



Written Statement of the Record

April Frazier Camara

Chief, Lifelong Learning at the National Legal Aid and Defender Association
Chair, Black Public Defender Association

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Hearing on

From Miranda to Gideon: A Call for Pretrial Reform

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Chair Jackson Lee, Ranking Member Biggs, and members of the Subcommittee, thank you for the opportunity to submit this written testimony for the Subcommittee’s hearing on pretrial reform.

My name is April Frazier Camara, and I am the Chief of Lifelong Learning at the National Legal Aid and Defender Association (NLADA) and Chair of the Black Public Defender Association. Currently, I also serve as the chair of the American Bar Association (ABA) Criminal Justice Section; however, I do not speak on behalf of the ABA today. For more than a century, NLADA has pioneered access to justice at the national, state, and local levels. We serve as the collective voice for our country’s civil legal aid, public defense, and client community and offer high-quality advocacy, training, and technical assistance aimed at achieving America’s promise of equal justice under the law.

For me, this work is both professional and personal. As a former public defender and the Co-founder and Chair of the Black Public Defender Association, I see myself in clients who are facing the threat of incarceration or those who are already incarcerated. I believe that Black public defenders, who fight for justice daily and come from the communities most harmed by the criminal legal system, must be among the leading voices in shaping solutions, and I am honored to speak before this Subcommittee about advancing pretrial reform through a racial equity lens.

Introduction

We, as a country, are in the midst of a once-in-a-generation civil rights movement. In the past year, we have witnessed an uprising across the country and a resounding call for racial justice and racial awakening. Polling shows that a majority of Americans now believe that our criminal legal system needs a “complete overhaul” or “major changes.”¹

All Americans have the obligation to understand the history of white supremacy in this country. The murders of George Floyd and countless others is the inevitable result of our failure to reckon with our past and confront the legacy of slavery, Black Codes, lynchings, Jim Crow laws, redlining, and the war on drugs. State-sanctioned violence against Black people did not begin with the killing of George Floyd, but rather it is a part of a long legacy of brutality that started with slavery and currently exists within the criminal legal system.

Our country is demanding systemic changes to the criminal legal system, and policymakers should meet the moment by advancing reforms that eliminate racial disparities within our legal system. Dr. King reminded us during the 1960s civil rights movement that:

“History will have to record that the greatest tragedy of this period of social transition was not the strident clamor of the bad people, but the appalling silence of the good people.”

As a society, we can no longer remain silent about the unjust racial disparities that plague the criminal legal system. Proposed solutions have to address harms to Black communities, who are disproportionately surveilled, arrested, and funneled into the criminal legal system. When

¹ AP-NORC poll: Nearly all in US back criminal justice reform. (2020) Retrieved from <https://apnorc.org/ap-norc-poll-nearly-all-in-us-back-criminal-justice-reform/>

advancing pretrial reform, lawmakers must adequately address the disproportionate harm inflicted on Black communities and ensure that reforms are not inadvertently widening existing racial disparities or creating additional disparate harm to Black communities.

Policymakers must also take a holistic view of these issues to understand how the criminal legal system intersects with other parts of the legal system. The Black Public Defender Association is currently examining these issues through a comprehensive carceral systems approach. The definition of carceral systems includes the criminal legal system, housing courts, immigration, foster care systems, and other systems that disproportionately impact Black people in the U.S. It is important for lawmakers to keep in mind the intentional and unintentional consequences of the pretrial system on other carceral systems in order to develop effective strategies that disrupt the cycle of harm to communities of color.

Two Justice Systems in America

The failed “tough on crime” policies of the last forty years have targeted Black and Latinx communities, especially those who are experiencing poverty, and have trapped them in a cycle of incarceration that destabilizes their housing, families, and employment, among other harms.² From arrest to incarceration, Black and Latinx communities are disproportionately targeted: they are more likely to be arrested, and once arrested, they are more likely to be convicted, and receive harsher sentences than white people.³ Federal prosecutors are twice as likely to charge Black people with offenses that carry a mandatory minimum as compared with similarly situated white people,⁴ and state prosecutors are more likely to charge Black people under habitual offender laws as compared with similar white people.⁵ Black communities in particular face stark realities. Black men are 6 times more likely to be incarcerated than white men and 2.5 times more likely than Latinx men.⁶ If we do not disrupt these systems of harm, 1 in every 3 Black boys born today can expect to go to prison in his lifetime, compared to 1 in every 17 white boys.⁷

This is a crisis, and it must end.

Pretrial is a crucial phase of the criminal legal system, and reform is urgently needed. Pretrial detention fuels mass incarceration and is responsible for 99% of our country’s jail population growth in the past fifteen years.⁸ Today, more than two-thirds of people in jail—nearly half a million people—are legally innocent and awaiting trial.⁹ As with other parts of the criminal legal system, Black and poor communities have endured the brunt of this crisis disproportionately. Black people comprise nearly a third of America’s jail population despite making up just 13% of

² National Research Council. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. *The National Academies Press*. Retrieved from <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>

³ The Sentencing Project. (2013). *Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System*. Retrieved from <https://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/>

⁴ Starr, S. B. & Rehavi, M. M. (2013). Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of the Yale Law Journal, 123(2), 2-80. See also The Sentencing Project (2018). *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*. Retrieved from <https://www.sentencingproject.org/publications/un-report-on-racial-disparities>

⁵ Crawford, C., Chiricos, T., & Kleck, G. (1998). Race, Racial Threat, and Sentencing of Habitual Offenders. *Criminology*, 36(3), 481–512.

⁶ See note 3

⁷ See note 3

⁸ Wagner, P. (2015). *Jails matter. But who is listening?* Retrieved from <https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/>

⁹ Digard, L. & Swavola, E. (2019). *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*. Vera Institute of Justice. Retrieved from <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>

the general population.¹⁰ Additionally, people entering jail are overwhelmingly poor, with a median annual income of approximately \$15,000, which is less than half of the median for similarly-aged non-incarcerated people.¹¹ Being detained pretrial means that people who are already marginalized risk losing their jobs, housing, and children, all of which exacerbate economic and familial instability and worsen public safety.¹²

Black Children and Youth

Even though the number of children in confinement has dropped significantly, pretrial detention is common in the juvenile legal system. One in five children in juvenile facilities is awaiting trial. Black and Latinx children are especially vulnerable to this practice and comprise 62% of children in juvenile facilities who are detained pretrial.¹³ Removing children from their homes and community, and detaining them, particularly when they are legally innocent, is detrimental and unnecessarily exposes children to trauma and maltreatment in juvenile detention facilities. Lawmakers should invest in alternatives to incarceration for children, and provide support services to families and children in their communities, outside of the criminal legal system.

Black Women

More than 60% of women in jail are awaiting trial.¹⁴ Black women alone comprise 44% of women incarcerated in jail, and they face significant challenges in the pretrial phase.¹⁵ Black women have the lowest incomes before incarceration compared to other demographic groups, which makes it much less likely that they will be able to purchase their freedom pretrial.¹⁶ Research shows that even Black women who are not facing the threat of incarceration themselves are impacted disproportionately by the criminalization of poverty. Nearly half of all Black women have at least one incarcerated family member, and they are the most often burdened with securing the funds to purchase their loved one's freedom.¹⁷

The data points above should push us to recognize and reckon with the fact that there are two systems of justice in America: one for wealthy people (who are disproportionately white) and one for poor people (who are disproportionately people of color). Historic and structural racism drives these two systems. The legal framework of affording the accused substantial constitutional rights, in theory, promotes a concept of fairness in America. However, how courtrooms operate each day across this nation displays a different and frightening reality. Over 80% of people

¹⁰ Bureau of Justice Statistics. (2020). Jail Inmates in 2018. Retrieved from <https://www.bjs.gov/content/pub/pdf/ji18.pdf>

¹¹ Rabuy, B. & Kopf, D. (2016). Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time. Retrieved from <https://www.prisonpolicy.org/reports/incomejails.html>

¹² Leslie, El. & Pope, N. (2017). The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments. Journal of Law and Economics. Retrieved from http://econweb.umd.edu/~pope/pretrial_paper.pdf

¹³ Sawyer, W. (2019). Youth Confinement: The Whole Pie 2019. Retrieved from <https://www.prisonpolicy.org/reports/youth2019.html>

¹⁴ Kajstura, A. (2019). Women's Mass Incarceration: The Whole Pie 2019. Retrieved from <https://www.prisonpolicy.org/reports/pie2019women.html>

¹⁵ Vera Institute of Justice. (2016). Overlooked: Women and Jails in the Era of Reform. Retrieved from <https://www.vera.org/downloads/publications/overlooked-women-and-jails-fact-sheet.pdf>

¹⁶ Rabuy, B. & Kopf, D. (2016). Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time. Retrieved from <https://www.prisonpolicy.org/reports/incomejails.html>

¹⁷ Clayton, G., Richardson, E., Mandlin, L. & Farr B. (2018). Because She's Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones. Essie Justice Group. Retrieved from <https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group-Because-Shes-Powerful-Report.pdf>

charged with crimes in state courts cannot afford counsel and are represented by public defenders or assigned counsel.¹⁸

Most states inadequately fund their public defense programs. While there are some high-quality public defender offices, in far too many cases indigent individuals with low incomes are represented by public defenders with excessively high caseloads, or by assigned counsel with limited experience in criminal defense.¹⁹ I have the experience of working in both a high-quality public defender office and a poorly resourced office, and I have witnessed firsthand the devastating impact of inadequate representation. Funding high-quality community oriented public defense must be a key strategy to sustain any efforts toward pretrial reform.

Advancing Racial Equity through Pretrial Reform: Policy Recommendations

The scope of pretrial reform is very broad and it requires a combination of collaborative solutions. My recommendations focus on three key areas: (1) Centering the Voice of Directly Impacted Communities in Policy-Making; (2) Counsel at First Appearance, and (3) Alternatives to the Traditional Prosecution and Holistic Defense.

The Voice of Black Defenders and Directly Impacted Community

As we discuss these reforms, it is crucial to call attention to *who* is being policed, criminalized, and incarcerated. At each stage of the criminal legal system, people of color are disadvantaged and overrepresented. Black people, specifically, are surveilled, detained, charged, and punished at rates that dwarf similarly-situated white people. This is a moment to face our history and chart a path toward achieving true public safety. Historically, public safety is defined for impacted Black communities instead of with them, which has led to the current realities of many Black communities being over-policed, surveilled, and targeted by the criminal legal system.

Black communities are rarely asked, “What does safety mean to you?” Typically, questions of public safety are defined by law enforcement and addressed as normative needs, which frame issues from expert perspectives and amassed knowledge, but not lived experience. Experts are often not from the impacted Black communities they seek to study and influence. While there are many expert voices on criminal reform, the voices of defenders and directly-impacted community members are missing.

We are at a critical juncture in America in attempting to address racism and inequities in the legal system, and we must use this moment to do things radically different. We risk repeating the past failures by allowing “experts” to define what the future of public safety should look like in the Black community without the voice of the Black community. Congress must include skilled Black public defenders and directly impacted communities in the efforts to address pretrial reform and work with them to advance race equity.

¹⁸ Bureau of Justice Statistics. (2000). Defense Counsel in Criminal Cases. Retrieved from <https://www.bjs.gov/content/pub/pdf/dccc.pdf#:~:text=publicly%20financed%20counsel%20to%20represent%20criminal%20defendants%20who,were%20the%20same%20for%20defendants%20represented%20by%20publicly>

¹⁹ E.g., Quealy, J., L.A. Times (Dec. 13, 2020). With L.A. courts paralyzed by COVID-19, public defenders say caseloads are ‘unconscionable’. Retrieved from <https://www.latimes.com/california/story/2020-12-13/los-angeles-courts-covid-public-defender-caseloads-doubled-tripled>; Oppel, R. & Patel, J., New York Times (Jan. 31, 2019). One Lawyer, 194 Felony Cases, and No Time. Retrieved from <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html>

Counsel at First Appearance

Providing access to counsel at an individual's first appearance before a judicial officer (variously termed as a bail hearing, arraignment, or magistration) can be used as an effective strategy to promote racial equity in the criminal legal system. Black people and other people of color are overrepresented in America's jail population, and representation by counsel at first appearance has been shown to reduce jail admissions, the length of jail stays, and bail amounts.²⁰

Counsel at first appearance also can push back against the culture of treating people in the criminal legal system as case numbers rather than full human beings with lives that matter. Quality representation at first appearance is critical for telling the stories of people impacted by the criminal legal system and humanizing people accused of crimes. This aspect of pretrial representation by counsel is particularly notable in the context of the systematic devaluation of Black lives that has been perpetuated by the criminal legal system for centuries.

Alternatives to Traditional Prosecution and Holistic Defense

For too long in this country, we have used jails and prisons to respond to social problems, racialized neglect of Black communities, and unmet needs such as housing, and access to treatment for drug or mental diagnoses. This strategy has proven to be costly, unsustainable, and harmful to Black and low-income communities. Policymakers must seriously consider investing in deflection programs to divert people away from the criminal legal system and instead connect them to community support services to address the underlying conditions that force people to interact with the system.

Congress can look to the 29 jurisdictions across the country—as varied as Tucson, Arizona; Louisville, Kentucky; Austin, Texas; and Washington, D.C.—that diverted people away from jail as a result of COVID-19 and the public health risks of incarceration, while reducing their crime rates.²¹ These cities have made the case for eliminating unnecessary prosecutions, particularly for nonviolent misdemeanors that criminalize poverty and addiction.²² We are safer as a community and society when we use taxpayer resources to address the conditions that lead people to interact with the criminal legal system.

Another example is the groundbreaking Pre-Entry Initiative in Philadelphia, Pennsylvania. This program, launched by Chief Defender Keir Bradford Grey at the Defender Association of Philadelphia in November 2019 through funding from the John D. and Catherine T. MacArthur Foundation's Safety and Justice Challenge, to provide support services to people who have been arrested. This program saw a reduction in racial and ethnic disparities and reduced pre-trial rearrests by approximately 40%.²³ This initiative demonstrates the ways that defenders can

²⁰ Mrozinski, M. & Buetow, C. (2020). Access to Counsel at First Appearance: A Key Component of Pretrial Justice. Retrieved from <http://www.nlada.org/sites/default/files/NLADA%20CAFA.pdf>

²¹ ACLU. (2020). Decarceration and Crime during COVID-19. Retrieved from <https://www.aclu.org/news/smart-justice/decarceration-and-crime-during-covid-19/>

²² Smith, A., Johnson, V., & Copacino, J. (2021). Opinion | Misdemeanor Court has been closed for a year. keep it that way. *The Washington Post*. Retrieved from <https://www.washingtonpost.com/opinions/2021/03/04/misdemeanor-court-has-been-closed-year-keep-it-that-way/>

²³ Defender Association of Philadelphia (2020). Pre-Entry Coalition. Retrieved from <https://phillydefenders.org/pre-entry-2>.

enhance community safety and avoid some of the harmful outcomes of the criminal legal system through holistic programs.

The goal of the criminal legal system should be to address the underlying conditions that brought a person into contact with the system to prevent future contact and enhance public safety. Holistic defense models provide the necessary resources needed to assist clients in achieving these goals; however, they are underfunded along with community-based alternatives to traditional prosecution. For example, limitations in publicly funded treatment options create fewer sentencing alternatives available to low-income persons charged with crimes who cannot afford to pay for treatment programs as an alternative to confinement.²⁴ Community-oriented holistic defenders play a key role in providing community based alternatives to low-income clients, who are disproportionately Black and Latinx.²⁵ Congress must adequately fund community-based alternatives to prosecution and holistic defenders to achieve better outcomes.

To this end, one proposal that NLADA strongly supports is the EQUAL Defense Act (H.R. 1408). This bill would represent a substantial step toward making the criminal legal system more fair by providing federal support to state, local, and tribal public defenders. Amid state and local budget shortfalls, supplemental federal funding would be critical to allowing defender programs to realize initiatives aimed at holistic defense and racial equity.

Thank you for the opportunity to submit this written testimony. I look forward to your questions.

²⁴ See note 18

²⁵ Ghandoosh, N. (2015). Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System. The Sentencing Project. Retrieved from <https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/>