

ACLU-VT Testimony on H. 728
Senate Judiciary Committee
April 4, 2018



Thank you for the opportunity to testify on H. 728. This legislation represents a welcome and positive step towards long overdue and needed improvements in Vermont’s bail system. We know that so much of Vermont’s progress in criminal justice reform has come from this committee, and we thank you for taking up an issue of such critical importance and one that is such a high priority for the ACLU and our members. At the same time, we believe more needs to be done—and specifically that certain provisions in this bill need to be strengthened—to ensure a more just and equitable criminal justice system in Vermont.

Above all, the ACLU stands by the proposition articulated by many state leaders and community members across the state that **no one should be incarcerated simply because they are poor. No one should be imprisoned for no other reason than their inability to pay bail.** To be clear: this bill, in its current form, would **not** prevent that from happening. And so we urge the members of this committee to consider seriously the specific changes that can be made to ensure that all low-income Vermonters have the same access to justice as anyone else.

In Vermont, around 400 people are incarcerated pretrial every day,¹ many of them simply because they cannot afford to pay bail. “Innocent until proven guilty” is a fundamental American principle, but people who cannot afford bail are treated as if they have already been tried, convicted, and sentenced to imprisonment. A person’s freedom should not depend on their income.

Even short stays in jail can have cascading effects on individuals, causing people to lose their homes, their jobs, their cars, their livelihoods, and even child custody – severe punishments for people who are still presumed innocent.² People who are jailed before trial are more likely to receive a jail or prison sentence, and for a longer time, than those who go free before their trial.³ Due in part to this stress on one’s livelihood, low risk

¹ *Vermont Dep’t of Corrections FY 2016 Budget Presentation* 11, <http://www.doc.state.vt.us/about/reports/department-of-corrections-budget-documents/fy-2016-budget-presentation-final/view>.

² *Moving Beyond Money: A Primer on Bail Reform*, Harvard Law School Criminal Justice Policy Program (Oct. 2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> at 7.

³ Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes” 3 (May 2016), <https://www.law.upenn.edu/cf/faculty/mstevens/workingpapers/Distortion-of-Justice-April-2016.pdf>; Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger,

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detainees held for more than 24 hours are more likely to commit another crime.⁴

Poor people, people of color, and people with disabilities are disproportionately affected by wealth-based pretrial detention, as they are more likely to be jailed before trial and less likely to be able to afford bail.⁵ Black and Latino people are half as likely to be able to afford bail as white people.⁶ Nationwide, black people are assigned higher bail amounts than white people accused of similar offenses. Bail for black men averages 35% higher than bail for white men, even when controlling for seriousness of the offense.⁷ While Vermont does not track court data, there is good reason to suspect these same disparities exist in our courts. And we know from DOC's data that Vermont incarcerates Black men at a higher rate than any other state.⁸



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H. 728 makes promising first steps toward reforming our bail system. The elimination of cash bail for expungable misdemeanors is a critical step in ensuring people are not jailed simply because they are poor. The change from risk of nonappearance to risk of flight is also crucial. This change will help to ensure that detention is considered only for those who are at risk for actively fleeing the state, rather than those who may miss a court appearance through no fault of their own or with no malicious intent.

Other provisions, however, fall well short of ensuring that people are not imprisoned on account of their poverty alone. These provisions can and should be strengthened to ensure that never happens.

First, limiting the bill to expungable misdemeanors would severely limit the impact of this legislation on our pretrial population. For the most part, people who commit misdemeanors are not arrested or at least are not assigned cash bail. Because bail is directed at the risk of flight, it need not and should not be limited to misdemeanors. There is no reason to fail to include within this bill's provisions, at a minimum, **all** non-violent

"Investigating the Impact of Pretrial Detention on Sentencing Outcomes," THE ARNOLD FOUND. (Nov. 2013),

http://static.prisonpolicy.org/scans/ljaf/LJAF_Report_state-sentencing_FNL.pdf.

⁴ *Moving Beyond Money* at 7; Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention*, THE ARNOLD FOUND. (Nov. 2013),

<http://www.pretrial.org/download/research/The%20Hidden%20Costs%20of%20Pretrial%20Detention%20-%20LJAF%202013.pdf>.

⁵ Steven Demuth, *Racial and Ethnic Difference in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 J. OF CRIM. 873, 897 (2003).

⁶ *Id.*

⁷ Shawn D. Bushway and Jonah B. Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* (2010),

http://eml.berkeley.edu/~webfac/kline/e251_s11/gelbach.pdf.

⁸ Ashley Nellis, The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (2016), <http://bit.ly/1ZOy1R4>.

misdemeanors and felonies. Fortunately, there is already language in statute that defines all non-violent misdemeanors and felonies at 28 V.S.A. 301(5)(B)(i-ii) – all felony and misdemeanor offenses that are not listed crimes or offenses involving sexual exploitation of children. Cash bail for these offenses should also be eliminated.

Second, the removal in the final, House-passed version of the bill of the provision prohibiting money bail for violations of conditions of release weakens the legislation. In many cases, those who have violated conditions have broken no laws but simply, for example, stayed out a little past their curfew, or were unable to get to an appointment because of child care issues or illness. Violation of conditions of release is the most charged—and some would say vastly overcharged—offense, so failing to include these violations in bail reform would be a major oversight and would limit the impact of the bill on reforming our criminal justice system. We urge the committee to restore the prohibition of money bail for violations of conditions of release.

Finally, as included in the bill, simply having a judicial officer consider a defendant's financial means will not by itself halt the imposition of unaffordable bail. Bail legislation currently under consideration in California **forbids** judges from setting monetary bail in an amount that results in the pretrial detention of a defendant solely because of his or her inability to pay. This bill would be strengthened by a similar provision, effectively creating a sliding scale based on income. In any case, findings regarding financial resources and ability to pay should be written and on the record—otherwise, we will continue to see bail imposed without sufficient consideration of the fact that even nominal amounts may be unsurmountable for the poorest defendants.

Again, we commend the committee for its commitment to creating a more equitable and fair bail process, we thank you for inviting the ACLU's perspective, and we look forward to contributing however we can so that, ultimately, no one in Vermont will be imprisoned simply because they are too poor to afford their freedom.



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