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NEW YORK NEEDS BAIL REFORM

The City Bar supports efforts by the Governor and Legislature to fix New York's two-tiered bail system, which jails thousands of New Yorkers each year solely because they are unable to pay. New York should enact comprehensive bail reform that, consistent with the U.S. Supreme Court's instruction, will ensure that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception" (United States v. Salerno, 481 U.S. 739, 755 (1987)). The City Bar supports comprehensive bail reform in New York, and believes that such reform should adhere to three basic tenets.

GUIDING PRINCIPLES FOR COMPREHENSIVE BAIL REFORM

(1) Shrink New York's jail population and protect the presumption of innocence

(2) Eliminate race- and wealth-based discrimination in pretrial decision making

(3) Ensure due process

As most recently reaffirmed in 2013 and 2018 reports, the City Bar has stood by its view - expressed in a 1996 report - that "a person charged with a crime is presumed innocent, and that pre-trial detention contributes substantially to a deterioration of an accused's morale, impacts the quality of a detainee's legal defense, artificially inflates the costs of preparing a defense and results in overcrowding of jails all at the most critical stage of the criminal process."[1]

With the Governor, Senate and Assembly each having their own respective proposals for how to accomplish bail reform in New York, the City Bar has used these principles to review and comment on key provisions under consideration.

We urge the Governor, Assembly and Senate to apply these core principles as they consider how to achieve much-needed bail reform in New York.

[1] See Report on A.6799/S.4483 (July 2013), https://www2.nycbar.org/pdf/report/uploads/20072490-BailLegislation.pdf; Report on A.9505-A/S.7505-A (Budget Article VII; Part C) (March 2018), https://s3.amazonaws.com/documents.nycbar.org/files/2017346-BailReformBudget.pdf. To see all of the City Bar's bail reform related reports, visit http://tinyurl.com/ybwp6z9s. (All websites cited in this letter were last visited on March 22, 2019.) These reports were approved by the following City Bar Committees: Civil Rights, Corrections and Community Reentry, Criminal Courts, Criminal Justice Operations, Juvenile Justice, and the Mass Incarceration Task Force.

I. SHRINK NEW YORK'S JAIL POPULATION AND PROTECT THE PRESUMPTION OF INNOCENCE

a. Appearance Tickets for Low-Level Offenses

We support requiring police to issue appearance tickets, rather than make custodial arrests, for misdemeanors and Class E felonies (except in certain enumerated circumstances) to better ensure that freedom before trial, particularly with respect to low-level offenses, becomes the norm in New York rather than the exception.[2] Requiring the use of desk appearance tickets in these circumstances is a commonsense way to avoid needless pre-arraignment incarceration for people charged with low-level offenses, and eliminate the serious collateral consequences that result from unnecessarily removing a person from their families, communities, jobs, and caregiving responsibilities. Moreover, the fact that a person has voluntarily appeared in court pursuant to an appearance ticket should be a significant factor in favor of release at arraignment.

b. Court Appearance Reminders

We support the inclusion of court appearance reminder provisions for people released on recognizance or under non-monetary conditions. The court (or a certified pretrial services agency) would notify such individuals of all court appearances in advance by text message, electronic mail, telephone call or first class mail. This simple and pragmatic measure would further ensure a person's appearance in court and avoid unnecessary warrants and/or revocations of pretrial release.

c. Limit The Use of Preventive Detention for Failing to Appear in Court

Preventive detention for failing to appear in court should be a last resort, and lawmakers should tightly limit its use. Only individuals charged with felony offenses who "willfully and persistently"[3] fail to appear in court after receiving notice of scheduled court appearances should ever be eligible for pretrial incarceration. We believe this is an appropriate standard to apply before resorting to the serious penalty of revoking pretrial release.

II. ELIMINATE RACE- AND WEALTH-BASED DISCRIMINATION IN PRETRIAL DECISION MAKING

a. Elimination of Cash Bail

We support the complete elimination of cash bail to "break the link between paying money and earning freedom."[4] For far too long, our system of monetary bail has created two tiers

[2] CPL 150.20 already permits law enforcement officers to issue appearance tickets, in lieu of arrest, in these circumstances; the proposal would simply require their use in these cases, rather than leaving it to the discretion of the arresting officer.

[3] A.2005-A/ S.1505-A (Budget Article VII); S.2101-A, "Bail Elimination Act of 2019" (https://www.nysenate.gov/legislation/bills/2019/s2101).

[4] A.2005-A/ S.1505-A (Budget Article VII) – Part AA, Subpart A, § 1.

of justice: allowing people who can afford bail to pay for their liberty, and ensuring detention for those who cannot. Since people of color are disproportionately impacted by the criminal legal system and make up a majority of New York's pretrial jail population,[5] eliminating cash bail moves closer to a system in which race and wealth are not factors in pretrial decisions.

We support presumptive release in most cases. Accused people should be released on their own recognizance "unless the court finds on the record that release on recognizance will not reasonably assure the individual's court attendance."[6] In those cases, the court should release the person under non-monetary conditions that are the least restrictive means necessary to reasonably ensure the person's return to court. The court should support its imposition of non-monetary conditions on the record, and a person subject to such conditions should not be required to pay for any part of the cost of release under non-monetary conditions, including the cost of electronic monitoring.

We support limiting electronic monitoring to people charged only with serious or violent felony offenses. It is not appropriate for people charged with non-violent felonies or misdemeanors.

b. Concerns about Use of Risk Assessment Tools in Pretrial Decision-Making

Where a person is subject to a potential loss of liberty before trial, due process requires an individualized assessment based on the unique and specific facts and circumstances of the case. Although some jurisdictions rely on risk assessment tools to measure a defendant's flight risk, we remain deeply concerned that such tools have, and perpetuate, a discriminatory and disparate impact on certain groups, particularly people of color. As such, the City Bar urges the utmost caution in incorporating any risk assessment tool into pretrial decision-making processes.

c. Eligibility for Pretrial Detention

All of the current proposals provide that, under certain circumstances (including where the defendant is charged with a serious violent felony offense), the prosecution may move for pretrial detention if the accused poses a high risk of intentionally failing to appear in court. New York has repeatedly—and rightly—rejected the broad inclusion of perceived public safety risk as a basis for pretrial incarceration. We urge lawmakers to continue that tradition, and not to incorporate generalized public safety considerations[7] into any new bail statute. Including it will only exacerbate the race- and wealth-based inequities that bail reform attempts to address.

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[5] See New York City Bar Association, "Mass Incarceration: Where Do We Go From Here?" (Jan. 2017), at 6 (http://documents.nycbar.org/files/mass_incarceration_where_do_we_go_from_here.pdf), citing Hon. Jonathan Lippman, Independent Commission on New York City Criminal Justice and Incarceration Reform, "Rethinking Rikers Island," More Just NYC (July 13, 2016) (http://www.morejustnyc.com/about-us/#about-us/rethinking-rikers-island).

[6] S.2101-A, Section 4.

[7] To the extent there is concern that a person accused of a crime poses a future potential safety risk to an individual, it should be noted that the bail reform proposals do not diminish existing statutory protections under those circumstances. See e.g., CPL § 530.12(11)(a) and 530.13(8)(a) (court may revoke release and remand defendant where, after hearing, court is satisfied by competent proof that defendant willfully violated order of protection).

d. Data Collection and Analysis

We support a requirement that the Office of Court Administration and/or the chief administrator of the courts collect data and prepare an annual report on pretrial release and detention outcomes. This should include the collection and analysis of such data to determine whether, and the extent to which, racial disparities exist in pretrial decisions to release, set conditions on, or detain individuals. Such transparency is essential to hold courts accountable and to root out implicit or explicit bias in pretrial decisions.

III. ENSURE DUE PROCESS

a. Taking Profit Motives Out of Pretrial Services

We strongly support requiring that pretrial services be provided by public and non-profit entities. This will remove profit motivations from pretrial services and help ensure that pretrial services are focused on the needs of defendants, their communities, and the courts, rather than driven by the economic motivations of third parties. Pretrial services should be provided by a county probation department or nonprofit pretrial services agency.

b. Due Process Considerations with Respect to Electronic Monitoring

We support due process protections for people subjected to electronic monitoring, including the requirement that electronic monitoring can only be imposed after notice and an opportunity to be heard, an individualized determination explained on the record or in writing that no other non-monetary condition or set of conditions will reasonably ensure the person's return to court, and that any electronic monitoring method or device imposed be the least restrictive method and as unobtrusive as possible. Electronic monitoring should be conducted only by a public entity under the supervision and control of a county or municipality or a non-profit entity under contract to the county, municipality or the state; private for-profit entities should not be used for such purposes. We also support regular, periodic review of electronic monitoring orders to ensure that such monitoring is still the least restrictive means necessary to ensure the person's future appearance in court.

Where a non-monetary condition of release has been imposed, we support mandatory review of such condition at each subsequent court appearance, during which the court should consider a lessening or modification of conditions to a less burdensome form based on the person's compliance with existing conditions of release. This is a commonsense way to evaluate conditions of release and ensure that the least restrictive means to ensure the person's return to court are being used throughout the period of pretrial release; review of conditions of release at court appearances also incentivizes people to comply with such conditions and earn the right to have them lifted.

c. Due Process Considerations with Respect to Pretrial Detention

i. *Timing of hearing*

We support the recommendation that detention hearings be held within two days. Three business days can easily become five or six if there is an intervening weekend and/or holiday, and such a lengthy period of time comes at a significant cost to the detainee.

ii. *Require prosecutor to show a likelihood of success on preventive detention motion before allowing pre-hearing detention*

We support a requirement that prosecutors who seek to detain an accused person show a likelihood of success on their detention motion and, if successful, only then allow the court to order prehearing detention or set any other release condition. Permitting the imposition of prehearing detention merely because the prosecution indicates an intent to file a motion erodes the constitutional rights to pretrial liberty and the presumption of innocence.

iii. *Discovery before pretrial detention hearing*

We support requiring the prosecution to furnish specified discovery to the defense before a pretrial detention hearing. That is, we support the disclosure of the complaint and supporting documents; police reports; all statements, written or recorded or summarized in any writing or recording, and the substance of all oral statements, made by the defendant or a co-defendant; all statements, written or recorded or summarized in any writing or recording, made by persons whom the prosecutor knows to have evidence or information that relate to the subject matter of the case; all statements or reports upon which the prosecution relies in the hearing; and all facts, evidence, and information favorable to the defendant, including but not limited to, information that tends to negate the defendant's guilt or that tends to mitigate the defendant's culpability as to a charged offense, tends to support a motion to suppress evidence on constitutional or statutory grounds, or that is relevant to a witness's credibility.[8] We further support requiring the prosecution to present competent, admissible, reliable evidence, and prohibiting the prosecution from relying on hearsay evidence to satisfy its burden.

iv. *Standard for Imposition of Pretrial Detention*

We support a requirement that the people establish by "clear and convincing" evidence that the person poses a high risk of intentional flight for the purpose of evading criminal prosecution and that no conditions or combination of conditions in the community will reasonably ensure the defendant's return to court before a court may order pretrial detention. We also support the inclusion of a presumption that some condition or conditions in the community will reasonably contain a high risk of flight, and that such presumption may only be overcome by clear and convincing evidence. Presumptive release is consistent with the principle that pretrial

[8] To the extent that disclosure of such information could endanger witnesses or others and/or compromise an ongoing investigation, the court can impose protective measures, such as allowing individuals' names and other identifying information to be redacted.

release should be the norm, not the exception, and a clear and convincing standard is appropriate to ensure that courts do not deprive people of pretrial liberty unless it is demonstrably necessary.

We also support provisions to reopen a pretrial detention hearing where the court finds there has been a change in circumstances or that information exists that was not known to the prosecution or to the accused at the time of the hearing which has a material bearing on the outcome of the hearing. We also support a requirement of recurring review of detention orders to ensure that no one is detained when their circumstances no longer require it.

v. *Eliminate the motion-practice exception to the limit on preventive detention*

We support a framework that strictly limits the length of any pretrial detention as well as the number and duration of extensions courts can impose. The time that a person may be held in pretrial detention should not be extended merely because motions are filed in the person's case: indeed, as motions are routinely filed in almost every criminal case, such an exception would swallow the rule.[9]

March 2019

[9] While limiting the duration of pretrial detention also could be addressed through speedy trial reform, we believe it should also be addressed in the bail reform context because of the uncertainty of if and when speedy trial reform will take place.