Dissenting Statement of Commissioner Peter N. Kirsanow

Introduction

This is far from the worst report the Commission has issued during my tenure. Bail reform is an important topic, and there are aspects of this report with which I agree. However, there are too many omissions and faulty premises for me to support it wholeheartedly. This statement should not be taken as an exhaustive list of my disagreements with the report and with many of the issues surrounding bail reform.

As is the case with many of this Commission's reports, this one begins from the wrong place. The report is primarily concerned with the consequences experienced by people who have been arrested. In my view, the balance of considerations should be weighed in favor of the law-abiding.

Let me put it more bluntly: it is the duty of government officials to prioritize the law-abiding over law-breakers. It is true that no one is legally guilty until they are convicted. However, the police had probable cause to arrest them. And the lack of a conviction later on does not necessarily mean they did not commit the crime. It may mean that they were innocent, or it may be that witnesses failed to appear (either due to fear or simple lack of interest), prosecutors dropped the case to prioritize other cases, or any number of other considerations.

Bail Reform: What Are We Examining?

Even if a person commits a crime because he or she is (for example) addicted to drugs, that does not mean he or she did not commit the crime. One panelist testified that she was arrested for a theft charge and said that the charge arose out of a drug problem she had. That doesn't mean that she didn't commit the theft. In fact, she didn't deny that she had committed the theft, but rather said that she took a plea deal in order to go to a treatment program and get back to her children sooner.[1268]

There is a societal cost to releasing criminals. Former Washington, D.C. police chief Peter Newsham testified:

[1268] Transcript at 85.

> I was arrested in 1998, from a drug addiction that I had at the time, but it was for a theft charge, and was given a bail that I could not afford, a $10,000 cash bail. The options were I can plea out to go to treatment immediately and be home in six months or take it to trial and actually go to prison for up to 18 months. Having small children at home, I was not afforded the opportunity, because I couldn't pay bail, to actually try to get treatment outside or see what my options were.
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> I felt I was forced to plead to the six months so that I can return home to my children as soon as possible. But also, was returning home and wanted to address the issue I had.

> [T]he violence in Washington, D.C. is restricted to a very small geographic area. So Washington, D.C., although it's considered a big city, the neighborhoods that are plagued with violence are very, very small.
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> When a dangerous gun-related violent offender is turned back into that community, everybody knows that that happened. That results in a lack of trust in the system by the folks who live there.
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> The trauma that's being placed on these communities by this gun violence is so palpable. You have young people that are fearful to go to the store, young people that are afraid to go to school.
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> So I think that when we're considering release, particularly on the violent offenders, we've got to be extremely careful that we don't let the pendulum swing too far.[1269]

The question should not be, "How much of the margin of error can we persuade the law-abiding to bear?" Yet too often, that is the premise from which government policy starts.

Any reform of the bail system should be a non-starter if it potentially exposes the public to more crime. This is particularly true in regard to violent crime, but it is not limited to violent crime. The same rule applies to property crime. Property crimes, drug crimes, and "lifestyle crimes" are not "victimless crimes." A criminal who repeatedly steals cars is victimizing people. His victims then have to file a claim with their insurance company, find alternative transportation to work or school, purchase a new vehicle (which will almost certainly require a financial outlay on their part in addition to their insurance claim), and likely have an increased insurance premium. Their neighbors will also likely experience increases in their insurance premiums. Likewise, selling drugs (as very few people are incarcerated for mere possession, even if possession is what they are charged with) is not a victimless crime. Thousands of people die of drug overdoses every year. The drug cartels that smuggle drugs into this country or grow them here illegally engage in human trafficking, murder, intimidation, and virtually every form of criminal activity – even when drugs are legalized.[1270]

Thus, I disagree with panelists who primarily focus on the relative rarity of violent felony offenses committed by people released pretrial. Violent felony offenses are not the only crimes that are worthy of judicial consideration.[1271] But even some of those panelists, when they begin discussing specifics, believe that it is the law-abiding public, rather than criminals, that should shoulder the

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[1269] Transcript at 91-92.

[1270] Dennis Romero et al., "Foreign cartels embrace home-grown marijuana in pot-legal states," NBC News, May 29, 2018, Foreign cartels embrace home-grown marijuana in pot-legal states (nbcnews.com).

[1271] Insha Rahman, Vera Institute, written statement at 2 ("typically less than 2% of all people released – either on their own recognizance, under nonmonetary conditions, or on bail – are rearrested for a violent felony offense during the pretrial period.").

costs of crime. Insha Rahman of the Vera Institute listed three characteristics of what she described as "good" bail reform":

- Implementing mandatory release without bail, and without onerous conditions, for the vast majority of people arrested.
- Building a community-based, supportive system of pretrial services.
- When considering detention, eliminate mere FTA [failure to appear] as a basis to detain and tighten the standard for risk to public safety.[1272]

These three recommendations, taken together, shift both the costs of crime and the risks of future crime from criminals to taxpayers. The first recommendation may be feasible, depending upon how it is implemented. The second recommendation – "building a community-based, supportive system of pretrial services" – shifts the cost from the arrestee (who would receive reminders, etc., from a bail bondsman) to taxpayers, who are going to pay to build this "supportive system". Not coincidentally, people will still profit from these new systems. "Advocacy groups" receive grants to develop these new systems, serve in advisory roles, and staff these systems. Indeed, the court-appointed monitor hired the Vera Institute of Justice to provide trainings about the Harris County consent decree to public defenders, district attorneys, judges, and others.[1273]

It will simply be that people who are aligned with the views of advocacy groups will profit from these new systems, rather than bail bondsmen.

The owner of two bail-related companies stated in her public comment to the Commission that bail professionals work with their clients to help them achieve success, beyond merely showing up for court.

[1272] Insha Rahman, Vera Institute, written statement at 3.

[1273] *Monitoring Pretrial Reform in Harris County: Second Report of the Court-Appointed Monitor*, March 3, 2021, at 20, https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2021/03/ODonnell-Monitor-Second-Report-v.-32.pdf. During this past six-month time period, Vera Institute of Justice was retained to provide trainings on Rule 9 and the Consent Decree. On December 11, 2020, the first training was provided and it was attended by about 370 people. The initial training covered these topics:

- Origin of Consent Decree (and authority based in Federal Constitution)
- Impact of bail reform in Harris County
- How the basic process has changed and each step in the process from arrest to first setting
- Serve as a problem-solving liaison: Vera Institute of Justice will be available to gather feedback and concerns.

  The Vera Institute of Justice will provide additional targeted workshop trainings with specific groups: (1) workshops for all practitioners (district attorneys, defense counsel, magistrates, and judges) about how to make the hearings robust [and] how to think through cases, and (2) a session specific to pretrial services and their role and expectations.

> What I see instead are human beings who need accountability so that they go to court. My agents and I provide that accountability at no cost to taxpayers. We remind clients of court dates, and then if they do not go, we help them get there.
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> We also provide many of our clients with friendship and someone to believe in them and cheer them on. We give them referrals to things like domestic violence shelters, food banks, drug and alcohol programs. We help them get jobs and safe housing. We help them make positive changes in their lives. Our goal for every client is that they never need our services again. That may seem counter-intuitive, but that is not only our choice, but also the choice of every bondsman I know. We all desire to help people to do better.[1274]

It is also worth noting that Rahman's preferred bail reform would "eliminate mere FTA as a basis to detain". There is nothing "mere" about failing to appear for a court date. Failing to appear for a court date is thumbing your nose at the legal system. If a person doesn't appear for a court date, he is avoiding the punishment that is likely coming his way. If it is a relatively low-level crime, such as a property crime, the police likely will not have the resources to track him down until they (almost inevitably) encounter him when he commits another infraction. On the other hand, if a person out on bond fails to show up, the bail bondsman will track him down, and the criminal knows it. This is an additional incentive to appear in court, and also the cost of apprehending a criminal who does not appear for a court date falls on the bail bondsman, rather than the taxpayer. Since the bail bondsman has an incentive to apprehend his client quickly, it may also reduce the client's opportunities to commit more crimes.

Furthermore, at least one study has found that people released on commercial bonds have lower rates of FTA than people released on other types of pretrial release. In a public comment to the Commission, Dr. Stephen Clipper explained what his research found:

> In this study, we compared the failure to appear (FTA) rates between attorney, cash, commercial, pretrial service bonds, as measured by a bond forfeiture or similar outcome for defendants released via pretrial serviced supervision. (For a detailed explanation of the study methodology see: Clipper et al., 2017.) **Our results indicated that commercial bonds had lower rates of FTA compared to other mechanisms when accounting for the effect of relevant and available covariates.** It bears repeating: we were not and do not advocate for or against any mechanism of pretrial release.
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> While my coauthors and I cannot know for certain why the commercial bail bonds yielded a lower rate of FTA compared to other mechanisms, we hypothesize that the difference may be the result of available resources which affect the ability for these mechanisms to engage in best practices. Research on FTA suggests that absconding is rare and instead most FTAs are non-nefarious. Studies have found that many FTAs are the result of defendant confusion surrounding the appearance

[1274] Kay Sharpe, Public Comment, Mar. 3, 2021 (on file with Commission).

> requirements. One such study utilized a court reminder initiative coupled with modifications to the appearance of summons to make them easier to understand. Results of these interventions were found to increase appearance rates and decrease added charges. **At the time of data collection in Dallas County, commercial bail bonds often collected many means of communication with a defendant (e.g., contact information for an employer, family member, and friends) and provided reminders through many points of contact, if there was difficulty contacting the defendant directly. Anecdotally, commercial bail bonds providers would ensure transportation and provide transportation to court if the defendant did not have adequate means to get to court. Commercial bond providers were at an advantage to perform these roles; they were adequately resourced by a for-profit, defendant-funded model.**
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> These resources simply did not exist for the government-funded alternatives we compared to commercial bonds. This was especially true for individuals released via Dallas County's Pretrial Services Department. Dallas County's Pretrial Services Department did not have the resources necessary to match the level of service provided by commercial bonds providers, even with the dedication and hard work of the agency staff. The case load for Dallas County's Pretrial Services Department was several times larger compared to commercial bond provider's caseloads. The underfunding largely prevented Dallas County's Pretrial Service Agency from engaging in the same practices that commercial bonding agencies were performing. Regardless of the nature of the program, a well-resourced program engaging in evidence-based best practices will perform better compared to an under-funded program that is unable to provide that same support [emphasis added; citations omitted].[1275]

In her oral testimony, Rahman elaborated upon what she means by "tighten[ing] the standard for risk to public safety." She said:

> Illinois just signed into law bail reform this week. And one thing they did that is unique is that the risk to public safety element for considering detention, they narrowed it significantly, so that the standard is that it's risk to an individual person or persons and a risk of physical harm, not just this broad standard that can encompass all kinds of behavior, including behavior that is not threatening or not risk at all.[1276]

The Illinois statute in question, which goes into effect January 1, 2023 provides, "Detention shall only be imposed when it is determined that the defendant poses a specific, real and present threat to a person, or has a high likelihood of willful flight."[1277]

[1275] Stephen Clipper, Public Comment, Mar. 25, 2021, at 1-2 (on file with the Commission).

[1276] Transcript at 35-36.

[1277] 725 ILCS 5/110-2(c).

Subsection (e) seems to contradict this, as it provides:

> This Section shall be liberally construed to effectuate the purpose of relying upon contempt of court proceedings or criminal sanctions instead of financial loss to assure the appearance of the defendant, and that the defendant will not pose a danger to any person or the community and that the defendant will not pose a danger to any person or the community and that the defendant will comply with all conditions of pretrial release.[1278]

It remains to be seen how the Illinois courts interpret this statute. The "specific, real, and present threat to a person" language in subsection (c) suggests that the pretrial detention should only be used in rare circumstances where there is an identifiable future victim. Subsection (e)'s command to interpret the section "liberally" and that the defendant should not pose a danger to the community suggests that detention should be used to protect the community generally from future crimes.

Rahman's interpretation of this statute seems to suggest that public safety should not be considered as a basis to detain someone unless there is a specific physical threat to an identifiable person. If someone has committed a violent offense but the police can't identify an individual who might be at risk if this person is released, the arrestee should be released. If someone committed a violent robbery, but it was a crime of opportunity, there probably isn't an identifiable future victim. Law-abiding citizens will just have to hope they are not in the perpetrator's vicinity when he again feels the need for some easy money. Someone arrested for auto theft likely does not pose a physical threat to an identifiable person. The fact that he may steal another car hours after being released, as happened in New York under its bail reform law, apparently does not matter.[1279] The owner of the stolen car is out of luck. Enjoy navigating the insurance process!

Here is just one example of a man whose arrest for a nonviolent offense does not adequately capture his criminal background:

> On September 25, 2020, Metropolitan Police Department (MPD) officers arrested the Defendant, and the next day the Court issued an arrest warrant pursuant to a criminal complaint charging him with one count of Unlawful Possession of a Firearm and Ammunition by a Person Convicted of a Crime Punishable by Imprisonment for a Term Exceeding One Year, in violation of 18 U.S.C. §9 922(g)(1). . . .

[1278] *Id.* at (e).

[1279] William Bratton, written statement at 2.

> The New York State bail reforms stipulate that auto thieves cannot be held even for arraignment and must be released on desk appearance tickets within hours of their arrests. Auto thefts were up 66.7 percent by year's end. As with burglary, auto thefts have declined for decades in the city, with only one annual increase in any year since 1990. An auto thief with multiple arrests in 2020, was released, as required, on a desk appearance ticket only to be arrested again on the very same night trying to steal a van within blocks of the precinct house from which he had been released.

> On September 25, 2020, MPD officers responded to a location in Southeast, Washington, District of Columbia, based on an anonymous report that an unresponsive individual was lying under a vehicle. D.C. Fire Department members arrived first to the scene, where they found the Defendant unconscious. They administered Narcan to resuscitate him. The Fire Department members found a firearm loaded with one round of ammunition in the chamber and twelve rounds in the magazine in the Defendant's waistband, which they removed while he was still unresponsive. The firearm was a 45 semi-automatic pistol. When the MPD officers arrived, they saw the Defendant lying on the ground and regaining consciousness.
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> In 2012, the Defendant was convicted of Accessory After the Fact: Assault with Intent to Commit Robbery While Armed. In 2014, the Defendant was convicted of Second-Degree Murder and Use of a Handgun/Crime of Violence.[1280]

Using the bail reform characteristics proposed by advocates, Kent likely would have been released rather than detained, given that there was no evidence that the safety of an identifiable individual was threatened. As the court noted in its decision requiring detention, however:

> The danger posed by the Defendant's release is that he would use or possess a firearm in a dangerous way. Firearms present a risk of danger from either intentional or unintentional discharge; each risk has the potential to cause injury or death to members of the community. . . . Here, the Defendant had a loaded firearm on his person while apparently under the influence of a controlled substance. . . . This firearm could have discharged, causing injury to the Defendant or anyone else in the area, or it could have easily been taken by someone else, as evidenced by the fact that a member of the Fire Department was able to remove the firearm from his waistband while the Defendant remained unresponsive. . . . Given the Defendant's repeated offenses and his instant re-arrest while on supervision, the Court has little confidence that even strict release conditions, such as home incarceration, would adequately mitigate the danger posed by his release.[1281]

This case illustrates why it is vital to give judges broad discretion to detain criminals to protect public safety. When a federal judge orders an individual detained pending trial, she is required to issue a detention order containing findings of fact and a written statement providing the reasons for the detention.[1282] This is not required if a judge releases an individual. Therefore, it is more difficult to know the history of those who are being released.

A similar dynamic is in play at the state court level, at least in some states. New York law requires that when a judge must determine whether to release a defendant and under what conditions, "The court shall explain its choice of release, release with conditions, bail or remand on the record or in

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[1280] U.S. v. Kent, 496 F.Supp.500, 501 (D.D.C. 2020).

[1281] *Id.* at 506.

[1282] 18 U.S.C. § 3142(i).

writing."[1283] However, as a New York court explained in a decision regarding a defendant's appeal of his bail, "bail decisions are made all the time, and they are also usually made orally and immediately. For example, a judge sitting in a busy New York City Criminal Court arraignment part (when no pandemic is underway) can sometimes be called upon to make as many as seventy-five oral bail decisions in one day."[1284] In this particular case, although the defendant had not yet been convicted of any crimes as an adult, he had embarked on a criminal career at a young age.

> Petitioner Brian Cespedes is a twenty-year-old man. His criminal history record (or "rap sheet") indicates that, apart from the two instant open gun indictments, petitioner has a 2016 Juvenile Delinquent adjudication for Assault in the Second Degree with a Weapon or Dangerous Instrument for which he received a sentence of fifteen months' probation, and an Adjournment in Contemplation of Dismissal for a July 2019 misdemeanor arrest (for inciting to Riot, and related charges).
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> Petitioner was arrested on May 26, 2018, and charged with Criminal Possession of a Weapon in the Second Degree. It is alleged in substance on that case that petitioner and his companions, upon seeing the police approach, discarded two loaded guns under a parked car.
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> Petitioner was initially released on his own recognizance on the 2018 case. In August of 2018, a Grand Jury voted Indictment Number 1657/2018 charging Petitioner Cespedes with two counts of Criminal Possession of a Weapon in the Second Degree and related crimes. The 2018 case was calendared in Part 77 pending trial, and petitioner Cespedes voluntarily appeared on that case a number of times without incident until his re-arrest in August of 2020.
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> On August 12, 2020, petitioner Cespedes was once again arrested and charged with Criminal Possession of a Weapon in the Second Degree and related charges.
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> In the 2020 case the prosecution in substance alleges that petitioner Cespedes became embroiled in some kind of a dispute inside a bodega. As shown on surveillance video, petitioner was wearing a "fanny pack" while inside the bodega. The police were summoned. As the police approached, petitioner discarded the fanny pack just outside the bodega. The police recovered it almost immediately, and found a loaded gun inside.[1285]

Reported cases will tend to be the most serious cases, and also the cases where a judge denied bail. In this case, the petitioner had been charged with numerous serious crimes by age 20, despite not yet having been convicted of a crime. This is worth bearing in mind when advocacy organizations and ex-convicts claim that individuals facing pretrial detention are still innocent. They remain not guilty until convicted, but that does not mean they are not dangerous and have not committed other crimes. The judicial system gave Cespedes every opportunity to change his ways. Even as an adult,

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[1283] CPL § 510.10(1).

[1284] People ex rel. Griffin v. Brann, 147 N.Y.S.3d 313, 323 (N.Y. App. Div. 2020).

[1285] *Id.* at 316-317.

he was first released on his own recognizance for his first adult weapons charge, and then received an adjournment in contemplation of dismissal on the misdemeanor charge of inciting a riot. Nevertheless, the very next year he was back to illegally possessing firearms and engaging in altercations.

Sharlyn Grace of the Coalition to End Money Bond and the Illinois Network for Pretrial Justice said that she was representing "people who have been incarcerated pretrial, their loved ones, and all of us who are made less safe by the destabilization of our communities that pretrial jailing causes".[1286] Grace testified that the stakeholders she represents want several things out of bail reform:

> [P]eople want to be released, and they want to be free from other forms of pretrial surveillance and punishment. . . .
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> This means that any referrals to services must be voluntary. We know that for people who use drugs, in particular, who are at a dramatically increased risk of death both in jails and after they're released from jail, that voluntary engagement with treatment is much more effective than mandatory treatment.
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> I also want to caution against the imposition of pretrial release conditions that lead to greater failure rates and have no proven benefits to the community, such as drug testing, electronic monitoring, and other conditions that the courts refer to as services, but which are experienced nearly universally as forms of pretrial punishment.[1287]

The interests of society and law-abiding citizens are subordinated to the preferences of criminals and their families. Grace says that drug users should not be required to seek drug treatment or be subject to drug testing as a condition of release. Drug use is still a crime in most states, particularly drugs other than marijuana. Treatment may be more effective when a person seeks it voluntarily, but drug users are notoriously averse to seeking treatment. Drug use is also a motivation for many types of property and vice crimes, and also a contributing factor to public order offenses and some violent crimes. If someone is going to be released pending trial, it is not too much for taxpayers and law enforcement to demand that the person avoid further lawbreaking while awaiting trial. Drug use is by its nature lawbreaking (even marijuana use is a violation of federal law), and it contributes to many other crimes as well. Requiring people to seek treatment and be tested for compliance is not too much to ask.

Likewise, the staff-written portion of the report approvingly cites Professor Megan Stevenson forty-six times. This is Professor Stevenson's view on pretrial detention:

> A coauthor and I developed a form of contingent valuation that allows us to estimate the relative cost of crime victimization and incarceration. We asked

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[1286] Transcript at 79.

[1287] Transcript at 80.

> respondents questions such as, if you had to choose between spending a month in jail or being the victim of a robbery, which would you choose?
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> In short, we find that people are incredibly averse to incarceration. Most of our respondents reported that a single day in jail imposes harms greater than burglary. Three days in jail impose harms greater than robbery. A month in jail imposes harms greater than a serious assault.
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> And these responses are not just uninformed speculation, even those who have personal experience with incarceration and/or crime victimization report that jail is incredibly harmful and even short stays can impose harms as grave as serious crime.
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> Now, back to our cost-benefit analysis, once again, a legal precondition for pretrial preventive detention. If jail is so harmful, then a person must pose an extraordinarily high risk of committing a serious crime in order to justify pretrial detention.
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> In order for pretrial detention to avert more harm than it creates, you would have to avert crimes as grave as burglary in order to justify caging someone for a single day, avert crimes as grave as robbery in order to justify caging them for three days, avert crimes as grave as serious assault in order to justify caging them for a month.[1288]

If we follow this reasoning to its logical conclusion, there is almost no reason to ever incarcerate someone, even after they are convicted of a crime. After all, if people would rather be the victim of a robbery than go to jail for three days, that applies just as much to post-sentence incarceration as to pretrial detention. Policymakers cannot look at crime and punishment in a "would this individual rather suffer x or y" approach. They must consider, "What will society be like if all robbery suspects are released pending trial?" Professor Stevenson says very few people reoffend pending trial, and we can't accurately predict which ones will reoffend.

> In one commonly used risk assessment tool, only 2.5 percent of those in the highest risk category are expected to commit a violent crime within 30 days. At that risk level, the harms of incarceration are probably 40 times greater than the benefits of averted crime.[1289]

Professor Stevenson did not, however, address how criminals' behavior is likely to change if they are aware that they will be released as soon as they are arrested. Why would you avoid robbing people if you know you are almost certain to be released again, if you are even caught?

Bail Reform and Witness Intimidation

[1288] Transcript at 115-116.

[1289] Transcript at 116-117.

Policymakers and the public should also bear witness intimidation in mind when considering bail reform. Peter Newsham, who was formerly chief of police in Washington, D.C. and currently serves as chief of police in Prince William County, raised this concern in his testimony to the Commission.

> [O]ften, what's not considered is whether or not the releasee will intimidate or dissuade participation by witnesses while they are on pretrial release. Sometimes, the offense itself can be an intimidating factor to victims of violent crime.[1290]

A Chicago Tribune investigation of Chicago's bail reform (General Order 18.8A, discussed later in this statement) suggests that witness intimidation increased in domestic violence cases following the reform.[1291] Tribune reporters examined a total of 702 "aggravated domestic violence cases" in 2016 and 2018. The average bond amount in 2018 was dramatically lower than in 2016, and 19% of defendants were released on their own recognizance. This was accompanied by a sharp increase in aggravated domestic violence cases dropped by prosecutors. In 2016, 56% of aggravated domestic violence cases were dropped by prosecutors, and that rose to 70% in 2018.

This is a consideration that is often omitted from discussions of bail reform. The mere knowledge that a person involved in a robbery or assault has been released may be enough to discourage neighborhood witnesses from cooperating with police. After all, the released person knows where you live. This is particularly true because many of those arrested for low-level offenses have been known to the police for some time, or may have committed violent crimes in the past. As William Bratton, two-time NYPD Commissioner, testified:

> For the advocates, arrested persons have merely been accused of crimes, not convicted, and therefore should be spared incarceration except in the cases of serious violent offenses.
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> Police take a longer view. Many offenders, including many robbers, burglars, and auto thieves have long histories of criminal activity. The same is true of many gun criminals, who often exhibit a pattern of firearm arrests and involvement in prior shootings, without having been convicted yet as the actual violent perpetrator of a particular shooting or murder. They are deeply enmeshed in violence, but not yet charged with an act of violence.[1292]

No one wants to draw the attention of the neighborhood tough guy. Advocacy organizations argue that people released from detention are more likely not to be convicted of a crime, and point to their ability to maintain ties to the community, work, and so on. This may be true. However, it is

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[1290] Transcript at 72.

[1291] David Jackson and Madeline Buckley, "Domestic violence victims face risk of being attacked again following Cook County reforms, a Tribune investigation found," CHI. TRIB., May 2, 2019, https://www.chicagotribune.com/investigations/ct-met-domestic-violence-bonds-20190219-story.html.

[1292] Transcript at 77-78.

also entirely possible that an additional factor is that prosecutors more often drop charges because witnesses refuse to testify due to fear.

The Cost of Bail

A repeated complaint among those who want to reform bail is that many people cannot afford even small amounts of bail.

> Professor Megan Stevenson found that when equal bail amounts were set, residents from low-income neighborhoods were less likely to be able to afford bail and thus, more likely to be detained pretrial and often times these defendants were detained for the entire duration of their pending case. These results often apply even for defendants who have relatively low monetary bail amounts set. For instance, in a report of pretrial detainees in New York, 40 percent of defendants remained in jail until case disposition, despite having bail amounts that were $500 or less.[1293]

Two quick notes on this paragraph. First, *of course* poorer people will have more difficulty paying the same amount of bail as a wealthier person.

Second, the report is remarkably incurious as to how someone winds up in jail despite having a bail amount of $500 or less. Does he have no siblings, no friends, who might be willing to chip in to get him out of jail? Again, one of our panelists offered an answer to this question, but our staff missed it. Michelle Esquenazi, herself a bail agent, wrote in her statement to the Commission:

> Our profession offers a community based service in conjunction with family members who have the accused's restorative goals as a priority. ***Much of the time those who do not make bail have been involved in previous behavior that has alienated their familiar support group. Many are heavily involved in addiction, or suffer from mental illness issues*** (emphasis added).[1294]

A public comment submitted by Kay Sharpe, who owns two bail-related companies in North Carolina, made a similar point:

> It's rare that a client is "stuck in jail because they are poor". We help clients find creative and legal ways to raise money. They find ways to accomplish that goal. The ones who stay in jail tend to be people who have no one in their lives who is willing to co-sign for them (guarantee they will go to court). That's often because the defendant has stolen from them, broken many promises over years, or been violent in the past. When you have no friends or family willing to trust that you'll go to court, you're not likely to go to court.[1295]

[1293] Report at n. 317-319.

[1294] Michelle Esquenazi, written statement, at 2.

[1295] Kay Sharpe, Public Comment, Mar. 3, 2021 (on file with the Commission).

Why is "For-Profit" Bad?

I also note that the report and various panelists repeatedly criticized the bail industry for being "for profit".[1296] Bail companies are taking a risk when they post bond for someone who has been arrested. If the person fails to appear, the bail company forfeits the money they have posted. The bail company has to buy insurance to cover these losses – because it is virtually guaranteed that some people will not appear for their hearings. In order to minimize those losses, the bail company sends reminders to clients about appearing for hearings. All of this requires staff and money.

Many advocacy organizations and individuals seem to believe that it is the bail industry that is driving increases in bail amounts. Although that is possible, it ignores the fact, as panelist Michelle Esquenazi pointed out, that it is judges, not bail companies, that set bail amounts.[1297] Why, then, do some advocacy organizations, government officials, and others denigrate bail professionals and not judges?

There may be at least two reasons. First, judges are lawyers, like many of the individuals who work for advocacy organizations, as well as the members of this Commission and many members of the Commission staff. They belong to the same professional class and also occupy positions of authority, and thus they are respected by fellow lawyers and other professionals. People who work in the bail industry are, as Ms. Esquenazi said, "the bluest of blue shirt America."[1298] They are small business owners, and not a glamorous small business like producing ethically sourced bean-to-bar artisanal chocolate. The nature of their business means that they are dealing with some rough people.

Second, there is a strange assumption that if two people are doing the same work, but one works for a for-profit company and the other for a non-profit company, the latter is morally superior. This may be true if the second person is working for free, but that is rarely the case.

No one here at the Commission is doing this work purely out of the goodness of their hearts. All of our staff and Commissioners expect to be paid. Likewise, all the witnesses from advocacy organizations who testified at our briefing are paid by their organizations. There is nothing inherently less noble about working for a for-profit company than an advocacy organization.

Racial Disparities in Pretrial Detention

The report and some of the witnesses and advocacy organizations that testified at our hearing also make much of the fact that there are racial disparities in pretrial detention, and these disparities persist even after bail reform is implemented. These racial disparities are wholly predictable.

[1296] *See, e.g.*, Insha Rahman, Vera Institute, written statement at 1 ("The ills of a for-profit bail bond industry – whose primary purpose is to turn a profit, almost $2 billion per year – are by now well documented.").

[1297] Michelle Esquenazi, written statement, at 2.

[1298] Transcript at 130.

African-Americans commit crimes at dramatically higher rates than their percentage of the population would lead one to expect, and at higher rates than other ethnic groups. Therefore, they will be more likely to be arrested and more likely to be detained pretrial.

According to the FBI's Uniform Crime Report for 2019 (the most recent year that is available), in 2019 the law enforcement agencies that contribute to the UCR made 6,816,975 total arrests for the covered crimes. 4,729,290 of those arrests were of white individuals (which includes most Hispanic individuals), and 1,815,144 of those arrests were of black individuals.[1299] This means that 69.4 percent of arrests were of non-Hispanic white and Hispanic individuals, and 26.6 percent of arrests were of black individuals. Yet African-Americans account for only 13 percent of the U.S. population.

The difference is even more stark when one examines arrest statistics for individuals under 18. The contributing jurisdictions made 475,371 arrests of individuals under 18 for the covered crimes in 2019. Of those, 296,881 were white (which again includes most Hispanics) and 161,149 were black. In percentages, 62.5 percent were white and 33.9 percent were black.[1300] This suggests that black offenders begin their criminal careers at a younger age than whites. Therefore, at any given time when they are arrested, blacks are likely to have a lengthier criminal background than a white person of the same age and be considered (by algorithms, judges, and the average citizen) at greater risk of failing to appear or recidivate if released.

Nor are black arrests concentrated among less serious offenses, which might lead to more equal rates of pretrial detention. African-Americans are overrepresented relative to their population share in every crime category except for "drunkenness" and "driving under the influence," where they account for only 14.8 percent and 14 percent of arrests, respectively. Interestingly, whites constitute a huge majority of those arrested on "suspicion," which would likely be an easy catch-all charge if the police were truly seeking to discriminate on the basis of race. But here is a sample of black percentages of other crimes:

- Murder and non-negligent manslaughter: 51.2 percent (this is actually larger in both number and percentage than white arrests for murder and non-negligent manslaughter, not just in terms of population share)
- Rape: 26.7 percent
- Robbery: 52.7 percent
- Aggravated assault: 33.2 percent
- Burglary: 28.8 percent
- Larceny-theft: 30.2 percent

[1299] Table 43A, Arrests by Race and Ethnicity, Uniform Crime Report, FBI, 2019, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43.

[1300] Table 43B, Arrests by Race and Ethnicity, Uniform Crime Report, FBI, 2019, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43.

- Motor vehicle theft: 28.6 percent
- Fraud: 30.5 percent
- Embezzlement: 36.3 percent
- Weapons; carrying, possessing, etc.: 41.8 percent
- Prostitution and commercialized vice: 42.2 percent
- Drug abuse violations: 26.1 percent
- Offenses against the family and children: 28.3 percent
- Drunkenness: 14.8 percent
- Driving under the influence: 14.1 percent

This is not an exhaustive list even of crimes tracked by the FBI. Again, blacks constitute approximately 13 percent of the U.S. population. Except for crimes pertaining to the personal consumption of alcohol, African-Americans are represented among arrests for almost every type of crime at least double their percentage of the population. This includes "white-collar" crimes such as fraud and embezzlement. It is therefore completely predictable that blacks would be overrepresented among pretrial detainees, and that bail reform would reduce the racial disparity in pretrial detention.

Some of the witnesses at the briefing claimed that racial disparities in incarceration are the result of "over-policing" black communities, which results in "more interaction around probation and parole technical violations."[1301] This is unlikely.

African-Americans are overrepresented among perpetrators of crime. They are also overrepresented among victims of crime. Thus, bail reform that results in an increased number of crimes being committed – even if the overall re-offending rate remains constant – will fall most heavily on African-Americans. As Dr. Matt DeLisi wrote in his statement to the Commission:

> Of course, allegations of systemic or institutional racism in the criminal justice system would impugn official arrest data due to concerns that police activity itself is biased. **However, large racial differences in criminal victimization undermine that narrative. This is especially important since most criminal victimization is intraracial.** According to the most recent data from the National Crime Victimization Survey, which is a nationally representative survey of households to measure criminal victimization, African Americans accounted for 29% of nonfatal violent crimes including more than half of robberies, a third of aggravated assaults, and nearly one fourth of rape or sexual assaults and simple assaults. Importantly, there are no statistically significant differences by race

[1301] Transcript at 103.

> between offenders identified in the NCVS and offenders arrested in the UCR (emphasis added).[1302]

The police have to go where the crime and complaints are. This means they are going to receive more calls to black neighborhoods, and if they are engaged in proactive policing, will spend more time in black neighborhoods. Even if people released on probation or parole encounter the police and incur a technical violation, they still committed the crime that initially caused them to be on probation or parole.

Bail reform may in some cases actually *exacerbate* the racial disparity in pretrial detention, because African-Americans constitute a *majority*, not just a disproportionate percentage, of those arrested for homicide offenses and robbery (the latter of which is also a crime of violence). They are therefore less likely to be released from detention under any system that takes public safety into consideration.

Bail Reform in Chicago

The portion of the report that concerns Chicago is remarkably gullible. In support of its proposition that the bail reform implemented by Chief Judge Timothy Evans did not lead to an increase in crime, the report cites only a review of the reform by the Chief Judge's own office.[1303] (The order mandating bail reform is General Order 18.8A, henceforth referred to as GO18.8A.) Unsurprisingly, the review issued by the Office of the Chief Judge evaluating the effects of the Chief Judge's order concluded that it was a glowing success.

Commission staff should not have been unaware of other evaluations of GO18.8A. At the Commission's briefing, panelist Rafael Mangual specifically noted that two independent studies concluded that Chicago's bail reform led to a greater number of crimes being committed.

> Another paper, by researchers at the University of Utah, found that the more generous release procedures put into place recently in the city of Chicago led to a 45 percent increase in the number of pretrial defendants charged with new crimes and a 33 percent increase in the number of pretrial defendants charged with new violent crimes.
>
> A more recent study of Chicago's bail reform by researchers at Loyola University Chicago found that the rate at which pretrial defendants in that city reoffended essentially remained constant after the reforms went into effect, meaning that the

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[1302] Matt DeLisi, written statement, at 8, *citing* Allen J. Beck, *Race and Ethnicity of Violent Crime Offenders and Arrestees, 2018*, Bureau of Justice Statistics, January 2021, https://bjs.ojp.gov/content/pub/pdf/revcoa18.pdf.

[1303] Report at n. 902-906.

> increase in the number of pretrial defendants translated to an increase in the number of crimes committed by that population.[1304]

Commission staff did not address either of these studies in the report. Nor did they address a multi-part Chicago Tribune investigation of the effects of GO18.8A, which found serious deficiencies in the Chief Judge's review.

The Loyola University Chicago study, which is generally supportive of Chicago's bail reform, found that there was a slight increase in failures to appear following GO18.8A.

> After controlling for defendant and case factors, 16.7% released defendants were expected to have an FTA before GO18.8A compared to roughly 19.8% after GO18.8A[]. In other words, of the 9,200 defendants who were released in the six months after GO18.8A, we would have expected 1,536 to have an FTA if the pre-GO18.8A rates had continued. However, the statistical model revealed that 1,822 defendants had an FTA after GO18.8A.[1305]

When looking closely at the data, it is clear that even the sympathetic Loyola study found slight increases in new crimes and new violent crimes after the issuance of GO18.8.A. 17.3% of releasees were arrested for new criminal activity post-GO18.8A, versus 16.7% of releasees prior to GO18.8A. There was also an increase in releasees arrested for new violent criminal activity. Prior to GO18.8A, 2.9% of releasees were arrested for new violent criminal activity, which rose to 3.2% after GO18.8A.[1306]

As Rafael Mangual noted in his testimony, however, and as Paul Cassel and Richard Fowles point out in their study of GO18.8A, if the *rate* of new crimes remains constant, the *number* of new crimes will increase.[1307] Think of it this way: In Chicago, 17% of released individuals commit crimes after their release. If you release 100 people, that means 17 of them will commit new crimes. Even if each one only commits one crime, that is 17 new crimes. Now imagine you release 150 people. If the rearrest rate remains constant at 17%, 26 new crimes will be committed. And as Cassel and Fowles also note, this does not account for the low percentage of crimes solved by police. They estimate that the national clearance rate for violent crimes is about 45%, and only

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[1304] Transcript at 17-18.

[1305] Don Stemen and David Olson, *Dollars and Sense in Cook County: Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release, and Crime*, Safety + Justice Challenge, at 10, https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/11/Report-Dollars-and-Sense-in-Cook-County.pdf.

[1306] *Id.* at 19.

[1307] Paul Cassel and Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, S.J. Quinney College of Law research paper No. 349, February 19, 2020, at 35, https://dc.law.utah.edu/scholarship/194/.

20% for property crimes.[1308] It is extremely unlikely that the number of arrests represents the total number of crimes committed by these individuals.[1309]

Therefore, Cassel and Fowles argue:

> We have previously estimated that the expanded pretrial releases from G.O. 18.8A led to at least 280 additional charged new crimes against persons in the fifteen months after the Order compared to the fifteen months before. Using crime clearance rates to estimate what fraction these charged crimes were compared to the crimes actually committed by the pretrial releasees, we can estimate that G.O. 18.8A led to 930 additional crimes against persons in the "after" period compared to the "before" [period].[1310]

The report never addresses the most serious consideration in evaluating the success of bail reform – homicides. Nor does the Loyola University study discuss homicides, preferring to look only at "new violent criminal activity".[1311] The report issued by the Office of the Chief Judge claims that "only" three homicides were committed by pretrial releasees after the issuance of G.O.18.8A.[1312] A subsequent investigation by the Chicago Tribune found that in reality, twenty-one homicides were committed by pretrial releasees after the issuance of G.O.18.8A.[1313] Cassel and Fowles summarize the reasons for the discrepancy:

> The reasons for the dramatic undercount varied from case to case, but included:
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> - The Study included only those defendants whose initial charge was a felony; it excluded those charged with a misdemeanor, which is far more common. Five of the murder defendants found by the Tribune had bonded out of jail on

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[1308] *Id.* at 35; *see also* Paul Cassel and Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 BOST. U. L. REV. 685, 709-710 (2017).

[1309] Paul Cassel and Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, S.J. Quinney College of Law research paper No. 349, February 19, 2020, at 35, https://dc.law.utah.edu/scholarship/194/.

[1310] *Id.* at 35.

[1311] Don Stemen and David Olson, *Dollars and Sense in Cook County: Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release, and Crime*, Safety + Justice Challenge, at 11, https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/11/Report-Dollars-and-Sense-in-Cook-County.pdf.

[1312] Office of the Chief Judge, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois, May 2019, at 36, https://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20%20Published%2005.9.19.pdf.

[1313] David Jackson, Todd Lighty, and Gary Mark, "Bail reform analysis by Cook County chief judge based on flawed data, undercounts new murder charges," Chi. Trib., Feb. 13, 2020, https://www.chicagotribune.com/investigations/ct-cook-county-bail-bond-reform-tim-evans-20200213-tkodxevlyvcp7k66q2v2ahboi4-story.html.

misdemeanor charges. Four of them had past felony convictions from attempted murder to armed robbery, and three had served prison time.

- The Study counted only the first new charge against defendants after they were released from custody. The Tribune identified two people who were released, charged with another crime, released again and then charged with murder, all within the time period being examined. Those later murder charges were not entered into the database used for the report.
- The Study excluded three murder defendants whose first charge occurred before bail reform even though they were released on bond after the reforms took effect in September 2017.
- Data entry mistakes and incomplete court records marred the data set used in the analysis.[1314]

This brings me once again to the question I asked at the beginning of this essay: Who should bear the costs of crime? Is it (accused) criminals? Or is it the law-abiding public? There is undoubtedly a cost to individuals and their families when held on pretrial detention. But there is also a cost for people like Terrell Jones, a sanitation worker married to his high school sweetheart and father of three, killed by a gang member released on his own recognizance from a felony weapons charge.[1315] Who should have borne the risk of re-offending – Terrell Jones and his family, or his killer who was released pending trial?

Risk Assessments

Whatever form possible bail reforms take, they should incorporate risk assessments. Matt DeLisi, a professor at Iowa State University, explained in his testimony to the Commission:

> Risk assessment instruments that use race as a proxy for risk are discriminatory, fortunately, there is no evidence to my knowledge that any risk assessment tools use race or ethnicity to inform pretrial decision-making. In contrast, risk assessment tools employ behavioral criteria that are empirically associated with offending, recidivism, and noncompliance. To illustrate, the development of the federal pretrial actuarial risk assessment tool included the following criteria: number of felony convictions, prior failures to appear, pending cases, current offense type, offense classification, age at interview, highest education, employment status, residence, and current drug problems. These criteria are correlates of antisocial behavior and do not invoke race or ethnicity. As mentioned earlier, the only demographic feature that is included—age—is incorporated into risk assessment

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[1314] Paul Cassel and Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, S.J. Quinney College of Law research paper No. 349, February 19, 2020, at 27, https://dc.law.utah.edu/scholarship/194/.

[1315] David Jackson, Todd Lighty, and Gary Mark, "Bail reform analysis by Cook County chief judge based on flawed data, undercounts new murder charges," Chi. Trib., Feb. 13, 2020, https://www.chicagotribune.com/investigations/ct-cook-county-bail-bond-reform-tim-evans-20200213-tkodxevlyvcp7k66q2v2ahboi4-story.html.

> tools because of its strong inverse association with criminal offending. The other socioeconomic factors (education, employment, and residence) are similarly empirical correlates of offending and substantiate a defendant's community ties.[1316]

In other words, risk assessments use behavioral characteristics to predict whether someone is likely to reoffend while on pretrial release. Risk assessments take some of the guesswork out of the decision whether to release an individual. Because judges have more information, they have more confidence in releasing people who are classified as low-risk.[1317]

Oddly, the report repeats panelist DeAnna Hoskins's criticism of risk assessments, which is that the assessments only look at how many times an individual failed to appear for court, not how much time has elapsed since those failures to appear.[1318] Immediately after Ms. Hoskins expressed her concern, however, Judge Glenn Grant of New Jersey stated that New Jersey's risk assessment tool does take into account how much time has elapsed since someone failed to appear.

> New Jersey's tool is not static. And the efforts that Ms. Grace described is what we're currently working on, to recalibrate our tool to take into consideration what was the type of notice you missed.
>
> It also currently says did you miss in the last two years or was it more than two years? And it creates a different assumption for you with respect to that.
>
> But we're going more granular, to saying can we track what was the reason for the person missed, as opposed to absconding, which is relevant to a court's consideration. So I don't want to lump all risk assessment in the same tool.[1319]

By including Ms. Hoskins's criticism of the lack of a time element in risk assessments, but not Judge Grant's clarification that New Jersey's risk assessment does include such a time element, the report misleads readers into believing Ms. Hoskins's criticisms are generally applicable.

However, risk assessments are not perfect. As the Chicago Tribune found in its investigation, the Arnold Ventures risk assessment did not flag individuals charged with domestic violence. Risk

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[1316] Matt DeLisi, written statement at 6.

[1317] Matt DeLisi, written statement at 7.

> For example, a recent study compared a group of 2,631 pretrial defendants who received a risk assessment to matched control groups of defendants who did not receive an assessment. Defendants with risk assessment, where the courts could clearly see objective behavioral criteria, were more likely to receive non-financial release from jail, had higher rates of pretrial release, and spent less time in pretrial detention. Those with risk assessment were no more or less likely to fail to appear, but had slightly higher rearrest rates.

[1318] Report at n. 1142, quoting transcript at 111.

[1319] Transcript at 111-112.

assessments should be regularly evaluated to ensure that they are fulfilling the purpose of protecting the community as well as releasing people deemed to be at low risk of reoffending.

Possible Bail Reforms

There are some simple reforms that might improve the bond process without endangering public safety. The monitor of the consent decree for Harris County, Texas made the following suggestions that the sheriff's office might be able to implement:

- Expanding the avenues for people to "self-bond" without the need for assistance from family or bondsman, which is currently only available for people who happen to have in their possession at the time of arrest the full amount needed in cash to post bond.
- Implementing quality assurance measures to ensure that every person admitted to the jail has had an opportunity to transcribe phone numbers from their phones so that no one is left incommunicado while in jail.
- Improving the procedures and interdepartmental communication to reduce the time it takes to release people after making bond.[1320]

[1320] *Monitoring Pretrial Reform in Harris County: Second Report of the Court-Appointed Monitor*, March 3, 2021, at 18, https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2021/03/ODonnell-Monitor-Second-Report-v.-32.pdf.