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**NEW YORK STATE SENATE JUDICIARY COMMITTEE
NEW YORK STATE SENATE CODES COMMITTEE
NEW YORK STATE SENATE HOUSING, CONSTRUCTION AND COMMUNITY
DEVELOPMENT COMMITTEE**

**ONLINE PUBLIC HEARING TO EXAMINE THE RE-OPENING AND OPERATION
OF NEW YORK'S COURTS DURING THE COVID-19 PANDEMIC
AUGUST 21, 2020**

**WRITTEN TESTIMONY OF NEW YORK CITY BAR ASSOCIATION
CONCERNING OPERATIONS OF NEW YORK CITY CRIMINAL
COURTS DURING COVID-19 PANDEMIC**

The New York City Bar Association, through its Committee on Criminal Courts and its Committee on Criminal Justice Operations respectfully submits this written testimony to the above-named New York State Senate Standing Committees and requests that it be included in the record of today's hearing. This testimony is limited to New York City's criminal courts.

Much has been written in the past few weeks about the return to in-person appearances for pending felony cases in New York City's criminal courts. Much has also been written about what's causing a reported recent increase in crime, particularly gun-related crime, in the City: Is the NYPD standing down or stretched too thin? Have criminal courts been too slow to "reopen"? Is it the pandemic's toll on New Yorkers' finances, access to services, and mental health? The closure of schools and camps? Or, is it a "backlog of violence" as one expert recently opined? [WSJ, 8/10/20].¹ Some have even blamed bail reform. While this debate will no doubt continue, one point of consensus has emerged, at least among judges, defense attorneys, prosecutors, and court officials: "court shutdown" is not a factor; the court system is merely a convenient scapegoat. Where there appears to be disagreement among this cohort, however, is on when and how (and why) to resume in-person appearances in New York City's criminal courts. As a bar association with criminal committees comprised of lawyers and judges working across the criminal justice spectrum, we do know this: when members discuss this question privately among themselves, they are largely unified in the view that, given the City's efforts to contain

¹ Ben Chapman, "What's Fueling New York City's Rise in Violent Crime? There Are Several Theories," Wall Street Journal, August 10, 2020, <https://www.wsj.com/articles/whats-fueling-new-york-citys-rise-in-violent-crime-there-are-several-theories-11597064288>

COVID's spread and prevent a "second wave" in the fall, requiring in-person appearances in NYC's criminal courts for routine matters should be the exception, not the rule.

First, to be clear: the City's criminal courts were never "closed" and they are not "reopening" now. At every stage of the pandemic shutdown, due to the laudable efforts of judges, court personnel, court administrators and lawyers, the criminal court system has remained open, just not in a physical sense. Since the pandemic caused the physical shutdown of courthouses in March, individuals arrested and charged with a felony have been seen, either remotely or in person, by a judge who then makes a bail determination. Preliminary hearings have been conducted (often remotely) since May, so that judges may make initial determinations of the sufficiency of the evidence against the accused. Motions have been decided virtually. Search warrants have been ordered and executed, grand jury investigations have continued, and, most recently, grand juries resumed hearing cases in mid-August. Importantly, while some claim that people who would commit violent crimes are at liberty when they'd normally be in custody, the exact opposite is true. Due to the Governor's executive orders suspending speedy trial and indictment requirements, people accused of violent crimes have been held in jail longer than would otherwise be permitted. The claim that New York City's criminal courts have shut down is simply false.

The City's criminal courts are now in transition, and in-person court appearances are being required for an undefined category of felony cases, including routine matters, regardless of whether it is necessary or beneficial or even requested by defendant's counsel. Many of these required court appearances, such as those to issue decisions on motions or for status updates, can easily be conducted remotely. And no matter how diligent court and City staff are in keeping courthouses clean and safe, they cannot completely mitigate COVID's exposure and transmission risks, including those that come from traveling to court on public transportation and from sitting in older, poorly ventilated courtrooms. A better balance can be achieved, one which would follow this guiding principle: a routine matter that can be heard virtually with no harm to any party should be heard virtually. This is a safer and, in fact, more efficient approach. A default presumption of remote appearances under these circumstances would allow far more cases to be heard each day, leaving time for in-person appearances when necessary, such as for hearings, pleas, or where a defendant requests an in-person appearance because witness testimony is involved and there is no other acceptable option for proceeding.

New Yorkers are understandably concerned by the reports of increased violent crime. Officials must work to understand the nuanced roots of this rise, including New Yorkers' increased frustration, fear, and economic uncertainty. Resuming large scale in-person criminal court operations will not address the problem, and is contrary to public safety recommendations that as many people as possible continue to work remotely.

This conversation would be incomplete if it did not include an acknowledgement of the racial inequity in our City's high-volume courts. We know that Black New Yorkers and New Yorkers of color are disproportionately arrested, accused, convicted, and jailed in our City. These are the New Yorkers who will be disproportionately harmed by having to travel to and wait inside courthouses without a good reason for doing so, just as they have been disproportionately harmed by the pandemic.

Our recommendation is that the courts focus on streamlining the current system by improving and expanding remote appearances and leaving space for in-person appearances only when necessary or beneficial. This is the best approach to adjudicating criminal matters in a City still grappling with a deadly pandemic. We understand that minds may differ as to the level of risk involved with traveling to and appearing in court, but presumably (most) everyone would agree that even a small amount of risk would weigh against an in-person appearance in routine matters where the appearance could be accomplished over video-conference without harm to any party.

Thank you for your consideration.