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HOUSE DEMOCRATIC POLICY COMMITTEE

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HOUSE OF REPRESENTATIVES

COMMONWEALTH *of* PENNSYLVANIA

House Democratic Policy Committee Hearing

Cash Bail

Wednesday, April 27, 2022 | 9:00 a.m.

Representatives Summer Lee and Pete Schweyer

Opening Remarks

9:00a.m. Rep. Summer Lee, D-Allegheny
Rep. Pete Schweyer, D-Lehigh

PANEL ONE

9:10a.m. Mike Dershowitz, Founder
PA Pretrial Partnership

PANEL TWO

9:30a.m. Autumn Redcross, Movement Director, Founder of Court Watch Program
Abolitionist Law Center

Muhammad Ali Nasir, Core Organizer
Bukit Bail Fund

PANEL THREE

10:10a.m. Chris Shanley, Board Member
PA Pretrial Services Association

David Erhard, Steve Rice Law
PA Association of Criminal Defense Attorneys

PANEL FOUR

10:30a.m. Kevin Drennan, Executive Director
Senate of New Jersey

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CLOSING REMARKS

10:45a.m.

Rep. Summer Lee, D-Allegheny
Rep. Pete Schweyer, D-Lehigh

Pennsylvania Pretrial Partnership
House Democratic Policy Committee Hearing
April 27, 2022

Testimony: Mike Dershowitz, CEO Fair Trade Outsourcing

*Pennsylvania taxpayers have spent approximately **\$1.4 billion per year** to jail people who have not been convicted of a crime and have not had their day in court.*

***65% of Pennsylvania's jail population is being held pretrial** (approx. 25,000 people) at a cost of more than \$85 a day per person.*

As a business owner - and taxpayer - these numbers are alarming and represent too much opportunity cost wasted for Pennsylvania's economy.

Business owners strive to build good, collaborative relationships between our company and our communities. We are also aware of the current, unprecedented strains on business and individuals, including workforce shortages, inflation, and supply chain issues.

To address this, I have a unique business model and economic philosophy: *Dual Purpose Corporation™*. This philosophy seeks to maximize both social and financial profit.

Capitalism - or pure profit motives - drives economies around the world. However, profit maximizing businesses are no longer organized to address or survive the unprecedented challenges we are facing.

For Social Businesses, societal goals are their sole priority. But purely social businesses are lacking because they feel like a charity and, ultimately, discount and potentially stifle the entrepreneurial spirit.

To truly appreciate this, we must acknowledge that we live within a market economy. We need to address what motivates entrepreneurs, while providing a positive social impact in our communities. When we blend these two models, we get a *Dual Purpose Corporation™*. And when we do this, we find a number of key benefits.

In my business, Fair Trade Outsourcing, we have organized, layered priorities: Our top priority is the well-being of our employees, followed by better results for our customers, and finally business profit.

Economies grow because businesses, especially entrepreneurs, search for solutions to solve market needs or problems. By prioritizing our employees, we are unlocking immense amounts of talent and drive. In addition, sustainable economic lives create stable families. People in stable families naturally want to better their communities, and they now have the resources to do it.

All of this led me to form the non-profit *Pennsylvania Pretrial Partnership*.

Business owners have a unique opportunity to address systemic business and community issues by having a voice in developing a new, modern, and safe approach to pretrial detention in this commonwealth.

The Pennsylvania Pretrial Partnership looks at pretrial incarceration through a unique, social impact business lens.

First, Pennsylvania taxpayers are spending too much to detain non-violent offenders pretrial. Jailing people who have been arrested before trial is the single greatest expense generated by the current system. Pennsylvania taxpayers shoulder \$1.4 billion a year in pretrial incarceration, paying more than \$40,000 per person per year.

Second, releasing non-violent offenders pretrial will bolster workforce opportunities and mitigate poverty. Businesses are facing an unprecedented workforce shortage, and at the same time, many families are facing suffocating poverty. Spending even a few days in jail can have a massive effect on people's lives, including losing their job, housing, and even custody of their children. Past incarceration also reduces annual employment by nine weeks and decreases annual earnings by 40%. Releasing non-violent offenders pretrial will provide an opportunity to bolster the workforce, while encouraging intact families and productive members of society.

We also need to focus on 21st century pretrial solutions. Pennsylvania is not the first jurisdiction to attempt pretrial reforms. Some have been more successful than others. What we do know is that states and other jurisdictions that have implemented bail reforms saw decreases or negligible increases in crime and court appearance rates remained the same. Therefore, the use of widespread cash bail for non-violent offenses does not improve public safety or court appearance rates and there are other, more effective, and less costly solutions.

Finally, an investment in robust social and pretrial services will bolster communities, increase employment, and keep our families safe. Pretrial services have distinct goals: ensuring court appearance rates, protecting the community, and providing treatment and assistance. This includes helping people to correct problems that may be linked to their criminal behavior, including substance abuse or mental health treatment, medical care, training, and/or employment assistance.

Instead, our current system and its overuse of cash bail promotes costly instability within our communities. We can do better.

In order to find success, we need to hear your ideas. We need your help in educating and mobilizing a diverse and bipartisan group of stakeholders to actively support reform efforts.

Only together will we find the solutions to pretrial reform that will ensure a sensible, safe, and modern system.

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Abolitionist Law Center - Written Testimony
April 27, 2021

Writing on the failure of lawyers in the criminal punishment system, Alex *Karakatsanis* says *this*:

Lawyers must understand and communicate what it does to a person to strip from him almost every form of humanity that we take for granted every day: to prevent him for years from eating at a restaurant, going on a date, making love, visiting a museum, traveling to a new place, hugging his mother, seeing his grandfather.

While Karakatsanis is focused on the part lawyers take in the policing to prison pipeline, I want to emphasize the role that policy makers play in the lives of those subject to legislation formulated potentially by many of those here. The consequences of the carceral detainment “go well beyond physical banishment.” He continues, they include what we do to people in our cages: scandalous medical and mental health care, brutal beatings, rampant sexual trauma, extended periods of solitary confinement, and coerced labor; obliteration of parental and other family relationships; severing of friendships; loss of jobs; revocation of the right to vote; rendering families homeless; deportation; and crushing cycles of debt, despair, and alienation.”

Impact of Cash Bail

ACLU has reported extensively on the imposition of cash bail causes. Assigning cash bail makes our communities more dangerous. Multiple studies have documented the way in which cash bail and pretrial detention undermine public safety. A large study of cash bail in Philadelphia and Pittsburgh found that assigning cash bail to a defendant increases the likelihood of recidivism by 6-9%.¹

ALC Court Watch has published two reports in the two years it has been in existence—collecting and analyzing data from preliminary arraignment dockets in Allegheny County. We examines two key actors in the development and maintenance of racial apartheid in the Pittsburgh region: police and judges.

According to the report, 1,658 police officers working for 126 different police agencies made 5,664 arrests that led to preliminary arraignments in Allegheny County between August 14 and December 31, 2020. Just 71 officers (4% of the total) made 20% of all arrests, and 30% of all drug arrests. In a county that is less than 13% Black, 56% of all arrests in the report period were of Black residents.

Moreover, Seventy percent of all Pittsburgh arrests and 47% of all arrests outside Pittsburgh in Allegheny county were of Black community members, despite Black people only making up 23% of the Pittsburgh population – and only 9% of the county population outside Pittsburgh. The report also illustrates how Black men, who make up less than 7% of the county population, were subjected to 33% of all misdemeanor

arrests. Once arrested and detained, the next cog in the wheel is the preliminary arraignment in Allegheny County.

I have seen what I can only describe as pleas of desperation from defendants in the courtroom. I have heard defendants given monetary bail beg for alternative conditions. I remember a pointedly person with drug charges responding to the magistrate who presided over his preliminary arraignment, “I don’t have \$2000, I have a drug problem.” He was only silenced and asked if he had any procedural questions, before the magistrate dismissed this individual and went to the next person. \$18,522,700 in secured monetary bail (meaning defendants had to pay for their pre-trial liberty) was imposed on 1,140 defendants, an average of \$16,248 per defendant.²

In Allegheny County, our preliminary arraignments at this time are unfortunately ceremonial. What I mean is that magistrates have already reached bail decisions at the time of the arraignments. And that there is typically no opportunity given to those charged to speak, nonetheless explain their financial disposition, whether or not they can pay the bond set—allowing them to be bailable.

Current Pennsylvania Law

Cash bail could end tomorrow in PA if bail setting auth (mag judges, bail coms) simply followed the law, specifically the PA const and the Pa rules of criminal procedure, which require consideration of a defendant’s financial condition when setting bail. If that was actually happening, no one in the Commonwealth would be incarcerated because they could not afford bail. So when it comes to cash bail in Pennsylvania, the current state of the law is actually not the main issue. Because the law is already relatively strong, legislation may not be the best answer. Legislation is risky in every case, and we have here a situation where it’s very possible that legislation might do more harm than good.

Pretrial Incarceration in Allegheny County

Generally less than 5% of the Allegheny County Jail (ACJ) population is serving a sentence.³ The remaining 95% are being detained while awaiting trial or some other court proceeding. Notably, based on current statistics and previous information, fewer than 100 of the approximately 1800 individuals incarcerated at ACJ are being held solely for their inability to pay cash bail. While the cash bail system must absolutely be abolished, it is not the primary driver of pretrial incarceration in many regions. The primary reason for pretrial incarceration in Allegheny County—and many other counties in the state—is probation detainers. Currently, 34% of ACJ’s jail population is incarcerated for this reason.⁴ Prior to the pandemic and the subsequent push to decarcerate, over half of the jail population was being held on probation detainers.⁵

Probation Detainers

Probation detainers are orders issued by judges mandating a defendant’s detention in jail. The Gagnon I hearing is a fact finding hearing to determine probable cause of probation violation, ultimately determined at their Gagnon II. Until their Gagnon II hearing--a proceeding that often occurs many months after an individual’s arrest, people are often held in jail.

There are two kinds of probation violations: direct violations which are new criminal convictions, and technical violations, which is any non-criminal violation of one's probation conditions. Technical violations can include unpaid electronic monitoring fees, unpaid court costs, failing to attend (expensive) mandated programming, failing a drug or alcohol test, not being available at your place of residence during a random check in, or a host of other non-serious and non-criminal behavior. The observed practice in Allegheny County is for the Probation Department (more specifically, the Probation Officers) to lodge detainers for nearly every alleged direct violation. Judges rarely challenge or lift these detainers.

It remains our position that judges and probation officers should not make use of detainers. They serve no justifiable public safety purpose. In instances of alleged technical violations of probation, the alleged conduct does not rise to the level of a new charge, thereby undercutting any possibility of a resulting threat to public safety. In instances of alleged direct violations, a new charge has been brought, upon which an individual has been arraigned and had bail set—this bail determination should be controlling, and anyone determined by the bail-setting authority as safe-to-be-released should accordingly actually be free to be released. Probation detainers serve no justifiable purpose. If an individual poses a potential risk to public safety, that determination is made at a bail hearing.

The most incredible danger of the imposition of probation detainers is exceedingly painful to point out. The young Gerald Thomas had his bail set at \$2,000, a relatively low amount, thus showing them to be bailable at the discretion of the magistrate presiding over their preliminary arraignment. This young man could have been released, pending the resolution of his charges. And, actually, the charges for which a detainer was lodged ultimately ended up being dismissed.

However, because of the probation detainer, Gerald Thomas could not have been released even if he did post his bail. The young man remained incarcerated at the Allegheny County Jail for nearly a year on the basis of charges that were the product of illegal police conduct. His detainer did not automatically dissolve and he died in ACJ. Allegheny County Jail (ACJ) stands out as one of the worst jails in the country. It has one of the nation's highest suicide rates⁶, and a death rate higher than Riker's Island. Since the start of the COVID-19 pandemic and the beginning of the Court Watch in 2020, Mr. Thomas and one dozen other people incarcerated in the Allegheny County Jail have died.

Incarceration is immensely harmful in any institution. In fact, Each year in prison takes 2 years off an individual's life expectancy⁷.

Insert use of force comparison #'s Allegheny County citizens voted to pass a referendum by nearly 70% in an attempt to end the use of solitary confinement and to prohibit the use of chemical agents and the restraint chair at the facility⁸. To date, the jail has failed to comply with the requirements of the referendum⁹.

ACJ is also chronically understaffed, and especially struggles in retaining medical and mental health staff and has frequently been in the news for dangerous and unsanitary conditions.

Moreover, ACJ has been subject to numerous lawsuits in recent years, including suits alleging excessive force, failure to treat medical or mental health issues, and dangerous conditions that have repeatedly increased the likelihood of COVID-19 transmissions. Since the start of the pandemic, the jail has been on repeated lockdown, forcing those held at the jail to experience indefinite solitary confinement. And the overpractice of solitary confinement poses a violation of human rights.

Although I am speaking broadly, this discussion is about the impact on individuals—each and every living human being right now is affected, and at risk. Their suffering is not isolated, but permeates out through the people they love and who love, count on and need them. “After just a few days in jail, a person can lose their job, access to necessary medical care, custody of their children, and even their homes. Studies have also found that pretrial detention leads to a higher likelihood of conviction and lengthier sentences.”¹⁰

While one third of the Allegheny County Jail **population** is being held on probation detainers and is the single most common reason for pretrial incarceration in this region, dwarfing the population of individuals detained on cash bail, there are about 100 people incarcerated on unaffordable money bails there. Only 4% of those in the jail are serving a sentence, which leaves the majority of the jail population as folks sitting pre-trial innocent until proven guilty and without seeing their day in court.

The call as we see it is for pretrial freedom—all the way. Our interests:

- We demand Magisterial District Judges to stop assigning cash bail immediately
- We demand all probation detainers and financial holds to be lifted
- We demand re-investment in community based programs to support the accused
- We demand a restoration of the presumption of innocence

Magisterial district judges have the ability to implement these demands immediately. There is no measurable correlation between pretrial detention and public safety. On the contrary there are innumerable accounts of the adverse effects incarceration has on not only the accused, but on their loved ones and community. There also is no statistical measure supporting the idea that unaffordable bail is the only way to guarantee appearance in court. We believe with adequate community support the accused will be empowered to resolve their charges. Especially during these trying times, everyone should be released on their own recognizance and treated as though they're innocent which is a fundamental principle of our criminal justice system.

Muhammad Ali Nasir, Core Organizer, Bukit Bail Fund

My name is Muhammad Ali Nasir, or MAN-E, I'm a lifelong Allegheny County resident from the Homewood neighborhood in Pittsburgh, PA. I'm the Policy and Advocacy Civic Engagement Coordinator at 1Hood Media, an Elder Meje at the Afro-American Music Institute, a core organizer of the Bukit Bail Fund of Pittsburgh and a co-founder of Jailbreak PGH.

Before I became involved in the efforts to end cash bail and pretrial detention in Allegheny County, I was directly impacted by cash bail multiple times. My first experience was as a 16-year-old who instead of going through the juvenile justice system, was charged as an adult and went to the Allegheny County Jail where I was given a bail of 25,000 dollars. The second bail—or ransom, as we define it—I was given was also 25,000 dollars, the third was 50,000 dollars and the fourth was 2000 dollars. I was asked to pay over 100,000 dollars for my pretrial freedom, without council and with no regard for my ability to pay. Ultimately I was absolved in each and every one of these cases, through either acquittal or dismissal of the charges.

Direct engagement with the criminal justice system is something that's all too common among black and poor people in Pennsylvania, but my experience is unique for 2 reasons. (1) My family was able to secure my release through the use of a bondsman, and (2) I was among roughly 5% of people who choose to go to trial when facing criminal charges. Unaffordable cash bail, which is essentially a pretrial jail sentence for legally innocent people, plays a major role in how those facing criminal charges proceed legally, often leading to coercive plea sentences that include long probation sentences.

The work we do at the Bukit Bail Fund aims to disrupt the way the current system functions. We level the playing field for those who can't afford their bail, but more importantly we recognize their right to the presumption of innocence. We also recognize that in Allegheny County, where at least 13 people have died in our jail since 2020, an unaffordable cash bail could be a death sentence.

While cash bail is a trendy subject, it's important to name that it's just one of the levers Judges pull to keep people incarcerated before they're given a fair trial. My concern with well-meaning legislation is that it will lead to Judges pulling other levers more frequently. While unaffordable cash bail is common practice, Judges currently have the ability to assign affordable bail, nominal bail, or no dollar amount at all, releasing people on their own recognizance or with non-monetary conditions. My concern is possible reliance on Pretrial Risk Assessment Tools or PRATS which relies on a discriminatory algorithm to determine who deserves freedom or not, and also predetermining there be no bail be set for specific charges. Both practices will continue to fail to acknowledge ones presumption of innocence and keep people

unfairly detained pretrial. Under several proposed changes that I've seen, I personally would've been unbailable because of the nature of my charges and my past criminal arrest and charge history. In which case, my experience wouldn't have been unique at all. I would've likely taken a coercive plea deal to return home to my family and have a record that hinders me for rest of my life.

My position may be perceived as radical but it's not a new concept, and it's fueled by my experience. It's the recognition that a criminal charge and an arrest doesn't make someone guilty, and a call for the restoration of the presumption of innocence in the Criminal Justice System.

Christopher J. Shanley
Deputy Director
Allegheny County Pretrial Services
Fifth Judicial District of Pennsylvania

In 2007, Allegheny County Pretrial Services went live in the Allegheny County Jail, and the old practice of taking our best guess as to what would be a reasonable amount of either a straight cash bail or a percentage bail came to a welcome end. Gone were the days of “\$5,000 straight” or “\$10,000 at 10%,” and in were terms like “non-monetary – report in person” and “comply with a drug and alcohol evaluation.” Although trainings were conducted for Magisterial District Judge (MDJ) and Common Pleas Court Judges, everyone asked the same question of Pretrial Services, “What about the cash bail?” I am hopeful that in my time before you today, I can provide you with enough background as to why my agency has never recommended monetary bond, and why the Commonwealth of Pennsylvania should explore moving in this direction.

Before I talk about why money shouldn’t be a factor in bail, I need everyone to understand what bail is. Therefore, I quote one of the most brilliant speakers on the subject, Timothy Schnacke and his trademark “3 Ms.”

1. Maximize Appearance - Bail set higher than an amount that can reasonably be afforded is “excessive” under the Eighth Amendment (Stack v/Boyle)
2. Maximize Safety - Detention may be authorized after an adversary hearing (US v/Salerno)
3. Maximize Release – Liberty is the norm, and detention prior to trial is the exception (US v/Salerno)

And before I address each of these points individually, I state without hesitation, cash bail keeps poor people in jail and allows people with the ability to pay to be released.

The experience of Allegheny County Pretrial Services has shown that because of the interaction with the supervision officer a defendant given a non-monetary bond with the condition to report to Pretrial Services will appear at a higher rate than one who simply pays a cash bond. Any jurisdiction imposing monetary bonds without an ability-to-pay hearing is excessively setting bail. Bail is not intended to be pretrial punishment and, therefore, should not be set based on the lead charge. As an administrator of a successful pretrial agency, I can testify before you today that most people who miss a court appearance do not board a plane and flee the country. Most people get the date wrong, go to the wrong place, can’t get off work or can’t find daycare.

In many jurisdictions cash bond gives the appearance of safety. If a defendant is charged with robbery and the MDJ sets a \$50,000 straight bond, the defendant can simply post the bond and go out and commit another offense. For a defendant with the means to pay, monetary bond is not a deterrent and the amount is immaterial. Pennsylvania is a preventative detention state, meaning that defendants can be held pretrial for dangerousness. Additionally non-monetary bond conditions can include drug/alcohol evaluations, abstinence from substance use, mental health evaluations, and reporting conditions to assure these conditions are met. These are all valuable tools in maximizing safety.

In reality, most people charged with a crime do not have the financial means to post most bonds. A person or family without the financial capability to pay \$5,000 at 10% turns to a professional bondsman to get their beloved family member out of jail. The family pays a non-returnable fee to the bondsman who pays the rest. The defendant is released and weeks later after complying with all court appearances, the case is withdrawn. The bond money is returned to the bondsman, however, the fee the bondsman collected is not. Just another example of how those with financial insecurity are treated differently.

Additionally, those who cannot afford to pay even the smallest amount of bail find themselves pleading guilty to winnable cases just to end the case to be placed on probation and released from jail.

Which leads me to my final "M" – Maximize Release. To quote Chief Justice Rehnquist, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." But unfortunately, that isn't the case. According to the Prison Policy Initiative 67% of the jail population nationally is made up of pretrial cases. The median bond for a felony case is \$10,000 and the annual income for a male who cannot afford bail is \$16,000 and \$10,000 for a female. The average statewide bail amount in the state of Pennsylvania was \$38,433 (ACLU Broken Rules 2021). Remember, these are all people who are innocent. We must change our perspectives and attitudes towards release and cash bail. Releasing people pretrial without imposing money as a punishment for committing an alleged crime needs to become more customary.

Cash bail doesn't equate to safety. Cash bail doesn't equate to appearance. Cash bail simply keeps poor people in jail where liberty should be the norm.

**Testimony of David Erhard on behalf of
the Pennsylvania Association of Criminal Defense Lawyers
Before the House Democratic Policy Committee
April 27, 2022**

As a member of the board of directors for the Pennsylvania Association of Criminal Defense Lawyers ("PACDL"), I would like to thank the House Democratic Policy Committee for this opportunity to testify about the critically important issue of cash bail. PACDL is a professional association of approximately 900 private criminal defense attorneys and public defenders who have been admitted to practice before the Supreme Court of Pennsylvania. Founded in 1988, PACDL represents experienced criminal defense attorneys who work to achieve justice and dignity for criminal defendants by protecting and ensuring those individual rights guaranteed by the Pennsylvania and United States Constitutions.

I have practiced criminal defense and its collateral matters *exclusively* for nearly 16 years and across multiple counties in Pennsylvania. I also serve as a panel attorney in the District Court for the Middle District of Pennsylvania. As a panel attorney, I accept court-appointed cases under The Criminal Justice Act for federal defendants. I have served in this role for six years.

The individuals whom I have had the privilege to represent have diverse cultural, economic, and social backgrounds. Those differences raise a variety of considerations regarding the use of cash bail vs. alternative measures to incarceration. Our justice system is built on subjective and ethical treatment of all. A defendant's wealth or lack thereof should not be a consideration within such a system. That is why cash bail should be limited to the degree that the wealth of the accused cannot be the sole factor keeping that person in jail, particularly when non-monetary conditions will suffice. This approach in favor of more equitable considerations and just practices will ensure that as few people as possible are unnecessarily incarcerated.

Cash Bail Is Problematic

The primary problem with cash bail is clear- citizens who stand accused of crimes and have financial resources can get out of jail; those who do not have money cannot. Stated differently, cash bail creates a two-tiered justice system in which rich people get to enjoy the presumption of innocence, while an indigent defendant does not. The current economic crisis within our country and communities only serves to enhance this problem.

A 2021 CBS News report claimed that fewer than 4 in 10 Americans have enough money set aside to cover an unexpected \$1,000 expense, such as a trip to the ER or car repairs. In a post-pandemic world with inflation rising and the wealth disparity gap widening, Americans' financial problems are not likely to improve anytime soon.

There is a startling number of Americans in jail awaiting trial. At any given time, roughly 480,000 people sit in America's local jails awaiting their day in court, according to a 2015 estimate by the International Centre for Prison Studies, a research group based in England. Black adults were most likely to say they have had an immediate family member to have ever spent a day in jail – at 63% of black respondents compared to 48% of Latino and 42% of white respondents, per a 2018 CNN report.

About half of respondents with household incomes below \$50,000 said an immediate family member had been jailed, while about a third of respondents above \$75,000 a year said a family member had been jailed. When divided by income, those in the lowest income bracket are the most likely to have an immediate family member who has been in jail or prison. Sadly,

Americans have accepted the seemingly timeless truth that people who have less access to resources will have less access to justice. With nearly half a million people living behind bars, this accepted trope must be undone.

Pretrial Incarceration Leads To Unfair Results

Incarceration of defendants provides a tremendous advantage to the prosecution and leads to unjust convictions. As a practical matter, defending an incarcerated person is far more challenging than defending one who is free.

Communication with a person in jail is inherently inferior. Whereas a person who remains at liberty pending trial can call or meet with their attorney freely. In contrast, jail visitation comes with cumbersome limitations, including restrictions on access by counsel to a client. An attorney must meet with a client on the jail's terms. This often means limited and inconvenient hours of visitation, discussions through a glass window with ill-maintained phones, and an inability to access documents or helpful technology that would otherwise be available.

Time is a defense attorney's most valuable commodity, and travel to and from jail followed by lengthy waiting and security checks take a toll on that resource. Some jails are not open on the weekend, but that is when many busy attorneys do not have court and squeeze in client visits.

Of course, less time and communication with a client will result in a lower quality of representation. In matters where a single discussion or piece of evidence can drastically cause a case to pivot, meaningful preparation time with a client is of paramount importance.

Additionally, many incarcerated individuals become fatigued with defending themselves. While awaiting trial, they watch their lives and the lives of loved ones move on without them. They immediately see their bills accrue and the rent or mortgage payment becomes past due. Jobs are lost. Personal relationships are strained. The undignified and sometimes violent jail environment takes its toll. Some may even lose custody of their children. Thus, many incarcerated people are inclined to take plea offers for crimes that they did not commit because they must preserve a way of life or simply survive.

It is not uncommon for prosecutors to oppose bail release while also offering sentences of probation or time served. There is not a single experienced defense attorney without an anecdote wherein the government opposed bail release of an inmate unless, of course, that inmate agreed to a guilty plea. For all these reasons, pretrial incarceration serves more as an effective tactical weapon for the prosecution, rather than the social protection that it so often thought to be.

The Process Of Bail Imposition Is Not Uniform

The primary function of bail is to secure the defendant's appearance at future court appearances, but this often takes a back seat to other considerations. At the time the bail decision is made, a long list of factors are to be considered under PA Rule of Criminal Procedure Rule 523. But the rules do not specify how much weight is given to any single factor.

Among these considerations, the court is allowed to factor in the safety of the community. This factor is often the primary, if not only one given consideration. But inherent in this factor is the notion that the accused is guilty. Thus, the presumption of innocence often suffers.

Bail is typically first set by a magisterial district justice but can be set or modified by a higher court (Common Pleas) judge as well. A judge's individual bail philosophy can vary greatly from judge to judge and from jurisdiction to jurisdiction. And, in most instances, judges are not required to create any record of the bail factors that were considered, what weight was

given to those factors, or any other indication as to why a particular bail amount was set. Such broad discretion has led to a vast disparity in the imposition of bail across the state.

Where cash bail is concerned specifically, the rules of criminal procedure only dictate that the amount of bail be "reasonable". This is an incredibly subjective notion. What is reasonable to one judge may be outrageous to another. Furthermore, while a judge is required to consider a defendant's particular financial situation, many defendants are incapable of posting literally any amount, which results in their unjust detention based simply on a lack of funds. Where one judge may consider that requiring \$5,000 to be posted is fair, another may consider \$50,000 to be fair for identical circumstances. But, where a defendant does not have an extra \$5,000 available to him, either amount is insurmountable.

Reconsideration Of Bail Takes Far Too Long

Once cash bail is set, there are limited opportunities to seek reconsideration. If a magisterial district justice sets the bail, the next time for reconsideration is typically either through a motion to the higher court or at a subsequent preliminary hearing. Although there are no required time frames from one bail event to the next, the time between bail hearings is typically weeks if not months. For many, irreparable damage is done in the interim time such as eviction, loss of a job, or missing a litany of important life events.

Technology Can Reduce Incarceration Dramatically

The COVID-19 pandemic has forced courts across Pennsylvania to take new approaches to confinement and communication. Most courts have now been compelled to incorporate video conferencing technology into day-to-day operations. This technology can be used for pretrial release supervision reporting with minimal expense and as often as daily contact with a probation officer. Pretrial release supervision that formerly required onerous impositions on the time and resources of a county probation department can now be achieved with something as simple as a 10-minute video conference that one can do with a common smartphone or other devices.

Similarly, the use of video conferencing and house arrest with Global Positioning System (GPS) monitoring via ankle bracelets has never been more prevalent than today. Electronic monitoring allows the courts to set windows of time for defendants to leave home for certain critical events like doctor visits, meetings with an attorney and court. Each person may have release conditions specific to his/her needs or circumstances including, maintaining, or obtaining employment, attending counseling or other treatment, submitting to substance abuse testing, and refraining from contact with others on pre-trial supervision. Pre-trial supervision can accommodate events such as attending funerals or other once-in-a-lifetime events that if incarcerated, one would otherwise miss. If a violation of electronic monitoring is alleged, there is a virtually indisputable record of the defendant's whereabouts via the use of GPS.

Electronic monitoring allows the accused to continue to work, pay bills, and provide for the household. According to a May 2017 report from the Vera Institute for Justice, Pennsylvania spends approximately \$43,000 per year housing inmates. While monthly electronic monitoring does come with an expense (sometimes \$400-500 / month), this expense is minuscule in comparison to the cost of the state paying for the housing, feeding, and personnel costs associated with incarceration. What's more, is that electronic monitoring bracelets can also be designed to include alcohol monitors that will alert authorities when a defendant drinks. Because the story of many criminal cases begins with the consumption of alcohol, this enhanced monitoring is effective in ensuring that alcohol use on bail will either be avoided or punished.

Conclusion

Cash bail is a fundamentally broken and unjust concept. It should be replaced with a new process for bail consideration that heavily favors alternative measures to incarceration. While pretrial incarceration may remain appropriate for some circumstances, it should be viewed as a last resort. A defendant's wealth or lack thereof should not be a consideration in the justice system.

Testimony by: Kevin Drennan

Senior Advisor

NJ Senate Majority Office

Date: 4/27/2022

Thank you Representatives Lee and Schweyer,

My name is Kevin Drennan, I am currently the Senior Advisor to Senate President Scutari in New Jersey after serving 10 years as Chief of Staff/Executive Director in the Senate Majority Office. During my tenure, one of the most significant policy changes in New Jersey was the Elimination of Cash Bail.

There are many factors both political and policy that led to the elimination of cash bill, but to keep my remarks short I am going to focus on pre-trial statistics prior to the elimination and crime statistics post elimination of cash bail and why I believe the New Jersey model is a great success.

In 2013 New Jersey had 22 county jails and 3 residential reentry facilities that house county inmates.

In those facilities three-fourths of all inmates were awaiting trial or sentencing. The most common serious charge for defendants pending trial were drug offenses.

Over 5000 inmates had an option to post bail, but did not have the means to do so. Among them were 800 inmates with bail set at \$500 or less.

Another startling statistic was that inmates who had been indicted but had not yet had a trial had been in custody on average 314 days with 12% of the entire jail population in custody due to an inability to pay a bail amount of \$2500 or less

Given the inherent inequity of this system, the Chief Justice of the State Supreme Court convened a group of stakeholders including all 3 branches of government, prosecutors, and public defenders, to make recommendations on how to create a more just process.

The key to getting the bail reform law across the finish line was the significant training and outreach efforts of the Judiciary, Attorney General's Office, County Prosecutors, Public Defender's Office, ACLU and Drug Policy Alliance.

The effectiveness of the law rests on:

A risk assessment that must be conducted on anyone issued an arrest warrant and taken to the county jail; those issued a summons are released from the police station

A new Pre-trial Services Program within the Judiciary that utilizes an objective and validated risk assessment tool.

Release decisions must be made within 48 hours

A presumption of detention exists for murder and cases carrying a penalty of life imprisonment

Prosecutors must make motion for detention even if presumption of detention charge.

Speedy trial – 2 year limit

Obviously, major concerns about pre-trial release are crime rates, and court appearances, and New Jersey has succeeded in both:

The number of people released who were charged with new crimes while awaiting trial is 13% for serious crimes, including those with guns less than 1%, and court appearances is 90% - all consistent with cash bail percentages.

And the state is saving money.

The pre-trial jail population of individuals held for inability to pay bail in the amount of \$2500 or less decreased from 12% of the prison population in 2012 to 0.2% in 2020.

Multiple County prisons have closed/merged or intend to close or merge.

I will close with an editorial from this last fall in the Law Journal:

“these results indicate that the reform of bail in New Jersey, while difficult to implement, has been a very significant success.”