Hearing of the Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security

The Administration of Bail by State and Federal Courts:

A Call for Reform

Written Statement of the American Civil Liberties Union
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Introduction

The American Civil Liberties Union (ACLU) would like to thank Crime Subcommittee Chairwoman Bass and Ranking Member Ratcliffe, for the opportunity to testify about the critical issues of pretrial liberty and bail during this hearing on *The Administration of Bail by State and Federal Courts: A Call for Reform*.

I am the Deputy Director of Smart Justice Litigation at the American Civil Liberties Union (ACLU). Our team is the litigation arm of the ACLU's Campaign for Smart Justice, a multi-state, multi-year effort to reduce America's prison and jail population by 50% and to challenge systemic racism in the administration of criminal justice.

Here are the stakes. We cannot end mass incarceration and its legacy of racial injustice unless we radically reform our pretrial systems. Of the 2.2 million people trapped by the carceral epidemic, nearly one out of every five is a person confined to a jail cell, awaiting trial.[1] Most of these people are in jail because they cannot afford to purchase their release. People of Color are uniquely burdened by this practice.[2]

Pretrial detention feeds mass incarceration. People held in jail before trial are more likely to be convicted, often because they plead guilty to crimes they did not commit simply to go home; they are more likely to receive a jail or prison sentence; and they are more likely to receive a longer jail or prison system.[3]

I. The ACLU's Bail Reform Litigation

This is a constitutional and moral outrage. In response to this crisis, over the past five years, numerous civil rights organizations and lawyers have brought dozens of lawsuits across the country to end our dependence on money bail. The ACLU successfully brought the first of these challenges in 2014 in Mississippi, on behalf of Octavious Burks and Joshua Bassett. Respectively,

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[1] Prison Policy Initiative, *Mass Incarceration: The Whole Pie*, available at: https://www.prisonpolicy.org/blog/2019/03/19/whole-pie/.

[2] *E.g.*, David Arnold, et al, *Racial Bias in Bail Decisions*, 11/2018, THE QUARTERLY JOURNAL OF ECONOMICS, 133, 4, 1885-1932; Cynthia E. Jones, *"Give Us Free: Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919 (2013); Stephen Demuth, (2003). *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, CRIMINOLOGY, 41(3), 801-836 (2003).

[3] *E.g.*, Will Dobbie, et al, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 214 (2018); CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 4 (2013), craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf [https://perma.cc/498S-LM6P].

they spent ten and eight months in jail—without a lawyer and without even being formally charged with an offense—all because they could not afford bail.[4]

Since then, the ACLU has litigated over a dozen pretrial reform cases. Most of our clients are people jailed on unaffordable bail without counsel. They are people like Candace Edwards, who was arrested in Alabama for forging a $75 check. For this, her bail was set at $7,500. When we met Candace the day after her arrest, she told us that the night before she slept on the concrete floor of an overcrowded cell. Candace was seven months pregnant.

In 1987, the Supreme Court, in *United States v. Salerno*, declared: "In our society, liberty is the norm, and detention prior to or without trial, is the carefully limited exception."[5] Today, too many of our criminal court systems have this exactly backwards. Octavious, Josh, and Candace are the norm. Indefinite detention without counsel is the norm. Liberty, sadly, is the arbitrarily denied exception.

We bring these lawsuits to reverse course, to make real the Supreme Court's decree that the right to pretrial liberty is fundamental. To paraphrase *Salerno*, that means the government can only jail you before trial if it has an exceptional reason. We otherwise eviscerate the presumption of innocence, the bedrock of our criminal justice system.

Money is almost never an exceptional reason. The Supreme Court has long condemned imprisoning people "solely because of [their] indigency."[6] More importantly, money bail does not work. The three primary goals of the pretrial system are to release people promptly, to ensure that those people appear for trial, and to protect the public from imminent danger. Money bail fails on all three accounts.

Rigorous studies in a variety of jurisdictions—such as Colorado;[7] Cook County (Chicago), Illinois;[8] New Jersey;[9] New York City, New York;[10] Mecklenburg County (Charlotte), North

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[4] Campbell Robertson, *In a Mississippi Jail, Convictions and Counsel Appear Optional*, New York Times, Sept. 24, 2014, available at: https://www.nytimes.com/2014/09/25/us/in-a-mississippi-jail-convictions-and-counsel-appear-optional.html

[5] 481 U.S. 739, 755 (1987).

[6] Tate v. Short, 401 U.S. 395, 398 (1971); *see also* Bearden v. Georgia, 461 U.S. 660, 672 (1983).

[7] Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*,.Washington, DC: PRETRIAL JUSTICE INSTITUTE (2013); Claire M. B. Brooker, et al, (2014), *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds*. Washington, DC: PRETRIAL JUSTICE INSTITUTE.

[8] Cook County Office of the Chief Judge, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*. Chicago, IL: State of Illinois Circuit Court of Cook County (2019, May).

[9] Glenn A. Grant, *2018 Report to the Governor and the Legislature*, Trenton, NJ: Administrative Office of the Courts (April 2019).

[10] Aubrey Fox and Stephen Koppel, *Research Brief: Pretrial Release Without Money: New York City, 1987–2018*. New York, NY: New York City Criminal Justice Agency (March 2019).

Carolina;[11] Philadelphia, Pennsylvania;[12] and Yakima County, Washington[13]—demonstrate that nonfinancial conditions of release are more effective at achieving the goals of the pretrial system. Indeed, most people come back to court and stay out of trouble without any or minimal conditions on their liberty. Courts are increasingly recognizing this truth, most prominently the Fifth Circuit Court of Appeals in *O'Donnell v. Harris County*.[14]

The reasons money fails are simple. Paying money bail often delays a person's release by days or weeks, as they scramble to collect money from family and friends. In that time, a person may experience many or all of the harms of pretrial detention: loss of employment, housing, or child custody. This trauma makes them *more* likely to miss court or to be re-arrested.

Our lawsuits help bring these truths to power. Along with limiting wealth-based detention, in *Booth v. Galveston County, Texas*, we obtained the first injunction from a federal court declaring that individuals have a right to counsel at a bail determination because these proceedings are critical phases of a criminal prosecution.[15] The guiding hand ensures that judges have a complete picture of the individual before them and that they remain faithful to the Constitution's presumption of pretrial release.[16]

We have also challenged abusive conditions of release, such as profiteering by private companies that force people to pay for invasive supervision like GPS monitoring. In *Ayo v. Dunn*, for example, we sued a private pretrial supervision company in East Baton Rouge, Louisiana, that trapped people in jail unless they agreed to pay a $525 monitoring fee. We prevailed in the district court on the claim that this practice constitutes extortion under the Racketeering Influenced and Corrupt Organizations Act (RICO).[17]

We subsequently used RICO, along with consumer and tort law, to challenge the bail bond industry, the entity most responsible for the metastasis of money bail in recent decades. Our case *Mitchell v. First Call Bail and Surety, Inc.*, is on behalf of Eugene Mitchell and his wife, Shayleen

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[11] Cindy Redcross, et al,. *Pretrial Justice Reform Study: Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment: Effects in Mecklenburg County, North Carolina*, New York, NY: MDRC Center for Criminal Justice Research (March 2019) (Report 1 of 2); Cindy Redcross, et al, *Pretrial Justice Reform Study: Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment: Effects in Mecklenburg County, North Carolina*, New York, NY: MDRC Center for Criminal Justice Research (March 2019) (Report 2 of 2).

[12] Oren M. Gur, et al, *Prosecutor-Led Bail Reform: Year One*, Philadelphia, PA: Philadelphia District Attorney's Office (Feb. 2019,).

[13] Claire M. B. Brooker, *Yakima County, Washington Pretrial Justice System Improvements: Pre- and Post-Implementation Analysis*, Rockville, MD: PRETRIAL JUSTICE INSTITUTE (2017).

[14] 892 F.3d 147, 154 (5th Cir. 2018) (finding "reams of empirical data" showing that "release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision").

[15] No. 3:18-cv-00104, 2019 WL 3714455, slip op. at *9-10 (S.D. Tex. Aug. 7, 2019), *adopted, as modified, by* Booth v. Galveston Co., 2019 WL 4305337 (S.D. Tex. Sept. 11, 2019).

[16] *Id.*

[17] No. 17-cv-526, 2018 WL 4355199, slip op, at *2 (M.D. La. Sept. 12, 2018).

Meuchell. In April 2017, bounty hunters conducted a nighttime raid of their Lolo, Montana home, and held them and their four-year old daughter at gunpoint. All this was to arrest Mr. Mitchell on a $1,670 bond for inadvertently missing a court date on traffic violations. The federal district court recently held that the bounty hunters and the bail bond company that hired them were both accountable for this assault.[18] Most critically, the court also held that Allegheny Casualty International Fidelity Associated Bond (AIA), the insurance company that underwrote Mr. Mitchell's bond, could face liability for perpetuating these abuses.[19] Insurance companies like AIA are the lifeblood of the bail bond industry, a multi-billion dollar enterprise that preys on the desperation of arrested individuals and their families when courts force them to buy their freedom from jail.[20]

We have litigated across the South, in Alabama, Georgia, Florida, Louisiana, Mississippi, North Carolina, and Texas. But we have also litigated in places as diverse as Arizona, California, Colorado, Michigan, Montana, Pennsylvania, and New York.

II. The Need and Case for Legislative Action

Pursuing these cases over the past five years has taught us a valuable lesson: while litigation can expose the irrationality of money bail and rein in severe abuses within the pretrial system, litigation alone is not enough. For one, we cannot end money bail in a courtroom. For every jurisdiction we sue, there are three more that cling to money bail. Rather, litigation plays a supporting role in a broader movement to realize the culture of release that the Constitution demands. That movement needs your leadership.

This is why the ACLU is pleased to support The No Money Bail Act[21] and the Pretrial Integrity and Safety Act,[22] legislation that has been offered in this body by Representative Ted Lieu (D-CA-33). These bills use federal resources to incentivize states to reform unjust money bail systems.

However, it is critical that you understand this: ending money bail is not enough. Look no further than the federal system, which bans detaining someone based on wealth. Instead, a court may only detain someone if it issues an explicit detention order.[23] Yet, prior to trial, the federal system warehouses 76% of people accused of federal offenses and 84% of those accused of drug offenses.[24] This hardly seems like the "carefully limited exception" mandated by *Salerno*.[25]

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[18] No. 19-cv-67, 2019 WL 5069352, at *1 (D.Mo. Oct. 9, 2019).
[19] *Id.*
[20] *See generally*, American Civil Liberties Union and Color of Change, *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail Systems* (May 2017).
[21] H.R. 4474, 116th (2019), S. 3271, 115th (2018).
[22] H.R. 4019, 115th (2017), S. 1593, 115th (2017).
[23] *See* 18 U.S.C. § 3142(c) (2012).
[24] Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, FED. PROB., Sept. 2017, at 52, 53.
[25] 481 U.S. at 754–55.

Our vision must be bolder. At the ACLU, we want a nation in which 95% of all people arrested are released within 48 hours.[26] Consider this. Of the presumption of innocence at trial, the English common law expert Blackstone famously wrote, "It is better that 10 guilty persons escape than one innocent suffer." That injunction should apply with equal or more force *before* trial, when we are trying, not to determine what a person has already done, but instead to predict what a person might do.

To this end, we know pretrial violence is extremely rare, and thus extremely hard to predict. Only 1.9% of people arrested for felonies are re-arrested for violent offenses.[27] Keep in mind, the rate is this low despite the fact that most jurisdictions do not provide any resources that might prevent such incidents.

Further, on the Pretrial Safety Assessment, the most popular and best-designed risk assessment instrument, a mere 9% of those flagged as most dangerous will actually be re-arrested for a crime of violence.[28] In other words, 9 of 10 will turn out to pose no threat at all. True flight, meaning people trying to avoid prosecution rather than merely forgetting a court date, is even rarer and more difficult to measure. Indeed, there is no validated risk assessment that predicts flight.

Given these facts, 95% may be too low. Regardless of whether you agree, I urge you to think of the problem this way: given the presumption of innocence and the fundamental right to pretrial release, how many people should we detain to avoid a risk that occurs in only 2% of cases over all, and in only 9% of the cases most likely to present the risk? And how many people can we detain in good conscience knowing that our methods of prediction, either by a judge alone or with the aid of a risk assessment, reproduce the racial disparities that infect our entire system of criminal enforcement? I hope your answer is now closer to 95%.

III. Recommendations

I want to suggest things the Congress can do, in addition to ending money bail, to reform the federal system and incentivize states to significantly reduce pretrial detention and increase racial equity, all while ensuring that people return to court and keeping communities safe.

1. **Increase mandatory and presumptive release**. This also requires eliminating existing presumptions of pretrial detention, thus reserving pretrial incarceration for rare, serious charges. Jurisdictions must provide those that are not released immediately with robust,

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[26] American Civil Liberties Union, *A New Vision for Pretrial Justice in the United States*, at 2 (Mar. 2019).

[27] Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 527 (2012).

[28] Matt Alsdorf, *Public Safety Assessment—Court*, NCSC 6, https://www.ncsc.org/~/media/Microsites/Files/PJCC/NCSC%20DC%20Presentation.ashx https://perma.cc/3AF2-8C64]; LAURA & JOHN ARNOLD FOUND., *RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT – COURT IN KENTUCKY* 3 (2014), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf [https://perma.cc/8QS4-CYSB] (indicating that the New Violent Criminal Activity (NVCA) category is associated with an 8.6% likelihood of arrest for a violent charge).

individualized hearings, including the assistance of counsel, that prohibit detention unless the government proves it is necessary.

2. **Invest in evidence-based reforms that work, such as court reminders.** Most people do not flee, they forget. Thus, text message reminders and improved court notices significantly increase court attendance.[29] Access to voluntary mental health and addiction treatment is also critical.

3. **Eliminate or reduce practices that set people up for failure.** This includes limiting drug testing and GPS monitoring. These measures have not proven effective and may increase pretrial failure.[30] It also includes eliminating requirements that people to pay for the costs of their pretrial conditions, which only perpetuates the cycle of debt we seek to end by abandoning money bail.

4. **Set clear goals for risk assessments, then evaluate whether they are working**. The ACLU opposes the use of risk assessments to determine pretrial liberty. However, jurisdictions using them must ensure that the tools actually result in releasing more people and reducing racial bias.

5. **Data, data, data.** Jails and local courts are among the least transparent of our criminal systems. In many places, particularly across the South, bail proceedings are not on the record. We cannot reform these systems unless we know what they are doing. That means helping to modernize local court systems to better track pretrial data—both pretrial success and failure—and making that data readily available to the public in a way that respects individual privacy.

Conclusion

The stakes are high. But Congress has an extraordinary opportunity to end the tyranny of money bail and champion a culture of release across the country. The Constitution demands more pretrial release and racial justice, and we now have the research and the experience demonstrating that we can meet these demands safely and efficiently. Thank you for your leadership.

[29] Associated Press, *Text Message Reminders Help People Remember Their Court Dates*, LOS ANGELES TIMES, May 4, 2019, https://www.latimes.com/nation/la-na-court-case-text-reminders-defendants-20190504-story.html.

[30] The Pretrial Blog, *Electronic Monitoring: Proceed with Caution*, Pretrial Justice Institute (Mar. 2018); John S. Goldkamp, et al, *Pretrial Drug Testing and Defendant Risk*, Journal of Criminal Law and Criminology, Fall 1990, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6669&context=jclc.