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*BAIL ADVOCACY IN NEW YORK STATE*

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## I. HISTORY OF BAIL IN NEW YORK

### A. CODE OF CRIMINAL PROCEDURE

- 1) The Code of Criminal Procedure, in effect from 1881 to 1970, only permitted a judge to set an amount of bail, not determine the method in which bail could be posted.<sup>1</sup>
- 2) The method in which bail could be posted varied depending on the nature of the crime charged and the possible punishment for the offense, but required a fully secured surety or personal appearance bond (secured by real or personal property),<sup>2</sup> or an insurance company bond.<sup>3</sup>
- 3) The C.C.P. also included a provision entitled “Deposit Instead of Bail” which provided that a defendant, “instead of giving bail . . . may deposit with the county treasurer of the county in which he is held to answer or appear, or in the city of New York with the finance administrator . . . the sum mentioned in the order of commitment [or designated bonds, notes, etc.]”<sup>4</sup>

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<sup>1</sup> See C.C.P. § 561 (Gilbert’s 1970) (“If the application for bail be made to the court, an order must be made, granting or denying it, and if it be granted, stating the sum in which bail may be taken”) (emphasis added).

<sup>2</sup> These provisions, together, reveal that “bail” under the C.C.P. was understood to be synonymous with what we now refer to as “bond” executed by sureties with sufficient security to cover the entire amount of the undertaking, and by “putting in bail,” the defendant was released to the custody of the surety or sureties to guarantee his return to court. See *People v. Torn*, 110 A.D. 676, 678 (1906) (“The surety by executing this undertaking secured the release of his principal from the custody of the law . . .”); *People v. Gillman*, 125 N.Y. 372 (1891) (“By the present Code of Criminal Procedure a new practice is prescribed and a written undertaking is required to be put in. When executed in the form prescribed, or in substantially that form, the prisoner goes in custody of the person who has thereby become surety for his appearance. . .”).

<sup>3</sup> Although not permitted at the time the Criminal Code was enacted, as early as 1913, a defendant could also post bail through an insurance company bond. See § 557-a (“Bail by Fidelity or Surety Company” providing that “[b]ail may be given by a fidelity or surety company authorized to transact business within this state.”); *People v. Smith*, 196 Misc. 304, 310-11 (Co. Ct., Kings Co. 1949) (explaining that the provision adding bail by insurance company bond was added to the Code in 1913 and that “the rates charged by bondsmen are fixed by law (Code Crim. Pro., § 554-b); 5% for the first \$1,000, 4% for the second \$1,000 and 3% for all bonds over \$2,000. There is a minimum premium of \$10 permitted for all bonds under \$200.”). The practice came under increasing regulation as bail bond agency prospered.

<sup>4</sup> C.C.P. § 586 (Gilbert’s 1970).

B. ENACTMENT OF THE CRIMINAL PROCEDURE LAW<sup>5</sup>

- 1) The Criminal Procedure Law, enacted in 1970 and effective September 1, 1971 (L. 1970, c. 996, §1, A- 4561), was intended to permit more defendants to be released on bail.<sup>6</sup>
- 2) The Criminal Procedure Law represented a substantial reform of the entire system of bail that existed in the Code of Criminal Procedure, and a shift to “a presumption in favor of pretrial release” that included providing for “alternate methods of release” as well as a method for reducing the unconvicted portion of the prison population.<sup>7</sup>
- 3) To accomplish these goals, the Criminal Procedure Law added and defined additional, and less onerous, forms of bail that did not previously exist. The Criminal Procedure Law, at the time of enactment, contained eight forms of

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<sup>5</sup> The presumption in favor of pre-trial liberty in the United States was solidified by the Federal Bail Reform Act of 1966 which endorsed non-financial bail. See 18 U.S.C. §§ 3141-3151. The Act generally directed that non-capital defendants should be released pending trial on their personal recognizance or on “personal bonds” unless the judicial officer determined that these incentives would not adequately assure their appearance at trial, in which case the judge was to choose the least restrictive alternative. H.R.Rep. No. 89-1541, at 7-8 (1966) (The Act sought to “assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges” and to further the goals of the Judiciary Act of 1789 provision that “upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death.”).

<sup>6</sup> The “Memorandum in Support and Explanation of Proposed Criminal Procedure Law,” Prepared by the Commission on Revision of the Penal Law and Criminal Code, described the Criminal Procedure Law as follows:

In structure, substance, form, phraseology and general approach, the proposed Criminal Procedure Law bears little resemblance to the distinctly archaic Code of Criminal Procedure . . . it lays a new foundation and, in the process, proposes numerous significant changes of substance in an attempt to provide a workable body of procedure accommodated to modern times. Among the innovations are . . . a reformulated system of bail and release on recognizance (Arts. 500-540) . . . [the goal of which was] to reduce the unconvicted portion of our jail population.

(S. Int. 7276, A. Int. 4561).

<sup>7</sup> People v. Burton, 150 Misc.2d 214, 225 (Sup. Ct., Bronx Co. 1990), overruled on other grounds, People v. Sielaff, 79 N.Y.2d 618 (1992) (“New York’s statutory scheme [of bail under the Criminal Procedure law] manifests a continuing sensitivity for the rights of criminal defendants, and reflects an admirable attempt to reduce the cost of liberty for those citizens awaiting trial.”).

bail and included partially secured and unsecured forms of bond that permitted bail to be posted with minimal or no security.

C. STATUTORY PURPOSE AND CRITERIA

1) Discretion

The court's discretion in setting bail pursuant to C.P.L. §§ 530.20, 530.40 is limited. For example, the court may not order remand and must order bail or release the defendant on his or her own recognizance if the defendant is charged only with misdemeanors. However, the court must remand the defendant without bail if he or she is charged with a class A felony and the court is a city, town or village court.

2) The Purpose of Bail

To the extent that a bail determination is a matter of discretion, under C.P.L. § 510.30(2)(a), the court must base its order on the measures necessary to "secure [the defendant's] attendance at court when required." New York does not allow the court to set bail based on the defendant's presumed dangerousness to the community or as preventive detention.

3) The Criteria

The court must consider the following factors outlined in § 510.30(2)(a) when making bail decisions insofar as each bears on securing the defendant's attendance in court:

- (1) The defendant's character, reputation, habits and mental condition;
- (2) His employment and financial resources;
- (3) His family ties and length of residence in the community;
- (4) His criminal record, if any;
- (5) His record of previous adjudication as a juvenile delinquent, or youthful offender, if any;
- (6) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution;
- (7) The weight of the evidence against him and other factors indicating probability or improbability of conviction; and
- (8) The sentence that may be imposed on conviction.

II. TYPES OF BAIL

A. FORMS OF BAIL

Under New York law C.P.L. § 520.10, there are currently nine forms of bail permitted:

- 1) Cash bail
- 2) An insurance company bail bond
- 3) A secured surety bond
- 4) A secured appearance bond
- 5) A partially secured surety bond
- 6) A partially secured appearance bond
- 7) An unsecured surety bond
- 8) An unsecured appearance bond
- 9) Credit card or similar device<sup>8</sup>

B. DEFINITIONS UNDER C.P.L. § 500.10

- 1) Principal - defendant in a bail proceeding
- 2) Bail - cash bail or bail bond
- 3) Obligor - person who executes a bail bond on behalf of a principal and thereby assumes the undertaking (principal may be obligor)

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<sup>8</sup> The statute was amended to add credit card or similar device in 1986 but the language specified it was only permitted “where the principal is charged with a violation under the vehicle and traffic law” and there are no V.T.L. violations, only infractions, so it was impossible to utilize this provision. See C.P.L. § 520.10 (1) (L. 1986, ch 708, § 2; amend. L. 1987, ch 805, § 3; 1 2005, ch 457 § 4). In 2005, the statute was amended again making the provision applicable to any offense. Id. (L. 2005, ch. 457, § 4, 2005). The statute was scheduled to sunset on August 9, 2009 but was extended by recent legislation. Id. (L. 2010, ch 528 § 5, eff Sept 17, 2010, deemed eff on and after Sep 1, 2009, amended L. 2005, ch 457, § 7, so as to delete Aug 9, 2010, expiration date applicable to amendment of Sub1(i)). The “reasonable administrative fee” required for implementation of this provision must be set by the Chief Administrative Judge. The fee has not yet been set and therefore this provision cannot be utilized. However, the matter is currently under consideration. In the interim, a liberal construction of “cash bail” would permit payment by credit card as credit cards are similarly accepted for fines, surcharges and other fees by many N.Y. courts. Bail be credit card is currently accepted at NYC jails (Rikers and the Boat).

- 4) Surety - obligor who is not a principal
- 5) Cash Bail - "sum of money" posted that will become forfeited if the principal does not appear as required
- 6) Bail Bond - a written undertaking (executed by one or more obligors) that principal will appear and that if he fails to do so the obligor will pay a sum a sum of money
- 7) Insurance Co. Bail Bond - a surety bond, executed in the form prescribed by the superintendent of insurance
- 8) Appearance Bond - obligor is principal
- 9) Surety Bond - obligors are one or more sureties or one or more sureties and the principal
- 10) Secured Bail Bond - secured by (1) personal property valued equal to or greater than amount of the bond, or (2) real property with a value of at least twice the amount of the undertaking
- 11) Partially Secured Bail Bond - bond is secured only by a deposit of money not to exceed 10% of total amount of undertaking
- 12) Unsecured Bail Bond - bond secured by promise to appear with no money or property

C. BAIL CHART (See appendix)

III. MECHANICS OF POSTING BAIL

A. MECHANICS OF POSTING CASH BAIL C.P.L. § 520.15

The person posting cash bail must complete and sign a form which states

- 1) the name, residential address and occupation of each person posting cash bail;
- 2) the title of the criminal action or proceeding involved;
- 3) the offense or offenses which are the subjects of the action or proceeding involved, and the status of such action or proceeding;
- 4) the name of the principal and the nature of his involvement in or connection with such action or proceeding;
- 5) that the person or persons posting cash bail undertake that the principal will appear in such action or proceeding whenever required and will at all times render himself amenable to the orders and processes of the court;
- 6) the date of the principal's next appearance in court;

- 7) an acknowledgement that the cash bail will be forfeited if the principal does not comply with any requirement or order of process to appear in court; and
- 8) the amount of money posted as cash bail.

**B. THE MECAHNICS FOR POSTING NON-CASH BAIL**

1) General Requirements

C.P.L. § 520.20 states “when a bail bond is to be posted in satisfaction of bail, the obligor or obligors must submit to the court a bail bond in the amount fixed . . . accompanied by a justifying affidavit of each obligor . . . .”

2) The Bail Bond

A bail bond must be subscribed and sworn to by each obligor (C.P.L. § 520.20(2)) and must state:

- a. The name, residential address and occupation of each obligor;
- b. The title of the criminal action or proceeding involved;
- c. The offense or offenses which are the subjects of the action or proceeding involved, and the status of such action or proceeding;
- d. The name of the principal and the nature of his involvement in or connection with such action or proceeding;
- e. That the obligor, or the obligors jointly and severally, undertake that the principal will appear in such action or proceeding whenever required and will at all times render himself amenable to the orders and processes of the court; and
- f. That in the event that the principal does not comply with any such requirement, order or process, such obligor or obligors will pay to the people of the state of New York a designated sum of money fixed by the court

3) The Justifying Affidavit—All bonds require a justifying affidavit. The justifying affidavit must be subscribed and sworn to by the obligor-affiant and must state:

a. Insurance Company Bail Bond

- (1) Obligor’s name;
- (2) Residential address;
- (3) Occupation;
- (4) The amount of the premium paid to the obligor; and

- (5) All security and all promises of indemnity received by the surety-obligor in connection with its execution of the bond, and the name, occupation and residential and business addresses of every person who has given any such indemnifying security or promise.
- b. Fully Secured Appearance or Surety Bond
    - (1) Obligor's name;
    - (2) Residential address;
    - (3) Occupation;
    - (4) Every item of personal property deposited and of real property pledged as security;
    - (5) The value of each such item; and
    - (6) The nature and amount of every lien or encumbrance thereon.
  - c. Partially Secured or Unsecured Appearance or Surety Bond
    - (1) Obligor's name;
    - (2) Residential address;
    - (3) Occupation;
    - (4) The place and nature of the obligor-affiant's business or employment;
    - (5) The length of time he has been engaged therein;
    - (6) His income during the past year; and
    - (7) His average income over the past five years.

#### IV. EXAMINATION OF SURETY

##### 1) Court's Authority

###### a. Generally

C.P.L. § 520.30 gives the court the authority to review the bond and the justifying affidavits to determine the reliability of the obligors or persons posting cash, the value and sufficiency of any personal or real property offered, and whether any aspect of the bond contravenes public policy.

###### b. In Cash-Bail Cases:

C.P.L. seems to require that an inquiry of a person posting cash bail must be made upon application of the district attorney and the district attorney must have reasonable cause to believe that the person posting cash bail is

not in rightful possession of money posted as cash bail or that such money constitutes the fruits of criminal or unlawful conduct.

2) Procedure

Upon such inquiry, the court may examine, under oath or otherwise, the obligors and any other persons who may possess material information. The district attorney has a right to attend such inquiry, to call witnesses and to examine any witness in the proceeding. The court may, upon application of the district attorney, adjourn the proceeding for a reasonable period to allow him to investigate the matter.

3) Scope of Inquiry

The court may inquire into any matter stated or required to be stated in the justifying affidavits, and may also inquire into other matters appropriate to the determination, which include but are not limited to the following:

- a. The background, character and reputation of any obligor, and, in the case of an insurance company bail bond, the qualifications of the surety-obligor and its executing agent;
- b. The source of any money or property deposited by any obligor as security, and whether any such money or property constitutes the fruits of criminal or unlawful conduct;
- c. The source of any money or property delivered or agreed to be delivered to any obligor as indemnification on the bond, and whether any such money or property constitutes the fruits of criminal or unlawful conduct;
- d. The background, character and reputation of any person who has indemnified or agreed to indemnify an obligor upon the bond; and whether any such indemnitor, not being licensed by the superintendent of insurance in accordance with the insurance law, has within a period of one month prior to such indemnity transaction given indemnification or security for like purpose in more than two cases not arising out of the same transaction;
- e. The source of any money posted as cash bail, and whether any such money constitutes the fruits of criminal or unlawful conduct; and
- f. The background, character and reputation of the person posting cash bail.

At the conclusion of the inquiry, the court must issue an order either approving or disapproving the bail.

4) Lifting the Examination of Surety Requirement

If court alters bail and lifts examination of surety requirement, you must make sure the securing order reflects this. If client produced for surety hearing or

court appearance where bail is changed, make sure blue card is changed. If client is not produced or waived and examination of surety requirement is lifted, you must make sure judge issues a new/superseding commitment with the changed securing order for DOCS to honor change.

#### **IV. THE CURRENT METHODS FOR SETTING BAIL**

##### **A. PROVISIONS**

There are two different provisions for setting bail:

- 1) C.P.L. § 520.10(2)(a) provides:
  - a. “A court may designate the amount of the bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in either of the forms specified in paragraphs (g) and (h) of subdivision one;”
  - b. Pursuant to this provision, a court may simply set an amount of bail, and remain silent as to how that bail should be posted. Under such circumstances, the statute allows a defendant to post bail in the most permissive forms under subdivisions (g), unsecured surety bond, and (h), unsecured appearance bond.
- 2) C.P.L. § 520.10(2)(b) provides:
  - a. “The court may direct that the bail be posted in any one of two or more of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms[.]”

##### **B. DISPUTE OVER THE INTERPRETATION OF (2)(b)**

There are currently two different interpretations of this provision.

- 1) Two Forms are Required by Statute
  - a. One interpretation of this provision is that (2)(b) requires the court to set at least two forms of bail from which the defendant can choose. This interpretation is based on a close reading of the statute.
  - b. The phrase the “court may direct that the bail be posted in any one of two” refers to the manner in which the defendant posts the bail, not the manner in which the court may set the bail. In order for the defendant to post the bail “in any one of two or more forms,” the court would have to set more than a single form of bail. The phrase “two or more” must, therefore, be understood as empowering the court to decide which of the forms specified in subdivision one to set, and whether to set two or more, but requiring that at least two options be provided. The language is permissive because the court could set bail pursuant to (2)(a) instead on

(2)(b) in which case the court would simply set an amount of bail and not designate the form at all.

- c. This interpretation is supported by the legislative history since the C.C.P. never gave the court authority to set cash-only bail and the changes to the bail statute when the C.P.L. was enacted were intended to make it easier for defendants to post bail. Simultaneously granting authority to judges to make it harder for defendants to exercise the new options is contrary to legislative intent.
- d. Interpretation is also supported by the way that court officials have enforced the statute. Since its enactment the Commission on Judicial Conduct, for example, has interpreted this provision as prohibiting “cash only” bail and has gone so far as to censure judges for not following the statute.<sup>9</sup>

2) Only One Form is Required by Statute

- a. A minority of judges interpret this provision as simply allowing the court to set two or more forms of bail but not requiring it to do so.
- b. This interpretation finds support in the permissive language in the statute. Since the statute reads that the court “may” direct that the bail be posted in one of two or more forms, the court is not required to do so. Support is also found in the phrase “form or forms” found in subdivision (2)(a), arguing that (2)(a), therefore, contemplates the court’s ability to set a single form of bail.
- c. Finally, additional authority is found in one line of a memorandum in support of an amendment to the C.P.L. in which a writer notes that nothing in the amendment is meant to take away the court’s discretion to set bail in any “form” it chooses.

3) McManus Case:

This issue of whether a court can set cash-only bail is currently before the Court of Appeals from a writ that originated in Bronx County. The Supreme Court judge set cash-only bail. The client filed a bail writ which was denied. The client then appealed the denial to the First Department which found that nothing in the statute limited the “discretion of a judge to direct that bail be posted in one form only.” People ex rel McManus v. Horn, 77 A.D.3d 571 (1<sup>st</sup> Dept. 2010). In the interim, the client plead guilty, was sentenced, and

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<sup>9</sup> See 2009 New York State Commission on Judicial Conduct Annual Report at pp. 20-21 (“Since the 1970s, when [CPL 520.10] was enacted, judicial education and training programs run by the Office of Court Administration have stressed the point, which is also reinforced by the court system’s City, Town and Village Resource Center, that setting bail in one form only, typically by announcing “cash only,” is contrary to C.P.L. 520.10.”).

finished his term of incarceration. He nevertheless sought leave from the Court of Appeals which agreed to hear the case despite the issues mootness in Mr. McManus' case.

## V. BAIL REVIEWS

### A. DE NOVO

- 1) A defendant is entitled to one de novo bail review before a superior court judge from a bail determination made by a lower court judge on grounds that the local criminal court (a) lacked authority to issue an order; (b) has denied an application for bail or recognizance; or (c) has fixed bail which is excessive.<sup>10</sup>
- 2) Most arraignment parts are local criminal court parts, and so a defendant is entitled to one de novo bail review to a superior court judge following arraignment unless a superior court judge is sitting in local criminal court.
- 3) Practice Note: Since the review is de novo, the superior court can also raise the bail even though the application is brought by the defendant.

### B. CHANGED CIRCUMSTANCES

- 1) Application for Reduction of Bail or ROR by a Defendant

Any defendant who is incarcerated as a result of a previous securing order may make an application for recognizance or bail. See C.P.L. § 510.20. There is no limit to the number of such applications that can be made.<sup>11</sup>

- 2) The Standard

There is little, if any, authority governing the standard for a bail application by defense counsel under C.P.L. § 510.20 but it is reasonable to assume the relevant factors would be those articulated in C.P.L. § 510.30, and the application probably needs to be based on new information not available or offered to original bail-setting court.

The Preiser Practice Commentary opines:

This section provides the statutory vehicle for a principal (usually a defendant) to make an application for bail or recognizance—as opposed to commitment—and to present arguments and evidence in support thereof. The

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<sup>10</sup> See C.P.L. § 530.30.

<sup>11</sup> See People v. Mohammed, 171 Misc. 2d 130, 140 (Sup. Ct. Kings Co. 1996). Mohammed involved a writ stemming from an increase in bail and does not specifically cite or address C.P.L. § 510.20.

application may be made at the time of the original securing order or at any time thereafter. Where it is made after bail has been fixed, it may simply be a plea for reduction or change in form of a bail order previously fixed, or for recognizance, based upon changed circumstances (*cf.*, People ex rel. Rosenthal (Kolman) v. Wolfson, 48 N.Y.2d 230, 233 (1979)). . . . In considering this matter it is important to observe that the defendant is entitled to be heard on the application and that statutory criteria govern exercise of the court's discretion (*see* CPL § 510.30). . . . In the case of [a bail application under C.P.L. 510.20] prior decisions may be examined afresh and revised as a matter of discretion.<sup>12</sup>

### C. BAIL WRITS

#### 1) Authority

An inmate who contends that a criminal court has unlawfully set bail or that amount of bail is excessive may seek writ of habeas corpus. *See* C.P.L.R. § 7010(b). Such prisoners have no right of appeal from a bail determination and must seek collateral relief by means of a habeas corpus proceeding.

#### 2) Abuse of Discretion Standard

The standard for review is "abuse of discretion." The scope of review of an order denying or fixing bail by another court on a writ of habeas corpus is narrow.<sup>13</sup> Usually, the habeas court is limited to determining whether the constitutional or statutory standards prohibiting excessive bail and the arbitrary refusal of bail were violated.<sup>14</sup> A bail determination that does not consider the statutory factors is an abuse of discretion.<sup>15</sup> A bail determination that considers extraneous factors, including dangerousness to the community,

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<sup>12</sup> Preiser Practice Commentary (McKinney's 2009).

<sup>13</sup> People ex rel. Siegel v. Sielaff, 182 A.D.2d 389, 390 (1st Dept. 1992).

<sup>14</sup> People ex rel. Klein v. Krueger, 25 N.Y.2d 497, 499 (1969).

<sup>15</sup> If the person has been "admitted to bail but the amount fixed is so excessive as to constitute an abuse of discretion," C.P.L.R. § 7010(b), and the habeas court does not discharge him, the habeas court "shall direct a final judgment reducing bail to a proper amount." *Id.* If the person has been denied bail, and the habeas court does not discharge him, "the court shall direct a final judgment admitting him to bail forthwith, if he is entitled to be admitted to bail as a matter of right," or if it appears that "the denial of bail constituted an abuse of discretion." *Id.* If the habeas court sets bail, it "must fix the amount of bail," and set forth the next time and place the detained person is to appear, and order the person's release on bail. *Id.* If the habeas court does not discharge the detained person or admit him to bail, the detainee is to be remanded "to the detention from which he was taken." C.P.L.R. § 7010(c). *See In the Matter of Sardino v. State Commission on Judicial Conduct*, 58 N.Y.2d 286, 289 (1983).

is also an abuse of discretion.<sup>16</sup> However, the habeas corpus court may not substitute its discretion for that of the *nisi prius* court if the bail decision was the product of the exercise of discretion resting on a rational basis.<sup>17</sup> The habeas court's function is not to decide if it would have made the same decision or to exercise independent discretion as to bail.<sup>18</sup>

### 3) Procedure for Filing a Bail Writ

A person “illegally imprisoned or otherwise restrained in his liberty” may petition without notice for a writ of habeas corpus.<sup>19</sup> A petition for a writ of habeas corpus may be made to the Supreme Court, the Appellate Division or any Justice of the Supreme Court or a County Judge in the judicial district where the petitioner is detained, except that in a city of one million or more, it must be made to the Supreme Court (if made to the Appellate Division it will be made returnable to Supreme Court where the petitioner is detained).<sup>20</sup> The petition must be verified and accompanied by an affidavit stating (1) naming the person detained and the location; (2) the cause of detention; (3) that a court or judge of the United States does not have exclusive jurisdiction over the petitioner; (4) the nature of the illegal detention; (5) whether any appeal has been taken; and (6) the date, court of prior applications.<sup>21</sup>

If the petitioner is being held illegally, he is to be released immediately.<sup>22</sup> A petitioner can apply for bail while a habeas proceeding is pending.<sup>23</sup>

### 4) Appeal of Denial of Writ

The denial of a writ of habeas corpus is appealable.<sup>24</sup> The scope of review on appeal is whether the habeas court abused its discretion by denying bail

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<sup>16</sup> See People ex rel. Schweizer v. Welch, 40 A.D.2d 621 (4th Dept. 1972).

<sup>17</sup> People ex rel. Brown v Bednosky, 190 AD2d 836 (2d Dept 1993).

<sup>18</sup> People ex rel. Rosenthal v. Wolfson, 65 AD2d 113 (1978); Matter of Buthy v. Ward, 34 AD2d 884 (1970).

<sup>19</sup> See C.P.L.R. 7002(a).

<sup>20</sup> See C.P.L.R. § 7002(b).

<sup>21</sup> See C.P.L.R. § 7002(c).

<sup>22</sup> See CPLR § 7010(a).

<sup>23</sup> See C.P.L.R. § 7009(e).

<sup>24</sup> See C.P.L.R. § 7011.

without reason or for insufficient reasons<sup>25</sup> or whether there was a violation of the constitutional prohibition against excessive bail or its arbitrary refusal.<sup>26</sup>

D. FORFEITURE AND REMISSION

Bail can be forfeited but if client returns within 30 days, most often forfeiture has not gone through and can be re-instated. If 30 days have passed, a civil action must be brought for remission of forfeiture of bail.<sup>27</sup>

VI. CHANGES WARRANTING REMAND/CHANGE IN BAIL

A. VIOLATION OF TEMPORARY ORDER OF PROTECTION

1) In Family Offenses

- a. C.P.L. § 530.12 (1) permits court to issue an order of protection “[w]hen a criminal action is pending involving a complaint charging any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household, as members of the same family or household are defined in subdivision one of section 530.11.”
- b. C.P.L. § 530.12(11)(a) provides for revocation of an order of recognizance or bail and remand where, after a hearing, the court is satisfied by competent proof that defendant willfully violated order of protection.

2) In Non-Family Offenses

- a. C.P.L. § 530.13 permits a court to issue an order of protection in conjunction with a securing order in non-family offenses.
- b. C.P.L. § 530.13(8)(a) provides for revocation of recognizance or bail and remand “if a defendant is brought before the court for failure to obey any lawful order issued under this section and if, after hearing, the court is satisfied by competent proof that the defendant has willfully failed to obey any such order.”

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<sup>25</sup> People ex rel. Rosner v. Warden, Bronx House of Detention for Men, 53 A.D.2d 519 (1st Dept. 1976)

<sup>26</sup> People ex rel. Klein v Krueger, 25 N.Y.2d 497 (1969); People ex rel. Hunt v Warden, 161 A.D.2d 475 (1990).

<sup>27</sup> C.P.L. §§ 540.10-540.30.

B. FOR “GOOD CAUSE SHOWN” OR WHERE RELEASED ON FELONY AND “REASONABLE CAUSE” TO BELIEVE DEFENDANT COMMITTED CLASS “A” OR VIOLENT FELONY OR SPECIFIED WITNESS TAMPERING OFFENSES

1) Good Cause

- a. C.P.L. § 530.60(1) provides for revocation of an order of recognizance or bail for “good cause shown.”
- b. Only new evidence relevant to one of the criteria listed in C.P.L. § 510.30 can constitute “good cause.”<sup>28</sup>
- c. Subsequent arrests can constitute “good cause” if they are evidence of increased risk of flight. First, “a new arrest may . . . indicate irresponsibility” or “show that the court’s initial appraisal of [the defendant’s] character, reputation or habits was erroneous.”<sup>29</sup> New criminal charges also increase the sentence that a defendant faces upon conviction, which is one of the statutory criteria for risk of flight.<sup>30</sup>

2) New Class A, Violent Felony, or Witness Tampering

- a. Section (2)(a) provides for revocation of recognizance or bail where a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance or bail and “the court finds reasonable cause to believe the defendant committed one or more specified class A or violent felony offenses or intimidated a victim or witness in violation of sections 215.15, 215.16 or 215.17 of the penal law while at liberty.”<sup>31</sup>
- b. The court “must hold a hearing and shall receive any relevant, admissible evidence not legally privileged. The defendant may cross-examine witnesses and may present relevant, admissible evidence on his own behalf. . . . A transcript of testimony taken before the grand jury upon

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<sup>28</sup> See People v. Mohammed, 171 Misc. 2d 130, 142 (Sup. Ct. Kings Co. 1996) (“After the first release determination all modifications must comply with C.P.L. § 510.30 and there must be a showing of change in circumstances warranting a bail modification.”); People v. Saulnier, 129 Misc. 2d 151 (Sup. Ct. New York Co. 1985) (“The decision whether to revoke bail for ‘good cause shown’ is – like the discretionary decision whether to set bail – subject to the same mandatory goal and criteria set forth in C.P.L. § 510.30.”).

<sup>29</sup> People v. Torres, 112 Misc. 2d 145, 150 (Sup. Ct. New York Co. 1981).

<sup>30</sup> See People v. Silvestri, 132 Misc. 2d 1015, 1019 (Sup. Ct. Kings Co. 1986).

<sup>31</sup> C.P.L. § 530.60(2)(a).

presentation of the subsequent offense shall be admissible as evidence during the hearing.”<sup>32</sup>

- c. Remand until expiration of shortest period of 90 days or until reduction or dismissal of felony charges or specified class A or violent felony offense.<sup>33</sup>

## VII. BAIL PENDING APPEAL<sup>34</sup>

### A. AFTER CONVICTION AND BEFORE SENTENCE (C.P.L. § 530.45)

- 1) After conviction, but before sentencing, you can apply for ROR or for bail “in a lesser amount or less burdensome manner than fixed by court”
- 2) Cannot be done when conviction is for a class A felony or sex offense against a minor.
- 3) Application must be on reasonable notice to People and defendant must allege that he intends to take an immediate appeal after sentence is pronounced.
- 4) Application to either:
  - a. Appellate Division in department of conviction (if actin was pending in Supreme or County Court; or
  - b. Supreme Court Judge in County (if action was pending in a local criminal court).
- 5) If Notice of Appeal is not filed within 30 days of sentence, or appeal is not heard within 120 days of filing the Notice of Appeal, the order terminates and the defendant must surrender himself to the criminal court in which the judgment was entered in order that execution of the judgment be commenced. Note: this can be avoided by having the order issued or extended until determination of the appeal easily done by including it in a motion for pauperis status and assignment of counsel following the Notice of Appeal.
- 6) If the judgment is affirmed on appeal, the matter must be remitted to criminal court for affirmance.
- 7) The order acts as a stay to any judgment/sentence.

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<sup>32</sup> Id.

<sup>33</sup> See C.P.L. § 530.60(2)(b).

<sup>34</sup> Note: V.T.L. has a specific provision indicating that license suspension/revocation is not stayed by any of these provisions unless the court specifically orders a stay of license suspension, grants reinstatement, and that order is filed with the commissioner of motor vehicles. See V.T.L. § 1808.

B. STAY PENDING APPEAL AFTER SENTENCE (C.P.L. § 460.50)

- 1) If an appeal is taken, defendant can apply for either a (1) stay or suspension of execution of judgment pending appeal, AND/OR (2) ROR or bail pending appeal.
- 2) Application is made to either:
  - a. Appellate Division Judge; or
  - b. Supreme Court Judge in County.
- 3) Application must be on reasonable notice to the People and only ONE application may be made (so choose court wisely).
- 4) If within 120 days after the issuance of such an order the appeal has not been brought, the order terminates and the defendant must surrender himself. Note: this can be avoided by having the order issued or extended until determination of the appeal and by including a request for extension of the bail in motion seeing pauperis relief and assignment of counsel after Notice of Appeal filed.
- 5) If judgment affirmed on appeal, matter must be remitted to criminal court for affirmance and court must, upon at least two days notice to the defendant, his surety and his attorney, promptly direct the defendant to surrender himself to the criminal court in order that execution of the judgment be commenced or resumed, and if necessary the criminal court may issue a bench warrant to secure his appearance.
- 6) Where leave to appeal to intermediate appellate court granted under section 460.15, the intermediate appellate court may issue an order both (1) staying or suspending execution of judgment pending appeal, or (2) ROR or bail pending appeal.

C. STAY OF JUDGMENT PENDING APPEAL TO COURT OF APPEALS (C.P.L. § 460.60)

- 1) One application can be made on notice to the People where...
  - a. A judge has received an application for a certificate granting a defendant leave to appeal to the court of appeals. The judge may issue an order BOTH (1) staying or suspending an execution of judgment pending the determination of the application for leave to appeal (and if that application is granted, staying or suspending the execution of the judgment pending the determination of the appeal), and (2) RORing or continuing or fixing bail pending appeal.
  - b. If the application for leave to appeal is denied, the stay or suspension pending the application automatically terminates.

- c. If within 120 days after the issuance of a certificate granting leave to appeal, the appeal has not been brought, the order terminates and the defendant must surrender himself to the criminal court. Note: this can be avoided by having the order issued or extended until determination of the appeal.
- d. Where the defendant is at liberty during the pendency of an appeal as a result of an order issued pursuant to this section, the court of appeals upon affirmance of the judgment or order, must, by appropriate certificate, remit the case to the criminal court in which the judgment was entered, and the latter must proceed in the manner provided in subdivision five of section 460.50 of this chapter.

## VIII. ISSUES IN CURRENT BAIL PRACTICE

### A. CURRENT BAIL SETTING PRACTICE

#### 1) Types of Bail Set

Typically judges set only two of the nine forms of bail: cash and insurance company bond.

##### a. Problem with Cash

Most onerous form of bail for clients especially since judges do not routinely tailor their cash bail to an amount that the client can afford but instead set fixed amounts often in \$500 increments (\$ 500, \$ 1,500, \$2,000, etc.).

##### b. Problem with Insurance Company Bonds

Bail bonds charge fees that are set by law by the New York State Insurance Department and are non-refundable at the end of the case.<sup>35</sup> The higher the bail amount, the more co-signers needed. In general, the higher the dollar amount of the bail, the smaller the percentage of cash a client needs to pay to the bail bond company. Since bail bond companies are profit-oriented, most will not write bonds for low bail amounts. Typically, bail in the amount of \$1,500 or less is not posted by bail bonds agencies because there is not enough profit.<sup>36</sup> When bail companies do

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<sup>35</sup> Fees were reported at 10% for first \$3,000, 8% for the next \$7,000; and 6% for amounts over \$10,000. See Mary T. Phillips, New York Criminal Justice Agency, "Making Bail in New York City: Commercial Bonds and Cash Bail", 2, (March 2010).

<sup>36</sup> See Mary T. Phillips, New York Criminal Justice Agency, "Making Bail in New York City: Commercial Bonds and Cash Bail", 2, (March 2010) ("Bondsmen offer defendants an alternative to posting bail in cash, but their non-refundable fees ensure that a commercial bond will be costlier in the long run.").

agree to post for small bond amounts, they often require a client to pay as much as 60% down in cash.<sup>37</sup>

B. PRE-TRIAL DETENTION POPULATION

- a. Nationally
  - b. According to the Bureau of Justice Statistics of the US Department of Justice, 62 percent of the nation's jail population consists of unconvicted detainees.<sup>38</sup>
  - c. The Pretrial Justice Institute estimates it costs \$9 billion annually to incarcerate defendants held on bail.<sup>39</sup>
- 2) New York City
- a. At any given moment, 39 percent of NYC's jail population consists of inmates who are in jail pretrial solely because they have not posted bail.
  - b. In 2009, there were 98,980 total admissions to the city's jails, a little more than half of which (51,047) were pretrial detainees incarcerated solely because they had not posted bail.<sup>40</sup>
  - c. In 2008, in cases with bail set at \$1,000 only 11.3 percent of defendants were able to post bail, compared to 17.6 percent in cases in which bail was under \$500.<sup>41</sup>
  - d. Defendants spent two to seven days in pretrial detention in almost half the cases of nonfelony defendants who were not able to make bail of \$1,000 or less at arraignment, and nearly one in four spent more than 15 days.
  - e. According to the 2009 New York City Criminal Justice Agency Annual Report 2009 where bail was set at \$500 or less, 16% of defendant's posted bail at arraignment and 41% were held in until final disposition.<sup>42</sup>

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<sup>37</sup> Amounts range from 2% to 100% but median in NYC in 2005 was 375 of bond amount. Id.

<sup>38</sup> HUMAN RIGHTS WATCH, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, 20, Dec. 3, 2010, available at: <http://www.hrw.org/node/94581>.

<sup>39</sup> Id.

<sup>40</sup> Id. at 21

<sup>41</sup> Id. at 23

<sup>42</sup> See New York City Criminal Justice Agency, "Annual Report 2009," pp. 22-24, (Dec. 2010).

- f. Non-financial bail has a failure to appear rate of less than .7%.<sup>43</sup> The Bronx Freedom Fund reported that posted cash bail most often between \$500 and \$1000 had return rate of 93% as compared to CJA average in NYC of 84%.<sup>44</sup>
- g. Bail is set in 32% of cases that survive arraignment in NYC.<sup>45</sup>

### C. EFFECTS OF PRETRIAL DETENTION

#### 1) Case Outcomes

- a. The CJA found that "pretrial detention had an effect on conviction after controlling statistically for the number and severity of arrest charges, the offense type of the arraignment charge, the defendant's criminal history, demographic characteristics, borough, and length of case processing, among other factors."<sup>46</sup>
- b. According to the NYS Division of Criminal Justice Services, about 60 percent of all misdemeanor arrests result in guilty pleas.
- c. In 99.6 percent of cases in which misdemeanor arrestees are convicted, the convictions are secured through guilty pleas.
- d. Of misdemeanor clients, 45% of those released on bail were convicted as opposed to 95%, and of those convicted 30% who were released received jail sentence versus 80% of those in on bail at time of conviction.<sup>47</sup>
- e. The median length of pretrial incarceration for misdemeanor defendants arrested in 2008 is five days, the average is 15; yet according to the NYS Division of Criminal Justice Services, in 48 percent of cases in which people arrested on misdemeanor charges are convicted and sentenced to jail, the sentence is less than 15 days; in 9 percent of cases it is less than five days.

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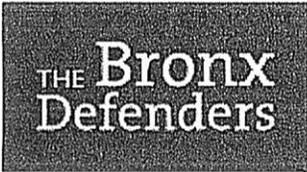
<sup>43</sup> See The Manhattan Bail Project, Vera Institute for Justice (1961).

<sup>44</sup> See New York City Criminal Justice Agency, "Annual Report 2007."

<sup>45</sup> See New York City Criminal Justice Agency, "Annual Report 2009," pp. 16-17, (Dec. 2010). In 2009, 173,114 cases were continued after arraignment 2009 in New York City and bail was set in 32% of those cases.

<sup>46</sup> HUMAN RIGHTS WATCH, The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City, 33, Dec. 3, 2010, available at: <http://www.hrw.org/node/94581>

<sup>47</sup> *Id.* at 30.



2) Life Outcomes

Those incarcerated on bail are more likely to have jail sentences imposed as well as have devastating collateral consequences.<sup>48</sup> These consequences include deportation, unemployment, homelessness, loss of benefits, and even the removal of children from the home.

- a. Deportation  
Incarceration for as little as one day can trigger deportation proceedings
- b. Unemployment  
No legal protection for absence due to incarceration
- c. Homelessness  
Absence from certain types of supported housing can trigger eviction
- d. Loss of benefits  
Missed work assignment or appointment can result in client's benefits being terminated
- e. Removal of children from the home  
Incarceration alone can result in a neglect proceeding and children being placed in foster care

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<sup>48</sup> See Barker v. Wingo, 407 U.S. 514, 532-33, 533 n.35 (1972).

Type	Who Pays	Requirements	\$500 Example
<b>Cash</b>	Anyone can pay bail (serve as "obligor"), including client (who is called the "principal")	Full amount in cash must be posted	Client and/or others pay \$500 cash
<b>Insurance Company Bond</b>	Insurance Company is surety-obligor and must be an insurance company licensed by the Superintendent of Insurance to engage in the business of executing bail bonds	Insurance Company covers entire face of bond and requires percentage of bond, signatures, and fees from those posting via Insurance Company	Client and/or others pay a percentage of the \$500 (percentage varies from company to company and from case to case), agrees to pay the full amount if the client does not appear, and pays up to 8% of the bond amount in fees
<b>Secured Surety Bond</b>	Obligor(s) are one or more sureties, or one or more sureties and the principal (client)	Bond is fully secured by (1) personal property valued equal to or greater than of the bond, or (2) real property with a value of at least twice the amount of the bond	Others (and client) put up car, jewelry, stocks, etc. worth at least \$500 or a house/land worth at least \$1,000
<b>Secured Appearance Bond</b>	Obligor is principal (client)	Bond is fully secured by (1) personal property valued equal to or greater than that of the bond, or (2) real property with a value of at least twice the amount of the undertaking	Client alone puts up car, jewelry, stocks etc. worth at least \$500 or a house/land worth at least \$1,000

Type	Who Pays	Requirements	\$500 Example
<b>Partially Secured Surety Bond</b>	Obligor(s) are one or more sureties, or one or more sureties and the principal (client)	Bond is secured by a deposit of money not to exceed 10% of total amount of undertaking	Others (and client) put down \$50
<b>Partially Secured Appearance Bond</b>	Obligor is principal (client)	Bond is secured by a deposit of money not to exceed 10% of total amount of undertaking	Client alone puts down \$50
<b>Unsecured Surety Bond</b>	Obligor(s) are one or more sureties, or one or more sureties and the principal (client)	Bond is secured by signatures guaranteeing return to court and agreeing to be responsible for full amount of bond in case of nonappearance, but not secured by any deposit of cash or lien upon property	Others (and client) agree that they will pay \$500 if client does not appear
<b>Unsecured Appearance Bond</b>	Obligor is principal (client)	Bond is secured by principal's signature guaranteeing return to court and agreeing to be responsible for full amount of bond in case of nonappearance, but not secured by any deposit of cash or lien upon property	Client alone agrees that he will pay \$500 if client does not appear
<b>Credit card or similar device</b>	Anyone can pay bail (serve as obligor), including principal (client)	Full amount in cash must be posted by credit card or similar device and court may assess a "reasonable administrative fee"	Currently unavailable because OCA has not set the "reasonable administrative fee"

BAIL BOND  
520.20 - CPL

CRIMINAL COURT OF THE CITY OF NEW YORK

Part \_\_\_\_\_ County, \_\_\_\_\_

Docket Number \_\_\_\_\_

State of New York }  
County of \_\_\_\_\_ }

THE PEOPLE OF THE STATE OF NEW YORK

Adjourned Date \_\_\_\_\_

vs. \_\_\_\_\_

Adjourned Part \_\_\_\_\_

An accusatory instrument having been filed in this Court on \_\_\_\_\_, 19\_\_\_\_\_,  
charging \_\_\_\_\_, the defendant herein,  
with the offense of \_\_\_\_\_  
and bail having been fixed in the amount of \_\_\_\_\_ (\$ \_\_\_\_\_) Dollars;

(I) (We), \_\_\_\_\_, the defendant herein,  
residing at \_\_\_\_\_,  
by occupation a \_\_\_\_\_;

(I) (and), \_\_\_\_\_, the surety herein,  
residing at \_\_\_\_\_,  
by occupation a \_\_\_\_\_;

Hereby (jointly and severally) undertake that the above-named defendant shall appear in the  
above-entitled action whenever required and will at all times render himself amenable to the  
orders and processes of this Court, and that in the event that the defendant does not comply  
with any such requirement, order or process, (I) (we) will pay to the People of the State of  
New York the sum of \_\_\_\_\_ (\$ \_\_\_\_\_) Dollars.

To partially secure payment of which I, \_\_\_\_\_, the (defendant)(surety),  
herewith deposit the sum of \_\_\_\_\_ (\$ \_\_\_\_\_) Dollars.

To secure payment of which I, \_\_\_\_\_, the (defendant)(surety),  
deposit the following personal property: \_\_\_\_\_

pledge the following real property: \_\_\_\_\_

Recorded in the Office of the Register of the County of \_\_\_\_\_, as follows:  
Section \_\_\_\_\_, Liber \_\_\_\_\_, Page \_\_\_\_\_, Flock \_\_\_\_\_, Recording Date \_\_\_\_\_.

Dated: City of New York

Principal (Defendant)

Surety

Sworn to before me: \_\_\_\_\_

CRIMINAL COURT OF THE CITY OF NEW YORK

JUSTIFYING AFFIDAVIT  
UNSECURED BAIL BOND  
PARTIALLY SECURED BAIL BOND  
520.20 - CPL

Part \_\_\_\_\_ County \_\_\_\_\_

Docket Number \_\_\_\_\_

THE PEOPLE OF THE STATE OF NEW YORK

State of New York }  
County of \_\_\_\_\_ }

vs. :

vs.

\_\_\_\_\_, being duly sworn, deposes and says:

That I am (the surety) (one of the sureties) (the defendant) named in the bail bond in the above-entitled action.

That I reside at \_\_\_\_\_.

That my occupation is \_\_\_\_\_.

That I am presently employed by \_\_\_\_\_.

located at \_\_\_\_\_.

and that I have been employed by said employer for a period of \_\_\_\_\_.

That I own my own business which is called \_\_\_\_\_.

located at \_\_\_\_\_.

and that I have been engaged in said business for a period of \_\_\_\_\_.

That my income for the past year was \_\_\_\_\_ (\$ \_\_\_\_\_) Dollars.

That my average income for the past five years was \_\_\_\_\_ (\$ \_\_\_\_\_) Dollars.

That within one month prior hereto I did not, for another in more than two cases not arising out of the same transaction, deposit money or property as bail or execute as surety a bail bond in any Court having criminal jurisdiction or in any criminal action or proceeding.

That no previous application for this bail has been made.

A previous application for this bail was made to \_\_\_\_\_

and denied for the following reasons: \_\_\_\_\_

and except for such application no previous application has been made.

Dated: City of New York

Affiant

Sworn to before me:

Judge

JUSTIFYING AFFIDAVIT  
SECURED BAIL BOND  
520.20 - CPL

CRIMINAL COURT OF THE CITY OF NEW YORK

Part \_\_\_\_\_ County \_\_\_\_\_

Docket Number \_\_\_\_\_

State of New York

County of \_\_\_\_\_

THE PEOPLE OF THE STATE OF NEW YORK

ss.: \_\_\_\_\_ vs. \_\_\_\_\_

\_\_\_\_\_, being duly sworn, deposes and says:

That I am (the surety) (one of the sureties) (the defendant) named in the bail bond in the above-entitled action.

That I reside at \_\_\_\_\_.

That to secure the payment of \_\_\_\_\_ (\$ \_\_\_\_\_) Dollars specified in the aforesaid bail bond

I: the following personal property not exempt from execution is deposited:

\_\_\_\_\_  
\_\_\_\_\_

I: the following real property is pledged:

\_\_\_\_\_  
\_\_\_\_\_

the title to which is of record, in deponent's own name, in the Office of the Register of the County of \_\_\_\_\_; and is recorded therein as follows:

Section \_\_\_\_\_, Liber \_\_\_\_\_, Page \_\_\_\_\_, Block \_\_\_\_\_, Recording Date \_\_\_\_\_.

That the value of each of the above items is as follows:

\_\_\_\_\_  
\_\_\_\_\_

That the following liens and encumbrances on the above items are presently in effect:

\_\_\_\_\_  
\_\_\_\_\_

That within one month prior hereto I did not, for another in more than two cases not arising out of the same transaction, deposit money or property as bail or execute as surety a bail bond in any Court having criminal jurisdiction or in any criminal action or proceeding.

I: That no previous application for this bail has been made.

I: That a previous application for this bail was made to \_\_\_\_\_ and denied for the following reasons: \_\_\_\_\_

and except for such application no previous application for this bail has been made.

Dated: City of New York

Affiant \_\_\_\_\_

Sworn to before me:

Judge \_\_\_\_\_

# WHAT TO DO WHEN A JUDGE SCREWS YOUR CLIENT: WRITS, STAYS, AND 530.30 MOTIONS

This horrible judge just threw my client in jail (pre-trial) for no good reason, what do I do?

Either a writ of habeas corpus or a 530.30 motion. Both are ways to essentially appeal the bail/remand decision to Supreme Court, and get your client ROR'd or bail reduced.. They are similar, but the key differences between the two are:

- WRIT: abuse of discretion standard, applicable to any incarcerated defendant in any type of case, appealable
- 530.30: *de novo* review, not available for indicted cases, not available if the judge who set bail/remand was a Supreme Court justice (in the Bronx this means only available between arraignment and the next court date), not appealable

These remedies are available essentially any time a client is incarcerated and shouldn't be, from the simplest issues of excessive bail and 170.70/180.80, to more complicated issues like an insufficient bail reduction when a case is only partially converted, an insufficient bail reduction after a Brady disclosure, 30.30(2) denials, etc.

Aren't they hard to do?

No, they're both really easy.

- 530.30: no papers required, simply go to the applicable part ("miscellaneous motions" in Brooklyn, "emergency part" in Queens, Part 1 in Manhattan, the administrative judge in Bronx) and request a 530.30 hearing. Technically you don't even need to notify the DAs, unless it's a felony, but in practice almost all judges will require their presence anyway.
- WRIT: fill out a 2 page *pro forma* application, with a brief description of why you're entitled to relief – no more than 2 or 3 sentences. Only cite cases if necessary, otherwise save it for oral argument. Attach copies of the compliant, CJA, and RAP sheet, and file it first with the DAs office and then with the applicable Supreme Court part (in the Bronx, file it first with Civil Court, then later with the DAs and the applicable part). You do not need to get the minutes from the criminal court appearance(s) (but in practice, some judges may require it). Supreme will calendar the case quickly. If the writ is granted, in some boroughs you may need to serve the signed and sealed judicial order on DOC – make sure to ask the court's clerk or court officers whether they will fax the proper materials to DOC.

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• Does the writ process differ when I'm "writ-ing" a Supreme Court Justice?  
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• Not really. The system may assign a different judge, or deem the part hearing the motion by a different name, but substantively the process is the same – and you file your papers the same way.  
.  
.  
.

How do I appeal the denial of a writ?

This process is more cumbersome, but the appellate division clerks are very helpful in getting your papers in the proper order. For the forms in Word format, and/or for example papers, email me at [bdcrow@legal-aid.org](mailto:bdcrow@legal-aid.org). The process also varies by Division:

AD1: Serve a notice of appeal in the AD1 Civil Division with the trial judge's written decision attached. With the DA, go to the courthouse with the proper papers, and the clerk will send you to a single arbitrary judge to argue orally. Whoever loses can seek an entire panel review, which takes some time.

AD2: This process works similarly to filing a "regular" writ, except that you are now filling out specialized AD2 paperwork, and you must have the minutes from the earlier writ. Serve the DAs appellate bureau, then the DOC, then finally serve AD2. If the papers are in proper order, an appellate judge will sign the order to show cause, and you must again serve a copy of this single piece of paper on the DAs and DOC. This order will have a date for oral argument, usually within a week, and at that time you'll argue in front of a panel of judges.

What do I do post-trial, or post-sentence?

You may always file a writ, but there are 2 more specifically tailored remedies:

- Post-conviction pre-sentence: 530.45 gives you a one-time review, in many ways identical to 530.30 review. The standards are the same for any bail application, with the additional factor of the likelihood of the appeal being granted. For an "appeal" of criminal court, papers are filed in the same fashion as a writ, in Supreme Court with notice to the DAs. For an "appeal" of a Supreme Court justice you must go to the Appellate Division.
- Post-sentence: 460.50 allows a stay of judgment similar to 530.45, with these key differences: a notice of appeal must be filed before making this motion, with a felony you may choose either the appellate division or another Supreme Court justice
- For both of these kinds of stays, the granting of the stay lasts only 120 days. You must have the appellate division/term extend the stay or else the sentence must be imposed.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK , Ex. Rel:  
BRIAN CROW on behalf of CHAD CHAMBERS

Petitioner

against

WARDEN, OTIS BANTUM CORRECTIONAL CENTER  
1600 HAZEN STREET, EAST ELMHURST, NY 11370  
or any OTHER PERSON HAVING CUSTODY OF THE  
DEFENDANT.

Respondent.

Index No.  
DOCKET #: 2011KN065239  
NYSID #: 01563722K  
B&C #: 141-11-10905  
D.O.B.: 4/12/85

**WRIT OF HABEAS CORPUS**

LAST COURT DATE: 8/14/11  
PART: AR3

NEXT COURT DATE: 9/22/11  
PART: APIF

*The People of the State of New York*

upon the relation of BRIAN CROW on behalf of CHAD CHAMBERS

TO WARDEN, OTIS BANTUM CORRECTIONAL CENTER  
1600 HAZEN STREET, EAST ELMHURST, NY 11370

Greeting:

WE COMMAND YOU, That you have and produce the body of

CHAD CHAMBERS

by you imprisoned and detained, as it is said, together with your full return to this writ and the time and cause of   
such imprisonment and detention, by whatsoever name the said person shall be called or charged before  
Hon. Presiding Justice

one of the Justices of the Supreme Court of the State of New York, County of Kings at Part Miscellaneous  
Motion, 320 Jay Street, Brooklyn, New York, in the courthouse thereof on the 16th day of August, 2011 at  
\_\_\_\_\_ .m. to do and receive what shall then and there be considered concerning the said person and  
have you then and there this writ.

WITNESS, Hon. Presiding Justice, one of the Justices of our said Court the 15th day of August, 2011.

Sufficient reason appearing therefore, let \_\_\_\_\_ service of  
a copy of this order and the papers upon which it was granted upon  
all parties entitled to service on or before \_\_\_\_\_ o'clock \_\_\_\_\_ on  
the \_\_\_\_\_ day of \_\_\_\_\_ be deemed good and sufficient service.

\_\_\_\_\_  
NANCY T. SUNSHINE  
Clerk

PRODUCTION OF THE DEFENDANT  
IS WAIVED FOR PURPOSES OF THIS WRIT.

BY: STEVEN BANKS, ESQ.  
Attorney(s) for Petitioner  
BRIAN CROW  
THE LEGAL AID SOCIETY  
111 Livingston Street  
Brooklyn, New York 11201  
(718) 243-6248

\_\_\_\_\_  
BRIAN CROW, Attorney for Petitioner

The within writ is hereby allowed this 15th day of August, 2011.

\_\_\_\_\_  
J. S. C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK , Ex. Rel:  
BRIAN CROW on behalf of CHAD CHAMBERS

Petitioner

against

WARDEN, OTIS BANTUM CORRECTIONAL CENTER  
1600 HAZEN STREET, EAST ELMHURST, NY 11370  
or any OTHER PERSON HAVING CUSTODY OF THE  
DEFENDANT.

Respondent.

Index No.  
DOCKET #: 2011KN065239  
NYSID #: 01563722K  
B&C #: 141-11-10905  
D.O.B.: 4/12/85

**PETITION FOR WRIT OF  
HABEAS CORPUS**

TO: SUPREME COURT OF THE STATE OF NEW YORK  
HELD IN AND FOR THE COUNTY OF KINGS

The petition of BRIAN CROW, ESQ.

shows that:

1. This petition is made on behalf of CHAD CHAMBERS who is detained by WARDEN, OTIS BANTUM CORRECTIONAL CENTER at 1600 HAZEN STREET, EAST ELMHURST, NY 11370
2. The cause or pretense of the detention, according to the best knowledge and belief of the petitioner is the defendant is being held on bail and has no holds.
3. That a court or judge of the United States does not have exclusive jurisdiction to order the release of said person.
4. This writ is sought because of an illegal detention, the nature of the illegality being bail is excessive given that Mr. Chambers is only being charged with a misdemeanor of stealing \$2.50. Alternatively, Mr. Chambers is entitled to an adjournment date far sooner than the 39 days Judge Wilson granted for discovery purposes, as this lengthy adjournment denies Mr. Chamber's due process under the circumstances.
5. An appeal has not been taken from the order by virtue of which said person is detained.
6. No previous application has been made for this relief.

Wherefore your petitioner prays that a writ of habeas corpus issue, directed to the respondent, requiring the respondent to produce the said CHAD CHAMBERS before a justice of this court at Criminal Term, Part Miscellaneous Motion thereof on August 15, 2011.

Dated: Brooklyn, New York  
October 11, 2011

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BRIAN CROW, Of Counsel  
STEVEN BANKS, ESQ.

Attorney(s) for Petitioner  
.....being an attorney at law, does hereby affirm under the penalties of perjury the truth of 11201 the above allegations.  
October 11, 2011

THE LEGAL AID SOCIETY  
111 Livingston Street, Brooklyn, NY  
(718) 243-6248

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To Whom It August Concern:

Pursuant to Section 8018(b) 3 of the C.P.L.R., it is requested that index number fees for the attached writ, filed by the Legal Aid Society, be waived.

The pertinent language of that section reads as follows:

“Section 8010(b) - Exemptions from index number fees: No fee shall be charged for the assignment of an Index number;

To a criminal case or to any action at the request of a public agency office or poor person entitled by law to exemption from payment of fees to a County Clerk.”

Very truly yours,

DAWN C. RYAN, ESQ.  
Attorney-in-Charge  
(718) 243-6348

DCR/im