

Courts in Crisis

In the spring of 2020, faced with terrifying uncertainties presented by an unprecedented global health crisis, our criminal justice system stakeholders worked together to protect public health by employing strategies to reduce the county jail population. One strategy employed during this time was the coordinated effort to conduct 4,308 detention review hearings and review 1,378 written petitions for release which resulted in the release of 1,474 people from custody. These releases combined with changes in arrest and other policies contributed to a historically low jail population of 3,645 people on May 08, 2020.

While we reduced the jail population significantly, these increased releases were achieved without any compromise to public safety. Notably, in the nine months following release, we have observed substantially similar rates of re-arrest as was reported in the city from 2012-2015.¹ Records indicate 76% of those released during the emergency petitions and expedited hearings have remained arrest-free and less than 4% of those re-arrested are alleged to have committed an act of violence.

Despite these successes since May of 2020 we have observed a steady rise in the jail population, particularly those pending charges, and more troublingly, even greater racial disproportionality than before the pandemic began. With the severe backlog of cases resulting from the COVID-19 crisis, this means presumptively innocent people will likely remain in custody for a year before they ever get their trial. We at Defender believe there is a better way – and call to create a more thoughtful transparent structure that effectively balances public safety without compromising the due process protections of people charged with crimes.

Call for Pretrial Reforms

The Defender Association of Philadelphia continues to call for an end to our local systems' reliance on the use of monetary conditions of bail as a detention tool. Our plan, originally agreed to by the District Attorney Office and presented to the courts in 2018, endorses the development and implementation of a transparent process for courts to make individualized decisions about who can be safely released into the community and who must be detained pretrial to protect public safety.

The systemic use of monetary conditions of bail results in the unnecessary and racially disproportionate detention of people who could, but for their poverty, otherwise be safely released to the community. It also permits those with access to wealth, who pose extraordinary risks to public safety, to buy their freedom.

This system has a devastating impact on our clients, the victims of crimes, and the communities in which they reside. Unnecessary pretrial detention is correlated not only with harmful case outcomes but also long-term impacts on community safety. People who are detained pretrial are more likely to be convicted, go to prison, and serve lengthier prison terms than similarly situated peers. Upon release, they are also more likely to be re-arrested both while their case is pending resolution and up to two years after their jail stay. We attribute this re-arrest rates to the spiraling and often unintended impact of pretrial detention on our clients, their families and neighborhoods. The removal of our clients from their roles in family and community place extra-ordinary child-rearing and financial burdens on already taxed kin networks and de-stabilize family units. These economic and child-rearing consequences are exacerbated by the unprecedented financial and health crisis presented by COVID-19.

¹ [Calculating a Unified Recidivism Rate for Philadelphia: A Data Snapshot of Reentry and Recidivism 2012-2015](#) (2018). The Philadelphia Reentry Coalition.

These burdens have not historically and are not now evenly borne. While there is always a racial divide in the length of pretrial detention, the confluence of COVID-19 court closures, modified police practices, and emergency petitions for release has exacerbated this problem. Currently, Black pretrial detentioners are held on average for more than 2 months longer than their White counterparts. This disproportionality is attributed in large measure to White defendant's greater access to financial resources necessary to pay financial conditions of release.

The District Attorney's Office's, simulated 'no cash bail' policy exacerbates this issue. Firstly, in a six-week snapshot from September 1, 2020 through October 15, 2020, our office represented clients at 3,595 preliminary arraignments. The District Attorney's Office requested cash bail at 1,794 of these hearings, with 1,573 of the requests for \$999,999. Cash bail was set in 1,757 of the hearings.

If not Cash Bail then What?

The reliance on financial conditions of release is both misplaced and unnecessary because our rules of Criminal Procedure, and federal and state constitution provide a better way, one that properly balances a presumptively innocent person's right to liberty against the possibility that the person's pretrial release might pose a real threat to community safety. Our plan achieves that balance by

- (1) Creating a presumption that pretrial release is the norm;
- (2) Limiting the types of offenses for which the DAO can seek pretrial detention to those crimes that reflect a real danger to an individual or the community;
- (3) Requiring that any pretrial condition of release imposed by the court is narrowly tailored and the least restrictive means to provide a reasonable assurance that the person will appear in court as directed and remain law-abiding if released.
- (4) Compelling the courts to hold a hearing with adequate procedural safeguards before detaining someone. These safeguards include at a minimum
 - a. The prosecutor will have to present some evidence that the defendant committed the crime as charge;
 - b. Then if the court finds there is reason to believe the defendant committed the crime as charged, the DAO would then have to present some evidence that the defendant's release presents a threat to public safety;
 - c. If the court finds that release does present a risk the public safety, then the DAO will have to present some evidence that no condition or combination of release are sufficient to provide a reasonable assurance of public safety and prove that the court must detain the person pending the resolution of the case; and
 - d. Defendants will be represented by counsel and must have the right to cross-examine witnesses against them and present evidence on their own behalf both as to the issue of crime charged; any threat to the community they pose; and what conditions of release would mitigate those concerns.
- (5) Providing the defendant with the right to have that detention decision reviewed; and
- (6) Ensuring speedy trial protections guard against indeterminable detention prior to any actual finding of guilt.

To be clear, the Defender Association is not calling for the immediate and complete eradication of the use of cash bail. But we continue our long-standing objection to the current system's unlawful use of cash bail for the purpose of detention. In accordance with the ABA Guidelines, NAPSAs Standards, and federal and state constitutional law we discourage the use of financial conditions of bail to provide assurances of public safety. We recognize there may be instances when cash bail may actually be the least restrictive

condition available to the court to provide a reasonable assurance of the defendant's appearance in court. But cash bail should be just one, of many tools, available to the court. In the cases of our clients, all of whom qualify for our services by virtue of their indigency, it must be one of last resort imposed only after the court carefully considers our clients' ability to pay.

This proposal enables the court to make individualized assessments of the unique nature of the charges and the person's circumstances and make better upfront, transparent choices about who should be detained or released while their criminal charge is pending. It does not prevent the court from detaining people who present real public safety challenges. But it does require the court to make specific factual findings and conclusions of law prior to ordering detention. This transparent process achieves a more effective balance between the defendant's right to be free from unnecessary detention and the community's interest in safety and eliminates the harms caused by our current system of wealth based detention.