanic/Latino	American Indian/Alaska Native <sup>a</sup>	Asian/Pacific Islander <sup>a</sup>
<b>Number of prior arrests</b>					
None	32%	15%	28%	24%	50%
1	13	7	14	11	17
2 to 4	20	18	26	23	16
5 to 10	18	26	21	21	10
11 or more	18	35	12	22	7
<b>Number of prior convictions</b>					
None	43%	24%	41%	32%	66%
1	14	12	18	15	14
2 to 4	20	27	26	24	13
5 to 10	15	25	12	18	6
11 or more	7	13	3	11	2
<b>Nature of prior convictions<sup>b</sup></b>					
Misdemeanor conviction only	35%	18%	33%	46%	42%
Felony conviction	65	82	67	54	58
Nonviolent	16	9	19	11	18
Drug	22	27	27	10	17
Violent	27	46	22	33	23
<b>Citizenship status</b>					
U.S. citizen	95%	95%	20%	98%	61%
Legal alien	3	3	7	1	26
Illegal alien	3	3	73	1	13
<b>Number of defendants</b>	60,427	54,346	155,036	4,049	5,569

Note: Excludes defendants classified as other race. Information on race and ethnicity was available for 99.0% of defendants, citizenship status was available for 98.7%, and information on criminal history was available for 99.8% of defendants. Felony conviction percentages may not sum to total due to rounding.

\*Excludes persons of Hispanic or Latino origin.

<sup>b</sup>Includes only defendants with a prior conviction record.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

## 17% of federal defendants released prior to case disposition committed technical violations

Technical violations (such as violations of pretrial conditions, including drug test failure or failure to maintain electronic reporting requirements) were committed by 17% of defendants released prior to case disposition from 2008 to 2010 (table 11). Defendants released on weapons (30%), drug (25%), and violent (24%) offenses had the highest rates of technical violations, while immigration defendants released pretrial had the lowest rates of violating their pretrial conditions (6%). The relatively low rate of technical violations for immigration defendants may be due to federal courts typically not attaching pretrial conditions to these defendants when released prior to disposition.

From 2008 to 2010, relatively few released defendants either failed to make court appearances (1%) or were rearrested for new offenses (4%). The percentage of defendants with missed court appearances did not exceed 2% across the major offense types. Rearrest percentages ranged from 1% for immigration defendants to 8% for weapons defendants.

Fifty-six percent of defendants who committed misconduct had their release revoked by the federal courts (not shown in table). Twenty-one percent of released weapons and more than 15% of violent (18%) and drug (16%) defendants had their release revoked, while less than 10% of released property (7%), public-order (6%), and immigration defendants (4%) had a pretrial release revocation.

In comparison, a third of released defendants in the nation's 75 most populous counties committed some form of pretrial misconduct during 2006. Half of pretrial misconduct events involved bench warrants that were issued due to missed court appearances, while a similar percentage of defendants with pretrial misconduct were rearrested for new offenses committed during the pretrial release period (not shown in table). In 2006, the percentage of defendants charged with pretrial misconduct was highest for drug defendants (37%) and lowest for those released after being charged with a violent offense (26%) (not shown in table).

**TABLE 11**  
Behavior of defendants released pretrial for cases disposed in federal district courts, by offense type, FY 2008–2010

Most serious offense charged	Number of released defendants	Percent of released defendants who had—				
		At least one violation	Failed to appear	Technical violations of bond conditions	A rearrest for new offense*	Release revoked
<b>All defendants</b>	101,622	19%	1%	17%	4%	11%
<b>Violent</b>	2,668	26%	1%	24%	4%	18%
<b>Property</b>	31,332	15%	1%	13%	3%	7%
Fraudulent	25,378	14	1	12	3	7
Other	5,954	16	1	14	3	9
<b>Drug</b>	31,887	28%	2%	25%	5%	16%
Trafficking	26,683	29	2	26	6	17
Other	5,204	24	2	23	4	12
<b>Public-order</b>	15,058	12%	1%	11%	2%	6%
Regulatory	2,818	10	1	9	2	5
Other	12,240	12	1	11	2	6
<b>Weapons</b>	7,127	33%	2%	30%	8%	21%
<b>Immigration</b>	11,939	7%	1%	6%	1%	4%

Note: Detail will not sum to total because a defendant could have more than one type of violation. Information on offense type available for 98.4% of released defendants.

\*Includes felony and misdemeanor offenses.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

**Prior criminal activity correlated with higher rates of pretrial misconduct in the federal courts**

Released defendants with substantial criminal histories engaged in pretrial misconduct more frequently than defendants with less serious criminal backgrounds. From 2008 to 2010, released defendants with more than 10 prior arrests committed technical violations (29%) at a higher rate than defendants with two to four prior arrests (20%) or defendants with no arrest history (9%) (table 12). Defendants with more than 10 prior arrests also had a higher likelihood of being rearrested for new offenses (8%) than defendants who had never been arrested prior to the current case (2%).

In addition, federal courts were more likely to revoke the releases of defendants with more serious criminal histories. More than 20% of released defendants with more than 10 prior arrests or convictions received a release revocation, compared to less than 10% of defendants with no history of prior arrests or convictions.

Prior criminal activity was also associated with higher rates of pretrial misconduct in state courts. For pretrial release and misconduct in the nation's 75 most populous counties from 1990 to 2004, defendants with at least one prior felony conviction (43%) had a higher rate of pretrial misconduct than defendants with misdemeanor convictions only (34%) or no prior convictions (27%) (not shown in table). (See *Methodology*.)

**TABLE 12**  
**Misconduct of defendants released pretrial for cases disposed in federal district courts, by criminal history, FY 2008–2010**

Criminal history	Number of released defendants	Percent of released defendants who had—				
		At least one violation	Failed to appear	Technical violations of bond conditions	A rearrest for new offense*	Release revoked
<b>All defendants</b>	101,622	19%	1%	17%	4%	11%
<b>Number of prior arrests</b>						
None	38,009	10%	1%	9%	2%	5%
1	14,902	16	2	14	3	8
2 to 4	21,909	22	2	20	4	12
5 to 10	16,044	28	2	26	6	17
11 or more	10,547	33	2	29	8	21
<b>Number of prior convictions</b>						
None	52,790	13%	1%	12%	2%	6%
1	15,842	20	2	18	4	11
2 to 4	19,785	25	2	23	5	15
5 to 10	9,771	31	2	27	7	19
11 or more	3,223	35	2	31	9	24
<b>Nature of prior convictions</b>						
Misdemeanor conviction only	21,214	24%	2%	21%	5%	14%
Felony conviction	27,407	27	2	24	6	16
Nonviolent	7,672	20	2	17	5	12
Drug	10,065	28	2	25	6	17
Violent	9,670	31	2	28	8	19
<b>Prior failure to appear</b>						
None	88,262	17%	1%	15%	3%	9%
1	6,204	29	2	27	6	17
2 or more	6,945	37	2	33	8	22

Note: Detail may not sum to total because a defendant could have more than one type of violation. Not all violations resulted in revocation. Information on number of prior felony arrests or convictions, nature of prior convictions, and failure to appear history available for 99.8% of released defendants.

\*Includes felony and misdemeanor offenses.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

**Black and American Indian/Alaska Native defendants were charged with pretrial misconduct more frequently than white and Hispanic defendants**

In the federal courts, 29% of released American Indian/Alaska Native and 27% of released black defendants had at least one violation of their pretrial conditions, while 18% of released white, 16% of released Asian/Pacific Islander, and 14% of released Hispanic defendants engaged in some form of pretrial misconduct from 2008 to 2010 (table 13). Black and American Indian/Alaska Native defendants were also charged with technical violations of their release conditions, rearrested for new offenses, and had their pretrial release statuses revoked at higher rates than white, Asian/Pacific Islander, or Hispanic defendants.

The percentage of males (20%) committing pretrial misconduct was slightly higher than females (17%). As with pretrial release, there was a curved relationship between age and pretrial misconduct, with younger and older defendants charged with pretrial misconduct less frequently than defendants in the mid-age range. Seventeen percent of defendants age 17 or younger committed some form of pretrial misconduct, compared to 24% of defendants ages 20 to 29 and 14% of defendants age 40 or older.

**TABLE 13**  
**Misconduct of defendants released pretrial for cases disposed in federal district courts, by demographic characteristics and citizenship status, FY 2008–2010**

Demographic characteristic and citizenship status	Number of released defendants	Percent of released defendants who had—				
		At least one violation	Failed to appear	Technical violations of bond conditions	A rearrest for new offense <sup>a</sup>	Release revoked
All defendants	101,622	19%	1%	17%	4%	11%
<b>Sex</b>						
Male	75,991	20%	2%	18%	4%	11%
Female	25,438	17	1	15	3	9
<b>Age</b>						
17 or younger	169	17%	2%	15%	2%	10%
18–19	2,387	22	1	21	4	14
20–29	30,630	24	2	22	5	14
30–39	29,039	20	2	18	4	11
40 or older	39,202	14	1	13	2	7
<b>Race/ethnicity</b>						
White <sup>b</sup>	39,534	18%	1%	16%	3%	10%
Black/African American <sup>b</sup>	23,570	27	2	24	6	15
Hispanic/Latino	30,542	14	2	13	2	9
American Indian/Alaska Native <sup>b</sup>	2,172	29	2	27	5	22
Asian/Pacific Islander <sup>b</sup>	3,663	16	1	14	2	6
<b>Citizenship status</b>						
U.S. citizen	81,902	22%	1%	20%	4%	12%
Legal alien	6,481	17	5	14	3	10
Illegal alien	11,793	2	1	2	--	1

Note: Detail may not sum to total because a defendant could have more than one type of violation. Excludes defendants classified as other race. Information on race and ethnicity available for 98.5% of released defendants. Information on sex available for 99.8% of released defendants, age available for 99.8%, and citizenship status available for 98.6%.

--Less than 0.5%

<sup>a</sup>Includes felony and misdemeanor offenses.

<sup>b</sup>Excludes persons of Hispanic or Latino origin.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

**Defendants released on financial bond had fewer technical violations than defendants released through nonfinancial methods**

From 2008 to 2010, the percentage of released defendants committing technical violations of their pretrial conditions was lower for defendants released on deposit (14%) or surety (7%) bond, compared to defendants released on unsecured

bond (19%) or personal recognizance (19%) (table 14). This variation is due in part to the relatively lower rates in which courts attach pretrial conditions to those released through financial bond. In comparison to technical violations, the differences between financial and nonfinancial release in terms of missed court appearances or rearrests for new offenses were fairly similar across the various types of pretrial release.

**TABLE 14**  
**Misconduct of defendants released pretrial for cases disposed in federal district courts, by type of pretrial release, FY 2008–2010**

Type of release	Number of released defendants	Percent of released defendants who had—				
		At least one violation	Failed to appear	Technical violations of bond conditions	Rearrested for new offense*	Release revoked
<b>All releases</b>	101,622	19%	1%	17%	4%	11%
<b>Financial release</b>	27,271	15%	2%	13%	3%	8%
Collateral bond	6,577	20	2	18	5	10
Deposit bond	12,359	17	2	14	3	10
Surety bond	8,335	8	1	7	1	5
<b>Unsecured bond</b>	39,734	21%	2%	19%	4%	11%
<b>Personal recognizance</b>	32,292	21%	1%	19%	4%	12%

Note: Detail may not sum to total because a defendant could have more than one type of violation. Excludes financial and nonfinancial release types for 2,325 defendants with a release classified as other or whose release types could not be determined.

\*Includes felony and misdemeanor offenses.

Source: Administrative Office of the U.S. Courts, Office of Probation and Pretrial Services Automated Case Tracking System, 2008–2010.

## Methodology

### Federal Justice Statistics Program (FJSP)

Data used for this report are from the Bureau of Justice Statistics' (BJS) Federal Justice Statistics Program (FJSP) database. The FJSP is presently constructed from source files provided by the U.S. Marshals Service, Executive Office for U.S. Attorneys, Administrative Office of the U.S. Courts (AOUSC), United States Sentencing Commission, and Federal Bureau of Prisons. In addition to providing data describing defendants in cases processed by the federal judiciary, the AOUSC provides data describing defendants processed by the federal pretrial services agencies and the federal probation and supervision service. For more information about the methodology used for the FJSP, see the BJS website.

### Office of Probation and Pretrial Services Automated Case Tracking System (PACTS)

For this report, all tables were created from data in the AOUSC's Office of Probation and Pretrial Services Automated Case Tracking System (PACTS), which were subsequently processed for the FJSP. The PACTS data contain information on defendants interviewed, investigated, or supervised by federal pretrial services. The information covers defendant pretrial hearings, detentions, and releases from the time they are interviewed through the disposition of their cases in federal district courts. The data describe defendants processed by federal pretrial service agencies within each of the 93 federal judicial districts. Defendants who received pretrial services through a local, nonfederal agency were excluded. Since the District of Columbia operates its pretrial services agency separate from the AOUSC, data describing defendants prosecuted in the U.S. district court for the District of Columbia but processed by the D.C. pretrial services agency were excluded in this analysis.

The data describe 283,358 defendants who were under the jurisdiction of federal pretrial services from October 1, 2007, through September 30, 2010 (i.e., fiscal years 2008 through 2010), and whose cases were filed by complaint, indictment, or information. Federal pretrial service agencies have jurisdiction over both released and detained defendants from the time of arrest until their case is disposed by the federal courts. A disposition occurs through a guilty plea or trial conviction, dismissal, or acquittal.

In these tables, the totals include records for defendants whose offense or other attributes were missing or unknown. The percentage distributions are based on nonmissing values, and missing values are reported in the table footnotes.

Offenses in the PACTS are based on the most serious charged offense, as determined by the probation officer responsible for interviewing the defendant. The probation officer classifies the major offense charged into AOUSC four-

digit offense codes. For defendants charged with more than one offense on an indictment, the probation officer chooses as the major charged offense the one carrying the most severe penalty or, in the case of two or more charges carrying the same penalty, the one with the highest offense severity. The offense severity level is determined by the AOUSC, which ranks offenses according to the maximum sentence, type of crime, and maximum fine amount. These four-digit codes are then aggregated into the primary offense charges used for this report.

### Defining pretrial release within the PACTS data

Defendants are identified as released pretrial if they were released anytime during the period between the initial appearance hearing and case adjudication. At the initial appearance, the defendant could either be released pretrial or detained for additional hearings. For those defendants not released at initial appearance, pretrial release could occur at subsequent events, including detention or bond hearings, or the defendant could be held for the entire duration of a case. For this report, the total pretrial release rate includes those defendants released at initial appearance, as well as those released after a period of detention.

In addition, the number of released defendants reported in the BJS *Federal Justice Statistics* reports for fiscal years 2008 and 2009 differ from those in this report due to recent adjustments with the PACTS data. For the 2008 and 2009 reports, defendants were identified as being released pretrial only if they were released during the initial appearance or detention hearing stages of a criminal case. Pretrial releases did not cover defendants released after these events and showed release rates of 29% in fiscal year 2008 and 31% in fiscal year 2009. The 2008 and 2009 PACTS files analyzed for this report were adjusted so that defendants released anytime during the course of a case were coded as released pretrial. These adjustments resulted in pretrial release rates of 35% for both fiscal years 2008 and 2009. This method of identifying released defendants encompasses a broader range of releases and is similar to those used in BJS's Federal Justice Statistics reports that were published prior to 2008. For more information, see *Federal Justice Statistics, 2008 –Statistical Tables*, NCJ 231822, BJS website, November 2008, and *Federal Justice Statistics, 2009*, NCJ 234184, BJS website, December 2011.

The forms of pretrial release and detention shown in the report are reported as mutually exclusive categories. However, a single defendant may have multiple forms of pretrial release and detention. For example, the court may have initially released a defendant on their own recognizance, and then the defendant may have been brought back to court on a technical violation with a financial bond set. The PACTS data only cover the initial and not subsequent release methods. In addition, pretrial release conditions, such as drug monitoring or treatment, are counted separately from the release types because federal courts typically attach such conditions regardless of how a defendant was released.

## State level data on pretrial release

In this report, the federal pretrial data were compared with state-level data when possible. Information on pretrial release and misconduct in state courts was obtained from reports that used data from the State Court Processing Statistics (SCPS) data collection program (most recent data are for 2006). SCPS provides data on the criminal justice processing of felony defendants in a sample of 40 of the nation's 75 most populous counties. The program prospectively tracks felony defendants from charging by the prosecutor during the month of May of an even number year until disposition of their case or for a maximum of 12 months. The SCPS project obtains data on a variety of felony case processing characteristics in addition to information about pretrial release and misconduct in state courts. Some of the core data elements collected in SCPS included demographic characteristics, arrest offenses, criminal justice status at the time of arrest, prior arrests and convictions, bond and pretrial release, court appearance record, rearrests while on pretrial release, adjudication outcomes including whether and how the defendant was convicted, and type and length of sentence. (For more information, see *Felony Defendants in Large Urban Counties, 2006*, NCJ 228944, BJS website, May 2010, and *Pretrial Release of Felony Defendants in State Courts, 1990-2004*, NCJ 214994, BJS website, November 2007.)

## Key terms

*Initial appearance*—The first time that a defendant charged with a federal offense appears before a federal judicial officer, typically a magistrate judge. At the initial appearance stage, the defendant can either be released pretrial or detained for additional hearings. For those defendants not released at initial appearance, pretrial release can occur at subsequent events including detention or bond hearings, or the defendant can be held for the duration of the entire case.

*Federal court disposition*—The act of terminating a case proceeding through a guilty plea or trial conviction, dismissal, or acquittal. The defendant is no longer under supervision of the federal pretrial authority after disposition.

*Defendant (unit of analysis)*—In the Federal Justice Statistics Program, the unit of analysis is a combination of a person and a case. For example, if the same person is involved in three different criminal cases during the period specified in this report, then these cases are counted as three defendants, or three cases disposed. Similarly, a single criminal case involving four defendants is counted as four cases disposed.

*Released defendant*—Defendant is released pretrial prior to case disposition. A release can occur anytime from initial appearance to case disposition. Under this definition, defendants are considered released even if they had been initially detained by the court.

## Types of pretrial release

Defendants may be released without financial conditions according to the following methods:

*Personal recognizance*—The defendant is released subject to no financial or other conditions.

*Unsecured bond*—No money is required to be posted before release, but the defendant is liable for full bond amount if the defendant fails to appear.

*Conditional release*—Any combination of restrictions that are deemed necessary to guarantee the defendant's appearance at trial or the safety of the community. These conditions commonly place restrictions on the defendant's movements, associations, or actions. They may also involve employment or treatment for medical, psychological, or substance abuse conditions. Pretrial conditions are typically attached to defendants released without financial bond; however, courts can impose pretrial conditions on defendants receiving a financial release.

Defendants may also be released on financial conditions. Financial conditions include the following methods:

*Deposit bond*—The defendant is required to post a percentage of the total bond amount with the federal court, (usually 10%).

*Surety bond*—The defendant is released subject to guarantees by a third person, usually a bail bondsman, that the full amount will be paid.

*Collateral bond*—Money or property equal to the full bond amount required to be posted by the defendant before release.

Financial conditions may occur in combination with nonfinancial conditions.

## Types of pretrial detention

According to the Bail Reform Act of 1984, preventive detention is applicable in instances in which the defendant was charged with—

- 1) a crime of violence
- 2) an offense with a statutory maximum sentence of life imprisonment or death
- 3) a drug offense with a statutory maximum sentence of 10 years or more imprisonment
- 4) any felony offense if the defendant had been convicted on two or more occasions of an offense described above or a similar state-level offense.

A defendant on preventive detention is typically detained during the entire period from initial appearance through case adjudication. Other forms of pretrial detention include detention because defendants could not meet the financial bond set by the court or because they were unable to meet specified pretrial conditions.

*Pretrial misconduct*—Instances in which a released defendant violated their pretrial release conditions.

### **Types of pretrial misconduct**

The following types of events are included under pretrial misconduct:

*Technical violation*—Events in which the defendant failed to comply with their pretrial release conditions, including failing a drug test, failing to maintain or seek employment, refusing to maintain contact with a pretrial supervision officer, or violating weapons prohibitions.

*Failure to appear*—Occurs when a defendant misses a scheduled court appearance.

*Rearrest for new offenses*—Occurs when a defendant is rearrested for felony or misdemeanor offenses committed while out on pretrial release.

### **Definitions of major offense categories**

*Violent*—Includes murder, non-negligent or negligent manslaughter, aggravated or simple assault, robbery, rape or sexual abuse, kidnapping, and threats against the President.

*Property*—Includes fraudulent and other types of property offenses.

*Fraudulent property*—Includes embezzlement, fraud (including tax fraud), forgery, and counterfeiting.

*Other property*—Includes burglary, larceny, motor vehicle theft, arson, transportation of stolen property, and other property offenses, such as destruction of property and trespassing.

*Drug*—Includes offenses prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance), or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

*Public-order*—Includes regulatory and other types of offenses.

*Regulatory public-order*—Includes violation of regulatory laws and regulation in agriculture, antitrust, labor law, food and drug, motor carrier, and other regulatory offenses.

*Other public-order*—Includes nonregulatory offenses concerning tax law violations (tax fraud), bribery, perjury, national defense, escape, racketeering and extortion, gambling, liquor, mailing or transporting of obscene materials, traffic, migratory birds, conspiracy, aiding and abetting, jurisdictional offenses, and other public-order offenses.

*Weapons*—Includes violations of any of the provision of 18 U.S.C. 922–923 concerning the manufacturing, importing, possessing, receiving, and licensing of firearms and ammunition.

*Immigration*—Includes offenses involving illegal entrance into the United States, illegally reentering after being deported, willfully failing to deport when so ordered, or bringing in or harboring any aliens not duly admitted by an immigration officer.



The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. James P. Lynch is the director.

This Special Report was written by Thomas H. Cohen. Mark Motivans verified the report.

Jill Thomas and Morgan Young edited the report, and Barbara Quinn produced the report under the supervision of Doris J. James. Barbara Parthasarathy of Urban Institute provided comments.

November 2012, NCJ 239243



**Office of Justice Programs**  
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# Exhibit 8

## Attorney General Eric Holder Speaks at the National Symposium on Pretrial Justice

Washington, DC ~ Wednesday, June 1, 2011

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Thank you, Mary Lou Leary, for your kind words, for your years of service to the Justice Department, and for the extraordinary leadership that you – and Assistant Attorney General Laurie Robinson – are providing to the Office of Justice Programs. You and your team have done a great job of bringing so many critical partners together for this symposium.

It's a privilege to join with top federal officials; members of the bench and of the bar; federal, state, and local law enforcement and corrections officers; jail and prison administrators; victims; prosecutors; former defendants; and advocacy organizations – as we examine, discuss, and – ultimately – work to improve the state of pretrial justice in America.

Your insights and expertise are essential to this work. I want to thank each of you – especially Tim Murray, Judge Truman Morrison, and their colleagues at the Pretrial Justice Institute – for your participation. Like Tim and Judge Morrison, many of you have been on the front lines of efforts to strengthen and reform the pretrial process for decades. And your work has helped to ensure fairness, efficiency, and public safety.

But – as you've discussed this morning – we have much more to do. This symposium marks an important step forward in what I know – and what I pledge – will be an ongoing conversation about how we can achieve safe and fair pretrial release and diversion practices in our communities – and, in so doing, make our justice system both more effective and more efficient.

As extraordinary as this gathering is, it's important to note that it is hardly unprecedented. Nearly half a century ago, our nation's 64<sup>th</sup> Attorney General, Robert Kennedy, launched the national dialogue we're extending today when he convened the first-ever National Conference on Bail and Criminal Justice here in Washington.

That landmark gathering helped to raise awareness about the need for pretrial justice reform, and to usher in a wave of meaningful changes – most notably, the Federal Bail Reform Act of 1966, which constituted the first major restructuring of the federal system since the year George Washington was sworn in as president.

Before Robert Kennedy's historic conference, there was limited understanding about the cost and public safety benefits of allowing for the release of defendants on their own recognizance, pending trial. And few states had established such policies. But soon after Attorney General Kennedy helped to shine a light on this issue, there was a flurry of activity in state legislatures nationwide – as proposals were formulated, considered, and implemented. By 1999, in one form or another, virtually every state had put these policies into effect.

Policymakers, law enforcement officers, and judges across the country helped to design appropriate procedures to detain without bail those defendants who were deemed too dangerous for release – or who posed a flight risk – while at the same time safeguarding due process and civil rights. Today – after decades of study, analysis, and cooperation – there is no doubt that, compared to Kennedy's time, current pretrial release and diversion programs are not only more effective, but more just.

And yet – serious problems, as well as significant inefficiencies, remain.

As we speak, close to three quarters of a million people reside in America's jail system. When they are sent home or sentenced to prison, they will cycle out, and others will cycle in – so that, by the end of the year, 10 million individuals will have been involved in nearly 13 million jail admissions and releases.

Across the country, nearly two thirds of all inmates who crowd our county jails – at an annual cost of roughly nine billion taxpayer dollars – are defendants awaiting trial. That's right, nearly two thirds of all inmates.

Many of these individuals are nonviolent, non-felony offenders, charged with crimes ranging from petty theft to public drug use. And a disproportionate number of them are poor. They are forced to remain in custody – for an average of two weeks, and at a considerable expense to taxpayers – because they simply cannot afford to post the bail required – very often, just a few hundred dollars – to return home until their day in court arrives.

This link between financial means and jail time is troubling in its own right. But it's compounded by the fact that many inmates become ineligible for health benefits while they're in jail – imposing an additional burden on taxpayers when they're released, and often are forced to rely on emergency rooms for even the most routine medical treatments.

Now, the reality is that it doesn't have to be this way. Almost all of these individuals could be released and supervised in their communities – and allowed to pursue or maintain employment, and participate in educational opportunities and their normal family lives – without risk of endangering their fellow citizens or fleeing from justice. Studies have clearly shown that almost all of them could reap greater benefits from appropriate pretrial treatment or rehabilitation programs than from time in jail – and might, as a result, be less likely to end up serving long prison sentences.

But, within the confines of the current system, we too often find ourselves with few – if any – viable alternatives to incarceration.

This is where today's conversation begins – and why this symposium is so important. By competently assessing risk of release, weighing community safety alongside relevant court considerations, and engaging with pretrial service providers – in private agencies, as well as in courts, probation departments, and sheriff's offices – we can design reforms to make the current system more equitable, while balancing the concerns of judges, prosecutors, defendants, and advocacy organizations. We can help those serving on the bench make informed decisions that improve cost-effectiveness and preserve safety needs, as well as due process. And we can spark, as Robert Kennedy did, not only a vital discussion – but unprecedented progress.

I'm proud to report that, already, the Department of Justice is working to support pretrial services – and evidence-based decision making – in jurisdictions across the country. Together with our partners at the Pretrial Justice Institute and the National Association of Counties, we're providing guidance to elected officials at the local level, and soliciting perspectives from experienced pretrial management professionals. We're examining new ways to ensure that risk assessment is an integral part of the conversation. And, to that end, we've published a report – based on the research and recommendations of experts from across the country – on how to improve our capabilities and manage defendant risk when it comes to detention and release decisions.

At the same time, we're working to improve reentry policies, so we can have an impact on both ends of the process – from pretrial justice, to the smooth reintegration of those we release from custody. In January, I chaired the first meeting of the Interagency Reentry Council, composed of seven Cabinet Members and other top Administration officials – which, last year, awarded almost \$100 million under the Second Chance Act to support substance abuse treatment, employment assistance, housing, mentoring, and other reentry services. In total, we now support some 250 reentry programs, and have launched rigorous evaluations to measure the degree to which they reduce recidivism.

There's no reason why we can't – or shouldn't – adopt a similarly broad-based approach to the pretrial justice system. But, with federal, state, and municipal resources in high demand and short supply, the simple truth is that government simply can't solve these problems alone. We need to engage key partners and innovators across the country to guide our efforts, to bring an expanded network of stakeholders to the table, and to push for responsible reform.

So, to be blunt – we need your expertise. We need your ideas. And we need your help.

Our discussions must be grounded in rational and transparent risk assessments – built on evidence-based tools, and predicated on the presumption of innocence – but ever mindful of the need to keep our neighborhoods safe.

Each of you can play a key role in this effort. You can help us find ways to support the growth of pretrial service agencies and diversion programs in the more than 300 jurisdictions where they already exist – and encourage their creation where they do not. You can fight to ensure that, for every defendant who enters the system, our judges have access to the best information possible – along with a range of supervision and service options, as well as sound guidelines to inform their decisions.

And you can broaden our engagement with other experts on the ground, raising the profile of this work – and igniting, once again, a movement for meaningful change.

The call for such a movement was first issued nearly half a century ago, at the very first gathering of this kind, when Robert Kennedy challenged this nation, “to see to it that for the poor man, the word ‘law’ does not mean an enemy, a technicality, an obstruction. Let us see to it that law, for all men, means justice.”

This is the mission, the legacy, and the cause that we now must carry forward.

As we rededicate ourselves to this work, I can’t help but feel optimistic about where we’ll arrive – and what we will achieve – together. Not only do I look forward to hearing about the discussions that you will have – and the recommendations that you will develop – during this symposium, I look forward to our continued partnership, our continued progress, and our continued pursuit of security, opportunity, and justice for all.

Thank you.

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**Speaker:**

Attorney General: Eric H. Holder, Jr.

**Component(s):**

Office of the Attorney General

*Updated August 18, 2015*

# Exhibit 9

IN THE COURT OF APPEALS OF MARYLAND

R U L E S   O R D E R

This Court's Standing Committee on Rules of Practice and Procedure having submitted its One Hundred Ninety-Second Report to the Court, recommending the adoption of proposed new Rule 4-216.1 and amendments to current Rules 4-212, 4-213, 4-213.1, 4-214, 4-215, 4-216, 4-216.1, 4-216.2, 4-217, 4-349, 5-101, and 15-303 and Form 4-217.2 of the Maryland Rules of Procedure, all as posted for comment on the website of the Maryland Judiciary; and

An open hearing having been held by the Court on January 5, 2017, notice of which was posted as prescribed by law, at which the Court considered written comments and oral presentations regarding the proposed Rules changes; and

After more than an hour of discussion among the Members of the Court, the Court having (1) declared the evidentiary record to be closed, (2) deferred further consideration of the

proposals by the Court until an open meeting on February 7, 2017, and (3) consistent with prior practice, requested that any Member of the Court who desired language changes to address that Member's questions or concerns regarding the proposed Rules to contact the Chair of the Rules Committee individually for the purpose of drafting such language for consideration by the Court at the February 7, 2017, meeting; and

As a result of such contacts, a Supplemental Report by the Chair of the Rules Committee containing proposed language changes as requested by Member(s) of the Court, for consideration on February 7, 2017, having been filed with the Court and posted on the website of the Maryland Judiciary on January 20, 2017; and

In furtherance of the ongoing process of addressing judicial concerns, further contacts having been made by individual Judges of the Court with the Chair of the Rules Committee, and, as a result of such contacts, Supplement No. 2 having been filed with the Court and posted on the website of the Maryland Judiciary on February 1, 2017; and

This Court having considered at an open meeting on February 7, 2017, notice of which was posted as prescribed by law, the 192nd Report, the comments received to it, and the two Supplements and having made certain amendments to the proposed Rules changes on its own initiative, it is this 17th day of February, 2017,

ORDERED, by the Court of Appeals of Maryland, that new Rule 4-216.1 and amendments to current Rules 4-212, 4-213, 4-213.1, 4-214, 4-215, 4-216, 4-216.1, 4-216.2, 4-217, 4-349, 5-101, and 15-303 and Form 4-217.2 be, and they are hereby, adopted in the form attached to this Order; and it is further

ORDERED that the Rules changes hereby adopted by this Court shall govern the courts of this State and all parties and their attorneys in all actions and proceedings and shall take effect and apply to all actions commenced on or after July 1, 2017, and, insofar as practicable, to all actions then pending; and it is further

ORDERED that a copy of this Order be posted promptly on the website of the Maryland Judiciary.

/s/ Mary Ellen Barbera  
Mary Ellen Barbera

/s/ Clayton Greene, Jr.  
Clayton Greene, Jr.

/s/ Sally D. Adkins  
Sally D. Adkins

/s/ Robert N. McDonald  
Robert N. McDonald

/s/ Shirley M. Watts  
Shirley M. Watts

/s/ Michele D. Hotten  
Michele D. Hotten

/s/ Joseph M. Getty  
Joseph M. Getty

Filed: February 16, 2017

/s/ Bessie M. Decker  
Clerk  
Court of Appeals of Maryland

MARYLAND RULES OF PROCEDURE  
TITLE 4 - CRIMINAL CAUSES  
CHAPTER 200 - PRETRIAL PROCEDURES

ADD new Rule 4-216.1, as follows:

Rule 4-216.1. PRETRIAL RELEASE - STANDARDS GOVERNING

(a) Definitions

The following definitions apply in this Rule:

(1) Appearance; Appear

"Appearance" or "appear" means the appearance of the defendant in court whenever required.

(2) Bond

"Bond" means a written obligation of the person signing the bond conditioned on the appearance of the defendant and providing for the payment of a penalty sum according to its terms.

(3) Collateral Security

"Collateral security" means any property deposited, pledged, or encumbered to secure the performance of a bond.

(4) Compensated Surety

"Compensated surety" means a person who is licensed to become a surety on bonds written in the county and who charges compensation for acting as surety for defendants.

(5) Release on Personal Recognizance

"Release on personal recognizance" means a release, without the requirement of a bond, based on a written promise by the defendant (A) to appear in court when required to do so, (B) to commit no criminal offense while on release, and (C) to comply with all other conditions imposed by the judicial officer pursuant to this Rule, Rule 4-216.2, or by other law while on release.

Committee note: The principal differences between a personal recognizance and a bond are that the former does not provide for payment of a penalty sum if the defendant fails to appear when required and is not subject to any financial conditions.

(6) Special Condition

"Special condition" means a condition of release required by a judicial officer, other than the conditions that the defendant appear in court when required to do so and commit no criminal offense while on release.

(7) Special Condition of Release with Financial Terms

"Special condition of release with financial terms" means the requirement of collateral security or the guarantee of the defendant's appearance by a compensated surety as a condition of the defendant's release. The term does not include (A) an unsecured bond by the defendant or (B) the cost associated with a service that is a condition of release and is affordable by the defendant or waived by the court.

Committee note: Examples of a condition of release that is not a special condition of release with financial terms are

participation in an ignition interlock program, use of an alcohol consumption monitoring system, and GPS monitoring.

(8) Surety

"Surety" means a person other than the defendant who, by executing a bond, guarantees the appearance of the defendant and includes an uncompensated or accommodation surety.

(9) Surety Insurer

"Surety insurer" means a person in the business of becoming, either directly or through an agent, a surety on a bond for compensation.

(10) Uncompensated Surety

"Uncompensated surety" means an accommodation surety who does not charge or receive compensation for acting as a surety for the defendant.

(b) General Principles

(1) Construction

(A) This Rule is designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond. Additional conditions should be imposed on release only if the need to ensure appearance at court proceedings, to protect the community, victims, witnesses, or any other person and to maintain the integrity of the judicial process is demonstrated by the circumstances of the individual case. Preference should be given to additional conditions without financial terms.

(B) This Rule shall be construed to permit the release of a defendant pending trial except upon a finding by the judicial officer that, if the defendant is released, there is a reasonable likelihood that the defendant (i) will not appear when required, or (ii) will be a danger to an alleged victim, another person, or the community. If such a finding is made, the defendant shall not be released.

Cross reference: Code, Criminal Procedure Article, §5-101. For the inapplicability of the Rules in Title 5 to pretrial release proceedings, see Rule 5-101 (b).

(2) Individualized Consideration

A decision by a judicial officer whether or on what conditions to release a defendant shall be based on a consideration of specific facts and circumstances applicable to the particular defendant, including the ability of the defendant to meet a special condition of release with financial terms or comply with a special condition and the facts and circumstances constituting probable cause for the charges.

(3) Least Onerous Conditions

If a judicial officer determines that a defendant should be released other than on personal recognizance or unsecured bond without special conditions, the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release set forth in section (d) of this Rule that will reasonably ensure (A) the appearance of the defendant, and (B) the safety of each alleged victim, other

persons, and the community and may impose a financial condition only in accordance with section (e) of this Rule.

Committee note: If a defendant was arrested without a warrant and the judicial officer finds no probable cause for any of the charges or for the arrest, Rule 4-216 (a) requires that the defendant be released on personal recognizance, with no conditions imposed.

(4) Exceptions

Nothing in this Rule is intended to preclude a defendant from being held in custody based on an alleged violation of (A) a condition of pretrial release, a release under Rule 4-349, or an order of probation or parole previously imposed in another case, or (B) a condition of pretrial release previously imposed in the instant case.

(c) Release on Personal Recognizance or Unsecured Bond

(1) Generally

Except as otherwise limited by Code, Criminal Procedure Article, §5-101 or §5-202, unless the judicial officer finds that no permissible non-financial condition attached to a release will reasonably ensure (A) the appearance of the defendant, and (B) the safety of each alleged victim, other persons, or the community, the judicial officer shall release a defendant on personal recognizance or unsecured bond, with or without special conditions. If the judicial officer makes such a finding, the judicial officer shall state the basis for it on the record.

Committee note: Pursuant to section (b) of this Rule, the preference should be for release on personal recognizance.

Cross reference: Code, Criminal Procedure Article, §5-101 (c) precludes release on personal recognizance if the defendant is charged with certain crimes. Section 5-202 of that Article precludes release by a District Court commissioner if the defendant is charged with certain crimes under certain circumstances.

(2) Permissible Conditions

Permissible conditions for purposes of this section include the required conditions set forth in subsection (d)(1) and the special conditions set forth or authorized in subsection (d)(2) of this Rule.

(d) Special Conditions of Release

(1) Required Conditions

There shall be included, as conditions of any release of the defendant, that (A) the defendant will not engage in any criminal conduct during the period of pretrial release, and (B) the defendant will appear in court when required to do so.

(2) Special Conditions

Subject to section (b) of this Rule, special conditions of release imposed by a judicial officer under this Rule may include, to the extent appropriate and capable of implementation:

(A) one or more of the conditions authorized under Code, Criminal Law Article, §9-304 reasonably necessary to stop or prevent the intimidation of a victim or witness or a violation

of Code, Criminal Law Article, §§9-302, 9-303, or 9-305, including a general no-contact order;

(B) reasonable restrictions with respect to travel, association, and place of residence;

(C) a requirement that the defendant maintain employment or, if unemployed, actively seek employment;

(D) a requirement that the defendant maintain or commence an educational program;

(E) a reasonable curfew, taking into account the defendant's employment, educational, or other lawful commitments;

(F) a requirement that the defendant refrain from possessing a firearm, destructive device, or other dangerous weapon;

(G) a requirement that the defendant refrain from excessive use of alcohol or use or possession of a narcotic drug or other controlled dangerous substance, as defined in Code, Criminal Law Article, §5-101 (f), without a prescription from a licensed medical practitioner;

(H) a requirement that the defendant undergo available medical, psychological, or psychiatric treatment or counseling for drug or alcohol dependency;

(I) electronic monitoring;

(J) periodic reporting to designated supervisory persons;

(K) committing the defendant to the custody or supervision of a designated person or organization that agrees to supervise the defendant and assist in ensuring the defendant's appearance in court;

Committee note: The judicial officer may commit the defendant generally to supervision by a pretrial services unit operating in the county, subject to more detailed requirements of that unit appropriate to the supervision.

(L) execution of unsecured bonds by the defendant and an uncompensated surety who (i) has a verifiable and lawful personal relationship with the defendant, (ii) is acceptable to the judicial officer, and (iii) is willing to execute such a bond in an amount specified by the judicial officer;

(M) execution of a bond in an amount specified by the judicial officer secured by the deposit of collateral security equal in value to not more than 10% of the penalty amount of the bond or by the obligation of a surety, including a surety insurer, acceptable to the judicial officer;

(N) execution of a bond secured by the deposit of collateral security of a value in excess of 10% of the penalty amount of the bond or by the obligation of a surety, including a surety insurer, acceptable to the judicial officer; and

Committee note: A compensated surety qualified under Rule 4-217 is presumptively acceptable. Before finding an uncompensated surety to be acceptable, the judicial officer should inquire into the ability of the proposed surety to satisfy the condition of the bond if called upon to do so. Whenever possible, however, the judicial officer should give preference to an uncompensated surety having a verifiable and lawful personal relationship with the defendant and, if collateral security is

required, should accept the posting of adequate real or personal property of that surety or the defendant. This preference is based on the inference that the defendant may be more likely to appear when required if the liability and property of a friend or family member is at risk.

(O) any other lawful condition that will help ensure the appearance of the defendant or the safety of each alleged victim, other persons, or the community.

(e) Release on Special Conditions

(1) Generally

(A) A judicial officer may not impose a special condition of release with financial terms in form or amount that results in the pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition. In making that determination, the judicial officer may consider all resources available to the defendant from any lawful source.

Committee note: Information regarding the defendant's financial situation may come from several sources. The Initial Appearance Questionnaire Form used by District Court commissioners seeks information from the defendant regarding employment, occupation, amount and source of income, housing status, marital status, and number of dependents relying on the defendant's income. The criminal and juvenile record checks made by the commissioner also may reveal relevant information. Additional information may be available to the judge at a bail review proceeding from a defense attorney, the State's Attorney, and a pretrial services unit.

(B) Special conditions of release with financial terms are appropriate only to ensure the appearance of the defendant and may not be imposed solely to prevent future criminal conduct during the pretrial period or to protect the safety of any person

or the community; nor may they be imposed to punish the defendant or to placate public opinion.

(C) Special conditions of release with financial terms may not be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.

(2) Other Permissible Conditions

If the judicial officer finds that one or more special conditions also may be required to reasonably ensure (A) the appearance of the defendant, and (B) the safety of each alleged victim, other persons, or the community, the judicial officer may impose on the defendant one or more special conditions in accordance with section (d) of this Rule.

(f) Consideration of Factors

(1) Recommendation of Pretrial Release Services Program

In determining whether a defendant should be released and the conditions of release, the judicial officer shall give consideration to the recommendation of any pretrial release services program that has made a risk assessment of the defendant in accordance with a validated risk assessment tool and is willing to provide an acceptable level of supervision over the defendant during the period of release if so directed by the judicial officer.

(2) Other Factors

In addition to any recommendation made in accordance

with subsection (f) (1) of this Rule, the judicial officer shall consider the following factors:

(A) the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction;

(B) the defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

(C) the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;

(D) any request made under Code, Criminal Procedure Article, §5-201 (a) for reasonable protections for the safety of an alleged victim;

(E) any recommendation of an agency that conducts pretrial release investigations;

(F) any information presented by the State's Attorney and any recommendation of the State's Attorney;

(G) any information presented by the defendant or defendant's attorney;

(H) the danger of the defendant to an alleged victim, another person, or the community;

(I) the danger of the defendant to himself or herself; and

(J) any other factor bearing on the risk of a willful failure to appear and the safety of each alleged victim, another person, or the community, including all prior convictions and any prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult.

(g) Disclosure

If the judicial officer requires collateral security, the judicial officer shall advise the defendant that, if the defendant or an uncompensated surety posts the required cash or other property, it will be refunded at the conclusion of the criminal proceedings if the defendant has not defaulted in the performance of the conditions of the bond.

Source: This Rule is new.

# Exhibit 10

Maryland Politics

# Maryland's highest court overhauls the state's cash-based bail system

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By **Ovetta Wiggins** and **Ann E. Marimow** February 7

Maryland's highest court voted unanimously Tuesday to overhaul the state's bail policies, essentially abolishing a system in which poor people could languish behind bars for weeks or months before trial because they could not post bond.

The rule change, which takes effect July 1, requires judges to impose the "least onerous" conditions when setting bail for a defendant who is not considered a danger or a flight risk.

That means Maryland will join a handful of states, including New Mexico, Kentucky and New Jersey, that have moved away from bail as part of a larger criminal-justice overhaul movement.

Judges will be required for the first time to consider whether a defendant can afford to make bail before setting their pretrial release conditions. They must also weigh whether defendants pose a risk of committing another crime or of not appearing for their next court date.

The directive approved by the rules committee of the Maryland Court of Appeals says that "preference should be given to additional conditions without financial terms," court spokesman Kevin Kane said.

Maryland Attorney General Brian E. Frosh (D), who has been pushing for an overhaul of the system, called the rules change a "huge step forward" that will lead to "more justice in Maryland."

"If you're poor, you're not going to be held in jail just because you can't make bail," Frosh said. The new rules, he said, tell judges to "keep dangerous people behind bars" and to "let the vast majority who are not a threat out" before trial.

Under the current system, judges often require defendants to leave a certain amount of money with the court in exchange for release in advance of trial. People who cannot make bail on their own or with the help of bail bondsmen — who guarantee payment to the court in exchange for a percentage of the bail amount — remain locked up.

Nationally, about 47 percent of felony defendants who are required to post bond remain jailed before their cases are heard because they cannot come up with the required amount.

In Maryland, more than 46,000 defendants between 2011 and 2015 were detained more than five days at the start of their criminal case, according to a 2016 report by the Maryland Office of the Public Defender. Of those, more than 17,000 were held on less than a \$5,000 bail.

A draft version of the rules change posted on the court's website does not eliminate money bail or bail bondsmen. But it says that judges "may not impose a financial condition, in form or amount, that he or she knows or has reason to believe that the defendant is financially incapable of meeting."

The District passed a law in the 1990s that also prohibited judges from imposing a "financial condition" that a person could not pay. That law, too, did not explicitly prohibit money bail.

But in practice, it effectively got rid of the bail-bond business in the District.

Bail bondsmen in Maryland have vehemently opposed changing the state's system, either through the court's rules committee or through legislation in the State House in Annapolis.

On Tuesday, Vinnie Magliano, president of East Coast Bailbonds, said the court was "moving one million miles an hour in the wrong direction."

Magliano, a member of the Maryland Bail Bonds Association, said the industry will consider pushing the legislature to roll back the court's decision. "I'm advocating for sensible reform," he said. "I think this goes too far."

Doug Mayer, a spokesman for Gov. Larry Hogan (R), said the governor's office had not seen the rules change and could not comment.

In January, the judges heard more than five hours of testimony about the merits of reforming the system, including from former U.S. attorney general Eric H. Holder Jr., and about the benefits of keeping the current policies in place.

Maryland's legislature has been debating whether to limit or eliminate cash bail for more than a decade, with critics of the current system calling it discriminatory and potentially unconstitutional.

Frosh, a former state senator who had pushed for change in the legislature without success, asked the appeals court late last year to consider changing the directives given to judges as they set bail.

Five Democratic lawmakers who were also eager to abolish bail had asked Frosh to weigh in on whether the state's system could pass constitutional muster.

Frosh's office issued an opinion that said the system, which set bails at amounts many defendants cannot afford, could violate due process.

Del. Erek L. Barron (D-Prince George's), one of the five legislators, said Tuesday that he was "encouraged" by the ruling but did not want to comment further without seeing the final decision.

Barron said the legislature needs to focus its efforts on providing statewide pretrial services, including an assessment of whether a defendant is dangerous or a flight risk, and an economic evaluation. Montgomery and St. Mary's counties already have those services, although judges there can still set bail.

The decision by the judges cannot be appealed, but the Maryland legislature could pass a law changing the rules.

**Read more:**

[When it comes to pretrial release, few other jurisdictions do it D.C.'s way](#)

[In Maryland, a fight is brewing over cash bail for poor defendants](#)

 **74 Comments**

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Ovetta Wiggins covers Maryland state politics in Annapolis.  Follow @OvettaWashPost

Ann Marimow covers legal affairs for The Washington Post. She joined the Post in 2005, and has covered state government and politics in California, New Hampshire and Maryland.  Follow @amarimow

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# Exhibit 11

2017

# Trends in State Courts



Fines, Fees, and  
Bail Practices:  
Challenges and  
Opportunities



[www.ncsc.org](http://www.ncsc.org)





# Bail Reform in New Jersey

**Hon. Stuart Rabner** Chief Justice, New Jersey Supreme Court

Many defendants who pose no real threat to public safety languish in jail pretrial because they cannot afford bail. New Jersey is using a risk-assessment system, rather than monetary bail, to determine whether defendants should be held in jail before trial.



Before signing the Bail Reform Act of 1966, President Lyndon B. Johnson spoke of the need to reform a justice system in which some criminal defendants could post bail and buy their freedom while others would languish in jail before trial—not because they were guilty or likely to flee, but because they were poor. The scales of justice, Johnson observed, were weighted “not with fact, nor law, nor mercy,” but with money.

A half century later, that problem is still with us. As recently as 2012, a study of New Jersey’s county jail population revealed that one in eight inmates were in jail because they could not make bail of \$2,500 or less. They did not pose a risk of danger or flight but sat in jail because they did not have enough money to post even a modest amount of bail.

Meanwhile, defendants who posed serious risks to public safety could be released if they had access to money.

In 2016, as in 1966, money typically decided who was released before trial and who sat in jail until trial began.

*“Criminal justice reform in New Jersey has had broad-based support. In 2012, the governor publicly called for an amendment to the state constitution to allow for pretrial detention. In 2013, the judiciary formed the Joint Committee on Criminal Justice, composed of representatives from all three branches of government.”*



## There is a better way.

On January 1, New Jersey's criminal justice system started to adapt to its most significant transformation in decades. We shifted from a system that relied heavily on monetary bail to one that objectively measures the risk defendants pose on two levels: Will they show up for trial? Will they commit a crime while on release? Under the new risk-based system, those who present a substantial risk of danger or flight can be detained pending trial. Those who do not will be released on conditions that pretrial services officers will monitor.

Why does this matter? Because whether a defendant is released pretrial is one of the most significant decisions in the criminal justice system. There are real consequences for poor defendants, often members of minority groups, who pose little risk but sit in jail for weeks and months while they are presumed innocent. During that time, they may lose jobs when they fail to show up for work. They may lose contact with family members. They may lose custody of children. And the cost to taxpayers to house a low-risk defendant can amount to \$100 or more per day.

In his speech in 1966, President Johnson cited examples of how the bail system punished people simply for being poor. Johnson recalled a defendant who spent two months in jail and lost his job, his car, and his family, only to later win an acquittal. Another defendant spent 54 days in jail because he could not post \$300 bail for a traffic offense that carried a maximum sentence of five days.

Time spent in jail can also become an incentive for a defendant to plead guilty and receive a sentence for time served. Studies show that defendants held pretrial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released pretrial.



The consequences are equally grave at the other end of the spectrum. Some defendants charged with serious offenses pose a great risk that they will commit new crimes or try to intimidate or retaliate against witnesses. Their pretrial release raises a genuine concern about public safety.

For those and other reasons, a national movement is underway to reform the criminal justice system, and New Jersey has been active in a number of ways.

Criminal justice reform in New Jersey has had broad-based support. In 2012 the governor publicly called for an amendment to the state constitution to allow for pretrial detention. In 2013 the judiciary formed the Joint Committee on Criminal Justice, composed of representatives from all three branches of government. The committee's 33 members included the attorney general and county prosecutors, the public defender and private defense attorneys, counsel for the ACLU, judges, and staff. A year later, many of the committee's recommendations were adopted by the legislature, with the strong backing of the senate president and the assembly speaker, and signed into law by the governor.

The public took the next major step. In November 2014 more than 60 percent of New Jersey voters approved a constitutional amendment that gave judges, for the first time, the ability to detain defendants to ensure their appearance in court and protect the safety of the community.

Since then, all parts of the criminal justice system have been hard at work to make reform a reality. A risk-assessment tool has been developed in partnership with the Laura and John Arnold Foundation; that tool has been validated with data from thousands of actual New Jersey cases. Pilot programs in three vicinages trained staff and tested new technology. The supreme court adopted court rules to implement the law. The attorney general issued guidelines to law enforcement statewide. And the administrative director of the courts, public defender, director of the Division of Criminal Justice, and others led 15 seminars for a total of more than 3,000 county officials throughout the state to train stakeholders about the new law and foster coordination across the justice system.

### Here is how it will all work.

On January 1, the court system began using the risk-assessment tool to help judges make more informed decisions about pretrial release. To predict whether a defendant poses a low, moderate, or high level of risk, pretrial services officers now review each defendant's criminal history, record of prior court appearances, and other objective information—as they will in an estimated 50,000 cases per year. Officers then make a recommendation to the judge.

Most defendants will be released pretrial on a range of conditions that will not include money bail. For low-risk defendants, the court may simply direct an officer to send a text message or place a phone call to remind defendants when they must appear in court. Defendants who pose greater risks may be placed on electronic monitoring. Those considered a serious threat to public safety or risk of flight will be detained. Judges can also modify conditions of release based on new circumstances.

# Trends in the U.S.

## New Mexico Denial-of-Bail Measure

In November 2016, New Mexico voters approved Constitutional Amendment 1, which allows courts to deny bail to a defendant charged with a felony if a prosecutor shows evidence that the defendant poses a threat to the public, while also providing that a defendant cannot be denied bail because of a financial inability to post a bond.

See “Constitutional Amendment 1,” at <https://tinyurl.com/ly55yhd>.



Defendants who are detained will be subject to the new law's speedy trial provisions, which impose time limits for when a defendant must be indicted and when a trial must begin.

In recent years, some jurisdictions have successfully implemented a risk-based approach. In Lucas County, Ohio, for example, nearly twice the number of defendants are being released pretrial on conditions without bail. During that time, the percentage of defendants who skipped a court date has been dramatically reduced, and the number of defendants arrested while on release has been cut in half. The rate of violent crimes committed by defendants on pretrial release has also gone down.

Like all changes, the reforms underway will be hard to achieve. They will succeed only with the continued cooperation among partners throughout the criminal justice system and the continued support of all branches of government. We have made great strides—collectively—so far, and there is more work ahead of us.

Together, we can build a better, fairer, and safer system of criminal justice.

# Exhibit 12

## Sec. 54-23. - Bail.

- (a) Any person detained or imprisoned for the commission of a crime as defined in this chapter shall be entitled to bail at the earliest practical time after such detention or imprisonment.
- (b) The judges of the municipal and traffic court shall cause to be published a bail schedule as specified in this subsection and subsections (c) and (d), below. The schedule shall be equally available to booking officers, defendants, and their attorneys and prosecutors. The schedule shall be consistent and in accordance with existing state law.
- (c) For all municipal offenses not specified in section (d), the bail schedule shall direct that the defendant shall be released on his or her own recognizance, without the requirement of posting any financial obligation. Such defendants are to be released from custody immediately after booking. They are to be directed to appear in the municipal and traffic court for their initial appearance hearing at a time and date set by the court, with the exception of defendants charged with section 54-97—Assault, section 54-153—Criminal trespass, section 54-403—Disturbing the peace, section 54-376—Cruelty to animals; and section 54-151—Criminal damage to property, who shall be released on their own recognizance and shall be directed to appear for their initial appearance with 24 hours.
- (d) For the municipal offenses specified in this section, the bail schedule shall direct that the defendant is to be detained until the initial appearance hearing, which is to be held no later than 24 hours after the time of the arrest. The specified offenses are: Section 54-96—Battery; section 54-341—Illegal carrying of weapons; section 54-444—Impersonating a peace officer; and section 54-526—Domestic violence.
- (e) At the initial appearance hearing of all defendants, whether appearance is a result of subsection (c) or (d), the court must determine whether there is a substantial risk that the defendant may flee or poses an imminent danger to any other person or the community.
  - (1) Absent such a finding, the court shall release the defendant on his or her own recognizance.
  - (2) If there is such a finding:
    - i. The court shall impose the least restrictive non-financial release conditions, tailored specifically to address the risk of flight or danger to the community, including peace bonds, stay away orders and protective orders. For any person who qualifies for indigent defense, or does not have the present ability to pay, the court may not set a non-financial release condition that requires fees or costs to be paid by the defendant.
    - ii. Should the court impose a secured financial condition, the court must make an inquiry into the defendant's ability to pay and a finding that the person has the present ability to pay the amount set. If the court does impose a secured financial condition, in no event shall the bond exceed \$2,500.00.
  - (3) The court shall state on the record the basis for any and all bail or release obligations

imposed by the court.

- (f) No defendant awaiting trial, after the initial appearance hearing, shall be detained only because they do not have enough money to post bond. No defendant may be detained because of failure to abide by a non-financial release condition due to inability to pay. Neither the court nor any agent thereof may impose a financial condition that results in the pretrial detention of any person after the initial appearance hearing, except as provided in section (g) below.
- (g)
- (1) If a person who has been released on recognizance under this ordinance is later arrested and detained for another violation of the New Orleans Municipal Code or on a warrant for failure to appear during the pendency of the earlier charge, the sheriff shall bring that person to the initial appearance hearing to be held on later than 24 hours after arrest.
  - (2) If the court determines after a hearing that a defendant has willfully failed to appear for a court date in the present proceeding and that all previous attempts at imposing non-financial conditions have failed to ensure the defendant's presence in court, the court may set a financial bail.

(Code 1956, § 42-4; M.C.S., Ord. No. 27232, § 1, 1-12-17)

**State Law reference—** Bail, R.S. 15:81 et seq.

# Exhibit 13

## IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

### GENERAL ORDER NO. 18.8A. Procedures for bail hearings and pretrial release

This order is intended to ensure no defendant is held in custody prior to trial solely because the defendant cannot afford to post bail, to ensure fairness and the elimination of unjustifiable delay in the administration of justice, to facilitate the just determination of every criminal proceeding, and to preserve the public welfare and secure the fundamental human rights of individuals with interests in criminal court cases,

This order is effective as provided below:

1. This order applies to all rulings on bail pursuant to Article 110 of the Code of Criminal Procedure, 725 ILCS 5/110-1, *et seq.*, (Art. 110) including rulings on review of prior bail decisions, on the following schedule:
  - a. effective September 18, 2017, in all felony cases;
  - b. effective January 1, 2018, in all cases.
2. Prior to the initial bail hearing and at such other times as the court may direct, Pretrial Services shall request information from the defendant regarding the defendant's ability, within 48 hours, to post monetary bail. All information gathered by Pretrial Services from the defendant regarding the ability to pay monetary bail shall be provided to the court.
3. For all bailable defendants, Pretrial Services shall use a risk-assessment tool approved by the chief judge to assist the court in establishing reasonable bail for a defendant by assessing the defendant's likelihood of appearing at future court proceedings or determining if the defendant poses a real and present threat to the physical safety of any person or persons. Public disclosure of information used with the assessment tool by Pretrial Services to assist the court shall be governed by the Pretrial Services Act, 725 ILCS 185/0.01, *et seq.*
4. If the court determines that release on bail is not appropriate, the court shall, in substance, make one or more of the following findings and state the finding(s), together with sufficient supporting facts, on the record in open court:
  - a. the defendant will not appear as required, and no condition or combination of conditions of release can reasonably assure the defendant's appearance in court; or
  - b. the defendant poses a real and present threat to any person or persons, as defined in 725 ILCS 5/110-1(d).

Where applicable, the court shall also make a finding that the proof is evident or the presumption great that the defendant has committed the offense charged.

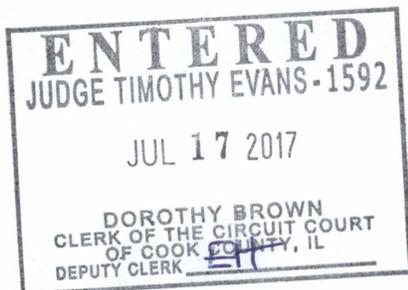
5. When setting bail, there shall be a presumption that any conditions of release imposed shall be non-monetary in nature, and the court shall impose the least restrictive conditions or combination of conditions necessary to reasonably assure the appearance of the defendant for further court proceedings. Said conditions shall include conditions necessary to ensure the defendant does not pose a real and present threat to the physical safety of any person. The court shall consider the defendant's social and economic circumstances when setting conditions of release.
6. Prior to setting or modifying a condition of release that includes monetary bail, the court shall conduct an inquiry into the defendant's ability to pay monetary bail. Such inquiry shall allow the prosecutor, defense counsel, and the defendant the opportunity to provide the court with information pertinent to the defendant's ability to pay monetary bail. This information may be provided by proffer, and may include statements by the defendant's relatives or other persons who are present at the hearing and have information about the defendant's ability to pay monetary bail. All information shall be admissible if it is relevant and reliable, regardless of whether it would be admissible under the rules of evidence applicable at criminal trials.
7. When the court determines that monetary bail is a necessary condition of release, the court shall, in substance, make the following findings and state them, together with sufficient supporting facts, on the record in open court:
  - a. no other conditions of release, without monetary bail, will reasonably assure the defendant's appearance in court;
  - b. the amount of bail is not oppressive, is considerate of the financial ability of the defendant, and the defendant has the present ability to pay the amount necessary to secure his or her release on bail; and
  - c. the defendant will comply with the other conditions of release.
8. The procedures required in paragraphs 6 and 7 of this order are not required when the court imposes non-monetary conditions of release or an obligated amount of cash is a condition of release on recognizance (I-bond).
9. If the court is presented with insufficient information to make a finding regarding the defendant's ability to pay the ordered amount, it shall so state on the record in open court.
10. Nothing in this order shall limit a court's authority to revoke bail, in accordance with present law, where the defendant has violated conditions of his or her release on bail.
11. In addition to any other relief available under the Code of Criminal Procedure of 1963, 725 ILCS 5/100-1, *et seq.*, a person in custody due to an inability to post monetary bail shall be brought before the court at the next available court date or 7 calendar days from the date bail was set, whichever is earlier, for a review of the conditions of release pending further court proceedings.

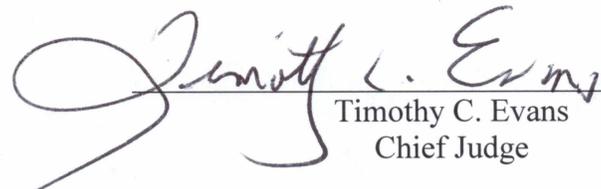
12. Beginning no later than December 1, 2017, Pretrial Services shall provide reminders to all defendants released on bail in felony cases of their upcoming court dates, unless the defendant informs Pretrial Services that he or she does not want to receive reminders. Said reminders shall be communicated to the defendant by telephone, Short Message Service (text messaging), or similar technology. The defendant may choose to receive or decline to receive reminders, and may inform Pretrial Services of this choice at either an in-person interview with Pretrial Services or online via Cook County's Web site. Nothing in this order shall be interpreted to prevent Pretrial Services from reminding defendants of their court dates by other means, including, but not limited to, conventional mail, email, and personal contact. Nothing in this order shall be interpreted to prevent Pretrial Services from reminding defendants in misdemeanor cases of their court dates by any appropriate and reliable means.
13. This order shall be liberally construed to effectuate the purpose of relying upon contempt of court proceedings or criminal sanctions instead of financial loss to assure the appearance of the defendant, that the defendant does not pose a danger to any person or the community, and that the defendant will comply with all conditions of bond.
14. This order shall be interpreted to supplement Art. 110, and nothing in this order shall be construed to supersede or limit its provisions.
15. This order shall supersede all conflicting provisions in existing general orders and general administrative orders of the court. Application of existing orders with conflicting provisions shall be reconciled so as to fully implement the provisions of this order.

Except as otherwise ordered herein, this order is effective September 18, 2017.

Dated this 17th day of July, 2017.

**ENTER:**



  
\_\_\_\_\_  
Timothy C. Evans  
Chief Judge

# Exhibit 14



STATE OF NEW YORK  
EXECUTIVE CHAMBER  
ALBANY 12224

MEMORANDUM filed with the following bills:

Senate Bill Number 7276, entitled:

#141  
Chap 996

"AN ACT to establish a criminal procedure law, constituting chapter eleven-A of the consolidated laws, and to repeal the code of criminal procedure"

Senate Bill Number 9069, entitled:

#142  
Chap 997

"AN ACT to amend a chapter of the laws of nineteen hundred seventy, entitled 'An act to establish a criminal procedure law, constituting chapter eleven-A of the consolidated laws, and to repeal the code of criminal procedure,' in relation to arrests without a warrant; to the designation of constables and police constables as peace officers; to the designation as police officers of the fire marshals of the New York City fire department and of the conservation officers of the conservation department; and to the repeal of certain provisions relating thereto"

A P P R O V E D

These bills establish a new Criminal Procedure Law to replace the present Code of Criminal Procedure.

In 1961, upon my recommendation, the Legislature created the Temporary State Commission on Revision of the Penal Law and Criminal Code. (L. 1961, c. 346.) The completely revised Penal Law, which was prepared by the Commission and approved by the Legislature in 1965 (c. 1030), has been widely recognized as a major improvement in our system of criminal justice and many of its provisions have been adopted by other jurisdictions.

We must constantly strive to obtain the fairest and most effective procedures for the treatment of persons charged with the commission of crimes, in order to protect individual freedoms, to safeguard the public and to promote respect for law and the legal process.

The new Criminal Procedure Law embodied in Senate Bill Number 7276 and its chapter amendment, Senate Bill Number 9069, represents the State's first comprehensive modernization of procedures for the administration of criminal justice in this century. When it becomes effective on September 1, 1971, New York State will have a complete system of criminal laws, embodying both this measure and the revised Penal Law, carefully designed as an integrated framework for the effective administration of criminal justice.

Included among the numerous innovations in the Criminal Procedure law are:

- A revamped lower criminal court structure;
- A revised and consolidated system of motion practice;
- A reformulated system of bail and release on recognizance;
- Provision for greatly expanded use of summonses in lieu of arrest;
- Checks upon lengthy incarceration of defendants prior to the filing of the ultimate charges upon which they are to be prosecuted;
- Significant changes in the law relating to mental fitness of a defendant to stand trial;
- Important alterations in the laws relating to the compulsion of evidence by grants of immunity; and
- Clarification of arrest powers and geographical authority of police and peace officers.

Procedural requirements for the administration of the criminal law under the State and Federal Constitutions have undergone substantial modifications in a relatively short period of time. This factor, combined with the rapid increase of crime in all its forms, has placed a heavy burden on the entire criminal justice system.

For this magnificent effort, I join with the many persons and organizations who have recommended approval of the bill, in commending the Temporary Commission on Revision of the Penal Law and Criminal Code, its members, staff and especially its Chairman, Richard J. Bartlett.

The bill is approved.

/s/ NELSON A. ROCKEFELLER

# Exhibit 15

MEMORANDUM IN SUPPORT AND EXPLANATION  
OF PROPOSED CRIMINAL PROCEDURE LAW

(S. Int. 7276, A. Int. 4561)

Prepared By the

Commission on Revision of the  
Penal Law and Criminal Code

March, 1970

INTRODUCTORY

This bill, embodying a proposed "Criminal Procedure Law," prepared by the Temporary Commission on Revision of the Penal Law and Criminal Code is, in effect, the Commission's fourth draft of a complete revision of the Code of Criminal Procedure.

The first three drafts of the CPL were published by the Edward Thompson Company (West Publishing Company) and, following wide distribution thereof, public hearings were held on each throughout the state. In addition, in the fall of 1969, public hearings were held in New York City, Albany and Buffalo on the 1969 study bill jointly by the Codes Committees of the Senate and Assembly.

The final 1970 bill, or fourth draft, contains a number of changes, both formal and substantive, from the 1969 study bill. Some of the substantive changes were proposed by the Commission in the course of its continuous re-evaluation of its work, and others were made by the respective Codes Committees following their public hearings and intensive study of the 1969 bill.

A. THE CRIMINAL PROCEDURE LAW IN GENERAL

In structure, substance, form, phraseology and general approach, the proposed Criminal Procedure Law bears little resemblance to the distinctly archaic Code of Criminal Procedure. Ignoring the existing Code format, it lays a new foundation and, in the process, proposes numerous significant changes of substance in an attempt to provide a workable body of procedure accommodated to modern times. Among the innovations are a revamped lower criminal court structure (see Art. 10), a new omnibus motion technique (see §§170.30-170.45, 210.20-210.45, 330.30-330.50, 440.10-440.40, 710.10-710.70); a reformulated system of bail and release on recognizance (Arts. 500-540), a scheme involving greatly expanded use of the so-called police summons, relabeled an "appearance ticket" (Art. 150; see, also §140.20[2,3]; changes in the standards of proof required for preliminary judicial action in the lower or "local criminal courts" (see §§70.10, 100.40, 130.70); changes in rules of evidence and related matters (Art. 60); a new and tighter system of judicially authorized eavesdropping orders or warrants (Art. 700); establishment of a pre-trial discovery motion and remedy (Art. 240); new and comprehensive post-judgment motions and remedies for non-appellate challenges to judgments of conviction (Art. 440); important alterations in the laws relating to compulsion of evidence by grants of immunity (§§190.40, 190.45; see, also, §§50.10-50.30); codification of the law of former jeopardy (Art. 40); checks upon lengthy incarceration of defendants prior to the filing of the ultimate charges upon which they are to be prosecuted (see §§170.70, 180.90, 190.80); substantial revision of the youthful offender process (Art. 720); and significant changes in the law relating to mental fitness of a defendant to proceed with a criminal action against him (Art. 730).

Some of the procedural areas covered and changes wrought by the proposed Criminal Procedure Law (sometimes referred to as CPL) are treated below.

1. The lower criminal court structure (see Art. 10)

While working within the framework of the existing lower criminal court structure, the proposal creates a new lexicography and a new foundation that frequently leads to procedural simplification and clarification.

The Criminal Code sets forth all of its lower criminal court procedure in terms of "magistrates" and "courts of special sessions." These are traditional oddities in that neither signifies a "court," as such, for there is no such thing as a magistrates court, in the true sense of the word, or a court of special sessions. Rather, these labels or concepts constitute mantles or hats which the various lower courts and justices (town justices, village judges, city courts, etc.) don and doff at certain stages of a criminal action. A town justice, for example, is said to be and to act as a "magistrate" in the preliminary stages of a criminal action when an information is laid before him, when he issues a warrant of arrest or a summons, when he conducts a preliminary hearing upon a felony charge, when he holds a defendant for the action of a grand jury, and the like. He continues to act as a magistrate when he tries or finally disposes of an information charging a non-criminal offense, such as disorderly conduct or a traffic infraction; but when he tries a misdemeanor charge or accepts a plea thereto he automatically takes off his magistrate hat and puts on his special sessions hat, or "holds a court of special sessions."

The defects and lack of logic in this system of presenting lower court procedure seem apparent. The proposed Criminal Procedure Law abandons the traditional "magistrate" and "special sessions" language in favor of a system that simply describes what the lower criminal courts are and what they do.

The first step in that direction is taken by a provision (§10.10[3]) which enumerates various specific courts constituting the lower court structure (sometimes under new labels) and blankets them under the key term, "local criminal court." The local criminal courts consist of the five regular lower court categories (district, city, town and village courts, plus the New York City Criminal Court), and-for limited purposes-Supreme Court justices and County Court judges.

With the creation of the term "local criminal court," and with the enumerative definition thereof, the proposed Criminal Procedure Law subsequently establishes its lower court procedure simply in terms of functions of "local criminal courts." Since all these courts perform the same basic functions, reference to the individual classifications is unnecessary in most of the provisions dealing with them. Owing to some variations in their operation and other factors, however, a number of ensuing sections do, where essential, specifically allude to village courts, town courts, city courts, etc., and provide separate procedures in certain situations.

One significant feature of this new scheme is the inclusion of the New York City Criminal Court, as a "local criminal court," within the ambit of the proposed Criminal Procedure Law. Under existing law, this court operates almost entirely under its own "New York City Criminal Court Act" and its procedure is governed only in small part by the Code of Criminal Procedure (see CCP §740-d). In an endeavor to provide as much procedural uniformity as possible in the state lower court structure, the proposed formulations embrace the New York City court, allowing for and specifying variations where necessary.

This new and comprehensive lower court scheme would necessarily require the repeal of the principal procedural provisions-some in conflict with the provisions now contained in the New York City Criminal Court Act, the Uniform District Court Act, the Uniform City Court Act and the Uniform Justice Court Act. Such repealing legislation will be submitted prior to the effective date of the proposed CPL. X

## 2. Arrests without a warrant

The proposed CPL, together with a proposed chapter amendment, make several significant changes in the law dealing with arrest without a warrant by police officers and other peace officers.

### (a) Concerning difference in powers of police officers and other peace officers; and concerning misdemeanors not committed in the officer's presence.

Under the Criminal Code, although "police officers" are separately enumerated (§154 -a) and distinguished from "peace officers" (§154), the language with respect to the difference in arrest powers between them is loose and confusing (§177). The proposed CPL preserves the dichotomy between peace and police officers and attempts, as well, to delineate with some degree of precision the arrest powers of each group.

One problem inherent in present CCP §177 is the concept that an arrest for an offense of less than felony grade may be made only when the offense is committed "in his [the officer's] presence." Especially in connection with crimes divided into degrees - ordinarily with the higher degrees being felonies and the lowest a misdemeanor - the "in his presence" rule creates unwarranted difficulties. Accordingly, the proposal eliminates this distinction. The general rule is the same for a peace officer making an "on-duty" arrest as it is for a police officer. The appropriate sections authorize an arrest for any crime - misdemeanors as well as felonies - upon reasonable cause to believe that the person in question committed it whether in or out of the officer's presence (CPL §§140.10[1], 140.25[1]).

In addition, the proposed chapter amendment (bill §2), for the first time, specifically sets forth the arrest powers of an "off-duty" peace officer other than a police officer. In effect, these proposed "off-duty" arrest powers are the same as such peace officer's present "on-duty" arrest powers under CCP §177.

### (b) The bailiwick problem.

The Criminal Code fails to address itself to the important and difficult problem of the geographical area in which a police or other peace officer may exercise his arrest powers. The problem may be simply put as follows: If a police officer of a village in Hamilton County is vacationing in New York City, does he have the authority to make a police arrest there in the same manner as would a New York City police officer? There are sharply conflicting opinions on the subject between some groups, while others have no firm opinions.

The proposed solution to the problem (reading bill section one of the proposed chapter amendment together with CPL §140.10) is that as to arrests for crimes, a police officer may exercise his arrest powers anywhere in the state and without regard to the situs of the commission of the crime. As to petty offenses (violations and traffic infractions), however, arrests may be made only in the county of commission of the offense or an adjoining county, and only if the offense was committed in the arresting officer's bailiwick.

The proposed chapter amendment (bill §2) also contains provisions detailing the arrest powers of a non-police peace officer outside his bailiwick. In effect, they are the same powers as are presently authorized for police officers outside their bailiwick under CCP §162-b. It should be noted that the term "geographical area of employment" (bailiwick) is defined as it applies to police officers in CPL §1.20(34-a), and as it applies to peace officers other than police officers, in the proposed chapter amendment (bill §2).

### 3. The appearance ticket

The term "appearance ticket," as used in the proposal, denotes a citation or notice issued by a police officer or other public servant, of a kind usually but improperly referred to as a "summons."

On a state-wide basis, the use of appearance tickets is at present largely confined to traffic infraction cases (see Vehicle and Traffic Law §207). In New York City, however, numerous non-police public officials and employees, such as those of the Sanitation, Fire, Building and Markets Departments, are authorized to issue and serve such tickets in cases involving offenses peculiarly within their ambits (violations of the Health Code, building regulations, etc.; see N.Y.C. Crim. Ct. Act. §57.).

Employed in this manner, an appearance ticket is a substitute for or an alternative to an arrest without a warrant. Upon the theory that the virtues of this alternative have not been sufficiently exploited, the proposal empowers any police officer to issue and serve an appearance ticket upon a person, instead of arresting him, in any case in which an arrest for a misdemeanor or a petty offense would be authorized (§150.20[1]); and similar provision is made for the issuance and service of such tickets by other public servants who are by other statutes specially authorized to do so (id., subd. 3).

Another subdivision of the statute in question (§150.20[2]) presents a method of employing the appearance ticket in combination with an arrest without a warrant. It contemplates an arrest by a police officer who, after taking the defendant to a station house, determines that, in view of the defendant's roots and all the circumstances of the case, prompt booking, formal charges, court arraignment and bail are unnecessary. In such a case, the officer may then abandon the post-arrest procedure and, instead, issue and serve an appearance ticket upon the defendant in the same manner as if he had never arrested him. As provided in the next section (§150.30), still another alternative, involving issuance of a ticket upon a deposit of bail, is available (see, also, §140.20[2,3], 140.25[5], 140.40[2]).

The results to be expected from the new appearance ticket scheme are (1) an immense saving of police time, (2) elimination of much expense and embarrassment to defendants charged with minor offenses who are excellent risks to appear in court when required, and (3) above all, a significant reduction of that portion of our jail population consisting of unconvicted defendants awaiting trial or other disposition of their cases.

#### 4. Concerning bail

Another type of endeavor to reduce the unconvicted portion of our jail population is found in the proposed CPL provisions dealing with the subject of bail.

One of the current difficulties in this field is that the courses of action available to the court for assuring the defendant's future attendance are quite limited. On the one hand, a judge may commit the defendant to prison or fix bail - which may well be beyond the defendant's means. On the other, he may release the defendant upon his own recognizance. In many instances, none of these decisions seems attractive or satisfactory.

With this in mind, the proposal inserts two intermediate devices, one termed an "unsecured bail bond" and the other a "partially secured bail bond" (§520.10[1]). The unsecured bond is executed by a surety (other than a bonding company), or by the defendant himself where permitted by the court, who deposits no security with the court but contracts to pay a designated sum of money in case of the defendant's failure to appear (§500.10[19]). The "partially secured bail bond" differs only in that the surety or obligor deposits a fractional sum of money fixed by the court, not to exceed ten percent of the total undertaking (id. [13]).

The possible advantages of these new devices may be hypothetically illustrated by a case of a young man charged with burglary who has previously been embroiled with the law but resides in the community and whose father is a reputable person long employed in the same position at a fairly modest but adequate salary. Here, a judge not inclined to release the defendant on his own recognizance doubtless would, under present law, fix bail, and in a fairly substantial and possibly burdensome amount owing to the seriousness of the crime. If so authorized, however, he might well be satisfied to release the defendant upon his father's undertaking to pay \$1,000 (possibly accompanied by a \$100 deposit) in the event of the defendant's failure of appearance.

#### 5. Verification of information and other instruments (§100.30)

The proposal authorizes the verification of an information, misdemeanor complaint, felony complaint and supporting deposition by (1) having the deponent swear to it before the court, or (2) having the deponent swear to it before another police officer of designated rank, or in some cases before a non-police public servant, or (3) not requiring the deponent to swear to it at all but merely having him sign such an instrument containing a form notice that false statements therein are punishable as a class A misdemeanor pursuant to a specified Penal Law section (CPL §100.20).

Only the first of these methods - a swearing before the court - is permitted under present law. Relaxing the procedure to allow police officers and witnesses to have the verification performed in the station house, and in fact to authorize verification without actual oath, should be of immense aid in speeding up the criminal process and should save many hours of both police and private citizen time.

3. Prior drafts of the CPL made two particularly noteworthy changes in the procedure relating to preliminary hearings. At present, it is only in the New York City Criminal Court that provision is made for the preliminary examination of a charge of misdemeanor (New York City Crim. Ct. Act §40[2]). Outside of New York City there is not now nor has there ever been any such preliminary examination. The Commission found that the procedure, which was a technically necessary stepping stone in the pre-court organization days when New York City had a dual lower criminal court system, was now an anachronism under the single New York City Criminal Court. The Commission was also of the view that the preliminary hearing was not necessary for the proper administration of criminal justice. As a result, the Commission proposed the elimination of such hearings by simply not providing for them in the CPL (and earmarking New York City Crim. Ct. Act §40[2] for repeal).

The Codes Committees, while recognizing the practice as anachronistic, concluded that such preliminary hearings still served a useful screening function in New York City. Accordingly, a new section was added to the CPL (§170.75), incorporating provisions for preliminary hearings on misdemeanor charges in the New York City Criminal Court.

9. Another change with respect to preliminary hearings proposed by the Commission, related to hearings on felony charges. The Commission had proposed that, since such hearings were but a first screening process to determine whether or not to hold a defendant for the grand jury, that hearsay evidence should be admissible therein. This recommendation was reflected in the 1969 study bill in §180.60(3). However, the Codes Committees determined that evidence at felony hearings should be confined to the non-hearsay variety and, therefore, subdivision (3) was amended accordingly.

10. CPL §440.30 deals with the procedure applicable to a post-judgment motion. Subdivision four thereof sets forth those circumstances under which the court may deny the motion without a hearing. The 1969 study bill provided for three standards; the 1970 bill adds a fourth (§440.30[4][d]). This addition reflects a currently recognized criterion in both the state and federal courts for the denial, without a hearing, of a post-judgment motion. See, e.g., People v. White, 1956, 309 N.Y. 636, 640-641, Machibroda v. United States, 1962, 368 U.S. 487, 495.

11. The 1969 study bill, at §510.30(2) contained in paragraph (b) thereof, a procedure for holding a defendant in custody without bail because of the likelihood that he would be a danger to society if permitted to remain at liberty during the pendency of the action. This concept is commonly referred to as "preventive detention." The formulation contained in the 1969 study bill was, admittedly, inadequate because it failed to provide appropriate due process safeguards. On reconsideration of the provision and of the whole question of preventive detention, the Commission eventually voted to delete the entire concept from the CPL. It was discovered that opposition to the procedure came not only from those who are defense-oriented, but also from many who are prosecution-oriented, such as district attorneys. The latter's objections stemmed from the belief that a preventive detention procedure that could successfully meet constitutional requirements of due process would impose a whole new layer of hearings on the already overburdened local criminal courts, all out of proportion to the gains that could reasonably be expected to result from such a system.

# Exhibit 16

# A MORE JUST NEW YORK CITY

Independent Commission on New York City  
Criminal Justice and Incarceration Reform



# A MORE JUST NEW YORK CITY

Independent Commission  
on New York City  
Criminal Justice and  
Incarceration Reform

Dear Fellow New Yorkers:

As the chairman of the Independent Commission on New York City Criminal Justice and Incarceration Reform, it is my pleasure to share with you this report.

New York City Council Speaker Melissa Mark-Viverito called the Commission into existence just over a year ago. Since that time, the 27 members of the Commission — along with our research and strategic partners from the private and non-profit sectors — have worked diligently to study the criminal justice system in New York City, with a particular focus on what should be done with Rikers Island. We heard from a broad array of stakeholders, including prosecutors, clergy, public defenders, correction officers, civil rights leaders, victim advocates, elected officials, community leaders, the formerly incarcerated, and their families. We sought input from New York residents through our website and at numerous public meetings in each of the five boroughs. And we conducted independent and in-depth analysis of the available data and research.

The perspectives and voices we solicited were diverse. There was disagreement on many issues. But there was one important common thread across what we heard: **our criminal justice system requires dramatic change.**

We entered the process with no predetermined judgment. I asked the members of the Commission — law enforcement officials, business leaders, judges, academics, and community activists alike — to look at the justice system with a fresh set of eyes. We let the facts be our guide as we examined both the successes and the failures of recent years.

But we have done more than just look at what was — we have sought to articulate what could be.

The result is a vision of a twenty-first century criminal justice system that all New Yorkers can be proud of. This system will be animated by a new set of affirmative goals — keeping people safe, aiding victims, responding to community needs, and crafting proportionate, meaningful, and compassionate responses to unlawful behavior.

The report that follows is the product of a unified Commission. In laying out this blueprint, we build on a solid foundation. For more than 20 years, New York City has successfully driven down both crime and incarceration. The City has proven that **more jail does not equal greater public safety.** Indeed, an emerging body of research suggests that jail can actually make us less safe, leading to more criminal behavior and undermining the health of families and communities alike.

We believe that a twenty-first century justice system must acknowledge the multiple harms that incarceration, and Rikers Island in particular, has caused hundreds of thousands of New Yorkers, their families, and their communities. And it must acknowledge that these harms fall disproportionately on communities of color. To heal and restore hope, jail must become a last resort rather than the path of least resistance.

Dramatically reducing incarceration is just part of the larger project of reimagining justice, however. Going forward, the idea of community justice must become standard operating practice — investing in New York City neighborhoods damaged by past practice and creating stronger links between criminal justice agencies and the people they exist to serve. Going forward, every decision and interaction — whether on the street, in the courthouse, or behind the walls of our jails — must seek to advance the fundamental values of dignity and respect. And going forward, **we must close the jail complex on Rikers Island. Period.**

Rikers Island is a stain on our great City. It leaves its mark on everyone it touches: the correction officers working back-to-back shifts under dangerous conditions, the inmates waiting for their day in court in an inhumane and violent environment, the family members forced to miss work and travel long distances to see their loved ones, the attorneys who cannot easily visit their clients to prepare a defense, and the taxpayers who devote billions of dollars each year to keep the whole dysfunctional apparatus running year after year. Put simply, **Rikers Island is a 19th century solution to a 21st century problem.**

We reviewed, studied, and debated every possible solution to the problem of Rikers. We have concluded that simply reducing the inmate population, renovating the existing facilities, or increasing resources will not solve the deep, underlying issues on Rikers Island. We are recommending, without

hesitation or equivocation, permanently ending the use of Rikers Island as a jail facility in any form or function.

Closing Rikers Island is far more than a symbolic gesture. It is an essential step toward a more effective and more humane criminal justice system. **We must replace our current model of mass incarceration with something that is more effective and more humane** — state-of-the-art facilities located closer to where the courts are operated in civic centers in each borough.

Rikers Island is not just physically remote — it is psychologically isolated from the rest of New York City. Rikers severs connections with families and communities, with harmful consequences for anyone who spends even a few days on the Island.

That's why we believe that a smaller, borough-based jail system is critical. Our future jails must promote the safety and well-being of both correction officers and the individuals they supervise, the vast majority of whom are awaiting trial and have been found guilty of no crime. These goals are best served when we make clear that the point of correction is exactly that — to correct. Going forward, our jails must work to reduce crime through rehabilitation.

This is not just the right thing to do — it is also the fiscally prudent thing to do. Indeed, as you will see in the pages that follow, we believe that closing Rikers Island will result in significant cost savings. It will also enable us to move forward as a City, boldly preparing for the challenges that the next century will bring. Permanently ending the use of Rikers Island as a de facto penal colony will free up the space needed for the kinds of transportation and energy infrastructure projects that are crucial to the future of our great City.

I am acutely aware that in order to enact our recommendations, we will need courageous leadership from our City and State officials. Creating a more just New York City will not happen overnight — and it will not happen with the support of a single person or entity. It is now more critical than ever that we confront the challenges ahead together. This report serves as a roadmap for what must be done.

**By working together to close Rikers Island, an international symbol of despair and damage, New York will be a beacon of safety, humanity, and justice for cities across the country and around the world.**

Let New York City lead the way, as it has done so often in the past.

Sincerely,

A handwritten signature in cursive script that reads "Jonathan Lippman".

The Hon. Jonathan Lippman

# Reducing Pretrial Detention

One of the foundations of the American legal system is the presumption of innocence. And yet, on any given day, three-quarters of those held in New York City jails have not been convicted of a crime. These are defendants whose cases are pending in court. The vast majority are being held because they are unable to make bail. As one person noted via the Commission’s website, “poverty should not be the reason you are in jail.”

The recommendations that follow build on the most effective parts of our pretrial system and seek to repair the parts that are broken. We believe that it is possible to safely and effectively release many defendants without compromising safety. Recent efforts by both the City and nonprofit providers demonstrate that defendants do not need money as an incentive in order to appear in court and comply with conditions of pretrial release. The Commission seeks to build on these positive developments.

The Commission’s pretrial reform recommendations can reduce the daily jail population by just over 3,000 individuals. The Commission’s projections are based exclusively on reforms that can be implemented right now, within the current statutory framework.

## Current Practice

In 2016, 249,776 criminal cases were arraigned in New York City—82 percent on misdemeanor and 18 percent on felony charges. Nearly half of the misdemeanors and just under 3 percent of the felonies were resolved right away at arraignment. In the remaining cases, arraignment judges heard brief oral arguments and then made a decision about whether to release the person on their own recognizance or to set bail.

Seven out of ten defendants are released on their own recognizance at this stage of the process. No bail is set in these cases and the accused leaves the courtroom subject to no formal monitoring or court-mandated conditions. With a handful of exceptions, the remaining defendants—roughly three out of every ten—are required to post bail to secure their release.<sup>23</sup>

As might be expected, the use of bail increases along with charge severity—of these cases that are not resolved at arraignment, bail is set in 18 percent of misdemeanor cases, compared to 47 percent of nonviolent felonies and 63 percent of violent felonies. The use of bail also varies from borough to borough.

The problems with this situation have been well-documented. Of those who had to make bail in 2016, almost nine in ten (89 percent) were unable to do so at arraignment.<sup>24</sup> If bail is not made, defendants remain in pretrial detention. More often than not, this means a trip to Rikers Island.

## Bail Decisions in 2016

**150,756**

Total Cases

**106,788**

Misdemeanors

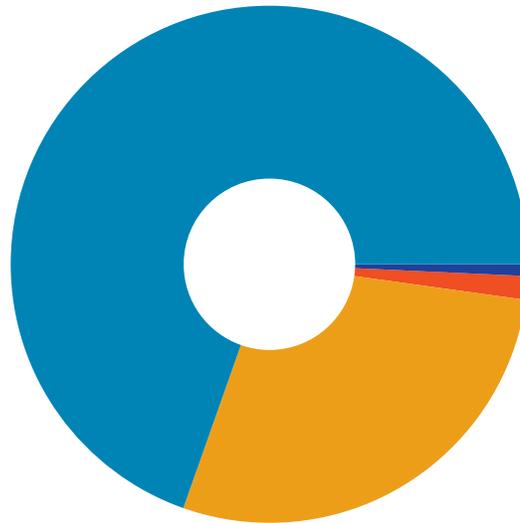
**27,566**

Nonviolent Felonies

**16,402**

Violent Felonies

### ALL CASES



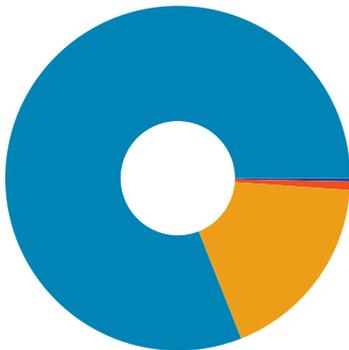
69.6% Release on Recognizance

28.2% Bail Set

01.5% Supervised Release

00.8% Remanded

### MISDEMEANORS



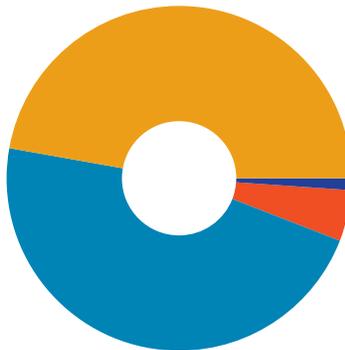
81.0% Release on Recognizance

17.9% Bail Set

00.8% Supervised Release

00.3% Remanded

### NONVIOLENT FELONIES



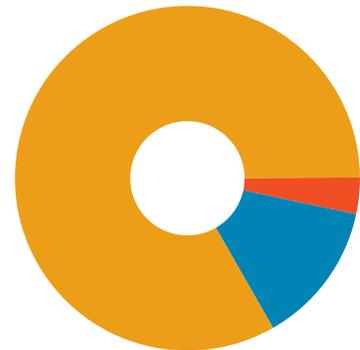
47.2% Bail Set

46.9% Release on Recognizance

04.8% Supervised Release

01.1% Remanded

### VIOLENT FELONIES



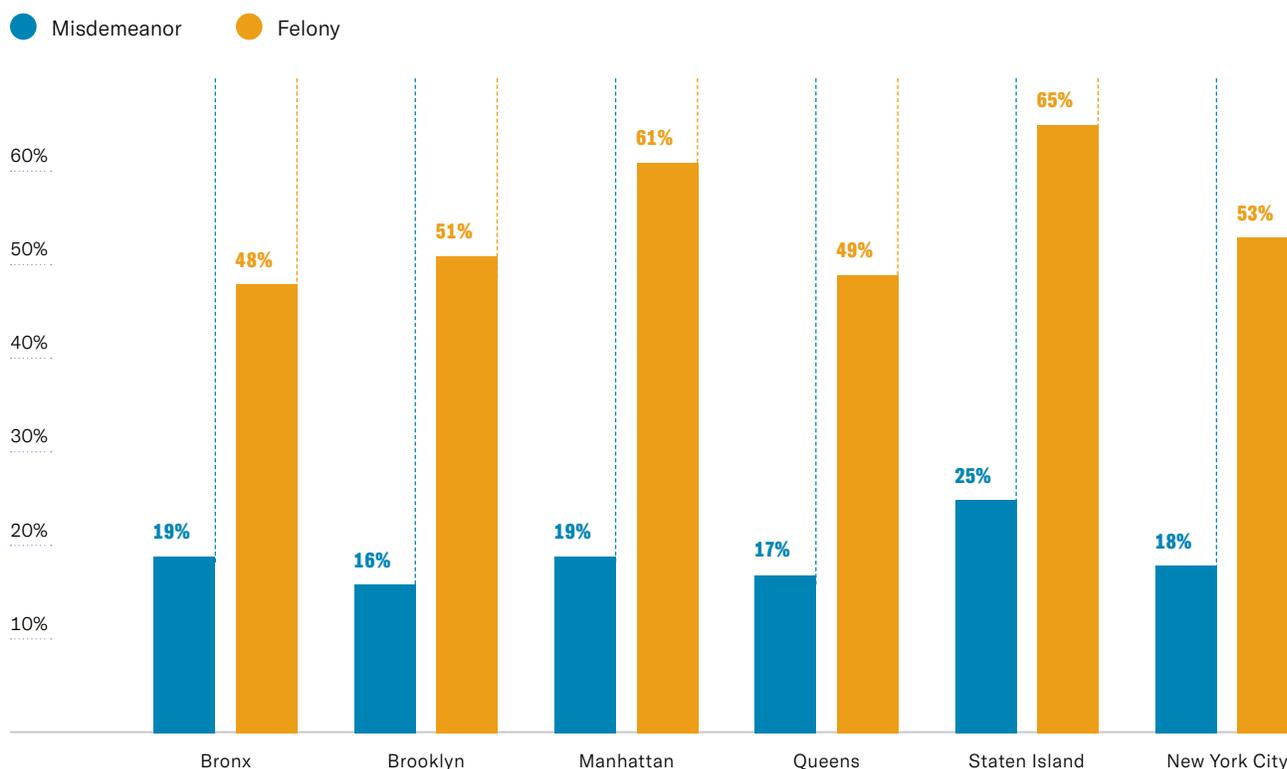
63.4% Bail Set

33.2% Release on Recognizance

03.4% Remanded

00.0% Supervised Release

## Bail Imposed by Borough in 2016



## Public Safety

A survey of New Yorkers revealed that 88 percent of respondents support “holding people in jail prior to a conviction only if they present a high risk to the safety of the community.”<sup>25</sup> This is not what happens today. Among misdemeanor defendants detained on bail in New York City, a Center for Court Innovation study found that nearly two-thirds (64 percent) posed only a minimal-to-moderate risk of re-arrest over a two-year tracking period. Even among detained felony defendants, nearly six in ten (59 percent) posed only a minimal-to-moderate risk of re-arrest.<sup>26</sup>

It is worth noting that this analysis examined the risk of *any* re-offense. When isolating risk of violence—a better measure of whether someone poses a real danger to the public—the same study found that 90 percent of detained defendants with a misdemeanor charge and 78 percent with a felony charge posed only a minimal-to-moderate risk of re-arrest on a violent felony charge over a two-year period.

Undermining the public safety argument further is the reality that the average length of stay in jail is only 17 days for people held pretrial on misdemeanor charges. In fact,

over half (55 percent) of misdemeanor pretrial stays last less than five days. Jail stays of this length serve little public purpose. But they can have a massive impact on the life trajectories of defendants—as little as 48 hours in jail can be enough time to increase recidivism rates after release.<sup>27</sup>

There are many reasons why bail is overused, but much of the problem stems from an overreliance on charge severity. A study by the New York City Criminal Justice Agency found that prosecutors accord particularly heavy weight to charge severity when recommending bail. In turn, judges rely more heavily on the prosecutor’s bail recommendation than any other factor when setting bail.<sup>28</sup> Research shows that charge severity is, in fact, a weak predictor of either a defendant’s likelihood of failing to appear for a scheduled court date or of future arrest.<sup>29</sup>

Thus, whether the purpose of pretrial decision-making is to secure court attendance—as it is under current New York State law—or to prevent the release of individuals who pose a high risk to public safety during the pretrial period, the empirical evidence indicates that charge severity should not exert as large an influence as it now does over bail and release outcomes.

## Detained Defendants by Risk Level

● Minimal ● Low ● Moderate ● Moderate-High ● High

### MISDEMEANORS



**90%** Minimal- To Moderate-Risk

### FELONIES



**79%** Minimal- To Moderate-Risk

## Bail Amounts

In 2016, 84 percent of misdemeanor bail amounts were set at \$2,000 or less, compared to 22 percent of nonviolent felony and 14 percent of violent felony bail amounts. Bail amounts exceeding \$10,000 were nearly non-existent among misdemeanors, while 35 percent of violent felony cases had bail set above this amount.

There is precious little evidence that either prosecutors or judges consider a person’s ability to pay bail, even though New York’s bail statute requires that the “financial resources” of the defendant be taken into account.<sup>30</sup> As one advocate noted at a Commission event, “if a person is on public assistance and you know they are receiving \$300 a month, and you give them a \$5,000 bail...that’s a ransom—not a bail.”

While many cannot afford bail, those who do pay bail often are compelled to use scarce financial resources that would otherwise go toward rent, basic necessities, and providing for family and dependents. The process of paying bail in New York City is anything but user-friendly.<sup>31</sup> One part of the problem is an overreliance on the types of bail that are the most difficult for people to pay. The New York bail statute provides for nine different forms of bail;<sup>32</sup> judges are required by law to set at least two different forms of bail.<sup>33</sup> Yet judges routinely allow defendants to post only the two

most onerous forms—cash bail, which requires all money to be paid up front; and insurance company bond, which requires 10 percent of the bond amount to be deposited as collateral with a bail bond company, and any other non-refundable fees.

Among the alternative forms of bail available under the law, credit card bail involves nothing more than the use of a credit card to pay bail of \$2,500 or less. Arraignment judges allowed credit card bail in only 3 percent of eligible cases in 2013.<sup>34</sup> Barely used at all are partially secured bonds, which enable the payment of a percentage of the total bail amount (up to 10 percent) up front and the rest only if the defendant doesn’t return to court. Similarly, unsecured bonds do not require any up-front payment and are only collected upon failure to appear.

Research shows that unsecured bonds, because they still require payment if the defendant fails to appear in court, are just as effective at guaranteeing court attendance as paying the full bail amount up front.<sup>35</sup> In New York City, a pilot study of alternative forms of bail confirmed that when partially secured or unsecured bonds were used, more people made bail at arraignments. Even more encouraging, rates of re-arrest and failing to appear remained the same as when cash bail or a commercial bail bond option was set.<sup>36</sup>

## Bail Amounts in 2016

● ≤ \$1,000   
 ● \$1,001–\$2,000   
 ● \$2,001–\$5,000   
 ● \$5,001–\$10,000   
 ● > \$10,000

### MISDEMEANOR



### NONVIOLENT FELONY



### VIOLENT FELONY



When defendants are detained pretrial, the prosecutor inevitably gains leverage. Getting out of jail is an enormous incentive to agree to a plea deal, whether favorable or not. Studies in New York City<sup>37</sup> and elsewhere<sup>38</sup> confirm that pretrial detention is directly tied to an increased likelihood of conviction and a sentence involving incarceration. In the words of one individual who wrote to the Commission’s website, “the link between unaffordable bail and pleading guilty is critical. The level of violence at Rikers would make almost anyone do whatever was necessary to get out—guilty or not.” In New York City, those held in jail throughout the pretrial period had a conviction rate 10 percentage points higher in misdemeanor cases and 27 percentage points higher in felony cases compared to similar defendants not held pretrial. Pretrial detention also increased jail sentences by 40 percentage points in misdemeanor cases and increased state prison sentences by 34 percentage points in felonies.<sup>39</sup>

The bottom line is this: money bail does not have a meaningful impact on appearance in court but it does serve to hold thousands of New Yorkers in jail without a strong public safety rationale.

## Recent Reforms

Acknowledging the need for change, reformers both inside and outside of government have recently launched several promising initiatives.

**Supervised Release.** In 2016, the Mayor’s Office of Criminal Justice created a groundbreaking supervised release program intended to divert 3,000 defendants per year from traditional bail to community supervision. The model includes phone and in-person check-ins, as well as linkages to voluntary services. Participants are accepted after a risk assessment screening that determines whether they are a low, medium-low, medium, medium-high, or high risk for re-arrest. The level of supervision and conditions imposed pretrial are based upon the defendant’s risk assessment score.

The program is open to most misdemeanor and nonviolent felony charges. It excludes violent felonies, Class A felonies, firearms and domestic violence cases, and defendants who lack verifiable contact information.<sup>40</sup> The supervised release program also excludes defendants who are classified as posing a high risk of felony re-arrest. Similar to earlier pilots that produced promising evaluation findings in Brooklyn,<sup>41</sup> Manhattan,<sup>42</sup> and Queens,<sup>43</sup> the new program is administered by nonprofit agencies in each borough.<sup>44</sup> The City projects that this program will reduce the

“THE LEVEL OF VIOLENCE AT RIKERS WOULD MAKE ALMOST ANYONE DO WHATEVER WAS NECESSARY TO GET OUT—GUILTY OR NOT.”

jail population by about 200 people on any given day.<sup>45</sup> So far, the supervised release program is successfully meeting its volume targets, with 2,445 intakes in the last ten months of 2016.<sup>46</sup> While this volume amounts to only 1.8 percent of all cases not resolved at arraignment,<sup>47</sup> it has nonetheless made a promising start and lays the foundation for many of the Commission's recommendations that follow.

**Charitable Bail Funds.** In 2012, New York State passed a law that allows for the licensing and operation of charitable bail funds that may post bail in misdemeanor cases where bail is set at \$2,000 or less. The Bronx Freedom Fund, in operation since 2012, and the Brooklyn Community Bail Fund, since 2014, have bailed out over 2,000 people combined. Overall, the rates of court appearance are strong. Based on this success, The New York City Council voted to invest \$1.4 million in a citywide charitable bail fund, the Liberty Fund, to be launched in 2017.

**Other Bail Initiatives.** The Mayor's Office of Criminal Justice has undertaken other important initiatives, such as introducing a new, more accurate risk assessment tool to predict failure to appear in court. Currently the assessment tool used at arraignment classifies 49 percent of defendants as posing a high risk of failing to appear.<sup>48</sup> Yet, the data shows that these individuals had only a one in five chance of failing to appear in court and a one in ten chance of both failing to appear and not returning within 30 days.<sup>49</sup> The new failure to appear risk assessment tool will seek to address these problems. The Mayor's Office also established the Bail Lab to implement a number of bail payment reforms, including creating an online bail payment option; installing ATMs in all courthouses; and ensuring that the court is promptly notified whenever a bail amount of \$1 is set for administrative reasons and this \$1 fee is holding a defendant in jail.

## Recommendations Within the Current Statutory Framework

The Commission's pretrial justice recommendations fall into two categories—those that can be implemented immediately and those

that require legislative changes. All of the recommendations seek to promote public safety; provide an incentive for defendants to attend future court dates; and protect the constitutional rights of the accused.

We can make great strides within the current statutory framework, creating a more robust framework to support supervised release and making it easier for defendants to pay bail. In developing these recommendations, the Commission recognizes that great care must be taken to avoid net widening, which would occur if individuals who are currently released without conditions inadvertently end up facing more onerous requirements in the future. To accomplish this will require discipline on the part of three principal parties—judges, defense attorneys, and prosecutors. The Commission recommends that the City establish a routine training and briefing protocol on bail alternatives for judges whenever they are assigned to arraignment court, as well as training for all prosecutors and defense attorneys who handle cases at arraignment.

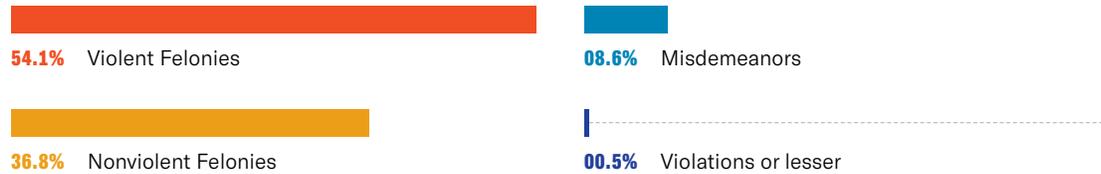
### **An assessment tool should be used to measure a defendant's ability to afford bail.**

Currently, the courts are not provided with meaningful information about a defendant's ability to afford bail unless it is provided by a defense attorney.<sup>50</sup> The Commission supports the implementation of an ability-to-pay assessment tool that would cover employment status, sources of income, public assistance, total household income, expenses, access to a bank account or credit card, housing assets, and responsibility for dependents. The questions could be adjusted to explore both the defendant's financial situation and that of family or friends who might be available to pay bail. The tool would produce a financial resources score and a formal bail amount recommendation. The tool should be piloted on a sample of defendants to measure validity and reliability.

### **Validated risk assessment tools should be used to measure a defendant's future risk of: (a) any re-offense, (b) violence, and (c) domestic violence.**

Formal risk assessment tools use past patterns

## Pretrial Detention Breakdown



**7,653** Total Population in Pretrial Detention

to predict future behavior. Risk assessments have long been used in medicine to predict life expectancy, in finance to predict future profits or loss, in education to predict likelihood of dropping out, and in criminal justice to predict recidivism.

Most risk assessment tools look at factors such as prior arrests and convictions, prior failure to appear in court, revocations of probation or parole, the severity of the current charges, and demographics such as age and gender. Some, but not all, risk assessments use a direct interview with defendants to gain information about other circumstances, such as family ties, employment, housing, and treatment needs such as substance use or mental health disorders.<sup>51</sup>

In the criminal justice context, formal risk assessments have been shown to outperform individual judgments regarding whether someone will be re-arrested.<sup>52</sup> Accordingly, risk assessments are a powerful aid to decision-makers and can serve to improve (but not replace) professional judgment. The City's supervised release program uses a risk assessment tool that identifies those defendants suitable for the program and recommends an appropriate level of supervision and conditions based on the assessment results.

The Commission recommends that the City build upon this foundation and create three new risk assessment tools to be used at arraignment with defendants who are not appropriate for release on recognizance.

Each tool should be developed through a participatory process and the factors used to assess risk, and the relative weight given to each, should be publicly disclosed. In general, risk assessment tools should also be rigorously

tested for bias. Tool developers should ensure that their assessments are, empirically, just as accurate in classifying risk within each racial or ethnic group. They should focus especially on the racial composition of the high risk subgroup, recognizing that this subgroup is most likely to be incarcerated. If Black individuals are classified as high risk in substantially higher proportions than others, tool developers should consider adjusting their algorithms to avoid a disproportionate impact. In short, given legitimate, well-documented concerns in this area, explicit steps should be taken to mitigate racial bias.<sup>53</sup>

Tools should also be validated separately for women and men, with risk formulas adjusted for women if necessary, given prior research that risk assessments developed with samples that consist mostly of men may not as accurately classify female defendants.<sup>54</sup>

Consistent with national best practices, each of the following assessment tools should have five categories: minimal, low, moderate, moderate-high, and high risk.

**Risk of Re-Arrest:** This tool would be calibrated to classify risk of any re-arrest.

**Risk of Violence:** Especially regarding tough decisions over whether to release a defendant who is currently facing violent felony charges, it is important to have a finely calibrated tool to classify defendants based on risk of future violence.

**Risk of Domestic Violence:** Research has shown that domestic violence defendants have specific risk factors—most importantly a prior history of domestic violence—that do not tend

to be measured in other tools.<sup>55</sup> To draw reliable conclusions about this population's future behavior, a specially calibrated tool is necessary.

**New York City should have a robust pretrial services capacity.**

The City's current framework of pretrial services is a mosaic of various agencies and providers. Over the past four decades, the New York City Criminal Justice Agency has interviewed defendants prior to arraignment and assessed their likelihood of failing to appear for scheduled court dates.<sup>56</sup> Several different nonprofit service providers conduct pretrial assessments and provide supervision for those in supervised release, including CASES and the Center for Court Innovation, in addition to the New York City Criminal Justice Agency.

The Commission recommends that the City invest in a comprehensive pretrial services model, potentially increasing the resources of the Department of Probation and nonprofit providers. Pretrial services staff should be responsible for administering risk and ability-to-pay bail assessments; maintaining a presence in the courtroom to aid judges in making bail and release decisions; helping defendants pay bail as needed; and overseeing an expanded supervised release infrastructure. Under this system, many defendants will continue to be released on recognizance. For all defendants—those released on recognizance and those under supervision—pretrial services can assist with transport to and from court and court date reminders.

**The current citywide supervised release program should be expanded and enhanced.**

Some types of cases and defendants are currently ineligible for the City's supervised release program. During pilot operations, these exclusions were understandable. Based on the program's demonstrated early success, the Commission recommends expanding supervised release to include some defendants charged with domestic violence offenses, some who score as high risk on the risk assessment tool, and some charged with serious offenses.

Research demonstrates that treatment and interventions are effective at reducing recidivism among high-risk populations, including those charged with offenses involving violence.<sup>57</sup>

Recent evaluations of New York State's drug treatment courts,<sup>58</sup> and national research on the effects of cognitive-behavioral therapy<sup>59</sup> both point to especially large recidivism reductions with high-risk populations. Requiring these defendants to engage in treatment and services would help to address some of the problems that underlie their criminal justice involvement.

Even as we expand supervised release to this population, it is important to remember that all participants in pretrial programming are presumed innocent. Any effort to link a pretrial population to mandatory services must reckon with this reality. Nonetheless, numerous cities, counties, and states across the country successfully release defendants who are high risk and charged with serious offenses and link them to services.

The Commission recommends an expanded range of pretrial supervision for these populations, which could include requiring treatment participation, electronic monitoring, or house arrest. Agencies such as the Department of Probation could help supervise high-risk individuals, given the extensive experience of the department in supervising defendants with a wide range of risk levels and needs.

**High-risk defendants.** Many charge-eligible misdemeanor and nonviolent felony defendants are excluded from the City's current supervised release program due to a high-risk classification on the City's risk assessment. The Commission recommends that these defendants be allowed into the program.

**Domestic violence.** The Commission recommends that judges be given the discretion to allow defendants charged with domestic violence offenses to participate in supervised release. Under the status quo, defendants who are held in pretrial detention for misdemeanor domestic violence only average 15 days in jail. Seen in this light, ordering domestic violence defendants to intensive pretrial supervision might afford a greater opportunity to monitor and detect order-of-protection violations than the status quo, where many domestic violence defendants make bail after a short stay in jail and then experience no supervision at all—potentially increasing the threat to victim safety. Allowing

for some defendants to be released and engaged in treatment and programming, such as Moral Reconciliation Therapy and other modalities tailored toward addressing intimate partner violence,<sup>60</sup> may be more beneficial to victims and more productive to defendants than jail.<sup>61</sup> Supervised release providers can also monitor and detect violations of existing orders of protection and stay-away orders.

Recognizing that supervised release for domestic violence populations is a relatively new concept, we propose common sense limitations on eligibility, such as ruling out those who pose a high risk of future domestic violence based on a validated assessment. We also propose that policies and practices designed to provide pretrial supervision to domestic violence defendants be designed in collaboration with the City's victim advocacy community.

**Serious cases.** A wide array of offenses are currently classified as "violent," ranging from homicide and rape to injuring someone while trying to grab their cell phone. Of those currently held in jail pretrial on violent felony charges, one-third (34 percent) are youth ages 16 to 24. Of these youth, almost half (49 percent) are held on first or second degree assault, burglary, or robbery charges. Many of the assault charges do not involve a deadly weapon, and in many of the robbery or burglary cases the young person was acting as an accessory or accomplice. We believe that many of these young defendants merit a second chance. The Commission recommends that at least some youth facing violent felony charges should be able to enroll in intensive supervised release. Specific eligibility could be limited by charge and risk. In the more distant future, if supervised release with carefully selected 16-to-24-year-olds facing violent charges proves effective, supervised release could be expanded to older defendants with similar charges.

In general, for cases in which the defendant is not released on recognizance, misdemeanors and nonviolent felonies should be assigned to supervised release, with the specific intensity of supervision determined by pretrial services staff based on the specific risk level. Violent felony defendants and defendants charged with domestic violence offenses should be handled

more vigilantly, but with expanded opportunities for some defendants to participate in more intensive supervised release.

Penalties for non-compliance, such as failure to appear in court or to complete a condition of release, should be graduated and proportionate. Across all charge categories, first-time failures to appear in which the defendant returns to court within a reasonable period of time (e.g., 30 days) might result in greater conditions of release, but should not automatically elicit a quick resort to traditional bail or detention.

#### **Paperwork and logistics related to alternative forms of bail should be streamlined.**

Presently, for an arraignment judge to grant a secured, partially secured, or unsecured bond requires completing three separate forms: a bail bond form, justifying affidavit, and undertaking to answer. Each form elicits different information, yet some of the same items are required on all three. The defense attorney and court clerk typically require 10 to 15 minutes to work with those posting bail to get the paperwork completed—a long period of time in arraignment courts that must process cases rapidly.

To increase the use of these forms of bail, pretrial services staff should step in to assist with required paperwork whenever possible. The three required forms should be consolidated into one, with potentially different versions for each alternative form of bail. And, in cases where family or friends can make an unsecured or partially secured bond, but need additional time to gather the necessary paperwork and proof (e.g., pay stubs), an alternative form of bail should be set at arraignment, allowing for proof and payment of the deposit (if applicable) to be satisfied later.

#### **All parties should facilitate rapid bail payment.**

Prior to arraignment, system players—including the arresting officer, defense attorneys, and pretrial services staff—should assist individuals in recording the phone numbers of family or friends that could help with bail payment. The arresting officer should allow people to manually record phone numbers from their cell

phones prior to vouchering. Where necessary, defense attorneys should proactively contact any identified friends or family members who have not been notified of the pending arraignment. Pretrial services staff should also help locate friends and family members if they learn that no one has been contacted. Signs should be posted in the holding cells to clearly communicate that efforts are underway to make contact with friends and family and to provide an overview of the bail payment process.

Building upon the efforts of the Mayor’s Office of Criminal Justice’s Bail Lab, automatic bail holds should be instituted for at least three hours in all cases, with a two-hour extension to five hours available upon request. Defendants should not be transported to jail if court staff are told that friends or family are in the process of securing bail fund support but need a little more time.

**The Department of Correction should assist bail payment at intake.**

At the outset of jail intake, Department of Correction staff should verify with the defendant whether friends and family have been notified of their detention. Correction staff should immediately reach out to make contact if the defendant requests it. In cases where friends or family inform correction staff of their intention to post bail shortly, staff members should pause the intake process and prepare the defendant for immediate release once bail is paid.

To be clear, we are proposing a fundamentally new role for corrections officers stationed at intake—one in which their very first interaction with a defendant will consist of an effort to ask questions and offer help. Proceeding in this fashion can set the stage for a different type of relationship between corrections officers and the people they supervise.

**“Second look” procedures should be established to review whether bail was appropriately set at arraignment.**

As part of its standard intake process, the Department of Correction performs a risk of readmission assessment. Based on this assessment, any individual in the lowest risk category who is eligible for supervised release and still detained several days following admission should be scheduled for an immediate

bail review hearing.

Anyone still detained approximately three months after admission who has no record of disciplinary infractions on the current case should also be scheduled for an immediate bail review hearing—where the court should be apprised of the person’s positive behavior.

These proactive steps will enable the Department of Correction to bring to the judge’s attention useful information about risk, as well as about conduct inside the jail, that may constitute new evidence justifying supervised release in lieu of continued incarceration.

Finally, the courts should establish a policy requiring an automatic hearing on bail at the second court date for any misdemeanor or nonviolent felony defendant who was unable to post bail by that date and is technically eligible for supervised release. This measure builds on an existing bail review protocol for misdemeanors.

**District Attorneys should examine prosecutorial strategies to mitigate racial and ethnic disparities.**

Prosecutors are responsible for deciding charges, requesting bail, and extending plea offers. These decisions have enormous influence over the criminal justice process. Implicit bias may result in more punitive plea offers for Black and Latino felony defendants following indictment, as was demonstrated in a recent study.<sup>62</sup> The Commission recommends regular and ongoing training for implicit bias among prosecutors. Elected district attorneys should regularly review office practices and policies to identify potential racial and ethnic disparities. To mitigate disparities, prosecutors should explore the use of a structured decision-making tool which lays out the range of bail requests and typical offers (“going rates”) for different types of cases.

**The processing of Desk Appearance Tickets should be expedited.**

Under the status quo, if a defendant who receives a Desk Appearance Ticket appears in court on the scheduled arraignment date, the case will nearly always resolve without jail time. Warrants, however, are issued for those who fail to appear. Once brought in, those individuals are

then exposed to a real risk of jail time, even if the original offense was relatively minor.<sup>63</sup>

To promote higher rates of appearance at the initially scheduled Desk Appearance Ticket arraignment date, appearances should be scheduled for no later than two weeks following the moment of arrests. Longer delays only serve to increase the likelihood that defendants will forget the date.<sup>64</sup> Courts should ensure that DAT defendants can have their cases heard after a minimal wait, ideally no more than two hours after walking into the courthouse.

## Recommendations Requiring State Legislation

New York's bail statute, Criminal Procedure Law Articles 500-530, was enacted in 1970 with the express purpose of allowing judicial discretion and, when setting bail, providing a range of bail payment options that increase the chances of pretrial release.<sup>65</sup> When judges set bail, they must consider factors such as the defendant's character, financial circumstances, criminal record, and family ties.<sup>66</sup> But under New York law, judges are not currently allowed to consider a person's risk to public safety.

We join with other New Yorkers, including Mayor Bill de Blasio and Governor Andrew Cuomo, in voicing our support for reforming our bail law. We believe that money should not determine a person's liberty. The Commission endorses a system of pretrial justice that maximizes release. All but a small number of defendants can and should be safely released.

### **New York should eliminate money bail.**

Given the unmistakable harms of traditional bail, there is a growing movement to eliminate money bail entirely. Washington, D.C. eliminated bail in the early 1990s. New Jersey recently enacted a similar approach. Each person arrested in New Jersey is assessed for risk for failure to appear, risk of re-arrest, and risk of violent re-arrest. Based on the results of all three assessments, a pretrial services agency makes a recommendation for release, supervised release, or preventive detention. The attorneys can also offer evidence to support an outcome that differs from the pretrial agency's recommendation, with the judge making the final

determination.

The Commission believes that this is also the correct approach for New York—getting money out of the equation is the right thing to do. Any effort to eliminate money bail through state legislation must be mindful of the potential for unintended consequences. In particular, if bail reform efforts end up significantly increasing the use of preventive detention—defined as detention without chance of release on bail during the pretrial period—they will be a failure. Any acceptable legislative solution must contain sufficient and extensive safeguards to avoid this outcome. These should include stringent limitations establishing a small number of charges that can be subject to preventive detention and, as is the case in Washington, D.C., strict time limits on the duration of any detention during the pretrial period.

### **Pretrial decision-making should prioritize risk of future danger based on empirical information.**

The pretrial decision to detain someone should be reserved for those individuals who pose an empirically-based, clear danger to an individual or to the community during the pretrial period. New York's bail law should be amended to allow judges to consider an individual's potential risk of harming others, with the presumption that any risk of failure to appear can be addressed through appropriate pretrial supervision. Building upon the model used in Washington, D.C., discretion favoring release should be exercised in the majority of cases. For those whose alleged offense and future risk indicates that no amount of pretrial supervision or monitoring could adequately assure the safety of the community, there should be a very narrowly prescribed set of charges and circumstances in which pretrial detention is permissible. For that narrow set of people who are deemed too dangerous to release pretrial, due process, procedural safeguards, and a strictly enforced speedy trial clock are necessary to ensure that detention is used rarely and, where used, lasts for no more than a minimal period of time.

The assessment of risk should be conducted using actuarial risk instruments that are customized to be used on New York City's population to accurately predict whether

defendants pose a low, moderate, or high risk of violence. As in New Jersey’s new bail statute and consistent with the approach recommended recently by Governor Cuomo, absent a compelling justification, detention should only be permissible for high-risk individuals.

The Commission also recommends that risk tool developers test for whether their assessments could have a disproportionate impact on different racial or ethnic groups. (Safeguards regarding the construction of risk assessment tools were discussed previously, where we introduced our recommendations for using risk assessment within the existing statutory framework.) Under any legislative solution, it is especially important for risk assessment tools to be developed, validated, and assessed for disproportionate impact with great diligence and rigor.

**Create a statutory presumption of release for misdemeanors and nonviolent felonies.**

The Commission recommends a strong presumption of release for all misdemeanors and nonviolent felonies, which account for over 3,300 people who are currently detained on any given day. Broadly consistent with the approach in Washington, D.C. and New Jersey, these charges should be on the excluded list from preventive detention, absent a compelling justification that is proven in a special bail

hearing. Defendants with these charges—as well as defendants facing violent charges but who do not have a statistically-demonstrable high risk of future violence—can and should be released during the pretrial period, in some cases under rigorous community supervision.

**Current restrictions on bail funds should be relaxed and judges should be required to set at least three forms of bail.**

Until cash bail is eliminated, some legislative reforms can help ease the payment of bail. Charitable bail funds step in to pay bail in misdemeanor cases where the amount is no more than \$2,000. The Commission supports a bill, A. 4880, currently pending in Albany to make bail fund assistance available at higher amounts of \$5,000 for both misdemeanors and felonies.

Furthermore, the law currently requires judges to set at least two forms of bail, which in practice are usually cash bail or an insurance company bail bond. Requiring that judges set a third form of bail would encourage greater use of credit cards and unsecured and partially secured bonds, reducing excessive upfront bail amounts and making it easier for people to pay bail.

# Exhibit 17

# The Bail Trap

Every year, thousands of innocent people are sent to jail only because they can't afford to post bail, putting them at risk of losing their jobs, custody of their children — even their lives.

By NICK PINTO AUG. 13, 2015

On the morning of Nov. 20 last year, Tyrone Tomlin sat in the cage of one of the Brooklyn criminal courthouse's interview rooms, a bare white cinder-block cell about the size of an office cubicle. Hardly visible through the heavy steel screen in front of him was Alison Stocking, the public defender who had just been assigned to his case. Tomlin, exhausted and frustrated, was trying to explain how he came to be arrested the afternoon before. It wasn't entirely clear to Tomlin himself. Still in his work clothes, his boots encrusted with concrete dust, he recounted what had happened.

The previous afternoon, he was heading home from a construction job. Tomlin had served two short stints in prison on felony convictions for auto theft and selling drugs in the late '80s and mid-'90s, but even now, grizzled with white stubble and looking older than his 53 years, he found it hard to land steady work and relied on temporary construction gigs to get by. Around the corner from his home in Crown Heights, the Brooklyn neighborhood where Tomlin has lived his entire life, he ran into some friends near the corner of Schenectady and Lincoln Avenues outside the FM Brothers Discount store, its stock of buckets, mops, backpacks and toilet paper overflowing onto the sidewalk. As he and his friends caught up, two plainclothes officers from the New York Police Department's Brooklyn North narcotics squad, recognizable by the badges on their belts and their bulletproof vests, paused outside the store. At the time, Tomlin thought nothing of it. "I'm not doing anything wrong," he remembers thinking. "We're just talking."

Tomlin broke off to go inside the store and buy a soda. The clerk wrapped it in a paper bag and handed him a straw. Back outside, as the conversation wound down, one of the officers called the men over. He asked one of Tomlin's friends if he was carrying anything he shouldn't; he frisked him. Then he turned to Tomlin, who was holding his bagged soda and straw. "He thought it was a beer," Tomlin guesses. "He opens the bag up, it was a soda. He says, 'What you got in the other hand?' I says, 'I got a straw that I'm about to use for the soda.'" The officer asked Tomlin if he had anything on him that he shouldn't. "I says, 'No, you can check me, I don't have nothing on me.' He checks me. He's going all through my socks and everything." The next thing Tomlin knew, he says, he was getting handcuffed. "I said, 'Officer, what am I getting locked up for?' He says, 'Drug paraphernalia.' I says, 'Drug paraphernalia?' He opens up his hand and shows me the straw."

Stocking, an attorney with Brooklyn Defender Services, a public-defense office that represents 45,000 indigent clients a year, had picked up Tomlin's case file a few minutes before interviewing him. The folder was fat, always a bad sign to a public defender. The documentation submitted by the arresting officer explained that his training and experience told him that plastic straws are "a commonly used method of packaging heroin residue." The rest of the file contained Tomlin's criminal history, which included 41 convictions, all of them, save the two decades-old felonies, for low-level nonviolent misdemeanors — crimes of poverty like shoplifting food from the corner store. With a record like that, Stocking told her client, the district attorney's office would most likely ask the judge to set bail, and there was a good chance that the judge would do it. If Tomlin couldn't come up with the money, he'd go to jail until his case was resolved.

Their conversation didn't last long. On average, a couple of hundred cases pass through Brooklyn's arraignment courtrooms every day, and the public defenders who handle the overwhelming majority of those cases rarely get to spend more than 10 minutes with each client before the defendant is called into court for arraignment. Before leaving, Stocking relayed what the assistant district attorney told her a few minutes earlier: The prosecution was prepared to offer Tomlin a deal. Plead guilty to a misdemeanor charge of criminal possession of a controlled substance, serve 30 days on Rikers and be done with it. Tomlin said he wasn't interested. A guilty plea would only add to his record and compound the penalties if he were arrested again. "They're mistaken," he told Stocking. "It's a regular straw!" When the straw was tested by the

police evidence lab, he assured her, it would show that he was telling the truth. In the meantime, there was no way he was pleading guilty to anything.

When it was Tomlin's turn in front of the judge, events unfolded as predicted: The assistant district attorney handling the case offered him 30 days for a guilty plea. After he refused, the A.D.A. asked for bail. The judge agreed, setting it at \$1,500. Tomlin, living paycheck to paycheck, had nothing like that kind of money. "If it had been \$100, I might have been able to get that," he said afterward. As it was, less than 24 hours after getting off work, Tomlin was on a bus to Rikers Island, New York's notorious jail complex, where his situation was about to get a lot worse.

**"Criminal justice,"** President Obama said in a speech to the N.A.A.C.P. last month, "is not as fair as it should be. Mass incarceration makes our country worse off, and we need to do something about it." Two days after the speech, Obama became the first sitting president to visit a federal prison, meeting with convicts in a corrections institution in El Reno, Okla. The setting was dramatic, but mass incarceration isn't actually a federal problem. Of the 2.2 million people currently locked up in this country, fewer than one in 10 is being held in a federal prison. Far more are serving time in state prisons, and nearly three-quarters of a million aren't in prison at all but in local city and county jails. Of those in jails, 60 percent haven't been convicted of anything. They're innocent in the eyes of the law, awaiting resolution in their cases. Some of these inmates are being held because they're considered dangerous or unlikely to return to court for their hearings. But many of them simply cannot afford to pay the bail that has been set.

Occasionally, these cases make the news. In June, Sandra Bland was found dead in her cell in Texas after failing to come up with \$500 for her release. But often, they go unnoticed. The federal government doesn't track the number of people locked up because they can't make bail. What we do know is that at any given time, close to 450,000 people are in pretrial detention in the United States — a figure that includes both those denied bail and those unable to pay the bail that has been set. Even that figure fails to capture the churn of local incarceration: In a given year, city and county jails across the country admit between 11 million and 13 million people. In New York City, where courts use bail far less than in many jurisdictions, roughly 45,000 people are jailed each year simply because they can't pay their court-assigned bail. And while the city's courts set bail much lower than the national average, only one in 10

defendants is able to pay it at arraignment. To put a finer point on it: Even when bail is set comparatively low — at \$500 or less, as it is in one-third of nonfelony cases — only 15 percent of defendants are able to come up with the money to avoid jail.

Bail hasn't always been a mechanism for locking people up. When the concept first took shape in England during the Middle Ages, it was emancipatory. Rather than detaining people indefinitely without trial, magistrates were required to let defendants go free before seeing a judge, guaranteeing their return to court with a bond. If the defendant failed to return, he would forfeit the amount of the bond. The bond might be secured — that is, with some or all of the amount of the bond paid in advance and returned at the end of the trial — or it might not. In 1689, the English Bill of Rights outlawed the widespread practice of keeping defendants in jail by setting deliberately unaffordable bail, declaring that “excessive bail shall not be required, nor excessive fines imposed.” The same language was adopted word for word a century later in the Eighth Amendment to the United States Constitution.

But as bail has evolved in America, it has become less and less a tool for keeping people out of jail, and more and more a trap door for those who cannot afford to pay it. Unsecured bond has become vanishingly rare, and in most jurisdictions, there are only two ways to make bail: post the entire amount yourself up front — what's called “money bail” or “cash bail” — or pay a commercial bail bondsman to do so. For relatively low bail amounts — say, below \$2,000, the range in which most New York City bails fall — the second option often doesn't even exist; bondsmen can't make enough money from such small bails to make it worth their while.

With national attention suddenly focused on the criminal-justice system, bail has been cited as an easy target for reformers. But ensuring that no one is held in jail based on poverty would, in many respects, necessitate a complete reordering of criminal justice. The open secret is that in most jurisdictions, bail is the grease that keeps the gears of the overburdened system turning. Faced with the prospect of going to jail for want of bail, many defendants accept plea deals instead, sometimes at their arraignments. New York City courts processed 365,000 arraignments in 2013; well under 5 percent of those cases went all the way to a trial resolution. If even a small fraction of those defendants asserted their right to a trial, criminal courts would be overwhelmed. By encouraging poor defendants to plead guilty, bail keeps the system afloat.

“**What, did they arrest** all of Brooklyn today?” one court officer asked another on a recent Sunday night in one of the two bustling arraignment courtrooms in Downtown Brooklyn. Defendants, a vast majority of them black, paraded past the judge in quick succession: Unlicensed operation of a motor vehicle. Open container of alcohol in public. Marijuana possession. Riding a bicycle on the sidewalk. Misdemeanors, many of them minor, some aggravated by an outstanding bench warrant for failure to appear in court on another case, failure to complete court-ordered community service or failure to pay a fine. Hundreds of people were awaiting arraignment, first in central booking across the street, then in cells on the ninth floor and finally in a small communal cell called “the pen” behind the arraignment courtrooms on the ground floor. On this night, there were more than a dozen men in the cell waiting to see a lawyer, pacing, sitting on benches, crouching in corners.

One man called out from the pen, saying that there was dried excrement in there from the day before. “Nobody comes in here to clean!” he exclaimed. “It’s mad dirty!” A guard approached the bars and briefly sprayed a can of air freshener. Around the corner, the pen opened onto a series of booths, where, separated by heavy metal screens, the defendants met with their lawyers. Scott Hechinger, a senior trial attorney with Brooklyn Defender Services, picked up a stack of case files, quickly scanned the charges and rap sheets, stepped down a short hallway behind the courtroom and started calling names through the mesh screen. The first client was charged with criminal mischief after getting in an argument with his girlfriend and breaking some bowls. It was more complicated than that, he told Hechinger. She came home drunk, threw his clothes out the window. It escalated. He left. They arrested him across the street. Hechinger called the girlfriend and left a message. He called the client’s mother, whom the man lived with. If bail was set, how much could she afford? At most \$250. Time’s up. Next case.

A young man jumped a subway turnstile. Prosecutors were offering to make it go away and let him out that night if he did two days of community service and avoided being rearrested for the next six months. This one was easy. “Take the deal,” Hechinger said. It was better than paying a \$120 fee.

Next up was a homeless teenager, charged with “obstruction of governmental administration.” The paperwork said the police saw him with a knife, and that he resisted arrest. He said there was no knife, that the cops stopped him for no reason and

beat him. He showed Hechinger bruises on his arms and a fat lip. It was hard to see much through the screen. Hechinger promised to take a closer look in a few minutes when they were in front of the judge together. The final person was a man arrested for driving with a suspended license, a straightforward case.

After less than half an hour, Hechinger was back in the courtroom. The defendants he interviewed were marched out onto a bench against the left wall. First was the turnstile jumper. The prosecutor laid out the charges and the offer. The defendant took the deal and would have to complete community service. Next was the homeless teenager. The prosecutor asked for bail of \$5,000. Hechinger argued that bail was unnecessary. The judge set it at \$250. The teenager didn't have it. He would be sleeping at Rikers. The guy with the suspended license was released on his own recognizance — without any bail — and would be due back in court in a couple of months. Next appeared the man who broke his girlfriend's bowls. The prosecutor wanted bail set at \$2,500. Hechinger argued that there was no reason to believe his client wouldn't return to court on his own. The judge set it at \$1,000. "Your honor, I called the mother, she said she could afford \$250," Hechinger said. "I'm sorry, counselor, that's my bail decision," the judge responded.

Another half-hour had elapsed. Hechinger went back to the case pile and picked up another stack. One of the three other defenders working the courtroom stepped up with her own cases. When court shut down for the night at 1 a.m., defendants were still waiting. They would stay in their cells and be arraigned when court started up again in the morning.

The sheer speed of the arraignment process makes it virtually impossible for the court to make informed decisions. Prosecutors have nothing to go on but a statement from the police and possibly a complaining witness, and defense lawyers know only what they've been able to glean from their brief interviews and perhaps a phone call or two. It's in this hurried moment, at the very outset of a criminal case, before evidence has been weighed or even gathered, that a defendant's freedom is decided. The stakes are high, and not only for the obvious reason that jail is an unpleasant and often dangerous place to be. A pretrial stretch in jail can unravel the lives of vulnerable defendants in significant ways.

The next hearing in Tyrone Tomlin's drinking-straw case was scheduled for a week after his arraignment. He left the courthouse, was loaded onto a bus and crossed the narrow causeway that connects Queens to Rikers. Tomlin was assigned to the Anna M. Kross Center, one of 10 correctional facilities on the island.

Incarcerated people rarely have nice things to say about the places where they're locked up, but an investigation by the United States attorney's office this year found "a deep-seated culture of violence" among Rikers guards, who reported using force against inmates more than 4,000 times last year. Violence among inmates is also pervasive. A Department of Corrections document obtained by The Daily News reported 108 stabbings and slashings in the last year. "That place is miserable," Tomlin said. "It's dangerous. It's every man for himself. You could get abused, you could get raped, you could get extorted. That stuff is all around."

Housed in a unit with more than 50 other prisoners, Tomlin tried to keep his head down, and he was able to get through a week without incident. Outside, his aunt worried about him. His employer had no idea where he was. On Nov. 25, he was back in court for a discovery hearing, during which prosecutors were supposed to turn over any relevant evidence. None was presented, but prosecutors repeated their offer for Tomlin to plead guilty. He still refused. "I wasn't taking nothing, because I didn't do nothing," he says. His case was adjourned for another two weeks.

Tomlin's willingness to hold out against the charges was unusual. Across the criminal-justice system, bail acts as a tool of compulsion, forcing people who would not otherwise plead guilty to do so. A 2012 report by the New York City Criminal Justice Agency, based on 10 years' worth of criminal statistics, bears this out. In nonfelony cases in which defendants were not detained before their trials, either because no bail was set or because they were able to pay it, only half were eventually convicted. When defendants were locked up until their cases were resolved, the conviction rate jumped to 92 percent. This isn't just anecdotal; a multivariate analysis found that even controlling for other factors, pretrial detention was the single greatest predictor of conviction. "The data suggest that detention itself creates enough pressure to increase guilty pleas," the report concluded.

Still awaiting a trial, Tomlin returned to Rikers and quickly got into trouble with a group of younger inmates while on the phone with his aunt. "A young guy tells me, 'Yo,

pop, you gotta get off the phone,’” he said. “I said, ‘I’m in the middle of an important call.’ He wanted me to just hang up.” Tomlin quickly realized he’d made a mistake. That evening, in the shower, he was jumped by a group of young men. “Most of the punches went to the side of my head and my eye,” he said. “I was tussling one and had to worry about the other three, there was blows coming from everywhere.” Punched, kicked and stomped, Tomlin received medical attention, his face monstrously misshapen, his left eye swollen shut. “You’d think I was Frankenstein’s brother or something,” he said.

Tomlin’s eye was still swollen shut on Dec. 10, three weeks after his arrest, when he returned to court. At this hearing, prosecutors handed over a report from the police laboratory, which had tested the drinking straw. At the top of the report, in bold, underlined capital letters, were the words “No Controlled Substance Identified, Notify District Attorney.”

The report had been faxed to the district attorney on Nov. 25, the same day as Tomlin’s last court hearing and days before his beating. The key to his freedom had been sitting unexamined. Conceding that the case had unraveled, the prosecutor asked that the charges be dismissed. “The judge says, ‘Mr. Tomlin, this is your lucky day, you’re going home,’” Tomlin recalls. “I just left the courtroom, signed some papers and that was it.”

Tomlin had lost three weeks of income, was subjected to brutal physical violence and missed Thanksgiving dinner with his family. But he resisted the pressure to plead guilty. His previous convictions all came from pleas, most of them made with bail looming over him. He knows the bitter Catch-22 of pleading guilty to get out of jail. “It feels great to go home,” he says. “Anybody’s happy to go home. But at the same time, it feels bad, because that’s more damage on your record.”

For defendants who would fight their cases and maintain their innocence if they had the money, a guilty plea involves a ritual of court procedure that verges on the Kafkaesque:

“Your lawyer tells me you want to plead guilty to the charge. Is that correct?” the judge will ask. Yes, the defendant must reply.

“You understand that by your plea of guilty you are giving up certain trial rights?”  
Yes.

“The right to remain silent, the right to confront witnesses against you, the right to have the prosecutor prove your guilt beyond a reasonable doubt?” Yes, yes, yes.

And then: “Are you pleading guilty freely and voluntarily, because you are in fact guilty?”

Hechinger, the lawyer with Brooklyn Defender Services, hates this part of the process. “A lot of times, at that last question, you feel the client beside you bristle,” he says. “Everyone in the room knows it’s not ‘freely and voluntarily.’ They’re making a decision coerced by money. In many cases, if they had money, they wouldn’t be pleading. But they put their heads down, and they say, ‘Yes.’ It’s a horrible, deflating feeling.”

**The long-term damage** that bail inflicts on vulnerable defendants extends well beyond incarceration. Disappearing into the machinery of the justice system separates family members, interrupts work and jeopardizes housing. “Most of our clients are people who have crawled their way up from poverty or are in the throes of poverty,” Hechinger says. “Our clients work in service-level positions where if you’re gone for a day, you lose your job. People in need of caretaking — the elderly, the young — are left without caretakers. People who live in shelters, where if they miss their curfews, they lose their housing. Folks with immigration concerns are quicker to be put on the immigration radar. So when our clients have bail set, they suffer on the inside, they worry about what’s happening on the outside, and when they get out, they come back to a world that’s more difficult than the already difficult situation that they were in before.”

This spring, a 24-year-old woman named Adriana found herself newly single in New York, trying to make a life for herself and her daughter. Short and round, with oversize glasses that frequently slide off her nose, she has an easy manner and deadpan sense of humor that belie her past as a runaway from an abusive mother. Adriana arrived in New York in the middle of 2014 with her baby daughter, not yet 2, and knew no one but her boyfriend at the time, a controlling figure who lived off her earnings from massages she advertised on Craigslist. (Like many runaways, Adriana had sometimes relied on sex work to survive, though recently she was trying to avoid it.) After separating from her boyfriend, Adriana managed to secure a spot in a Brooklyn shelter for victims of domestic violence. “I was trying to get a job, trying to get my life

together,” she says. She was focused on her daughter. “I just want to be the best mother for her that I can be,” she says. “That’s my priority. That’s my only priority.” (Because of safety concerns, Adriana asked not to be identified by her full name.)

On the night of March 18, Adriana realized she was running low on diapers. A friend at the shelter who also had a child agreed to keep an eye on her daughter, and Adriana headed to a nearby Target. This was after curfew, and when a staff member saw Adriana leaving without her daughter, she called the police. “When I got to Target, I started getting all these texts from my friend,” Adriana says. “She was saying, ‘You’ve got to get back here — there are staff in your room, and they won’t let me in to look after the baby.’” Adriana rushed home with the diapers. In the shelter’s courtyard, she was met by police officers, who had her daughter.

“Where are you going with my baby?” she asked, according to court documents. “That’s my baby. I just went to the store to buy diapers.” It didn’t matter. The police placed her under arrest, charging her with endangering the welfare of a child. She gave one of the officers the diapers she’d just bought, in case her daughter needed to be changed. She was handcuffed and taken to the precinct. The police took her daughter to the station, too, where she was turned over to the city’s Administration for Children’s Services and eventually placed in a foster home.

Before her arraignment two days later, Adriana explained to her public defender what happened. Her friend could confirm that she was looking after the baby, she said. The lawyer told Adriana she’d do her best to get her released on her own recognizance. But when Adriana appeared in front of Judge Rosemarie Montalbano, the assistant district attorney asked for bail to be set at \$5,000. Adriana had no criminal record and had never failed to make a court appearance, but the prosecutor cited an “A.C.S. history,” meaning that Adriana and her daughter had previous contact with the Administration for Children’s Services. This was true but misleading. The A.C.S. report involving Adriana had found that she wasn’t responsible for any neglect or abuse. What the A.C.S. did find was violence and coercion on the part of her boyfriend; this is how Adriana landed a spot in the domestic-violence shelter.

But arraignments happen quickly. Just as there was no time to track down Adriana’s friend to confirm that her daughter hadn’t been left unsupervised, there was no time to find out what the A.C.S. order actually said. The judge set bail at \$1,500.

Adriana's public defender couldn't believe it. "Judge, I'm going to ask you to state the reason for setting bail in this case," she said, according to the court transcript. "Thank you, counsel," was the judge's only reply.

With no way to come up with \$1,500, Adriana spent the next two weeks on Rikers Island. Her bail made it harder for her to fight her case, but it also effectively dismantled the new life she was trying to build for herself and her daughter. She lost her bed at the shelter, and her child was living with strangers. "It feels like they were kicking me when I was down," she says.

Over subsequent hearings, Adriana's lawyers tried to get her bail lifted, but they ran into another common problem facing defendants: Once a judge sets bail, other judges are often reluctant to second-guess their colleague's decision. If they free a defendant who commits a crime while out on bail, the blowback from politicians, police unions and the tabloid press can be substantial. "I have no idea what motivated Judge Montalbano to set bail," said Judge Andrew Borrok at one of Adriana's hearings, four days after her arraignment. Still, he said, "I'm not inclined to change what's been done."

Adriana's lawyers managed to move her case to a court that specialized in sex-trafficking cases, hoping for a more sympathetic judge and prosecutors. In the trafficking court, however, prosecutors remained reluctant to lift bail, now citing concerns that Adriana's safety could be at risk if her ex-boyfriend found out she was set free. Ultimately, after two weeks of hearings, prosecutors agreed to remove Adriana's bail provided she complete weekly "life-skills coursework" administered by a group that serves arrested sex workers. "Congratulations on being in a place where a lot of people care about you," Adriana remembers the judge telling her as she stood before him in handcuffs, quietly asking a court officer to push her glasses back up her nose. "There's a lot of people in this room that want good things to happen to you. The fear is that you're not ready for all of these great things."

The judge ordered Adriana released. She could begin reassembling her life, finding a new shelter, retrieving whatever remained of her possessions. But her baby was still in foster care, and her case still wasn't resolved. In June, a judge finally agreed to dismiss her case if she wasn't arrested for the next six months. As this story went to press, five months after her arrest, she was still fighting in family court to regain custody of her daughter.

Outside the courtroom after the hearing for her release, Scott Hechinger, who helped coordinate Adriana's defense, was exasperated. "Remember," he said, "this is all about some diapers! Bail changes the conversation. If bail hadn't been set, Adriana wouldn't have to be negotiating to get out of Rikers. She'd just be released."

**In early 2013**, Jonathan Lippman, chief judge of the State of New York, decided that the business-as-usual approach to setting bail could not be tolerated any longer. "We still have a long way to go before we can claim that we have established a coherent, rational approach to pretrial justice," he said in his annual State of the Judiciary address. "Incarcerating indigent defendants for no other reason than that they cannot meet even a minimum bail amount strips our justice system of its credibility and distorts its operation." Lippman sent a package of proposed legislation to reduce the reliance on cash bail to lawmakers in Albany, and he lobbied for the reforms hard in the press. His efforts went nowhere. "Zero," Lippman says, shaking his head. "Nothing." Lawmakers had no appetite for bail reform.

Two years later, that may be changing. This summer, the New York City Council took a tentative step toward reform by earmarking \$1.4 million for a citywide fund to bail out low-level offenders. The fund, proposed with much fanfare by Speaker Melissa Mark-Viverito in her State of the City address in February, is modeled on a number of smaller bail funds around the city. The oldest of these, the Bronx Freedom Fund, was established in 2007 in association with the Bronx Defenders, a public-defender organization. The founders shut down the fund after only a year and a half, after a judge argued that it was effectively operating as an unlicensed bail-bond business. But before they did, the fund bailed out nearly 200 defendants and generated some illuminating statistics. Ninety-six percent of the fund's clients made it to every one of their court appearances, a return rate higher even than that of people who posted their own bail. More than half of the Freedom Fund's clients, now able to fight their cases outside jail, saw their charges completely dismissed. Not a single client went to jail on the charges for which bail had been posted. By comparison, defendants held on bail for the duration of their cases were convicted 92 percent of the time. The numbers showed what everyone familiar with the system already knew anecdotally: Bail makes poor people who would otherwise win their cases plead guilty.

Armed with these statistics, as well as a 2010 Human Rights Watch report that calculated that New York City was paying \$42 million a year to incarcerate nonfelony

defendants, the Freedom Fund's founders managed to persuade state lawmakers to pass legislation explicitly legalizing nonprofit bail funds. In 2013, the Freedom Fund resumed operation. Close behind was the Brooklyn Community Bail Fund, begun by Scott Hechinger and a colleague at Brooklyn Defender Services. It was opened this spring and has already bailed out more than 60 clients.

But even the staunchest supporters of bail funds are quick to say that they are, at best, temporary Band-Aids for a broken system. "They are a useful form of relief as long as people are being locked up because they're poor," says Hechinger, who is no longer affiliated with the Brooklyn bail fund. "They're an intervention for an urgent need. But they're not actual bail reform."

Earlier this summer, in the wake of the shocking suicide of Kalief Browder, a Bronx teenager arrested on suspicion of stealing a backpack and held on bail for three years in Rikers before his case was dismissed, Mayor Bill de Blasio unveiled his own initiative. "I wish, I deeply wish, we hadn't lost him — but he did not die in vain," de Blasio said. The centerpiece of de Blasio's initiative is a \$17.8 million citywide initiative based on pilot programs that have been running in Queens and Manhattan, offering something called "supervised release." Under these programs, a small number of qualifying defendants, who might otherwise be held on bail, are instead set free and required to check in with caseworkers by phone and in person. The pilot programs have shown good results, but they have narrowly tailored eligibility requirements. Tyrone Tomlin, for example, would not have been eligible because he had too many previous convictions. Kalief Browder would not have been eligible, either, because the crime he was accused of, stealing a backpack, was charged as second-degree robbery, a violent felony. "If Kalief Browder's death wasn't in vain," says Peter Goldberg, executive director of the Brooklyn Community Bail Fund, "it won't be because of the proposals we've seen so far from the city."

The only truly meaningful reform, many observers agree, is to take money out of the bail process entirely. Lippman has been championing this idea for several years. "You have to eliminate cash bail," he says. The ramifications of such a move are far-reaching. Without bail — and the quick guilty pleas that it produces — courts would come under significant strain. "The system would shut down," Goldberg says. "A lot of the 250 people who were waiting to be arraigned in Brooklyn last night would all be coming back to court soon to go forward with a trial for a misdemeanor that no one has

any interest in pursuing.” This crisis, Goldberg believes, would be a good thing. “You want pressure on the system. You want everyone involved to be reconsidering. Because of how much it could clog the system, you might have people on high telling cops to stop picking people up for an open-container violation, because ‘I don’t want to deal with it in my courtroom.’”

The idea of eliminating cash bail is hardly unprecedented. When Washington overhauled its bail system in the 1980s and ’90s, it instituted a supervised-release program and other measures designed to reduce the number of people held on bail. But judges continued to set bail until the law was rewritten to effectively forbid the imprisonment of people on financial grounds. The number of people locked up on bail plummeted. “D.C. had all the tools in place,” says Cherise Fanno Burdeen, executive director of the Pretrial Justice Institute. “They just needed a way to change the court culture.” Kentucky, Colorado and, last year, New Jersey have joined Washington in adopting legislation severely curtailing bail’s use.

The more modest reforms being proposed in New York City, Goldberg says, are hardly cause for celebration. “Robert Kennedy, when he was attorney general, raised exactly the concerns with bail we’re talking about now,” he says. “Fifty years later, we’re still having the conversation. We can’t be satisfied with cosmetic fixes. And the truth is, even meaningful bail reform is just the beginning. The real work is asking why we’re arresting so many people on low-level offenses in the first place, and why so many of them come from poor black and brown communities. Bail is easy.”

**In late June**, Tyrone Tomlin sat at a picnic table in St. John’s Park in Crown Heights, trying to cool down after a hot day of work and sipping bodega iced tea through a straw. Beneath his baseball cap, his left eye still looked askew, his gaze unfocused and hard to meet. “My sight is still a little blurry,” he said. “I still feel the aftereffects. Pains in my eye, in my head.” The whole situation could have been worse, he knows. He could have been hurt more seriously at Rikers. He could have been fired from his construction job, after being a no-show for the better part of a month while locked up. But even so, he was still angry about what happened last winter. “I’m not no prince,” he acknowledged. “But I got a raw deal.”

The inability to make bail has been a virtual constant in Tomlin’s life. His first encounter with the law came when he was 14 or 15 — he recalls being picked up on a

robbery charge and sent to Spofford juvenile detention center in the Bronx because his family couldn't pay bail. After a few months, he says, he pleaded guilty and received probation. "They said it's supposed to teach you a lesson," he said. "It just got me worse." In two-thirds of the times he has pleaded guilty to misdemeanors in the last 14 years, he did so either at arraignment to avoid being sent to Rikers or after already spending as much as two weeks at Rikers. Not once has he been able to pay bail.

"I'm not Johnny Rich-Kid with a silver spoon," he says. For Tomlin, the historical evolutions of bail and pretrial jurisprudence are abstractions without meaning in his life. Bail is simply a feature of the landscape, the thing that means he is locked up when someone with more money wouldn't be. "Sure, yeah, I'm mad about it," he said grudgingly. "But that's the way it is. I've got to accept it. It's not right, but it's the way it is." He shrugged. "What are you going to do?"

Nick Pinto is a freelance journalist living in Brooklyn. He last wrote for the magazine about the history and purpose of policing.

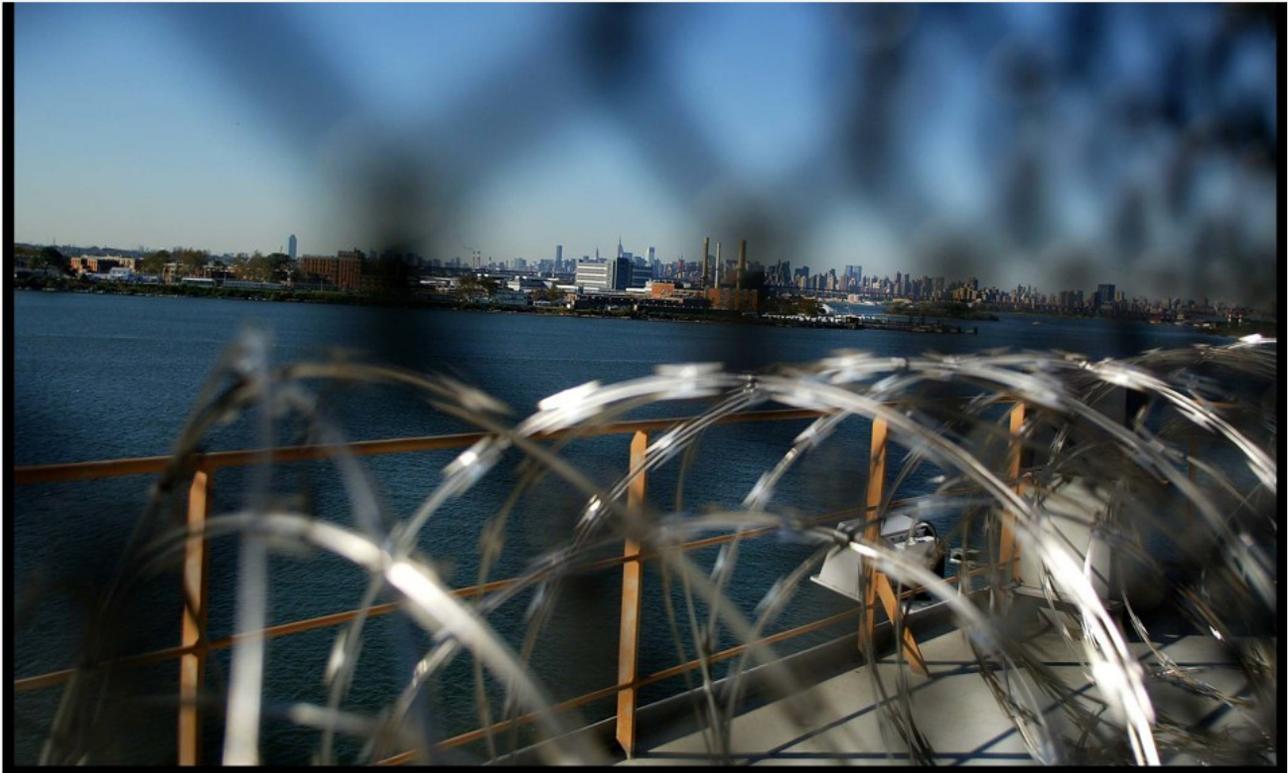
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A version of this article appears in print on August 16, 2015, on Page MM38 of the Sunday Magazine with the headline: The Bail Trap.

# Exhibit 18

## The Failure of New York's Bail Law

The state has “one of the best and most impressive bail statutes in the entire country.” Trouble is, in the most populous city, the courts don’t actually follow it.



A view of Manhattan from a Rikers Island facility

David Howells / Getty Images

IAN MACDOUGALL

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THE PRESENCE OF JUSTICE

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SIGN UP

BROOKLYN, N.Y.—Spend even a little time in Kings County Criminal Court, and a pattern to the proceedings quickly emerges. A person recently arrested in Brooklyn is brought before a judge to be arraigned. An assistant district attorney asks the judge to set bail. The judge, without asking whether the defendant can afford the payment, offers him two **unworkable** choices: Post the full amount of bail now or pay a visit to the bail bondsman, an **expensive proposition**.

Most are forced to default to a third option: Unable to put up the cash, the defendant is left to spend weeks and months—in some cases, **even years**—at **the widely condemned** jail complex on Rikers Island. There, the defendant awaits trial as one of **more than 7,000 inmates**—about **three-quarters** of New York City’s jail population—convicted of no crime and detained only because they can’t buy their freedom. The whole arraignment takes no more than a few minutes, and then it’s on to the next one.

Public defenders in Brooklyn are in the process of launching a new initiative intended to disrupt this pattern. When a judge sets bail that a defendant can’t afford, the Brooklyn Defenders Service will systematically challenge the judge’s order. If that fails, they’ll appeal it. The goal of the project is to begin to repair New York City’s long-criticized **bail system** by persuading and incentivizing judges to focus on bail’s essential purpose: It’s collateral meant to guarantee a criminal defendant’s return to court, not punishment for a person accused of a crime. At a moment when bail-reform efforts are **gaining momentum nationwide**, the initiative models a steady, case-by-case approach to challenging the status quo within the criminal-justice system. It also provides an object lesson in the limits of another, more traditional strategy: broad-sweeping legal change.

Exorbitant bail is the default in many courts in America, even though judges aren’t actually required to set it. They can release a defendant pending trial, and they can impose non-monetary conditions for their release. Of the roughly **450,000 inmates** awaiting trial on any given day nationwide, **nearly all** of them were jailed because they can’t make bail. In some jurisdictions, overly harsh statutes are to blame. In others, like New York, norms and practices, not the law, are responsible.

New York’s bail law is a product of a progressive overhaul of the bail system in the late 1960s and early 1970s. On paper, it’s among the more defendant-friendly nationwide—Scott Hechinger, a senior staff attorney and the director of policy for the Brooklyn Defenders, called it “one of the best and most impressive bail statutes in the entire country.” It requires judges to consider whether a defendant **can afford bail**, and it lets judges choose from **nine different forms**, including options that don’t require a defendant to pay anything up front. (**Studies**, including a report on New York City

released in September, suggest that non-cash forms of bail are as effective as cash bail at ensuring a defendant shows up for trial.)

Yet, for almost 50 years, the practice in city courts has failed to conform to the revised law. The law was designed, in the words of the legislature, to “reduce the un-convicted portion of our jail population.” But over time, it “ended up resulting in more, not less, pretrial detention,” said Jocelyn Simonson, a former public defender and Brooklyn Law School professor who studies bail. According to a report issued this spring by a New York City criminal-justice commission, “there is precious little evidence that either prosecutors or judges consider a person’s ability to pay bail.” City judges, the report observes, “routinely allow defendants to post only the two most onerous forms”—cash bail or a bail bond.

Public defenders concede that defense attorneys share some of the blame: From the outset, overworked criminal-defense lawyers lacked the time and resources to dig into their clients’ backgrounds and challenge the many bail determinations that departed from the law. For prosecutors, the incentives favor the present state of affairs: A defendant in jail is far more likely to take a plea deal, giving the government a win, than take a case to trial.

With both sides largely silent, judges, for their part, have had no reason to change long-standing practice. There can also be real risks to releasing a defendant, and current conditions permit them to take more punitive precautions. “Whether directly or subliminally,” said Jonathan Lippman, the former chief judge of New York’s highest court and the head of the criminal-justice commission, “the judge doesn’t like to see his name on the front page of a tabloid: ‘Judge releases so-and-so,’ and they do some great damage to public safety.”

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Here are the basics of the Brooklyn Defenders’ approach: An associate with the law firm Kramer Levin Naftalis & Frankel, which is partnering with the organization, will work pro bono with one of the public defenders to document each client’s finances, background, and community ties. They will then present their findings to a judge and either argue that bail is unnecessary or propose a form of bail the client can

realistically meet. Where bail remains outside of the defendant's financial reach, they will challenge the ruling in an appeals court.

In addition to seeing clients freed, the end game of the project is to change courtroom habit and get all parties involved following the law. "Part of this is just training judges," Hechinger said. Systematic appeals—if accompanied by a steady stream of reversals—could also prompt reform by expending judges' time and resources repeatedly redoing reversed bail determinations.

This August, I attended a test run of the project in the Kings County Supreme Court, where Brooklyn's felony cases are tried. The defendant, Mordecai Omatiga, had never been arrested until earlier this year, when a police officer allegedly recognized him on the street from surveillance footage of a grocery-store robbery. When the officer arrested Omatiga, he said, he'd found a handgun and a bag of marijuana on him. Omatiga pleaded not guilty to the robbery and other charges.

At an earlier stage in his case, a judge had given Omatiga two choices if he wanted to post bail: He could deposit \$50,000 with the court, or he could pay a bondsman **more than \$6,000** to post a \$100,000 bond. Omatiga didn't have that kind of money. He had a job, but he was attending vocational school and helping raise his five-year-old son.

Omatiga's lawyers—Debora Silberman, a public defender, and Alejandro Ortega, an associate at Kramer Levin—presented the judge with a type of bail application that's central to the Brooklyn Defenders' initiative. The lawyers had spent the preceding weeks interviewing their client and his family, and reviewing their finances. What they'd found, they told Justice James Sullivan, was a man who was a minimal flight risk. His entire life was in New York, and he was very close to his family, which had attended every one of his court dates. If Sullivan wouldn't release Omatiga outright, his parents—Nigerian immigrants—were willing to vouch for his return to court through an unsecured surety bond, one of New York's nine bail options. They would be contractually obliged to pay the court if Omatiga jumped bail.

"They're standing here in court to tell your Honor that they will, essentially, not have a dollar in their pockets," Silberman said. "Every dollar would go to this court until

Mr. Omatiga is returned.”

After a prosecutor spoke briefly, Sullivan denied the defense attorneys’ request. His reasons were threefold. He’d misread Omatiga’s clean criminal record and thought it showed a prior arrest for a violent felony. Although Omatiga denied involvement in the robbery, prosecutors said he’d acknowledged to police that he carried a handgun. And there was a video of the crime (though prosecutors and the defense disagreed whether the person in the video resembles Omatiga). “So the Court does not see any ground for changing bail,” Sullivan concluded. He made no mention of how specific factors that the bail statute instructs judges to consider affected his reasoning: Omatiga’s ability to afford cash bail, his ties to his community, and his family connections. The entire ruling took up less than half a page of court transcript.

Lawyers I spoke to described Sullivan as a careful judge with a reputation for fairness. Yet, he had followed the pattern defense attorneys had predicted he would. He had cited only the severity of what Omatiga was charged with and the evidence against him. He had said nothing about the other factors in the bail law. Nor had he explained why other forms of bail weren’t enough to ensure the defendant’s return to court. (Sullivan, through a court spokesperson, declined to comment on an ongoing criminal case.)

Later, before an appeals court, prosecutors argued that it was enough that Sullivan indicated he had considered the evidence put in front of him, even if he didn’t explain how certain factors listed in the statute had failed to persuade him to change Omatiga’s bail. The appellate court partly agreed. Last week, it cut Omatiga’s bail in half without explanation, though it left in place the decision to require cash bail or a bail bond. It’s not clear he’ll be able to meet that reduced amount.

“The reason [bail] gets set is because this is how it’s always been done,” Hechinger told me outside the courthouse after the August hearing, as Omatiga waited in a holding cell for a bus back to Rikers.

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A number of efforts to curb cash bail on a system-wide level have been instituted lately, including statewide legislation in [New Jersey](#) and broad-sweeping court orders

in **Massachusetts**, **Houston**, and **Chicago**. New York City's history, however, underscores the limits of systemic reforms. Legal change on paper alone is not enough to change long-entrenched judicial practice, a lesson that's already becoming apparent in jurisdictions that are part of the new wave of bail reforms. In Chicago, for example, representatives from criminal-justice groups have found that judges have not changed their practices to conform to a new cash-bail process implemented this summer by the chief judge, Simonson told me.

"New York is a lesson in this," said Josh Norkin, a staff attorney at the Legal Aid Society of New York, which represents low-income criminal defendants throughout the city's five boroughs. "There was never a sustained effort. What's a pretty good and pretty liberal statute has been so widely abused to make it almost non-functional."

The Brooklyn Defenders initiative, if successful, may provide a blueprint for case-by-case enforcement of systemic bail-reform measures across the country. A sustained litigation effort, however, is time- and resource-intensive, and a major barrier to that kind of effort is the **notorious underfunding** of public-defender offices. In Brooklyn, pro bono assistance from the private sector is helping overcome that hurdle, taking pressure off public defenders and assisting them with gathering information, preparing bail applications, and drafting briefs.

Despite the outcome of Omatiga's appeal, there is some reason to believe the initiative—as part of a **larger push toward criminal-justice reform in New York**—will begin to change courtroom practices. At Legal Aid, Norkin has implemented a smaller scale analog of the Brooklyn program, adding to one litigation group in Manhattan an attorney, paralegal, and social worker dedicated to bail. That unit has secured release for 64 of the 141 defendants it has represented over the past year. (The judicial process is slower moving than in Brooklyn, where the appeals courts adjudicate cases more quickly.)

Still, victory for Brooklyn Defenders might mean only a change in process—forcing judges to explain publicly why they set bail beyond what a defendant can afford—not a change in outcome, Norkin said. Even that, though, could have a meaningful effect: Requiring judges to explain their decisions on the public record may dissuade them from setting bail arbitrarily.

This week, the new project got under way, with a challenge to the bail status of an 18-year-old held at Rikers on gun-possession charges. The initiative will initially focus on felony defendants between the ages of 16 and 25, a cohort whose youth, Hechinger said, leaves them especially likely to be traumatized by stays in the facility. The case is expected to be the beginning of a long process to change practices deeply engrained in the judiciary—practices Lippman, the former chief judge, called “cultural.”

“The only way to do that,” Hechinger said, “is to get th[e] law in front of as many judges as possible on as systematic a level as possible.”

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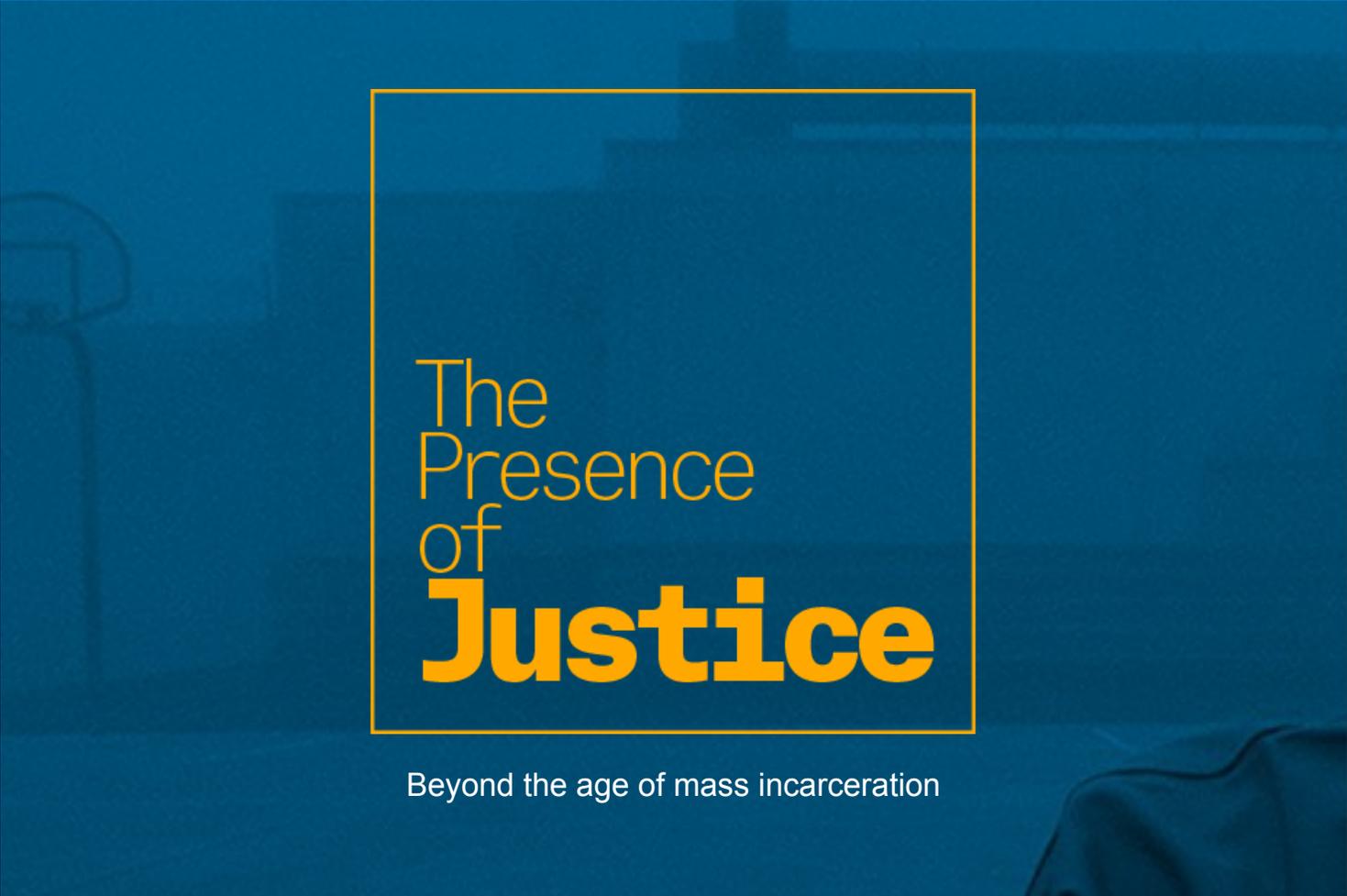
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The  
Presence  
of  
**Justice**

Beyond the age of mass incarceration

# Exhibit 19

# UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION



**Michael R. Jones  
Washington, D.C.  
October 2013**

# TABLE OF CONTENTS

Acknowledgements . . . . . 2

Study Summary . . . . . 3

Introduction . . . . . 4

Method . . . . . 6

    Defendants were assessed for their pretrial risk, and nearly 70% scored in the lower two of four risk categories. . . . . 6

    Defendants received either unsecured or secured bonds, and were separated into four groups to enable analysis of bond-type comparisons. . . . . 7

    Goals of the study. . . . . 9

Results. . . . . 10

    Unsecured bonds are as effective as secured bonds at achieving public safety. . . . . 10

    Unsecured bonds are as effective as secured bonds at achieving court appearance. . . . . 11

    Unsecured bonds free up more jail beds than do secured bonds because more defendants with unsecured bonds post their bonds. . . . . 12

    The monetary amount of secured bonds affected pretrial release rates but not court appearance rates. . . . . 13

    Unsecured bonds also free up more jail beds than do secured bonds because defendants with unsecured bonds have faster release times. . . . . 14

    Unsecured bonds are as effective as secured bonds at “fugitive-return” for defendants who have failed to appear . . . . . 16

    Many defendants are incarcerated for the pretrial duration of their case and then released to the community upon case disposition. . . . . 17

Discussion and Implications for Policy Making . . . 19

    The type of bond set by the court has a direct impact on the amount of jail beds consumed, but it does not impact public safety and court appearance results. . . . . 20

    Jurisdictions can make data-guided changes to local pretrial case processing that would achieve their desired public safety and court appearance results while reserving more jail beds for unmanageably high risk defendants and sentenced offenders. . . . . 21

    Colorado judicial officers now have data and law to support changing their bail setting practices to be as effective but much more efficient. . . . . 22

    This study’s findings are likely more generalizable to jurisdictions that use bond setting practices similar to those used in Colorado. . . . . 23

References . . . . . 24

About the Author . . . . . 25

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The Pretrial Justice Institute is a non-profit organization dedicated to advancing safe, fair, and effective pretrial justice practices and policies. For more information, visit [www.pretrial.org](http://www.pretrial.org).

## STUDY SUMMARY

This study was done to provide judicial officers, prosecutors, defense attorneys, sheriffs, jail administrators, county commissioners, pretrial services program directors, and other decision-makers in Colorado as well as in other states empirical evidence that can directly inform their pretrial release and detention policies and practices. Specifically, the simultaneous influence of unsecured bonds (personal recognizance bonds with a monetary amount set) and of secured bonds (surety and cash bonds) on the three most important pretrial outcomes: (1) public safety; (2) court appearance; and (3) jail bed use, were compared. The study, using data from over 1,900 defendants from 10 Colorado counties, found the following:

For defendants who were lower, moderate, or higher risk:

- Unsecured bonds are as effective at achieving public safety as are secured bonds.
- Unsecured bonds are as effective at achieving court appearance as are secured bonds.
- Unsecured bonds free up more jail beds than do secured bonds because: (a) more defendants with unsecured bonds post their bonds; and (b) defendants with unsecured bonds have faster release-from-jail times.
- Higher monetary amounts of secured bonds are associated with more pretrial jail bed use but not increased court appearance rates.

- Unsecured bonds are as effective at “fugitive-return” for defendants who have failed to appear as are secured bonds.
- Many defendants are incarcerated for the pre-trial duration of their case and then released to the community upon case disposition.
- Jurisdictions can make data-guided changes to local pretrial case processing that would achieve their desired public safety and court appearance results while reserving more jail beds for unmanageably high risk defendants and sentenced offenders.
- Judicial officers now have data and law to support changing their bail setting practices to maintain their effectiveness while increasing their efficiency.

This study provides empirical evidence about the effectiveness of secured and unsecured bonds. Findings support judicial officers changing their practices to use more unsecured releases, to include unsecured bonds if currently permitted by law, to achieve the same public safety and court appearance rates while using far fewer jail beds. These unsecured bonds could be used in conjunction with an individualized bond setting hearing.

# INTRODUCTION

Multiple criminal justice and government decision-makers have a role in the decision to release or detain defendants on pretrial status, either at the policy level or on a case-by case basis. Jail administrators are commonly granted authority by the court to release many defendants on their own recognizance or through the use of a money bond schedule, and those administrators are responsible for housing defendants who are not released. Pretrial services staff members perform risk assessment and information gathering, and provide the results and any release-condition recommendations to the court. Prosecutors and defense attorneys at pretrial hearings often request certain release conditions, including substance testing, electronic monitoring, or changes to a previously set monetary bond amount, based on their perception of the defendant’s pretrial risk to court appearance or public safety. Judges make the final decisions about the types of bond and conditions of bond, including financial and non-financial release conditions. County commissioners or state legislators fund the staff and court and jail facilities that comprise the pretrial system and/or pass laws, but often do so with little or no evaluative feedback about the system’s effectiveness or efficiency.

Whether in the role of making daily, case-by-case pretrial release or detention decisions or policy-level funding decisions, many of these criminal justice decision-makers have had to do so without scientific evidence to help guide their decisions. As a result, they may assume that the current pretrial justice process meets their standards for effectiveness and efficiency, and that the money bail system motivates defendants to return to court or to refrain from criminal activity upon release from jail pending the disposition of their case.

Researchers have recently attempted to determine to what extent, if any, secured monetary forms of pretrial release (e.g., surety or cash bonds) improve court appearance and public safety over non-monetary or unsecured forms of pretrial release (e.g., recognizance bonds). Unfortunately, for the reasons that Cohen and Kyckelhahn (2010) and Bechtel, Clark, Jones, and Levin (2012) have recently explained, researchers have not had access to data that has allowed them to determine simultaneously the effect of different bond types on the three most important pretrial outcomes: (1) public safety; (2) court appearance; and (3) pretrial release and jail bed use. To summarize, previous research has either: (a) had data or methodological limitations that limit the generalizability of the findings to other jurisdictions (see, for example, Morris, 2013; Krahl & New Direction Strategies, 2011); (b) has not sufficiently accounted for possible alternate explanations of the findings (see, for example, Block, 2005); and/or (c) was limited to measuring the effect of various forms of pretrial release on a singular outcome - court appearance, but not on both of the other two important pretrial outcomes - public safety and jail bed use (see, for example, Helland & Tabarrok, 2004; Morris, 2013). Indeed, as Bechtel et al. (2012) explain, the optimal outcome for any pretrial justice system from both an effectiveness (justice system goals) and efficiency (resource management) perspective is to:

- (1) Maximize public safety  
and
- (2) Maximize court appearance  
while
- (3) Maximizing release from custody.

Achieving only one or two of these pretrial outcomes without or at the expense of realizing the remain-

der would be less optimal than achieving all three simultaneously. Indeed, Osborne and Hutchinson (2004) make a compelling case for governments to maximize results while expending the minimal public resources to achieve those results.

The purpose of this study is to overcome some of the limitations of previous research and provide information to pretrial release decision-makers and criminal justice funding decision-makers that will enable them to accomplish a win-win situation: to achieve their desired public safety and court appearance outcomes while most efficiently using their costly jail resources. Because the study uses data from multiple Colorado counties, the results are generalizable throughout Colorado. Factors that may affect the extent to which the results are generalizable outside of Colorado are addressed later in the paper.

Furthermore, due to Colorado statute’s requirement of financial conditions of release, this study is an evaluation of the effect of different types of monetary bonds on public safety, court appearance, and jail bed use. As described in more detail later, some of these monetary bonds in Colorado require the defendant to post the entire monetary amount in cash or some portion thereof through a commercial bail bondsman prior to leaving jail custody, whereas other monetary bonds do not require any money to be posted prior to release.<sup>1</sup>

After each statistical analysis, a brief explanation of the meaning of the findings is provided. Practical implications of this study for pretrial release decision-making and policy-making are discussed in the final section.

<sup>1</sup> This study does not evaluate the effectiveness of commercial bail bonding in achieving court appearance results, nor does it evaluate the effectiveness of pretrial services program supervision in achieving certain court appearance or public safety results. Rather, the focus is on outcomes associated with various forms of monetary bonds set by the court.

## METHOD

Data for this study came from the dataset used to develop Colorado’s 12-item empirically-derived pretrial risk assessment instrument, the Colorado Pretrial Assessment Tool (CPAT; Pretrial Justice Institute & JFA Institute, 2012). The dataset has hundreds of case processing and outcome variables collected on 1,970 defendants booked into 10 Colorado county jails over a 16-month period.<sup>2</sup> Each local jurisdiction collected data on a pre-determined, “systematic ran-

dom sampling” selection schedule to minimize bias in selecting defendants and to enhance the generalizability of the findings. For example, each jurisdiction collected data at an interval of every 2nd, 4th, or 7th defendant who was booked into the jail on new charges. Over 80% of the state’s population resides in the 10 counties that participated: Adams, Arapahoe, Boulder, Denver, Douglas, El Paso, Jefferson, Larimer, Mesa, and Weld.

**DEFENDANTS WERE ASSESSED FOR THEIR PRETRIAL RISK, AND NEARLY 70% SCORED IN THE LOWER TWO OF FOUR RISK CATEGORIES.**

Based on the CPAT’s scoring procedures, 1,970 defendants in the dataset were assigned a CPAT risk score, ranging from 0 (lower risk) to 82 (higher risk), and to a corresponding risk category, ranging from 1 (lower risk) to 4 (higher risk). Some relevant data were missing for 51 defendants, so they were removed from all analyses. Thus, the final sample

used in the analyses was 1,919 defendants, with 1,309 (68%) of them having been released on pretrial status prior to case disposition. Table 1 shows the percentage of released defendants and the public safety and court appearance success rates associated with each risk category.

**Table 1. Average Risk Score, Percent and Number of Defendants, and Public Safety and Court Appearance Rates by Released Defendants’ Risk Category**

CPAT PRETRIAL RISK CATEGORY	CPAT RISK SCORE RANGE	AVERAGE CPAT RISK SCORE	PERCENT (AND NUMBER) OF DEFENDANTS	PUBLIC SAFETY RATE <sup>a</sup>	COURT APPEARANCE RATE <sup>b</sup>
1 (lower)	0 to 17	8	20% (265)	92% (243/265)	95% (252/265)
2	18 to 37	28	49% (642)	81% (517/642)	86% (549/642)
3	38 to 50	44	23% (295)	70% (205/295)	78% (231/295)
4 (higher)	51 to 82	57	8% (107)	59% (63/107)	51% (55/107)
Average/Total	0 to 82	30	100% (1,309)	79% (1,028/1,309)	83% (1,087/1,309)

a. On the CPAT and for this study, the public safety rate is defined as the percentage of defendants who did not have a prosecutorial filing in court for any new felony, misdemeanor, traffic, municipal, or petty offense that allegedly occurred during the pretrial release time period. Thus, public safety is defined very broadly as any new filing and is not limited to physical harm against a person or to felony or misdemeanor charges.  
 b. The court appearance rate is defined as the percentage of defendants who attended all of their court hearings during their pretrial release (i.e., they did not have any notations of failure to appear indicated in the Colorado Judicial Branch’s statewide database).

<sup>2</sup> Risk assessment data were collected over the 16-month period from February 2008 to May 2009, and pretrial outcome data were collected after cases closed up until December 2010, thus allowing at least 19 months for all cases to close after defendants were booked into jail because of new charges. Ninety-nine percent (99%) of the cases closed within the minimum 19-month time period.

### Summary of Findings

The CPAT effectively sorts defendants into one of four risk categories, with each category having different rates for the desired outcomes of public safe-

ty and court appearance. Nearly 70% of defendants scored in the lower two risk categories. These risk categories can be used when examining the impact of different forms of money bonds on public safety, court appearance, and jail bed use.

### DEFENDANTS RECEIVED EITHER UNSECURED OR SECURED BONDS, AND WERE SEPARATED INTO FOUR GROUPS TO ENABLE ANALYSIS OF BOND-TYPE COMPARISONS.

Table 2 shows the percentage of released defendants who received unsecured or secured (surety or cash) money bonds within each of the four risk

categories. Statutorily, all bonds in Colorado must have a financial condition.<sup>3</sup>

**Table 2: Percent and Number of Released Defendants by Bond Type and Risk Category**

PRETRIAL RISK CATEGORY	BOND TYPE	
	UNSECURED <sup>a</sup>	SECURED <sup>b</sup>
1 (lower)	52% (137/265)	48% (128/265)
2	32% (208/642)	68% (434/642)
3	15% (45/295)	85% (250/295)
4 (higher)	13% (14/107)	87% (93/107)
Average	31% (404/1,309)	69% (905/1,309)

a. Unsecured bonds do not require defendants to post money prior to their pretrial release from jail. While Colorado law uses the term “personal recognizance,” the term “unsecured” is used in this paper to distinguish these bonds from “pure” personal recognizance bonds (or “own recognizance” bonds), as they are called in many other states. Financial conditions are rarely allowed or used with “pure” or “own” recognizance bonds.

b. Secured bonds require defendants to post some amount of money prior to their pretrial release from jail.<sup>4</sup>

<sup>3</sup> Unsecured bonds in Colorado are known in statute as personal recognizance bonds and although they are required to have a financial condition in some monetary amount, they do not require the defendant to post any money with the court prior to pretrial release from jail. If the defendant fails to appear, the court can hold the defendant liable for the full amount of the bond. The court can also require the signature of a co-signor on unsecured bonds prior to the defendant’s release from jail. The co-signor is typically a family member who promises the court that he or she will assist the defendant in appearing in court and who may be held liable for the full monetary amount if the defendant fails to appear. In this study, as noted above, these personal recognizance bonds are called “unsecured” bonds because they have a financial condition for which the defendant or co-signor could be fully liable. The unsecured bond group is for the most part a “defendant-only (with no co-signor) unsecured” group because 344 (85%) of the 404 unsecured bonds did not require a co-signor.

<sup>4</sup> Secured bonds in Colorado require money to be posted with the court on the defendant’s behalf prior to pretrial release, and can be in the form of cash, surety, or property. If the defendant fails to appear, the court can hold the defendant or a commercial bail bondsman (for a surety bond) liable for the full amount of the bond. The secured bond group is for the most part a “surety bond” group because 849 (94%) of the 905 secured bond defendants posted a surety bond rather than a cash bond. Surety bonds were the most prevalent form of bond set by the court during the time this study’s data were collected. Property bonds are very rarely used in Colorado, and were not used for any of the defendants in this study.

**Summary of Findings**

Data show that judicial officers set both unsecured and secured bonds for defendants in each of the four risk groups. All of these bonds carry the possibility that the court could hold the defendant or other party (i.e., co-signor or bail bondsman) legally liable for the bond’s full monetary amount if the defendant fails to appear in court. For surety bonds, defendants are still liable for the full monetary amount, albeit indirectly. If a defendant released on surety bond fails to appear, the court, within the confines of statute, may hold the bail bondsman liable for the full monetary amount. If so, then the bail bondsman may offset this expense by collecting the full monetary amount of the bond pursuant to the contract with the defendant or the defendant’s family member or friend, and turn over the full bond amount to the court.

Placing defendants into one of four risk categories stratifies defendants based on their overall level of risk, thus helping increase the chances that defendants’ bond type, rather than their degree of pretri-

al risk, accounts for the observed results. Specifically, the stratification was done because in the total sample there was a relatively higher proportion of lower risk defendants in the unsecured bond group and a relatively higher proportion of higher risk defendants in the secured bond group. This pattern of data is found across most criminal justice systems nationwide. In addition, the total sample size of defendants in this study and in the four separate risk groups is large enough to detect statistical differences between the two bond-type groups if differences indeed do exist (see Cohen, 1988).<sup>5</sup>

Moreover, the Colorado jurisdictions that have already implemented the CPAT or that will be implementing it in the near future use the CPAT’s four-category risk scheme to guide daily pretrial release and detention decision-making, so using the CPAT’s risk scheme in this study enables the study to provide decision-makers with findings that directly inform their daily practice.

<sup>5</sup> The social science conventional standard of 0.05 for statistical significance testing was used throughout this study. Statistical significance at the 0.05 level means that we can be at least 95% confident that the observed results are not due to chance. To statistically determine that defendants with unsecured bonds were similar in pretrial risk to defendants with secured bonds, stratification, or the separation of the defendants into incremental groups, was done. Separate t-tests (tests used to determine if two groups have different averages on a measure) were performed on the four pretrial risk groups. These analyses showed that the average risk score for defendants with unsecured bonds was not statistically significantly different than the average risk score for defendants with secured bonds in risk categories 1, 3, and 4 (all  $p > 0.19$ ). For risk category 2, the average score for defendants with unsecured bonds (27) was two points less than the average score for defendants with secured bonds (29) ( $p < .001$ ). However, given that there was no significant difference for the other three risk categories, including the categories both below (i.e., category 1) and above (i.e., categories 3 and 4) category 2, and because the two-point score difference was no larger than the non-significant score difference in the other three risk categories, the statistically significant difference observed in category 2 is determined not to be practically significant. That is, the difference is likely not meaningful enough to be useful for purposes of informing practice. Additionally, there were no significant differences in the percentages of defendants who were ordered to pretrial supervision among the four risk groups (ranging from 48% to 50% for each of the four groups), indicating that pretrial supervision likely did not interfere with the effects of bond type on the outcome measures.

---

**GOALS OF THE STUDY**

This study evaluates the extent to which, if at all, one type of money bond (unsecured) is associated with better pretrial outcomes than is the other type of money bond (secured, in the form of cash or surety) while also accounting for jail bed use. Because all bonds in Colorado have a monetary condition, this study was not able to test whether bonds with no financial condition could have achieved the same public safety or court appearance outcomes as did bonds with a financial condition.

For the following analyses, defendants were sorted into two groups depending on the type of money bond they received – unsecured or secured. Defendants’ performance on the three pretrial outcomes most important to pretrial decision-makers - public safety, court appearance, and jail bed use - was examined. Defendants in the two bond-type groups were compared separately within each of the four pretrial risk categories to mitigate the influence of defendants’ risk levels on the observed outcomes.

# RESULTS

## UNSECURED BONDS ARE AS EFFECTIVE AS SECURED BONDS AT ACHIEVING PUBLIC SAFETY.

Table 3 shows the percentage of defendants who were not charged with a new crime during pretrial release (i.e., the public safety rate) for the unsecured and secured bond groups in each of the four risk categories.

**Table 3: Public Safety Outcomes by Bond Type and Risk Category**

PRETRIAL RISK CATEGORY	PUBLIC SAFETY RATE	
	UNSECURED BOND	SECURED BOND
1 (lower) <sup>+</sup>	93% (128/137)	90% (115/128)
2 <sup>+</sup>	84% (174/208)	79% (343/434)
3 <sup>+</sup>	69% (31/45)	70% (174/250)
4 (higher) <sup>+</sup>	64% (9/14) <sup>*</sup>	58% (54/93)
Average <sup>**</sup>	85% (342/404)	76% (686/905)

<sup>+</sup> All statistical comparisons showed no statistically significant differences. All  $p > 0.16$ .  
<sup>\*</sup> The 64% observed in this cell is based on a small sample size ( $n=14$ ) and thus should be interpreted with caution. For example, if one more defendant in the unsecured bond group had no new charges, the percentage would increase to 71%. If one more of these defendants had a new charge, the percentage would decrease to 57%.  
<sup>\*\*</sup> The public safety rate for all unsecured bond defendants was not compared to the rate for all secured bond defendants because that analysis would fail to control for defendants' degree of pretrial risk.

Chi-square tests<sup>6</sup> revealed that there were no statistically significant differences in defendants' public safety outcomes for the two different types of bond in each of the four risk categories. This finding also holds when only person crimes are analyzed. That is, defendants from both bond-type groups did not significantly differ from one another in their rate of receiving new charges for alleged crimes against a person while on pretrial release ( $p > 0.65$ ).

### Summary of Findings

Whether released defendants are higher or lower risk or in-between, unsecured bonds offer the same public safety benefit as do secured bonds. This finding is expected because although defendants can have their bond revoked if they receive a new charge while on pretrial release, they legally cannot be ordered to forfeit any amount of money or property under any bond type. Thus, the financial condition of an unsecured or secured bond cannot legally have an impact on defendants' criminal behavior. This study's failure to find a public safety benefit for one bond type over another is consistent with previous research (Helland & Tabarrok, 2004; Morris, 2013).

<sup>6</sup> The Chi-square statistic tests the degree of agreement between observed data and the data expected under a certain hypothesis. It can be used to compare the differences in frequencies on a measure between two groups.

**UNSECURED BONDS ARE AS EFFECTIVE AS SECURED BONDS AT ACHIEVING COURT APPEARANCE.**

Table 4 shows the percentage of defendants who made all of their court appearances during pretrial release (i.e., the court appearance rate) for the unsecured and secured bond groups in each of the four risk categories.

Chi-square tests revealed that there were no statistically significant differences in defendants’ court appearance outcomes for the two different types of bond in each of the four risk categories.

**Table 4: Court Appearance Outcomes by Bond Type and Risk Category**

PRETRIAL RISK CATEGORY	COURT APPEARANCE RATE	
	UNSECURED BOND	SECURED BOND
1 (lower) <sup>+</sup>	97% (133/137)	93% (119/128)
2 <sup>+</sup>	87% (181/208)	85% (368/434)
3 <sup>+</sup>	80% (36/45)	78% (195/250)
4 (higher) <sup>+</sup>	43% (6/14) <sup>*</sup>	53% (49/93)
Average <sup>**</sup>	88% (356/404)	81% (731/905)

<sup>+</sup> All statistical comparisons showed no statistically significant differences. All  $p > 0.12$ .  
<sup>\*</sup> The 43% observed in this cell is based on a small sample size (n=14) and thus should be interpreted with caution. For example, if one more defendant in the unsecured bond group made all court appearances, the percentage would increase to 50%. If one more of these defendants had a failure to appear, the percentage would decrease to 36%.  
<sup>\*\*</sup> The court appearance rate for all unsecured bond defendants was not compared to the rate for all secured bond defendants because that analysis would fail to control for defendants’ risk.

**Summary of Findings**

Whether released defendants are higher or lower risk or in-between, unsecured bonds offer decision-makers the same likelihood of court appearance as do secured bonds. The lack of benefit from using one financial bond type versus another is not surprising given that both bond types carry the potential for the defendant to lose money for failing to appear.

**UNSECURED BONDS FREE UP MORE JAIL BEDS THAN DO SECURED BONDS BECAUSE MORE DEFENDANTS WITH UNSECURED BONDS POST THEIR BONDS.**

Table 5 shows the percentage of defendants who were released from jail on pretrial status for the unsecured and secured bond groups in each of the four risk categories.<sup>7</sup>

Chi-square tests revealed that the release rates for unsecured bond defendants were statistically significantly higher than the release rates for secured bond defendants for all four of the pretrial risk categories.

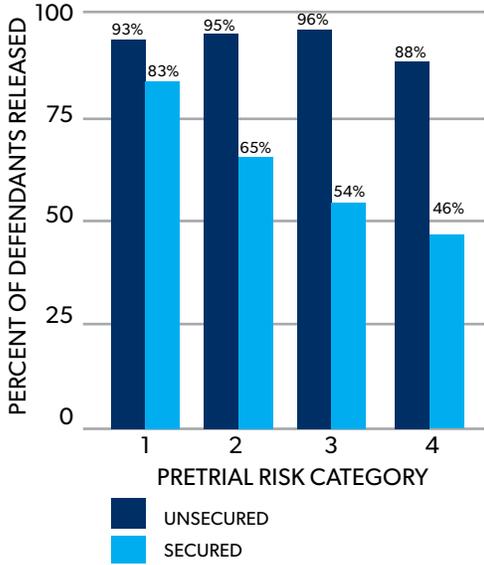
**Table 5: Pretrial Release Rates by Bond Type and Risk Category**

PRETRIAL RISK CATEGORY	RELEASE RATE <sup>+</sup>	
	UNSECURED BOND	SECURED BOND
1 (lower) <sup>+</sup>	93% (137/147)	83% (128/155)
2 <sup>+</sup>	95% (208/220)	65% (434/669)
3 <sup>+</sup>	96% (45/47)	54% (250/464)
4 (higher) <sup>+</sup>	88% (14/16)*	46% (93/201)
Average**	94% (404/430)	61% (905/1,489)

<sup>+</sup> All statistical comparisons were statistically significant. All  $p < 0.006$ .  
<sup>\*</sup> The 88% observed in this cell is based on a small sample size ( $n=16$ ) and thus should be interpreted with caution. For example, if one more defendant in the unsecured bond group were released, the percentage would increase to 94%. If one more of these defendants were not released, the percentage would decrease to 81%.  
<sup>\*\*</sup> The release rate for all unsecured bond defendants was not compared to the rate for all secured bond defendants because that analysis would fail to control for defendants' risk.

The findings shown in Table 5 are illustrated in Figure 1.

**Figure 1: Pretrial Release Rates by Bond Type and Risk Category**



<sup>7</sup> The number of defendants who post their bonds and the time to post those bonds, as opposed to the number of defendants released on pretrial status and their time to release, are better measures for more accurately determining pretrial jail bed use because once a bond is posted, the defendant is no longer utilizing a jail bed for pretrial reasons. The defendant may or may not remain in jail after bond-posting because of other cases or holds. However, for this study, like in most pretrial research, data on dates that bonds were posted were not available, so the next best measures for determining pretrial jail bed use - release on pretrial status and time to pretrial release - were used.

Both Table 5 and Figure 1 show that judicial officers used both unsecured and secured bonds with defendants of all risk levels - higher risk, lower risk, and those in between. For defendants at all risk levels, defendants with an unsecured bond were statistically significantly more likely to be released than defendants with a secured bond.<sup>8</sup>

**Summary of Findings**

Whether released defendants are higher or lower risk or in-between, unsecured bonds enable more defendants to be released from jail than do secured bonds. Findings show that many defendants of all

risk levels never post their secured bond. This finding is expected because defendants who receive unsecured bonds, or their family or friends, do not have to pay some monetary amount to the court or a commercial bail bondsman prior to the defendants' release from jail custody. Secured bonds, however, do require pre-release payment. Consequently, secured bonds used more jail beds. This finding is consistent with previous research using data from across the United States that shows that secured bond defendants are much more likely to be detained for their entire pretrial period than are unsecured bond defendants (Cohen & Reaves, 2007).

**THE MONETARY AMOUNT OF SECURED BONDS AFFECTED PRETRIAL RELEASE RATES BUT NOT COURT APPEARANCE RATES.**

Table 6 shows the percentage of defendants who were released from jail on secured bonds of select monetary amounts.

**Table 6: Pretrial Release Rates by Secured Bond Amount**

SECURED MONETARY BOND AMOUNT	PERCENT (AND NUMBER) OF RELEASED DEFENDANTS
\$500 (12 <sup>th</sup> Percentile)	64% (52/81)
\$5,000 (65 <sup>th</sup> Percentile)	58% (100/191)
\$50,000 (97 <sup>th</sup> Percentile)	49% (37/76)

Frequency analyses revealed that when the secured bond amount was set relatively very low at \$500 (12th percentile of secured bond amounts set by Colorado judicial officers in this study), 64% of defendants were released. When the secured bond amount was set at \$5,000 (65th percentile of secured bond amounts), 58% of defendants were released. When the secured bond amount was set at \$50,000 (97th percentile of secured bond amounts), 49% of defendants were released. However, correlational analyses revealed that the monetary amount of posted secured bonds was not statistically significantly related to court appearance for any of the four risk groups (*p* > 0.09).

<sup>8</sup> It is possible that the lower release rate for secured bond defendants could have been in part associated with judicial officers having accounted for an unmeasured risk factor in these defendants, and thus the public safety and court appearance rates would have been lower for these defendants had they been released. The mechanism for achieving this increase in pretrial detention would have been judicial officers setting secured bonds in a monetary amount the defendant could not post. Several judicial officers have told this author that this practice is not uncommon in Colorado, but have acknowledged its questionable lawfulness given Colorado's constitutional and statutory law. Nonetheless, as indicated by this study's analyses, if more secured bond defendants had been released, the secured bonds would likely not have associated with increased public safety or court appearance.

## Summary of Findings

As the monetary amount of secured bonds increases, fewer defendants post their bonds. However, regardless of whether defendants are higher or lower risk or in-between, higher bond amounts are not associated with better court appearance outcomes for released defendants. Thus, higher secured bond amounts are

associated with more pretrial incarceration but not more court appearances. The finding of increased incarceration associated with secured bonds is consistent with previous research using data from across the United States: As the monetary amount of secured bonds increases, the probability of release decreases (Cohen & Reaves, 2007).

### UNSECURED BONDS ALSO FREE UP MORE JAIL BEDS THAN DO SECURED BONDS BECAUSE DEFENDANTS WITH UNSECURED BONDS HAVE FASTER RELEASE TIMES.

Table 7 shows the cumulative percent of defendants who were released on pretrial status for the unse-

cured and secured bond groups by the amount of time in jail that elapsed prior to pretrial release.

**Table 7: Time to Pretrial Release by Bond Type**

DAYS TO PRETRIAL RELEASE*	CUMULATIVE PERCENT OF DEFENDANTS RELEASED ON UNSECURED BONDS	CUMULATIVE PERCENT OF DEFENDANTS RELEASED ON SECURED BONDS
<1 to 1.9 <sup>+</sup>	80% (325/404)	58% (525/905)
2 to 2.9 <sup>+</sup>	83% (336/404)	68% (611/905)
3 to 3.9 <sup>+</sup>	85% (344/404)	73% (663/905)
4 to 4.9 <sup>+</sup>	86% (348/404)	77% (699/905)
5 to 5.9 <sup>+</sup>	87% (351/404)	80% (721/905)
6 to 6.9 <sup>+</sup>	88% (356/404)	81% (731/905)
7 to 7.9 <sup>+</sup>	88% (356/404)	82% (741/905)
8 to 8.9 <sup>+</sup>	89% (358/404)	84% (758/905)
9 to 9.9 <sup>+</sup>	89% (360/404)	85% (768/905)
10 to 10.9 <sup>**</sup>	89% (360/404)	86% (774/905)
11 to 11.9 <sup>**</sup>	89% (361/404)	86% (781/905)
12 to 12.9 <sup>**</sup>	90% (362/404)	87% (784/905)

<sup>+</sup> All statistical comparisons were statistically significant. All  $p < 0.05$ .

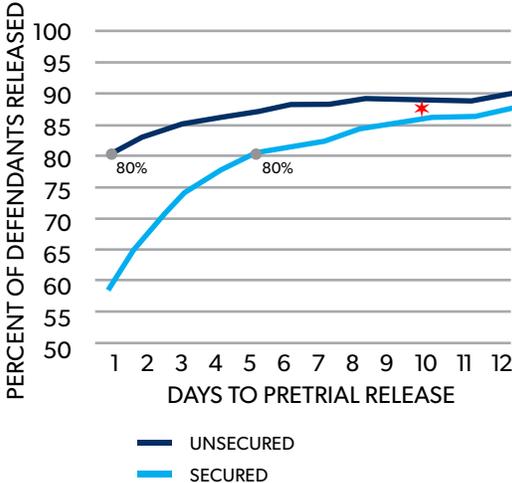
\* Defendants across all risk categories were grouped together for this analysis because a defendant's pretrial risk level can have no legal bearing on the amount of time a defendant remains in pretrial incarceration after a judicial officer sets the bond. In contrast, the monetary amount of a secured bond, holds from other jurisdictions, or requirements from a defendant's other cases can affect whether and when the defendant can be released from jail even if the defendant has posted his bond, regardless of bond type and regardless of his pretrial risk level.

\*\* Beginning on the tenth day of pretrial incarceration, the percent of defendants in the two bond type groups who had not been released on pretrial status was no longer statistically significantly different ( $p > 0.07$ ). Because there was no significant difference after day 9, it was assumed for the purposes of this analysis that after day 9 other factors, such as the defendants' other cases or possible holds, contributed to defendants' continued pretrial incarceration to the degree that the bond type was no longer the primary factor contributing to continued pretrial incarceration. In addition, a t-test revealed that the average time to pretrial release for the unsecured bond group (0.7 days) was statistically significantly lower than that for the secured bond group (1.5 days) when the analysis of pretrial incarceration was capped at 9 days for the reasons described above ( $p < 0.0001$ ). The 9-day cap also makes it likely that the 1.5-day average for the secured bond defendants is an underestimate because 10 or more days may actually elapse before a defendant or his family can meet the court's cash bond or bondsman's surety bond requirements; however, this cap was derived from the best data available for this study. Moreover, the use of this average for the secured bond defendants is still sufficient for statistically demonstrating the increased jail use that results from secured bonds, and is sufficient for demonstrating practical significance for policy-making.

Chi-square tests revealed that statistically significantly more defendants with unsecured bonds were released on pretrial status than were defendants with secured bonds for each of the first nine days after defendants' bonds were set. A t-test revealed that the average number of days spent in jail on pretrial status was statistically significantly less for defendants with unsecured bonds than the average for defendants with secured bonds up to the first nine days after defendants' bonds were set.

The findings shown in Table 7 are illustrated in Figure 2.

Figure 2: Time to Pretrial Release by Bond Type



Note. The \* symbol denotes that after day 9, the difference in the percent of released defendants between the two groups was no longer statistically significant. The time at which the 80% threshold was achieved is indicated for both groups.

Figure 2 depicts that released defendants with unsecured bonds spent fewer days incarcerated on pretrial status than did defendants with secured bonds. Moreover, Figure 2 depicts:

- Five days of jail incarceration were required for defendants with cash or surety bonds to achieve the same release threshold of 80% that defendants with unsecured bonds experienced by day one.
- Ten days of jail incarceration were required for defendants with cash or surety bonds to achieve the same overall release threshold as defendants with unsecured bonds because there were statistically significant differences for the first nine days.

Summary of Findings

After judicial officers set defendants' bonds, unsecured bonds enable defendants to be released from jail more quickly than do secured bonds. This finding is expected because nearly all defendants who receive unsecured bonds can be released from custody immediately upon signing their bond, whereas defendants with secured bonds must wait in custody until they or a family member or friend negotiates a payment contract with a commercial bail bondsman or their family member or friend posts the full monetary amount of a cash bond at the jail. This finding indicates that the process of posting a secured bond takes much longer than the process of posting a unsecured bond for released defendants. Furthermore, this finding is consistent with previous research using data from across the United States that shows released defendants with secured bonds remained in jail longer than did released defendants with bonds that did not require a pre-release payment (Cohen & Reaves, 2007).

**UNSECURED BONDS ARE AS EFFECTIVE AS SECURED BONDS AT “FUGITIVE-RETURN” FOR DEFENDANTS WHO HAVE FAILED TO APPEAR.**

Table 8 shows the percent of defendants whose case was still open up to 19 months after they were released from jail and who were at-large because of a failure to appear warrant, among all released defendants who had failed to appear (i.e., the at-large rate), for the unsecured and secured bond groups.

**Table 8: At-Large Rate by Bond Type**

AT-LARGE RATE <sup>†*</sup>	
UNSECURED BOND	SECURED BOND
10% (5/48)	9% (15/174)
<sup>†</sup> The comparison was not statistically significantly different ( $p > 0.69$ ). Non-significance was also found when data from just the surety bond defendants were compared to the unsecured bond defendants - that is, when the cash-only bond defendants were removed from the secured bond group ( $p > 0.48$ ). <sup>*</sup> There were too few at-large cases in each of the four risk categories to permit analyses within each of the risk categories.	

Chi-square tests revealed that there were no statistically significant differences in defendants’ at-large rates for the two different types of bond, as well as for surety-bond-only defendants.

**Summary of Findings**

When released defendants fail to appear, unsecured bonds offer the same probability of fugitive-return as do secured (including surety-only) bonds. Because the commercial bail bond industry often claims that it locates and captures defendants who have failed to appear or who are fugitives on the run (see Professional Bail Agents of the United States, 2013; Tabarrok, 2011), this topic is discussed in detail.

Nationally, the fugitive-return function has received minimal attention in the empirical research literature, and no empirical research prior to the current

study has been done in Colorado. This study failed to find support for the commercial bail bond industry’s fugitive-return claim for defendants released on surety bonds because there was no difference in the percent of defendants who were released on surety bonds, who failed to appear, and who still had an open case, when compared to the percent of defendants who were released on unsecured bonds, who failed to appear, and who still had an open case. All defendants who had an open case at the time this study’s data collection was completed were at-large on a failure to appear warrant and not in jail custody. If commercial bail bondsmen or hired bounty hunters return defendants at a greater rate than the rate for which defendants on unsecured bonds return to custody or court, then the percent of at-large surety bond defendants would be statistically significantly less than it is for unsecured bond defendants. That difference was not found in this study.

This study’s failure to find a fugitive-return benefit for one bond type over another is consistent with previous research designed to measure directly the fugitive-return function allegedly associated with surety bonds. Jones, Brooker, and Schnacke (2009) found no empirical support for Colorado commercial bail bondsmen’s claim that they locate or apprehend surety bond defendants who had failed to appear, as indicated by local jail booking data, the court’s bondsman-contact tracking logs, and by law enforcement officials’ report (p. 83).

Furthermore, in 2012 a committee that consisted of several justice system stakeholders and Colorado bail agents’ representatives studied Colorado pretrial case processing and decision-making for a year. A portion of that review included discussion about fugitive-return evidence in Colorado.

Committee members acknowledged that there are no data to support the bondsmen’s fugitive-return claim, and that the extent to which bondsmen re-

turn defendants to jail, court, or to law enforcement officers in Colorado remains empirically undemonstrated.<sup>9</sup>

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**MANY DEFENDANTS ARE INCARCERATED FOR THE PRETRIAL DURATION OF THEIR CASE AND THEN RELEASED TO THE COMMUNITY UPON CASE DISPOSITION.**

Because some judicial officers, sheriffs, and defense attorneys have expressed concern or puzzlement to this author about their observation that apparently many defendants spend the pretrial duration of their case in custody, sometimes for several weeks or months, and then are released to the community upon conviction or sentencing, data on case dispositions were analyzed to determine the extent to which this phenomenon occurs in Colorado.

Table 9 shows the collective percentage of never-released, secured-bond defendants by type of case disposition from all 10 Colorado jurisdictions.

**Table 9: Never-Released Defendants by Case Disposition**

CASE DISPOSITION	PERCENT (AND NUMBER) OF DEFENDANTS OR OFFENDERS*
Department of Corrections	14% (79)
Jail, Work Release, or Time Served in the Local Jail	34% (194)
Community-Based Option (Diversion, Probation, Community Corrections, Home Detention)	37% (210)
Dismissed or Not Filed	13% (76)
Still Open or Had Some Other Sentence	2% (9)
<b>Total</b>	<b>100% (568)</b>
* Each percentage changes 1% or less when unreleased defendants with recognizance bonds were included in the analysis.	

<sup>9</sup> See the Colorado Commission on Criminal and Juvenile Justice’s Bail Subcommittee’s March 2012 Meeting Minutes at <http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251617151523>.

**Summary of Findings**

These findings have implications for pretrial jail bed use because 50% (37% + 13%) of defendants return to the community upon conviction or case closure.<sup>10</sup> This percentage increases to 84% (50% + 34%) when defendants who return to the community after completing a jail sentence (including those who received sentences for time served while in pretrial custody) are included. This pattern of findings sug-

gests that when judges and other decision-makers consider the likelihood of a defendant’s conviction and the most likely type of sentence, they can further reduce pretrial jail bed use by using more unsecured bonds in lieu of secured bonds for defendants who will likely return to the community upon case disposition (i.e., for those defendants who are not likely to be transported to the Department of Corrections to start a sentence).

<sup>10</sup> With the exception of some defendants for whom another case results in continued detention.

## DISCUSSION AND IMPLICATIONS FOR POLICY MAKING

The findings from this study provide strong evidence that the type of monetary bond posted does not affect public safety or defendants' court appearance, but does have a substantial effect on jail bed use. Specifically, when posted, unsecured bonds (personal recognizance bonds with a financial condition) achieve the same public safety and court appearance results as do secured (cash and surety) bonds. This finding holds for defendants who are lower, moderate, or higher risk for pretrial misconduct. However, unsecured bonds achieve these public safety and court appearance outcomes while using substantially (and statistically significantly)

fewer jail resources. That is, more unsecured bond defendants are released than are secured bond defendants, and unsecured bond defendants have faster release times than do secured bond defendants. The amount of the secured monetary bond was associated with increased pretrial jail use but not increased court appearance. Finally, the type of monetary bond did not affect the fugitive-return rate as measured by the percent of cases with a failure to appear warrant remaining open up to one-and-a-half years later.

**THE TYPE OF BOND SET BY THE COURT HAS A DIRECT IMPACT ON THE AMOUNT OF JAIL BEDS CONSUMED, BUT IT DOES NOT IMPACT PUBLIC SAFETY AND COURT APPEARANCE RESULTS.**

A three-jurisdiction example demonstrates this study's implications for jail bed use. If there were three jurisdictions that use different rates of unsecured and secured bonds, they each would use

their local jail resource very differently to achieve the same public safety and court appearance outcomes.<sup>11</sup> Table 10 demonstrates this scenario.

**Table 10: Differential Jail Bed Use Resulting from Different Bond Setting Practices in Three Jurisdictions**

JURISDICTION	PERCENT OF UNSECURED BONDS	PERCENT OF SECURED BONDS	PRETRIAL BEDS NEEDED FOR UNSECURED BONDS*	PRETRIAL BEDS NEEDED FOR SECURED BONDS*	TOTAL PRETRIAL BEDS NEEDED*	PUBLIC SAFETY RATE**	COURT APPEARANCE RATE**
Status Quo <sup>a</sup>	31%	69%	34	430	<b>464</b>	79%	83%
Moderate Unsecured <sup>b</sup>	61%	39%	67	243	<b>310</b>	79%	83%
High Unsecured <sup>c</sup>	91%	9%	100	56	<b>156</b>	79%	83%

c. The "Status Quo" jurisdiction's use of unsecured bonds was selected to be the same as the average unsecured bond use in the 10 jurisdictions that contributed data to this study (see Table 2).

d. The "Moderate Unsecured" jurisdiction's percent of unsecured bonds was selected to be 30 percentage points higher than that of the Status Quo jurisdiction and centered between the other two jurisdictions. Its bond type percentages are nearly the inverse of the Status Quo jurisdiction.

e. The "High Unsecured" jurisdiction's percent of unsecured bonds was selected to be 30 percentage points higher than that of the Moderate Unsecured jurisdiction. It also uses nearly the same percent of unsecured bonds as there are defendants in the three lowest Colorado Pretrial Assessment Tool (CPAT) risk categories (i.e., categories 1, 2, and 3). This would approximately be the case, for example, if a jurisdiction were to use unsecured bonds for defendants whose pretrial risk score is in CPAT risk categories 1 through 3 and use secured bonds for defendants whose pretrial risk score is in CPAT risk category 4.

\* Per 10,000 defendants booked into jail on new charges.

\*\* The public safety rate of 79% and the court appearance rate of 83% were averages for all 1,309 released defendants, regardless of their bond type or risk level.

As seen in Table 10, secured bonds require more jail beds than do unsecured bonds when a relatively high number (69% or 39%) of secured bonds are used. In particular, the Status Quo jurisdiction would need 464 jail beds allocated for pretrial de-

tention for every 10,000 defendants booked into jail on new charges, whereas the Moderate Unsecured jurisdiction would need 310 jail beds allocated for pretrial detention for this same pool of defendants.

<sup>11</sup> The average length of time that defendants spent in detention for pretrial reasons (calculated for this study as 0.7 days for unsecured bond defendants and 1.5 days for secured bond defendants) and the average length of time of 58 days for all in-custody cases to close were used to calculate the number of beds that defendants would use. See Cunniff (2002) for the formulas used (p. 30).

The Status Quo jurisdiction’s higher amount of jail bed use is caused by fewer secured bond defendants being released and when they are released, taking more time to do so when compared to unsecured bond defendants (refer back to Tables 5 and 7).

In contrast, the High Unsecured (i.e., high use of personal recognizance bonds) jurisdiction would need only 156 jail beds allocated for pretrial detention for every 10,000 defendants booked into jail on new charges. In this jurisdiction, more jail beds are actually required for unsecured bond defendants than for secured bond defendants because of the very high volume of unsecured bond defendants. However, this jurisdiction uses substantially fewer pretrial jail beds overall than do the other two

jurisdictions because fewer defendants remain incarcerated, and when defendants are released, they are released much more quickly.

In summary, the High Unsecured jurisdiction achieves the same court appearance and public safety outcomes as does the Status Quo jurisdiction, but does so while reserving 197% more jail beds for other purposes (e.g., incarcerating sentenced inmates, reducing jail expenses by closing one or more housing sections). Similarly, the Moderate Unsecured jurisdiction achieves the same court appearance and public safety outcomes as does the High Unsecured jurisdiction, but consumes twice as many jail beds while doing so.

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**JURISDICTIONS CAN MAKE DATA-GUIDED CHANGES TO LOCAL PRETRIAL CASE PROCESSING THAT WOULD ACHIEVE THEIR DESIRED PUBLIC SAFETY AND COURT APPEARANCE RESULTS WHILE RESERVING MORE JAIL BEDS FOR UNMANAGEABLY HIGH RISK DEFENDANTS AND SENTENCED OFFENDERS.**

Criminal justice policy-makers, such as judges, sheriffs and jail administrators, district attorneys, defense attorneys, and county commissioners or city council members, in each local jurisdiction (e.g., county or city-county) could benefit from convening to discuss and analyze their current practices and to identify opportunities for improving their pretrial practices. Colorado jurisdictions use secured money bonds for over two-thirds (69%) of their cases. However, this study provides compelling evidence that the same level of public safety and court appearance that these jurisdictions experience today can be achieved at considerably lower costs to taxpayers who fund local jails, and this finding occurs for defendants of all risk levels.<sup>12</sup> Moreover, this study’s findings provide empirical support for a Colorado jurisdiction changing its

pretrial practices to be consistent with Colorado’s new bail statute enacted in May of 2013.<sup>13</sup>

It will be important for local decision-makers to collaborate to hold each other accountable to maximize their desired public safety, court appearance, and jail bed use outcomes. Judges, sheriffs, district attorneys, and other justice system decision-makers desire to achieve the highest levels of public safety and court appearance as possible, and they rely on county commissioners and legislators to provide them with the resources (e.g., jail and court facilities, staff, programs) to make those outcomes possible. Similarly, county commissioners or legislators fund the jail and program resources, and they rely on judges and other system decision-makers to engage in effective practices that most efficiently

<sup>12</sup> The higher financial cost to each local jail created by the use of secured bonds can be demonstrated whether short-run marginal costs and/or step-fixed costs are used in cost calculations (see Henrichson & Galgano, 2013).

<sup>13</sup> See House Bill 13-1236 at <http://www.leg.state.co.us/>.

use those resources. This study indicates that Colorado jurisdictions have the opportunity to be much more effective and efficient with the pretrial use of local jails by using an empirically-based risk assessment instrument such as the Colorado Pretrial Assessment Tool and by maximally using personal recognizance bonds with a financial condition. In

this decision-making scenario, defendants' risk for pretrial misconduct would be known prior to defendants' release from custody, and all released defendants would have a personal recognizance bond with a financial condition that the court could enforce if the defendant were to fail to appear.

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**COLORADO JUDICIAL OFFICERS NOW HAVE DATA AND LAW TO SUPPORT CHANGING THEIR BAIL SETTING PRACTICES TO BE AS EFFECTIVE BUT MUCH MORE EFFICIENT.**

This study does not address the question of whether or when judicial officers should use monetary bonds or not use them (i.e., bonds with a financial condition or bonds with no financial condition). That is a research question beyond the scope of this study and is not currently relevant in Colorado, given that statute requires all bonds to have a financial condition. Rather, this study's results, combined with the new bail statute enacted in May of 2013, provide Colorado judicial officers with both empirical and legal justification for changing their bail setting practices to achieve their desired levels of public safety and court appearance while incarcerating only higher risk individuals and no longer incarcerating lower risk defendants who cannot pay their cash or surety bonds. The pretrial release mechanism created in Colorado's new bail statute for achieving all of these outcomes simultaneously are personal recognizance bonds with an unsecured financial condition found in Colorado Revised Statutes Sections 16-4-104(1) (a) and (b). These bonds are the only ones in Colorado that simultaneously (1) allow judicial officers to set an amount of money that they believe may give defendants sufficient incentive to return to court, *and* (2) do not prevent those defendants' release because the amount is too high for them or their family or friends to post.<sup>14</sup>

The new statute and this study's findings also converge to imply two features of a money bond schedule if a jurisdiction's decision-makers choose to have one: (1) The schedule should have the defendant's risk integrated into the formula that is to guide or determine a specific monetary amount of bond for each individual defendant; and (2) the scheduled monetary amounts should only be used for financial conditions associated with recognizance bonds and not for cash or surety bonds. If these two features are not incorporated and integrated into money bail bond schedules and pretrial decision-making, then the jurisdiction is likely to achieve its desired public safety and court appearance outcomes while failing to minimize pretrial detention because of the number of lower risk defendants who will be incarcerated for their lack of pre-release financial resources.

This study shows that defendants who are released from jail on personal recognizance bonds with a financial condition return to court and avoid new charges at the same rate as do defendants who bond out on cash or surety bonds, and they are as unlikely to remain at-large on fugitive status. Nonetheless, as one pretrial legal scholar has proposed (T. Schnacke, personal communication, August 1,

<sup>14</sup> The Colorado Commission on Criminal and Juvenile Justice's Bail Subcommittee discussed the possibility that defendants are more likely to appear in court when they have "skin in the game" because of a financial condition of their bond (see <http://www.colorado.gov/cs/Satellite/CDPS-CCJJ/CBON/1251617151523>). Several justice system decision-makers in other states have suggested the same to this author. This study could not test this hypothesis; however, this study does provide empirical support that if defendants are more likely to appear in court because of a financial condition, this "motivation" is achieved just as effectively with a personal recognizance bond with a financial condition than it is with a cash or surety bond, but without the accompanying unnecessary pretrial jail bed use.

2013), even if the fugitive-return rate were some degree higher for surety bond defendants than for unsecured bond defendants, criminal justice decision-makers in each jurisdiction would need to decide if this gain offsets other costs. Specifically, if commercial bail bondsmen were to return defendants to custody sooner than law enforcement does, these cases could be closed more quickly. However, this benefit needs to be weighed against the high financial cost the local justice system incurs from the pretrial jail bed use that results from the large percent of surety bond defendants who are never released from jail or who take much longer to be released when they are released.

Finally, the pretrial decision-making supported by this study and the new statute has a precedent in Colorado. In early 2010 during Jefferson County's Bail Impact Study, which was a pilot project in which judges set more recognizance bonds with the support from the local criminal justice coordinating committee, a First Judicial District Court Judge set personal recognizance bonds with a financial condition for 75% of defendants who appeared before him at initial advisement. This Bail Impact Study, among initiatives in other jurisdictions and an earlier version of the research done for this paper, ultimately led to the introduction and passage of House Bill 13-1236, which rewrote Colorado's bail statute to encourage more recognizance releases and to reduce unnecessary pretrial detention while still emphasizing public safety and court appearance.<sup>15</sup>

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**THIS STUDY'S FINDINGS ARE LIKELY MORE GENERALIZABLE TO JURISDICTIONS THAT USE BOND SETTING PRACTICES SIMILAR TO THOSE USED IN COLORADO.**

Colorado jurisdictions' pretrial case processes are very similar to one another and are typical of the processes used nationwide. When defendants are booked into jail, typically within a day or two most of them have the opportunity to leave custody after posting their bond via a money bail bond schedule or after first appearing before a judicial officer. Colorado judicial officers use unsecured, cash, and surety bonds in varying proportions, but not in a "sequential" manner as is done in some jurisdictions. For example, Dallas County's (Texas) use of non-financial release occurs almost exclusively in instances when defendants cannot first post their secured bond (L. Gamble, personal communication, March 4, 2013). In Colorado, judicial officers order unsecured bonds regardless of defendants' initial ability to post a secured bond. This non-sequential use, combined with this study's statistical

controls for defendants' pretrial risk level, allow for methodologically sound bond-type comparisons on public safety, court appearance, and jail bed use.

Finally, research methods similar to those used in this study should be replicated in jurisdictions outside of Colorado to determine to what extent similar findings emerge. Criminal justice officials in many jurisdictions outside of Colorado also heavily rely on secured money bonds without any data showing the effect, pro or con, of these secured bonds on all three pretrial outcomes simultaneously. These decision-makers could likely improve the efficiency of their systems without detriment to their public safety and court appearance outcomes by using more recognizance bonds with a financial condition in lieu of cash or surety bonds.<sup>16</sup>

<sup>15</sup> See C.R.S. 16-4-103(4) (c) (2013), "The Court shall . . . consider all methods of bond and conditions of release to avoid unnecessary pretrial incarceration."

<sup>16</sup> As previously noted, the effect on court appearance of recognizance bonds that have no financial condition compared to unsecured or secured bonds could not be examined in this study. If studies show that recognizance bonds with no financial condition outperform unsecured or secured bonds, then they would provide an effective release option for jurisdictions that seek, voluntarily or through statute or court rule, to impose the least restrictive conditions that assure public safety and/or court appearance.

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## ABOUT THE AUTHOR

Dr. Michael R. Jones has been a senior project associate at the non-profit Pretrial Justice Institute (PJI) since 2010. At PJI, he has assisted dozens of states and local jurisdictions in understanding and implementing more legal and empirically-based pretrial policies and practices. In Colorado, he led the project to develop Colorado's first empirically-based pretrial risk assessment tool, coordinated pretrial services programs' statutorily mandated performance measurement, and assisted justice system decision-makers in their efforts to defeat regressive legislation and pass progressive legislation. He currently provides strategic planning, training,

technical assistance, and consulting to a variety of justice system stakeholders in Colorado and nationwide. Prior to PJI, he worked for nine years as a criminal justice planner and manager in Jefferson County, Colorado, where he was lead staff for the local criminal justice coordinating committee. He has also worked as a technical resource provider for the National Institute of Corrections since 2004, providing justice system assessments and assisting local jurisdictions in developing or improving their capacity for systemic collaboration and data-guided policy-making. Mike has a Ph.D. in Clinical Psychology from the University of Missouri-Columbia.

# Exhibit 20

# The High Cost of Bail:

How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions



**Maryland Office of the Public Defender**

*Justice, Fairness and Dignity for All*

November 2016

## About

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This report by the Office of the Public Defender is the product of a collaboration among Arpit Gupta, Douglas Swanson, and Ethan Frenchman:

**Arpit Gupta** is Assistant Professor at the Stern School of Business, New York University. Professor Gupta's research focuses on using large datasets to understand dynamics in personal finance, and his previous published work includes, "The Heavy Costs of High Bail: Evidence from Judge Randomization," *Journal of Legal Studies*, vol. 45 (June 2016).

**Douglas Swanson** is the former Vice President of Development and Chief Technology Officer of Malwarebytes and is the co-founder of the data consulting firm, Zipline Scientific, LLC. He holds a M.S. in Physics from Princeton University.

**Ethan Frenchman** is an appellate attorney at the Maryland Office of the Public Defender, and is a co-author, with Professor Gupta, of "The Heavy Costs of High Bail: Evidence from Judge Randomization," *Journal of Legal Studies*, vol. 45 (June 2016).

**The Maryland Office of the Public Defender (OPD)** is an independent state agency created in 1971 by the Maryland General Assembly. With over 900 employees, including 570 attorneys, OPD is the largest legal services organization in Maryland. Its mission is to provide superior legal representation to indigent defendants in the State of Maryland.

## Acknowledgments

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## Executive Summary

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In Maryland, District Court commissioners and judges routinely require defendants to post bail in order to be released before trial. In practice, this system jails the poor and allows the rich to go free. Multiple studies, in Maryland and across the United States, have demonstrated that the key factor in the incarceration of people awaiting trial is not the risk they pose to society, or their risk of failing to appear in court, but simply whether they have enough money to pay bail.<sup>1</sup> Even more, studies show that the widespread use of “secured bail”—which requires payment or security, such as a property title, posted directly to the court, or posting of corporate bond to obtain release—causes new crime, coerces convictions, and has little or no impact on defendants’ return to court.<sup>2</sup> Relying on these studies and legal analysis, the United States Department of Justice, former U.S. Attorney General Eric Holder, Maryland Attorney General Brian Frosh, and the American Bar Association, among others, have all concluded that a pretrial detention system that jails people because they are too poor to pay bail is irrational and unconstitutional.<sup>3</sup>

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<sup>1</sup> For an introduction to Maryland money bail reform, see John Clark, Abell Foundation, “Finishing the Job: Modernizing Maryland’s Bail System” (Jun. 2016), available online at <http://www.abell.org/publications/finishing-job-modernizing-maryland%E2%80%99s-bail-system> (last visited Nov. 13, 2016); and Governor’s Commission to Reform Maryland’s Pretrial System, Final Report (Dec. 19, 2014), available online at <http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf> (last visited Nov. 13, 2016). For a general introduction to legal and empirical research on money bail, see Harvard Law School, Criminal Justice Policy Program, “Moving Beyond Bail: A Primer on Bail Reform” (Oct. 2016) (hereinafter, “Moving Beyond Bail”), available online at <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> (last visited Nov. 13, 2016).

<sup>2</sup> For a recent summary of this research, see “Moving Beyond Bail” at 6-7, and studies cited therein.

<sup>3</sup> Dear Colleague Letter from Vanita Gupta, Principal Dep. Ass’t Att’y Gen., Civil Rights Division, and Lisa Foster, Director, Office for Access to Justice 7-8 (Mar. 14, 2016), available online at <https://www.justice.gov/crt/file/832461/download> (last visited Nov. 13, 2016); Memorandum from Eric H. Holder, Jr., et al., to Md. Att’y Gen. Brian Frosh re: Maryland’s Wealth-Based Pretrial Detention Scheme (Oct. 3, 2016) available online at <http://bit.ly/2eXTf0r> (last visited Nov. 14, 2016); Letter from Md. Att’y Gen. Brian Frosh to the Hon. Alan Wilner, Chair, Md. Rules Committee (Oct. 25, 2016), available online at [http://www.marylandattorneygeneral.gov/News%20Documents/Rules\\_Committee\\_Letter\\_on\\_Pretrial\\_Release.pdf](http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf) (last visited Nov. 13, 2016); ABA Amicus Brief, Walker v. City of Calhoun, No. 16-10521 (11th Cir.) (filed Aug. 18, 2016), available online at [http://www.americanbar.org/content/dam/aba/administrative/amicus/walker\\_v\\_city\\_of\\_calhoun.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/amicus/walker_v_city_of_calhoun.authcheckdam.pdf) (last visited Nov. 13, 2016).

The purpose of this report is to quantify the cost of Maryland's wealth-based detention system to the community. Based on a statistical analysis of more than 700,000 District Court criminal cases filed from 2011 to 2015 in 18 jurisdictions, this report is the most comprehensive public study of Maryland's pretrial detention scheme to date. The results are staggering:

1. Maryland's reliance on money bail causes the routine, illegal incarceration of poor people: over a five year period, no fewer than 46,597 defendants were detained on bail for more than five days at the start of their criminal case. Of these, more than 17,434 defendants were detained on bail amounts of less than \$5,000.
2. For those who go to a bondsman, the price is steep. Maryland communities were charged more than \$256 million in non-refundable corporate bail bond premiums from 2011 to 2015.
3. Defendants who use a bail bondsman are obligated to pay a corporate bail bond premium regardless of the outcome of the case. More than \$75 million in bail bond premiums were charged in cases that were resolved without any finding of wrongdoing.
4. Corporate bonds extract tens of millions of dollars from Maryland's poorest zip codes, contributing to the perpetuation of poverty.
5. The money bail system has a disproportionate impact on racial minorities: over five years, black defendants were charged premiums of at least \$181 million, while defendants of all other races combined were charged \$75 million.
6. For all these costs, secured money bail that requires a payment for release is no more effective than unsecured bonds, for which defendants pay nothing unless they fail to appear for court.

This report documents not only the human toll of incarceration due to unaffordable bail, but also the lesser-known consequences of money bail for defendants who are able to purchase their freedom through bail bondsmen. Maryland's reliance on money bail has caused a huge transfer of wealth from Maryland communities to the bail bond industry.

Yet the results of this study are also encouraging: less onerous alternatives are available to commissioners and judges to secure defendants' return to court. Consistent with other research, we find that unsecured bonds are as effective as secured bonds at preventing defendants' failure to appear, without the costs of pretrial detention and non-refundable bail bond premiums.

## Data and Methodology

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**W**e obtained comprehensive court case histories for criminal cases filed in the District Court of Maryland from 2011 through 2015 from the Maryland Judiciary Case Search website, which provides free public access to the case records of the Maryland Judiciary.<sup>4</sup> Using standard query language and statistical software, we developed an array of descriptive statistics about pretrial detention in Maryland. Our study includes approximately 3.6 million cases from 18 District Court jurisdictions.<sup>5</sup> Our analysis does not include jurisdictions that have shifted to the Maryland Electronic Courts case management system,<sup>6</sup> Circuit Court cases (except as described below), incarcerable traffic cases, and expunged cases. Because money bail is used in these jurisdictions and cases, our study underestimates the scope of wealth-based pretrial detention in Maryland.

To estimate the failure to appear rate, our study focused exclusively on cases filed in the District Court for Baltimore City between 2011 and 2015, but includes failures to appear in the Circuit Court for Baltimore City in cases that were transferred from the District Court by indictment, information, or jury trial prayer.

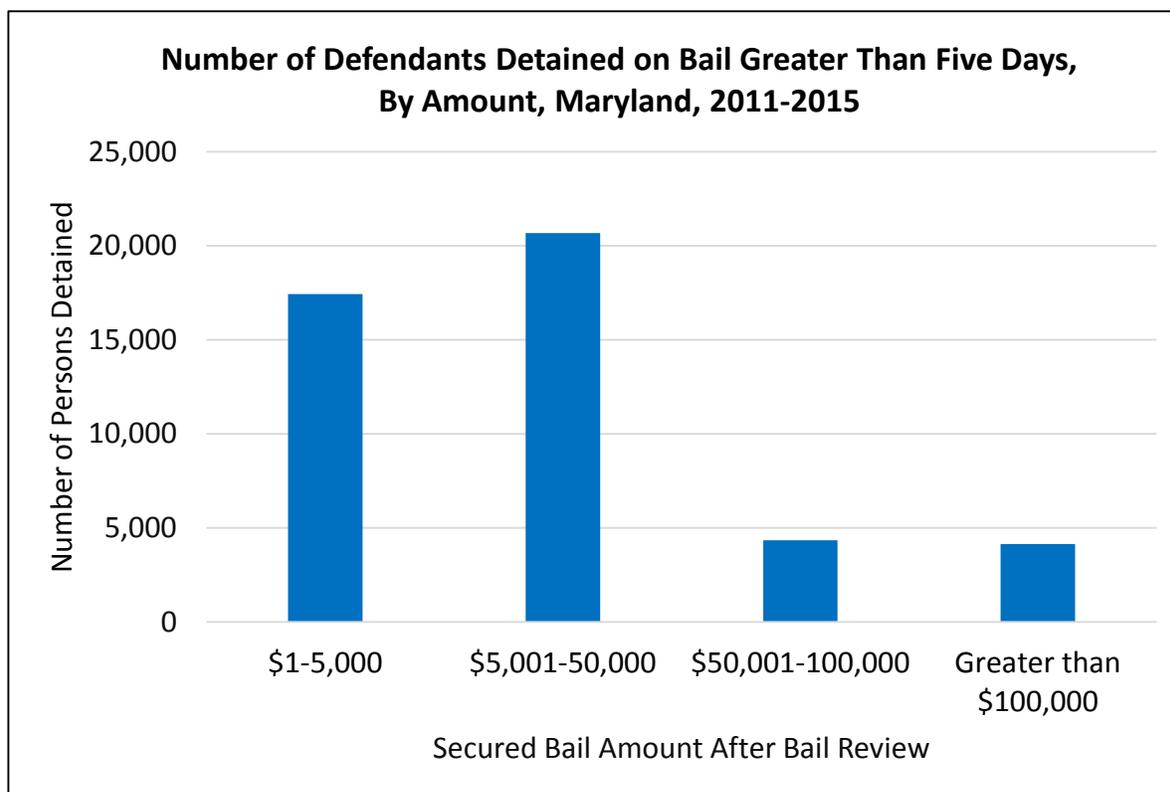
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<sup>4</sup> Maryland Judiciary Case Search is available online at [casesearch.courts.state.md.us](http://casesearch.courts.state.md.us).

<sup>5</sup> The jurisdiction included are: Allegany County, Baltimore City, Baltimore County, Calvert County, Carroll County, Charles County, Dorchester County, Frederick County, Garrett County, Harford County, Howard County, Montgomery County, Prince George's County, St. Mary's County, Somerset County, Washington County, Wicomico County and Worcester County.

<sup>6</sup> Those jurisdictions are Anne Arundel, Caroline, Cecil, Kent, Queen Anne's and Talbot Counties.

## Thousands of Presumptively Innocent People Are Detained On Unaffordable Money Bail.



**U**nder Maryland’s pretrial detention Rule 4-216, a judicial officer is obligated to impose the “least onerous conditions” of release necessary to reasonably ensure that a person charged with a crime will appear to court and to protect the safety of any alleged victim, other individuals and the public. In determining the least onerous condition of release, the judicial officer is required to consider a defendant’s “employment status” and “financial resources.” The Maryland Attorney General’s office has recently concluded that bail set in an amount that is not affordable to a defendant, “thus effectively denying release,” likely violates both the U.S. Constitution and the Maryland Declaration of Rights.<sup>7</sup>

Nonetheless, thousands of presumptively innocent Marylanders remain jailed pending trial on unaffordable bail amounts. During the study period of 2011–2015, more than 46,597 defendants were detained on bail for more than five days at the start of their criminal case. Of these, 17,434 defendants were detained on bail amounts of less than \$5,000.

To determine the number of defendants held on unaffordable bail, we first narrowed our inquiry to cases with a defendant held on bail immediately after arrest, at the initiation of

<sup>7</sup> Letter of Md. Att’y Gen, Brian Frosh to Del. Erek Barron, et al., at 1–2 (Oct. 11, 2016).

the criminal case, and continued to be held on bail after bail review.<sup>8</sup> We further isolated detentions at the beginning of a criminal case by excluding cases in which detention followed a defendant’s failure to appear or post-conviction violation of probation. Finally, we defined detention as a defendant’s incarceration for at least five days after the initial appearance before the District Court commissioner.

While excluded from our analysis, defendants are frequently held on bail after the initial appearance. Defendants who fail to appear in court, or who are accused of violating the terms of their probation, are subject to re-arrest on warrants. These defendants also appear before a commissioner and a judge for pretrial release consideration and are frequently assessed money bail as a condition of release. When other events like failure to appear and violations of probation are included, we find that the number of defendants detained for more than five days on unaffordable bail rose to 79,182.

<b>Defendants Detained More Than Five Days, By Amount, Maryland, 2011-2015</b>	
<b>Amount of Secured Bail</b>	<b>Number of Defendants</b>
\$1-5,000	17,434
\$5,001-50,000	20,674
\$50,001-100,000	4,346
Greater than \$100,000	4,143

In light of these figures, it is not surprising that the Pew Charitable Trust, as part of a statewide Justice Reinvestment Initiative, found that nearly one-quarter of people incarcerated in Maryland are merely awaiting trial.<sup>9</sup> Many of those presumptively innocent people would be released if they simply had more money.

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<sup>8</sup> Bail review is the first pretrial determination made by a judge, and occurs in cases where the defendant is not released after a commissioner’s initial bail determination.

<sup>9</sup> The Pew Charitable Trusts, “Maryland Criminal Justice System Assessment and Introduction to Policy Development,” presentation for the Maryland Justice Reinvestment Coordinating Council, Sept. 11, 2015, available online at <http://goccp.maryland.gov/wp-content/uploads/jrcc-assessment-intro-policy-development.pdf>

## Corporate Bond Premiums Cost the Community More Than \$256 Million from 2011 to 2015.

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**D**uring the study period of 2011–2015, the bail bond industry posted at least \$2.56 billion in corporate bonds in cases filed in the 18 District Court jurisdictions across Maryland. To post a corporate bond, a bail bondsman typically charges the defendant (or someone on his or her behalf) a non-refundable premium of 10 percent of the total amount of corporate bond posted.<sup>10</sup> Based on the total amount of corporate bonds posted and the standard 10 percent fee, we estimate that premiums charged by the bail bond industry to defendants and their loved ones were no less than \$256 million, or approximately \$51 million per year.

<b>Corporate Bond Premiums, Maryland, 2011-2015</b>	
<b>Year</b>	<b>Bond Premiums</b>
2011	\$52,188,578
2012	\$52,105,761
2013	\$53,893,349
2014	\$47,095,341
2015	\$50,867,701
<b>TOTAL</b>	<b>\$256,150,729</b>

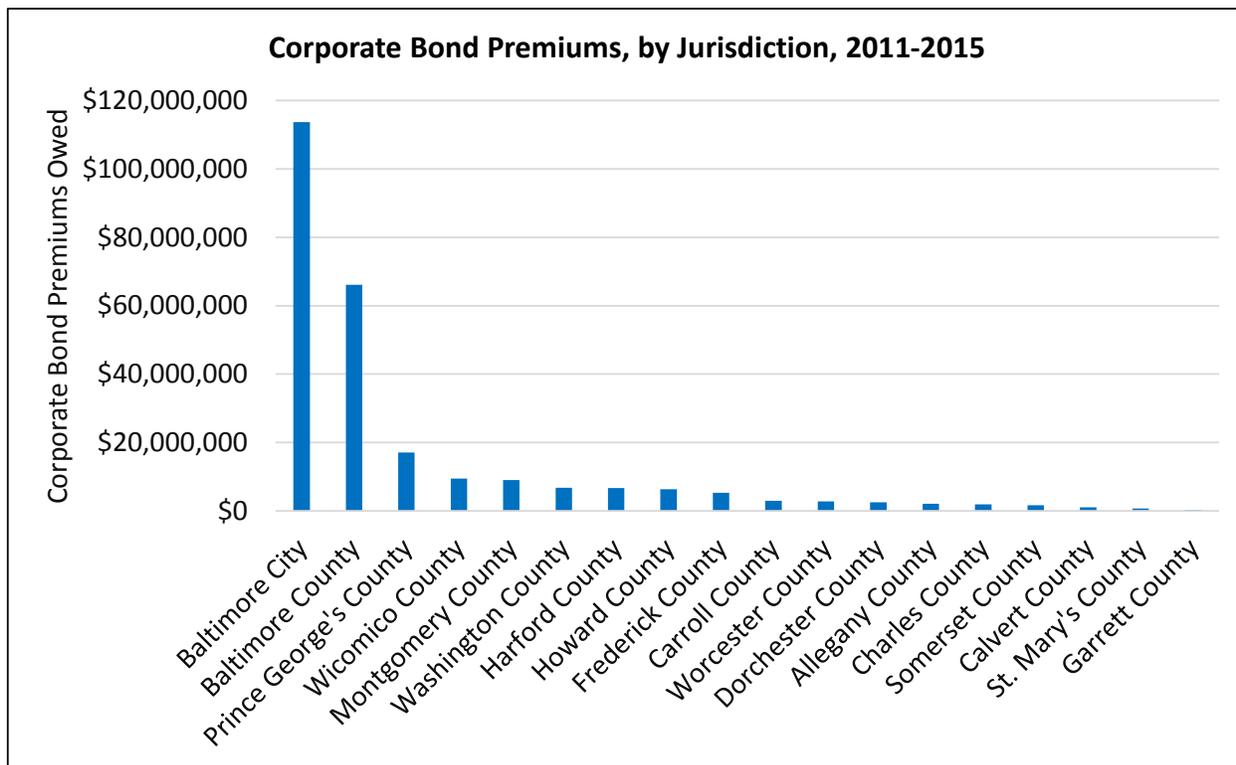
The 10 percent premium often is not paid all at once. Some bondsmen only require a portion of their fee, often as low as 1 percent, to be paid upfront. A payment plan is established for the remainder, which can result in years of debt and collection costs. This debt persists, even if the defendant appeared for all court dates and even if the criminal charges were dropped or the defendant acquitted. Our premium estimate includes both payments made and installment debts owed by the community to the industry, but does not include interest or debt collection fees.

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<sup>10</sup> A 2015 Fiscal and Policy Note by the Maryland Department of Legislative Services determined:

A corporate bondsman charges the defendant 10% of the bail bond, an amount which must be filed with and approved by the Insurance Commissioner. The 10% premium is an industry standard and is not set by the Insurance Commissioner. However, because some consumers are unable to pay the entire 10% premium up front, a corporate bondsman may finance the premium by allowing the consumer to make installment payments. This practice often amounts to a marketing tool for corporate bondsmen. In an industry where the premiums are the same, a corporate bondsman is able to draw business in by advertising down payments as low as 1%.

Amy Devadas, Dept. of Legisl. Servcs., Fiscal and Policy Note, H.B. 32, 2015 Sess., at 2, available online at [http://mgaleg.maryland.gov/2015RS/fnotes/bil\\_0002/hb0032.pdf](http://mgaleg.maryland.gov/2015RS/fnotes/bil_0002/hb0032.pdf) (last visited Nov. 14, 2016).

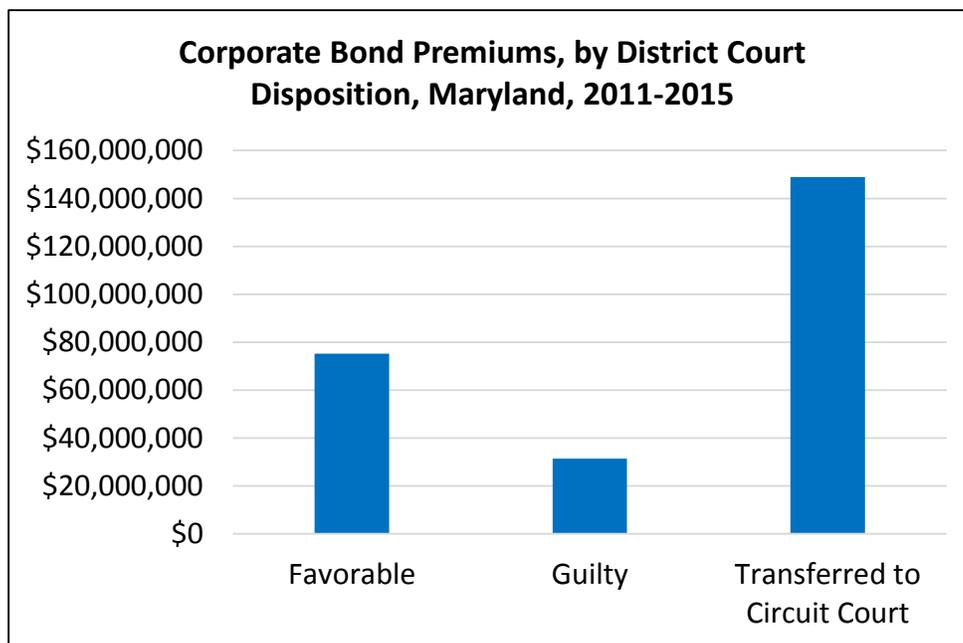


While Baltimore City accounts for the largest portion of bond premiums incurred (\$113 million of the \$256 million), corporate bonds are used in every jurisdiction surveyed. However, there is significant disparity in their use, even among similar jurisdictions. For example, in 2015 alone, bond premiums in Baltimore County totaled an estimated \$66 million, while in more-populous Montgomery County premiums totaled \$9 million. Bond premiums extracted more money from Wicomico County (\$9.47 million) than from the wealthier and larger Montgomery County, despite Montgomery County having nearly four times the criminal caseload.<sup>11</sup>

Altogether, corporate bonds cause presumptively innocent Marylanders and their families to pay or owe hundreds of millions of dollars in non-refundable premiums just to secure their freedom. This includes both money that is paid up-front to bail bondsmen, and the debt incurred for the full cost of the premium, which is frequently paid in installments for years after the resolution of the underlying criminal case.

<sup>11</sup> Md. Dept. of Planning, "Total Resident Population for Maryland's Jurisdictions, April 1, 2010 Thru July 1, 2015" (March 2016) (estimating 2015 populations of Baltimore County (831,128), Montgomery County (1,040,116), and Wicomico County (102,370)); Md. Judiciary, Annual Statistical Abstract FY 2015, Table DC-2 (reporting that in FY 2015, 15,039 non-traffic criminal cases were filed in the District Court in Montgomery County, and 4,001 such cases were filed in the District Court in Wicomico County).

## Individuals Paid More Than \$75 Million For Corporate Bonds In Cases Where the Defendant Was Not Convicted Of Any Crime.



The expectation that a presumptively innocent person must pay for his or her freedom is especially egregious for individuals who are ultimately not convicted. Individuals whose cases originated between 2011 and 2015, were resolved in the District Court, and who were not found guilty of *any* crime, were charged more than \$75 million in bail bond premiums—more than double the total premiums charged in cases resulting in a conviction in the District Court.<sup>12</sup> An additional \$148 million in bond premiums was charged to defendants whose cases were resolved in the circuit court. Many of those cases were also likely resolved favorably for the defendant, but circuit court dispositions were not reviewed for this study. For this reason, we underestimate the total amount of commercial bail premiums charged in cases where there was no finding of wrongdoing, insofar as we do not include favorable resolutions in the circuit courts, six District Court jurisdictions, incarcerable traffic cases, or expunged cases.

The premiums charged by the bail bond industry to defendants and their families for posting bond are non-refundable even when the defendant shows up to every court date and is not found to have committed any crime. Therefore, innocent people are still charged tens of millions of dollars to secure their freedom.

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<sup>12</sup> “Favorable” refers to cases in which all charges were disposed as not guilty, acquittal, dismissal, *nolle prosequi*, or stet; “Guilty” refers to cases in which any charge resulted in guilt, probation before judgment, not criminally responsible, or *nolo contendere*; “Transferred to Circuit Court” refers to cases transferred to the circuit court due to indictment, information, or jury trial prayer.

## Corporate Bonds Extract Millions in Premiums from Maryland's Poorest Communities.

Top 15 Zip Codes for Corporate Bond Premiums and Federal Poverty Statistics, Maryland, 2011-2015					
Rank	Zip Code	Premiums	Median Income	% in Poverty	Location
1	21215	\$11,662,274	\$34,968	26%	Park Heights, Baltimore
2	21217	\$11,086,999	\$27,139	35%	Sandtown-Winchester, Baltimore
3	21213	\$9,869,717	\$31,418	26%	East Baltimore
4	21222	\$8,998,729	\$48,390	13%	Dundalk
5	21223	\$8,885,372	\$25,217	42%	Southwest Baltimore
6	21229	\$8,847,638	\$44,723	20%	West Baltimore
7	21216	\$8,697,750	\$33,557	25%	West Baltimore
8	21218	\$8,008,825	\$38,141	28%	North Baltimore
9	21206	\$7,973,169	\$48,721	14%	Northeast Baltimore
10	21224	\$6,472,193	\$56,221	19%	Highlandtown, Baltimore
11	21207	\$6,373,552	\$52,462	13%	Woodlawn, Baltimore
12	21221	\$5,591,714	\$51,540	12%	Essex
13	21205	\$4,889,494	\$24,568	36%	East Baltimore
14	21234	\$4,685,637	\$58,559	10%	Parkville and Carney
15	21225	\$4,684,407	\$37,291	27%	Brooklyn, Baltimore

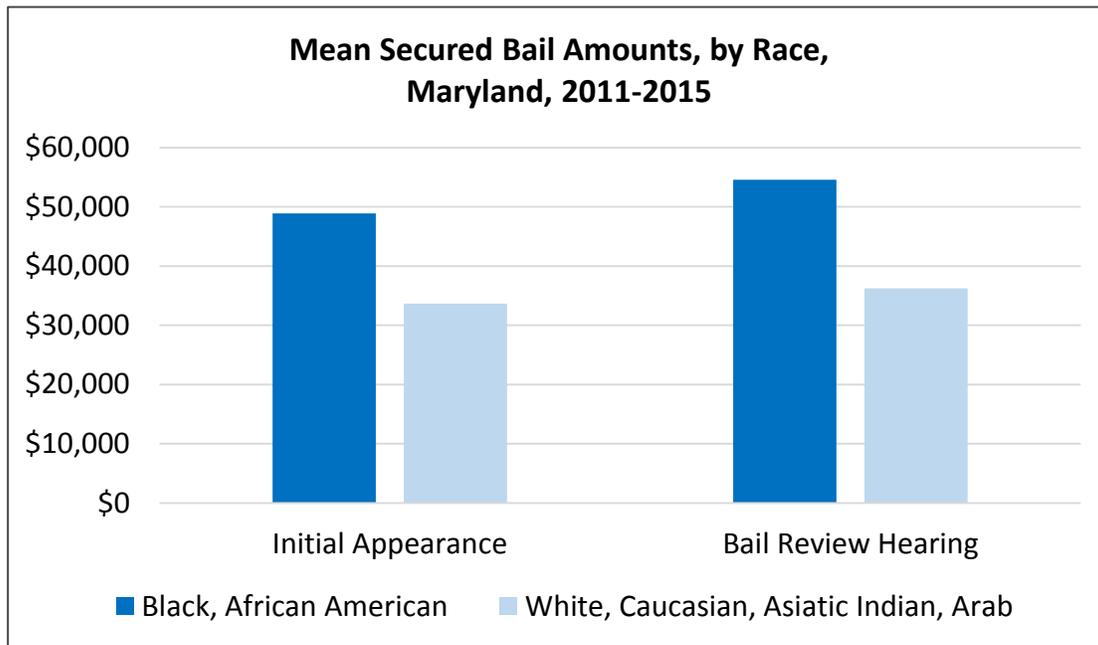
A ranking of premiums charged according to defendants' zip codes shows how corporate bonds extract millions of dollars from Maryland's poorest communities. The table above ranks the top 15 defendant zip codes for bond premiums. The median incomes for the neighborhoods charged the most in corporate bond premiums range from \$24,568 to \$58,599, far below the median Maryland household income of \$74,149.<sup>13</sup> Likewise, the poverty rates for these 15 zip codes, with a high of 42 percent and a low of 10 percent, are generally far above the Maryland statewide poverty rate of 9.7 percent. Although most of the top 15 zip codes for corporate bond premiums are in Baltimore City, three zip codes in Baltimore County are in the top 15, which together paid more than \$19 million to the bail bond industry.

The top two zip codes are also two of the poorest in Baltimore: Park Heights (21215) and Sandtown-Winchester (21217). These zip codes alone paid at least \$22.6 million in premiums, which is enough to send 219 students to the University of Maryland at College Park for four years or enough to provide a year of childcare for approximately 2,800 pre-kindergarten children in Baltimore City.<sup>14</sup>

<sup>13</sup> Poverty statistics included in this section are all derived from the U.S. Census Bureau American Community Survey. For more information see <http://www.census.gov/programs-surveys/acs/>.

<sup>14</sup> This is based on the University's estimate for 2016-17 that the in-state cost of attendance, including tuition, housing, meals, books, and other fees and costs, is \$25,742, and the Maryland Family Network's 2013 estimate that the annual childcare cost for a Baltimore family with two children ages 1-2 and 3-5 is \$16,174.

## Money Bail Disproportionately Impacts Black Defendants.

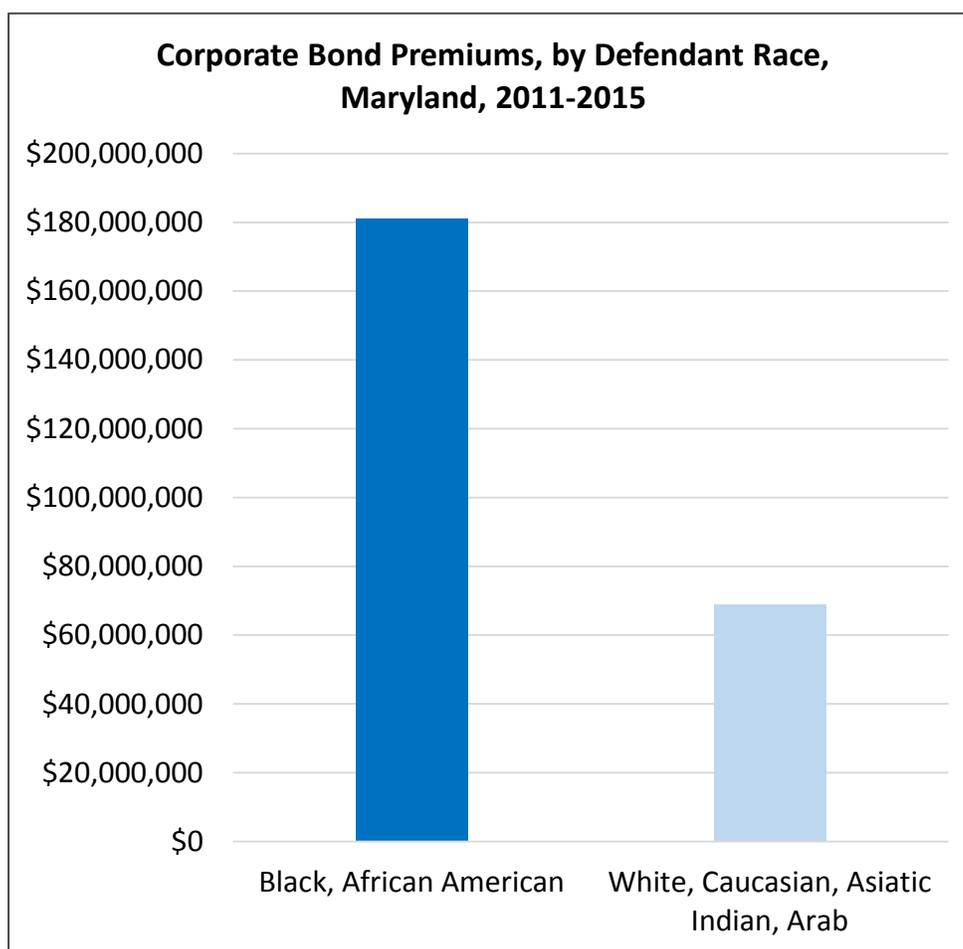


Racial disparities are evident in the assessment of money bail. The mean bail amount for black defendants is 45 percent higher than the mean amount for white defendants at the initial appearance before a District Court commissioner (\$48,895 versus \$33,678) and 51 percent higher at the bail review hearing before a District Court judge (\$54,565 versus \$36,224).

Many factors can affect the setting of bail, including a defendant’s criminal history, history of failures to appear, employment status, and other factors. These factors may have their own racial disparities and were not controlled for here. Therefore, we cannot and do not assert that commissioners and judges set bail in a way that is motivated by racial animus. Instead, we demonstrate that the money bail system, regardless of the underlying cause, has the consequence of imposing more onerous financial conditions of release on black defendants.

Although we do not control for the risk-level of defendants or their underlying charges, the difference in mean bail amounts is significant in light of previous findings that bail amounts in Maryland are unrelated to the underlying risk of the defendant. A leading empirical researcher on pretrial detention, Jim Austin, Ph.D., concluded after a 2014 study of Maryland bail practices that “[t]here was no relationship between risk and the amount of the bond that was set by the court.”<sup>15</sup>

<sup>15</sup> Jim Austin, JFA Institute, “Maryland Pretrial Risk Assessment Data Collection Study” (2014).



The racial disparity in mean bail amounts creates a racial disparity in the premiums charged to defendants. Black defendants were charged more than \$181 million in premiums by the bail bond industry—more than twice the premiums charged to defendants of all other races combined, even though only approximately 30 percent of the Maryland population identifies as black.<sup>16</sup>

<sup>16</sup> U.S. Census QuickFacts Maryland website, <http://www.census.gov/quickfacts/table/PST045215/24> (indicating that 30.5 percent of respondents reporting only one race in 2015 identified themselves as Black or African American; an additional 2.7 percent identified themselves as multi-racial).

## Unsecured Bonds Are As Effective As Corporate Bonds.

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There is an effective alternative to traditional money bail. Rather than imposing a “secured bail,” which requires payment or security, such as a property title posted directly to the court, or posting of corporate bond, some judges and commissioners are increasingly using “unsecured bonds.” With an unsecured bond, individuals accused of a crime are released before trial when they agree to pay a specified amount if they fail to appear to court. If they appear as required, they pay nothing.

After analyzing data from Baltimore City’s District and Circuit Courts, we find that

unsecured bonds are as effective as secured bonds at ensuring defendants return to court. We estimate that the failure to appear (“FTA”) rate in cases where defendants were released on unsecured bond was approximately 6.3 percent. In cases where defendants were released on secured bond, the failure to appear rate was approximately 6.5 percent.

Our FTA rate estimate is focused exclusively on cases filed in the District Court for Baltimore City between 2011 and 2015, but includes failures to appear in the Circuit Court for Baltimore City in cases that were transferred to the Circuit Court for Baltimore City by indictment, information, or jury trial prayer. To determine whether the defendant failed to appear, we looked at cases where an FTA warrant was issued, rather than cases where an FTA was merely noted, because the issuance of a warrant usually indicates that the court found no acceptable reason (e.g. illness) for the defendant’s absence.<sup>17</sup>

Our finding is consistent with a 2013 Colorado study that found that pretrial defendants appeared for court and stayed out of trouble pending trial at the same rates whether they had been released on unsecured bond or a secured bond.<sup>18</sup> We therefore present additional evidence that there is at least one effective means of ensuring defendants return to court without requiring financial payments to the court or a bail bond company.

FTA Rate, Secured v. Unsecured Bond, Baltimore City, 2011-2015	
Bond Type	FTA Rate
Unsecured Bond	6.3%
Secured Bond	6.5%

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<sup>17</sup> Our analysis identified cases where there was (1) a bail (secured or unsecured) set by the court, and (2) an FTA warrant was issued. It does not exclude cases where a FTA warrant was issued before the court imposed the bond, or after that bond was no longer in effect. As a result, the actual rates of FTA warrants issued while a defendant was free on bond are likely lower than our estimates.

<sup>18</sup> Michael R. Jones, Pretrial Justice Institute, “Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option” (Oct. 2013), available online at <http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf> (last visited Nov. 10, 2016).

## Conclusion

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As these data make clear, money bail practices in Maryland are counter to the District Court's stated mission "to provide equal and exact justice for all." Maryland's reliance on a wealth-based pretrial detention scheme causes the incarcerations of tens of thousands of people due to their inability to pay bail. The costs are also steep for those who are able to make at least a down payment to a bail bondsman. Bail bondsmen charge the community hundreds of millions of dollars in premiums to post bond so that presumptively innocent people can be free while awaiting trial. The communities that are charged the most in bond premiums are some of the poorest communities in Maryland.

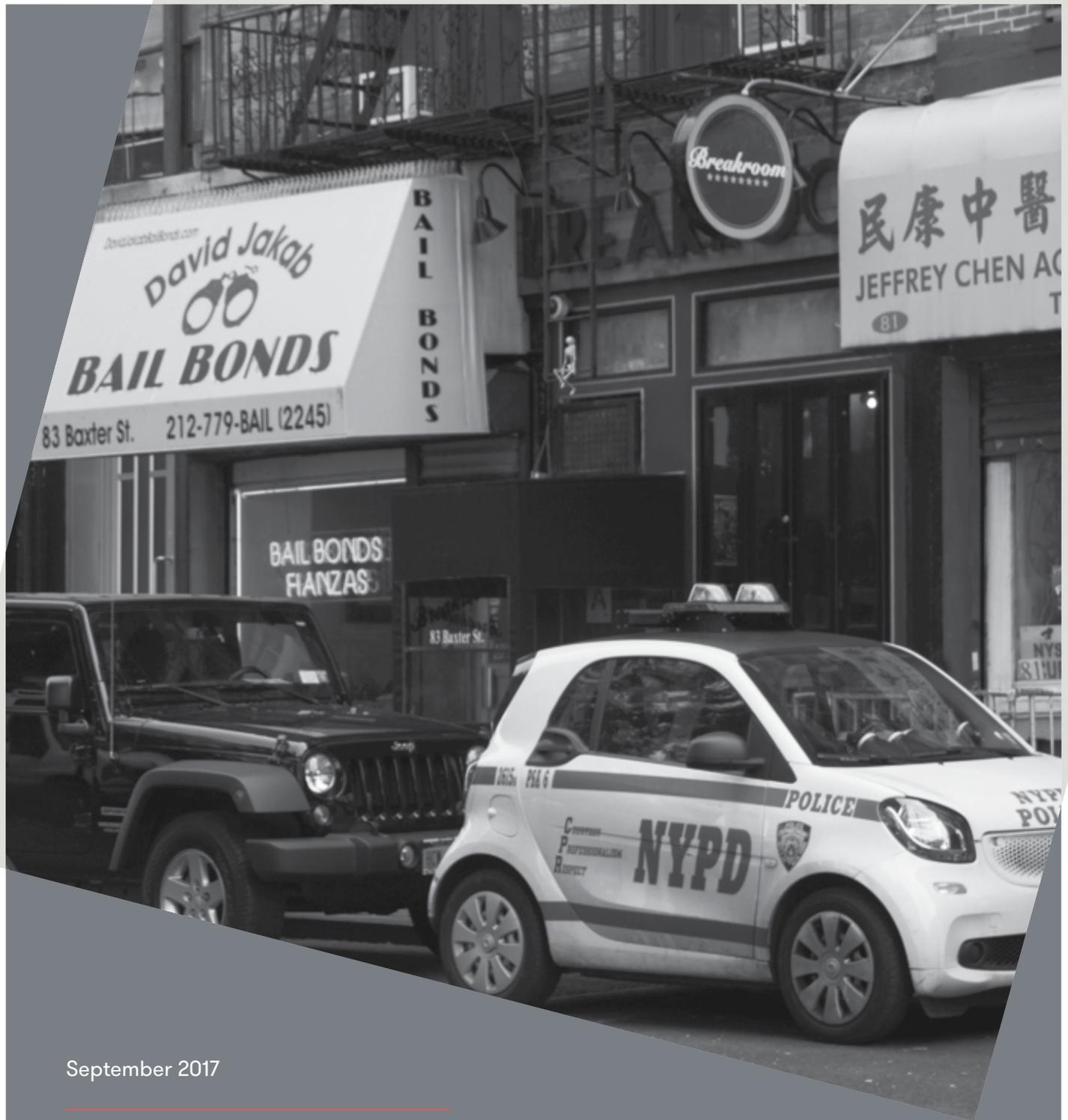
However, our findings are also encouraging. We demonstrate, consistent with other research, that unsecured bond, where defendants are released upon a promise to pay an amount should they willfully fail to appear to court, is a viable alternative to secured bail. Unsecured bond can reasonably ensure that defendants return to court without the debt and incarceration wrought by the current pay-or-stay system.

Because unsecured bond allows for the release of defendants even if they cannot immediately afford an up-front payment, the broader use of unsecured bond will further the public interest in reducing Maryland's pretrial jail population.<sup>19</sup> The benefits of unsecured bonds extend further still. Unsecured bond do not require the satisfaction of a non-refundable premium. Consequently the broader use of unsecured bonds will guarantee that hundreds of millions of dollars will remain where it belongs, in the pockets of the Maryland community.

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<sup>19</sup> Although not measured in our report, other alternatives to secured bond have been found effective at reducing FTA rates, including automated court reminders, pretrial supervision, and GPS monitoring.

# Exhibit 21



September 2017

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## Against the Odds

Experimenting with Alternative Forms of Bail in New York City's Criminal Courts

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*Insha Rahman*

**Vera**  
INSTITUTE OF JUSTICE

## From the Director

“Judge, if you set that amount of bail the odds are my client won’t make it.”

Those words are uttered frequently by defense attorneys in arraignment courts throughout New York City. Annually, almost 50,000 admissions to the jails at Rikers Island and across the city are for those held pretrial because they cannot afford the bail set in their case.

Under New York law, the use of bail doesn’t have to be this onerous. Judges may opt to set bail from nine forms, including bail that requires a deposit of no more than 10 percent of the total amount, or bail that requires no upfront payment at all. Although these “alternative” forms of bail—known as partially secured and unsecured bonds, respectively—have been available for decades, they remain underutilized in the courts, where judges traditionally set bail in the form of cash or an insurance company bail bond.

Why aren’t alternative forms of bail used more widely and what would happen if they were? In partnership with the Office of Court Administration, Vera explored these questions in a three-month experiment designed to promote the use of alternative forms of bail in New York City arraignment courts. The results of that effort are documented in this report, along with insights about the procedural challenges associated with these forms of bail and recommendations to improve their use.

Up against a mandate in the next decade to close Rikers Island and to cut the average daily jail population by half, improving the bail system is critical to criminal justice reform in New York City. While there is movement afoot to eliminate money bail altogether, this experiment demonstrates that significant progress can be made right now, under the current law, to reduce the power of money as a determinant of liberty. The 99 cases that comprise the cohort of this project tell a fascinating story about the possibility of culture change in the use of bail in the city’s criminal courts, and demonstrate the potential of alternative forms of bail to serve as one more tool to make the bail system fairer.

Today, the number of people incarcerated in New York City’s jails is at an all-time low, as is its crime rate, with several thousand fewer arrests this year compared to last. New York City has already demonstrated that less incarceration can equal *more* public safety, yet we cannot stop there. In the months since this project’s inception, more stakeholders already have become aware of these forms of bail and efforts are underway to increase their use. We hope this report contributes to the growing knowledge about alternatives to traditional bail and reinforces what recent research demonstrates all too clearly—money alone should not determine a person’s pretrial liberty.



Nicholas R. Turner  
President and Director  
Vera Institute of Justice



# Executive summary

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Statistics show that money bail is unaffordable and out of reach for many New Yorkers. Even though the median bail amount on felony cases in New York City is \$5,000—and even lower—at \$1,000, on misdemeanor cases – over 7,000 people are detained pretrial at Rikers Island and other New York City jails on any given day because they cannot make bail.

Under New York law, the use of bail doesn't have to be this burdensome. In setting bail, judges have nine forms to choose from, including “alternative” forms such as partially secured or unsecured bonds, that require little to no upfront payment to secure a person's pretrial release. The traditional practice in the courts, however, is to ignore these options and impose only the two most onerous forms of bail to make: cash bail and insurance company bail bond.

The Vera Institute of Justice (Vera) launched a three-month experiment in New York City arraignment courts to examine what would happen if alternative forms of bail were used more often. In what kinds of cases might judges be willing to set these forms of bail? In what amounts? What impact would these alternatives have on a person's ability to make bail? What other pretrial outcomes might be expected?

Drawing from a cohort of 99 cases in which an unsecured or partially secured bond was set, these cases were tracked over a nine- to 12-month period to document bail-making, court appearance, pretrial re-arrest, and final case disposition. Interviews were conducted with judges, defenders, and court staff to better understand the results and develop recommendations for improving the use of bail in New York City.

The results were promising. Sixty-eight percent of the cohort made bail, and an additional 5 percent were released on recognizance. The use of alternative forms of bail in the cohort was not limited to low-level offenses or certain types of offenses. Approximately 54 percent of cases had a top charge of a felony, and the cohort—felonies and misdemeanors—spanned the gamut from drug possession, larceny, and robbery, to assault, criminal contempt, and weapons possession. Those released had a combined court appearance rate of 88 percent and a rate of pretrial re-arrest for new felony offenses of 8 percent. When released pretrial, the majority of cases resolved in a disposition less serious than the initial top charge at arraignment, with

fully one-third ending in dismissal and another 19 percent ending in a non-criminal conviction.

Ninety-nine cases out of the thousands where bail is set is a miniscule number in the larger scheme of New York City's bail system, yet this experiment illustrates the possibility of meaningful culture change.

The recommendations in this report offer strategies to increase and ease the use of alternative forms of bail:

- > stakeholders should be educated about them;
- > the associated paperwork and procedures to set these forms of bail should be simplified;
- > they should be set routinely as an option in addition to traditional forms of bail; and
- > when bail is set, it should be done with an individualized inquiry into a person's ability to pay.

# Introduction

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Every day in New York City, people who have been arrested are brought before a judge to hear the formal charges filed against them by the state. This is the process of arraignment, which typically occurs within 24 hours after arrest.<sup>1</sup> At arraignment, if the case is not resolved with a dismissal or a plea, the judge must make a decision—to release a person on his or her own recognizance pending trial, or to set bail—a sum of money intended to serve as collateral. Although New York law allows judges to opt from nine forms of bail—some less burdensome than others—in practice, they select only two forms: cash bail and insurance company bail bonds.<sup>2</sup>

Out of the nine forms of bail available, these “traditional” forms of bail—those used most commonly—are the most difficult for individuals and their families to afford. Cash bail requires a full payment of money up front to the courts, which is returned to the payer at the end of the case minus a small administrative charge if a guilty plea or conviction is secured. An insurance company bail bond requires a person to pay a 10 percent premium and other nonrefundable fees to a for-profit bail bond company, and to satisfy conditions such as obtaining multiple payers and proof of employment. Many New Yorkers cannot meet the financial and other demands of these traditional forms of bail. As a result, when bail is set, slightly less than half of all defendants make bail before the end of their cases.<sup>3</sup> Instead, they remain detained pretrial at Rikers Island or other city jails, such as the Brooklyn Detention Complex; the Vernon C. Bain Center, colloquially known as “the Barge” or “the Boat”; or the Manhattan Detention Complex, often called “the Tombs.”

Partially secured and unsecured bonds are alternative forms of bail that are as legitimate under New York law as the traditional bail options. Alternative forms of bail are also easier to afford, as they do not require people to put up large amounts of money or to pay nonrefundable premiums and fees. Yet in setting bail on more than 40,000 cases annually, judges in New York City rarely impose these alternatives.<sup>4</sup> This is despite a 2012 ruling from New York’s highest court that judges are required to impose at least two forms of bail so that a person may choose whichever option is less onerous.<sup>5</sup>

In a moment of intense focus on bail reform nationally and locally, Vera partnered with the New York State Office of Court Administration on a

three-month experiment in arraignment courts across New York City to promote the use of alternative forms of bail and explore these questions: What would happen if partially secured and unsecured bonds were used more often? In what kinds of cases might judges be willing to set these forms of bail? If set, what impact would these alternatives have on a person's ability to make bail? What rates of appearance at future court dates or re-arrest pending trial could be expected? How would these cases resolve?

The project had three objectives:

- > to educate judges and defense attorneys about alternative forms of bail and combat the overall lack of awareness about how to request, or set, a partially secured or unsecured bond;
- > to create a cohort of cases in which these forms of bail were set and to analyze their outcomes, including bail-making, court appearance, pretrial re-arrest, and case disposition; and
- > to develop a better understanding of why alternative forms of bail have rarely been used, what about the cases in the cohort inspired a different approach, and what efforts are needed going forward to promote the use of these forms of bail more widely.

This report documents the results and offers some recommendations for reform. Although the results provide some valuable insights, it is important to note their limitations. Because the project was not designed as a research study, the cases in the cohort are not necessarily representative of the typical cases on which judges set bail. Due to the lack of a control group, the data comparisons offered in this report between alternative and traditional forms of bail for pretrial outcomes on bail-making, failure to appear, and re-arrest rates are illustrative only, and not conclusive. It is important not to overstate these as findings or draw generalized inferences from this project. What the results in this report do offer, however, are insights into the reasons why alternative forms of bail have historically been underutilized, how their greater use might impact pretrial detention rates and pretrial measures of success, and some steps that can be taken to increase their use in New York City arraignment courts.

## How bail typically operates in New York City

Under New York law, the purpose of bail is to guarantee a person's appearance at subsequent court dates after an arrest.<sup>6</sup> The prevailing logic is that a financial stake hanging over a person's head serves as an incentive to appear in court or risk forfeiting that money. The request for bail comes initially from the prosecutor's office, with an assistant district attorney making a recommendation for a particular bail amount to be set based on the nature of the charges, the person's criminal history, any outstanding warrants, and other factors like ties to the community and employment status. When a person before the court is facing serious charges, has a long criminal record, or has a warrant history of missed court appearances, the amount of bail requested by the district attorney's office tends to increase.<sup>7</sup> The prosecution's bail request acts as an anchor, increasing the likelihood that the court will set bail, often at amounts beyond the reach of average New Yorkers.<sup>8</sup> In New York City, more than 50 percent of people cannot pay the bail amount imposed by the court, even though bail is set at lower amounts, on average, compared to other jurisdictions nationwide: the median bail amount set in New York City for misdemeanors is \$1,000 and, for felonies, \$5,000.<sup>9</sup> That many people cannot afford bail in the amount of \$1,000, let alone \$5,000, demonstrates New Yorkers' limited economic resources to make bail.<sup>10</sup>

Juan Gonzalez's case illustrates how the bail process typically works in New York City.<sup>11</sup> Juan found himself in handcuffs and under arrest when he tried to break up a brawl at the bar where he worked. After waiting in a cell for almost 24 hours until he met the public defender assigned to his case, he learned he was charged with felony assault. The public defender told him that based on experience the prosecutor would likely seek \$15,000 bail, and the judge would likely set bail at \$10,000.

Juan didn't have \$10,000. He doubted his mother had that money either, but was sure she could come up with 10 percent of the amount and go to a bail bond company. His lawyer informed him that in addition to paying the 10 percent premium, Juan would also need at least one or two family members employed full-time to agree to sign for the bond and to show paystubs or tax returns. The public defender called Juan's mom, who in turn called his brother, uncle, and three other family members. Within a half hour, all six of them were at the courthouse, waiting anxiously for Juan to appear in front of the judge.

At the bail hearing, the prosecutor argued that bail should be set at \$15,000 because Juan presented a flight risk, the assault charges were serious, he had a prior misdemeanor assault conviction, and recently had been arrested for theft of services—entering the subway without paying the fare—for which he had failed to complete his required two days of community service. Juan’s lawyer argued for his release, detailing the circumstances of the brawl and his client’s attempts to intervene. The public defender explained that the misdemeanor assault conviction was from five years prior, when Juan was 17 years old, and that he had successfully completed three years of probation and received youthful offender status. He further told the judge that Juan wasn’t able to finish the community service on the recent arrest for jumping the turnstile because he had started working full-time and would have lost his job had he taken time off. The public defender pointed out Juan’s family members in the courtroom, indicating Juan’s strong ties to his community.

Nevertheless, the judge set bail at \$7,500 insurance company bail bond or \$5,000 cash. In practice, this ruling required Juan and his family either to pay more than \$750 in non-refundable premiums and miscellaneous fees to a for-profit bail bond company, or to deposit \$5,000 cash up front with the court. His family couldn’t afford \$5,000 in cash and, although his brother and uncle had \$750 and were willing to sign for a bail bond, they couldn’t find a bail bond company to underwrite the bond as neither Juan’s brother, uncle, nor other family members were employed full-time. Despite potentially having a good defense at trial, Juan remained in jail for six weeks until he pled guilty to a misdemeanor and was released.

Filled with individuals like Juan Gonzalez who are unable to make bail, Rikers Island and other New York City jails face a crisis.<sup>12</sup> Upwards of 75 percent of people there on any given day are detained pretrial because they cannot make bail.<sup>13</sup> Almost half of those who enter are released from jail within seven days or less, illustrating the high levels of churn.<sup>14</sup> But although thousands of New Yorkers cycle quickly through the city’s jails, another 10 percent of the jail population remains detained for at least six months, many for longer, awaiting resolution of their criminal cases.<sup>15</sup> The case of Kalief Browder, a 16-year-old arrested and held at Rikers Island for three years until his case was dismissed, brought into stark relief some of the most harmful consequences of bail and pretrial detention.<sup>16</sup>

## New York's alternative forms of bail

Bail wasn't intended to work this way. Historically, the purpose of bail was to *increase* pretrial release and to guard against unnecessary pretrial detention. (See “Why bail reform matters” on page 9.) However, the practical effect of requiring cash bail or bond fees and premiums to be paid in exchange for pretrial release is that many people, despite being presumed innocent, remain in jail while awaiting trial because they do not have enough money to make bail.

Almost 50 years ago, the New York State Legislature recognized the need for an alternative:

On the one hand, a judge may commit the defendant to prison or fix bail—which may well be beyond the defendant's means. On the other, he may release the defendant upon his own recognizance. In many instances, none of these decisions seems attractive or satisfactory. With this in mind, the proposal inserts two intermediate devices, one termed an “unsecured bail bond” and the other a “partially secured bail bond.”<sup>17</sup>

In 1970, the legislature reformed the state's bail laws to allow judges to consider less restrictive forms of bail than cash. The express objective of bail reform was to “reduce the un-convicted portion of our jail population.”<sup>18</sup> In addition to prescribing cash bail and insurance company bail bonds, New York State Criminal Procedure Law §520.10 allowed for an additional seven alternative forms of bail, most of them secured or unsecured variations of surety or appearance bonds.<sup>19</sup>

For people held on bail, these alternative forms provide options as to who can pay bail for them, in what form, and in what amount. The first distinction is between surety and appearance bonds. A *surety bond* requires the payer—called the “obligor” in the statute—to be someone other than the defendant, although a defendant may serve as one of two or more obligors. An *appearance bond* requires the defendant to be the sole person paying the bond. The second distinction is between secured, partially secured, and unsecured bonds. A *secured bond* requires those responsible for the bond to deposit personal or real property with the court, while a *partially secured bond* requires a money deposit of no more than 10 percent of the bond, although a judge may set a lesser amount. An *unsecured bond*, in contrast, requires no deposit of either property or money, but simply a promise to be liable for the full amount of the bond if the person fails to appear at subsequent court dates and bail is forfeited.

To see how these alternative forms of bail would play out in practice, consider again the case of Juan Gonzalez. If the judge had still set bail at \$7,500

bond or \$5,000 cash, but set the form of bail as a partially secured bond, Juan and his family would only have had to deposit \$750—money that would be returned to them at the end of the case if he appeared for all his court dates.<sup>20</sup> If the judge had set an unsecured bond, Juan and his family wouldn't have needed to make any deposit at all, allowing him to walk out of the courtroom after his arraignment on a promise that they would pay the full amount of the bond only if he failed to appear in court. In setting either alternative form of bail, the obligors—in this case, his family members—would still swear, under oath, to be liable for the full \$7,500 and complete paperwork attesting to their liability. But Juan Gonzalez likely would not have spent the night—much less six weeks—in jail.

### Why bail reform matters

Historically, the purpose of bail was to facilitate pretrial release.<sup>a</sup> Bail originated as a sorting mechanism to release those individuals likely to return to court during the pendency of their case and detain those who posed too high of a flight risk. However, over time, the shift from the use of personal sureties and unsecured bonds to cash bail and bail bonds issued by for-profit companies resulted in the disparity we see today—hundreds of thousands of people in jail awaiting trial and unable to afford their freedom, while those wealthy enough to make bail are set free.<sup>b</sup>

In 1961, troubled by how many men and women they saw in pretrial detention when they visited a Manhattan jail, Louis Schweitzer and Herbert Sturz started the Manhattan Bail Project. Over three years, the Bail Project interviewed thousands of defendants in Manhattan Criminal Court and recommended release on recognizance to the presiding judge if the person demonstrated he or she was not a flight risk based on employment history, local community ties, and past criminal record.<sup>c</sup> Data from the experiment showed that 98 percent of individuals released returned to court, and were 250 percent more likely to be acquitted at the end of their cases than those who remained in jail on bail. Building on the success of the Manhattan Bail Project's findings, Congress passed the Bail Reform Act of 1966 to revise bail practices so that people “were not needlessly detained . . . regardless of financial status.”<sup>d</sup>

Despite these efforts, the use of bail and rates of pretrial detention across the United States continued to rise, especially in smaller jurisdictions.<sup>e</sup> The result is the current system, in which almost 450,000 presumptively innocent individuals are held in jail nationwide on any given day simply because they cannot afford their bail.<sup>f</sup> Recent research has

shown that the effects of unnecessary pretrial detention defy conventional wisdom that incarceration equals public safety—even short stays in jail can lead to increased rates of failure to appear and recidivism.<sup>g</sup>

The failings of pretrial justice over the past five decades have galvanized efforts at bail reform among the courts, criminal justice stakeholders, and advocates, based on many of the same lessons learned from the Manhattan Bail Project. Nationally, litigation challenging the use of bail schedules has resulted in several jurisdictions reconsidering their use of bail in low-level and misdemeanor cases.<sup>h</sup> Recent reforms to the New Jersey bail system have yielded a dramatic reduction in the use of cash bail.<sup>i</sup> In New York City, many new initiatives provide an alternative to traditional bail.<sup>j</sup> For example, nonprofit charitable bail funds in the Bronx and Brooklyn pay bail for people held in jail on misdemeanor charges where bail is set at \$2,000 or less.<sup>k</sup> Building on the success of the bail funds, the New York City Council approved funding for a bail fund in all five boroughs to be launched in 2017.<sup>l</sup> Another citywide program, called Supervised Release, began in March 2016. It provides pretrial supervision to 3,000 people annually who are at risk of having bail set.<sup>m</sup>

The fundamental problem with cash bail is this: How can it be that two otherwise similarly-situated individuals, with the same charges, criminal histories, and circumstances, face radically different fates based simply on their wealth? Collectively, recent bail reform efforts have shown that people do not need their own money at stake to return to court, and that money as the determinant of pretrial liberty is neither effective nor fair.

# Experimenting with alternative forms of bail: How it worked

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## Project impetus: Why are alternative forms of bail underutilized?

Despite being legitimate forms of bail, judges rarely if ever set an unsecured or partially secured bond in New York City courts.<sup>21</sup> There are several theories as to why. In some cases, particularly those involving serious charges, judges may use cash bail as a means to secure pretrial detention in the absence of a preventive detention statute by setting bail out of reach. In other instances, judges may simply be unaware of the options to use less restrictive forms of bail.<sup>22</sup>

Many judges, especially those newer to the bench, are unaware that these forms of bail exist under New York law, or have never seen them imposed when bail is set in the courts. As one judge noted, “It’s just part of the culture—cash or bond? When I became a judge, it’s just what everyone was using.”<sup>23</sup> Another judge recounted, “I’ve rarely been asked to consider an alternative form of bail. The first time I was asked to set a partially secured bond, I hesitated because I was unfamiliar with the paperwork or the process.”<sup>24</sup> This lack of familiarity is especially common in arraignments, where by custom the most recently elected or appointed criminal court judges are assigned.

The burden does not lie solely with the bench. Judges rarely receive requests from defense attorneys to set alternative forms of bail, and most judges are unlikely to go against custom and impose a form of bail that was not requested. Many defense attorneys are unaware that partially secured or unsecured bonds are available under New York law, or do not know the procedure and paperwork required to secure them. As one prominent public defender wrote, “I am the first to admit that until a few years ago, I had never really looked at the bail statute. I certainly never asked a judge to set a form of bail other than cash or insurance company bond.”<sup>25</sup>

To request one of these alternative forms of bail—a partially secured or unsecured bond—the Office of Court Administration requires at least one person paying to agree to sign paperwork and swear under oath to be

liable. That person must be able to demonstrate that he or she has a source of income and will pay the full amount if bail is forfeited.

Both judges and attorneys may be deterred from using partially secured or unsecured bonds at arraignments because of the complexity of the paperwork required and the time needed to complete it and take the necessary testimony from obligors. Three different forms must be completed to secure an alternative form of bail. The *bail bond* form states the type of bail set, the amount of bail, and the names of the responsible parties. If the bond is secured, the bail bond form lists the property posted and, if the bond is partially secured, the amount deposited. A *justifying affidavit* must also be completed for each person responsible for the bond, and requires information about their place of residence, employment, and income. The third form, *undertaking to answer*, must also be completed for each responsible party, and requires each to swear under oath to be responsible for the person's appearance in court and liable for the full amount of bail if he or she fails to appear and bail is forfeited.

## Project design and queries: What if alternative forms of bail were used more?

This experiment was conducted in criminal court arraignments in Manhattan, Queens, Brooklyn, and the Bronx over a three-month period. A total of 99 cases were identified from arraignment court calendars where an unsecured or partially secured bond had been set. Those cases were tracked over a nine- to 12-month period after arraignment to document bail-making, court appearance, pretrial re-arrest, and final case disposition.

***Educating stakeholders about alternative forms of bail.*** Before the project period began, Vera trained defense attorneys at every public defender office in Manhattan, Queens, Brooklyn, and the Bronx on how to request partially secured and unsecured bonds at arraignments.<sup>26</sup> Attorneys from these offices are present at arraignments in all five boroughs and collectively handle the vast majority of cases arraigned in New York City.<sup>27</sup> Public defenders who attended the trainings were educated on New York's bail statute, including the nine forms of bail, and trained on following the procedure and completing the paperwork required for requesting an alternative form of bail. The training included time for discussion to share borough-specific strategies to

increase the likelihood that arraignment judges would set partially secured and unsecured bonds. Vera staff shared training materials and a short guide to alternative forms of bail during the trainings, which were also disseminated by e-mail to all attorneys in each of the offices.

**Choosing and tracking a cohort.** During the three-month project period, Vera, in collaboration with the New York State Office of Court Administration, reviewed the daily arraignment court calendars in Brooklyn, Manhattan, Queens, and the Bronx to flag cases in which an alternative form of bail was set. From December 2015 through March 2016, 99 cases were identified in which judges granted an unsecured or partially secured bond option in addition to traditional forms of bail. Prior to the project, court staff in arraignments routinely noted on the arraignment court calendar the outcome of every case heard during the shift, including information as to type and amount of bail set, and whether bail was made at arraignment. During the project period, court staff were instructed to note if a judge set an unsecured bond by listing “USB” next to that case, or “PSB” for a partially secured bond.

A daily review of completed court calendars identified all cases marked with “USB” and “PSB,” which were then added to the project cohort. After documenting the docket numbers, defendant names, top charge, and other identifying information, Vera requested data from the Office of Court Administration on bail-making, future court appearances, case dispositions, and new arrests within the five boroughs for those cases. Vera’s analysis of that data is documented below.

**Baseline comparison data.** No control group exists as the project was not designed to be a research study. Given this limitation, generalized inferences from the results in this report cannot be made.<sup>28</sup> There is, however, readily available data that provides a valuable baseline comparison of key pretrial outcomes in New York City that can be used for illustrative comparisons on bail-making, failure to appear, and pretrial re-arrest rates. The New York City Criminal Justice Agency (CJA) documents overall outcomes for all criminal court cases arraigned in New York City. Vera compared data from the project cohort on bail-making and failure to appear in court to citywide data in CJA’s 2015 Annual Report.<sup>29</sup> Vera also compared re-arrest data to a 2009 CJA study on pretrial re-arrest rates.<sup>30</sup>

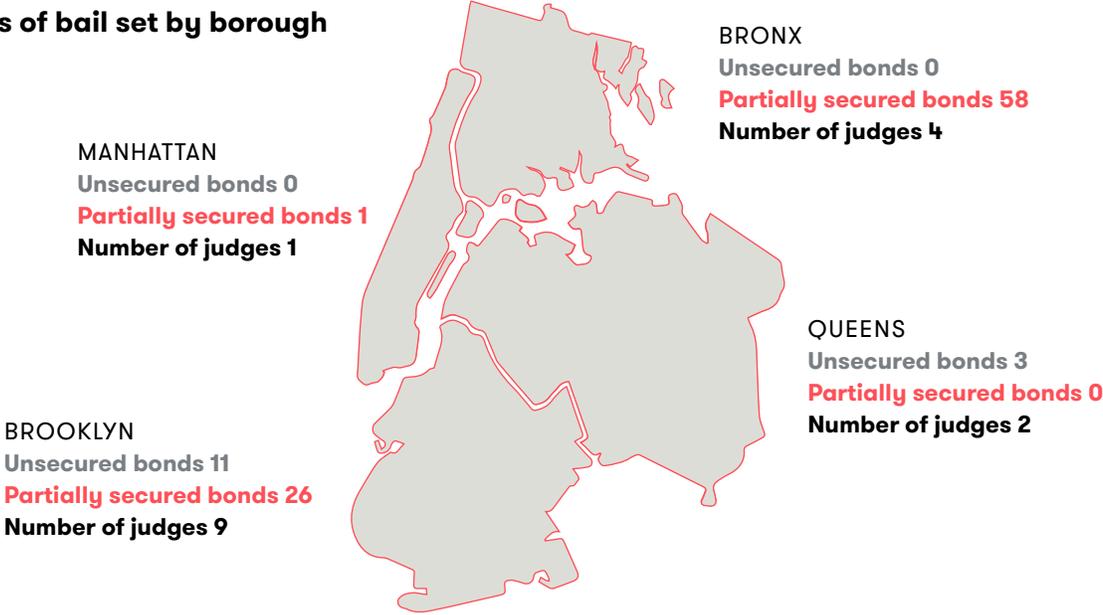
# Data analysis

The 99 cases that were evaluated were tracked for a nine- to 12-month period following arraignment to document appearance at future court dates, often scheduled six to 12 weeks apart, and to allow time for the majority of cases in the cohort to resolve. Vera staff obtained and analyzed case outcome data for the cases along the following measures: failure to appear, pretrial re-arrest, and ultimate case dispositions. From interviews with stakeholders, including judges, defenders, and court staff, Vera also gathered qualitative information to better understand why an alternative form of bail had been granted.

In all cases in the cohort, an alternative form of bail was set *in addition* to traditional bail options, such as cash or an insurance company bail bond.<sup>31</sup> Although this does not conclusively rule out the possibility that defendants in any of the cases in the cohort would otherwise have been released on recognizance but for the setting of an alternative form of bail, it suggests that bail would likely have been set in these cases regardless.

Figure 1

### Alternative forms of bail set by borough



## Bail setting by borough and type of bond

By far the greatest use of partially secured and unsecured bonds during the project was in Brooklyn and the Bronx. Although each of the four boroughs included in the demonstration project had at least one case in which an alternative form of bail was set, and 16 judges set a partially secured or unsecured bond at least once, 96 percent of all cases (95 cases) came from these two boroughs. As shown in Figure 1 on page 13, in the cases studied, judges set an unsecured bond in 15 percent (14 cases), and a partially secured bond in the remaining 85 percent (85 cases).

## Forms of bail set by charge and offense type

Vera analyzed the use of alternative forms of bail for cases in the cohort by charge as shown in Figure 2.<sup>32</sup> Notably, the use of partially secured and unsecured bonds was not limited to only low-level offenses. More than half of the cases examined had a top charge of a felony—29 percent nonviolent

Figure 2

### Alternative forms of bail set by charge level

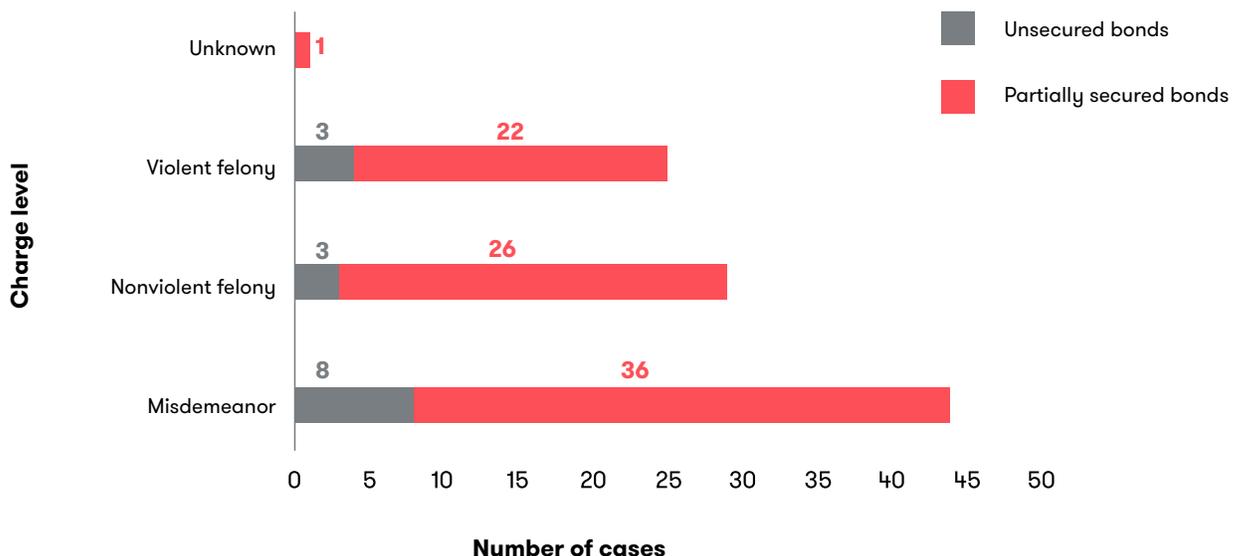
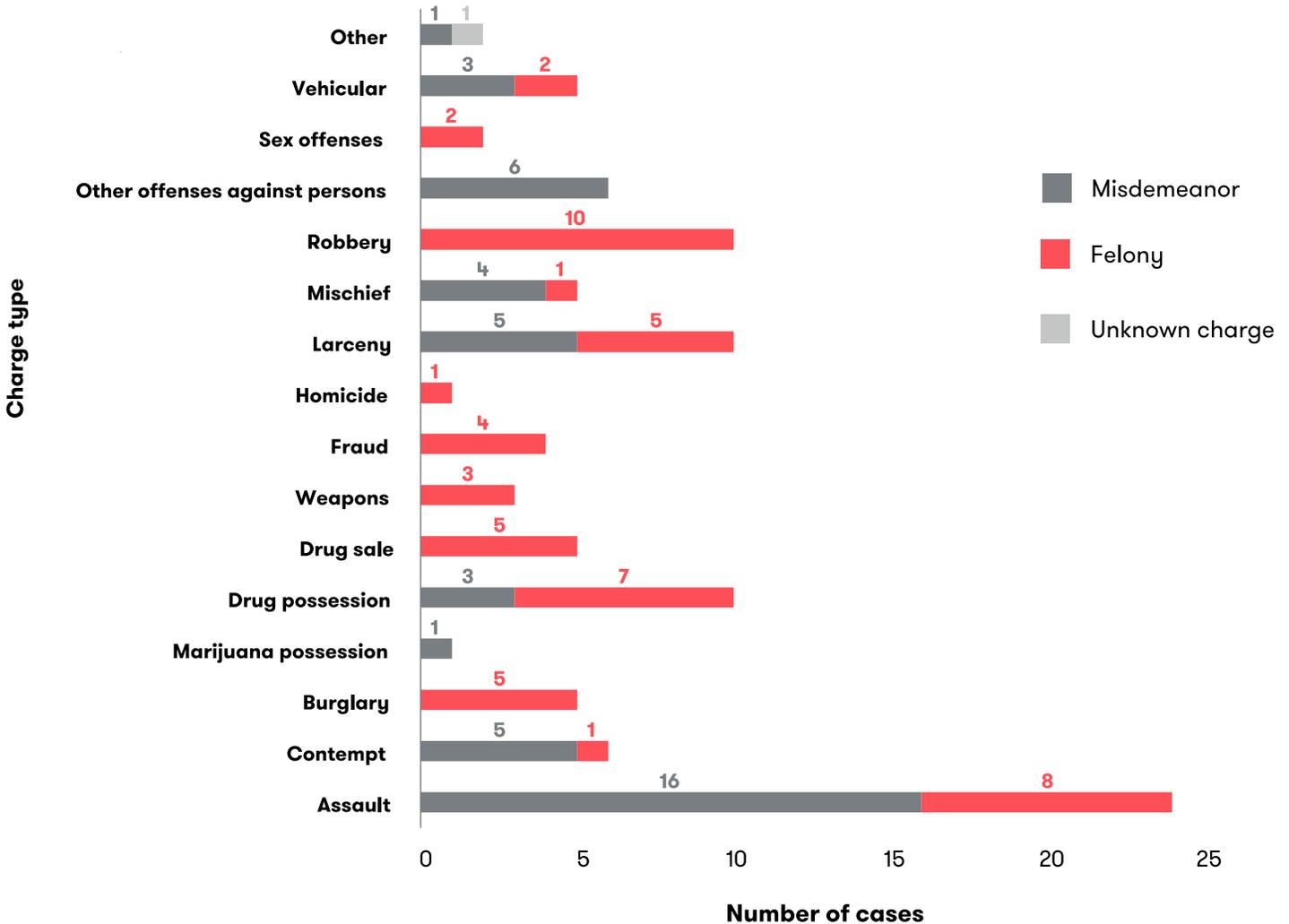


Figure 3

**Alternative forms of bail set by offense type**

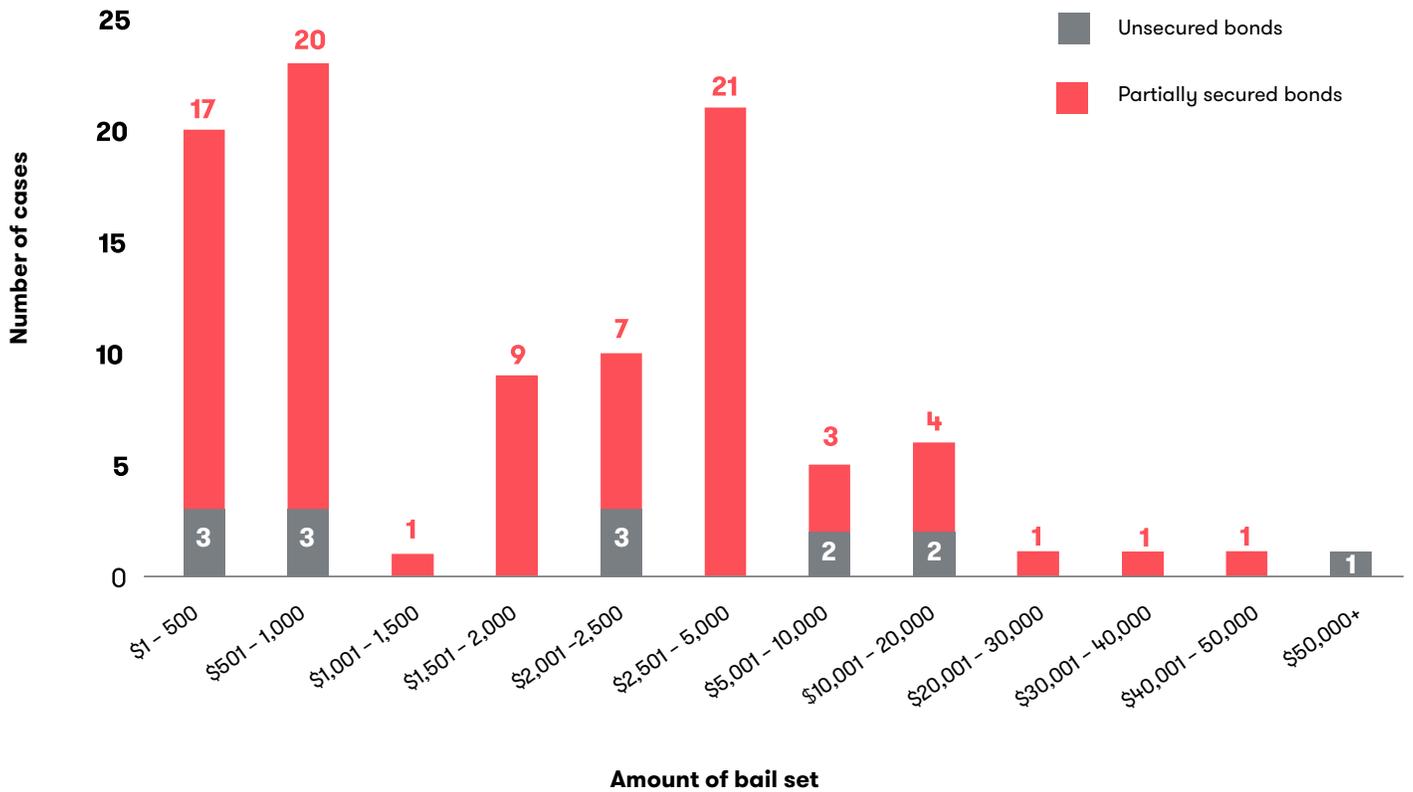


felonies (29 cases) and 25 percent violent felonies (25 cases). Forty-four percent had a top charge of a misdemeanor (44 cases).

The range of types of cases in which an alternative form of bail was set was similarly broad. Although felony and misdemeanor assault charges by far comprised the greatest number of cases in which an alternative form of bail was set, as shown in Figure 3, overall these forms of bail were set in cases as varied as vehicular offenses, drug sales, and weapons offenses.

Figure 4

**Amounts of bail set when an alternative form used**



## Bail amounts

Vera also tracked the amount of bail set in the 99 cases. During trainings with public defenders at the outset of the project, several attorneys expressed concern that even if judges were willing to set unsecured or partially secured bonds, they would only do so at higher than typical amounts. As one defense attorney noted, “If a judge traditionally sets \$500 bail that my client can’t pay, and instead sets a partially secured bond of \$5,000, then there’s no difference in outcome.”<sup>33</sup> According to CJA, in New York City, the median bail amount for a misdemeanor is \$1,000 and, for a felony, \$5,000.<sup>34</sup> The cases in which a partially secured and unsecured bond were set did not deviate significantly from these baseline comparisons. As shown in Figure 4, while 15 percent of cases (15 cases) had a bond amount set higher than the New York City average for felonies, 43 percent (43 cases) had bail set at \$1,000 or less.

Table 1

**Bail-making when alternative forms used**

<b>Outcome</b>	<b>Overall</b>	<b>Unsecured bond</b>	<b>Partially secured bond</b>
Rates of bail made when an unsecured and partially secured bond was set	68%	100%	64%
Number released on bail when an unsecured or partially secured bail was set	68 out of 99	14 out of 14	54 out of 85
Number released on recognizance after arraignment	5 out of 99	0 out of 14	5 out of 85

## Bail-making rates

Vera also analyzed the rate at which bail was made in the cases in which an alternative form was set. As shown in Table 1, 68 percent of people made bail overall (68 cases). Because no deposit is required, where an unsecured bond was set, 100 percent of individuals were immediately released at arraignment (14 cases). Bail was made in 64 percent of cases where a partially secured bond was set (54 cases), predominantly at arraignment or within one week post-arraignment. In 6 percent of cases in which a partially secured bond was set, bail was not made but the individual was released on recognizance with no bail at a post-arraignment court date (5 cases).<sup>35</sup>

As a baseline comparison, the overall citywide average of bail-making at arraignment is 11 percent, with bail being made immediately in 10 percent of felony cases and 13 percent of non-felony cases.<sup>36</sup> When bail is set, in 12 percent of both felony and non-felony cases individuals are released on recognizance at a court date after arraignment without posting bail.<sup>37</sup> In an additional 34 percent of felony and 32 percent of non-felony cases, bail is made post-arraignment. Citywide, individuals in the remaining 45 percent of felony and 43 percent of misdemeanor cases do not make bail at any point prior to disposition.<sup>38</sup>

Table 2

**Time until bail made when a partially secured bond was set**

<b>Outcome</b>	<b>Misdemeanors</b>	<b>Nonviolent felonies</b>	<b>Violent felonies</b>
Made bail at arraignment	16	8	4
Made bail within one week	4	6	7
Made bail between one and two weeks	2	1	1
Made bail between two and three weeks	3	0	1
Made bail within one month or after	0	0	1
Did not make bail	11	9	6
Bail not made but later released	1	2	2

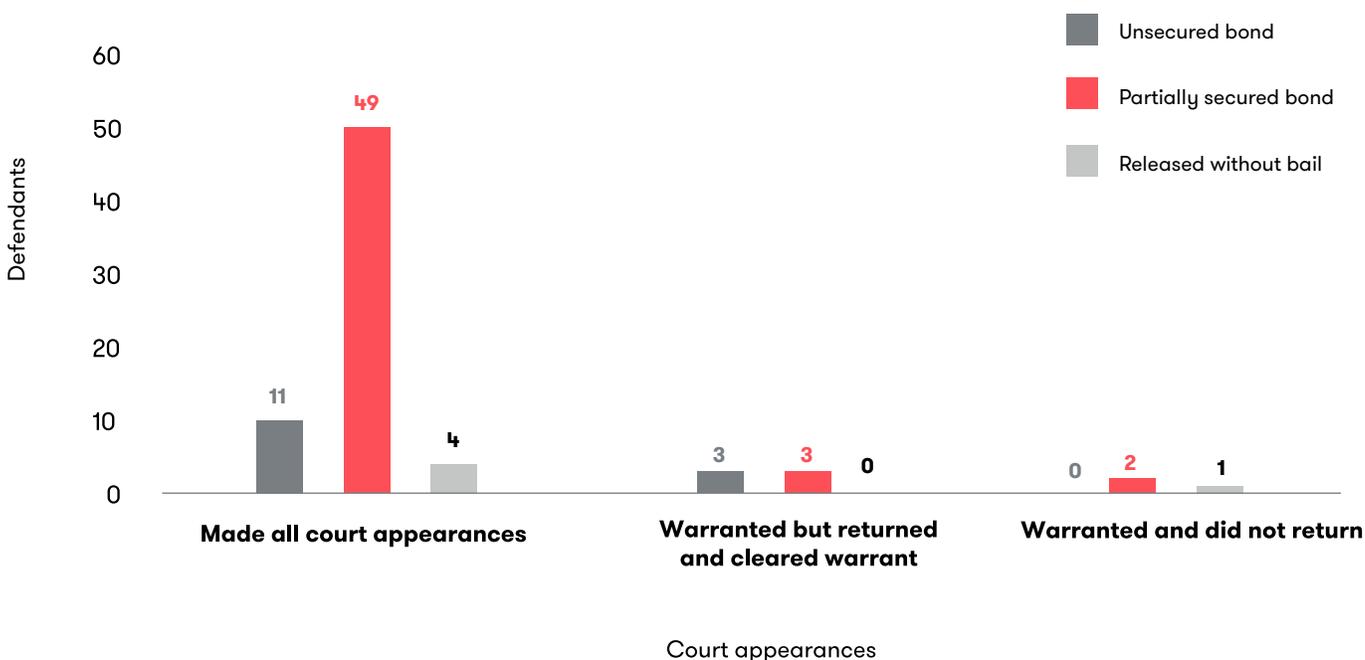
In looking at the 54 cases in which a partially secured bond was set *and* bail was made, 52 percent made bail immediately at arraignment (28 cases). An additional 31 percent made bail within one week after arraignment (17 cases). In line with other known statistics about bail-making in New York City, rates of making bail dropped off significantly after the first week.<sup>39</sup> Despite an alternative form of bail being set, almost one-third of all individuals in the cases studied did not make bail before disposition (26 cases). (See Table 2.)

## Impact on case outcomes

The experiment sought to measure the impact of alternative forms of bail on individual case outcomes over time. For the 73 cases in which people were released because they either made an alternative form of bail or were released on recognizance post-arraignment, Vera tracked pretrial failure to appear, new arrests while cases were pending, and final case dispositions. By the time the final data was compiled in February 2017, more than 90 percent of all cases in the dataset had been resolved.

Figure 5

### Failure to appear at future court dates by type of release



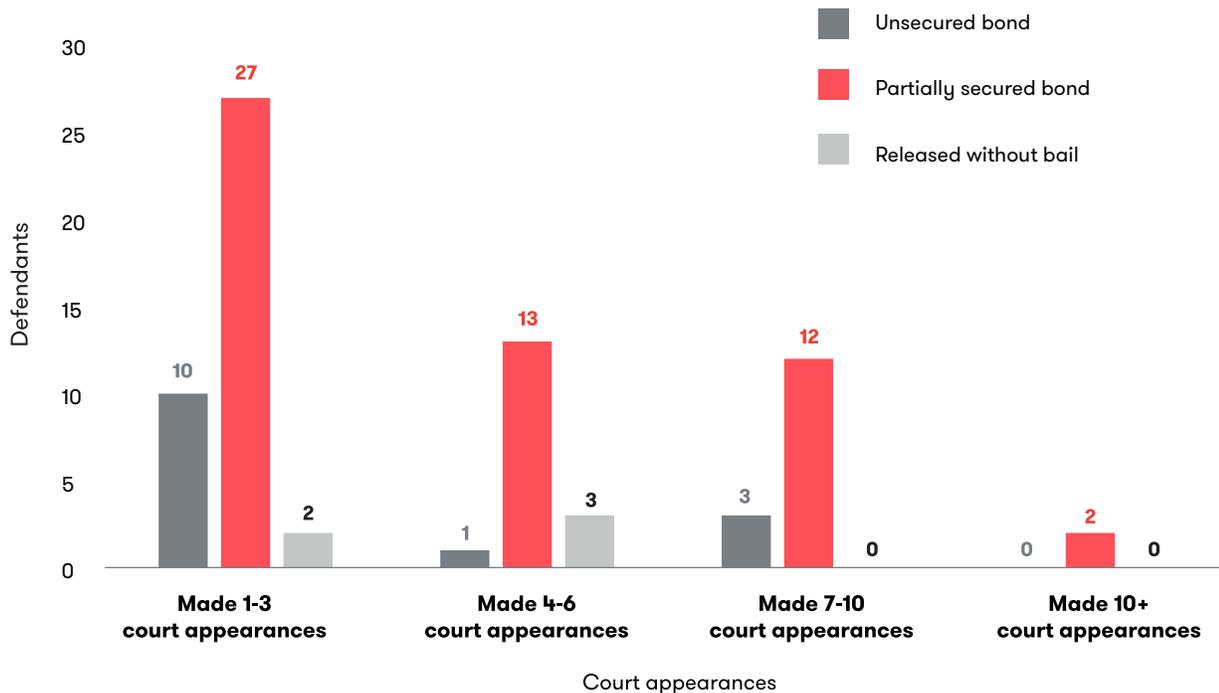
### Failure-to-appear rates

Failure-to-appear (FTA) rates measure whether a person returns to court as required for subsequent appearances after release on recognizance or making bail. In New York City, if a person does not appear in court on a scheduled court date, a judge may issue a bench warrant for the person’s arrest.<sup>40</sup> If the person is released on bail, a bench warrant will result in bail being forfeited unless the person returns to court and provides a satisfactory explanation for the failure to appear.<sup>41</sup> In practice, judges may “stay” a bench warrant if a person does not appear in court on a scheduled court date but his or her lawyer provides an explanation for the failure to appear. In these instances, no bench warrant is issued and bail is not forfeited despite the defendant’s non-appearance in court.

Warrants were counted any time a bench warrant was issued, including in cases in which a bench warrant was issued for a missed court appearance but the defendant returned to court voluntarily within a short time after and bail was ultimately not forfeited. “Stayed” bench warrants were not counted in this analysis, as technically no failure to appear or forfeiture of bail occurred. Overall, the FTA rate for cases in the cohort was 12 percent. (See Figure 5.) One hundred percent of people who were

Figure 6

**Number of court appearances made by type of release**

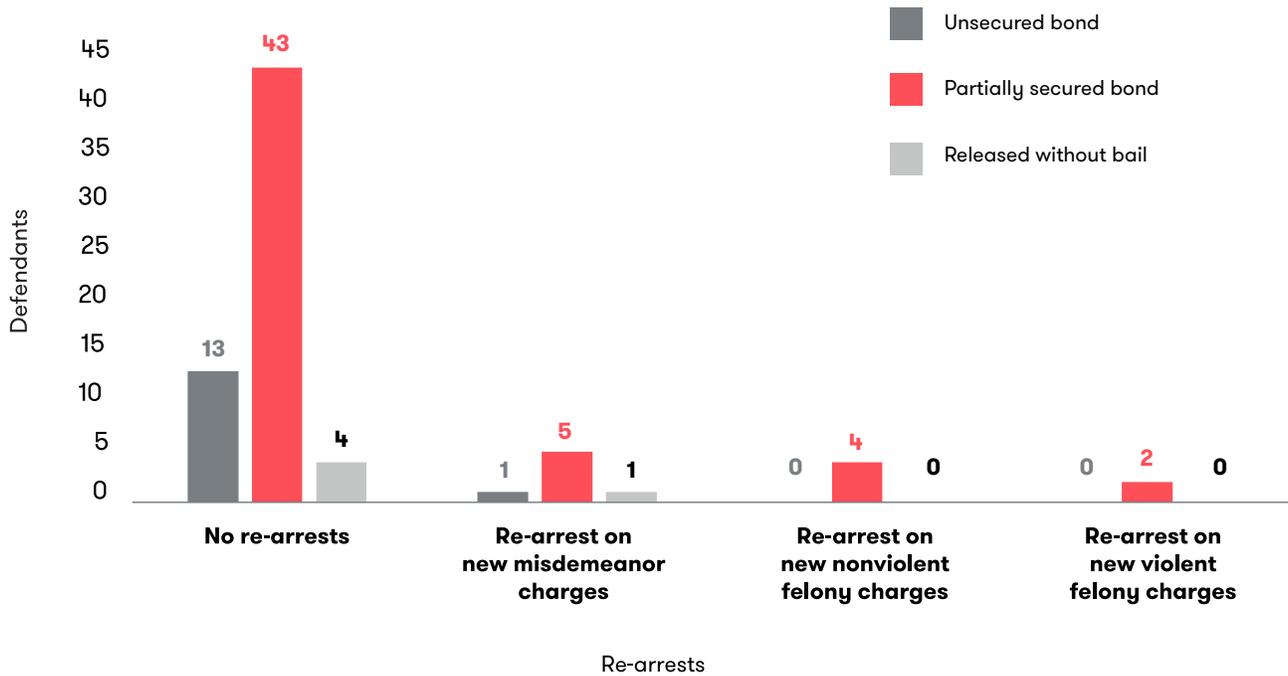


either released or made bail on violent felony charges, including robbery and assault, made all court appearances. The FTA rate for people who were either released or made bail on nonviolent felony charges, such as drug possession or drug sale, was higher than the overall average for the cohort.<sup>42</sup> In six cases, people warranted at least once during the pretrial period but returned to court and were continued on bail. In three cases, individuals had warranted and had not returned to court. As a baseline comparison, these FTA rates closely mirror those in the cases analyzed by CJA in published citywide statistics on post-arraignment court appearance rates. Overall, the citywide average rate of failure to appear is 11 percent in felony cases and 14 percent in non-felony cases.<sup>43</sup>

A significant number of individuals in the cohort made several court appearances during the tracking period. Approximately one-half of the 73 cases were resolved within one to three court appearances after arraignment. In 17 cases, people appeared in court at least seven times or more within the tracking period. (See Figure 6.)

Figure 7

## Pretrial re-arrest by type of release



## Rates of re-arrest

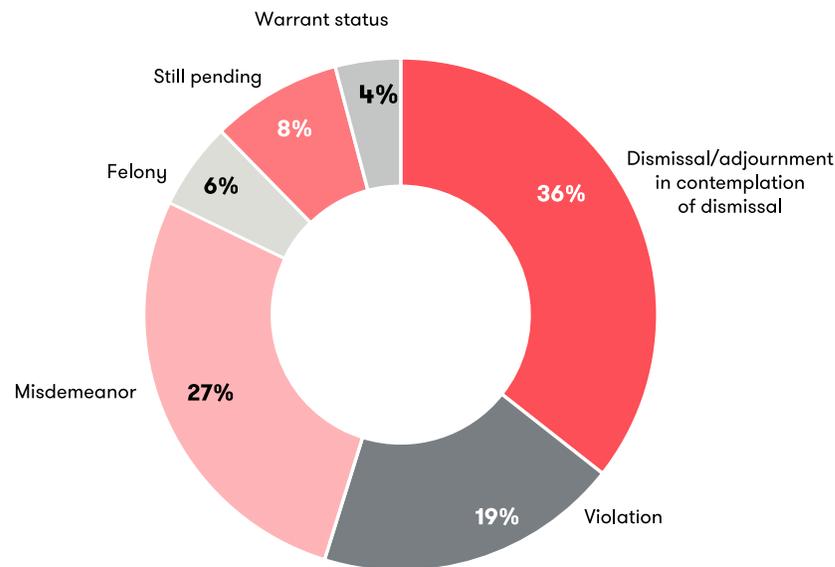
For all 73 cases in which the person was released or made bail, any re-arrest for a new misdemeanor, nonviolent felony, or violent felony offense was tracked in the Office of Court Administration's CRIMS database.<sup>44</sup> Overall, the re-arrest rate for any new offense was 18 percent. Nine percent of individuals had a new arrest on a misdemeanor charge, 5 percent on a nonviolent felony, and 3 percent on a violent felony offense. (See Figure 7.) As a baseline comparison, these rates of pretrial re-arrest are comparable to those published by CJA in a 2009 study, where overall pretrial re-arrest rates were 18 percent of individuals who were released on recognizance or made bail.<sup>45</sup>

## Case disposition

Case dispositions were tracked for all 73 cases in the cohort where bail was made or the person was released. (See Figure 8.) Slightly over one-third (26 cases) resulted in a dismissal or an adjournment in contemplation of dismissal, known colloquially as an "ACD," where charges are ultimately dismissed after a period of six to 12 months.<sup>46</sup> Another 19 percent (14 cases) resolved with a violation plea, which is a non-criminal class of offenses under New York law that does not result in a criminal conviction or a permanent record. Twenty-

Figure 8

## Case dispositions



seven percent of cases (20 cases) resolved in a misdemeanor conviction, while only 6 percent of cases (4 cases) resolved in a felony conviction. At the time of data analysis, 8 percent of cases (6 cases) were still pending, and 4 percent (3 cases) were in warrant status where the defendant hadn't appeared at a scheduled court date or at a date thereafter.

## Overall themes and takeaways

The baseline comparison of pretrial measures of success between traditional forms of bail, as reported by CJA in bail-making, failure to appear, and pretrial re-arrest, and the alternative forms used in the experiment, suggest promising results and the need for a deeper, more methodologically rigorous study. A closer look at the cases generated as a result of the project also uncovered some interesting trends.

### Notable trends

**Alternative forms of bail were used in a wide range of cases.** Courts set alternative forms of bail in a wide range of cases, both by level of offense and offense type. Judges did not limit the use of partially secured and unsecured bonds to only low-level cases—approximately half of the cases in the cohort involved felony-level charges. Moreover, a significant number

of the cases examined would not have been eligible for other existing bail initiatives in New York City, such as supervised release or the charitable bail funds. (See “Why bail reform matters” on page 9.) More than half involved a top charge of a felony, making them ineligible for a charitable bail fund; and at least one-third were excluded by charge from supervised release, which does not accept violent felony offenses or any charges where the allegations involve domestic violence or sexual misconduct.

In serious cases where pretrial release is appropriate but release on recognizance is not granted, alternative forms of bail may be a promising alternative. Judges, particularly when granting partially secured bonds, may feel confident that there is still “skin in the game.” As one judge noted, “You could go with a ‘more traditional’ low cash bond, with an amount of \$1,000 bond or \$500 cash, but then you realize they would not be able to make it. The defense attorney tells you, ‘Judge, they have \$100.’ Under those circumstances, I was very open-minded in the right case. That \$100 to one family might be like \$100,000 to another family. It might be more than enough to secure my confidence that this person would come back to court on the next date.”<sup>47</sup>

***The majority of cases in which bail was made resolved in a dismissal or a low-level disposition.*** Another notable trend was that the majority of cases resolved in a disposition far less serious than a felony charge, even though half of all cases involved a top charge at arraignment of a nonviolent or violent felony. Fully a third of all cases where a partially secured or unsecured bond were made resulted in an outright or delayed dismissal, and almost half resolved with a conviction of a violation, or a misdemeanor-level charge. In contrast, fully 100 percent of cases in the cohort that were not released resolved in a misdemeanor or felony disposition. (See Figure 8 on page 22.)

The disposition outcomes of the project cohort closely resemble overall case outcomes in New York City where, according to the most recent annual report from the New York City Criminal Courts, approximately 42 percent of arraignments resolve in either an ACD or an outright dismissal.<sup>48</sup> What is notable about the project cohort of cases compared to the overall citywide numbers is that all defendants in cases in the project cohort had bail set, while the vast majority of defendants included in the citywide numbers were released on recognizance. Given recent studies that document the negative impact of bail on case dispositions, this trend in overall case dispositions suggests that setting an unsecured or partially secured bond instead of, or in addition to, a traditional form of bail may lessen the deleterious effect of bail on final case outcomes by increasing rates of pretrial release and removing the pressure to resolve a case with a guilty plea.<sup>49</sup> This possibility merits further study.

## Factors influencing adoption of alternative forms of bail

### ***The cases in which an alternative form of bail was granted were unique.***

Those instances in which a judge agreed to a partially secured or unsecured bond were cases that stood out in some way from the usual thrum—a case where the person accused had a particularly compelling story, or the facts were unusual, or an attorney made an especially forceful argument on the record on behalf of the client. In one case in Brooklyn, for example, a defense attorney reported that an unsecured bond was set only after he made an extensive record and spent several minutes describing to the court the unique circumstances that led to his client being arrested and charged with a violent robbery offense.<sup>50</sup> Another defense attorney noted, “Setting an alternative form of bail is great in theory, but if it’s in an amount that isn’t reflective of a person’s actual financial circumstances it’s not that helpful. Judges who have set partially secured or unsecured bonds often do so because the defense lawyer has presented a fuller picture of their client, their family, and their financial resources.”<sup>51</sup>

Compared to the usually rushed three or four minutes most cases last in arraignment, with only cursory information given about the circumstances of the person accused, the level of detail provided in cases where an alternative form of bail was set may have influenced the judge to depart from imposing traditional cash or an insurance company bail bond. These cases often involved a more extensive back-and-forth and discussion of a person’s circumstances, including financial ability to make bail, than is usually done at arraignment. As one judge described, “I like the process where you bring the surety up and you put the surety under oath. It adds gravity to the situation. When I set a partially secured bond, I almost invariably talk to the defendant and the family about losing that money. There’s more in that circumstance because you have a family member saying, ‘You better come back. I took an oath for you.’”

***Partially secured bonds could be used as an alternative to insurance company bail bonds.*** Partially secured bonds are seen by some judges as an effective alternative to insurance company bail bonds. Most such bail bonds require obligors to demonstrate full-time employment through paystubs and tax returns. Other sources of income, such as from public assistance or disability payments, are often not accepted. Nor will many bail bond companies underwrite low bails, especially those set at \$1,000 or less, as they are not profitable for the company. Partially secured bonds operate almost like insurance company bail bonds, except that the 10 percent deposit is

refundable, meaning a person who makes all appearances loses no money. One judge equated partially secured bonds as the functional equivalent of an insurance company bail bond: “If we do a typical bail bond, there’s a private bond company and they’re responsible for the paperwork. With a partially secured bond, the company is taken out of the mix and it’s the court that works with the defense to prepare the paperwork.”<sup>52</sup>

Two judges, one in Brooklyn and the other in the Bronx, were primarily responsible for the 99 cases in the project where an alternative form of bail was set. One noted that the reason he began to set partially secured bonds was that it was increasingly requested by defense attorneys. He said, “What initially happened is that a partially secured bond was requested. I gave it thought and I did it. Initially, I met some resistance to completing the paperwork. It’s more work for the defense attorney and for the court. But any time you’re doing something new or different it takes time. Culture change. You can do it but it takes time.”<sup>53</sup>

## Recommendations

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The results of this experiment suggest that if New York City courts opted more frequently for alternative forms of bail, they could potentially reduce the use of pretrial detention without compromising other important considerations of compliance with court appearances and public safety. However, the challenge will be to make the process by which these forms of bail are requested and set easier, and to educate and encourage both the judiciary and the defense bar to actively embrace them.<sup>54</sup> Vera spoke with judges, defense attorneys, and court staff to better understand the barriers to using alternative forms of bail and to develop strategies for their increased use at arraignment, resulting in the following recommendations.

### Educate stakeholders about alternative forms of bail

Increasing outreach to key stakeholders so that they can develop comfort and familiarity with these forms of bail—and their potential to increase pretrial release without compromising failure to appear or public safety—is

critical to promoting their use. One of the judges involved in the project used his experience in setting alternative forms of bail as a guide for training other judges citywide, and the Office of Court Administration has included alternative forms of bail as part of their judicial seminar curriculum.

## Simplify the paperwork required

One deterrent to requesting a partially secured or unsecured bond is the complexity of the paperwork required to secure them. Even in cases where the eligibility criteria for issuing an alternative form of bail is met—willing sureties present in court, proof of income, money in hand to pay the deposit amount—most of the time no request for these forms of bail is ever made. In part that is because of the logistics of completing the paperwork. It takes, on average, at least 10 to 15 minutes to complete the forms. This process becomes onerous for attorneys and court staff during a busy arraignment shift, especially if multiple defendants are making requests for alternative forms of bail. To make the process easier, courts should simplify the paperwork. In lieu of the currently required three forms, the necessary information could be organized into a clear and simple double-sided single page specific to the type of bail being requested—partially secured, unsecured, or secured.

## Allow an alternative form of bail to be routinely set as a third option

Judges in New York are already required to set at least two forms of bail to give defendants and their families the option to make bail in the least onerous form. Typically, judges opt for cash up front or commercial bonds. In cases where an insurance company bail bond is set, one option is to automatically set a partially secured bond as a third option. A partially secured bond option would allow obligors to demonstrate their liability to the court for the full amount of bail with non-traditional sources of income typically not accepted by private bail bond companies. Moreover, unlike for-profit bond companies, courts are not dissuaded from using partially secured bonds in cases where low bail is set.

## Introduce an independent assessment of ability to pay

The mere act of requesting an unsecured or partially secured bond prompted a more thorough hearing in court of the circumstances of the case. In many cases where an alternative form of bail was set, either the defense attorney offered or the judge requested some information about ability to pay bail—why the person could not make cash bail or afford a commercial bond, and if there were any family members or friends who could serve as obligors. In cases where release on recognizance is not appropriate, the courts should consider introducing an independent assessment at arraignment of a person's ability to pay bail. That assessment would consist of an interview with the defendant to gather information about income, financial obligations, and potential obligors. The assessment would then provide the court with a recommendation for how much bail should be set and in what form.

## Conclusion

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**N**inety-nine cases out of a total of several thousand where bail is set is a miniscule number in the larger scheme of New York City's court system. Yet this small cohort tells a fascinating story of how a change in practice can potentially have a significant impact on reducing the use of pretrial detention without compromising public safety or rates of court appearance.

In a time where the larger mandate is to close Rikers Island and reduce the city's average daily jail population by half, using alternative forms of bail is one of many strategies that judges should have in their wheelhouse. Even with such alternatives, the role of money in our justice system still lurks within this endeavor. Is there a place for it? And if so, what should that place be? In the long term, our courts must grapple with and address those larger normative questions. In the short term, although money is still a factor in release, alternative forms of bail require the courts to truly consider a person's individual circumstances at the decision point of pretrial release. The move towards a more considered decision to detain or release may result in more equitable release determinations in which money is not the sole factor impacting a person's pretrial liberty.

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## Endnotes

- 1 New York City also offers an alternative route to arraignment. Upon arrest, an officer has the discretion to issue a Desk Appearance Ticket (DAT) if the arrest charge is a violation, misdemeanor, or an eligible class E felony offense. When a DAT is issued, the person avoids being transported to central booking immediately after arrest. Instead, he or she is released from the precinct and given a date to appear for arraignment within the next several weeks. By New York Police Department policy, DATs may only be issued if the person arrested has no outstanding warrants and can provide state-issued identification at the time of arrest. In 2015, approximately 70,000 DATs were issued out of a total of more than 300,000 arrests. See New York City Criminal Justice Agency (CJA), *Annual Report 2015* (New York: CJA, 2016), 26. According to official statistics from the Office of Court Administration, in 2015 the New York City courts arraigned 314,815 cases, including DATs. See Criminal Court of the City of New York, *Annual Report 2015* (New York: Office of the Chief Clerk of the New York City Criminal Court, 2016), 7, <https://perma.cc/NX5E-RD3E>.
- 2 The bail statute itself uses the term “insurance company bail bond” to connote those bonds underwritten and proffered by private, for-profit companies. N.Y. Criminal Procedure Law §520.10(1)(b). These types of bonds are colloquially called “commercial bonds” and the companies that underwrite them “private bond companies” or “for-profit bond companies.” The terms are used interchangeably in this report.
- 3 CJA, *Annual Report 2015* (New York: CJA, 2016), at 30. CJA interviews people arrested in the criminal courts in all five boroughs and generates a risk score for that person’s likelihood of appearance in court based on their current residence, employment, contact information, and past criminal history. That risk score tells the arraignment judge whether the person has a low, medium, or high risk of failure to appear. CJA also collects data from arraignments on bail setting, bail-making, and failure to appear. According to its 2015 annual report, 60 percent of cases arraigned continued past arraignments. *Ibid.* at 17. The bail-making statistics above apply only to cases where bail was set that continued past arraignments.
- 4 Jamie Fellner, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (New York: Human Rights Watch, 2010), 17, <https://perma.cc/ZK2D-743R>. The one exception is the use of credit card to pay bail, which has become more common since the New York State Office of Court Administration issued a directive governing its use in 2013. See Mary T. Phillips, *New York’s Credit Card Bail Experiment* (New York: CJA, 2014), <https://issuu.com/csdesignworks/docs/creditcardbail14/1?e=2550004/9230440>.
- 5 *People ex rel. McManus v. Horn*, 18 N.Y.3d 660 (2012).
- 6 See N.Y. Criminal Procedure Law §510.30 (application for recognizance or bail; rules of law and criteria controlling determination).
- 7 For more on how prosecutors choose bail amounts, See Fellner, *The Price of Freedom* (New York: Human Rights Watch, 2010), at 41-46.
- 8 *Ibid.* at 41-42.
- 9 CJA, *Annual Report 2015*, 22. In comparison, the average amount of bail nationally for felony cases nearly doubled between 1992 and 2006 from \$25,400 to \$55,500. Justice Policy Institute, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* (Washington, DC: Justice Policy Institute, 2012), 10, <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>. Bail is also set less often in New York City compared to other cities across the United States. See New York City Mayor’s Office of Criminal Justice, “Safely Reducing the New York City Jail Population,” <https://perma.cc/L5M2-YJZ2>. Moreover, of the approximately 150,000 cases in New York City that continue past arraignments in a given year, nearly seven out of 10 individuals are released on recognizance (ROR) without any type of financial condition imposed. See Mary T. Phillips, *A Decade of Bail Research in New York City* (New York: CJA, 2012), 32.
- 10 To the extent that full-time employment or participation in education or a training program is a meaningful proxy for economic opportunity, only 46 percent of men and 38 percent of women assessed by CJA at the time of arrest reported having a full-time job or being engaged in training or school. CJA, *Annual Report 2015*, 9.
- 11 Based on a true account of an arrest and arraignment proceeding in Bronx Criminal Court, as narrated by the lawyer assigned to the case. Details have been changed to protect privacy.
- 12 See Nick Pinto, “The Bail Trap,” *New York Times Magazine*, August 13, 2015, <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.
- 13 New York City Mayor’s Office of Criminal Justice, “Safely Reducing the New York City Jail Population,” <https://perma.cc/L5M2-YJZ2>. This includes approximately 650 of the 10,000 people held daily at city jails who are there pending trial on misdemeanor charges. *Ibid.*
- 14 *Ibid.*

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- 15 Ibid.
- 16 Jennifer Gonnerman, “Three Years on Rikers Without Trial,” *New Yorker*, October 6, 2014, <http://www.newyorker.com/magazine/2014/10/06/before-the-law>.
- 17 Temporary Commission on Revision of the Penal Law and Criminal Code, *Proposed New York Criminal Procedure Law* (New York: West Publishing Co., 1969), Section 5, <https://perma.cc/3VM5-FRLN>.
- 18 Ibid. The law’s drafters provided a hypothetical to illustrate the utility of alternative forms of bail: “[A] young man charged with burglary who has previously been embroiled with the law but resides in the community and whose father is a reputable person long employed in the same position at a fairly moderate but adequate salary. Here, a judge not inclined to release the defendant on his own recognizance doubtless would, under present law, fix bail, and in a fairly substantial and possibly burdensome amount . . . If so authorized, however, he might well be satisfied to release the defendant upon his father’s undertaking to pay \$1,000 [possibly accompanied by a \$100 deposit] in the event of the defendant’s failure of appearance.”
- 19 N.Y. Criminal Procedure Law §520.10. The forms of bond now allowed include:
- Secured surety bond
  - Secured appearance bond
  - Partially secured surety bond
  - Partially secured appearance bond
  - Unsecured surety bond
  - Unsecured appearance bond
- The State Legislature also amended this section in 1986 to authorize bail to be posted by credit card.
- 20 In New York City courts, when cash bail or a deposit is posted on a partially secured bond, that full amount is returned at the end of a case, minus a 3 percent administrative fee when the case ends in a violation, misdemeanor, or felony conviction. A recent proposal by the New York City Council, the Mayor’s Office of Criminal Justice, and other city agencies seeks to end the practice of taking a 3 percent fee in cases where bail is posted and all court appearances have been made. See New York City Council, “Speaker Melissa Mark-Viverito to Introduce Department of Correction Reform Package,” press release (New York City: New York City Council, September 12, 2016), <https://perma.cc/22WC-XPPU>.
- 21 Fellner, 2010, 17.
- 22 Ibid.
- 23 Interview with sitting Criminal Court judge, December 9, 2016.
- 24 Interview with sitting Criminal Court judge, July 24, 2017.
- 25 Justine Olderman, “Fixing New York’s Broken Bail System,” *City University of New York Law Review* 16, no. 1 (2012), 9-20, <http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1319&context=clr>.
- 26 The trainings were led by a Vera staff member who was a former public defender, and some of the trainings provided Continuing Legal Education credits to attorneys who attended. A total of nine trainings were conducted overall—at each borough office of the Legal Aid Society, and at The Bronx Defenders, Brooklyn Defender Services, the Neighborhood Defender Service of Harlem, and New York County Defender Services.
- 27 The Legal Aid Society, Bronx Defenders, Brooklyn Defender Services, Neighborhood Defender Service of Harlem, and the New York County Defender Services assign attorneys to arraignment parts across the five boroughs in New York City. With the exception of arraignments in Staten Island, these attorneys are present in arraignment courts seven days a week, 16 hours a day, including weekends and holidays. In FY2017, these indigent services providers represented more than 350,000 cases. See The Council of the City of New York, *Report of the Finance Division on the Fiscal 2018 Preliminary Budget* (New York: NYC City Council, 2017), 5, <https://perma.cc/UJ3D-YXTP>.
- 28 Some other limitations about the results should be noted. The information gathered from court calendars to identify cases in which a partially secured or unsecured bond was set relied on the accuracy of the entries in those calendars. Moreover, the information available on the calendars and from a match with the Office of Court Administration’s court records database, called CRIMS, did not include age, race/ethnicity, or any other demographic information, nor did it include prior warrant or criminal history information about the individuals for whom an alternative form of bail was set, two factors which tend to bear heavily on the bail decision.
- 29 CJA, *Annual Report 2015*. For purposes of this project, Vera assumed based on anecdotal knowledge of bail setting practices in New York City that only traditional forms of bail were set in the cases reported by CJA, and that a partially secured or unsecured bond was the form of bail made in the cases tracked in the cohort. See Fellner, 2010, 17 (discussing customary practices in bail setting among city judges). An additional assumption was made that individuals in the cases in the project cohort would not

- have been released on recognizance prior to the project, thus resulting in “net-widening.”
- 30 Qudsia Siddiqi, *Research Brief: Pretrial Failure Among New York City Defendants* (New York: CJA, 2009), 3, <https://perma.cc/G9JX-CPNN>.
- 31 In all cases where an unsecured or partially secured bond was set, that option was a third (or even fourth) alternative to traditional cash bail, insurance company bail bond, or, in a limited number of cases, credit card bail.
- 32 For one case in which a partially secured bond was set, the top charge was missing in the dataset.
- 33 Interview with defense attorney, Brooklyn, New York, March 9, 2017.
- 34 CJA, *Annual Report 2015*, 22.
- 35 These are individuals who do not make bail but are released at a court date following arraignment because the district attorney does not yet have the necessary evidence to move forward on misdemeanor charges, or has not secured an indictment from the grand jury on felony charges. See N.Y. Criminal Procedure Law §170.70 (release of defendant upon failure to replace misdemeanor complaint by information) and §180.80 (proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition).
- 36 CJA, *Annual Report 2015*, 30. Percentages in the CJA report may not total 100 percent because of rounding. *Ibid.* at 31.
- 37 See footnote 35. N.Y. Criminal Procedure Law §170.70 (release of defendant upon failure to replace misdemeanor complaint by information) and §180.80 (proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition).
- 38 CJA, *Annual Report 2015*, 30. The CJA reports data on cases where bail is set at arraignment. The CJA data cited in this report combines overall bail-making on all cases—felonies and nonfelonies—at three junctures: at arraignment, post-arraignment, and when bail is not made prior to disposition. In addition to those measures, of cases where bail is initially set at arraignment, approximately 12 percent of felonies and 11 percent of nonfelonies are released on recognizance after arraignment. Those statistics were not included in the numbers cited in this report.
- 39 See New York City Mayor’s Office of Criminal Justice, “Safely Reducing the New York City Jail Population,” <https://perma.cc/L5M2-YJZ2>. Seventy-five percent of all individuals who make bail when it is set make bail within 0-6 days of arraignment.
- 40 A bench warrant is a judicial order that informs law enforcement and other authorities that a defendant can be taken into custody for a missed court appearance or another failure to comply with a judicial order. See Criminal Procedure Law §530.70 (order of recognizance or bail; bench warrant).
- 41 See N.Y. Criminal Procedure Law §540.10 (forfeiture of bail; generally).
- 42 During stakeholder interviews, both judges and defense attorneys were asked about the high rate of FTA for individuals charged with felony drug offenses compared to individuals charged with other offenses. Anecdotally, both judges and defenders noted that people arrested on felony drug offenses may often struggle with other challenges that impact court appearance, such as substance use disorders and housing instability.
- 43 CJA, *Annual Report 2015*, 33.
- 44 The CRIMS database only allowed for re-arrest information to be gathered for cases that were open or that resulted in a misdemeanor or felony conviction. Any arrests that resulted in a dismissal or a favorable, non-criminal disposition were not captured in the re-arrest statistics. Moreover, the CRIMS database only tracks arrests within the five boroughs of New York City, so any potential arrests outside that area were not captured.
- 45 Qudsia Siddiqi, *Pretrial Failure Among New York City Defendants* (New York: CJA, 2009), 3.
- 46 See N.Y. Criminal Procedure Law §170.55 (adjournment in contemplation of dismissal); and §170.56 (adjournment in contemplation of dismissal in cases involving marijuana).
- 47 Interview with sitting Criminal Court judge, December 9, 2016.
- 48 Criminal Court of the City of New York, *Annual Report 2015* (New York: Office of the Chief Clerk of the New York City Criminal Court, 2016), 17.
- 49 For research on the impact of bail and pretrial detention on case outcomes, see Paul Heaton, Sandra Mayson, and Megan Stevenson, “The Downstream Consequences of Misdemeanor Pretrial Detention,” *Stanford Law Review* 69, no. 3 (2017), 711-794; and Timothy R. Schnacke, Michael R. Jones, and

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Claire M. B. Brooker, *The History of Bail and Pretrial Release* (Maryland: Pretrial Justice Institute, 2010), 1-5.

- 50 Interview with defense attorney, Brooklyn, New York, March 9, 2017.
- 51 Interview with defense attorney, Bronx, New York, December 16, 2016.
- 52 Interview with sitting Criminal Court judge, December 9, 2016.
- 53 Ibid.
- 54 Though prosecutors were not included in this project, because of their primary influence on bail requests such education and outreach should include district attorney offices as well.

### “Why bail reform matters” (page 9)

<sup>a</sup> Timothy R. Schnacke, Michael R. Jones, and Claire M. B. Brooker, *The History of Bail and Pretrial Release* (Maryland: Pretrial Justice Institute, 2010), 1-5.

<sup>b</sup> For an overview of historical underpinnings of bail and its current use in the United States, see John Jay College of Criminal Justice and Prisoner Reentry Institute, *Pretrial Practice: Rethinking the Front End of the Criminal Justice System* (New York: John Jay/PRI, 2016), 15-17, <https://perma.cc/9UED-5TX5>.

<sup>c</sup> Joel L. Fleishman, J. Scott Kohler, and Steven Schindler, *Casebook for the Foundation: A Great American Secret: How Private Wealth is Changing the World* (New York: Public Affairs, 2007), 81-83.

<sup>d</sup> Bail Reform Act of 1966, 18 U.S.C. §§3146-3151.

<sup>e</sup> See Jacob Kang-Brown and Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America* (New York: Vera Institute of Justice, 2017), 9-13, <https://perma.cc/234F-MVK7>.

<sup>f</sup> Prison Policy Initiative, “Mass Incarceration: The Whole Pie 2017,” <https://perma.cc/74JQ-XLAF>.

<sup>g</sup> On the negative public safety consequences of even short terms of pretrial detention, see Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (New York: Laura and John Arnold Foundation, 2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf). On incarceration and public safety generally, see Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer* (New York: Vera Institute of Justice, 2017), <https://perma.cc/K5P8-L529>.

<sup>h</sup> See, e.g., *O’Donnell v. Harris County, Texas*, No. 4:16-CV-01414 (S.D. Tex. December 16, 2016,) at 94, <https://perma.cc/SX97-F9TX> (holding that bond schedule that made no individualized determination of ability to pay violated constitutional rights of poor defendants). See also the work of Civil Rights Corps, a nonprofit organization that has filed lawsuits challenging the use of money bail and wealth-based pretrial detention policies, <http://www.civilrightscorps.org/>.

<sup>i</sup> For an overview of these reforms, see New Jersey Courts, *Criminal Justice Reform: Report to the Governor and Legislature* (Trenton, NJ: New Jersey Courts, 2016), 1, <http://www.judiciary.state.nj.us/courts/assets/criminal/2016cjrannual.pdf>.

<sup>j</sup> New York City Mayor’s Office of Criminal Justice, *Justice Brief: The Jail Population—Recent Declines and Opportunities for Further Reductions* (New York: Mayor’s Office of Criminal Justice, 2017), 15-18, <https://perma.cc/CEG3-RFD6>.

<sup>k</sup> See the work of the Brooklyn Community Bail Fund, <https://brooklynbailfund.org/>, and the Bronx Freedom Fund, <http://www.thebronxfreedomfund.org/>. These two organizations were established under the New York State Charitable Bail Act of 2012, which allows nonprofit funds to operate as bail payment agents without charging a premium or fee for their services. See Office of the Governor of the State of New York, “Governor Cuomo Signs Legislation to Help Low-Income Defendants Meet Bail Requirements,” press release (Albany, NY: Office of the Governor of NY, July 18, 2012), <https://perma.cc/KWC3-WBP6>.

<sup>l</sup> See John Surico, “New York City is Creating a Bail Fund to Help People Get Out of Jail,” *Vice News*, June 29, 2015, <https://perma.cc/RW9B-B2KS>.

<sup>m</sup> Cindy Redcross, et al., *New York City’s Pretrial Supervised Release Program: An Alternative to Bail* (New York: MDRC/Vera, 2017), <https://perma.cc/LLX8-AEH9>.

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**EFFECT OF RELEASE TYPE  
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**FINAL REPORT**

**October 2011**

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**October 2011**

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# EFFECT OF RELEASE TYPE ON FAILURE TO APPEAR

<b>LIST OF TABLES</b> .....	ii
<b>LIST OF FIGURES</b> .....	iii
<b>ACKNOWLEDGEMENTS</b> .....	iv
<b>I. INTRODUCTION</b> .....	1
A. Overview .....	1
B. Types Of Pretrial Release In New York City.....	3
C. Research Questions.....	4
<b>II. LITERATURE REVIEW</b> .....	7
<b>III. METHODOLOGY</b> .....	13
A. The Data File.....	13
B. Analytic Procedures .....	14
<b>IV. DISTRIBUTIONS OF DEPENDENT, INDEPENDENT, AND CONTROL VARIABLES</b> .....	15
A. Dependent Variables.....	15
B. Independent Variables .....	16
C. Control Variables.....	18
<b>V. BIVARIATE RELATIONSHIPS</b> .....	25
A. Relationship Of FTA With Independent Variables .....	25
B. Relationship Of FTA With Control Variables .....	26
<b>VI. THREE-WAY RELATIONSHIPS</b> .....	31
A. Controlling For CJA Recommendation.....	31
B. Controlling For Criminal History .....	35
C. Controlling For Bail Amount .....	38
<b>VII. MULTIVARIATE ANALYSES</b> .....	41
A. All-Cases Models .....	41
B. Bail Models.....	46
<b>VIII. PROFILES OF DEFENDANTS RELEASED ON ROR, CASH BAIL, AND COMMERCIAL BOND</b> .....	51
<b>IX. CONCLUSIONS</b> .....	55
A. Summary Of Findings .....	55
B. Implications And Discussion.....	59
<b>REFERENCES</b> .....	63
<b>TECHNICAL APPENDIX</b> .....	67

## LIST OF TABLES

Table 1	FTA And Adjusted FTA Rates By Borough.....	15
Table 2	Release Type And Form Of Bail By Borough .....	17
Table 3	CJA Recommendation Category By Borough .....	19
Table 4	Defendant's Criminal History By Borough .....	20
Table 5	Bail Amount By Borough .....	21
Table 6	Timing Of First Release By Borough .....	22
Table 7	Charge Type By Borough .....	23
Table 8	Charge Severity By Borough .....	23
Table 9	FTA And Adjusted FTA Rates By Release Type And Form Of Bail.....	25
Table 10	FTA And Adjusted FTA Rates By CJA Recommendation Category .....	26
Table 11	FTA And Adjusted FTA Rates By Defendant's Criminal History .....	27
Table 12	FTA And Adjusted FTA Rates By Amount Of Bail Posted For Release.....	28
Table 13	FTA And Adjusted FTA Rates By Timing Of First Release.....	29
Table 14	FTA And Adjusted FTA Rates By Charge Type.....	29
Table 15	FTA And Adjusted FTA Rates By Charge Severity.....	30
Table 16	FTA And Adjusted FTA Rates By Release Type And Form Of Bail, Controlling For CJA Recommendation .....	32
Table 17	FTA And Adjusted FTA Rates By Release Type And Form Of Bail, Controlling For Defendant's Criminal History.....	36
Table 18	FTA And Adjusted FTA Rates By Form Of Bail, Controlling For Bail Amount.....	38
Table 19	Logistic Regression Models Of Failure To Appear And Adjusted Failure To Appear (All Cases) .....	42
Table 20	Logistic Regression Models Of Failure To Appear And Adjusted Failure To Appear (Cases With Release On \$1,000 Or Higher Cash Bail Or Bond) ..	47
Table 21	Selected Characteristics By Release Type And Form Of Bail .....	51

## LIST OF FIGURES

Figure 1	FTA And Adjusted FTA Rates By Borough .....	15
Figure 2	Release Type And Form Of Bail By Borough.....	17
Figure 3	FTA And Adjusted FTA Rates By Release Type And Form Of Bail, Controlling For CJA Recommendation .....	33
Figure 4	FTA And Adjusted FTA Rates By Release Type And Form Of Bail, Controlling For Defendant's Criminal History .....	37
Figure 5	FTA And Adjusted FTA Rates By Form Of Bail, Controlling For Bail Amount .....	39
Figure 6	Predicted Probability Of FTA, All-Cases Model 1 .....	45
Figure 7	Predicted Probability Of FTA, Bail Model 3.....	49
Figure 8	Selected Characteristics By Release Type And Form Of Bail.....	51

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## I. INTRODUCTION

### A. Overview

Prior research on bail making by the New York City Criminal Justice Agency (CJA) has documented the prevalence of commercial bonds in the City, described the costs and benefits of posting a commercial bond as opposed to cash bail, and identified case and defendant characteristics associated with each form of bail making (Phillips 2010a, 2010b, 2011a, 2011b). In the decades prior to this research New York City had nearly eliminated bail bonds from city jails, but the industry's huge nationwide growth since the early 1990s suggested that it was time to take another look.

We found that bonds constituted a small but substantial proportion of pretrial releases in 2005, using a dataset to which form of bail data had been added manually from court documents. As a proportion of all releases, commercial bonds still play a much smaller role in New York City than they do elsewhere in the country: 7% of released felony defendants posted a bond in New York City in 2005 (Phillips 2011a), compared to 42% in a sample of the largest counties in the country (Cohen and Kyckelhahn 2010). In fact, release on any type of bail is less common in New York City than elsewhere because of the greater use of release on recognizance (ROR).<sup>1</sup> Even so, tens of thousands of defendants are released on bail in New York City annually. Of these, about 15% — more than 3,000 by our estimate — post a commercial bail bond.<sup>2</sup>

This research comes in the midst of an aggressive national campaign mounted by the bail bond industry, aimed at influencing public opinion and legislators around the country. At stake in many states is legislation that would protect the bail bond industry at the expense of pretrial agencies, which are viewed as competitors. Bondsmen argue that they are more successful than pretrial services agencies in assuring court attendance and in preventing pretrial recidivism (see, for example, AIA 2010). This study addresses a part of that claim by comparing failure to appear (FTA) rates for defendants released on commercial bonds versus other types of release. This is the only contemporary research on the topic using New York City arrests, and the only study that controls for key factors that also affect FTA. (A decades-old study that used New York City arrests is discussed in the Literature Review.)

The context for this research also includes a renewed national interest in the problems associated with the system of money bail as a whole. A National Symposium On Pretrial Justice was convened by Attorney General Eric Holder in Washington, D.C. on May 31 – June 1, 2011, to examine pretrial detention, bail, and release decisions. The symposium came 47 years after the first national meeting on bail and pretrial release reform, convened in 1964 by Attorney General Robert F. Kennedy, and culminating in the

---

<sup>1</sup> Among felony cases in a dataset of New York City arrests from 2005, ROR constituted 65% of the pretrial releases compared to 28% in a national sample from 2006 (Phillips 2011a).

<sup>2</sup> This estimate is extrapolated from Table 1 in Phillips (2011a), which showed that 788 bonds were posted in cases with an arrest during a three-month period in 2005 ( $x4=3,152$ ). The data presented in Table 2 of the present report would yield a lower estimate (1,242 bonds for 6 months of arrests  $x2=2,484$ ) but this could be misleading because the additional data included a much higher proportion of cases with missing form of bail information. In addition, release type was recategorized for the current analyses if it changed prior to a failure to appear (see Methodology).

Federal Bail Reform Act of 1966. Criminal justice professionals attending this year's meeting were greeted with the words used by Kennedy in his challenge to conference participants nearly half a century ago:

*“What has been demonstrated here is that usually only one factor determines whether a defendant stays out of jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money.”*  
(Robert F. Kennedy, quoted in PJI 2011; and in Schnacke, Jones, et al. 2010)

The role of bail bondsmen in pretrial release is but one facet of the larger issue of the use of money bail in any form, which — as the prominence given to Kennedy's words suggests — was a central topic at the 2011 National Symposium. Relevant to that discussion is the more general question of the effectiveness of money bail compared to nonmonetary release in persuading defendants to return to court. This is not the only issue in the debate about money bail, but it is clearly relevant. However, the discussion about the effect of type of release on defendant behavior has been clouded by a lack of empirical data produced with appropriate methodological controls.

This study addresses the two aspects of the bail question raised above: the effect on FTA rates of setting bail as opposed to releasing defendants on recognizance; and — for the money bail cases — the effect on FTA rates of posting bail through a commercial bondsman as compared to depositing cash bail directly with the court.

Outside New York, criminal justice stakeholders may well be interested in re-arrest rates in addition to FTA in assessing the “effectiveness” of various types of release. Our study examines FTA alone because New York law specifically recognizes only flight risk as a consideration in setting bail or ordering release on recognizance. New York Criminal Procedure Law § 510.30-2.(a) states that “With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required.” Public safety, which has been a legally mandated consideration in most states since the mid-1980s, has not been added to the New York statute in spite of sporadic attempts to do so over the years.<sup>3</sup> Given this statutory

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<sup>3</sup> In the first 6 months of the 2011 sessions of the NY Assembly and NY Senate, several bills have been proposed offering amendments to the New York Criminal Procedure Law that aim to expand courts' ability to deny orders of recognizance or bail when a defendant poses a risk to public safety. Some of these amendments are based on specific provisions, while others more broadly advocate curtailing pretrial release in the interest of public safety. The most general of these bills in the Assembly, Bill no. A06705, would permit courts to invoke preventive detention and deny bail to any defendant posing a risk to the safety of the community. Bill no. A04559 proposed denying bail to defendants who are charged with violent crimes and have prior felony convictions, as well as defendants charged with a violent crime while out on bail or recognizance for another felony. Two additional bills would allow courts to deny bail or orders of recognizance to defendants in more specific circumstances. Bill no. A00251A targeted cases of domestic violence and called for defendants to be held if it was believed they might intimidate or injure the victim once released. Bill no. A02904 supported holding offenders who caused the death or serious injury of another person while driving while intoxicated. Each of these bills has a counterpart in the NY Senate. Note that if any of these bills were to become law, remand without bail would be allowed under the conditions specified in the law, but the prohibition against the *use of bail* to achieve preventive detention would remain unchanged. [Thanks to Jonathan Carmona for researching the bills, and to Miles Riemer-Peltz for contributing this footnote.]

framework, risk of failure to appear is the only suitable criterion for assessing the effectiveness of pretrial release in New York.

Of course, effectiveness — by this or any other definition — is not the only consideration in judging the relative merits of various types of release. For example, the reasons given by the American Bar Association for its opposition to commercial bonds are based on commonly held ideas about justice and fairness rather than empirical outcomes (ABA 2007). These additional considerations, which are enumerated briefly at the end of this report, have been fully discussed by others and lie outside the scope of this study.

A summary of the present research, highlighting the most important findings and recommendations, is available in the *CJA Research Brief* series (Phillips 2011c).

## **B. Types Of Pretrial Release In New York City**

The three release types examined and compared in this research are release on recognizance (ROR), cash bail, and commercial bond. All pretrial release in the study sample consisted of one of these three types.

- ROR — release on recognizance, with no money bail. No supervision of any kind was provided for defendants released on recognizance. Defendants on ROR receive a telephone call or, if no telephone number was provided, a letter notifying them of approaching court dates, as do all released defendants, including those out on cash bail or a bond.
- Cash bail — bail posted in cash directly with the court cashier. If two bail amounts are set by the court, the lower amount is the “cash alternative,” sufficient for gaining release only if posted in cash. If no cash alternative is set, the defendant may post the entire bond amount in cash. Cash bail is refunded in full at the conclusion of the case if there is no failure to appear and no conviction; a 3% fee is retained by the court in the event of a conviction (and the full amount is forfeited in the event of a failure to appear). Defendants released on cash bail also received no supervision.
- Commercial bond — a bond purchased from a commercial surety (bail bondsman), who then posts it with the court to gain the defendant’s release. If two bail amounts are set, the higher is the amount of the bond. Bondsmen charge nonrefundable fees based on the amount of the bond, and they also require a collateral deposit, which is refunded if the defendant appears for all scheduled court dates (possibly minus additional miscellaneous fees). If the defendant fails to appear, the bond company or its insurance underwriter is responsible for paying the court the full amount of the bond. No reliable information was available regarding the kind and extent of supervision exercised by bondsmen, but some bondsmen in the research sample indicated on their bail affidavits that they required clients to check in weekly by telephone or in person; some agents may have used additional forms of supervision for all or selected clients. (See Phillips 2011a for details regarding fees, collateral, and other aspects of commercial bonds.)

CJA has operated a supervised release project since 2009 for defendants who meet specified criteria in Queens, but nothing comparable existed for the defendants in the research sample of 2005 arrests (see Methodology for further details regarding the dataset).

Other types of release used routinely in many parts of the country were not encountered in the research sample. These included deposit bonds, unsecured bonds, and conditional release. Deposit bonds are bonds for which the defendant deposits a percentage, usually 10%, of the full amount. Unsecured bonds are those for which the defendant pays no money to the court but is liable for the full amount upon failure to appear. Both options have been available to New York City judges since 1970, but they are rarely used (Fellner 2010).

A factor that muddles most comparisons of FTA (and re-arrest) rates by release type is that in many parts of the country, pretrial service agencies perform supervisory functions for defendants out on bail, including defendants released on cash bail as well as those released through a commercial surety. Almost half of the pretrial agencies that responded to a 2009 survey by the Pretrial Justice Institute reported that they were responsible for defendants who were released on a commercial bond (NAPSA 2009).<sup>4</sup> As a result, low FTA rates sometimes credited to commercial bail bonds may in fact be attributable to supervision that the bondsmen had no hand in. This was not the case in New York City, as CJA does not supervise any defendants released on bail. Nor did CJA supervise any defendants released on recognizance during the study period. Accordingly, the comparisons by release type made in the present analyses are uncontaminated by the effects of mixed supervisory responsibility.

Notification of upcoming court dates reduces the likelihood of FTA, but this did not affect the results of the study. CJA attempts to notify all released defendants of scheduled court dates, regardless of release type.

### C. Research Questions

Four research questions were formulated to address the issues described above:

- Is **monetary bail** associated with a lower **FTA rate** than **ROR**, once the effects of other relevant factors have been accounted for?
- Is **monetary bail** associated with a lower rate of failure to appear *with no return within 30 days* (**Adjusted FTA rate**), compared to **ROR**, once the effects of other relevant factors have been accounted for?
- Is release on a **commercial bond** associated with a lower **FTA rate** than release on **cash bail**, once the effects of other relevant factors have been accounted for?

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<sup>4</sup> This is no longer the situation for at least one of the pretrial agencies included in the survey. In Harris County, Texas, bail cases comprised the majority of the supervisory caseload until very recently. For more than 15 years Harris County Pretrial Services had been responsible for monitoring defendants on cash bail or bond who were required to abide by certain conditions of release. This practice was reversed in mid-2010, leaving only defendants released without financial conditions under the supervision of Pretrial Services (PJI 2011, Harris County Pretrial Services 2011).

- Is release on a **commercial bond** associated with a lower **Adjusted FTA rate** than release on **cash bail**, once the effects of other relevant factors have been accounted for?

An additional question was formulated to test two (mutually contradictory) assertions sometimes made by critics of the bond industry: (1) that bond agents' putative success in achieving low FTA rates comes by way of their selection of clients who represent the "cream of the crop" because of their low risk; or (2) that bond agents release dangerous, high-risk defendants because they tend to have high bail, which is more profitable than low bail.

- Do defendants released on a **commercial bond** differ from defendants released on **cash bail** or **ROR** in ways that would suggest that they have a higher risk of FTA or that they are more dangerous?

## V. BIVARIATE RELATIONSHIPS

### A. Relationship Of FTA With Independent Variables

Bivariate analyses — with no control variables — show a small difference between ROR and bail in a defendant's likelihood of nonappearance for a court date (Table 9). The FTA rate for ROR cases was 17%, compared to 14% for cases in which the defendant was out on bail, a difference of three percentage points.

To examine differences in FTA rates by form of bail, we excluded cases with bail under \$1,000 because bondsmen did not write bonds under \$1,000. Bail set less than \$1,000 was posted in cash or not at all, so there was no variation in the form of bail among those cases. For cases with a defendant released on \$1,000 or more, the form of bail made almost no difference in likelihood of FTA: the FTA rate was 11% among cash bail cases and 10% among bond cases. The FTA rate for all bail cases (14%) was pushed upwards by the relatively high rates found among cases with bail under \$1,000 (Table 12, below).

Adjusted FTA rates were low to begin with, but bail reduced FTA a bit further (from 7% for ROR to 5% for bail) and a bond reduced it slightly more (from 5% for cash to 2% for bonds). These data suggest that any type of bail reduces both the total FTA rate and the Adjusted FTA rate by a very small amount, whereas the small effect of bonds is seen primarily in getting defendants back to court within 30 days once the failure to appear has already occurred. However, no conclusions can be drawn until the relationships have been explored further in multivariate analyses, controlling for the CJA recommendation, bail amount, criminal history, and other factors that also affect FTA.

TABLE 9  
FTA And Adjusted FTA Rates By Release Type And Form Of Bail  
At-risk cases with an arrest July–December 2005

Release Type	Failure To Appear			Total
	No FTA	FTA	<i>Adjusted FTA</i>	
ROR	83% 36,924	17% 7,420	7% (3,299)	100% 44,344
Bail (all amounts)	86% 9,461	14% 1,495	5% (578)	100% 10,956
Conflicting release type	0	92	(31)	92
Total sample	46,385	9,007	(3,908)	55,392

Form of Bail (\$1,000 or more)	Failure To Appear			Total
	No FTA	FTA	<i>Adjusted FTA</i>	
Cash	89% 3,955	11% 501	5% (203)	100% 4,456
Bond	90% 1,112	10% 130	2% (29)	100% 1,242
Bail form unknown	88% 1,825	12% 246	5% (95)	100% 2,071
Total Bail (\$1,000 or more)	89% 6,892	11% 877	4% (327)	100% 7,769

# Exhibit 23



JANUARY 3, 2018 Albany, NY

## **Governor Cuomo Unveils 22nd Proposal of 2018 State of the State: Restoring Fairness in New York's Criminal Justice System**

### Nation-leading, Five-Pronged Reform Package Will Ensure Equal Access to Justice for All Accused

### Sweeping Reforms Will Overhaul Antiquated Laws Governing Bail, Discovery, Speedy Trial and Asset Forfeiture to Ensure Fairness in New York's Criminal Justice System

### New Reform Package Will Improve the Re-Entry Process to Help Individuals Transition from Incarceration to their Communities

Governor Andrew M. Cuomo today announced the 22nd proposal of his 2018 State of the State agenda - a sweeping, five-pronged reform package to overhaul the State's criminal justice system. This comprehensive package - the most progressive set of reforms in the nation -- will guarantee fairness for the accused by reshaping New York's antiquated bail system, ensuring access to a speedy trial, improving the disclosure of evidence in the discovery process, transforming asset forfeiture procedures and implementing new initiatives to help individuals transition from incarceration to their communities.

"The Empire State has always served as a beacon of equality and social justice, and with these actions New York is once again showing the nation the way forward," **Governor Cuomo said.** "For too long, our antiquated criminal justice system has created a two-tiered system where outcomes depend purely on economic status - undermining the bedrock principle that one is innocent until proven guilty. This sweeping overhaul will transform our criminal justice system by removing critical barriers, reaffirming our beliefs in fairness, opportunity and dignity, and continue our historic progress toward a more equal society for all."

#### **The New Legislation will:**

- Eliminate monetary bail for people facing misdemeanor and non-violent felony charges;
- Expand the discovery process to include disclosure of information in a timely manner including evidence and information favorable to the defense; intended exhibits; expert opinion evidence; witnesses' criminal history information; and search warrant information;
- Reduce unnecessary delays and adjournments in court proceedings, requiring that people held in custody - not just their attorneys - consent to a speedy trial waiver that must be approved by a judge and ensure that defendants are not being held unnecessarily when the prosecution fails to meet deadlines;

- Ban all asset seizures, unless an arrest is made and enhance reporting requirements for local law enforcement and District Attorneys; and
- Improve the re-entry process for individuals transitioning from incarceration to their communities.

### **Reshaping Bail and Pretrial Detention**

When New York's laws governing bail were enacted back in the 1970's they were among the most progressive in the nation. Unfortunately, the status quo is no longer acceptable. New York's current bail system fails to recognize that freedom before trial should be the rule, not the exception, and by tying freedom to money, it has created a two-tiered system that puts an unfair burden on the economically disadvantaged. Furthermore, in practice, the location of an arrest often defines whether or not you are released or have to pay money for your freedom creating further injustice.

To rectify these inequities, the Governor is proposing legislation that will eliminate monetary bail for people facing misdemeanor and non-violent felony charges. Instead, people will be released either on their own recognizance or with non-monetary conditions imposed by the court, such as reporting to a pretrial services agency. For people charged with a violent felony offense, both monetary and non-monetary bail would be permitted, but only after a judge conducts an individualized review of the nature of the case and the defendant's personal and financial circumstances. If monetary bail is set, the court must give the defendant a choice between cash or bail industry bonds and an alternative form of bail such as an unsecured or partially secured bond. Additionally, in limited cases such as domestic violence offenses, cases involving serious violence, or when a defendant commits a new crime while out on pretrial release, a judge could order, after due process, a defendant to be held in jail pretrial without bail if they find the defendant poses a significant flight risk or if there is a current threat to a reasonably identifiable person's physical safety. Together, these proposals not only level the playing field for all defendants, regardless of their economic standing, but also ensure that actual threats to public safety are addressed.

### **Expanding the Discovery Process**

New York is one of only 10 states that enable prosecutors to withhold basic evidence until the actual day a trial begins. Even worse, New York has the distinction of standing alongside only three other states - Louisiana, South Carolina, and Wyoming - as having the nation's most restrictive discovery rules.

Under Governor Cuomo's plan, prosecutors and the defense will have to share information incrementally before a trial takes place. This will include disclosure of evidence and information favorable to the defense; intended exhibits; expert opinion evidence; witnesses' criminal history information; and search warrant information will be made available to defendants in a timely and consistent manner. Doing so ensures attorneys have the tools necessary to adequately represent their clients.

Additionally, along with an accelerated disclosure of witness information, this plan will provide numerous special procedures to ensure the safety of those witnesses and the sanctity of the judicial process.

### **Improving Access to a Speedy Trial**

The Sixth Amendment to the United States Constitution and state law guarantee all citizens accused of a crime the right to a speedy and public trial. Too often, however, defendants are held in custody, pre-trial, for excessive periods of

time and courts are overburdened with an overwhelming number of pending criminal cases. This leads to backlogs that disrupt the justice system and have a disparate impact on low-income and minority communities.

The new law will guarantee that criminal cases proceed to trial without undue delay and that people are not held in jail for unreasonable periods of time. It would reduce unnecessary delays and adjournments in court proceedings, requiring that people held in custody - not just their attorneys - consent to a speedy trial waiver that must be approved by a judge. These waivers include a deadline so that the defendant, defense attorneys, prosecutors, and judges understand when the trial is scheduled and will only be granted after the defendant has made an appearance before a judge.

Courts would also conduct periodic reviews of cases where defendants are held in detention, to assess the prosecutor's statement of readiness, reconsider bail status if appropriate, and schedule a pre-trial conference. This will ensure the courts monitor cases where defendants are in custody and encourage the case to move forward to a conclusion.

The final component will help prevent delays stemming from actions by the defense where attorneys may file frivolous speedy trial motions at the last minute to delay an impending trial date. Currently, the defense only has to allege that the prosecution failed to declare its readiness for trial within the statutory time period, shifting the burden to the prosecution to identify the sections of law that allow for its actions. Under the Governor's proposal, a motion to dismiss must be made at least 20 days before the trial begins and it must include sworn factual allegations specifying the time periods that are being charged against the prosecution.

### **Transforming Civil Asset Forfeiture**

Civil asset forfeiture is the process by which authorities confiscate cash or property they believe is obtained through illicit means. Currently, a person does not have to be found guilty to have their assets claimed by law enforcement -- law enforcement only needs a preponderance of evidence to make a seizure.

Under the Governor's proposal, new legislation would be put forth that would ban all asset seizures, unless an arrest is made. In cases where people are acquitted or the case is otherwise dismissed, they would get their money and valuables returned.

Additionally, Governor Cuomo will move to enhance reporting requirements for local law enforcement and District Attorneys. New York's current reporting procedure only requires these groups to report the total value of assets seized and the distribution of those assets. The State Division of Criminal Justice Services will expand reporting requirements to include additional information, such as demographic and geographic data, to better understand how civil asset forfeiture is used in New York State. Once a more comprehensive data set is created, New York will then evaluate the asset forfeiture system and make the appropriate changes to fix the identified issues.

### **Improving the Re-Entry Process**

Since taking office, the Governor has greatly reduced the barriers facing people with criminal convictions. These New Yorkers have paid their debt to society and now seek work, a place to live, an education, and participation in their community. In the last three years alone, New York has outlawed blanket discrimination against people with criminal

convictions in state-funded housing, in public college admissions, in state employment and in insurance coverage for employers who hire people with criminal convictions.

Building on this work, the Governor is proposing to remove outdated statutory bans on occupational licensing for professions outside of law enforcement and instead, applicants will be assessed on an individual basis. The mandatory suspension of driver's licenses following a drug conviction will also be removed to allow people to travel to work and attend drug treatment, as long as the crimes did not involve driving.

Additionally, the Governor will safely widen release opportunities for people who have shown rehabilitation by expanding the type and variety of programs provided in state prisons to make those individuals eligible for merit release and limited credit time allowances. There are also people in prison over the age of 55 whose debilitating or incapacitating medical conditions are costly to manage behind the walls. To remedy this, the Governor will propose that the Parole Board examine these cases under a new "geriatric parole" provision in which the Board will balance any public safety risk posed by these individuals with their need for age-appropriate treatment in the community.

Finally, the Governor will speed returning citizens' reintegration to society by reducing their financial burdens after release, including removing the current parole supervision fee and having local child support enforcement offices review child support orders for people incarcerated over six months. If warranted, these orders can be adjusted to reflect the parent's current financial circumstances. The child will not lose out because they are not receiving money now due to most parents' inability to pay while incarcerated. Emerging without a crushing weight of unpaid support, a parent will be ready to reenter the workforce and start supporting their child upon release. The Governor has also ordered a comprehensive review of parole revocation guidelines and practices to determine appropriate alternatives to incarceration for those who violate technical parole conditions, but pose no risk to public safety.

This five-pronged effort will build upon the long list of improvements New York has made to the criminal justice system under the leadership of Governor Cuomo. In 2017 alone, Governor Cuomo led the effort to raise the age of criminal responsibility, passed legislation that required law enforcement to video-record custodial interrogations for serious offenses, allowed the use of photo arrays to identify witnesses to be admissible at trial and extended the landmark *Hurrell-Harring* settlement's indigent criminal defense reforms to the entire State, becoming the first State in the Nation to overhaul its public defense system in such a drastic manner.

In the time since Governor Cuomo took office, New York State has closed 24 prisons and juvenile detention centers—more than in any other period under one Governor in state history. The prison population has also decreased by more than 6,000 within that time. The Governor also established the Work for Success Initiative which has helped over 18,000 formerly incarcerated people find work upon their release. Additionally, Governor Cuomo formed the state's first Council on Community Re-Entry and Reintegration in 2014 to address obstacles formerly incarcerated people face upon re-entering society. Since its launch, the Council has helped spur a number of changes to improve re-entry ranging from adopting "Fair Chance Hiring" principles in state agencies to issuing guidance that forbids discrimination at New York-financed housing based on a conviction alone.

## Contact the Governor's Press Office



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# Exhibit 24

The Daily Freeman (<http://www.dailyfreeman.com>)

## Dutchess County's new jail could be too small, sheriff warns

By Patricia R. Doxsey, Daily Freeman

Tuesday, August 1, 2017



POUGHKEEPSIE, N.Y. >> Dutchess County hasn't yet broken ground for a new jail, but county Sheriff Adrian "Butch" Anderson already is warning the facility under consideration might be too small.

Asked Thursday how plans for the new Dutchess County Law Enforcement and Transition Center were progressing, Anderson said: "We're going to be overcrowded when this thing opens."

While that prediction may be "a pessimistic view of things," it is not completely off the mark, said Deputy County Executive William O'Neill.

"If things were to continue as they are now, and we build the size jail we are contemplating right now, he would be right," O'Neill said.

The county has not yet decided on a final size for the new jail, O'Neill noted, adding that decision will be made in the next couple of months.

He said that, currently, the county is eyeing a jail with just under 500 general-population cells, plus an additional 35 medical unit beds and another 25 or 30 cells that could be used for double bunking, although the county would need special permission from the state for that.

"That would give us somewhere close to 570," O'Neill said.

On Tuesday, the 257-bed Dutchess County Jail had an inmate population of 485. Although the county received permission from the state to use temporary pods that house about 200 inmates, to help ease overcrowding, 40 Dutchess inmates were being boarded at the Ulster County Jail in Kingston.

Dutchess County has spent the better part of four decades struggling with overcrowding at its jail. When the current jail opened in 1996, it was overcrowded immediately. Over the next decade, the county continued to house inmates, sometimes in excess of 100 a day, in jails in other counties, costing Dutchess tens of millions of dollars and angering the state Commission of Corrections, which oversees the operation of county jails.

In 2013, facing the increasing ire of the state along with a burgeoning budget to house inmates in out-of-county jails, County Executive Marc Molinaro began pushing for the construction of a new Sheriff's Office and county jail that also would include programs for special-needs communities, such as those with mental health and substance abuse problems.

O'Neill said those programs will be key to helping bring down the daily jail population. "We're doing a lot of things to lessen the jail numbers," he said.

But he also said the county plans to step up its effort to encourage the jail to move parole violators — state prison inmates who were released from prison but either committed a new crime or violated the terms of their release — out of the county jail. He said on any given day, parolees make up 10 to 13 percent of the total inmate count.

“We’re going to make the hard case for [moving] parolees,” O’Neill said. “If I had the parolees out of my jail, I’d have no problem. I could probably build a smaller jail.”

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URL: <http://www.dailyfreeman.com/general-news/20170801/dutchess-countys-new-jail-could-be-too-small-sheriff-warns>

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# Exhibit 25

# Rural America's Jail Dilemma

By Eric Jankiewicz | July 6, 2017



*Dutchess County Jail. Photo by Eric Jankiewicz.*

New York's Dutchess County, a leafy place of winding country roads, farms, and old mansions overlooking the Hudson River, is a haven for New York City professionals seeking a quieter country life and cheaper housing. But it has a grimmer side.

Unemployment and urban blight plague its small communities and, like many other rural jurisdictions around the country, it is facing growing problems of substance abuse and drug addiction.

The evidence is tragically visible in the Dutchess County jail, located in the county's largest city of Poughkeepsie, which recorded a 50 percent increase in detentions between 1997 and 2016.

The 400 or so people currently held behind bars are straining the small facility (capacity 250), a solid-brick structure built in the 1980s located in a residential neighborhood near a golf course.

The overcrowding persuaded Republican county legislators last year to approve a \$192 million bond issue to build both a new 596-bed jail and a new sheriff's office.

Not everyone believes building a bigger jail is the answer to the county's social problems.

Joel Tyner, a Democratic legislator in the county for the past 14 years, argues that taxpayers' resources that could be better used to fund innovative strategies such as treatment counseling and alternatives to incarceration.

"We shouldn't be arresting all of these people," he says.

The debate over the Dutchess County jail is a microcosm of similar arguments across the U.S. heartland, where job losses, youth unemployment, economic underdevelopment—and the spreading opioid epidemic—fed the anger that helped elect President Donald Trump last fall.

The spike in jail detentions in rural areas like Dutchess is one of the key factors driving America's increasing numbers of incarcerated individuals, according to a [recent survey and report](https://www.vera.org/publications/out-of-sight-growth-of-jails-rural-america) (<https://www.vera.org/publications/out-of-sight-growth-of-jails-rural-america>) by the Vera Institute of Justice and the MacArthur Foundation's Safety + Justice Challenge.

Some 30 percent of the 2.2 million people behind bars are in the nation's 3,000 county jails, and rural areas have experienced the biggest increases, according to the Vera study.

The jail populations that have experienced the largest growth are in small counties, with populations under 250,000. Dutchess County's population, which has grown from 280,000 to 297,000 since 2000, is just slightly above the sample.

Vera report co-authors Ram Subramanian and Jacob Kang-Brown trace the rural jail increase to two principal factors: more people awaiting trial, and the increased use of jail beds for individuals detained by other local governments or who are being held at the request of federal authorities (for alleged violations of immigration laws).

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*Up to 80% of the people held in Dutchess county jail suffer from some combination of mental health issues and substance abuse.*

In Dutchess, there are no individuals held under Immigration and Customs Enforcement “detainers” (even though experts estimate as many as 60,000 undocumented immigrants work in Dutchess and nearby countries)—and authorities say there are no plans to use the new jail for those purposes.

But there has been an increase in the numbers of individuals awaiting trial—many of them detained for minor drug offenses. Dutchess County jail housed 278 individuals awaiting sentencing in 2016, making up more than half of the total.

Moreover, up to 80% of the people held in Dutchess county jail suffer from some combination of mental health issues and substance abuse, according to the Dutchess County Criminal Justice Council.

Defenders of the jail expansion in Dutchess County argue that increasing the number of beds will in fact help authorities address the behavioral issues that brought individuals into trouble with the law in the first place, while ensuring public safety.

“The current jail house was (not) built with the idea of restoring inmates’ lives,” said Marcus Molinaro, the County Executive and the main driving force behind building a new jail.

“I can find no legitimate reason to maintain the current county jail unless you think the warehouse model should be used going forward, which I don’t.”

The county’s District Attorney, William Grady, who was reelected in 2015 on a tough-on-crime platform, contends that it is too “risky” to free detainees awaiting trial.

“A drug-dependent individual who commits crimes to subsidize his habit is a risky person to have let go free in the community,” said Grady who predicts that the county’s jail population will grow even larger in coming years because of the influx of New York City residents seeking cheaper housing.

“Programming to treat those people is obviously most appropriate, but [they have] to wait for admittance to these programs by being held in jail,” he told *The Crime Report*

But legislators like Tyner and Francena Amparo, another county Democrat who was elected in 2011, say the county’s existing treatment facilities and programs, such as the Youth Bureau, which provides counseling and other services to at-risk youth, are in fact facing budget cuts.



Francena Amparo. Photo courtesy Francena Amparo.

“It’s pretty clear that substance abuse and mental issues are not being addressed enough,” Amparo said. “There aren’t enough rehabilitation facilities and clinics for those individuals, and they’re going to end up in jail at some point.”

Robert Wright, director of Nubian Directions, a youth-training program based in Poughkeepsie, said that school dropouts often end up getting caught in the criminal justice system.

“We’re seeing a lot of kids drop out of high school here and unfortunately many of them end up in jail,” Wright said.

The debate in Dutchess is also in some ways a reflection of a polarization in the political climate nationwide, where advocates of “tough on crime” measures now feel empowered by a federal government that is placing renewed emphasis on punishment.

Some local critics point out that Dutchess County Sheriff Adrian “Butch” Anderson, whose website describes him as a “cops’ cop,” was such a prominent and vocal supporter of Donald Trump during the last campaign that he was [named to the President-elect’s transition team](http://southwestdutchess.dailyvoice.com/politics/dutchess-county-sheriff-named-to-donald-trumps-transition-team/693444/) (<http://southwestdutchess.dailyvoice.com/politics/dutchess-county-sheriff-named-to-donald-trumps-transition-team/693444/>). The Clinton/Kaine ticket [narrowly won the county last November with just 469 votes after a recount](http://www.poughkeepsiejournal.com/story/news/local/2016/12/12/clinton-edged-trump-dutchess-following-certification/95346256/) (<http://www.poughkeepsiejournal.com/story/news/local/2016/12/12/clinton-edged-trump-dutchess-following-certification/95346256/>). Support for Democrats has been steadily slipping in presidential elections since 2008.

Opponents of the administration’s approach to justice argue that hardline strategies are especially counter-productive in smaller

communities.

The Vera report, for instance singles out the five-fold increase in pretrial detainees since 1970—from 82,900 people in 1970 to 462,000 in 2013, as a significant driver of the jail increase.

Cherise Fanno Burdeen, CEO of the Pretrial Justice Institute, a Washington, DC-based nonprofit, says many of those people don’t need to be in jail at all.

Economic factors—namely inability to afford bail—rather than criminal risk, are the main reasons why the pretrial population is so high, she says, adding that many rural jurisdictions could take a cue from urban areas that have begun to move away from the money bail system.

“Places like [Washington] D.C. don’t use money bail at all,” she told *The Crime Report*. “They release about 95 percent of people pretrial. So it works and we know it works.”

At the same time, she argued, authorities should also reduce the number of arrests by issuing citations or summonses in lieu of arrest.

Detention in jails, she said, should be restricted to those at the “highest level” of risk to the community.

“We should be able to identify and detain those people lawfully instead of saying ‘million dollar bond’ and then being scared when they make it,” she said.

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“A community would be better served by investing in community-based solutions (but) each county is going to be unique in its own way.”

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Nevertheless, in places like Dutchess County, attempting to implement these solutions can only happen if all the local players agree.



Dutchess County Executive Marcus Molinaro. Photo courtesy Dutchess County website.



Candidate Donald Trump and Sheriff “Butch” Anderson. Photo courtesy Sheriff’s Office, Dutchess County.

“A community would be better served by investing in community-based solutions (but) each county is going to be unique in its own way,” acknowledged Vera co-author Jacob Kang-Brown.

But he added: “Once enough places try solutions, they will then be able to land on what’s most effective, based on frequent experimentation.”

Such a consensus seems unlikely in Dutchess County, at least for now.

While the New York State legislature has earmarked about \$550,000 for a “youth services and crime prevention study” in the county, according to a document by the county’s criminal justice council, no additional funds appear to have been set aside for creating new programs.

Tyner, the Dutchess County legislator, says he hasn’t given up trying to change the county’s criminal justice priorities.

“I’m trying to wake up my fellow democrats and activists who can help,” he says.

“It’s not too late.”

*Eric Jankiewicz is a New York-based writer and a contributor to The Crime Report. He welcomes readers’ comments.*

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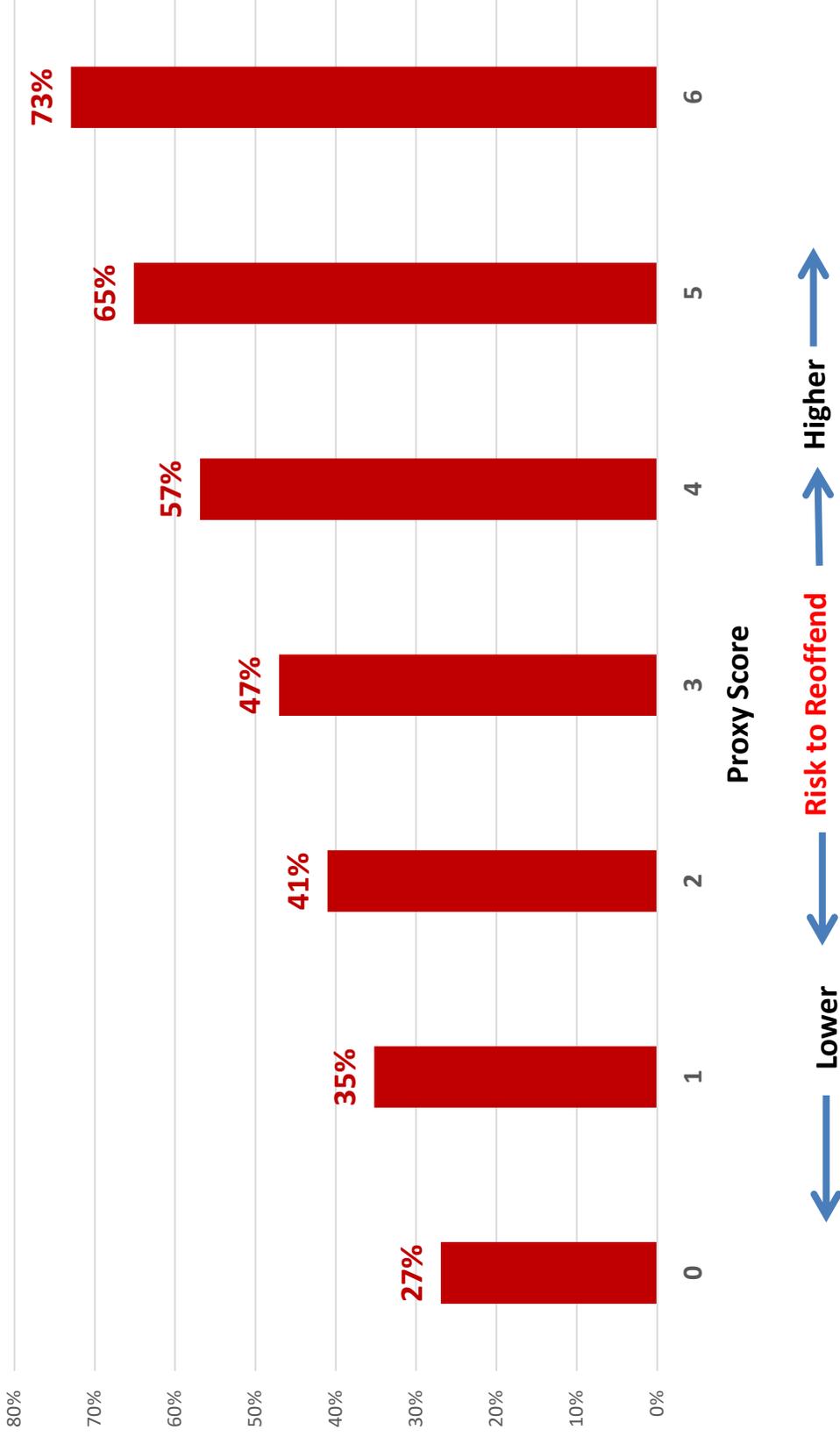
# Exhibit 26

# Dutchess County Jail Admissions, Releases, and Recidivism January – August 2017

Dutchess County Criminal Justice Council  
September 2017  
Gary E. Christensen, Ph. D.

# DCJ Recidivism - Minimum 1-Year Post-Release September 2017

(N=11,920 - Released to Street Jan. 2012-August 2016)



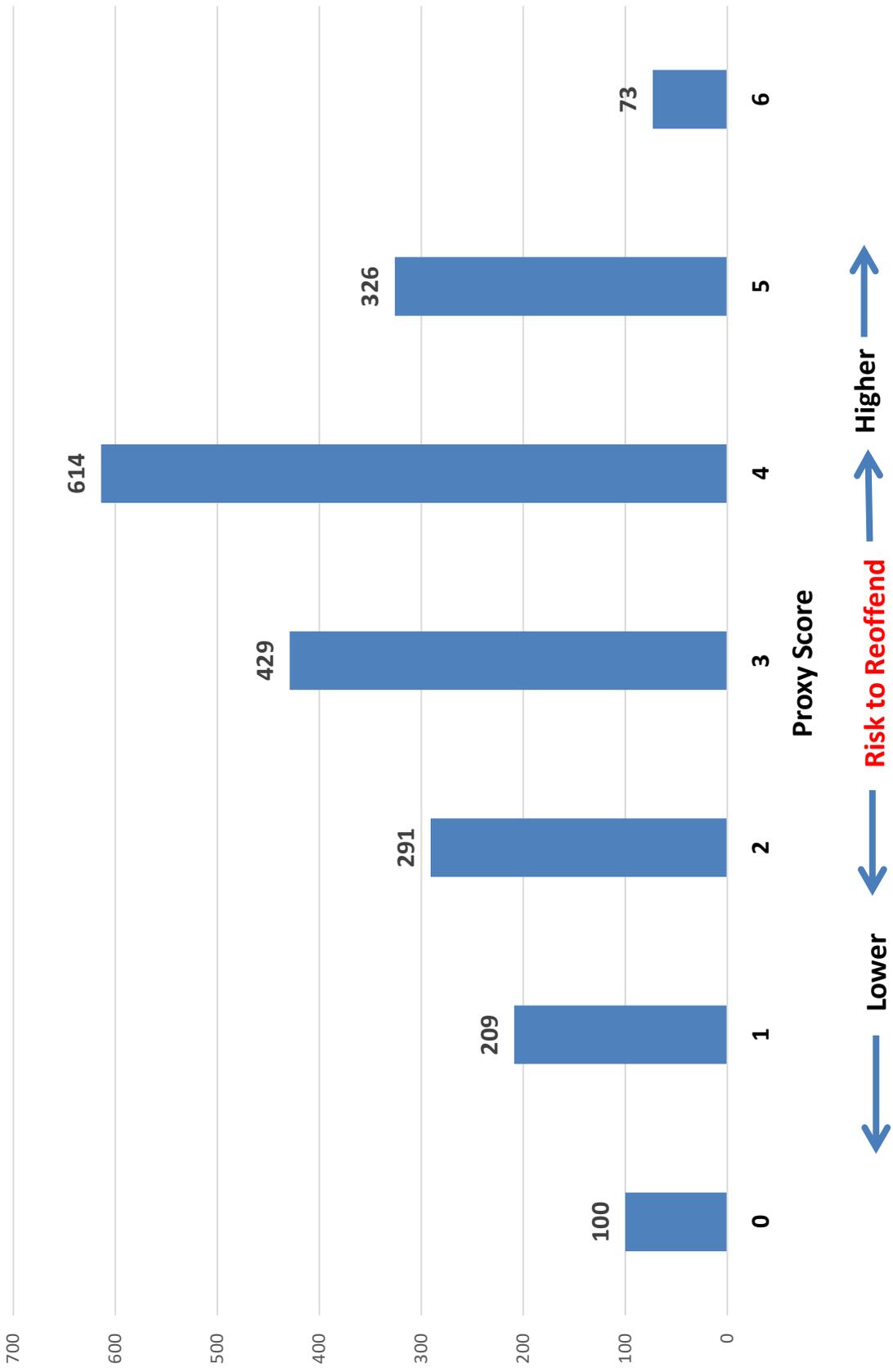
# DCJ - January - August 2017 - 2042 total admissions

Jurisdictions with 50+ DCJ Admissions in EITHER Jan-Aug 2016 OR Jan-Aug 2017												
	C/O Pok	T/O Pok	DC Court	C/O Beacon	T/O E-Fishkill	NYS Parole	T/O Hyde Park	T/O LaGrange	T/O Pl-Valley	T/O Fishkill	ALL	
Misdemeanor Jan/Aug 2016	243	338	9	79	31	0	58	39	40	40	877	
Misdemeanor Jan/Aug 2017	279	267	9	85	66	0	55	49	33	27	870	
<b>% Change in 2017</b>	<b>15%</b>	<b>-21%</b>	<b>0%</b>	<b>8%</b>	<b>113%</b>	<b>0%</b>	<b>-5%</b>	<b>26%</b>	<b>-18%</b>	<b>-33%</b>	<b>-1%</b>	
Non-Violent Felony Jan/Aug 2016	93	90	149	25	9	0	39	24	20	19	468	
Non-Violent Felony Jan/Aug 2017	140	69	198	26	17	0	19	30	28	22	549	
<b>% Change in 2017</b>	<b>51%</b>	<b>-23%</b>	<b>33%</b>	<b>4%</b>	<b>89%</b>	<b>0%</b>	<b>-51%</b>	<b>25%</b>	<b>40%</b>	<b>16%</b>	<b>17%</b>	
Violation/Lower Jan/Aug 2016	23	19	20	6	5	100	4	0	0	1	178	
Violation/Lower Jan/Aug 2017	69	11	19	5	3	92	1	1	5	4	210	
<b>% Change in 2017</b>	<b>200%</b>	<b>-42%</b>	<b>-5%</b>	<b>-17%</b>	<b>-40%</b>	<b>-8%</b>	<b>-75%</b>	<b>100%</b>	<b>500%</b>	<b>300%</b>	<b>18%</b>	
Violent Felony Jan/Aug 2016	46	11	18	6	2	0	4	4	1	8	100	
Violent Felony Jan/Aug 2017	55	20	23	12	11	0	8	1	4	3	137	
<b>% Change in 2017</b>	<b>20%</b>	<b>82%</b>	<b>28%</b>	<b>100%</b>	<b>450%</b>	<b>0%</b>	<b>100%</b>	<b>-75%</b>	<b>300%</b>	<b>-63%</b>	<b>37%</b>	
Total Admissions Jan/Aug 2016	405	458	196	116	47	100	105	67	61	68	1623	
Total Admissions Jan/Aug 2017	543	367	249	128	97	92	83	81	70	56	1766	
<b>% Change in 2017</b>	<b>34%</b>	<b>-20%</b>	<b>27%</b>	<b>10%</b>	<b>106%</b>	<b>-8%</b>	<b>-21%</b>	<b>21%</b>	<b>15%</b>	<b>-18%</b>	<b>9%</b>	
	C/O Pok	T/O Pok	DC Court	C/O Beacon	T/O E-Fishkill	NYS Parole	T/O Hyde Park	T/O LaGrange	T/O Pl-Valley	T/O Fishkill	ALL	

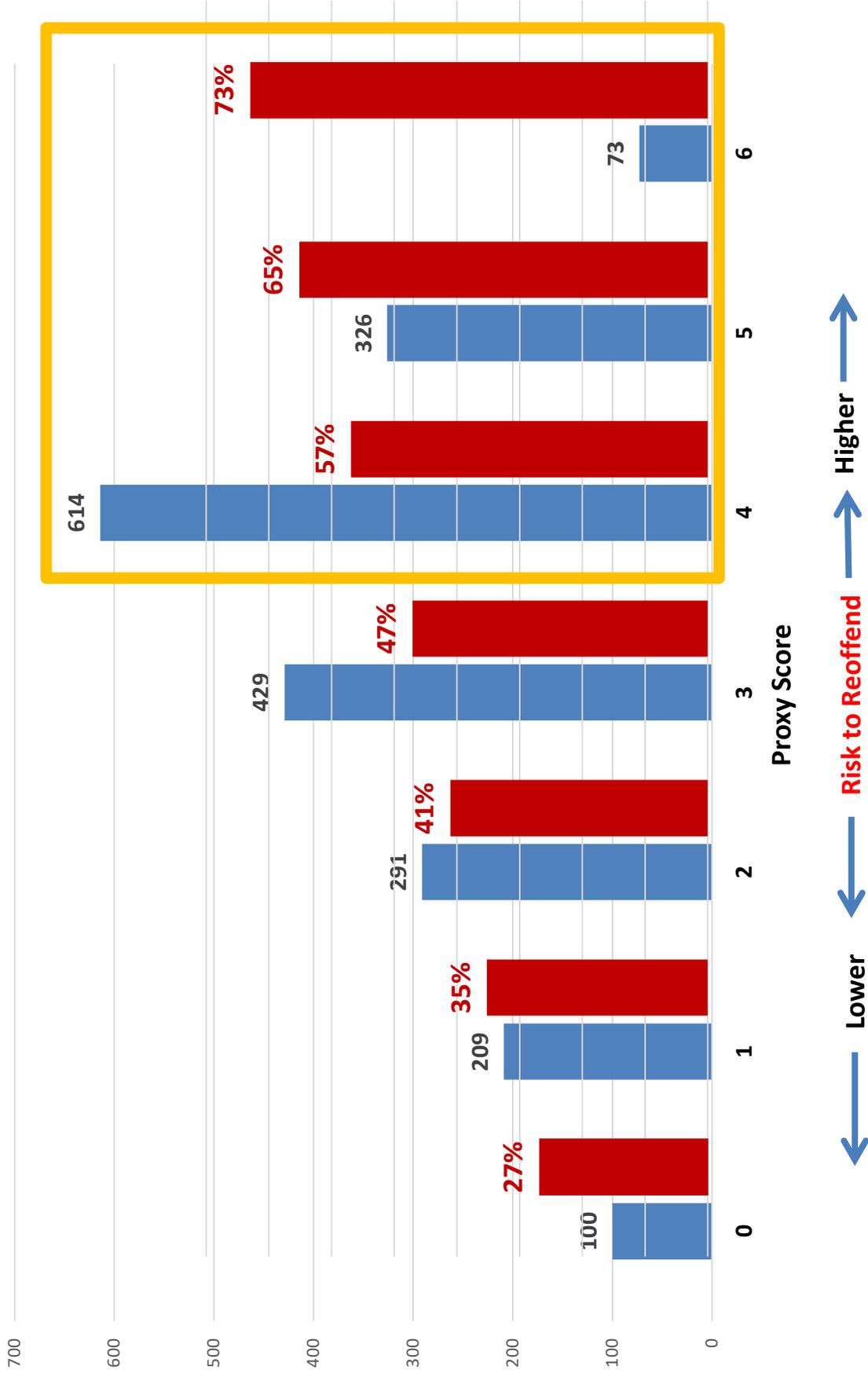
# DCJ - January - August 2017 - 20 or more admissions

Misdemeanor	Non-Violent Felony	Violent Felony	Violation/Lower
PETIT LARCENY			210
CRIM POSS CONTRL SUBST - Misd			136
CRIMINAL CONTEMPT 2ND			106
REVOKE PRESUMPTIVE RELEASE, PAROLE, COND RELEASE, PRS STATUS			96
CRIM POSS CONTR SUBST - Felony			96
CRIMINAL MISCHIEF - 4			60
CRIMINAL CONTEMPT 1ST			47
ASSAULT -3RD			43
BURGLARY-3RD DEG:ILLEGAL ENTRY WITH INTENT TO COMMIT A CRIME			39
GRAND LARCENY 4TH			37
CRIM POSSESSION STOLN PROP 5TH			33
CRIM SALE CONTRL SUBST			30
VIOL OF LOC LAW VIOL			27
CRIMINAL MISCHIEF - 3RD			25
RESPONDENT COMMITTED TO JAIL-FAIL TO OBEY ORDER OF SUPPORT			25
ENDANGERING WELFARE OF CHILD			25
DRIVING WHILE INTOXICATED- 1ST OFFENSE			24
OPER MOTOR VEH W// .08 OF 1% OR MORE ALCOHOL IN BLOOD-1ST OFF			24
ASSAULT -2ND DEGREE			23
FUGITIVE FROM JUSTICE - OUT OF STATE CRIME			22
CRIMINAL POSSESSION OF A WEAPON- 2ND DEGREE			22
MENACING 2ND			21
DWI: PREVIOUS CONVICTION DESIGNATED OFFENSE WITHIN 10 YEARS			21
RESISTING ARREST			20
DISORDERLY CONDUCT			20

# Risk to Reoffend - ALL Admissions Jan-Aug. 2017



# Risk to Reoffend with Projected Recidivism ALL Admissions Jan-Aug. 2017

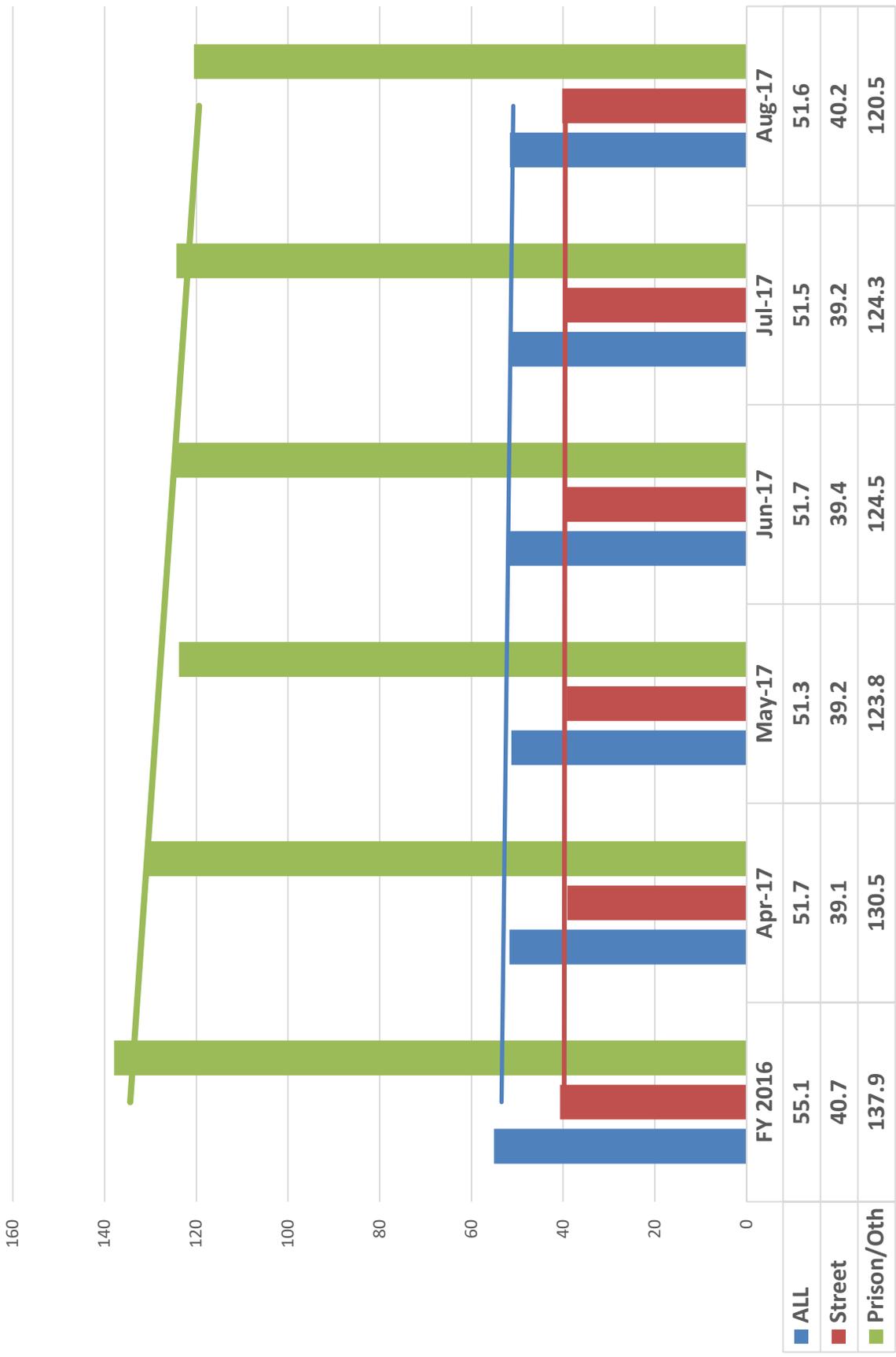


# DCJ - January - August 2017

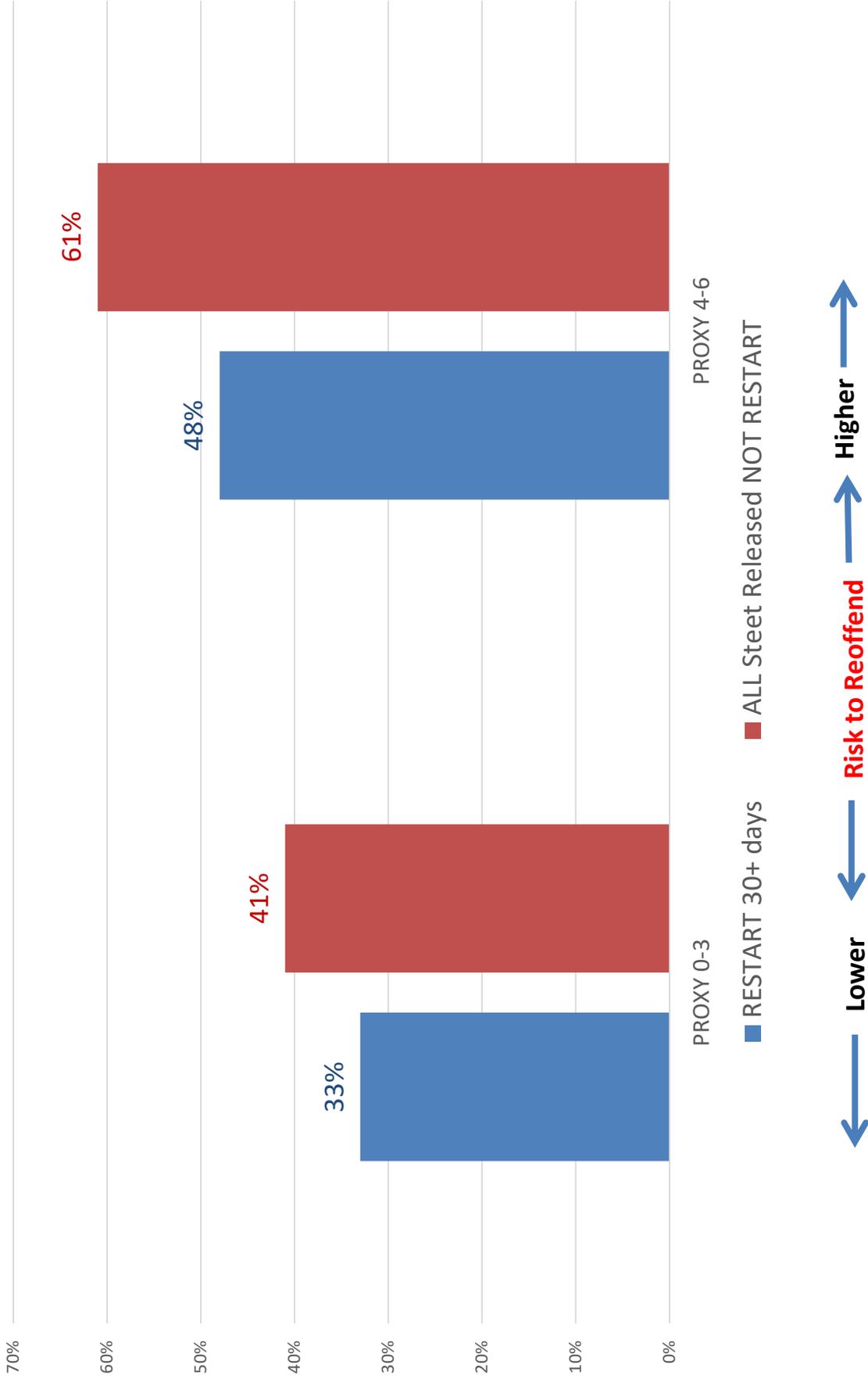
**1936 total releases (ALOS = 51.5)**

- Prison/Other releases = 281 (ALOS = 120.4; Jail Days = 33,840)
  - Misdemeanor = 47 releases (ALOS = 98.7; Jail Days = 4637)
  - Non-Violent Felony = 109 releases (ALOS = 147.8; Jail Days = 16,113)
  - Violation/Lower = 86 releases (ALOS = 39.7; Jail Days = 3416)
  - Violent Felony = 39 releases (ALOS = 248.1; Jail Days = 9674)
- Street releases = 1655 (ALOS = 39.9; Jail Days = 65,952)
  - Misdemeanor = 950 releases (ALOS = 43.5; Jail Days = 41,330)
  - Non-Violent Felony = 465 releases (ALOS = 39.7; Jail Days = 18,441)
  - Violation/Lower = 149 releases (ALOS = 21.3; Jail Days = 3176)
  - Violent Felony = 91 releases (ALOS = 33; Jail Days = 3005)

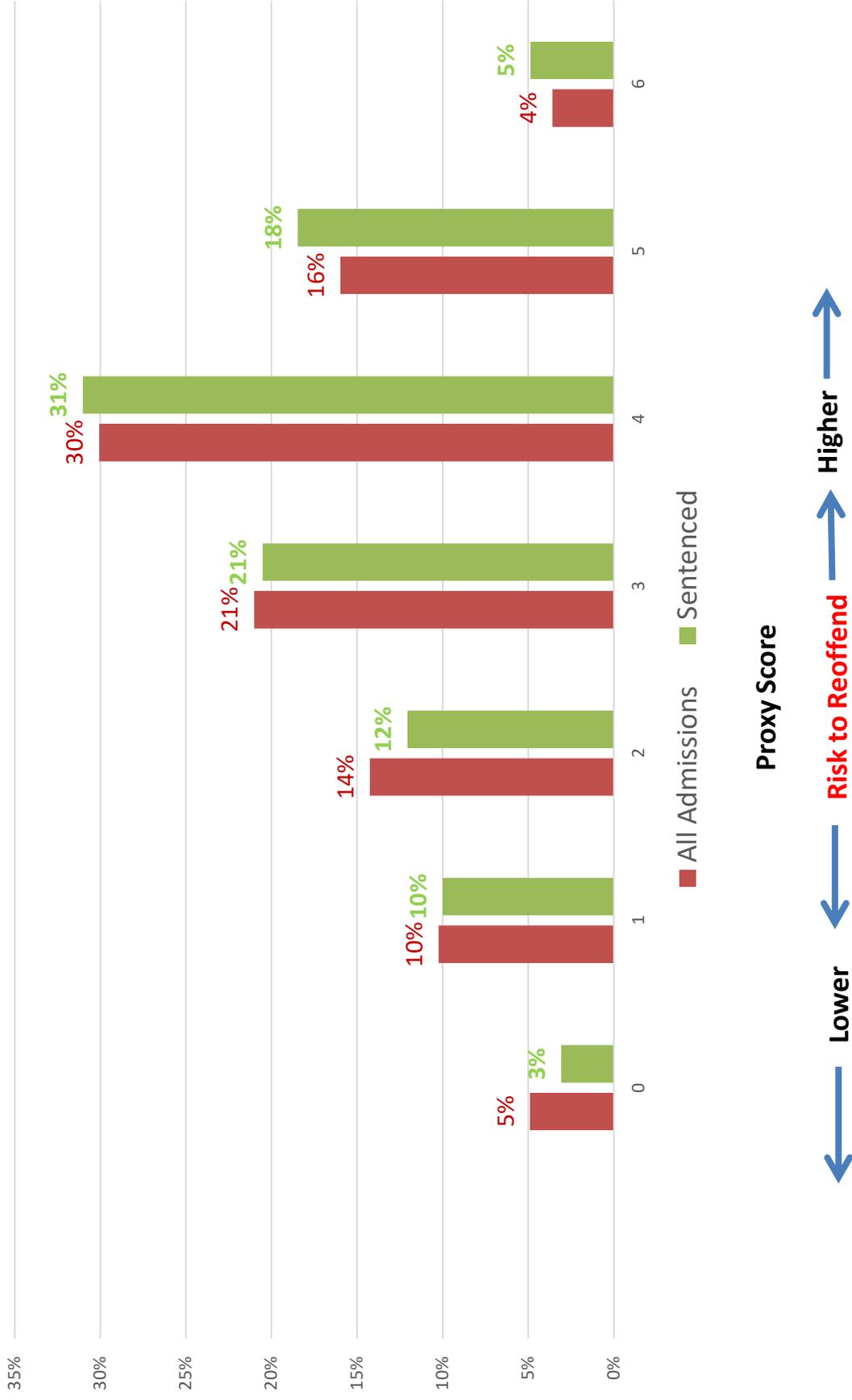
# ALOS Progress - FY 16 to date (1-Year Averages)



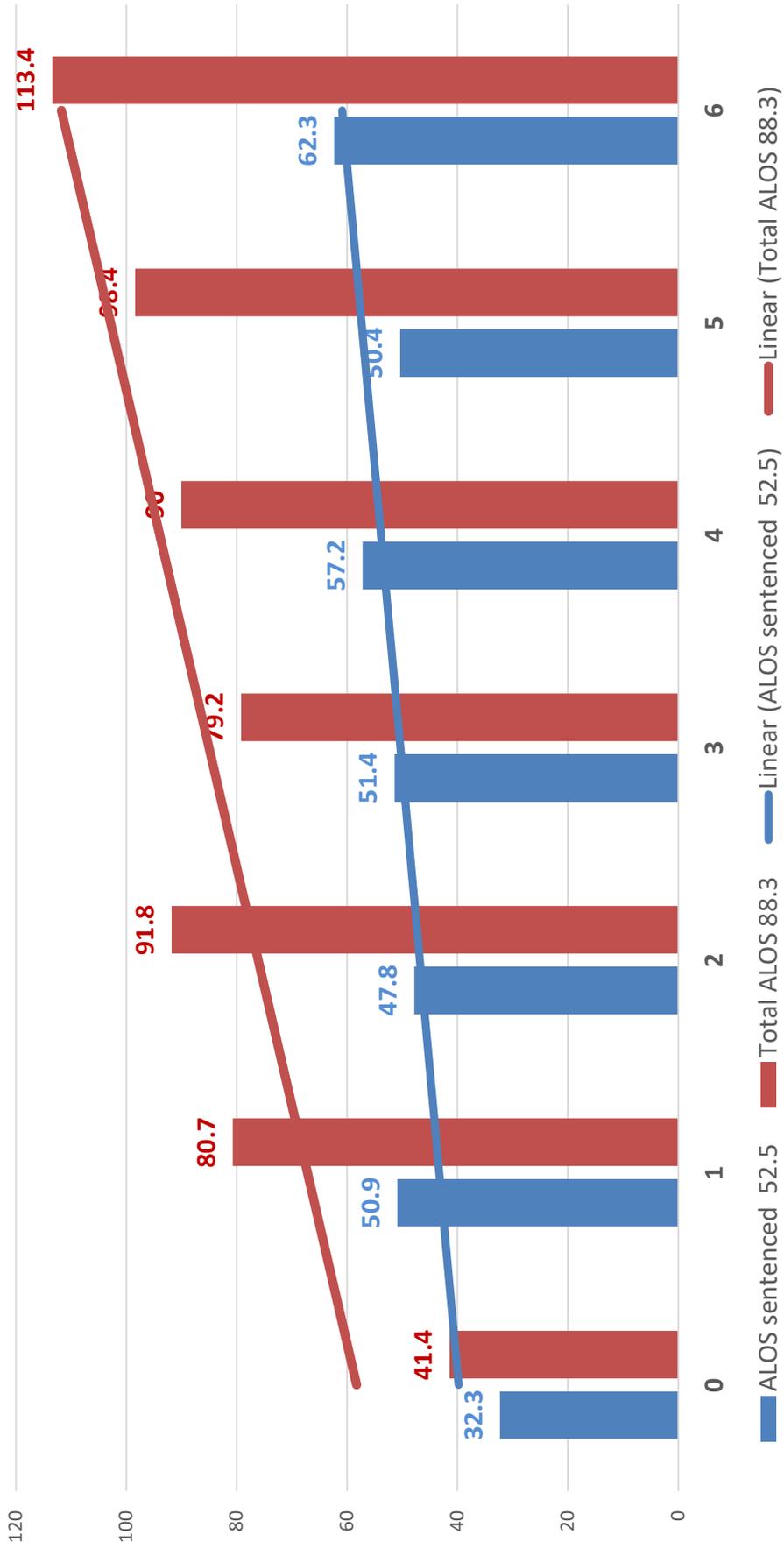
# RESTART Recidivism - Minimum 1-Year Post Release - September 2017



# All Admissions vs. Sentenced to DCJ by Risk to Reoffend Admissions and Releases - Jan-August 2017



# Sentenced Inmates Released to Street ALOS Sentenced vs Total ALOS



Proxy Score

← Lower

Risk to Reoffend

→ Higher

# Questions ?

# Exhibit 27



## Division of Criminal Justice Services

### Dutchess County

#### Alternatives to Incarceration (ATI) Programs

#### PRETRIAL RELEASE SERVICES OF DUTCHESS COUNTY

**Mary Ellen Still, Probation Director**

50 Market Street  
 Poughkeepsie, NY 12601-3247  
 (845) 486-2600 FAX (845) 486-6479

**Supervising Agency :**

Dutchess County Office of Probation and Community Corrections  
 Mary Ellen Still, Probation Director

This program began operation in 1989. This program's services include ROR (Release On his/her own Recognizance), RUS (Release Under Supervision), electronic monitoring, day reporting, transitional housing, and the domestic violence project. Agency services are primarily assessment, court advocacy, case monitoring and supervision services.

#### DUTCHESS COUNTY PROBATION DEPARTMENT AND COMMUNITY CORRECTIONS

**Mary Ellen Still, Probation Director**

50 Market Street  
 Poughkeepsie, NY 12601-3247  
 (845) 486-2600 FAX (845) 486-6479

This is an agency of county government. Agency services include the preparation of pre-sentence investigations for the criminal courts and the supervision of criminals sentenced to probation. Investigation and supervision functions are also provided for criminals released from jail by the Local Conditional Release Commission. Intake, investigation and supervision services are provided for Family Court. Many discretionary services for pretrial and alternative sentencing are also provided. This county probation department participates in PINS (Person In Need of Supervision) [Adjustment services](#) programming, day reporting, transitional housing, and sex offender treatment.

Probation and Correctional Alternatives
<a href="#">About Probation</a>
<a href="#">Probation Updates</a>
<a href="#">Probation Vision</a>
<a href="#">Probation Commission</a>
<a href="#">Funding/Assistance</a>
<a href="#">Rules and Regulations</a>
<a href="#">Standards and Procedures</a>
<a href="#">Statistics and Reports</a>
<a href="#">Newsletters</a>
<a href="#">Training</a>
<a href="#">Technology Advancing Practices</a>
<a href="#">Interstate Compact</a>
<a href="#">Specialized Projects</a>
<a href="#">Directory of Probation Depts</a>
<a href="#">Directory of ATI Programs</a>
<a href="#">Ignition Interlock</a>
<a href="#">Justice Mental Health</a>
<a href="#">FAQs</a>
<a href="#">Links</a>
<a href="#">Glossary</a>
<a href="#">Contact</a>

# Exhibit 28

DUTCHESS COUNTY  
CRIMINAL JUSTICE  
COUNCIL



Alternatives to Incarceration,  
Support Services,  
&  
Bail Options Manual  
3rd Edition



**Marcus J. Molinaro**  
*County Executive*

March 17, 2016

# DUTCHESS COUNTY CRIMINAL JUSTICE COUNCIL

*Mary Ellen Still*  
*Chairperson*

*Originally published - December, 2006*  
*Revised May, 2007 & March, 2016*

***Editors:*** Thomas Angell, Public Defender  
Mary Haight, Director, Women's Center Program  
Margaret Hirst, LCSW, ACSW  
Department of Behavioral and Community Health  
Dawn Hawley, Administrative Coordinator

## **ELECTRONIC MONITORING (EM)**

Operated by: Dutchess County Office of Probation and Community Corrections

Address: 50 Market Street Poughkeepsie, NY 12601

Contact/Title: Unit Administrator of Electronic Monitoring Unit—Mark Jaggi

Phone: 486-2600

Fax: 486-2676

Program Location: Same as above

Times of Operation: 24 hours/7 days a week

Program Description: Provides 24 hour per day monitoring through the use of a bracelet attached to the ankle. Electronic Monitoring is a structured, intensive Alternative to Incarceration program for both pretrial and sentenced individuals. Access to a phone is necessary. Individuals may be given "time out" for employment, court appearances, medical and counseling appointments.

Eligibility Criteria: County-wide by court order (pretrial and sentenced cases)

Fees: Probation supervision fee for sentenced individuals

Application Procedures: Screening for eligibility conducted by Probation

Discharge Criteria: Completion of sentence, dismissal of case or otherwise by court order

## **PRETRIAL SERVICES**

*Release on Recognizance (ROR)*

*Release under Supervision (RUS)*

Operated by: Dutchess County Office of Probation and Community Corrections

Address: 50 Market Street  
Poughkeepsie, NY 12601

Contact/Title: Unit Administrator of Pretrial Services Unit—Jonathan Heller

Phone: 486-2600

Fax: 486-2676

Program Location: Same as above

Times of Operation: ROR reporting schedule.

Program Description: Pretrial release program for persons arrested in Dutchess County who are unable to post bail. Probation Officer interview defendants for eligibility to be released from the jail using an evidence-based assessment instrument and make recommendations to remanding courts. Those placed on the program are monitored by Probation during the pendency of the case.

Eligibility Criteria: Defendants unable to post bail. An objective risk assessment is used. Judges may order release based on findings and recommendations.

Fees: NIA

Application Procedures: Probation Officers make assessments and recommendations to the courts  
Defendants are recommended for least restrictive program commensurate with their risk.

Discharge Criteria: Favorable: resolution of case or otherwise by court order  
Unfavorable: non-compliance or re-arrest

# Exhibit 29



NEW YORK CITY

CRIMINAL JUSTICE AGENCY

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Jerome E. McElroy  
Executive Director

**COMMUNITY SUPERVISION AS A MONEY BAIL ALTERNATIVE: THE  
IMPACT OF CJA'S MANHATTAN SUPERVISED RELEASE PROGRAM  
ON LEGAL OUTCOMES AND PRETRIAL MISCONDUCT**

**Freda F. Solomon, Ph.D.  
Senior Research Fellow &  
Project Director**

**Russell F. Ferri, Ph.D.  
Research Analyst &  
Co-Project Director**

**Final Report**

April 2016

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The mission of the New York City Criminal Justice Agency  
is to assist the courts and the city in reducing unnecessary pretrial detention.

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# **COMMUNITY SUPERVISION AS A MONEY BAIL ALTERNATIVE: THE IMPACT OF CJA'S MANHATTAN SUPERVISED RELEASE PROGRAM ON LEGAL OUTCOMES AND PRETRIAL MISCONDUCT**

**Freda F. Solomon, Ph.D.**  
Senior Research Fellow &  
Project Director

**Russell F. Ferri, Ph.D.**  
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Co-Project Director

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**Wayne Nehwadowich**  
IT Deputy Director for Programming

## **Administrative Support**

**Lauren A. Wilson**  
Communications Associate

**April 2016**

This report can be downloaded from [nycja.org/library.php](http://nycja.org/library.php).

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When citing this report, please include the following elements, adapted to your citation style:

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# TABLE OF CONTENTS

<b>ACKNOWLEDGEMENTS</b> .....	i
<b>INTRODUCTION</b> .....	1
<b>THE MANHATTAN SUPERVISED RELEASE PROGRAMS' CASE AND CLIENT CHARACTERISTICS</b> .....	4
<b>CREATING A COMPARISON GROUP</b> .....	8
<b>COMPARING COURT OUTCOMES, CASE PROCESSING, AND PRETRIAL MISCONDUCT BETWEEN MSR CLIENT AND COMPARISON GROUP CASES</b> ....	10
Court outcomes for MSR clients and the comparison group cases.....	10
Case processing for MSR clients and the comparison group cases .....	12
Pretrial Misconduct of MSR clients and comparison group defendants .....	15
<b>COMPARING COURT OUTCOMES, CASE PROCESSING AND PRETRIAL MISCONDUCT BETWEEN MATCHED CLIENT AND COMPARISON GROUP CASES AND DEFENDANTS</b> .....	20
Differences between the MSR clients and the comparison group: Matched comparison group analysis .....	20
Court outcomes for matched MSR client and comparison group cases .....	23
Case processing times for matched MSR client and comparison group cases.....	26
Pretrial misconduct for matched groups.....	29
<b>REDUCING PRETRIAL DETENTION THROUGH SUPERVISED RELEASE</b> .....	33
<b>SUMMARY OF FINDINGS</b> .....	38
<b>CONCLUSIONS</b> .....	41
<b>REFERENCES</b> .....	45
<b>APPENDIX A: CJA'S CRIME-TYPE CATEGORIES: AN OVERVIEW</b> .....	A1
<b>APPENDIX B: PROPENSITY SCORE MATCHING</b> .....	B1
<b>APPENDIX C: LOGISTIC REGRESSIONS ANALYSIS</b> .....	C1

## INTRODUCTION

The New York City Criminal Justice Agency (CJA), Inc., is a non-profit organization, working under a contract with the City of New York to provide pretrial services to defendants prosecuted in the City's Criminal Court system. The Agency's primary mission is to reduce unnecessary pretrial detention in New York City. As part of that mission, CJA has advocated for community supervision as an alternative to money bail for defendants posing a medium risk of failure to appear (FTA) if released on unsupervised personal recognizance. CJA created a pilot program after extensive consultation with, and the support of, the New York City Office of the Criminal Justice Coordinator (since renamed the Mayor's Office of Criminal Justice). The program was designed to offer judges at Criminal Court arraignment the option of supervised release as a bail alternative in selected non-violent felony cases with a high likelihood of having bail set.

In August 2009, CJA introduced its first Supervised Release (SR) program in the Queens Criminal Court. Based on the success of that program, the City contracted with CJA to develop a similar three-year demonstration project in the New York County (Manhattan) Criminal Court, which was implemented in April 2013. Owing to the success of the CJA programs the City, through the Mayor's Office of Criminal Justice, developed a proposal to introduce a more expansive program of pretrial release under supervision citywide. In March 2016, CJA's program was replaced in Manhattan by this new City initiative.

CJA's Manhattan Supervised Release (MSR) program, like its Queens counterpart, offered judges a pretrial community-based supervision program as an alternative to setting bail at the Criminal Court arraignment in cases arraigned on selected non-violent felony charges. In Manhattan, these have been felony charges involving drug, property, or fraud/theft crimes, plus a comparatively small number of other types of non-Violent Felony Offense (VFO) crimes (e.g., D-felony robbery). Cases involving domestic violence, or where the defendant was scheduled for a hospital arraignment, were excluded even if charge eligible.

Beyond the charge criteria, the program had additional restrictions used to screen potentially eligible cases and defendants that could be actively pursued by program staff. These included a review of adult criminal conviction histories, factors affecting risk of pretrial failure to appear (FTA) based on criteria used in CJA's release recommendation system, and supplemental criminal history information. Program court staff also was required to collect and verify community ties information necessary to maintain contact with defendants if released to the program. This has been an essential program component for ensuring that clients released under supervision in lieu of bail and pretrial detention would appear at all regularly scheduled court dates and comply with program requirements.

In this research study we analyze case processing and court outcomes, and investigate the pretrial misconduct—failure to appear and in-program re-arrests—of MSR clients. We also examine the jail displacement effect of community supervision as an alternative to money bail and pretrial detention. In order to assess the potential impact of the MSR program on these activities, we create for comparison purposes a data set of felony cases arraigned in the downtown Manhattan Criminal Court during the first twenty-one months of the MSR program (April 2013 – December 2014) in which defendants appeared to be eligible for MSR, to the extent that could be determined, but were not screened by MSR court staff.

It is not possible to perfectly mirror the actual composition of program cases and defendant characteristics in the comparison group for a variety of reasons. For example, defendants were ineligible for the program if they had a violent felony offense (VFO) within the past ten years. The MSR court staff had access to full criminal history records and could effectively screen potential clients based on this criterion. In comparison, CJA's main information system, on which the research data set is based, contains only a limited amount of criminal history information for each arrest. This includes the numbers of cases, if any, in which the most serious conviction charge is of felony and/or of misdemeanor severity, but not information about the specific charges in these cases. However, care was taken to ensure that the composition of the comparison group matched as closely as possible to the case and defendant characteristics of the population from which clients were drawn.

Among the specific research questions this study addresses are the extent to which there are differences found between client and comparison group cases and defendants with respect to:

- Court outcomes, especially conviction rates;
- Whether incarceration sentences are imposed in convicted cases;
- Case processing, including time to disposition;
- Pretrial failure-to-appear (FTA) rates; and,
- Pretrial re-arrest rates.

These research questions are based on differences found during the program planning process between cases and defendants with ROR versus bail set at Criminal Court arraignment in the program's target population, issues raised by stakeholders, findings from CJA's study of legal outcomes in its Queens Supervised Release program, and social science research on the consequences of pretrial detention. These are therefore outcomes which we hypothesize have been affected by the MSR program. In a separate report section we explore how the program may have achieved the goal of jail displacement.

## THE MANHATTAN SUPERVISED RELEASE PROGRAM'S CASE AND CLIENT CHARACTERISTICS

To have been eligible for the Manhattan Supervised Release (MSR) program the case and the defendant must have met a variety of charge, criminal history and community-ties criteria.<sup>1</sup> Only designated non-violent felony charges, of B-felony or lesser severity, were eligible. Defendants could have no more than six prior misdemeanor convictions and no more than one felony conviction which could not have been for a VFO crime within the past ten years. To be admitted into the program the defendant also had to have a New York City area address and access to a working telephone.

In addition, the program sought to actively pursue charge and criminal history eligible defendants most likely to have bail set. Defense attorneys played an important gate keeping role in this regard, and their consent had to be obtained before the program could interview prospective clients. In addition, the program would not proactively screen defendants classified by CJA as Recommended for ROR if the instant case appeared as the defendant's first arrest on the rap sheet. This restriction was created to provide a barrier against the enrollment of defendants with the greatest likelihood of being granted ROR (Solomon 2014).

This study began by selecting the MSR clients who were admitted from the beginning of the program on April 8, 2013, through December 31, 2014. To this we added the criteria that these clients must have exited the program *and* their case must have had an adjudicated outcome on or before June 30, 2015. However, not all convicted cases had been sentenced by June 30<sup>th</sup>, and in a handful of these cases the conviction could be superseded at a later date by a dismissal, ACD, or a plea to a charge of lesser severity than entered on the original conviction. For the purposes of this analysis, in these cases the first adjudicated outcome of a conviction, and the

---

<sup>1</sup> In some circumstances the program admitted defendants who did not meet all the program requirements. Usually such defendants were referred by the arraignment judge.

original conviction charge, is used. These selection criteria result in an analysis of 568 MSR clients.<sup>2</sup>

The MSR clients in this analysis are predominantly male, non-Hispanic black, and under the age of 30. Of the 568 clients in the analysis 72.5% are male and 27.5% female. Among the race/ethnicity characteristics 54.6% are non-Hispanic black, 31.9% Hispanic, and most of the remainder non-Hispanic white. Somewhat under half (46.7%) of the study clients are between the ages of 20 and 29, and another 15.7% between the ages of 16-19. The age distributions are shown in Figure 1.

**Figure 1**

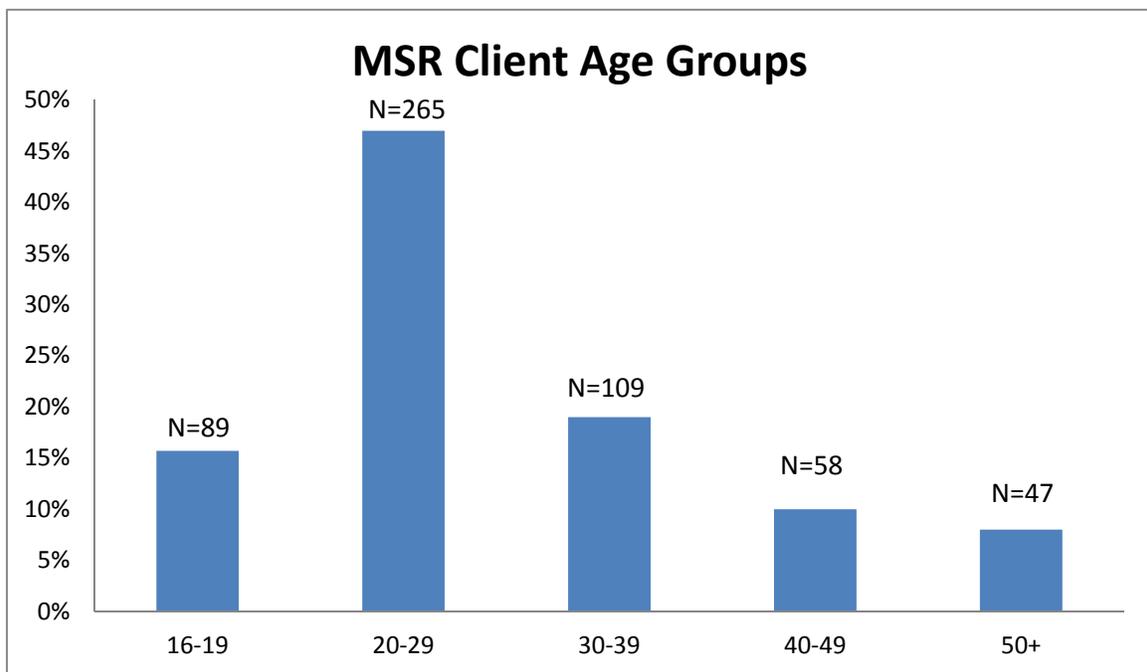
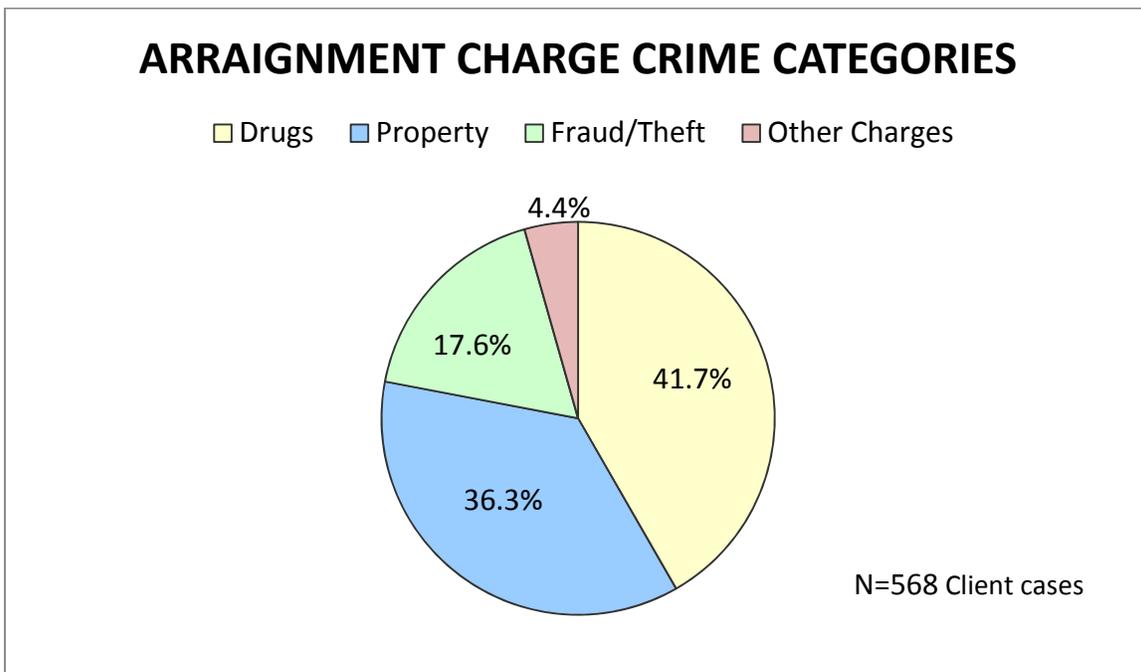


Figure 2 shows that the overwhelming majority of all client cases have a top arraignment charge of a felony drug or property crime. A plurality of the 568 clients have a drug charge as the top charge at Criminal Court arraignment, most commonly the B-felony severity charges of possession (PL § 220.16) or sale (PL § 220.39) of narcotics. Property crime is the second largest charge category. Most common in this

<sup>2</sup> There are actually 569 cases that meet these criteria. However, one MSR client had a top charge severity of an A misdemeanor. When analyzing statistical models that include charge severity, having a distinct category with only one case is mathematically problematic. Thus for the purposes of this analysis we removed the case.

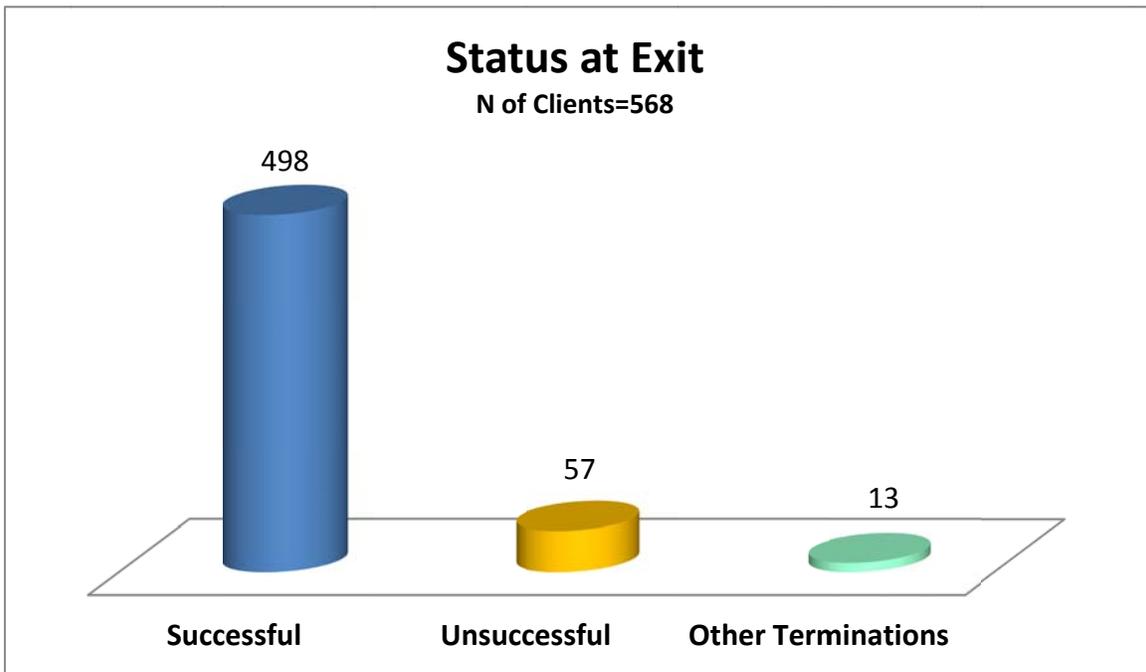
category are the E-felony grand larceny (PL § 155.30), D-felony (PL § 155.35) grand larceny, and the E-felony possession of stolen property (PL § 165.45) charges. Most prominent in the fraud/theft category are charges of possession of forged instruments in Penal Law Article 170. A handful of MSR client cases have other types of top arraignment charges such as D-felony robbery or a VTL offense. These are included in the “other” category.

**Figure 2**



As shown in Figure 3, of the 568 MSR clients included in this analysis, 498 were in compliance with program requirements at the time of exit and were considered successful clients (87.7%). Supervision was revoked for 57 clients because of participation issues (10.0%). The reasons for these unsuccessful exits can include failure to comply with program requirements, failure to appear for scheduled court dates, detention on another arrest, or any combination of those factors. Another 13 clients exited the program for other reasons (2.3%). These other terminations include

**Figure 3**



detention pursuant to an INS hold, detention on a case that had begun prior to the client's enrollment in MSR, and a variety of other events. These cases are considered distinct from the unsuccessful client group because the defendant's exit from the program is not due to in-program misconduct.

## CREATING A COMPARISON GROUP

To examine the potential impact of MSR on court outcomes, case processing, and pretrial defendant misconduct, this study first compares the MSR client cases to non-MSR cases. These are cases in which the charge and defendant characteristics are as similar as possible, based on available data elements, for both clients and non-clients and their cases. We selected cases in which the charge and defendant characteristics appeared to meet the program's criteria, and like the program cases were arraigned between the program's beginnings on April 8, 2013 through the end of calendar year 2014, but were not screened for the program.

Some defendants were found in both the client group and the comparison group if they had other cases eligible for MSR but for which they were not screened. Also, some defendants had multiple eligible cases in the comparison group. For the purposes of analysis, we excluded cases in the comparison group for any defendant who was a program client. For cases in which non-program defendants had more than one prospective case in the comparison group, only the case with the earliest arraignment date is included.

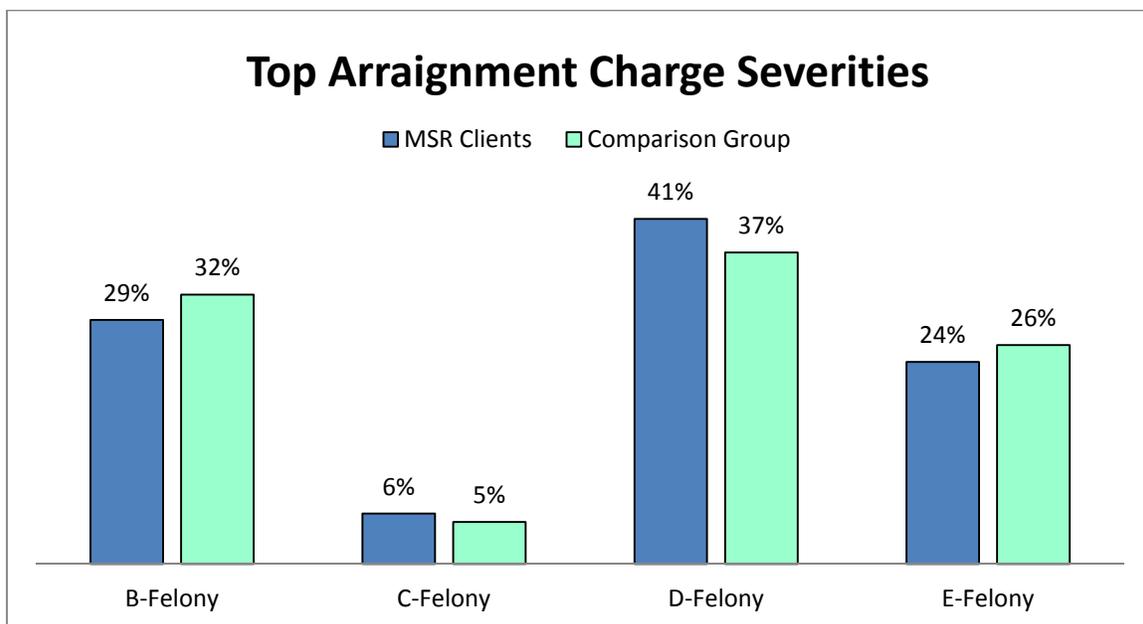
To determine the potential effect of MSR on court outcomes and case processing, the comparison group cases are restricted to those continued after the arraignment hearing and which have an adjudicated outcome on or before June 30, 2015. As with the client cases, not all comparison group convicted cases had been sentenced as of June 30<sup>th</sup>, and in a handful of these cases the conviction could be superseded at a later date by a dismissal, ACD, or a plea to a charge of lesser severity than entered on the original conviction. For the purposes of this analysis, for these cases the first adjudicated outcome of a conviction, and the original conviction charge, are used. Using these criteria, the number of cases in the non-screened comparison group is 1,661.

Among the 1,661 comparison group cases, defendants in 1,009 (60.7%) had bail set at Criminal Court arraignment. About two-fifths of defendants in the cases with bail set at arraignment were released prior to disposition, some by immediately posting bail

but most by a bail or recognizance release at some later pretrial point in case processing. Defendants in the other 652 cases (39.3%) were released on recognizance (ROR) at arraignment. During program planning it was not possible to develop models from available information that could predict with certainty which cases within the program's target population would have bail set. What was known was that in the cases fitting the program's criteria majorities of defendants would have bail set, and some proportion of these defendants subsequently would be released pretrial. It was therefore sufficient for comparative purposes that the case and defendant characteristics in the comparison group were not substantially dissimilar from the program's client cases and defendants.

There are some differences in the distribution of crime categories between the two groups, but drug and property crimes account for a majority of both groups' cases, and there is little difference in the distribution of the charges within these crime categories. For example, within the drug crime category approximately 37% of both groups' cases have a top arraignment charge of B-felony sale (PL § 220.39), and another 35% B-felony drug possession (PL § 220.16). In addition, the distribution among severity classifications of the top arraignment charge is very similar as illustrated by Figure 4.

**Figure 4**



## **COMPARING COURT OUTCOMES, CASE PROCESSING, AND PRETRIAL MISCONDUCT BETWEEN MSR CLIENT AND COMPARISON GROUP CASES**

In this report section we explore the extent to which there are differences between the MSR client and comparison groups in regard to court outcomes, case processing, and pretrial misconduct. Differences found between the client and comparison group cases are measured using tests of statistical significance. Statistical significance indicates the likelihood of obtaining the observed outcome given a hypothesis about the effect of a treatment, program, or intervention. In this study the hypotheses are that the MSR program has an effect on court outcomes, imprisonment sentences being imposed if convicted, and case processing times. We also examine and test if the program has an effect on failure to appear (FTA) rates or pretrial arrests for released defendants.

Statistical significance tests calculate the probability of obtaining an effect at least as large as the one in the sample data, given the hypothesis. This is referred to as a *p-value*. The *p-value* ranges from 0 to 1, and the closer the *p-value* to 0, the more confident one can be that the data provide support for the hypothesis. The most common confidence level used in the social sciences to determine statistical significance is .05, which is the criterion applied in this report. A significance level of 0.05 indicates a 5% risk of concluding that a difference exists between the two groups when there is no actual difference.<sup>3</sup> However, statistical significance is not a substitute for an analytic decision about the substantive importance of differences which may be found, and which are addressed in some depth in the concluding section of the report.

### **Court outcomes for MSR clients and the comparison group cases**

Conviction rates differ slightly between the MSR client cases and those in the comparison group. Clients have a slightly higher rate of conviction than the defendants in the comparison group. The difference is not statistically significant based on a two-tailed significance test.

---

<sup>3</sup> Because the direction of the differences (i.e. increase or decrease) was not predicted, a two-tailed test of significance was used.

<b>Table 1</b>				
<b>Client and Comparison Group Conviction Rates</b>				
<b>Group</b>	<b>Convicted</b>		<b>Not convicted</b>	
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>
MSR clients (N = 568)	444	78.2	124	21.8
Comparison group (N = 1,661)	1,263	76.0	398	24.0

The lack of statistical significance suggests that the difference in the conviction rates between the MSR client and comparison group is not attributable to the program. In addition, virtually all convictions for both groups are by pleas (data not shown).

We consider outcomes beyond conviction and examine whether a defendant receives a favorable disposition in his/her case. For the purposes of this research we define a favorable disposition as an acquittal, dismissal, or a conviction on a charge of lesser severity than the top arraignment charge.

<b>Table 2</b>				
<b>Type of Disposition for Clients and Comparison Group</b>				
<b>Group</b>	<b>Not a Favorable Disposition</b>		<b>Favorable Disposition</b>	
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>
MSR clients (N = 567)	175	30.9	392	69.1
Comparison group (N = 1,645)	468	28.4	1,177	71.6

*\*The N's are different for these data because we are unable to determine the conviction charge severity in some cases.*

MSR clients are less likely to have a favorable disposition than defendants in the comparison group cases as a whole, but this difference is not statistically significant.

Table 3 illustrates the likelihood of any imprisonment sentence being imposed after a conviction. The number of cases in this table is smaller than the total number of convictions because not all convicted cases had a sentence at the time the data set for the analysis was created.<sup>4</sup>

<sup>4</sup> The difference in whether or not a sentence had been imposed between convicted MSR clients and defendants in the comparison group is not statistically significant. In addition, in a small number of cases

<b>Table 3</b>				
<b>Any Sentence of Imprisonment for Convicted &amp; Sentenced Clients and Comparison Group</b>				
<b>Group</b>	<b>Imprisonment</b>		<b>No Imprisonment</b>	
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>
MSR clients (N = 373)	125	33.5	248	66.5
Comparison group (N = 1,080)	588	54.4	492	45.6

The imposition of any imprisonment sentence differs substantially between the MSR clients and the comparison group. Convicted and sentenced clients are less likely to receive sentences that include any incarceration in comparison to convicted and sentenced defendants in the comparison group. The difference is significant at the  $p < .000$  level. This means we can be very confident that participation in CJA's Supervised Release program contributes to the clients being far less likely to be sentenced to imprisonment than non-clients.

In this research we test only if any imprisonment sentence is imposed but not differences between clients and comparison group defendants in the sentence lengths when they occur. It is not possible from the data to reliably determine actual amounts of time defendants might serve after accounting for pretrial detention time and any good-time credit that might be applied to imprisonment sentences.

### **Case processing for MSR clients and the comparison group cases**

Most bail set cases are scheduled for the first post-arraignment appearance within five days. This is due to requirements set forth in New York State's Criminal Procedure Law (CPL § 180.80), which governs allowable time for the prosecution to move forward on the initial felony complaint for defendants held at arraignment. However, during the program planning process, case processing times from Criminal Court arraignment to the first post-arraignment appearance for ROR defendants were found to be highly variable. For this reason the program proposed a more regularly scheduled interval to the first post-arraignment appearance.

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in both groups the original conviction subsequently may have been withdrawn and a new disposition such as a dismissal or ACD substituted after successful completion of a treatment program.

Table 4 illustrates the mean (mathematical average) and median (midpoint) time from Criminal Court arraignment to the first post-arraignment appearance for MSR client and comparison group cases, shown by release status and overall.

<b>Table 4</b>		
<b>Time from Criminal Court Arraignment to the First Post-Arraignment Appearance</b>		
<b>Group</b>	<b>Mean days</b>	<b>Median days</b>
MSR clients (N = 568)	31.3	40.0
Comparison group – ROR (N = 652)	68.4	80.0
Comparison group – bail set (N = 1,009)	5.6	5.0
Comparison group – all (N = 1,661)	30.2	5.0

The mean and median times to the first post-arraignment appearance for clients is about half that of the ROR defendants in the comparison group. The difference in means is significant at the  $p < .000$  level. For cases with bail set at Criminal Court arraignment, the time to the first post-arraignment appearance is much shorter. This interval for the bail set cases conforms to statutory requirements which greatly restrict flexibility in the length of the first adjournment and therefore is not comparable to adjournment lengths for released defendants among MSR clients or ROR defendants.

The proportions of client and comparison group cases adjudicated in Supreme Court are virtually identical, and there is little difference in proportions which reached an adjudicated outcome in Criminal versus Supreme Court within crime categories. For those defendants with cases transferred to Supreme Court for disposition, Table 5 illustrates the time from the Criminal Court arraignment to defendant first appearances in Supreme Court.

<b>Table 5</b> <b>Time from Criminal Court Arraignment to First Appearance in Supreme Court</b>		
<b>Group</b>	<b>Mean days</b>	<b>Median days</b>
MSR clients (N = 225)	93.1	69.0
Comparison group – ROR (N = 114)	123.4	90.0
Comparison group – bail set (N = 533)	51.2	33.0
Comparison group – all (N = 647)	63.9	38.0

MSR clients have their first Supreme Court appearance scheduled sooner than the defendants in the comparison group with an ROR release status at Criminal Court arraignment. This difference is statistically significant at the  $p < .01$  level. Defendants in the comparison group with bail set at Criminal Court arraignment have a substantially shorter time to the first Supreme Court appearance, again most likely affected by procedural requirements for defendants never released pretrial in this comparison group.

Table 6 illustrates the time from Criminal Court arraignment to the 1<sup>st</sup> adjudicated outcome across courts for the MSR client and comparison group cases.

<b>Table 6</b> <b>Time from Criminal Court Arraignment to Disposition</b>		
<b>Group</b>	<b>Mean days</b>	<b>Median days</b>
MSR clients (N = 568)	165.2	151.5
Comparison group – ROR (N = 651)	163.5	140.0
Comparison group – bail set (N = 1,010)	141.3	108.5
Comparison group – all (N = 1,661)	150.0	125.0

Overall case processing times are longer for MSR clients compared to the entire comparison group. Client cases take only a slightly longer time to reach an adjudicated

outcome compared with defendants in the comparison group cases with an ROR release status at Criminal Court arraignment, and this difference is not statistically significant. The MSR client and ROR comparison group cases each have a longer time to reach an adjudicated outcome compared to defendants in the comparison group with bail set at Criminal Court arraignment, which includes cases of both never released and post-arraignment released defendants.

The number of court appearances between Criminal Court arraignment and the appearance at which an adjudicated outcome occurs also varies between the comparison group and the clients. Defendants in the comparison group cases overall have an average of 5.3 court appearances up to the first adjudicated outcome. MSR clients have an average of 5.6 court appearances. This difference is not statistically significant.

Defendants in the comparison group with an arraignment ROR have an average of 3.9 appearances; the difference between these defendants and the clients' 5.6 appearances is statistically significant at the  $p < .000$  level. Defendants for whom bail was set have an average of 6.2 appearances; the difference between the longer average number of court appearances for these defendants and the MSR clients is statistically significant at the  $p < .01$  level. (Data not shown)

### **Pretrial misconduct of MSR clients and comparison group defendants**

In this section we explore differences in two key types of pretrial misconduct, failure-to-appear and re-arrest rates, between the clients and comparison group defendants. For defendants in the comparison group we include misconduct up until the first adjudicated outcome. For MSR clients we include misconduct either until their exit from the program, or the date of their first adjudicated outcome, whichever occurred first.<sup>5</sup>

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<sup>5</sup> A Manhattan Supervised Release client typically would exit the program on the date of the adjudicated outcome or shortly thereafter. Some convicted clients not immediately sentenced upon conviction would continue in the program until a sentence was imposed and may have remained for several weeks or even several months after the initial disposition. Some clients would leave the program before adjudication, including clients removed from the program due to pretrial misconduct or due to issues not related to

However, the analysis of pretrial misconduct does not take into account differences among the groups in time at risk. That is, the amount of non-custodial pretrial detention time between Criminal Court arraignment and disposition. Because virtually all MSR clients are released at arraignment their at-risk time would likely be most similar to those with an arraignment release in the comparison group. For the bail set cases with post-arraignment releases, average time at risk likely would be shorter.

Failure to appear (FTA)

Table 7 illustrates FTA rates for the MSR clients and those in the comparison group. We report the rates for the comparison group in total. We also report the rates for those in the comparison group released at arraignment and those held at arraignment but released at some point prior to the disposition of their case.

We report FTA rates and “Adjusted FTA” rates. The Adjusted FTA rate does not count an FTA if the defendant returns to court within 30 days of the date of the appearance for which they failed to appear.<sup>6</sup>

<b>Table 7 FTA Rates for the MSR clients and Comparison Group</b>				
<b>Group</b>	<b>FTA</b>		<b>Adjusted FTA</b>	
	<b>N</b>	<b>%</b>	<b>N</b>	<b>%</b>
MSR clients (N = 568)	24	4.2	12	2.1
Comparison group – ROR or bail made at arraignment (N = 730)	50	6.8	14	1.9
Comparison group – held at arraignment but released prior to final disposition (N = 490)	33	6.7	4	0.8
Total Comparison group (N = 1,220)	83	6.8	18	1.5

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program participation. For this analysis we do not track misconduct after the first adjudication in order to allow for a closer comparison between the clients and the comparison group.

<sup>6</sup> For this report we only analyze cases with an adjudicated outcome. In some cases the last status of a case is the issuance of a warrant. Issuance of a warrant is not an adjudicated outcome and those cases are excluded from this report. As a result, this report essentially undercounts the number of MSR clients with an FTA. We use the same criteria for including cases in the comparison group and as a result are also undercounting the number of FTAs in that group. Thus, for the purposes of comparing MSR clients to the comparison group our criteria should not have any meaningful effects on the conclusions reached.

Overall FTA rates are low for all groups, but MSR clients have a lower FTA rate than the defendants in the comparison groups who were released at arraignment or at a subsequent point prior to the disposition of their case. This difference is statistically significant at the  $p < .05$  level.

The adjusted FTA rate for clients is fractionally higher than those defendants released at arraignment, and slightly higher than those who were held at arraignment but released at another time prior to the disposition of their case. The difference in the adjusted FTA rate between the clients and those in the comparison group who were ever at risk is not statistically significant.

### Re-arrest rates

We examine re-arrests for MSR clients and the comparison group defendants. For defendants in the comparison group we include all prosecuted arrests that occurred in New York City on any date after the defendant's arraignment and before the date of the first adjudicated outcome. For clients we include all prosecuted arrests that occurred between the program admission date and either the date of the first adjudicated outcome *or* the date of exit from the program, whichever came first.<sup>7</sup> We limit arrests to those that occurred within New York City because we only have immediate access to other NYC arrests for the comparison group. The MSR program tracks all client re-arrests including those that occur in other jurisdictions. Because we cannot do the same for the defendants in the comparison group we do not report on those arrests for the clients. Otherwise the re-arrest rate for clients would be artificially inflated relative to the comparison group. We only include prosecuted arrests, excluding in-custody arrests.

Of the 568 clients in the sample, 147 (25.9%) have at least one in-program arrest. Of the 1,220 defendants in the comparison group who were released at some point prior to the disposition of their case, 261 (21.4%) have at least one arrest between

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<sup>7</sup> For virtually every client the date of entry into MSR is the same date as the arraignment. For five defendants in this analysis entry into MSR came after the arraignment. Four of those defendants entered the program within 1-5 days of the arraignment, and one defendant entered over a month after the arraignment.

# Exhibit 30

STATE OF NEW YORK : COUNTY OF DUTCHESS  
TOWN OF POUGHKEEPSIE JUSTICE COURT

-----x  
THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

Docket No. N/A

- versus -

CHRISTOPHER KUNKELI,

Defendant.

-----x

HEARING

**October 11, 2017**

17 Tucker Drive

Poughkeepsie, New York 12603

BEFORE: HON. PAUL SULLIVAN,  
Town Justice

FOR DEFENDANT: VICTORIA WAGNERMAN, ESQ.  
Assistant Public Defender  
Dutchess County Public Defender's  
Office  
22 Market Street  
Poughkeepsie, New York 12601

*Proceedings electronically recorded.*

*Transcript produced by:*

.....  
**American Legal Transcription**

11 Market Street - Suite 215 - Poughkeepsie, NY 12601

Tel. (845) 452-3090 - Fax: (845) 452-6099

[amlegaltrans@aol.com](mailto:amlegaltrans@aol.com)

## PROCEEDINGS

1 (Transcriber's Note: At times parties  
2 were difficult to hear and  
3 understand.)

4

5 THE COURT: Okay. This is the case of the  
6 People of the State of New York versus Christopher  
7 Kunkeli, represented by the public defender. The  
8 charge is petit larceny. Do you waive formal  
9 reading, rights and charges?

10 MS. WAGNERMAN: Yes, Your Honor. I enter a  
11 plea of not guilty.

12 THE COURT: And you wish to be heard  
13 regarding that?

14 MS. WAGNERMAN: Yes, Your Honor. The  
15 Defendant has lived in LaGrange for 23 years total.  
16 That's where he grew up and that's where he  
17 currently resides with his parents. He does have a  
18 job here at Jordan's Used Auto Sales and he's been  
19 working there for the past one and a half years.

20 I ask that bail be set (indiscernible) not  
21 9,000 over 10,000 and there are some previous  
22 failures to appear, but the defendant has  
23 communicated to me that he (indiscernible)  
24 incarcerated.

25 THE COURT: Bail is set at \$5,000 over 10.

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The matter is adjourned to October 17th, 4:30 p.m.  
Thank you.

MS. WAGNERMAN: October 17th?

THE COURT: 17th. Yes.

MS. WAGNERMAN: What time?

THE COURT: 4:30.

(Proceeding adjourned)

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CERTIFICATION

I, Pietrina Nuccio, certify that the foregoing transcript of the proceedings in the Town of Poughkeepsie Justice Court of The People of the State of New York v. Christopher Kunkeli, Index No. N/A, was prepared using the required transcription equipment and is a true and accurate record of the proceeding to the best of my ability under the circumstances.



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AMERICAN LEGAL TRANSCRIPTION

11 Market Street

Poughkeepsie, New York 12601

Dated: December 7, 2017

# Exhibit 31



**NEW YORK STATE  
Unified Court System**

OFFICE OF COURT ADMINISTRATION  
25 Beaver Street  
New York, New York 10004  
(212) 428-2810

**Division of Administrative Services  
Criminal History Record Search (CHRS) Program**

*Criminal Disposition Information*

<b>Bill To Information</b>	<b>Job No.</b>	<b>Delivery Type</b>	<b>Order Date</b>	<b>Order Time</b>
PAULA GARCIA-SALAZAR 125 BROAD STREET 1900 NEW YORK, NY 10004 UNITED STATES OF AMERICA	4829532	E-mail	12/13/2017	12:25 PM

Name (A.K.A.)	County	Date of Birth	Arrest Date
KUNKELI,CHRISTOPHER	DUTCHESS	03/02/1985	09/17/2014

**Adjourn/Disposition Date, Charge, Disposition, and Sentence Information**

Poughkeepsie City Court

Docket/Case/Serial Number: 14-67430

Court Control Number: 66809395N

Adjourned To: 07/10/2015

Charge: PL 165.05 02 AM 3RD DEGREE - UNAUTHORIZED USE OF A VEHICLE

Disposition/Status: PLED GUILTY

Sentenced to: IMPRISONMENT TS, RESTITUTION,

Charge: VTL 511.2All 02 UM 2ND DEGREE - AGGRAVATED UNLICENSED OPERATION-2ND DEGREE

Disposition/Status: COVERED BY THE PLED TO CHARGE

Poughkeepsie City Court

Docket/Case/Serial Number: 14-67457

Court Control Number: 66809395N

Adjourned To: 07/10/2015

Charge: PL 165.05 02 AM 3RD DEGREE - UNAUTHORIZED USE OF A VEHICLE

Disposition/Status: PLED GUILTY

Sentenced to: IMPRISONMENT TS, RESTITUTION,

**OCA Remarks**

Name (A.K.A.)	County	Date of Birth	Arrest Date
KUNKELI,CHRISTOPHER	DUTCHESS	03/02/1985	12/07/2016

**Adjourn/Disposition Date, Charge, Disposition, and Sentence Information**

Poughkeepsie T.J.

Docket/Case/Serial Number: 16120116  
 Court Control Number: 67933374H  
 Adjourned To: 05/17/2017

Charge: PL 155.25 00 AM - PETIT LARCENY  
 Disposition/Status: PLED GUILTY  
 Sentenced to: IMPRISONMENT 365 DAYS,

Charge: PL 165.40 00 AM 5TH DEGREE - CRIMINAL POSSESSION OF STOLEN PROPERTY  
 Disposition/Status: COVERED BY THE PLED TO CHARGE

Charge: PL 165.45 02 EF 4TH DEGREE - CRIMINAL POSSESSION OF STOLEN PROPERTY  
 Disposition/Status: REDUCED

Charge: PL 155.35 01 DF 3RD DEGREE - GRAND LARCENY  
 Disposition/Status: REDUCED

**OCA Remarks**

Name (A.K.A.)	County	Date of Birth	Arrest Date
KUNKELI,CHRISTOPHER	DUTCHESS	03/02/1985	07/11/2009

**Adjourn/Disposition Date, Charge, Disposition, and Sentence Information**

Wappingers Falls V.J.

Docket/Case/Serial Number: 09070127  
 Court Control Number: 32633352N  
 Adjourned To: 07/13/2010

Charge: VTL 1192.3 03 UM - OPERATING MV UNDER INFLUENCE DRUG OR ALCOHOL  
 Disposition/Status: PLED GUILTY  
 Sentenced to: FINE \$500, LICENSE REVOKED,

Charge: VTL 1192.2 02 EF - OPERATING MV UNDER INFLUENCE DRUG OR ALCOHOL  
 Disposition/Status: REDUCED

Charge: VTL 1217.P 0P I - PARKED WITHIN ONE BLOCK OF FIRE TRUCK  
 Disposition/Status: COVERED BY THE PLED TO CHARGE

Charge: VTL 375.31 31 I - EQUIPMENT VIOLATIONS  
 Disposition/Status: COVERED BY THE PLED TO CHARGE

Charge: VTL 340.A 0A UM - FAILURE RETURN LICENSE, REGISTRATION, PLATES  
Disposition/Status: COVERED BY THE PLED TO CHARGE

Charge: VTL 511.AA AA UM 2ND DEGREE - AGGRAVATED UNLIC OPERATION-ALCOHOL RELATED  
Disposition/Status: COVERED BY THE PLED TO CHARGE

Charge: VTL 1192.2 02 UM - OPERATING MV UNDER INFLUENCE DRUG OR ALCOHOL  
Disposition/Status: COVERED BY THE PLED TO CHARGE

Charge: VTL 1192.3 03 EF - OPERATING MV UNDER INFLUENCE DRUG OR ALCOHOL  
Disposition/Status: REDUCED

Charge: VTL 511.EA EA EF 1ST DEGREE - AGGRAVATED UNLICENSED OPERATION MOTOR VEHICLE  
Disposition/Status: REDUCED

<b>OCA Remarks</b>	
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<b>Name (A.K.A.)</b>	<b>County</b>	<b>Date of Birth</b>	<b>Arrest Date</b>
KUNKELI,CHRISTOPHER (KUNKELI,CHRISTOPHER J)	DUTCHESS	03/02/1985	07/03/2010

**Adjourn/Disposition Date, Charge, Disposition, and Sentence Information**

Lagrange T.J.

Docket/Case/Serial Number: 10070043  
Court Control Number: 64279771R  
Adjourned To: 09/20/2010

Charge: VTL 1120.A 0A I - FAILURE TO KEEP TO THE RIGHT  
Disposition/Status: HELD FOR GRAND JURY

Charge: VTL 1129.A 0A I - FOLLOWING TOO CLOSE  
Disposition/Status: HELD FOR GRAND JURY

Charge: VTL 511.EA EA EF 1ST DEGREE - AGGRAVATED UNLICENSED OPERATION MOTOR VEHICLE  
Disposition/Status: HELD FOR GRAND JURY

Charge: VTL 1192.3 03 UM - OPERATING MV UNDER INFLUENCE DRUG OR ALCOHOL  
Disposition/Status: HELD FOR GRAND JURY

Charge: VTL 1192.2 02 UM - OPERATING MV UNDER INFLUENCE DRUG OR ALCOHOL  
Disposition/Status: HELD FOR GRAND JURY

County Court

Docket/Case/Serial Number: 00271S-2010  
Court Control Number: 64279771R  
Case Disposition Date: 10/21/2010  
Last Activity Date: 05/10/2011

Charge: VTL 1192.2 02 EF - OPERATING MV UNDER INFLUENCE DRUG OR ALCOHOL  
Disposition/Status: VIOLATION OF PROBATION  
Original Sentence: FINE \$1000, - OATC, LICENSE REVOKED 1 YEAR, PROBATION 240 HOURS - 5 YEARS,  
Resentenced to: IMPRISONMENT 1 YEAR,

<b>OCA Remarks</b>	
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Name (A.K.A.)	County	Date of Birth	Arrest Date
KUNKELI,CHRISTOPHER (KUNKELI,CHRISTOPHER J)	DUTCHESS	03/02/1985	03/14/2016

**Adjourn/Disposition Date, Charge, Disposition, and Sentence Information**

Poughkeepsie City Court  
Docket/Case/Serial Number: CR-01456-16  
Court Control Number: 67564841Z  
Adjourned To: 09/13/2016

Charge: PL 140.10 0A BM 3RD DEGREE - CRIMINAL TRESPASS-ENCLOSED PROPERTY  
Disposition/Status: PLED GUILTY  
Sentenced to: IMPRISONMENT 60 DAYS,

<b>OCA Remarks</b>	
--------------------	--

Name (A.K.A.)	County	Date of Birth	Arrest Date
KUNKELI,CHRISTOPHER (KUNKELI,CHRISTOPHER J)	DUTCHESS	03/02/1985	06/25/2016

**Adjourn/Disposition Date, Charge, Disposition, and Sentence Information**

Poughkeepsie City Court  
Docket/Case/Serial Number: CR-03331-16  
Court Control Number: 67712909J  
Adjourned To: 09/13/2016

Charge: PL 155.25 00 AM - PETIT LARCENY  
Disposition/Status: PLED GUILTY  
Sentenced to: IMPRISONMENT 7 MONTHS,

<b>OCA Remarks</b>	
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Name (A.K.A.)	County	Date of Birth	Arrest Date
KUNKELI,CHRISTOPHER	DUTCHESS	03/02/1985	05/13/2016

**Adjourn/Disposition Date, Charge, Disposition, and Sentence Information**

Poughkeepsie T.J.

Docket/Case/Serial Number: 16050445  
 Court Control Number: 67651384J  
 Adjourned To: 08/10/2016

Charge: PL 155.25 00 AM - PETIT LARCENY  
 Disposition/Status: PLED GUILTY  
 Sentenced to: IMPRISONMENT 5 MONTHS,

Charge: PL 155.25 00 AM - PETIT LARCENY  
 Disposition/Status: COVERED BY THE PLED TO CHARGE

<b>OCA Remarks</b>	
--------------------	--

Name (A.K.A.)	County	Date of Birth	Arrest Date
KUNKELI,CHRISTOPHER	ULSTER	03/02/1985	01/23/2009

**Adjourn/Disposition Date, Charge, Disposition, and Sentence Information**

New Paltz T.J.

Docket/Case/Serial Number: 09010691  
 Court Control Number: 32579151Y  
 Adjourned To: 06/17/2009

Charge: VTL 1192.2 02 UM - OPERATING MV UNDER INFLUENCE DRUG OR ALCOHOL  
 Disposition/Status: PLED GUILTY  
 Sentenced to: FINE \$500, LICENSE REVOKED,

Charge: VTL 1192.3 03 UM - OPERATING MV UNDER INFLUENCE DRUG OR ALCOHOL  
 Disposition/Status: COVERED BY THE PLED TO CHARGE

Charge: VTL 1128.A 0A I - FAILURE TO STAY IN SINGLE LANE  
 Disposition/Status: COVERED BY THE PLED TO CHARGE

Charge: VTL 1192.2A 2A UM - OPERATING VEH UNDER INFLUENCE DRUG OR ALCOHOL  
 Disposition/Status: REDUCED

Charge: VTL 1180.D 0D I - SPEEDING VIOLATION  
 Disposition/Status: COVERED BY THE PLED TO CHARGE

<b>OCA Remarks</b>	
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**Law Codes:**

AC	Administrative Code	CPL	Criminal Procedure Law	LOC	Local Law	RP	Real Property Law
ABC	Alcoholic Beverage Control Law	ECL	Environmental Conservation Law	MD	Multiple Dwelling Law	RR	Railroad Law
BL	Banking Law	GB	General Business Law	MHY	Mental Hygiene Law	SW	Social Services Law
CON	Conservation Law	GML	General Municipal Law	PHL	Public Health Law	TL	Transportation Law
COR	Correction Law	LAB	Labor Law	PL	Penal Law	VTL	Vehicle and Traffic Law

**Charge Nomenclature:**

Example: PL 220.03.00 AM

PL (Penal Law) = NYS Law    220.03 = Section    00 = Subsection    AM = Severity 'A' Misdemeanor

**Charge Severity:**

I = Infraction    V = Violation    M = Misdemeanor    F = Felony

**Court Control Number:**

This is preprinted on the NYS Fingerprint Card and used to match court dispositions to the arrest. This arrest specific numeric identifier can be used for contacting courts for case information when a docket (lower court) or case number (Supreme/County Court) is not available (e.g. case data reflects lower court dispositions as Grand Jury, Indicted, or Supreme Court Transfer but no related case number.)

**Case Supplement Data:**

Occasionally, current case disposition data cannot be displayed in the usual manner. We have provided this additional information under the heading of 'Case Supplement Data.' This information may not be complete and you should contact the court for complete case disposition.

UNDER NEW YORK STATE LAW VIOLATIONS AND INFRACTIONS ARE NOT CRIMES.

SEARCH RESULTS ARE BASED ON FINDING AN EXACT MATCH OF THE NAME AND DATE OF BIRTH SUBMITTED.

NYS TOWN AND VILLAGE COURT DISPOSITION DATA IS NOT AVAILABLE FOR THE PERIOD MAY 1991 THROUGH 2002. AS OF MAY 2007, ALL TOWN AND VILLAGE COURTS REPORT TO OCA.

DISCLAIMER: THIS RESPONSE IS BASED ON INFORMATION SUPPLIED BY THE CUSTOMER. ALL ENTRIES ARE AS COMPLETE AND ACCURATE AS THE DATA FURNISHED TO THE OFFICE OF COURT ADMINISTRATION BY THE NYS COURT OF CRIMINAL JURISDICTION.