CJA | NEW YORK CITY CRIMINAL JUSTICE AGENCY

The Future of Bail
Committee on Justice System
New York City Council
Aubrey Fox Testimony, Executive Director, CJA
December 12, 2018

Thank you Chair Lancman and members of the Committee on the Justice System for the opportunity to testify on my agency's work on reducing unnecessary pretrial detention and in helping defendants and their families pay bail when it is imposed.

Context: Bails are Down by 40 Percent Since 2013
Since CJA's founding in 1977, we have worked to provide judges and other court stakeholders with practical tools and information useful in reducing reliance on money bail as a means of securing pretrial release.

One of the remarkable aspects of New York City is how infrequently it relies on bail as a pretrial release outcome. We have been collecting data about pretrial release outcomes in a consistent fashion since 1987 and in the first decade, total bails ranged from around 70,000 to as many as 83,000 annually. Fast forward to 2018, and as of the end of November, the total number of bails is 28,010.

Thirty years is a long time to measure anything, but even if you look at more recent history, bail is being used far less frequently. For example, in 2013, there were 52,682 total bails. That means that in the last six years, total bails have gone down by more than 40 percent.

One simple explanation for this decline is that there are roughly 30 percent fewer cases continued at arraignment so far this year than there were in 2013. But another important factor is that bail is being used less frequently, and ROR and Supervised Release more frequently, as a proportion of continued cases. If you take out those defendants whose cases are dismissed at arraignment, or plead guilty, bail was imposed as a pretrial release condition in 30 percent of cases in 2013, but only 23 percent of cases in 2018. Alternatively, the percentage of defendants given a release on recognizance has increased from 69 to 72 percent, and an additional four percent of defendants receive Supervised Release.

In fact, there are now three times as many people being given a release on recognizance at arraignment as are receiving bail as a condition of pretrial release. That has never happened before in New York City. And, although a higher share of defendants are getting ROR, court appearance rates are high and getting higher for those defendants: in 2018, 88 percent of defendants given an ROR appeared for all their court dates, compared to 86 percent in 2013.

CJA's Bail Expediting Program
These figures are an example of how New York City, absent major state legislative reform, has made progress towards reducing reliance on money bail.

Money bail is still being used in our system, however, and through CJA's Bail Expediting Program, we work to assist defendants who have bail set at $5,000 or less in every borough except Staten Island. With the support from the New York City Council and the Mayor's Office of Criminal Justice, in 2017 we were able to increase eligibility to $5,000 bail – before it was $3,500 in Manhattan, Brooklyn and Queens, and $2,500 in the Bronx.

Citywide, for defendants with bail of $5,000 or less, 16 percent paid bail at arraignments in 2018. It's a small proportion but it is up from 11 percent in 2014 and 13 percent in 2016. Even a single percentage point increase can have big impacts when you consider that to date in 2018, 15,712 defendants received bail of $5,000 or less.

The attached flow chart gives a lot of detail about how BEX operates. I am happy to answer any detailed questions you might have, but I wanted to highlight three factors that you might find particularly interesting.

The Importance of Contacts in Paying Bail: One service BEX provides is contacting family members and friends who can pay a defendant's bail and giving them specific instructions about how to pay bail.

In 2018, of the total 15,712 eligible bailed defendants, BEX has worked closely with 6,944 who provided CJA with the name and phone number of someone who can pay their bail. That's what we mean when we say 6,944 defendants were "fully treated" by BEX.

When given contact information, we were able to help 28 percent of defendants pay bail at arraignment and 19 percent pay bail within two days of arraignment, compared to only 16 percent of defendants who paid bail at arraignment and 9 percent within two days.

Put another way, when we were able to contact a surety, half of defendants paid bail at arraignment or within two days, versus only one in four where we were unable to get surety information.

How Local Law 124 Has Helped Defendants: CJA also has the authority to issue a hold with the Department of Correction to prevent defendants from being transported from court to a local correctional facility while bail payment is being worked out. Last year, the City Council passed legislation increasing CJA's hold time to between four and 12 hours. This has been hugely beneficial to defendants and their sureties who need more time to arrange bail payment. Before Local Law 124, some boroughs allowed for two hour holds and others three hours. Now every borough allows for at least four hours and

in Manhattan, the practice is to allow for six hours. While this amount of time is sufficient for most defendants, when we need to ask for more, we are to request it from DOC.

More Holds Are Being Issued by CJA: We carefully track the number of times we issue holds and how often they result in someone paying bail at arraignment. What we have found is that even as the total number of bails has gone down, we are on track to issue more holds in 2018 than we did in previous years. Through the end of November, we have issued 1,830 holds, with a 71 percent success rate. In 2017, CJA issued 1,812 holds, of which a similar percentage resulted in bail being paid before the defendant was transported to jail. All told, in 2018, we issued holds on 7 percent of all bailed cases, compared to 5 percent in 2017.

Future Improvements

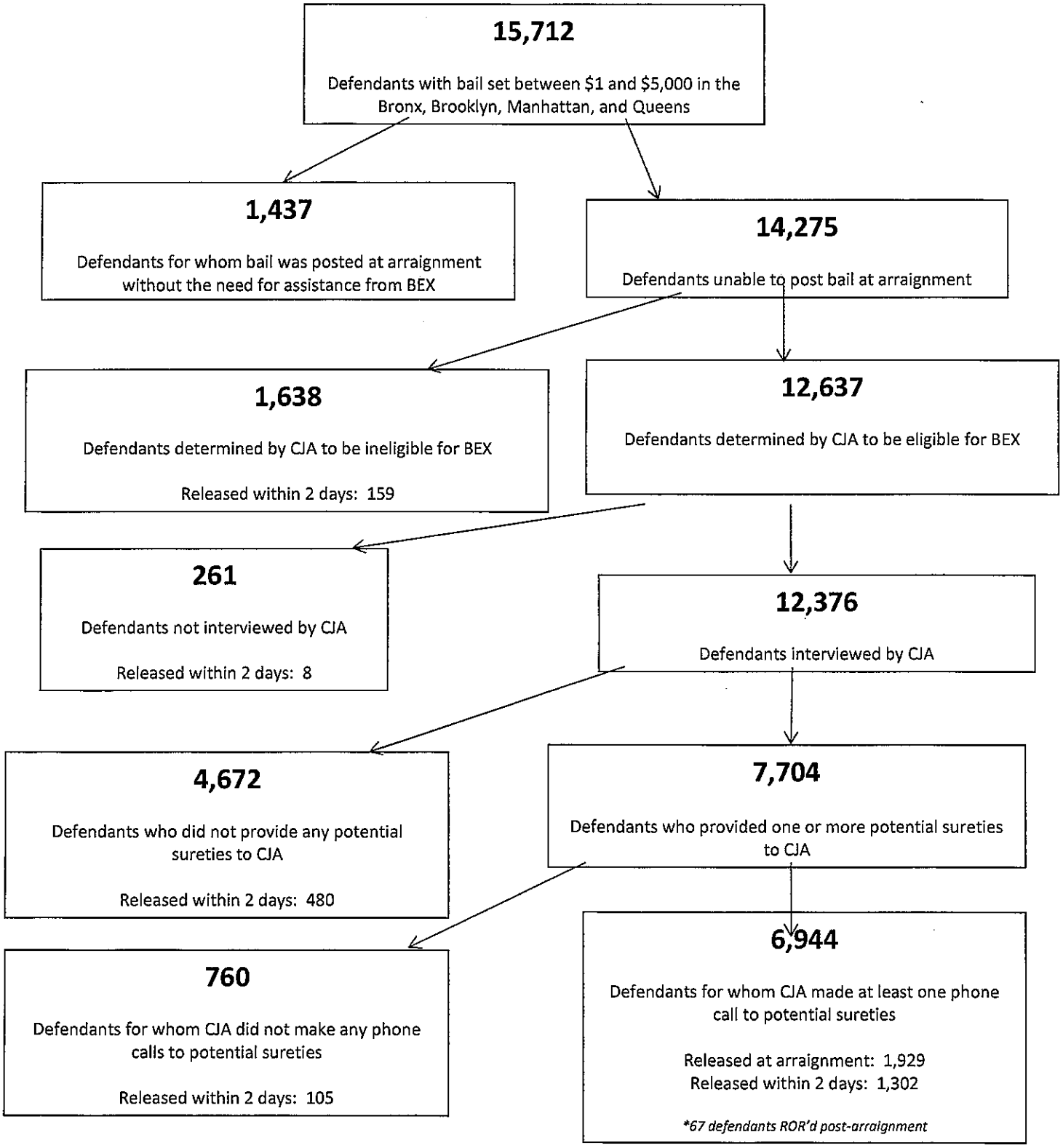
At CJA, we work continually to try and improve how BEX operates. As the attached flow chart shows, we have a lot of information now than we ever did about each stage of the bail payment process and where there are potential bottlenecks. This came about because we changed the way we collect and report BEX data in late 2017.

We use this data to improve our internal operations. One example is how often we make at least one phone call to a surety when a defendant gives the information to us. In 2018, we called 90 percent of the time, and we can do better. It should be 100 percent.

We are also working with the City on an expansion of the BEX program which would allow us to serve all defendants aged 16 and 17, regardless of bail amount.

Thank you for this opportunity to testify and I am happy to answer any questions you might have.

BEX – January to November 2018



6,944	Defendants fully treated by CJA for BEX
8,768	Defendants not fully treated by CJA for BEX
28%	Rate of release at arraignment for defendants fully treated by CJA for BEX
16%	Rate of release at arraignment for defendants not fully treated by CJA for BEX
19%	Rate of release within 2 days of arraignment for defendants fully treated by CJA for BEX
9%	Rate of release within 2 days of arraignment for defendants not fully treated by CJA for BEX
1,830	Number of holds placed
71%	Rate of release at arraignment of defendants for whom a hold is placed

The Bronx Defenders | Redefining public defense

New York City Council
Committee on Justice System
Oversight Hearing on
The Future of Bail
December 12, 2018
Testimony of The Bronx Defenders
By Dawit Getachew

Chairman Lancman, and members of the Committee, my name is Dawit Getachew and I am a criminal defense attorney and the Associate Special Counsel to the Criminal Defense Practice at The Bronx Defenders. Thank you for the opportunity to testify today.

The Bronx Defenders is a community-based and nationally recognized holistic public defender office dedicated to serving the people of the Bronx. The Bronx Defenders provides innovative, holistic, client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people of the Bronx. Our staff of over 300 represents approximately 28,000 individuals each year. In the Bronx and beyond, The Bronx Defenders promotes criminal justice reform to dismantle the culture of mass incarceration.

As the end of 2018 approaches, the need to fix New York City's broken bail system is no longer up for debate. The consensus among New Yorkers is that people should not stay in jail simply because they cannot afford to pay for their freedom. To this end, various stakeholders, including the City Council, have taken steps over the past year to address some of the obstacles that the current bail system erects against our clients and their families. The Bronx Defenders welcomes these efforts and we appreciate the opportunity to provide our feedback on some of the measures that have been implemented thus far. In particular, we hope to relay our experiences, as public defenders, with the use of alternative forms of bail; the Bail Assessment pilot project implemented by The Vera Institute of Justice, and Criminal Justice Agency's Bail Expediting Program.

Although New York's bail statute authorizes nine types of bail, its courts have historically favored setting bail in the form of cash bail and insurance company bond. The practice of limiting the options to the two most onerous forms of bail continues to subject many of our clients to an extended stay in jail because they are unable to raise the funds necessary for their release while their case is pending. It also requires them to rely exclusively on for-profit bail bonds companies which proves to be costly in the form of non-refundable premiums and fees.

Providing alternative options of bail payment dramatically increases the likelihood that people will avoid unnecessary pre-trial detention while fulfilling the only purpose for bail; assuring their appearance in future court proceedings for their case. Two forms in particular -- partially secured and unsecured bonds -- do not require people to put up a large amount of financial resources at the beginning of their case and are less burdensome for those with limited ability to pay bail. In fact, we have seen in our practice that clients who've had partially secured bond set in their case were more likely to post bail than those who were limited to cash bail or insurance company bond. Furthermore, alternatives like partially secured bond, eases the bail payment process and increases the chance that clients will be released from the court and avoid jail time altogether. In contrast, the process of securing the service of a bail bonds company generally requires time that virtually guarantees that clients will be held in for many additional hours, if not days, for bail to be posted. This delay, not only disrupts the lives of our clients but also costs New York City taxpayers by needlessly keeping people in jail.

Take for instance one of my clients, John, who was arrested on felony charges earlier this year. By any measure, John was eligible to be released on his own recognizance. He had no criminal record or prior failures to appear in court. Born and raised in the Bronx, he was employed and lived with his wife and two children. Family members were also present at the courthouse in support. During the interview prior to his arraignment, it was clear that John was very worried that he would lose his job if he didn't show up to work the following morning. He was more concerned about the prospect of not being able to financially support his family than spending the night in jail. Although the court set cash bail in his case, it also provided the option for partially secured bond in the amount of $10,000 with a 10 percent deposit. John's brother was able to step in as surety following the arraignment and posted the required amount immediately. John was released shortly thereafter.

Although John's family had gathered some amount of money, it wasn't nearly enough for the cash bail. Furthermore, given that John's arraignment occurred late at night, the option of going to a bail bonds company was not feasible without risking that John would be transported to Rikers. The court's decision to set partially secured bond in ensured that John was able to reunite with his family that night and likely averted the loss of his job. Since then, John has appeared for all of his court dates while maintaining his employment and the ability to support his family.

The outcome in John's case, however, remains unusual for many of our clients because cash bail and insurance company bond remain the primary and often the only options that are made available to them. We recognize that there has been an uptick in the use of alternatives forms of bail. Judges are setting partially secured bond and credit card bail in an increasing number of cases. Defense attorneys also regularly request the court to consider partially secured bond as an option when setting bail. Likewise, Vera's Bail Assessment Project has increased awareness about partially secured bond among judges, attorneys, clients and their families.

Although this trend is encouraging, there continues to be significant inertia against normalizing the use of alternative forms of bail in the courts. The use of unsecured bond is virtually unheard of. Furthermore, it is rare that judges will set partially secured bond without a specific request from defense attorneys. Even worse, many judges hesitate or outright refuse to provide it as an option when asked by counsel. In some cases, the decisions not to set partially secured bond have effectively remanded our clients.

The reluctance to embrace partially secured bond has become more apparent in light of the efforts by the Bail Assessment Project. Since the pilot began earlier this year, The Bronx Defenders attorneys have referred a number of cases to the Bail Assessment Project which conducts an independent assessment of our clients' ability to pay bail and make recommendations to the court as to the appropriate type and amount of bail based on their findings. The majority of our clients that we referred to the project were found to have no ability to pay bail. In the cases where it found that client had some resources, the Bail Assessment Project routinely recommended partially secured bond if bail was set. Despite the recommendation, bail was set only as cash bail and insurance company. While judges did occasionally set partially secured bond, the amount was often higher than what our clients were assessed to afford, which undermined the entire purpose of providing an alternative form of bail.

The sluggish pace to change the status quo when it comes to bail setting practices is partly because our clients and their families are often the only ones paying the price by the delay. Unfortunately, we are faced with a culture in our courts that is resistant to change including seemingly minor adjustments in day-to-day court operations. For example, when family members seek to post a partially secured bond is set at arraignments, the court often has to take a few minutes to swear in the surety and review the associated paperwork for the bond to be posted. This brief procedure, that courts regularly conduct for bail bond companies, seems to be treated as an annoyance that interrupts the regular proceedings rather than an integral facet of our court system.

Our clients continue to face other obstacles when attempting to navigate the process of posting the bond. The paperwork associated with partially secured bond can be daunting for our clients, and attorneys or other advocates have to regularly step in to assist them with the process. Furthermore, we are concerned that the inquiries by some judges when people seek to post bond can be arbitrary and onerous. There have been instances where judges have required excessive and unnecessary documentation as proof of income and assets erecting another set of obstacles and possibly delaying the release of our clients.

We also support the measures that are in place to keep people in the courthouse for a period of time where there is a likelihood that bail will be paid. The Criminal Justice Agency's Bail Expediting Program has played an important role in ensuring that people will not be turned over to the custody of Department of Corrections and facilitating in-court bail payment by contacting friends and family members who could potentially post bail before client's are removed from the courthouse. We also note that the CJA is currently interfacing with bail funds and have recently informed us that they now place holds on all bail fund eligible clients without CJA checking for sureties.

We have also seen an increased willingness on the part of DOC to honor courthouse holds for our clients. Nevertheless, we have noticed that occasionally, clients slip through the cracks and are shipped to Rikers Island due to some oversight. For example, in one case where an attorney placed a hold on a client who had a partially secured bond set at his arraignment because a family member intended to place bail was still transported to Rikers. No explanation was provided as to why this occurred though the attorney speculates that her client shared the same first and last name as another person who was arraigned around the same time. While we recognize that administrative errors can and do occur, the stakes and consequences are far too great to simply brush them aside.

Recommendations

The Bronx Defenders is encouraged by the City Council's attention towards addressing some of the problems plaguing our bail payment system and the tangible improvements that have been made over the past year. There is still a lot of work to do.

Our recommendations are as follows:

- Raising awareness of additional forms of bail and educating stakeholder on the use of alternatives;
- Encouraging judges to set alternative forms of bail that are less onerous than insurance company bonds and to impose the least financially burdensome conditions necessary to ensure that people return to court;

- Simplifying the paperwork and procedures required for alternative forms of bail;
- Expanding the use independent assessments such as, Bail Calculator implemented by the Bail Assessment Project, to determine a person's ability to pay prior to selecting the form of bail; and
- Providing resources for additional bail facilitators in the criminal court.

These recommendations are sensible and necessary steps towards improving the current bail setting practices and changing the culture in the criminal courts. It's important to note, however, that the problems facing our current bail system are long standing and deeply structural. As such, we are in need of comprehensive solutions if we are to redress the tremendous hardship inflicted upon New Yorkers involved in the criminal justice system.

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TESTIMONY OF THE LEGAL AID SOCIETY

The New York City Council

Committee on the Justice System

Public Hearing on The Future of Bail

December 12, 2018

New York, New York

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Introduction

Thank you for the opportunity to testify concerning our clients' and attorneys' experiences with the current operation of the bail system in New York City. We submit this testimony on behalf of The Legal Aid Society, and thank Chair Rory Lancman and the Committees on the Justice System for inviting our thoughts on the subject. We applaud the Council for its concern about the devastating impact of bail can have on the people of New York City. The problem is particularly acute in low-income neighborhoods, and disproportionately impacts people of color. The problem is also fixable, and we laud the City Council for the steps it has taken over the past several years to address it.

Since 1876, The Legal Aid Society has been committed to providing quality legal representation to low-income New Yorkers. We are dedicated to ensuring that no New Yorker is denied access to justice because of poverty. The Criminal Defense Practice of The Legal Aid Society ("The Society") is the largest defender organization in New York City, representing a very substantial proportion of the persons charged with crimes in New York City. The Special Litigation Unit observes city-wide trends in policing, prosecutorial, and judicial decision-making, prepares strategic impact litigation and consults on policy reform with multiple levels of government. The Society also pursues impact litigation and other law reform initiatives on behalf of our clients.

In June 2016, the Society launched the Decarceration Project, with the goal of eradicating the pretrial incarceration of New Yorkers because they are too poor to buy their way out of jail. Every day our attorneys provide assistance to people who are held on Rikers Island, fighting to ensure that all New Yorkers have a fair chance at obtaining their freedom.

Alternative Forms of Bail

The Legal Aid Society has long supported the greater use of unsecured and partially secured bonds in New York City courts to release our clients. While the New York legislature passed an expansive statutory scheme in the 1970s aimed at reducing the jail population it has never been utilized to its full potential. This chronic misuse of the statute has had devastating consequences for our clients. A study conducted by the Legal Aid Society, controlling for other causal factors, found that setting bail resulted in a 34% increase in the chances of being found guilty.[1]

It is now well known that New York City judges—as a practice—rarely use the less restrictive forms of bail authorized by the statute and typically act without determining whether the defendants can pay. As former Chief Judge Jonathan Lipmann recently observed "[t]here is precious little evidence that either

[1] Kristian Lunn, Erwin Ma & Mike Baiocchi, The Causal Impact of Bail on Case Outcomes For Indigent Defendants in New York City 3 Observational Stud. 39, 58 (2017).

prosecutors or judges consider a person's ability to pay bail."[2] And while New York's bail statute permits the setting of bail only to the extent the individual poses a flight risk, data suggests that severity of the charge, not the risk of flight, is the single most significant factor in a bail-setting court's bail determination.[3] That is so even though studies show that charge severity has no bearing on rate of return.[4]

As a direct result of these bail-setting practices, 68% of people admitted to a New York City jail in 2017 were admitted because they were unable to make bail at arraignment.[5] Of those, 32%—or 4,636 individuals—spent at least five days and up to one year in jail.[6] Data suggests that in 2016, on any given day, between 52% and 75% of the city jail population is comprised of pretrial detainees unable to make bail.[7] One study found that most of those confined "could not afford bail of

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[2] See Hon. Jonathan Lippman *et al.*, *A More Just New York City at* 44 (Apr. 2017), *available at* http://www.morejustnyc; See Insha Rahman, Vera Inst. of Justice, Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts 4 (2017) [hereinafter "2017 Vera Bail Study"] ("Setting bail on more than 40,000 cases annually, judges in New York City rarely impose . . . alternatives.").

[3] See Lippman Report at 41 ("As might be expected, the use of bail increases along with charge severity . . bail is set in 18 percent of misdemeanor cases, compared to 47 percent of nonviolent felonies and 63 percent of violent felonies."); Mary T. Phillips, N.Y.C. Criminal Justice Agency, Inc., A Decade of Bail Research in New York City 55 (2012) [hereinafter "2012 CJA Bail Study] (noting "widespread acknowledgment" that judges, as a practical matter, are reluctant to release felony defendants because of danger to the public, a rationale not permitted by law).

[4] 2012 CJA Bail Study, at 54–55 (noting the notion that a more severe charge leads to increased failure to returns "is not borne out by the data," and that, in fact, the failure to appear rate (12%) was lower for felony defendants than those charged with a misdemeanor or less severe charges (16%) among arrests in 2009).

[5] Office of the New York City Comptroller, The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC, at 11 (2018).

[6] Id. at 14.

[7] See Letter from Ronnie Lowenstein, Dir., N.Y.C. Independent Budget Office, to Rory Lancman, Council Member, N.Y.C. Council (May 16, 2017), at 3; 2017 Vera Bail Study at 7.

$2,500 or less—with 31 percent of the non-felony defendants held on bond amounts of $500 or less."[8]

When a person is denied his or her pretrial liberty, it can be life altering, resulting in the destruction of family ties, loss of employment, and in cases involving New York's homeless, loss of a shelter and a bed. See Gerstein v. Pugh, 420 U.S. 103 (1975) ("The consequences of prolonged detention may be more serious than the interference caused by arrest. Pretrial confinement may imperil he suspect's job interrupt his source of income, and impair his family relationships." (citing studies)).

Pretrial detention also hinders preparation of an effective defense by impeding presumptively innocent detainees from helping to collect evidence or seek out witnesses. As a result, as a bail study by the New York City Criminal Justice Agency ("CJA") has shown, individuals who were detained pretrial were more likely to be convicted, less likely to have their charges reduced, and more likely to be sentenced to jail or prison than those who remained free before trial.[9] See also People v. Johnson, 27 N.Y.3d 199, 209 (2018) (J. Pigott, concurring) ("It has long been known that a defendant at liberty pending trial already stands a better chance of not being convicted or, if convicted, of not receiving a prison sentence, than those who are detained before trial." (citing studies)).

[8] See Ram Subramanian et al., Vera Inst. for Justice, Incarceration's Front Door: The Misuse of Jails in America 32 (2015).
[9] 2012 CJA Bail Study at 11.

Unnecessary pretrial detention disproportionately affects ethnic and racial minority groups.[10] Black people in New York City are jailed at roughly twelve times the rate of White people, and Latinos five times the rate of White people.[11] A recent study conducted by the New York Civil Liberties Union of eight counties outside of New York City found that White New Yorkers were nearly two times more likely than Black New Yorkers to be released the same day bail was set. [12]

Data suggests that alternative forms of bail that do not require payment of any or significant monies up-front, such as unsecured appearance bonds, partially secured bonds, and credit card bail, are actually just as effective—if not more effective—than cash or secured bond for ensuring appearance at court. In a study of the New York City bail system's use of alternative conditions of release, the Vera Institute of Justice found that failure to appear rates were 12% for partially unsecured and unsecured bonds, which was lower than the 14% non-felony failure to appear rate on average citywide, and virtually the same as the 11% citywide average for felony charges.[13] As a result of this data, Vera recommended that "an independent assessment of ability to pay" be introduced and that partially secured bonds be set as a third option, in addition to cash and insurance company bond.[14]

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[10] Justice Policy Institute, Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail 15–16 (2012).
[11] See Subramanian, et al at 11.
[12] NYCLU, Presumed Innocent for a Price: The Impact of Cash Bail Across Eight New York Counties 2, 4 (2018).
[13] See 2017 Vera Bail Study at 19–20 (in a study of 99 cases, 85 involved partially secured bonds while 14 involved unsecured bonds).
[14] Id. at 26–27.

CJA has also found that providing a credit card option for posting bail resulted in higher pretrial release rates and no increase in the failure to appear.[15] In fact, the failure to appear rate was slightly lower (10%) for defendants who were offered credit card bail than a sample of cases with similar bail amounts (12%).[16]

This data, which focuses on return rates in New York City, is consistent with results in other jurisdictions. For example, the Pretrial Justice Institute conducted a study in Colorado based on 1,970 defendants held in ten county jails over a ten-month period. It found that an unsecured bond was just as—if not more—effective than an secured bond for defendants who were considered low, moderate, or even high flight risks.[17] Another study conducted by the Bureau of Justice Statistics found that federal defendants released from 2008-2010 on unsecured bonds failed to return at a rate of just two percent.[18]

The conclusion here is obvious: expanding the use of partially and unsecured bonds—set in amounts that an individual can pay—will reduce the Rikers Island jail population, maintain a high rate of court appearance, and ensure that the Legislature's vision for a functional and fair bail system is guaranteed for all New Yorkers.

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[15] See Mary T. Phillips, Research Brief: Paying for Bail on Credit 5–6 (2014) (noting, in the study of the use of the credit card bail option, that individuals were much more likely to be released when permitted to pay bail with credit card); Brooklyn Community Bail Fund, Our Results, https://brooklynbailfund.org/our-results (noting that while clients have no financial obligation to bail fund, 95% of clients return for all court dates).

[16] Phillips, 2014 Research Brief at 6.

[17] Michael R. Jones, Pretrial Justice Inst., Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option 11 (2013).

[18] Thomas H. Cohen, Bureau of Just. Statistics, Pretrial Release and Misconduct in Federal Courts 16 (2012).

Ability to Pay

The Legal Aid Society supports efforts by the City Council to ensure that New York City Courts take into consideration our clients' ability to pay any amount of monetary bail set.

Over the last sixty years the Supreme Court of the United States has consistently rejected practices that deny equal protection and due process to indigent criminal defendants because they are poor.[19] See, e.g., Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that individual may not be denied the right to appeal because of an inability to pay for a trial transcript); Douglas v. California, 372 U.S. 353, 358 (1963) (holding that the indigent are entitled to counsel on first direct appeal); Roberts v. LaVallee, 389 U.S. 40, 42–43 (1967) (holding that the indigent are entitled to free transcripts of preliminary hearings for use at trial); Mayer v. Chicago, 404 U.S. 189, 199 (1971) (holding that the indigent cannot be denied an adequate record to appeal a conviction under a fine-only statute); Gideon v. Wainwright, 372 U.S. 335 (1963).

[19] The Supreme Court has explained that because "[d]ue process and equal protection principles converge in the Court's analysis in these cases," the traditional equal protection framework that usually requires analysis under a particular level of scrutiny does not apply. Bearden v. Georgia, 461 U.S. 660, 665, 666 & n.8 (1983) (citation and internal quotation marks omitted). Rather, "[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" Griffin, 351 U.S. at 17 (citation omitted). Thus, the Constitution requires "a careful inquiry into such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose." Bearden, 461 U.S. at 666–67 (citation and internal quotation marks omitted).

On numerous occasions, the Supreme Court has affirmed that incarcerating individuals because they are unable to pay a sum of money, without regard for indigence and meaningful consideration of alternative methods of achieving the state's interest, denies equal protection to an entire class of persons—indigent individuals—while also violating fundamental procedural due process principles. See Bearden v. Georgia, 461 U.S. 660, 671 (1983) (holding that a state may not "punish[] a person for his poverty"). Three principle cases have established these principles and provide guidance here:

In Williams v. Illinois, the Supreme Court rejected the practice of incarcerating poor individuals beyond a statutorily prescribed term of imprisonment because they could not afford to pay outstanding court costs imposed in their cases. 399 U.S. 235, 242 (1970). "[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies," the Court held, "it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." Id. at 241–42.

Similarly, in Tate v. Short, the Court struck down a statute that incarcerated individuals convicted of fines-only offenses in order to "satisfy" outstanding fines because such incarceration "subjected [individuals] to imprisonment solely because of [their] indigency." 401 U.S. 395, 398 (1971). The Court emphasized

that there were "other alternatives to which the state may constitutionally resort to serve its concededly valid interest in enforcing payment of fines." Id. at 399; see also Bandy v. United States, 81 S. Ct. 197, 197–98 (1960) (Douglas J., in chambers) ("To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. . . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?").

In Bearden v. Georgia, the Supreme Court reaffirmed these principles. See 461 U.S. at 662–63. There, the trial court had sentenced the defendant to probation on the condition that he pay a fine, but when he was unable to remit payment, the trial court sentenced him to serve the remainder of his probation in prison. The Supreme Court reversed, finding that under Williams and Tate where a state has determined that its penological interest in punishment is satisfied by imposition of a fine, it may not thereafter imprison someone solely because that person is unable to pay it. Id. at 667–70. Instead, a court "must inquire into the reasons for the failure to pay," and, crucially, if the defendant is unable to pay through no fault of his or her own, a court "must consider alternate measures of punishment other than imprisonment." Id. at 672. Only if those alternate measures are inadequate to serve the government's penological interest may the court imprison someone who cannot pay the fine; "[t]o do otherwise would deprive the probationer of his

conditional freedom simply because, through no fault of his own, he cannot pay the fine." Id. at 672–73.

Thus, a New York City judge who sets monetary bail and incarcerates a presumptively innocent individual without making an inquiry into their ability to pay, and without seeking out less restrictive alternatives to incarceration, violates the Equal Protection Clause of the United States Constitution. Such illegal practices are endemic to bail setting in New York City Courts. Bearden establishes a clear equal protection principle that is all too frequently ignored: the state may not incarcerate a person because of his poverty unless it first inquires into the reasons for the failure to pay and whether an alternative to incarceration would still accomplish the state's interest. Absent such inquiries and determinations, the court can only presume that incarceration is due solely to a person's poverty, and therefore a violation of the Fourteenth Amendment.

Although they arise in the post-conviction and sentencing contexts, Bearden and its antecedents nevertheless apply with even greater force in the bail context—a presumptively innocent pretrial detainee has a far greater interest in freedom than does a convicted defendant. See, e.g., Caliste v. Cantrell, 2018 WL 3727768, at *__ n.5 (E.D. La. Aug. 6, 2018) (finding that the "the post-conviction detention cases, while not directly on point, are highly relevant because the liberty interests of presumptively innocent, pretrial detainees cannot be less than, and are generally

considered greater than, those of convicted defendants"); see also Griffin, 351 U.S. at 18 (noting equal protection and due process principles protect indigent individuals "at all stages" of criminal proceedings").[20]

An increasing number of courts around the country have relied on the Bearden line of cases to hold that an inquiry into an individual's ability to pay cash bail and into alternative, less restrictive conditions is essential to ensure that the financial condition of release imposed is no more than necessary to achieve bail's legitimate purpose of ensuring the defendant's return to court. In O'Donnell v. Harris County, for example, plaintiffs brought a federal class action challenging detention based on the county's use of fixed bail schedules caused the incarceration of indigent individuals with no regard for each individual's financial circumstances. 251 F. Supp. 3d 1052, 1058–59 (S.D. Tex. 2017). Relying on Bearden, the court held that "pretrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest." Id. at 1140. The Court of Appeals for the Fifth Circuit affirmed. See O'Donnell v. Harris Cty., 892 F.3d 147, 163 (5th

[20] Freedom prior to trial is an essential bulwark of the presumption of innocence. It "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." Stack v. Boyle, 342 U.S. 1, 4 (1951). Pretrial detention, on the other hand, reduces an individual's ability to gather evidence, contact witnesses, or otherwise prepare for trial, and "often means loss of a job," and disruption to family life. See Barker v Wingo, 407 U.S. 514, 532 (1972); Johnson, 27 N.Y.3d at 210 (Pigott, J. concurring) (recognizing that inequity in conviction rate of pretrial detainees stems from detainees inability to gather evidence and contact witnesses).

Cir. 2018). Driving the Fifth Circuit's analysis was its recognition of the unconstitutional disparity created when bail is set irrespective of financial resources:

> [T]he wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart.

Id. Accordingly, the county's bail practice, which "lack[ed] . . . individualized assessment" and involved only a "mechanical application of the secured bail schedule" violated equal protection. Id.

In In re Humphrey, the California Court of Appeals, relying on Bearden, held that its lower courts had to "consider the defendant's ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention." 228 Cal. Rptr. 3d 513, 535 (Ct. App. 2018). In that case, the petitioner was imprisoned on unattainably high bail, which the court recognized was nothing short of a remand order. Id. at 542. The court confirmed that "a [bail-setting] court may not order pretrial detention [through unattainably high bail] unless it finds either that the defendant has the financial ability but failed to pay the amount . . . or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance." Id. at 526.

Likewise, in Brangan v. Commonwealth, the Massachusetts Supreme Judicial Court, the highest court of that state, determined that where it "appears that the defendant lacks the financial resources to post the amount of bail set by the judge, such that it will likely result in the defendant's long-term pretrial detention," the bail-setting courts in Massachusetts must inquire into the defendant's ability to pay and determine whether less restrictive alternative conditions of release would assure appearance at court. 80 N.E.3d 949, 964–65 (Mass. 2017).

In addition, numerous federal courts have invalidated or enjoined state bail practices that result in pretrial incarceration of indigent defendants because of their inability to pay without meaningful consideration of indigency or alternative conditions of release. See Jones v. City of Clanton, No. 15-CV-34 (MHT), 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) (citing Bearden and holding that "use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment"); Cooper v. City of Dothan, No. 15-CV-425 (WKW)(WO), 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015) (finding allegations that city's arrest and detention policies and practices routinely resulted in confinement of individuals solely due to their poverty in violation of Fourteenth Amendment's Due Process and Equal Protection clauses warranted temporary restraining order);

see also Pugh v. Rainwater, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc) (noting that detention of an indigent "for inability to post money bail" is impermissible if the individual's "appearance at trial could reasonably be assured by one of the alternate forms of release").

Earlier this year, the New York Supreme Court, Dutchess County, applied Bearden to overturn a bail-setting decision, finding a violation of equal protection because the bail-setting court failed to consider an individual's ability to pay that bail. See People ex rel. Desgranges o/b/o Kunkeli v. Anderson, 72 N.Y.S.3d 328 (Sup. Ct. 2018) (Rosa, J.) ("[W]hen setting bail[,] discrimination on any basis, including on the basis of how much money someone has, is a violation of the equal protection clauses and due process clauses of the New York State and United States Constitutions.").

Finally, and most recently, the Eastern District of Louisiana struck down bail setting practices in New Orleans. Cantrell, 2018 WL 3727768. Relying on Bearden, Salerno, and Mathews v. Eldridge, 424 U.S. 319, 334 (1976), the court issued a declaratory judgment holding: "To satisfy the Due Process principles articulated by Supreme Court precedent, [a court] must conduct an inquiry into criminal defendants' ability to pay prior to pretrial detention." Cantrell, 2018 WL 3727768 at 10 (citing Cain v. City of New Orleans, 283 F. Supp. 3d 624 (E.D. La. 2017) (emphasis added)).

For over two years, Legal Aid attorneys have raised similar arguments before New York City judges. Our staff has consistently challenged bail setting practices as unconstitutional and fundamentally unfair to our clients. Our arguments have largely been ignored or discarded by judges on the bench. While there is little the City Council can do to directly impact judicial practices, the Vera Ability to Pay Pilot Program represents a promising start.

The Council could also publicly encourage judges to set partially secured and unsecured bonds, and recognize courts that consistently rely on these more flexible forms of bail when, and if, bail is necessary to ensure someone's return to court. By presenting judges with more information about our clients' ability to pay bail, and publicly calling for fuller use of the existing bail options, the City will be taking a large step toward fulfilling the promises of the Fourteenth Amendment's guarantee that every citizen be treated equally and fairly by the law.

THE LIBERTY FUND

Testimony of

David Long
Executive Director, The Liberty Fund

before the
New York City Council
Committee on Justice System
on

The Future of Bail

December 12, 2018 | 1:00 p.m.
City Hall – Committee Room | New York, NY

Chair Lancman and members and staff of the City Council, thank you for the opportunity to present my views to this committee. My name is Dave Long and I am the Executive Director of the Liberty Fund, the first city-wide, City Council-funded charitable bail organization in New York City. Our mission is to reduce the number of New Yorkers subjected to pretrial detention.

The Liberty Fund is distinct from other charitable bail funds in the city because our work happens directly in arraignment courts every night of the year—from 6pm until court closes (usually 1:00 a.m.). We began operations in August 2017, and posted bail for 614 men and women. I have included with my testimony a summary report with outcomes from our first year.

Today, I will offer three points that I hope will inform the conversation about the future of bail.

First, as long as cash bail is required for misdemeanors, it is crucial that we continue to fund and support the work of charitable bail funds. The Liberty Fund and the other charitable bail funds in NYC, Bronx Freedom Fund and Brooklyn Community Bail Fund, are keeping people who have not been found guilty of misdemeanor charges out of our correctional system. Instead of the trauma and disruption of going to jail, our clients leave court and return home to their jobs, their families, and their lives.

Second, through our experience providing on-the-ground intervention, the Liberty Fund has gained insights into the social service needs of the bail and ROR population. We intervene at a crucial moment: immediately after bail is set and before a person boards the bus to Rikers. After we post bail, we voluntarily offer other service referrals. In our first year, over a third of our clients requested assistance with housing, employment, substance abuse, mental health, immigration, entitlements, and other services. Clearly, this demonstrates a gap in our criminal justice system. And that leads me to the third point and most important point...

In a post-bail reform world, the Liberty Fund can be an important partner in providing social service interventions. As the bail reform movement progresses, the Liberty Fund should be leveraged into an intervention to fill social service referral gaps in our criminal justice system. Going forward, we can help people meet their basic needs, make their court dates, and—ultimately—help prevent future involvement with the criminal justice system.

In conclusion, the work of the city's charitable bail funds have demonstrated that removing pre-trial detention for misdemeanor offenses is more efficient and less disruptive in people's lives. As we move forward, we will continue to promote a more humane, fair, and effective criminal justice system for all.

Thank you for your time today.

THE LIBERTY FUND

YEAR ONE OUTCOMES

July 1, 2017 to June 30, 2018

I. INTRODUCTION

In its first year of operation, The Liberty Fund made a profound impact in bringing fairness to New York City's criminal justice system.

The Liberty Fund was established as part of a city-led strategy to reduce the number of people detained on bail of $2,000 or less. George McDonald, founder and president of The Doe Fund, and the New York City Council, identified the need for New York City to lead the way by establishing a citywide charitable bail fund.

Today, The Liberty Fund operates as an independent 501 (c)(3) not for profit organization consisting of 10 licensed bail bond agents. It is the first citywide charitable bail fund in New York City and the only organization that covers arraignments each day until the close of court for the evening--with bail bond agents posted at four courthouses every night of the year from 6pm until 1am. This ensures that individuals arraigned late at night can have bail posted on their behalf and avoid pre-trial detention in Rikers Island.

The financial inability to post bail often forces people to plead guilty in order to get out of jail. This results in a person's financial situation being the determining factor in who may or may not spend weeks or months in jail. The inability to post bail results in decisions to plead guilty in order to go home and greatly impacts a person's presumption of innocence and their right to a fair trial. Time spent in jail as someone who has not yet been found guilty of any crime can result in the loss of a job, home and negatively affect the family unit.

The Liberty Fund's mission is to reduce the number of New Yorkers subjected to pretrial detention due to their inability to post bail. It achieves this mission by advancing the following goals:

- To reduce the number of New Yorkers subjected to pretrial detention.
- To maintain the presumption of innocence by allowing clients the freedom and choice to contest charges against them.
- To support clients in other aspects of their lives through voluntarily provided services.

II. ABOUT OUR BAIL RECIPIENTS

1. In FY18, the vast majority of Liberty Fund bail recipients were male (87%) and between the ages of 20 and 45 (76%).

Figure 1: Gender of Liberty Fund Bail Recipients in FY18

GENDER	CLIENTS	%
Female	50	12%
Male	358	87%
Female trans	1	>1%
Male trans	1	>1%

Figure 2: Age of Liberty Fund Bail Recipients in FY18

AGE	CLIENTS	%
16 to 20	16	4%
21 to 25	71	17%
26 to 30	83	20%
31 to 35	62	15%
36 to 40	55	13%
41 to 45	44	11%
46 to 50	26	6%
51 to 55	25	6%
56 to 60	23	6%
61 to 65	3	1%
66+	2	>1%

2. In FY18, The Liberty Fund made 101 referrals to bail recipients with information about social services and agencies. The Liberty Fund provides voluntary social service referrals to help bail recipients maintain their freedom and limit their future interaction with the criminal justice system. Figure 3 details the areas of need.

Figure 3: Liberty Fund Bail Recipient Social Service Referrals in FY18

REFERRAL	CLIENTS	%
Benefits	9	9%
Counseling	11	11%
Education	8	8%
Employment	21	21%
Housing	12	12%
ID / documentation	2	2%
Immigration	1	1%
Legal services	5	5%
Medical / dental	3	3%
Mental health	7	7%
Parenting	1	1%
Shelter	8	8%
Substance abuse	7	7%
Victim services	1	1%
Other	5	5%

III. PROGRAM OUTCOMES

The Liberty Fund started full time operations near the beginning of FY18 and posted bail in a total of **410 cases.** Of those, 182 cases are open and still pending an outcome in court; 173 cases are closed, with bail was returned to the Liberty Fund; and 55 cases are closed in which bail was forfeited.

1. In FY18, 87% of Liberty Fund clients made all of their court appearances (355 out of 410).

2. The total amount of bail posted in FY18 by The Liberty Fund was $368,550.

3. The two most frequent bail amounts posted by The Liberty Fund were $500 (35% of all cases) and $1,000 (33% of all cases).

Figure 4: Liberty Fund Bail Amounts Posted in FY18

BAIL AMOUNT	CASES	%
$100	1	>1%
$250	12	3%
$300	3	1%
$500	142	35%
$750	39	10%
$800	1	>1%
$1,000	137	33%
$1,500	47	11%
$2,000	28	7%

4. In FY18, The Liberty Fund was refunded $125,850 back into its revolving bail fund to be used for future Liberty Fund clients. All successful closed cases have their posted bail monies going back to original bail fund after the court processes paperwork.

5. The average number of days between Liberty Fund clients' arraignment date and first court date was 5 days in FY18.

Figure 5: Number of Days Between Liberty Fund Clients' Arraignment Date and First Court Date in FY18

NUMBER DAYS BETWEEN ARRAIGNMENT DATE AND FIRST COURT DATE	CLIENTS	%
0	4	1%
1	9	2%
2	11	3%
3	42	10%
4	37	9%
5	199	49%
6	9	2%
7	4	1%
8	6	1%
9	3	1%
10	5	1%
11+	81	20%

6. The Liberty Fund saved New York City at least $1,521,100 in FY18. The New York City Controller's report has placed the cost of housing an individual at Rikers Island at $742 a day. With 610 clients avoiding an average of five nights in prison, this amounts to over $1.5 million in savings to the City of New York.

(410 clients x 5 days x $742 per client per day = $1,521,100)

IV. BAIL RECIPIENT TESTIMONIALS

The following are first-person testimonials provided by just four of the 410 individuals served by The Liberty Fund in FY18:

"I just got my son back last week after winning custody in court after I finished my seven months in a drug program. I don't wanna go back to Rikers. Please help me go home. I swear I'm coming to court. My kids need me and need to know I am there for them. This was such a big mistake I will never do again."

"I just finished my State time a few months back. I didn't do what police said, I was just trying to get money so I wouldn't jump turnstile. Thank you for believing in me and giving me a chance. I can't go back inside. I'm on meds and they would have given me wrong stuff I know it. Plus this would have hurt me being able to recertify my housing voucher because they make you do that in person."

"Getting out lets me keep my construction job and also help my girlfriend take the kids to school."

"I just started a new job last month and no doubt they would have fired me if I missed days so soon. I'm glad a company like Liberty Fund exists otherwise I'd be at Rikers which I heard is crazy bad."

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 12/12/18

(PLEASE PRINT)

Name: Sarah Cassel - Q+A only

Address: 1 Centre Street

I represent: Mayor's Office of Criminal Justice

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 12/12/18

(PLEASE PRINT)

Name: Insha Rahman

Address: 233 Broadway, 12th Floor NY NY

I represent: Vera Institute of Justice

Address: same address

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 12-12-18

(PLEASE PRINT)

Name: DAVE LONG

Address: _____

I represent: LIBERTY FUND

Address: 428 BROADWAY NYC 10013

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. Future of Bail Res. No. _____

☐ in favor ☐ in opposition

Date: 12/12/18

(PLEASE PRINT)

Name: Joshua Norkin

Address: _____

I represent: Legal Aid Society

Address: 199 Water Street, NY, NY 10038

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Aubrey Fox

Address: 299 Broadway

I represent: NYC Criminal Justice Agency

Address: 299 Broadway

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Dawit Getachew

Address: 360 E. 161 St Bronx NY

I represent: The Bronx Defenders

Address: _____

Please complete this card and return to the Sergeant-at-Arms