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Testimony of Rep. Rachel Talbot Ross presenting

LD 1421, An Act To Amend the Maine Bail Code

Before the Joint Standing Committee on Judiciary

Senator Carpenter, Representative Bailey and fellow members of the Joint Standing Committee on Judiciary, my name is Rachel Talbot Ross, and I represent House District 40, which comprises the Portland neighborhoods of Parkside, Bayside, East Bayside, Oakdale, and the University of Southern Maine campus. I am pleased to come before you today as sponsor of **LD 1421, An Act To Amend the Maine Bail Code**.

As a start, you should know that I have amended the original bill and provided the amendment that replaces it along with my testimony. After discussions with stakeholders, we arrived at this amendment which is, I believe, more concise and digestible, while still being a meaningful piece of legislation that serves the goals of our justice system. I will review the amendment with you in a moment.

First, I want to acknowledge this committee's excellent work recently to address the ways in which our legal system has created a two-tiered system of justice by advancing legislation ending the practice of suspending driver's licenses when people can't afford to pay their court fines. That commonsense piece of legislation reflected the understanding that we should take into account the practical impact of suspending someone's driver's license – especially in a rural state like Maine – and measure those consequences against the justice and public safety goals on the other side. Today, I ask you to look at another place where how much money you have can dictate punishment and can trigger all kinds of negative life and family ripple effects: Maine's pretrial justice system.

One of the things that moved me to sponsor this bill, and also struck me about the driver's licenses bill, is the idea that some of our laws intended to punish people for doing wrong end up punishing people more severely than the nature of the wrong. In doing so, the laws also end up disproportionately harming that person, as well as exacting damage on their children, families, schools and communities in the process.

We see this in our current pretrial system. The factors that judges and bail commissioners take into account when setting bail and the conditions they decide to impose have a direct impact not only on the defendants before them but also on their kids, who then carry the effects of this adverse childhood

experience through their lives.¹ We know that parental incarceration increases the chance that children will end up living in poverty or experiencing household and family instability.² The result is that these laws harm kids who have had no say and have done nothing wrong themselves. Parental incarceration often deprives children of their primary caretakers, destabilizes their lives and sets them up for future challenges while their parent can sit in jail without a public safety need or other sound policy basis.

My intent with this legislation is to take another reasonable step towards fixing some of the unintended consequences of our laws. To that end, the amendment to LD 1421 does the following:

First, the bill removes a select few of the conditions that currently can be placed on a defendant in exchange for their release from jail before their day in court. For example, the bill removes the ability of police to randomly search someone who has not been convicted of a crime solely based on a bail condition prohibiting use or possession of alcohol or drugs. Allowing a random search of this kind is a violation of the principles of the Fourth Amendment because it allows police to search people who are legally presumed innocent, anytime and anywhere. And, because violating *any* bail condition is a crime in our state, if a single beer is found in the refrigerator during a bail sweep, that can be the basis of new criminal charges. To be clear, the amended bill only removes the ability for *random* searches and leaves intact the ability to order police to search people if they can provide an *articulable suspicion*.

Second, this bill removes a few of the items a judge or bail commissioner may consider when deciding whether a person should be kept in jail before their trial. For example, the bill removes the ability to consider a defendant's prior substance use disorder when deciding whether they can be released from jail before their trial. Using a person's disability and their history of substance use to keep them in jail is bad health policy, bad public policy, costly both to the state and the person held, and violates the Americans With Disabilities Act.

Third, this bill adds three factors that a judge or bail commissioner must consider when deciding whether to keep someone in jail before their trial. Our justice system is based on the tenet that people are innocent until proven guilty. Detaining a person who has not been convicted of any crime should always be an exception to the rule. Judges and bail commissioners should take full account of a person's circumstances before they take away their liberty. As explained above, the kinds of things a judge or bail commissioner should take into account include the potential ripple effects of incarceration. This includes whether that person is the primary caretaker for a child and so keeping them in jail would put those children in jeopardy. They should also take into consideration whether a person has mental health or substance use issues that are better treated in the community than in jail and whether a person is likely to lose their job if they are held awaiting trial. Only with this full picture can judicial officers determine whether the conditions they impose are appropriate for a given defendant and serve the goals of the Bail Code.

¹ See Gjelsvik, A., Dumont, D. M., Nunn, A., & Rosen, D. L. (2014). Adverse childhood events: incarceration of household members and health-related quality of life in adulthood. *Journal of health care for the poor and underserved*, 25(3), 1169–1182. <https://doi.org/10.1353/hpu.2014.0112>

² *Id.*

Finally, this bill removes the ability of judges and bail commissioners to impose a financial bail condition for most people charged with a Class E crime, except for certain crimes of sexual assault and domestic violence.

It's important to remember the purpose of the Maine Bail Code is limited to "reasonably ensure the appearance of the defendant, as required, to otherwise reasonably ensure the integrity of the judicial process and, when applicable, to reasonably ensure the safety of others in the community." 15 M.R.S.A. §1002. We should not be holding people who are neither dangerous nor a flight risk in jail just because they can't afford to pay.

Money bail is one of the most broken parts of our legal system. It lets the size of a person's wallet determine whether a legally innocent person accused of a crime can return home or will remain locked up in jail while awaiting their day in court. This unfair and unjust system punishes those without money or resources even before they have had a chance to defend themselves. This system also disproportionately harms people of color, especially Black people, who often have significantly higher cash bail set than do white people who commit the same crimes.³ It is discriminatory, it is costly, and it doesn't work. In fact, research shows no evidence that people who pay cash bail are more likely to return to court than people released on their own recognizance.

Please join with me in taking this significant step to improve our system by ending wealth-based discrimination in our justice system. Thank you.

³ See, e.g., Wendy Sawyer, *How race impacts who is detained pretrial*, Oct. 9, 2019, Prison Policy Initiative, available at https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

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PROPOSED AMENDMENT TO LD 1421
Prepared for Representative Talbot Ross
Revised 2/14/2020 7:09 PM

COMMITTEE AMENDMENT “.” To LD 1421, An Act To Amend the Maine Bail Code

Amend the bill by striking out everything after the enacting clause and inserting in its place the following:

Sec. 1. 15 MRSA §1023, sub-§4, ¶¶F and G are amended to read:

4. Limitations on authority. A bail commissioner may not:

F. Set preconviction bail for crimes involving allegations of domestic violence without specifying a court date within 5 weeks of the date of the bail order; or

G. Notwithstanding section 1026, subsection 3, paragraph A, subparagraph (9-A), impose a condition of preconviction bail that a defendant submit to random search with respect to a prohibition on the possession, use or excessive use of alcohol or illegal drugs; or

Sec. 2. 15 MRSA §1023, sub-§4, ¶H is enacted to read:

H. Notwithstanding section 1026, subsection 3, paragraph A, subparagraphs (11), (12) and (18) and subsection 3, paragraph B, impose a financial condition of release for a defendant for whom the highest Class of crime charged was a Class E crime, except that a financial condition may be imposed for a defendant charged with a Class E crime.

(1) That is a violation of Title 17-A, chapter 11;

(2) That was committed against a family or household member as defined in Title 19-A, section 4002, subsection 4 or a dating partner as defined in title 19-A, section 4002, subsection 3-A; or

(3) That is a violation of a condition of release committed while the defendant is released on bail for a charge that involves: a violation of Title 17-A, chapter 11; a crime against a family or household member, as defined in Title 19-A, section 4002, subsection 4; or a crime against a dating partner as defined in Title 19-A, section 4002, subsection 3-A.

Sec. 3. 15 MRSA §1026, sub-§3 is amended to read:

3. Release on conditions. Release on a condition or combination of conditions pursuant to subsection 1, paragraph B or C must be as provided in this subsection.

A. If, after consideration of the factors listed in subsection 4, the judicial officer determines that the release described in subsection 2-A will not reasonably ensure the appearance of the defendant at the time and place required, will not reasonably ensure that the defendant will refrain from any new criminal conduct, will not reasonably ensure the integrity of the judicial process or will not reasonably ensure the safety of others in the community, the judicial officer shall order the pretrial release of the defendant subject to the least restrictive further condition or combination of conditions that the judicial officer determines will reasonably ensure the appearance of the defendant at the time and place required, will reasonably ensure that the defendant will refrain from any new criminal conduct, will reasonably ensure the integrity of the judicial process and will reasonably ensure the safety of others in the community. These conditions may include that the defendant:

- (1) Remain in the custody of a designated person or organization agreeing to supervise the defendant, including a public official, public agency or publicly funded organization, if the designated person or organization is able to reasonably ensure the appearance of the defendant at the time and place required, that the defendant will refrain from any new criminal conduct, the integrity of the judicial process and the safety of others in the community. When it is feasible to do so, the judicial officer shall impose the responsibility upon the defendant to produce the designated person or organization. The judicial officer may interview the designated person or organization to ensure satisfaction of both the willingness and ability required. The designated person or organization shall agree to notify immediately the judicial officer of any violation of release by the defendant;
- (2) Maintain employment or, if unemployed, actively seek employment;
- (3) Maintain or commence an educational program;
- (4) Abide by specified restrictions on personal associations, place of abode or travel;
- (5) Avoid all contact with a victim of the alleged crime, a potential witness regarding the alleged crime or with any other family or household members of the victim or the defendant or to contact those individuals only at certain times or under certain conditions;

- (6) Report on a regular basis to a designated law enforcement agency or other governmental agency;
- (7) Comply with a specified curfew;
- (8) Refrain from possessing a firearm or other dangerous weapon;
- (9) Refrain from the possession, use or excessive use of alcohol and from any use of illegal drugs. A condition under this subparagraph may be imposed only upon the presentation to the judicial officer of specific facts demonstrating the need for such condition;
- (9-A) Submit to:
 - (a) A random search for possession or use prohibited by a condition imposed under subparagraph (8) ~~or (9)~~, or
 - (b) A search upon articulable suspicion for possession or use prohibited by a condition imposed under subparagraph (8) or (9);
- (10) Undergo, as an outpatient, available medical or psychiatric treatment, or enter and remain, as a voluntary patient, in a specified institution when required for that purpose;
- (10-A) Enter and remain in a long-term residential facility for the treatment of substance use disorder;
- (11) Execute an agreement to forfeit, in the event of noncompliance, such designated property, including money, as is reasonably necessary to ensure the appearance of the defendant at the time and place required, to ensure that the defendant will refrain from any new criminal conduct, to ensure the integrity of the judicial process and to ensure the safety of others in the community and post with an appropriate court such evidence of ownership of the property or such percentage of the money as the judicial officer specifies;
- (12) Execute a bail bond with sureties in such amount as is reasonably necessary to ensure the appearance of the defendant at the time and place required, to ensure that the defendant will refrain from any new criminal conduct, to ensure the integrity of the judicial process and to ensure the safety of others in the community;
- (13) Return to custody for specified hours following release for employment, schooling or other limited purposes;
- ~~(14) Report on a regular basis to the defendant's attorney;~~

(15) Notify the court of any changes of address or employment;

(16) Provide to the court the name, address and telephone number of a designated person or organization that will know the defendant's whereabouts at all times;

(17) Inform any law enforcement officer of the defendant's condition of release if the defendant is subsequently arrested or summonsed for new criminal conduct;

(18) Satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant at the time and place required, to ensure that the defendant will refrain from any new criminal conduct, to ensure the integrity of the judicial process and to ensure the safety of others in the community; and

(19) Participate in an electronic monitoring program, if available.

B. The judicial officer may not impose a financial condition that, either alone or in combination with other conditions of bail, is in excess of that reasonably necessary to ensure the appearance of the defendant at the time and place required, to ensure that the defendant will refrain from any new criminal conduct, to ensure the integrity of the judicial process or to ensure the safety of others in the community.

B-1. Notwithstanding paragraph A, subparagraphs (11), (12) and (18) and paragraph B, a judicial officer may not impose a financial condition on a defendant for whom the highest Class of crime charged is a Class E crime, except that a financial condition may be imposed for a defendant charged with a Class E crime:

(1) That is a violation of Title 17-A, chapter 11;

(2) That was committed against a family or household member as defined in Title 19-A, section 4002, subsection 4, or a dating partner as defined in Title 19-A, section 4002, subsection 3-A; or

(3) That is a violation of a condition of release committed while the defendant is released on bail for a charge that involves: a violation of Title 17-A, chapter 11; a crime against a family or household member, as defined in Title 19-A, section 4002, subsection 4; or a crime against a dating partner as defined in Title 19-A, section 4002, subsection 3-A.

C. Upon motion by the attorney for the State or the defendant and after notice and upon a showing of changed circumstances or upon the discovery of new and significant information, the court may amend the bail order to relieve the defendant of any condition of release, modify the conditions imposed or impose further conditions authorized by this subsection as the court determines to reasonably ensure the appearance of the defendant at the time and place required, that the defendant will

refrain from any new criminal conduct, the integrity of the judicial process and the safety of others in the community.

Sec. 4. 15 MRSA §1026, sub-§4 is amended to read:

4. Factors to be considered in release decision. In setting bail, the judicial officer shall, on the basis of an interview with the defendant, information provided by the defendant's attorney and information provided by the attorney for the State or an informed law enforcement officer if the attorney for the State is not available and other reliable information that can be obtained, take into account the available information concerning the following:

- A. The nature and circumstances of the crime charged;
- B. The nature of the evidence against the defendant; and
- C. The history and characteristics of the defendant, including, but not limited to:
 - (1) The defendant's character and physical and mental condition;
 - (2) ~~The defendant's family ties in the State;~~
 - (3) The defendant's employment history in the State;
 - (4) The defendant's financial resources;
 - (5) The defendant's length of residence in the community and the defendant's community ties;
 - (6) ~~The defendant's past conduct, including any history of substance use disorder;~~
 - (7) The defendant's criminal history, if any;
 - (8) The defendant's record concerning appearances at court proceedings and whether failure to appear was willful;
 - (9) Whether, at the time of the current offense or arrest, the defendant was on probation, parole or other release pending trial, sentencing, appeal or completion of a sentence for an offense in this jurisdiction or another;
 - (9-A) Any evidence that the defendant poses a danger to the safety of others in the community, including the results of a validated, evidence-based domestic violence risk assessment recommended by the Maine Commission on Domestic and Sexual Abuse, established in Title 5, section 12004-I, subsection 74-C, and approved by the Department of Public Safety;

(10) Any evidence that the defendant has obstructed or attempted to obstruct justice by threatening, injuring or intimidating a victim or a prospective witness, juror, attorney for the State, judge, justice or other officer of the court; and

(11) Whether the defendant has previously violated conditions of release, probation or other court orders, including, but not limited to, violating protection from abuse orders pursuant to Title 19, section 769 or Title 19-A, section 4011-;

(12) Whether the defendant is the primary person responsible for the care of another person;

(13) Whether the defendant has a specific health care need, including a mental health care need, that is being met or would be better met outside of custody; and

(14) Whether being placed or remaining in custody would prevent the defendant from maintaining employment.

SUMMARY

This amendment replaces the bill.

This amendment prohibits a bail commissioner from imposing cash bail for a defendant whose most serious crime charged is a Class E crime. However, the prohibition on cash bail does not apply when the Class E crime was any of the following:

1. A violation of Chapter 11, which covers sexual assault crimes, of the Criminal Code;
2. A crime committed against a family or household member or a dating partner; or
3. A violation of a condition of release when the underlying crime for which the defendant has been released on bail is a violation of Chapter 11 of the Criminal Code or a crime against a family or household member or a dating partner.

This amendment also prohibits the imposition of cash bail by a judicial officer before trial in the same circumstances as for bail commissioners: When the highest Class of crime charged is Class E, but not when the crime is:

1. A violation of Chapter 11, which covers sexual assault crimes, of the Criminal Code;
2. A crime committed against a family or household member or a dating partner; or
3. A violation of a condition of release when the underlying crime for which the defendant has been released on bail is a violation of Chapter 11 of the Criminal Code or a crime against a family or household member or a dating partner.

This amendment removes from the list of potential conditions of release for preconviction bail being required to submit to a random search for possession or use of alcohol or illegal use of drugs when use or possession is prohibited by a condition of release, and being required to report on a regular basis to the defendant's attorney.

This amendment revises the list of factors a judicial officer considers when setting preconviction bail to remove consideration of the defendant's family ties in the State and the defendant's past conduct, including any history of substance abuse disorder, and clarifies that the defendant's record concerning court appearances should include whether any failure to appear was willful. It also adds three new factors to be considered by the judicial officer:

1. Whether the defendant is the primary person responsible for the care of another person;
2. Whether the defendant has a specific health care need, including a mental health care need, that is being met or would be better met outside of custody; and
3. Whether being placed or remaining in custody would prevent the defendant from maintaining employment.

Revised draft