May 4, 2020

**Via Electronic Mail**
Chief Administrative Judge Lawrence K. Marks
New York State Unified Court System
Office of Court Administration
25 Beaver Street, Room 852
New York, New York 10004

**Re: Due Process Concerns in Light of Governor's Executive Order**

Dear Honorable Chief Judge Marks:

Last week, the District Attorneys Association of the State of New York sent Your Honor a letter highlighting what the DA's Association believed to be the most important "first step in re-opening the courts." That letter focused on the impaneling of grand juries and the continued suspension of discovery and speedy trial rights. This focus was both misguided and blind to the true matter of urgency facing the court system: Presently, there are hundreds of New Yorkers indefinitely detained throughout the State on mere allegations contained in a misdemeanor or felony complaint. Preliminary hearings are not being held in any county within the State. Discovery is not being provided in many counties. And despite the Office of Court Administration's efforts to the contrary, the courts are closed to the most pressing matter facing these detained New Yorkers: their continued indefinite detention.

These are truly unprecedented times, and we recognize that OCA has had to make difficult decisions in light of COVID-19 to protect the courts, those who work within them, and the members of the public who must access them. We thank OCA and Your Honor for the efforts you have already taken in such a short time. Just as OCA has worked to protect the health and safety of those who interact with the courts, we as Defenders are requesting that OCA take urgent action to protect our clients' health, safety, and due process rights.

Namely, we are asking that OCA immediately rescind its policy of suspending required time limits for pre-trial detention mandated under C.P.L. §§ 180.80, 170.70, and 30.30(2). It is this policy that is subjecting our clients to indefinite detention based on untested allegations, in violation of state and federal statutory and constitutional law. Such a result is contrary to well-established rights of criminal defendants in New York State.

Therefore, we respectfully request the following. First, for individuals charged by felony complaint and detained on bail or remanded, we request that the courts either order a preliminary hearing (virtual or otherwise) pursuant to C.P.L. §§ 180.10 and 180.60[1] or release these individuals in accordance with C.P.L. § 180.80 and under the time-honored due process rules of this State. Second, for individuals charged by an uncorroborated misdemeanor complaint, we request that the courts order their release unless the prosecution files a supporting affidavit with the court pursuant to C.P.L. § 170.70. Third, for those detained in violation of C.P.L. § 30.30(2), we request that the courts conduct hearings and order their release.

*Executive Order 202.8 has been interpreted to allow a system of indefinite detention.*

New York has never permitted extended detention on a felony complaint without an adversarial hearing on whether there is a sufficient evidentiary basis for the prosecution. The right to a preliminary hearing not only dates back to New York's first Code of Criminal Procedure of 1881, it also appears in the state's first formal compilation of its laws: the Revised Statutes of 1829.[2] The Revised Statutes set forth the basic right to such a hearing, while the Code of Criminal Procedure of 1881 provided more procedural detail, including such requirements as that the court send a peace officer to give a message to the defendant's lawyer, and more specific rules regarding the timing and process. *See* N.Y. Code of Criminal Procedure (1881), Chapter VII, §§ 188-208. But both statutes were primarily codifying existing procedures, and were not creating new rights. Those rights have existed since the origin of this State.

Over the years, legislatures have of course modified some of the details of the preliminary hearing. For example, the 1829 statutes imply an immediate hearing as soon as the accused appears in front of a magistrate. *See* 2 Revised Statutes 708. The 1881 Code allows for a two-day adjournment if needed. *See* NY Code of Criminal Procedure (1881), 191. Later revisions allowed for 72 hours, whereas the current law is 120 hours, extendable to 144 hours. But no legislature in any epoch has ever dared to eliminate the procedure, or to allow months-long detentions on a felony complaint without a proper hearing.

It is true that a grand jury indictment can be the initial accusatory instrument, or can supersede the felony complaint at the beginning of the proceeding, eliminating the need for the hearing on the felony complaint. In this sense – but in only this sense – the right to the hearing has not been

[1] We note that nothing in C.P.L. § 182.10 precludes the right to a virtual hearing appearance. Moreover, if OCA has concerns about this format, a court can allocute a defendant regarding a knowing and voluntary agreement to proceed via video as the courts are doing for all arraignment matters.

[2] *See* 2 Revised Statutes 708, ¶¶ 13-14 ("The magistrate before whom any such person shall be brought, shall proceed as soon as may be, to examine the complainant and the witnesses produced in support of the prosecution, on oath, and in the presence of the prisoner, in regard to the offence charged, and in regard to any other matters connected with such charge, which such magistrate may deem pertinent…. If desired by the person arrested, his counsel may be present during the examination of the complainant and the witnesses on the part of the prosecution…").

absolute. But the indictment of a defendant by a grand jury that has seen and heard live witnesses provides a parallel form of due process offering similar protections – sworn firsthand testimony, questioning of witnesses by jurors, a prima facie case requirement, a vote of 12 jurors, and an opportunity to be heard. Until now, this state has never permitted extended detention without either the protections provided by a grand jury indictment or a preliminary hearing at which the defendant can confront and cross-examine witnesses.

On March 20, 2020, in response to the health crisis, the Governor of New York issued Executive Order 202.8, suspending "any specific time limit for the commencement, filing, or service of any legal action, notice, motion or any process or proceeding" prescribed in the criminal procedure law. In turn, the courts have interpreted this order and its extension orders to suspend all mandatory time periods defined by the Criminal Procedure Law, including the due process protective time periods codified in C.P.L. §§ 180.80, 170.70, and 30.30(2).

We believe that the current executive order did not in fact suspend C.P.L. § 180.80. The order does not suspend the entire criminal procedure law, rather it suspends "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state." C.P.L. § 180.80 does not set a time limit on any "legal action, motion, or other process or proceeding'; it sets a time limit on the defendant's incarceration, which is not one of the four items mentioned by the order. Since prosecutors can continue with any action or process after the defendant's release, and can even seek bail following indictment, C.P.L. § 180.80 should not fall within the order. But numerous courts have found that it did.

On the other hand, no court or prosecutor has claimed that the Executive Order has suspended C.P.L. § 180.10. That section not only grants each defendant the right to a "prompt hearing upon the issue of whether there is sufficient evidence to warrant the court in holding him for the action of a grand jury," but specifically states that the court "must itself take such affirmative action as is necessary to effectuate" such rights. See C.P.L. § 180.10(4). Indefinitely postponing all preliminary hearing procedures is not taking "affirmative action" to effectuate the defendant's right to such a hearing. It is the opposite, and courts cannot continue to simply ignore this duty.

As such, many individuals who are arrested and charged via a felony or misdemeanor complaint are being held in pre-trial detention in the absence of any substantive, post-arrest probable cause determination. It is particularly noteworthy that ordinarily, many defendants who are in custody on the 180.80 day are in fact released on that date. Release occurs for a number of reasons, including the filing of no true bills, the People's motion to reduce the charges, the inability of the prosecutor to call witnesses, the discovery of evidence favorable to the defense, the defendant's persuasive testimony or presentation of evidence in the grand jury, and the entry of non-jail dispositions that are worked out on the 180.80 date. In this current climate without any judicial

oversight, none of these possibilities exist and defendants who would normally be released are being held indefinitely in dire circumstances.

*New Yorkers are being detained on untested allegations without the process they are due.*

Given that a horizon for the end of this crisis is not yet in sight, the suspension of C.P.L. Articles 180, 170 and their attendant rights, along with Article 30, has left many pre-trial detainees in limbo. Those whose cases are unindicted or who are facing uncorroborated misdemeanor charges are trapped within indefinite detention, and are being denied statutorily-guaranteed access to an independent tribunal to determine whether there is sufficient competent, non-hearsay evidence to warrant their continued custody. The urgency of our request is compounded by the fact that virtually every system to test the validity or severity of pending charges against our clients has been shut down in light of the health crisis: When will our clients have access to trials to test the prosecution's proof? When will suppression hearings be conducted to test the legality of the evidence? When will clients be screened for and able to enter alternatives to incarceration programs? When will prosecutors be tasked with reaching out to witnesses and deciding an appropriate disposition in the case? With basically every proceeding that could result in a defendant's release shut down and statutory requirements indefinitely suspended, it is imperative that the courts conduct a probable cause hearing at the outset of the case before our clients are held indefinitely pre-trial.

And this need for pre-trial probable cause hearings is heightened by the present conditions within New York City's detention facilities and county jails around the state. As COVID-19 has ravaged the nation, New York State has emerged as *the* global epicenter of the virus.[3] The State has more confirmed cases of coronavirus than any nation in the world,[4] and New York City alone has more confirmed cases than any state in the nation.[5] Even in a region particularly hard hit, simply put, when it comes to COVID-19, right now there is no more dangerous place on Earth than detention facilities, like Rikers Island.[6]

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[3] N.Y. Times, *Coronavirus in the U.S.: Latest Map and Case Count* (last updated April 20, 2020, 9:02 a.m.), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states.

[4] BBC News, *Coronavirus: New York has more cases than any country* (Apr. 10, 2020), https://www.bbc.com/news/world-us-canada-52239261.

[5] Center for Systems Science and Engineering, Johns Hopkins University, Coronavirus COVID-19 (last updated on Apr. 20, 2020 10:38 a.m.), https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6.

[6] *Id.*; German Lopez, *Why US jails and prisons became coronavirus epicenters*, Vox (Apr. 22, 2020), https://www.vox.com/2020/4/22/21228146/coronavirus-pandemic-jails-prisons-epicenters; Legal Aid Society, *COVID-19 Infection Tracking in NYC Jails*, https://www.legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/ (last updated Apr. 19, 2020).

*Fundamental statutory and Constitutional rights, at a minimum, demand the courts hold preliminary hearings.*

First, it is and remains our position that the Governor's order cannot and does not apply to the limitations on incarceration found in C.P.L. §§ 170.70, 180.80, or 30.30(2).[7] However, it is beyond dispute that C.P.L. § 180.10, which is devoid of any specific time limits, was not suspended by the Governor's order. That section not only grants each defendant the right to a "prompt hearing upon the issue of whether there is sufficient evidence to warrant the court in holding him for the action of a grand jury," but specifically states that the court "must itself take such affirmative action as is necessary to effectuate" such rights. Indefinitely suspending all preliminary hearing procedures is not taking "affirmative action" to effectuate the defendant's right to such a hearing. C.P.L. § 180.10(4).

As such, the courts should take the statutorily required "affirmative action" and either order preliminary hearings (held virtually or otherwise) or release individuals held on a felony complaint in accordance with C.P.L. § 180.80; for those individuals held on an uncorroborated misdemeanor complaint, the court should release them pursuant to C.P.L. § 170.70; and the court should conduct hearings and release individuals where C.P.L. § 30.30(2) provisions apply. Not only do these statutory provisions provide due process protections for pretrial detainees, but the Constitution supports these types of protections.

The United States Supreme Court has made clear that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). To be consistent with the constitutional guarantees of substantive and procedural due process, pre-trial detention schemes are policed by the twin protections of strict time limitations and robust rights to be heard. As the Court has repeatedly recognized, in the pre-trial context, detention is carefully time bound by both the Sixth Amendment and statutory regulation. The states' complex criminal procedural laws, which ensure the detainee's right to be heard via robust pre-trial hearings or the action of the Grand Jury, also protect against prolonged erroneous detention. *See, e.g., United States v. Salerno,* 481 U.S. 739, 750 (1987) (explaining that due process was not offended by a statutory scheme in which "[t]he Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee," and second, the defendant must be provided a "full-blown adversar[ial] hearing" at which he has

[7] Specifically, the order does not suspend the entire criminal procedure law, rather it suspends "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state." Plainly, the order only applies to "time limit[s]" for the "commencement, filing, or service" of legal processes. Sections 170.70, 180.80, and 30.30(2) of the C.P.L. are not "time limits" for the "commencement, filing, or service" of anything. For instance, after the C.P.L. § 180.80 date, a Supreme Court proceeding can still be commenced, an indictment can still be filed, and a notice of readiness can still be served. Instead, these CPL provisions are "time limits" on incarceration. In sum, the plain text of the Governor's order does not apply to C.P.L. § 170.70, 180.80, or 30.30(2).

the opportunity to be heard and present evidence); *Foucha v. Louisiana*, 504 U.S. 71, 80-81 (1992) (describing the due process protections required for pre-trial detention).

Procedural and substantive due process require the courts to ensure a pre-trial detainee's right to be heard, to challenge the evidence against him, and to be protected against the "risk of erroneous deprivation" of his liberty. *Matthews v. Eldridge*, 424 U.S. 319 (1976). "The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963).

The Courts' failure to affirmatively provide a preliminary hearing violates due process in other ways as well. The felony complaint is an instrument that provides limited preliminary jurisdiction to the criminal court. C.P.L. §§ 1.20(8), 10.30. The Criminal Procedure Law states that the "primary purpose" of the proceedings on the felony complaint is "to determine whether the defendant is to be held for action of a grand jury with respect to the charges contained therein." By continuing to allow bail to be set at first appearance on felony complaints, but simultaneously condoning the suspension of 180.80 and not providing any other substitute, our courts have contorted the felony complaint far beyond its jurisdictional purpose. Rather than serving to permit a brief detention pending a prompt evidentiary hearing, the felony complaint has become an instrument for an open-ended administrative detention.

*Conclusion*

On April 13, 2020, Your Honor and Chief Judge Janet DiFiore issued a press release announcing that virtual courts would be expanded beyond essential matters.[8] While we continue to assert that preliminary hearings are in fact among *the most* essential of matters, we ask that the new expansion of issues to be heard take into consideration the plight of pre-trial detainees who are sitting in jail on unindicted, uncorroborated charges. Though we are indeed in the midst of "the gravest of emergencies"—a pandemic emergency that in fact puts those detainees at the highest risk—our fundamental constitutional principles must be upheld.

In light of the substantial risk of erroneous deprivation of liberty, we must not condone the prolonged, indefinite detention of a person pre-trial held on the basis of a hearsay felony or misdemeanor complaint that is not supported by competent, non-hearsay evidence. We respectfully request that the courts take the simple steps of requiring a C.P.L. § 180.60 preliminary hearing to be held virtually or otherwise upon demand, or a supporting affidavit be filed on a

[8] Press Release, *Virtual Courts Expanded Beyond the Limited Category of Essential and Emergency Matters* (Apr. 13, 2020), https://www.nycourts.gov/LegacyPDFS/press/PDFs/PR20_15virtualcourtstortsetc.pdf.

misdemeanor hearsay complaint and that the courts hold the People to their C.P.L. §§ 180.80, 170.70, and 30.30(2) obligations if they seek to continue the detention of a pre-trial detainee held on an unindicted or uncorroborated complaint.

Sincerely,

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Timothy W. Hoover
President, New York State Association of Criminal Defense Lawyers

Susan Bryant
Executive Director, New York State Defenders Association

**Albany County Public Defender**

**Albany County Alternative Public Defender's Office**

**Appellate Advocates**

**The Bronx Defenders**

**Brooklyn Defender Services**

**Broome County Public Defender's Office**

**Center for Appellate Litigation**

**Chemung County Public Advocate's Office**

**Chemung County Public Defender's Office**

**Columbia County Public Defender's Office**

**Delaware County Public Defender**

**Franklin County Conflict Defender**

**Franklin County Public Defender**

**Fulton County Public Defender**

**Genesee County Public Defender**

**Genesee County Assigned Counsel Program**

**Greene County Public Defender**

**Legal Aid Bureau of Buffalo**

**The Legal Aid Society**

**Legal Aid Society of Westchester**

**Monroe County Conflict Defender's Office**

**Monroe County Public Defender Office**

**Montgomery County Public Defender**

**Nassau Legal Aid Society**

**Neighborhood Defender Service of Harlem**

**New York County Defender Services**

**Onondaga Assigned Counsel Program**

**Orleans County Assigned Counsel Program**

**Orleans County Public Defender**

**Ontario County Conflict Defender's Office**

**Ontario County Public Defender**

**Queens Defenders**

**Saratoga County Conflict Defender**

**St. Lawrence County Conflict Defender's Office**

**St. Lawrence County Public Defender's Office**

**Sullivan County Conflict Legal Aid**

**Sullivan County Legal Aid Panel**

**Tioga County Public Defender's Office**

**Tompkins County Assigned Counsel Program**

**Warren County Assigned Counsel**

**Warren County Public Defender's Office**

**Washington County Public Defender**

**Wayne County Public Defender**

**Wyoming County Public Defender**