Court of Appeals of the State of New York

PEOPLE EX REL. McMANUS,

Petitioner-Appellant,

– v. –

MARTIN F. HORN, COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

ON APPEAL FROM THE APPELLATE DIVISION, FIRST DEPARTMENT

AMICUS CURIAE BRIEF OF NEW YORK CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION, LEGAL AID SOCIETY, NEW YORK STATE DEFENDERS ASSOCIATION, CENTER FOR APPELLATE LITIGATION, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE PRETRIAL JUSTICE INSTITUTE, FIVE BOROUGH DEFENSE, AND HUMAN RIGHTS WATCH

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INTRODUCTION

This case presents the question of whether Criminal Procedure Law Sec. 520.10(2) prohibits courts from ordering a single form of bail—in this case "cash only" bail—and instead requires them to authorize at least two forms of bail. The resolution of this appeal will have far reaching effects for indigent and minority New Yorkers. Even modest amounts of cash bail prevent indigent defendants from obtaining pretrial release, resulting in serious collateral consequences and affecting the final disposition of their criminal charges. *Amici* support the position advanced by the Petitioner-Appellant ("Appellant") in this case. The Appellant has demonstrated that the plain language of Sec. 520.10(2) requires that bail be made available in at least two forms. To the extent any interpretation of that plain language is necessary, *amici* raise three additional grounds—not addressed by either party in the merits briefs—demonstrating that Sec. 520.10(2) should be interpreted to require criminal courts to set bail in two or more forms. For the reasons stated in Appellant's briefs to this Court, as well as those discussed in this brief, *amici* urge the Court to reverse the decision of the First Department.

As discussed in Section I of this brief, Sec. 520.10(2) should be construed to require two forms of bail in light of the historical context that led to adoption of the law. The statute was part of broad reforms to the state's bail regime enacted in response to national efforts aimed at ensuring that pretrial release was available to

defendants except in very narrow circumstances and that it was accessible equally to both rich and poor. This additional context weighs heavily in favor of adopting the interpretation advanced by the Appellant.

In Section II, *amici* demonstrate that interpreting Sec. 520.10(2) to require at least two forms of bail is also compelled by the rule of statutory construction that a law must be construed to produce equal results and avoid unjust discrimination. Pretrial detention of an unconvicted individual is the most serious deprivation of liberty and causes a host of collateral consequences that disrupt basic life activities and familial support, hinder a defendant's ability to participate in building a defense, and lead to higher conviction rates and longer sentences for those who cannot secure pretrial release. Permitting only a single form of cash-only bail would have devastating consequences for indigent and minority New Yorkers. The statute should be construed to prohibit cash-only bail, ameliorating inequitable and unjust discrimination against the poor and people of color.

Finally, as discussed in Section III, Sec. 520.10(2) should be interpreted to require two or more forms of bail to ensure that New York's bail regime comports with constitutional limitations. Constitutional principles prohibiting excessive bail require criminal courts to set bail in the least restrictive form necessary to ensure the defendant's return to court and to take into account the financial wherewithal of the individual defendant where any out-of-pocket expenses are required to obtain

release from jail. The routine and systemic imposition of cash-only bail by New York criminal courts would violate these well-settled constitutional principles, and the statute should be interpreted to require two or more forms of bail to avoid these unconstitutional results.

INTEREST OF *AMICI CURIAE*

Amici are a diverse assemblage of non-profit organizations and associations that participate in advocacy, legislation, and litigation related to criminal justice issues and/or that provide direct services to indigent criminal defendants in New York. Individual statements of interest and Rule 500.1(f) disclosure statements for each *amicus curiae* appear in Appendix A. *Amici* have an interest in ensuring that New York's laws are construed in a manner that does not result in the inequitable pretrial detention of a person solely because of his or her indigence.

STATEMENT OF FACTS AND OF THE CASE

The facts of the case are set forth in detail in the parties' briefs to this court. The Supreme Court, Bronx County, set "cash-only" bail in Appellant's case with no alternative method for obtaining pretrial release. Appellant filed a petition for a writ of *habeas corpus* challenging the cash-only bail as violating Sec. 520.10(2), which states that bail may be posted "in any one of two or more of the forms" specified in the statute. The Supreme Court denied the petition, stating that "both

subdivisions of § 520.10(2) are written permissively." *See People ex rel. Meis ex rel. McManus v. Horn*, 888 N.Y.S.2d 392, 394 (Bronx Cty. Sup. 2009). Appellant was granted an expedited appeal by the Appellate Division, First Department and the First Department summarily affirmed the ruling holding, "Subdivisions (a) and (b) of Sec. 520.10(2) do not limit the discretion of a judge to direct that bail be posted in one form only." *See People ex rel. McManus v. Horn*, 77 A.D.3d 571 (1st Dep't 2010). The Court of Appeals granted Appellant's motion for leave to appeal on February 17, 2011. 16 N.Y.3d 768.

ARGUMENT

Three canons of statutory construction demonstrate that the statute should be interpreted to require criminal courts to provide two or more forms of bail. First, this interpretation is supported by the context of bail reform efforts—intended to ensure defendants would not be detained pretrial solely because of their indigence—underway at the time the New York legislature undertook a comprehensive reworking of state bail statutes in 1970. Second, because a "cash-only" bail regime would cause disproportionate impacts on the indigent and people of color, the interpretation of Sec. 520.10(2) advanced by the Appellant is required by the rule of statutory construction mandating that statutes be construed to avoid unjust and discriminatory results. Third, the statute should be construed to require at least two forms of bail to avoid the serious constitutional implications that would

arise if New York criminal courts were permitted to systematically impose "cash-only" bail on criminal defendants.

I. THE CONTEXT IN WHICH SEC. 520.10(2) WAS ADOPTED SUPPORTS AN INTERPRETATION MAXIMIZING ACCESS TO PRETRIAL RELEASE BY MAKING TWO FORMS OF BAIL AVAILABLE TO DEFENDANTS.

Under New York law, "[i]n ascertaining the purpose and applicability of a statute, it is proper to consider . . . the circumstances surrounding the statute's passage, and the history of the times." *See* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 124; *see also People v. Litto*, 8 N.Y.3d 692, 697 (2007) (citing Sec. 124 and stating, "in construing a statute, the courts frequently follow the course of legislation on the subject"); *cf. Cannon v. Univ. of Chicago,* 441 U.S. 677, 699 (1979) (finding statutory interpretation should be informed by the "contemporary legal context" at the time the law was enacted). In 1970, the legislature enacted Sec. 520.10(2) as part of a comprehensive restructuring of New York's bail regime in the context of, and in response to, national and international reform efforts meant to ensure that defendants were able to obtain pretrial release in all but the most narrow of circumstances. Viewed in this context, Sec. 520.10(2) should be interpreted to require criminal courts to permit defendants to post bail in at least two forms, increasing the ability of New Yorkers to obtain pretrial release while awaiting disposition of their criminal charges.

Unlike bail in England, which was predicated on the nature of the offense, the probability of conviction, and the criminal history of the accused, the provision of bail in the United States is grounded in the principles that bail must be provided in all non-capital cases and that it cannot be excessive. *See, e.g., Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), 18 U.S.C.A., federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail.").

The 1960s were a time of sweeping reforms to bail practices at both the state and federal level. At a 1965 national conference on bail reform, Attorney General Robert Kennedy declared

> [U]sually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?

See National Conference on Bail and Criminal Justice, Proceedings and Interim Report (Apr. 1965), 296.

The following year, Congress passed the Federal Bail Reform Act. This comprehensive legislation sought to reverse a trend of restrictive bail practices that were contrary to the traditional presumption in favor of pretrial release. *See* 18 U.S.C. § 3141 et seq. The law directed that non-capital defendants should be released pending trial without having to pay money—on personal recognizance or

on personal bonds—unless the judicial officer determined that these incentives would not adequately assure their appearance at trial, in which case the judge was to use the least restrictive alternative. *See* H.R.Rep. No. 89-1541, at 7-8 (1966).

In 1967, one year after federal reforms, a landmark and highly influential report was published by President Lyndon Johnson's Commission on Law Enforcement and the Administration of Justice, chaired by Nicholas Katzenbach. The Commission found that "[e]ach State should enact comprehensive bail reform legislation after the pattern set by the Federal Bail Reform Act of 1966." *See* President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*[1] (Feb. 1967), 133. The Commission was particularly focused on ending the persistent reliance on cash bail:

> By and large, money bail is an unfair and ineffective device. Its glaring weakness is that it discriminates against poor defendants, thus running directly counter to the law's avowed purpose of treating all defendants equally. A study in New York, where the bondsman's fee is 5 percent, showed that 25 percent of arrested persons were unable to furnish bail of $500-i.e., raise $25; 45 percent failed at $1,500; 63 percent failed at $2,500. A massive side effect of money bail is that it costs taxpayers millions of dollars a year.

Id. at 131.

In the wake of Katzenbach Commission report and the Federal Bail Reform Act, many states reformed their bail regimes. Twenty-three states passed laws

[1] Available: https://www.ncjrs.gov/pdffiles1/nij/42.pdf

requiring judges to use the least restrictive condition of bail.[2] In many of those states, the least restrictive form of bail is explicitly defined as nonmonetary (either an unsecured appearance bond or a written promise to appear).[3]

In 1970, the New York legislature also followed these trends and sought to reduce the number of people in pretrial incarceration by reforming the state's statutory regime to ensure that more defendants had access to pretrial release.[4] Consonant with the legislature's intent to make bail more attainable, the New York system was reformed to minimize the burden of bail on poor New Yorkers by authorizing courts to use non-monetary and less onerous forms of bail, such as unsecured and partially secured bonds, *see* CPL § 520.10(1), and by requiring that

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[2] Arizona (A.R.S. Crim. Proc. Rule 7.2); Arkansas (Arkansas Rules of Criminal Procedure, Rule 9.2); Connecticut (C.G.S.A. § 54-63b(b)); Illinois (725 ILCS 5/110-2); Maine (15 M.R.S.A. §§ 1002, 1006); Massachusetts (MGL Ch. 276, § 58); Michigan (M.C.L.A. 780.62—for misdemeanors only); Minnesota (49 M.S.A., Rules Crim. Proc. § 6.02(1)); Missouri (Missouri Supreme Court Rule 33.01); Montana (MCA 46-9-108 (2)); Nebraska (Neb. Rev. Stat. § 29-901); New Mexico (NMRA, Rule 5-401(D)(2)); North Carolina (N.C.G.S.A. § 15A-534(b)); North Dakota (N.D.R. Crim. P. 46); Oregon (ORS 135.245(3)); Rhode Island (RI ST § 12-13-1.3(e)); South Carolina (S.C. Code § 17-15-10—for non-capital cases only); South Dakota(SDCL § 23A-43-2—for non-capital cases only); Tennessee (T. C. A. § 40-11-116(a)); Vermont (13 V.S.A. § 7554—for misdemeanors only); Washington (WA ST SUPER CT CR CrR 3.2(b)—for non-capital cases only); Wisconsin (W.S.A. 969.01(4)); Wyoming (WY RCRP Rule 46.1(c)(1)(B)—for non-capital cases only).

[3] Of the state statutory schemes cited above in footnote 1, the following explicitly designate the least restrictive form of bail as non-monetary: Arizona, Connecticut, Illinois, Maine, Massachusetts, Minnesota, Missouri, New Mexico, North Carolina, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming.

[4] *See* Memorandum in Support and Explanation of Proposed Criminal Procedure Law, S. Int. 7276, A. Int. 4561(1970) ("Among the innovations are...a reformulated system of bail and release on recognizance... [the goal of which is] to reduce the unconvicted portion of our jail population."). For a thorough examination of the legislative history behind the Criminal Procedure Law's bail provisions, *see* Appellant's Br. at 22-34.

defendants be provided the opportunity to make bail in at least two of these forms.

As stated in the Practice Commentary to the amended bail statute:

> The theory of these innovations is that a judge who, despite an inclination to release a "good risk" defendant, feels impelled to fix bail in an amount which may be beyond the defendant's means under the former system, may achieve that release without reducing the bail sum. In short, by relaxing the *forms* of bail rather than the *amount* thereof, the unsecured and partially secured bonds should provide a method of release somewhere between bail as presently authorized and release on one's own recognizance; and should furnish a method of reducing to some extent that portion of our prison population consisting of unconvicted defendants.

Richard Denzer, Practice Commentary (1971) (emphasis added).

At the time the legislature adopted Sec. 520.10(2), international law had also recognized a defendant's right to pretrial release barring extraordinary circumstances. *See* Article 9(3), International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 171 (1966) ("It shall not be the general rule that persons awaiting trail shall be detained in custody, but release may be subject to guarantees to appear for trial."). As noted in a report published by Human Rights Watch last year, "[i]nternational treaty bodies and authoritative interpretations of Article 9(3) are uniform in the view that while pretrial detention may be permissible under certain circumstances, it should be an exception and as short as possible." *See* Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (Dec. 2010), 65.

As discussed in an extensive report of the National Association of Pretrial Services Agencies reviewing these waves of reforms, "the adoption of totally nonfinancial release systems in place of money bail increases the equity with which pretrial release is administered, increases accountability of the pretrial release system and brings pretrial release considerations more directly in line with the expressed purposes of bail." *See* Board of Directors of the National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Release and Diversion* (1978), 53. A recent update reinforced this now decades-old principle, adding that "jurisdictions should make sure that their laws and practices orient judicial officers toward the use of nonfinancial conditions of release." *See* National Association of Pretrial Services Agencies, *Standards on Pretrial Release*, 3rd ed. (2004), 16, 17 (financial conditions for bail should be "used only when nonfinancial conditions will not be sufficient to provide reasonable assurance that the defendant will make required court appearances, and never [] be used as a mechanism for holding the defendant in detention").

The reforms of the 1960s that led to Sec. 520.10(2) are also now reflected in the standards of the American Bar Association. *See* American Bar Association, *Criminal Justice Standards on Pretrial Release* § 10-5.2, 3rd Ed. (2002) ("[T]he court should impose the least restrictive of release conditions necessary reasonably to ensure the defendant's appearance in court"). In light of the context in which

Sec. 520.10(2) was adopted, there can be no doubt that the New York legislature intended to require criminal courts to provide at least two forms of bail one of which, by definition, would not be cash-only bail.

II. THE STATUTE SHOULD BE INTERPRETED TO REQUIRE TWO FORMS OF BAIL TO AVOID UNEQUAL ADVERSE CONSEQUENCES FOR THE INDIGENT AND MINORITIES.

A fundamental rule of statutory construction holds that a "court should adopt a statutory construction which will produce equal results and avoid unjust discrimination." *See* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 147; *see also People v. Alston*, 88 N.Y.2d 519, 527 (1996) (citing Sec. 147 and noting that "[s]tatutes should be construed to avoid creating . . . arbitrary application"). The Appellant's interpretation of Sec. 520.10(2) should be adopted by this Court because doing so will avoid unequal and unjustifiable discriminatory results. Pretrial incarceration imposes tremendous costs on the individual and on society, hinders a defendant's ability to effectively participate in his or her defense, and leads to disproportionately higher rates of guilty pleas and longer sentences. These adverse effects are borne disproportionately by the indigent and by racial minorities, who often cannot afford even modest out-of-pocket costs to secure pretrial release. Permitting criminal courts to allow only one form of monetary bail will dramatically increase the incidence of these consequences by reducing the number of indigent and minority New Yorkers able to obtain pretrial release.

These results are not just discriminatory but also unjustifiable given the overwhelming evidence showing that non-monetary forms of bail result in equal or higher rates of return to court as compared to cash bail.

A. Pretrial Incarceration Causes Severe Individual Consequences and Adversely Impacts Criminal Justice Outcomes.

When defendants are incarcerated for even short periods of time, they risk losing their only method of support (whether that is a job or public benefits), are frequently unable to access the medications they need to maintain their physical and mental health, and face significant barriers to maintaining contact with their families. As acknowledged by the U.S. Supreme Court:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

Barker, 407 U.S. at 532-533; *see also* John Irwin, *The Jail: Managing the Underclass in American Society*, (University of California Press, 1985) (finding any length of incarceration had negative effects on family and community ties).

As a result of their inability to prepare a defense and their desire to be released from jail, individuals subject to pretrial detention are more likely to plead guilty than those who obtain pretrial release. *See Barker v. Wingo*, 407 U.S. 514,

533 n.35 (1972) (citing Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. Rev. 631 (1964)); *see also* Joseph Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. Ky. L. Rev. 1, 50 (2005) ("A person in jail is more likely to accept a plea bargain to end his time in jail, especially if probation is offered, than is a person who is out on bail. The same pressures do not apply to a released defendant as to one who is incarcerated."); John Clark and D. Alan Henry, "The Pretrial Release Decision," *Judicature* (1997), pp. 76–81 (finding that defendants who were detained before trial were more likely to plead guilty, were convicted more often, and were more likely to receive a prison sentence than defendants who were released before trial).

It is clear that a vast number of indigent defendants continue to be subject to pretrial detention and plead guilty solely because of their poverty:

> [Two hundred and fifty-four] of the pleas to misdemeanors were by defendants who were incarcerated at the time of the plea of guilty. [Eighty-three] of the pleas to misdemeanors were by defendants who were not incarcerated at the time of the plea. Many of the pleas of guilty to misdemeanors were by defendants who could achieve their freedom only by pleading guilty. (Plead guilty and get out, maintain your innocence and remain incarcerated in lieu of bail.) Thus if all defendants had the economic wherewithal to make bail, it is clear that many fewer than 6.8% of the defendants would plead guilty to misdemeanors.

People v. Llovet, N.Y.L.J., Apr. 24, 1998, at 29, 30 n.7 (Crim. Ct. Kings Cty. 1998).

Numerous commentators have noted that a defendant's desire to win immediate release gives prosecutors much more leverage to extract pleas from detained defendants than from those free on bail. *See* Hans Zeisel, *The Limits of Law Enforcement* v. 48 (1982); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439, 444 (1971); Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleagured Dealer?*, 28 Crim. L. Bull. 419, 438 & n.68 (1992) (reporting that defendants often languish in jail for longer than the likely sentence and, when eventually brought to court, plead guilty in exchange for time served).

Even for those who do not plead guilty and who do make it to trial, pretrial detention affects a case's disposition. A recent study found that in misdemeanor cases in New York City, the conviction rate of people released prior to the disposition was 50%, whereas the conviction rate for those detained until disposition was 92%. *See* Mary T. Phillips, *Bail, Detention, and Non-Felony Case Outcomes*, New York City Criminal Justice Agency Research Brief #14 (May 2007), p.5; *see also* John Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (1979); *see also Estelle v. Williams,* 425 U.S. 501, 518 (1975) (Brennan, J., dissenting) ("Jurors may speculate that the accused's pretrial incarceration, although often the result of his inability to raise bail, is explained by the fact that he poses a danger to the community or has a prior

criminal record; a significant danger is thus created of corruption of the fact finding process though mere suspicion.").

This stigma not only affects determinations of guilt and innocence, but also the severity of the sentence that follows. Detained defendants receive longer sentences, are offered less attractive plea bargains, and are more likely to become "reentry" clients for no other reason than their pretrial detention. *See, e.g.* John S. Goldkamp, *Two Classes of the Accused: A Study of Bail and Detention in American Justice* (1979); Malcom M. Feeley, *The Process is the Punishment: Handling Cases In a Lower Criminal Court* (1992); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees,* Harvard Law School, (2005).

B. Pretrial Incarceration Disproportionately Affects the Indigent.

The significant consequences of pretrial detention described above fall disproportionately on indigent and on minority populations.[5] The effect of bail on

[5] Taxpayers also bear costs for this unnecessary and unjustified incarceration. *See Tate v. Short*, 401 U.S. 395, 399 (1971) (noting that detention "saddles the State with the cost of feeding and housing him for the period of his imprisonment"). As one commentator concluded in a recent article, "[i]n looking for ways to reduce correctional populations to better manage costs, the pretrial population must have a prominent place in any discussions. And at the forefront of those discussions must be the changing of reliance on money bail." *See* John Clark, *The Impact of Money Bail on Jail Bed Usage*, American Jails (July/August 2010), Available: http://www.aja.org/advertising/jailmagazine/default.aspx. Pretrial detention, which has increased in recent years despite the overall decrease in violent crime nationwide, is a major cause of jail overcrowding. According to one report, the cost of holding pretrial detainees costs New York City alone $600 million annually. *See* Jarrett Murphy, "Prisoners Dilemma: How NYC's Bail System Puts Justice on Hold," *City Limits* (Fall 2007), 25.

the poor is not new. Nearly two centuries ago, Alexis de Tocqueville wrote that "[bail] is hostile to the poor and favorable only to the rich. The poor man has not always a security to pledge . . . and if he is obliged to wait for justice in prison, he is speedily reduced to distress." *See Democracy in America* (1831), Ch. 2, Part 2.

To this day, most indigent defendants in New York are unable to post even the smallest amount of bail. As noted by New York City's Criminal Justice Agency, when bail is set at $500 or less, a mere 16% of defendants are able to make bail at arraignment and 41% are incarcerated until the final disposition of their case.[6] *See* New York City Criminal Justice Agency, Annual Report 2009, p. 22, 24 (Dec. 2010).

In addition, unlike wealthier New Yorkers, many indigent defendants do not have the benefit of counsel at the time that bail is set. *See* Honorable Chief Judge Jonathan Lippman, Law Day 2011 Speech (May 2, 2011)[7] ("In New York, as has been reported prominently in the press, defendants in our vitally important Town and Village Courts . . . are routinely arraigned and sometimes even jailed in lieu of bail—all without a lawyer present to argue for their pretrial liberty or begin to prepare their defense."); *see also Hurrell-Harring v. State of New York*, 15 N.Y.3d

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[6] Not only are defendants unable to afford these expenses out-of-pocket, they also cannot "finance" their way out of pretrial detention because bail bondsmen are unwilling to write bonds for such small amounts due to the limited profit to be made. *See* Mary T. Phillips, *Making Bail in New York City*, Criminal Justice Agency (May 2010), pp. 64-65, 2.

[7] Available <http://www.nylj.com/nylawyer/adgifs/decisions/050311speech.pdf>.

8 (2010) (challenging the state's inadequate provision of indigent defense services, including lack of counsel at arraignment). Requiring bail to be set in at least two forms, when combined with the availability of non-monetary and less onerous forms of bail authorized under New York law, serves as an important prophylactic statutory safeguard for indigent defendants whose bail is often set at the request of prosecuting attorneys in the absence of defense counsel.

C. Pretrial Incarceration Disproportionately Affects Minorities.

The consequences of cash-only bail also fall disproportionately on minority populations. Pretrial detention because of inability to post bail is endured primarily by Blacks and Hispanics, largely as a result of the disproportionate rates of minority arrests. *See* Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (Dec. 2010), 47. In New York City, Blacks and Hispanics constitute 89% of all pretrial detainees held for misdemeanors on bail of $1,000 or less. *Id.* at 49.[8]

Furthermore, studies have found that the setting of bail itself is often performed in a discriminatory manner. *See, e.g.* Shawn D. Bushway and Jonah Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric*

[8] Studies have shown that the *perception* of inequality in the courts causes defendants to be far more likely to fail to appear in court for a scheduled appearance. *See* Mitchel Herrian and Brian Bornstein, "Reducing Failure to Appear in Nebraska: A Field Study," *The Nebraska Lawyer,* 13 (Sep. 2010).

Estimation of a Parametric Model[9] (Feb. 2011), 1 (finding that "Black defendants are assigned systematically greater bail levels than whites accused of similar offenses and have lower probabilities of pretrial release."); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, Criminology (2003), 873–907 (finding that Black and Hispanic defendants are about twenty percent more likely to be denied bail than similarly situated whites and are more than twice as likely to be unable to afford bail).

Finally, research also shows that race is strongly correlated with the ability of a defendant to satisfy cash-only bail. The Criminal Justice Agency concluded Black defendants (including those who identified themselves as Black Hispanic) were nearly three times more likely to post a bond (as opposed to being able to pay in cash) than white defendants. *See* Mary T. Phillips, *Making Bail in New York City*, Criminal Justice Agency (May 2010), pp. 64-65. Hispanics were also significantly more likely to post a bond than whites. *Id.* Cash-only bail would erect an ever larger barrier to pretrial release for these minority populations.

D. Cash-only bail does not lower failure to appear rates.

The consequences of cash-only bail on the indigent and on minorities are even more unjustifiable given the overwhelming evidence showing that monetary

[9] Available: www.econ.yale.edu/seminars/labor/lap11/gelbach-110218.pdf

forms of bail do not increase the likelihood that defendants will return to court. Studies examining the issue have concluded that "failure to appear" rates where monetary forms of bail are imposed are the same or higher as compared to rates where non-monetary forms of bail were allowed. For example, the Vera Foundation (now the Vera Institute) and the New York University School of Law reported a failure to appear rate of less than 0.7% when defendants were released on their own recognizance, a rate lower than that experienced with defendants subject to cash bail. *See* Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976), 25.[10] In fact, studies show court attendance can be increased using alternative methods that have none of the pernicious effects of cash bail.[11]

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[10] From 1988 to 1994, similar results were seen in in Nassau, Bronx, and Essex (NJ) counties, when the Vera Institute experimented with a system of pretrial supervision whereby the Institute would take on the financial risk of the bail bondsman by posting bond for certain individuals who otherwise could not afford it in return for the individuals signing a release contract limiting his or her freedom and requiring participation in certain structured programs, such as drug treatment. *See* Vera Institute of Justice, *Bail Bond Supervision in Three Counties: Report on Intensive Pretrial Supervision In Nassau, Bronx, and Essex Counties* (Aug. 1995), 5. Despite lacking a financial incentive to return to court, failure-to-appear rates among defendants in the Vera program were extremely low. In Nassau, principals failed to show up for only 7 out of 1,867 court dates, yielding a failure-to-appear rate ("FTA") of less than .5%. In Essex, from April 1991 to July 1993, defendants failed to show up for only 4 out of 436 court appearances, yielding an FTA rate of less than 1%. In the Bronx, principals failed to show up for 15 out of 1,402 court appearances, yielding an FTA rate of just over 1%. *Id.* at 15.

[11] For instance, a study in Nebraska found that when misdemeanor defendants received a postcard reminder of the court date, the failure-to-appear rate was reduced from 12.6% to 9.7%. *See* Mitchel Herrian and Brian Bornstein, "Reducing Failure to Appear in Nebraska: A Field Study," *The Nebraska Lawyer* (Sept. 2010), 12; *see also* Jefferson County, Colorado Criminal Justice Planning, "Court Date Notification Program: Six Month Program Summary" (Nov. 2006)

III. THE STATUTE MUST BE INTERPRETED TO REQUIRE TWO FORMS OF BAIL TO AVOID THE UNCONSTITUTIONAL IMPLICATIONS OF A "CASH-ONLY" BAIL REGIME.

A fundamental rule of statutory construction holds that "[w]here the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results." *See Matter of Jacob*, 86 N.Y.2d 651, 667 (1995); *see also* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 150(c) ("A statute should be construed, if possible, to uphold its constitutionality."). Construing Sec. 520.10(2) in a manner that would allow New York's criminal courts to routinely impose a single cash-only bail option would implicate well-settled constitutional principles prohibiting excessive bail. To avoid these constitutional implications, the Court should find the statute requires courts to make two or more forms of bail available, with a preference for at least one form that imposes minimal hardship on the indigent.

New York's constitutional prohibition against excessive bail does not necessarily require that bail be given as of right. *See People ex rel. Fraser v. Britt*, 289 N.Y. 614 (1942). Where bail is granted, however, "the guarantee certainly requires that legislative provisions must, to satisfy constitutional limitations, *be related to the proper purposes for the detention of defendants before conviction*, as

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(program of telephonic reminders to defendants reduced FTA rate of the targeted population from 23% to 11%, a reduction of 52%).

must the judicial applications of discretion authorized by the Legislature." *See People ex rel. Klein v. Krueger*, 25 N.Y.2d 497, 499-500 (1969) (emphasis added).

Sec. 510.30(2) of the Criminal Procedure Law lists the limited factors New York criminal courts may consider when setting discretionary bail. As noted in the practice commentary to that statute:

> Unlike federal law, which sets out standards that permit a court to commit a defendant for preventive detention to reasonably assure the safety of the community, the sole objective to be considered when a New York court exercises discretion in choosing among available alternatives and, in the case of bail the form and amount thereof, is the kind and degree of control or restriction that is necessary to secure the principal's court attendance when required.

See Practice Commentary by Peter Preiser, N.Y. Crim. Proc. Law § 510.30 (2009) (citations and quotations omitted), citing *In re Restaino*, 10 N.Y.3d 577, 588 (2008); *Sardino v. State Comm. on Judicial Conduct*, 58 N.Y.2d 286, 289 (1983).[12]

Thus, where the only legitimate purpose of bail is to ensure a defendant's return to court and bail is set higher than necessary to ensure that return, the bail is excessive. *See, e.g., Cohen v. U.S.*, 82 S.Ct. 526, 528 (1962) ("The bail fixed would become 'excessive' in the sense of the Eighth Amendment because it would be used to serve a purpose for which bail was not intended."); *Stack*, 342 U.S. at 5

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[12] Despite these clear statutory limitations, studies suggest that bail is often set for reasons that have nothing to do with a defendant's return to court, for example, to facilitate plea bargains or to ensure an efficient docket. *See* Mary T. Phillips, "Factors Influencing Release and Bail Decisions in New York City: Part 3. Cross-Borough Analysis," New York City Criminal Justice Agency (July 2004), pp. 39-41.

("Bail set at a figure higher than an amount reasonably calculated to fulfill [a legitimate] purpose is 'excessive' under the Eighth Amendment").

While making monetary bail the sole option for pretrial release available to these defendants may not be unconstitutionally excessive *per se*, "excessiveness is a question which does emerge from the extrinsic, disproportionate, relationship between the amount of the [bail] and the economic resources of the defendant." *People v. Ingham*, 115 Misc.2d 64, 69 (Rochester City. Ct. 1982); *cf. People v. Alba*, 189 Misc.2d 258, 264 (Sup. Ct. Kings Cty. 2001) ("The Federal Constitution prohibits a State from keeping a defendant in jail prior to conviction on excessive bail. When a State sets a bail that a defendant *can afford to post*, the State is complying with the Federal Constitution.") (emphasis added). By requiring two forms of bail, at least one of which will not be cash-only, New York's statutory regime is meant to ensure bail is available in at least one form that is less onerous than cash-only bail, reducing the risk that a defendant will be detained solely because bail is financially unattainable.

On the other hand, interpreting the statute in a manner that would permit criminal courts to restrict a defendant's ability to secure pretrial release to a single cash-only bail option would raise serious constitutional concerns. In order to comport with the constitutional prohibition on excessive bail, a court imposing cash-only bail would have to determine that cash-only bail was the least restrictive

form of bail available to ensure the defendant's return to court. The court would also be required to set cash-only bail in an amount that is no more than necessary to ensure the defendant's return to court. To do so, the court would have to conduct an individualized examination of the individual defendant's financial wherewithal to ensure the defendant was not being subject to pretrial incarceration solely because of an inability to pay.[13] *See* CPL § 510.30(2) (requiring courts to take into consideration "employment and financial resources" when setting bail amount); *see also Kellman v. District Director, U.S. I.N.S.*, 750 F.Supp. 625, 628 (S.D.N.Y. 1990) ("The requirements of procedural due process . . . require an individual bail determination where, as here, a bail hearing would not pose significant fiscal or administrative burdens on the government and would greatly minimize the risk of erroneous deprivation of a liberty interest") (internal citations and quotations omitted).

Given the overwhelming evidence showing indigent defendants are unable to afford even relatively low amounts of cash bail, it is clear that interpreting Sec. 520.10(2) in a manner that would permit New York criminal courts to narrow bail

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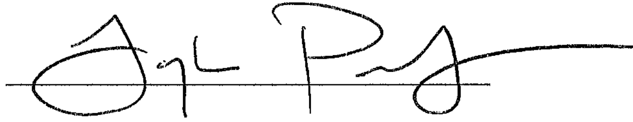
[13] The constitutional prohibition on jailing an individual solely because of indigence is also reflected in jurisprudence involving excessive fines. In *People v. Saffore*, 18 N.Y.2d 101, 104 (1966), this Court held that imprisoning a defendant on account of his financial inability to pay a fine violates Art. I, § 5 of the New York Constitution. *See also People v. Ingham*, 453 N.Y.S.2d 325, 328-329 (Rochester City. Ct. 1982); *cf. Tate*, 401 U.S. 395 (holding that a fine of $425.00 was excessive under the Equal Protection Clause if imposed on an indigent defendant who could not pay it and who faced jail as the only alternative to payment of the fine).

to a single cash-only option would lead to systemic constitutional violations. The legislature was aware of these constitutional implications when it (1) authorized several non-monetary and less onerous forms of bail and (2) mandated that criminal courts permit defendants to post bail in at least two forms one of which, by definition, would not be cash-only. These statutory reforms were meant strike a more appropriate balance between the government's interest in ensuring a defendant's return to court with the defendant's fundamental constitutional right not to be incarcerated before conviction for reasons that have nothing to do with ensuring a court appearance and that have everything to do with poverty.

CONCLUSION

For the reasons cited above, and those discussed in Appellant's brief, *amici* urge the Court to reverse the judgment of the Appellate Division, First Department.



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Pretrial Justice Institute
Five Borough Defense
Human Rights Watch

APPENDIX A

Amicus Curiae Statements of Interest and Rule 500.1(f) Disclosure Statements

New York Civil Liberties Union: The New York Civil Liberties Union ("NYCLU") is a non-profit membership organization and the New York State affiliate of the American Civil Liberties Union. The NYCLU is devoted to the protection and enhancement of fundamental constitutional freedoms, including the rights of criminal defendants. The NYCLU has filed numerous *amicus curiae* briefs with this Court in cases involving criminal justice issues, including *Batson* challenges (*People v. Hecker*, 15 N.Y.3d 625 (2010)) and the need for defendants to be informed of severe collateral consequences of their pleas (*People v. Harnett*, 16 N.Y.3d 200 (2011)). The statute at issue in this case serves as an important safeguard protecting the right to pretrial release on bail for indigent defendants, who often appear at bail hearings without defense counsel. *See Hurrell-Harring v. State of New York*, 15 N.Y.3d 8 (2010) (challenging the state's inadequate provision of indigent defense services, including lack of counsel at arraignment). This case requires the Court to interpret the law regarding the provision of bail and to consider the disparate impact of cash-only bail on the indigent and people of color, and is a matter of direct concern to the NYCLU and its members. Pursuant to Rule 500.1(f), NYCLU discloses that it is a non-profit 501(c)(3) organization with offices in New York City, Buffalo, Rochester, Syracuse, Albany, Hempstead,

Central Islip, and White Plains.

American Civil Liberties Union: The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and federal and state civil rights laws. The Criminal Law Reform Project of the ACLU seeks an end to excessively harsh policies that result in mass incarceration and stand in the way of a just and equal society. Through this project, the ACLU works to reduce the number of people entering jails and prisons by focusing on reform at the front end of the criminal justice system, including the reform of bail practices and the disproportionate and unjust effects of bail on the indigent and on people of color. The ACLU has appeared as a *amicus curiae* on criminal justice issues in the United States Supreme Court and state courts throughout the country. Pursuant to Rule 500.1(f), the ACLU discloses that it is a non-profit 501(c)(3) organization with offices in all fifty states, Puerto Rico, and Washington, D.C.

Legal Aid Society: The Legal Aid Society ("The Society"), under contract with the City of New York, serves as the primary defender of poor people prosecuted in the five boroughs of New York City. The Society staffs the majority of arraignment shifts in the New York City Criminal Court and represents the majority of all arraigned defendants. Because tens of thousands of individuals

affected by the State's bail statutes and the courts' bail practices each year are the Society's clients, the Society has a unique interest in the subject-matter of this litigation. The Society's indigent clients are particularly subject to the array of unfavorable collateral consequences described in Point II of this Brief, when judges impose "cash only" bail and do not permit any alternative forms of pretrial release. Pursuant to Rule 500.1(f), the Society discloses that it is a non-profit 501(c)(3) organization with offices throughout New York City.

New York State Defenders Association: The New York State Defenders Association ("NYSDA") is a not-for-profit membership association of more than 1,800 public defenders, legal aid attorneys, 18-b counsel and private practitioners throughout the state. With funds provided by the state of New York, NYSDA operates the Public Defense Backup Center, which offers technical assistance, legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York. NYSDA is contractually obligated "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." This Court has granted NYSDA *amicus curiae* status in numerous cases dealing with the rights of criminal defendants, including *People v. Ford*, 86 N.Y.2d 397 (1995) and most recently in *People v. Harnett*, 16

N.Y.3d 200 (2011). As discussed in this brief, indigent defendants who are given the sole option of "cash-only" bail are frequently unable to post and remanded to jail, impeding their ability to participate in their defense. Moreover, clients subject to pretrial detention because of the inability to post cash bail forfeit mitigation advantages in sentencing such as employment, educational and treatment opportunities. The effect that the inability to obtain pretrial release can have on the fair administration of justice highlights the need for non-restrictive bail practices in compliance with the Criminal Procedure Law, and is of direct interest to NYSDA and its members. Pursuant to Rule 500.1(f), NYSDA discloses that it is a non-profit 501(c)(3) organization with no parents, subsidiaries, or affiliates.

Center for Appellate Litigation: The Center for Appellate Litigation ("CAL") is a non-profit law firm representing indigent criminal defendants *pro bono* in appeals and post-conviction proceedings in New York and Bronx Counties. Almost all of CAL's clients have been convicted of serious crimes and have spent most of their time before trial in pretrial detention, having been unable to post bail. In many cases, they have spent so much time in pretrial detention that they are nearing release before their appeals can be heard. The resolution of this appeal in a manner that permits greater opportunity for pretrial release is a matter of direct concern to CAL and its clients. Pursuant to Rule 500.1(f), CAL discloses that it is a non-profit 501(c)(3) organization with no parents, subsidiaries, or

affiliates.

New York State Association of Criminal Defense Lawyers: The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit corporation with approximately 600 attorneys who practice criminal defense law in New York, including private practitioners, public defenders, and law professors. Founded in 1986, NYSACDL's purpose is to assist, educate and provide support to the criminal defense bar to enable its members to better serve the interest of their clients and to enhance their professional standing. NYSACDL is a recognized state affiliate of the National Association of Criminal Defense Lawyers, a nonprofit, professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. The proper interpretation of the law governing the provision of bail is a matter of great importance to NYSACDL and its members. Pursuant to Rule 500.1(f), NYSACDL discloses that it is a nonprofit organization and an affiliate of the National Association of Criminal Defense Lawyers, which is also a nonprofit organization.

Pretrial Justice Institute: The Pretrial Justice Institute ("PJI") is a non-profit organization headquartered in Washington, D.C. For more than 30 years, PJI has been the sole entity dedicated exclusively to improving pretrial justice in the United States. The mission of PJI is to advocate nationwide for fair and effective

pretrial practices that eliminate inappropriate detention, optimize diversion from prosecution, and maintain community safety. PJI seeks to accomplish this mission by facilitating research that drives evidence-based practices, assisting state and local governments in improving their pretrial policies, and providing technical assistance to elevate local pretrial practice. For more than three decades, PJI has worked in hundreds of local jurisdictions in nearly every state to facilitate informed pretrial release decision making and release on the least restrictive conditions necessary to reasonably assure appearance in court and, where relevant under the state's statute, safety to the community. This case is of direct concern to PJI because it has implications for the statutory presumption of release on the least restrictive conditions. Pursuant to Rule 500.1(f), PJI discloses that it is a non-profit 501(c)(3) organization with no parents, subsidiaries, or affiliates.

Five Borough Defense: Five Borough Defense is an unincorporated association of public defenders, civil rights attorneys, law students, academics, and others who directly represent, and advocate on behalf of, the civil rights of indigent New Yorkers. Since 2006, Five Borough Defense has provided a forum for the public defense community to discuss, strategize, and encourage the vigorous defense of indigent New Yorkers. Members of Five Borough Defense have witnessed how the pretrial incarceration of defendants undermines the just and fair resolution of criminal allegations. Incarcerated defendants awaiting trial often

deliberate between accepting a guilty plea that sets them free immediately or remaining incarcerated under dirty, dangerous, and demeaning conditions, uncertain of when they will be able to contest their charges. Moreover, significant numbers of defendants remain incarcerated until trial and are ultimately acquitted. The members of Five Borough Defense have a significant interest in ensuring Sec. 520.10(2) is interpreted to require at least two forms of bail. Pursuant to Rule 500.1(f), Five Borough Defense discloses that it is neither a corporation nor business entity.

Human Rights Watch: Human Rights Watch is a non-profit, independent organization and the largest international human rights organization based in the United States. For over 30 years, Human Rights Watch has investigated and exposed human rights violations and challenged governments to protect the human rights of all persons, including juvenile offenders. To fulfill its mission, Human Rights Watch investigates allegations of human rights violations in the United States and over 80 countries throughout the world by gathering information from governmental and other sources, interviewing victims and witnesses, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates for the enforcement of those rights before government officials and in the court of public opinion. In 2010 Human Rights Watch published a report, *The Price of Freedom: Bail and Pretrial Detention of Low Income*

Nonfelony Defendants in New York City, documenting the detention of nonfelony defendants solely because they could not post bail set at amounts and in forms they could not afford. Human Rights Watch has since been advocating for implementation of changed bail policies and practices that would better protect the human rights of New York City's low income defendants. Pursuant to Rule 500.1(f), Human Rights Watch discloses that it is a nonprofit 501(c)(3) organization with no parents, subsidiaries, or affiliates.