NYSACDL CLE

Pathways to Freedom – Pre-Trial & Post-Conviction Release During COVID-19

State Pre-Conviction / Pre-Parole-Adjudication Remedies

Lauren Gottesman, Legal Aid Society

THE LEGAL AID SOCIETY CRIMINAL DEFENSE

DECARCERATION PROJECT

Overview of Possible Remedies:

- Consent release (if bail only hold)
- Bail app (if bail only)
- Bail Review (if bail only)
- Individual writ of habeas corpus
- “Mass” writ
- Motion to reopen / renew
- Appeal from writ denials

Regardless of the Remedy, Always Attempt to Get Medical Records and Make a Discharge Plan

- Contact your client and CHS
  - **HIPPA with informed consent**– HHC has agreed to accept attorney-signed HIPPAs attesting to client's informed consent (during pandemic, not indefinitely)
- Discharge plan!
  - OEM and DHS isolation sites
    - 12 months shelter – DHS isolation site – if not OEM isolation cite
  - Some programs are still up and running (with limited capacity / teleservices)
    - Fortune Society
    - CRAN – medication
    - Montefiore Behavior Health Center
  - Note: Writ judge can impose conditions of release just like a judge presiding over a bail app

If $ Bail is the Only Pre-trial Hold, Options include:

- DA Consent
  - Don't count this out! (Attempt murder example)
  - But also don't rely on it – not working for most / fast enough (has to go up chain of command, at least in NYC that's what we are seeing)
- Bail Apps
  - Argue COVID risk PLUS excessive bail
- Bail reviews - CPL 530.30 (1 shot, de novo in Supreme Ct. for Crim. Ct matters)
- Current bail law still in effect – be creative in your asks!
  - Unsecured appearance bonds (no $ down) if judges are hesitant to ROR
  - Credit card bail alternatives matter more than ever!
    - COVID Release Fund (NYC Only I believe). Apply for your client here: https://forms.gle/EakBJskvi9uPFFeo9

Jan 1, 2020 Bail Reform is (for now) in full effect

- There is an argument for release (ROR; with conditions; or out on affordable bail) on EVERY SINGLE ONE of our cases.
- Everyone should be at liberty because of three big changes:
  - (1) **ROR is the Default** ON EVERY CASE.
    - CPL § 510.10(1) ("The court **shall release the principal pending trial on the principal's own recognizance, unless** it is demonstrated and the court makes an individualized determination that the principal poses a **risk of flight to avoid prosecution.**")
  - (2) The court **must select the least restrictive alternative** and condition or conditions that will reasonably assure the principal's return to court, for every case (and *only if* there's a finding of ROFTAP).
  - (3) A person's **financial circumstances** MUST be considered. Courts MUST consider client's ability to pay bail in an amount / form that does not pose an "undue hardship." 510.30(1)(f)

We are ALWAYS entitled to be heard on bail (we don't need a change in circumstance!):

CPL 510.20

1. **Upon any occasion** when a court has issued a securing order . . . and the principal is confined in the custody of the sheriff as a result . . . , the principal may make an application for recognizance, release under non-monetary conditions or bail.
2. Upon such application, the principal **must be accorded an opportunity to be heard**, present evidence . . . .

"'[C]hange in circumstances' is not the dispositive standard for determining the merits of an application seeking modification of bail." *See People v. Lora*, 28 N.Y.S.3d 780, 782 (N.Y. County Ct. 2015) (describing changed circumstances language as a ""hackneyed buzz phrase")

If Judge insists . . . Argue that every day client is in custody b/c of their inability to purchase their own liberty is a changed circumstance

> "A bail order is ambulatory. It is dynamic until the question of bail becomes moot.'" *People v. Grutola*, 339 N.Y.S.2d 178, 180 (N.Y. Crim. Ct. 1972) (citing *People ex rel. Manceri v. Doherty*, 192 N.Y.S.2d 140, 142 (N.Y. Sup. Ct. 1959)).

If Parole Hold (Pre-Adjudication) + $ bail

- Best option is to file a writ of habeas corpus
  - If Supreme Court Judge finds unconstitutional condition of confinement, Supreme Court judge has power to remedy it by lifting parole hold
  - A win does NOT dismiss the parole allegation – client can still be adjudicated on it / step back in later
- Jurisdiction: CPLR says any supreme court judge can hear a writ of habeas corpus, but if more than $1 bail on pending criminal case:
  - DA's office on pending case needs to be served, and
  - You'll likely get a lot of push back re: venue if you don't file in the county where the pending case is
- If parole hold is only hold – probably best to file in county of where client is in custody (Bronx for Rikers Island detainees)

How to File a Writ of Habeas Corpus for Pre-trial Detainee?

- It's Complicated!
- How-to Guides are Available for Manhattan, Brooklyn, Bronx, and Queens, thanks to Legal Aid Society CDP lawyers
- Generally speaking:
  - Step 1: Initiate the proceeding
    - Write the petition and e-file; an index number will be electronically assigned
  - Step 2: File in Civil County Court
    - Once you have the index number, a civil county judge reviews and signs and (typically) assigns a time for writ to be returnable in Supreme Court (Criminal)
  - Step 3: File in Supreme Court, Criminal Term
    - Once civil judge has signed, need to file in Supreme Court clerk's office to get the matter assigned a Supreme Court ID number (SCID)
  - Step 4: Get the case calendared (different process in different jurisdictions)
- How can I speed this up?
  - Get a Supreme Court Judge to agree to hear you on a particular date and sign a "same day writ letter" – if Civil sees that a Supreme Court judge is ready to hear this, they may move faster

Writ of Habeas Corpus **Federal COVID claims:**

- 14th amendment federal constitutional standard = deliberate indifference
  - BUT different than than 8th amendment deliberate indifference
- Due process clause applies for pre-trial / pre parole adjudication
  - Prohibits any "punishment" prior to conviction. Easier standard to meet than 8th amendment *cruel and unusual* punishment
  - 14th Amendment proscribes deliberate indifference to the serious medical needs of people held in pre-trial confinement. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017).
- Standard: Petitioner must demonstrate that:
  - (a) "Objective" prong: The challenged conditions are sufficiently serious
    - SCOTUS and courts throughout New York have recognized that the risk of contracting a communicable disease constitutes an "unsafe, life-threatening condition" that threatens "reasonable safety." *Helling v. McKinney*, 509 U.S. 25, 33 (1993).
  - (b) "Mens rea" prong: show respondents (1) acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though (2) they knew, or should have known, that the condition posed an excessive risk to health or safety.

NY Constitution Provides More Protection for Pre-trial Detainees: Balancing Test

- There is an even stronger due process right to be free from unconstitutional conditions of confinement under the New York State Constitution. *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979)
- Courts must balance the **harm to the individual resulting from the condition imposed v.** the benefit sought by the government through its enforcement
  - In NY – the only legitimate state interest in pre-trial detention is assuring return to court!
  - So in COVID context, the balance is your client's potential to contract a possibly fatal disease v. assuring their return to court (or assuring appearance for parole delinquency adjudication)

Who am I bringing these writs on behalf of?

- Based on available data re: COVID-19 hospitalizations/deaths so far, easier to establish due process violation for the medically vulnerable (50+ and comorbidities like asthma, diabetes, heart conditions, pulmonary issues)
- This could change as data / scientific studies emerge
- Of course, don't let this stop you from litigating on behalf of individual clients!
  - We've gotten wins on individual writs where no particular vulnerability to COVID
  - Example: Client with epilepsy and under 50. Held on just $1 bail and parole hold released last week in Manhattan – Judge granted habeas corpus writ on COVID-19 due process grounds
    - These sort of cases are ripe for **NY** Constitutional Arguments
    - Argue potential harm to petitioner outweighs State's interest under NY Due process law

How to Establish the Con Law Claim?

- Client detained in Rikers? Use our petition!
- The proof re: deliberate indifference is already out there:
  - DOC knows of the risk of harm and not doing enough to effectively mitigate the risk of harm
    - Rates of infection are exponentially rising!
    - Statements from correctional health services employees (past and present); BOC warnings
  - Best practice is probably to get an expert affidavit or expert testimony into record, but in interest of getting heard quickly, what's already available should be enough (has been in some cases)

Individual Writs based on COVID where $ Bail is Set - Include Excessive Bail Arguments

- Excessive bail set was an abuse of discretion AND unconstitutional under EP and DP clauses
  - *United States v. Salerno*, 481 U.S. 739, 755 (1987) (bail must be set in a "sum designed to ensure [the] goal [of insuring a defendant's return to court], and no more.")
  - *Williams v. Illinois*, 399 U.S. 235, 244 (1970) (holding that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency")
  - *Pugh v. Rainwater,* 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) ("imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.")
  - *ODonnell v. Harris County*, 892 F.3d 147, 159 (5th Cir. 2018) (affirming in part the district court's decision finding Harris County's bail statute unconstitutional under equal protection and due process grounds, noting that in Harris County "Judges almost always set a bail amount that detains the indigent. In other words, the current procedure does not sufficiently protect detainees from magistrates imposing bail as an 'instrument of oppression.'")
- Argue new CPL essentially adopted constitutional standards
- You probably need minutes from the appearance where judge set bail that you are saying is an abuse of discretion or wrongfully denied your bail app

Common Issues to Litigate in Writs and Appeals

- The bail / remand was set in violation of amended CPL and thus an abuse of discretion. Common examples of violations of CPL 510.10:
  - the court imposed bail without a sufficient demonstration / finding that your client poses a risk of flight to evade prosecution
  - the court failed to set the least restrictive alternative that would ensure client's return to court (it's mandatory under the new law)
  - the court failed to explain its choice to impose unaffordable bail
- Judge below failed to consider client's financial circumstances, ability to post bail without posing undue hardship. CPL 510.30(1)(f)
  - At least one court has already recognized that the purpose of the newly enacted law is to prohibit "[w]ealth" from "determin[ing] whether a person, accused but not convicted of a crime, will be jailed while awaiting trial." *People v. Steininger*, 2019 NY Slip Op 29397 (S.Ct. NY Ctny. Dec. 24, 2019) (Conviser, J.)

Mass Writs – COVID only

- Similarly situated clients can go on one writ
  - i.e., 50+ or 60+ clients, or all with comorbidities and all held on pre—trial bail
- Push back in Queens / Richmond Ctny, but nothing in CPLR that forbids this, and in fact COA case law suggests it's permissible:
  - *See e.g.*, *State ex rel. Harkavy v. Consilvio*, 7 N.Y.3d 607 (2006) and *State ex rel. Harkavy v Consilvio*, 838 N.Y.S.2d 810, 813 (2007) (COA addressing "mass" writs brought on behalf of multiple state prisoners arguing involuntarily confinement by the Office of Mental Health after their release from DOCSS custody)
- What's happening in practice for mass writ litigation in NYC?
  - First Manhattan – mass denial (put motion to reargue now pending)
  - Second Manhattan writ – one by one assessment
  - First Parole Writ– granted release of 106 technical parole violators at once
  - Second Parole Writ – Going through one by one

Opposing Counsel Arguments to Anticipate:

- Client is going to spread COVID to community
  - A solid discharge plan can combat this claim
- Client will receive adequate / better health care inside jail than in community
  - Reports from CHS officials belie this claim
- DOC is doing *something* / good faith
  - Irrelevant under federal and NY standards
  - Cite Dwyer opinion for notion that DOC has to take reasonably *effective* measures to mitigate

Appeal v. Motion to Reargue / Renew

- CPLR 2221 – motion to renew or reargue
- Typically goes back to original judge
  - Weigh likelihood of success of going back to the judge who denied you with new facts vs. appealing
  - Also consider timing – where can you get heard in your jurisdiction faster?
- Appellate process different in each jurisdiction
  - Interim relief (a "stay" granted by a single judge) may or may not be available depending on the jurisdiction
  - Still unclear how quickly we can get heard in Appellate Divisions, and will likely vary across the State