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TESTIMONY OF MEAGAN SWAY, ESQ.

Ought To Pass – LD 1703

An Act to Amend the Maine Bail Code

Submitted to the

JOINT STANDING COMMITTEE ON JUDICIARY

May 21, 2020

Good morning Senator Carney, Representative Harnett, and members of the Joint Standing Committee on Judiciary. My name is Meagan Sway and I am the policy director of the ACLU of Maine, a statewide organization committed to advancing and preserving civil liberties in Maine. I am here today to testify in support of LD 1703, which would eliminate money bail for most Class E misdemeanors, would set a legal standard for judicial officers to determine what evidence is necessary to overcome a presumption of pretrial release on one's own recognizance, and would require greater consideration by bail commissioners of how the bail conditions they set affect defendants' ability to care for their children, maintain employment, and meet their health needs.

While we support LD 1703 in its entirety, I am here today to speak to two specific parts of the bill that are especially important: eliminating cash bail for most Class E offenses and requiring legal standards that must be met in order to overcome the presumption of release pretrial on personal recognizance or unsecured bail.

I. LD 1703 Addresses Cash Bail for the Least Serious Crimes, to Ensure People Are Not Punished Because They Do Not Have Money

In Maine, when you're arrested for most crimes, a bail commissioner decides whether to let you go freely on personal recognizance until your court date, or to give you what we call "bail." Bail can be cash, and often is, but that's actually just one of 19 different bail conditions that a bail commissioner or judge can impose. If a defendant can't afford to pay the cash amount that a bail commissioner has imposed, or they can't meet one of the other conditions, then they go before a judge, who can change the bail.

When a judge or bail commissioner sets what is called "secured cash bail" a defendant must pay money *up front* in order to be released from jail until their court date.

It is important to note that this *up front* requirement for money to secure a defendant's freedom prior to conviction is a significant departure from the original, longstanding and still true purpose of bail. Bail is supposed to be a tool to keep defendants out of jail. When bail was established, and for many hundreds of years after, money was only ever forfeited if a defendant didn't show up for court. The right to bail meant the right to be released before trial, not the right to have a cash price assigned to one's freedom. Bail was intended to make sure people were not punished until they were convicted of a crime, epitomizing the maxim "innocent until proven guilty."

As explained in a report by the Criminal Justice Policy Program at Harvard Law School, "Bail is historically a tool meant to allow courts to minimize the intrusion on a defendant's liberty while helping to assure appearance at trial."[1]

Instead, Maine's use of cash bail has created a two-tiered criminal justice system whereby wealthy defendants pay cash bail and are released, while poor and working-class defendants are stuck behind bars awaiting trial because they can't afford to pay. It's a system that punishes people for being poor.

Money bail is now a primary driver of incarceration in Maine.

In fact, in every county jail in our state, between 60 and 80 percent of the population is pretrial. This means well over two thirds of people in Maine's jails have not been convicted of a crime, yet are being deprived of their liberty. This is not what bail was meant to do.

The U.S. Supreme Court has consistently, adamantly emphasized that money bail should not become a tool of incarcerating defendants before trial. In *Stack v. Boyle* the court explained that, "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U.S. 1, 4 (1951). And, in *United States v. Salerno*, Chief Justice Rehnquist ended the majority's opinion by stating that "in our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." 481 U.S. 739, 755 (1987).

LD 1703 addresses the stark reality that detention prior to trial is no longer the carefully limited exception in Maine, and the right to a presumption of innocence is under threat. The rights to physical liberty and presumption of innocence are two of the most important pillars of our criminal justice system. They provide vital safeguards against tyranny and the arbitrary exercise of state violence. You have a right to a trial and to not be punished unless found guilty. Yet the majority of

[1] Criminal Justice Policy Program, Harvard Law School, Moving Beyond Money: A Primer on Bail Reform (2016), 4, http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf (accessed December 18, 2018).

people in Maine jails have not had a trial and are in fact being punished before any conviction.

One of the other essential principles of our justice system is that everybody is equal before the law. Whether a lobsterman or a lawyer, a carpenter or a CEO, you will be treated the same. You have the same rights. When wealthy people can buy their freedom, while those struggling to support themselves and their families are locked up because they can't afford to pay, money bail undermines the promise of equality under the law.

LD 1703 is a crucial next step towards restoring the true purpose of bail while preserving public safety by exempting most Class E crimes from money bail.

Class E crimes are those that our government has decided are the least serious. Money bail, and pretrial incarceration as a result of it, should be reserved for the most serious crimes. That's not what we're talking about here. Class E offenses include littering, unlawful possession of less than 200mg of an illicit drug, trespassing on public beaches, petty theft, and violating a condition of release which often means things like being late for curfew or having a beer in your refrigerator when you're not supposed to possess alcohol or drugs. One of the top five reasons for Class E arrests last year was drinking in public.

In the ACLU's work on pretrial reform, we have come across fishermen, housepainters, and restaurant servers who lost their jobs because they spent as few as one or two nights in jail, after a bail commissioner set money bail they simply couldn't afford. We have met mothers who lost custody of young children after being held in jail over the weekend because they couldn't afford to pay their bail. Our staff met people experiencing homelessness who lost their beds in shelters, and people with substance use disorder who lost their beds in rehab.

Every single one of those cases was a misdemeanor.

These are not crimes for which people should be held in jail before trial at great personal and taxpayer cost.

And to be clear - wealthy people and most middle-class people *aren't* incarcerated for these minor offenses. The bail amounts for Class E offenses are often low – 50 dollars, 100 dollars, maybe 500 dollars – amounts that people with means can afford to pay. Instead, it is the most vulnerable Mainers, people living hand-to-mouth, including people whose stories you will hear today, who get stuck in jail for Class E crimes.

The purpose of the Bail Code is that "the judicial officer consider…the least restrictive release alternative that will reasonably ensure the attendance of the

defendant as required, or otherwise reasonably ensure the integrity of the judicial process." Certainly, for this class of crimes, there are better alternatives than money bail.

II. LD 1703 Supplies Guidance to Judicial Officers That the Bail Code Currently Lacks

Under Maine law, both bail commissioners and judges are considered "judicial officers." The Bail Code states that judicial officers "shall order the pretrial release of the defendant on personal recognizance or upon execution of an unsecured appearance bond…unless, after consideration of the factors listed in subsection 4, the judicial officer determines" that the purposes of the bail code would not be effectuated. 15 M.R.S. §1026(2-A). But, unlike every other part of the law, there's no standard in the bail code about how much evidence must be shown for a judicial officer to decide that a promise to return later is not enough. LD 1703 says that there must be clear and convincing evidence – or, it is substantially more likely to be true than untrue – that the purposes of the bail code will not be met, in order for a judicial officer to impose bail conditions. These standards help guide judges and bail commissioners about how certain they should be before imposing conditions, and would make the decisions they make more uniform.

III. Conclusion

The criminal legal system is complex. There are so many actors, and so many seemingly intractable problems. But you are in a powerful position today to support a bill that unequivocally moves us one step closer to embodying the principles of justice so meticulously laid out by the founders of this country. I urge you to vote yes on LD 1703.