

“Social justice should be the underlying goal of all humanity.”

-Alan V. Lowenstein, Institute Founder



TESTIMONY OF EMILY SCHWARTZ
NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE
REGARDING OF A5245
NEW JERSEY ASSEMBLY LAW AND PUBLIC SAFETY COMMITTEE
JUNE 15, 2023

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do social justice.

Thank you for the opportunity to present this testimony. The New Jersey Institute for Social Justice (the “Institute”) is here to contribute to the discussion of A5245,¹ a bill which seeks to establish a state-wide electronic monitoring program for individuals pre-trial and post-conviction.

My name is Emily Schwartz, I am senior counsel with the Criminal Justice Reform Program at the Institute. The Institute’s advocacy empowers people of color by building reparative systems that create wealth, transform justice and harness democratic power – from the ground up – in New Jersey. I am also a former public defender in both New Jersey and New York City and have handled all degrees of offenses, representing clients in the juvenile and adult criminal court systems.

Introduction

The Institute welcomes legislation that has the potential to reduce pre-trial detention and post-conviction incarceration. This is in part because of the horrific racial disparities that exist in both scenarios. In New Jersey has the worst Black to white disparity in adult and youth incarceration in the country. A Black adult is 12 times more likely to be incarcerated than a white adult.² A Black youth is 18 times more likely to be incarcerated than a white youth³ even though youth commit most offenses at similar rates.⁴ And while New Jersey’s overall population is 15% Black,⁵ the prison population is 59% Black.⁶ However, while we do need to encourage the release of detained and incarcerated individuals, electronic monitoring is not a panacea.

And we ask the drafters of this legislation to take a deeper look at the bill as written and reevaluate it for the following reasons: (1) This bill directly impacts the Criminal Justice Reform Act, by only authorizing electronic monitoring in specific situations, thus requiring changes to the CJRA that may adversely affect detention hearing outcomes; (2) by requiring individuals pretrial and post-conviction to pay for access to electronic monitoring it creates enormous financial burdens, perpetuating the cycle of poverty and (3) A5245 raises logistical concerns for individuals placed on monitoring, raising concerns as to whether it is feasible for individuals the drafters may have hoped to include.

As such we ask the legislature to review A5245 to address the following concerns:

1. *This bill directly impacts the Criminal Justice Reform Act (“CJRA”), by only authorizing electronic monitoring in specific situations, thus requiring changes to the CJRA that may adversely affect detention hearing outcomes.*

The CJRA is successful legislation. Since 2017, it has successfully eliminated a system where people were detained not based on risk but based on the amount of money they had. The CJRA ensured that defendants returned to court at a rate as high as 97.1% in 2020.⁷ Moreover, the vast majority of defendants that are released are not rearrested and only 1.2% of released defendants were rearrested for the most serious offenses (Graves or NERA offenses).⁸ Furthermore, crime across New Jersey had been falling prior to the CJRA,⁹ during the CJRA,¹⁰ and after a momentary increase across the nation during the height of the COVID-19 pandemic, it is once again decreasing.¹¹

Under current law, electronic monitoring is already available to individuals pre-trial.¹² At a detention hearing, the hearing judge is able to weigh all relevant factors, including but not limited to an individual's criminal history, the facts and circumstances of that particular case, the risk of flight and whether that individual might obstruct justice.¹³ Under current law, the court is also able to rely upon an objective, standardized and developed based on the analysis of empirical data and risk factors assessment instrument – the Public Safety Assessment.¹⁴ A5245 seemingly impacts the CJRA further by creating a new tool required to analyze the very information already conveyed by the PSA.

Additionally, at a detention hearing, the prosecution can convey the complainant's concerns as to detention or release. A5245 seemingly creates a separate hearing requirement. Rather than a judge being able to rely on their expertise in deciding to release someone on electronic monitoring, they would only be able to decide if a complainant provides "informed consent." While, of course, complainants should be informed of the decision made at a detention hearing, and perhaps be a consideration for the judge, the decision to release or detain an individual should be made by the judge alone. Complainants should not determine penalties. We have a legal system in place to determine objective penalties.

Though current law recognizes that electronic monitoring may be most applicable for offenses where there is a complainant, it does not preclude other offenses from being potentially eligible. By enumerating eligible offenses, A5245 eliminates electronic monitoring as an available option for individuals not charged with those specific offenses. By setting limitations on eligibility, the intent of A5245 to release more individuals from pre-trial detention or carceral sentences may be hindered.

2. By requiring individuals pretrial and post-conviction to pay for access to electronic monitoring it creates enormous financial burdens, perpetuating the cycle of poverty.

In recent years, New Jersey has recognized, time and time again, that a person's wealth – or lack thereof – should not determine how they are treated by the legal system. While we still have a long way to go to really have an equitable system, we must not go backwards.

New Jersey rightfully eliminated cash bail recognizing that an individual's access or lack thereof to financial resources should not be the determining factor for whether someone should be detained pre-trial. New Jersey also recognizes in our state constitution that in all criminal prosecutions, where an individual cannot afford to retain counsel, counsel shall be provided.¹⁵ "[I]n recognition of the disparate, long-term impact that many of our justice system fees and fines can have," Governor Murphy's proposed budget for this year includes a provision eliminating the fees associated with public defender-based representation.¹⁶ "These fees can leave individuals in debt forever affecting their credit and thus their ability to build pathways to financial stability. The same is true for the numerous fines and fees imposed on individuals entangled within the criminal court system. In fact New Jersey recognized this dilemma when in 2020 and again in 2022

eliminated most fines and fees for youth.¹⁷ As noted at the time by Governor Murphy, “Eliminating these fees will contribute towards breaking the cycle of poverty that often stems from historically biased institutions.”¹⁸

Yet, while cash bail and the financial burdens imposed on individuals entangled within the criminal legal system should continue to be a relic of the past, this bill imposes more costs. A5245 imposes several mandatory fees unless an individual can demonstrate “extreme financial hardship.”¹⁹ And while they can be reduced, as drafted, the expectation for an individual post-conviction is 1) \$250 initial monitoring fee 2) \$50 per day 3) a civil penalty ranging from \$200 to \$250.²⁰ These fees are not restitution to a complainant but rather go toward various funds within the court system itself. These fees are also in addition to the already imposed fines at sentencing. For any indictable conviction, the fees, at a minimum start at \$155, and the court can impose probation monitoring costs up to \$25 per month.²¹ Regarding the specific offenses outlined in A5245, there are also fines imposed ranging from \$500 to \$2,000.²² Not only does this debt have a profound effect on individuals, but these fees have also been found to disproportionately harm Black people and Black communities – widening existing disparities.²³ New Jersey already has one of the largest racial wealth gaps in the nation, over \$300,000.²⁴ In fact, the U.S. Commission on Civil Rights recommends states and municipalities explore alternatives to the imposition of fines and fees.²⁵

3. A5245 as drafted raises logistical concerns for individuals placed on monitoring, raising concerns as to whether it is feasible for individuals the drafters hoped to include.

Currently, judicial guidelines recommend that individuals placed on electronic monitoring reside at least 2,500 feet from the complainant’s address.²⁶ This distance rightfully recognizes that often individual defendants may reside near complainants. A5245 sets a threshold of three miles for notification and again at one mile, and half a mile. If the intent is to have individuals on electronic monitoring reside farther than three miles from the complainant, it might create housing instability for defendants. The result may inadvertently be that electronic monitoring leads to delayed detention of these individuals rather than creating a viable alternative to detention.

Conclusion

For individuals who would otherwise be detained pre-trial or incarcerated post-conviction, discussing electronic monitoring is a significant step. It is also important that electronic monitoring doesn’t expand to include individuals who would otherwise be released without such an onerous condition. For the above-discussed reasons, the Institute asks this Committee to go back to the drafting phase, review the Reconvened Joint Committee on Criminal Justice’s report on the CJRA, look at the data and speak with experts to ensure that this legislation does its intended purpose: have more people released from jail and prison.

¹ Asm. B. No. 5245, 220th Leg. (N.J. 2023), https://pub.nileg.state.nj.us/Bills/2022/A5500/5245_I1.PDF.

² ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENT’G PROJECT 10 (Oct. 13, 2021) <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>

³ JOSHUA ROVNER, BLACK DISPARITIES IN YOUTH INCARCERATION, THE SENT’G PROJECT (Jul. 15, 2021), <https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/>.

⁴ Joshua Rovner, THE SENT’G PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 6 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-andArrests.pdf>; see also Nat’l Juv. Just. Network,

Implicit Bias: Why It Matters for Youth Justice 1 (2017), <https://www.njjn.org/uploads/digital-library/NJJN%20Implicit%20Bias%20Snapshot%202017.pdf?phpMyAdmin=14730ab3483c51c94ca868bccffa06ef> (“Even though white youth and youth of color engage in illegal behavior at similar rates, substantial over-representation of youth of color in the juvenile justice systems across our country and disparities in treatment remains a serious problem.”).

⁵ Annual Report to the Governor and the Legislature (Nov. 2022) Figure 14,

<https://www.njcourts.gov/sites/default/files/courts/criminal/criminal-justice-reform/cjr2021.pdf>.

⁶ N.J. Dept. of Corrections, Incarcerated Persons in New Jersey Correctional Institutions on January 3, 2023, by Race/Ethnic Identification (Jan 2023), https://www.state.nj.us/corrections/pdf/offender_statistics/2023/By_Race-Ethnicity_2023.pdf p. 1

⁷ *Id.* at p. 15, Figure 6.

⁸ *Id.* at p. 15, Figure 4 and Figure 5

⁹ NJ.gov Crime Data, Official Site of the State of New Jersey, <https://www.nj.gov/nj/safety/features/crimedata.html>

¹⁰ *Id.*

¹¹ Michael Symons, *How Bad are Car Thefts in New Jersey? The Real Numbers for 2022*, NEW JERSEY 101.5 (Dec. 6, 2022), <https://nj1015.com/car-thefts-new-jersey-2022/>; Homicides and Shootings Decline in New Jersey’s Capital City (Aug. 31, 2022), <https://www.trentonnj.org/CivicAlerts.aspx?AID=762>; Coming Off Two Record Years, Homicides and Shootings Decline in New Jersey’s Capital City, MIDJERSEY.NEWS (Aug. 31, 2022), <https://midjersey.news/2022/08/31/coming-off-two-record-years-homicides-and-shootings-decline-in-new-jerseys-capital-city/>.

¹² Administrative Directive #27-21, (Nov 30, 2021), <https://www.njcourts.gov/sites/default/files/notices/2021/11/n211209a.pdf>

¹³ N.J. Stat. Ann §§ 2A:162-17-20 (West, 2023)

¹⁴ New Jersey Courts, Public Safety Assessment, New Jersey Risk Factor Definitions (Dec. 2018)

<https://www.njcourts.gov/sites/default/files/psariskfactor.pdf> ; New Jersey Courts, Pretrial Release Recommendation Decision Making Framework (DMF) (Aug. 2022) <https://www.njcourts.gov/sites/default/files/decmakframework.pdf>.

¹⁵ N.J. Const. art. 1, § 10.

¹⁶ Dana Difilippo, *Governor Murphy’s budget plan pitches ending fees for clients of public defenders*, NEW JERSEY MONITOR (FEB. 28, 2023), <https://newjerseymonitor.com/2023/02/28/governor-murphys-budget-plan-pitches-ending-fees-for-clients-of-public-defenders/>.

¹⁷ Katrina L. Goodjoint, *New Jersey just eliminated fines for youth in the juvenile system. And that’s a good thing*, NJ.COM (Jan. 22, 2020) <https://www.nj.com/opinion/2020/01/new-jersey-just-eliminated-fines-for-youth-in-the-juvenile-system-and-thats-a-good-thing-opinion.html>; *Certain Juvenile Justice Fines, Fees and Costs Eliminated Under New Legislation*, TAPINTOMORRISTOWN (Jan. 14, 2022) <https://www.tapinto.net/towns/morristown/sections/law-and-justice/articles/certain-juvenile-justice-fines-fees-and-costs-eliminated-under-new-legislation>

¹⁸ *Id.*; Governor Murphy Signs Legislation to Eliminate Certain Juvenile Justice Fines, Fees, and Costs (Jan. 10, 2022) [Office of the Governor | Governor Murphy Signs Legislation to Eliminate Certain Juvenile Justice Fines, Fees, and Costs](https://www.nj.gov/governor/newsroom/governor-murphy-signs-legislation-to-eliminate-certain-juvenile-justice-fines-fees-and-costs)

¹⁹ Asm. B. No. 5245, 220th Leg. Section e (1); (2)

²⁰ *Id.*

²¹ New Jersey Judiciary, Main Plea Form, Third Supplement to Directive #01-18 (Revised Form 12/29/2020)

https://www.njcourts.gov/sites/default/files/forms/10079_main_plea_form.pdf

²² New Jersey Judiciary, Supplemental Plea Form for Certain Sexual Offenses, Fourth Supplement to Directive #01-18 (Revised 6/29/21), https://www.njcourts.gov/sites/default/files/forms/10080_add_ques_cert_sex_offenses.pdf

²³ U.S. Commission on Civil Rights, *Targeted Fines and Fees against Communities of Color: Civil Rights and Constitutional Implications* (Sept. 2017) https://www.usccr.gov/files/pubs/2017/Statutory_Enforcement_Report2017.pdf

²⁴ N.J. INST. FOR SOC. JUST., MAKING THE TWO NEW JERSEYS ONE: CLOSING THE \$300,000 RACIAL WEALTH GAP IN THE GARDEN STATE (Feb. 2022) https://assets.nationbuilder.com/njisi/pages/689/attachments/original/1645217098/Making_the_Two_New_Jerseys_One_2.15.22-compressed.pdf?1645217098

²⁵ *Id.* at 14.

²⁶ *Supra* at EN12.