



February 18, 2021

Katherine Culliton-Gonzalez
Director, Office of Civil Rights Investigation
The United States Commission on Civil Rights
1331 Pennsylvania Ave, NW
Washington, D.C. 20425

RE: The United States Commission on Civil Rights' Investigation into Bail and Pretrial Outcomes in the United States

Dear Katherine Culliton-Gonzalez:

We write to you on behalf of Essie Justice Group to inform the United States Commission on Civil Rights' Investigation into bail and pretrial outcomes in the United States. Essie Justice Group is a California based nonprofit organization and we are a loving and powerful community for women with incarcerated loved ones fighting to end mass incarceration. Our members, who are primarily Black, Brown, and working class women, join our organization through our award winning nine-week [Healing to Advocacy program](#). Essie Justice Group is deeply connected to the larger movement for Black lives through our work in coalitions. For example, we are founding members of the [National Bail Out collective](#), members of the [Movement for Black Lives](#) Policy Table (instrumental in development of [The BREATHE Act](#)), the [JusticeLA](#) Executive team and pretrial workgroup, as well as the [Californians United for a Responsible Budget \(CURB\)](#) coalition. Our policy work and organizing are grounded in our members' lived experiences. Their analysis of mass incarceration's root causes, ongoing harm, and solution are documented in our groundbreaking reports, [Because She's Powerful](#) and [Lives on the line: Women with Incarcerated Loved Ones and the Impact of COVID-19 Behind Bars](#).

Pretrial detention, and the use of cash bail in particular, have a devastating impact on the physical, emotional, and economic wellbeing of the 1 in 4 women, and nearly 1 in 2 Black women, who have an incarcerated family member in the United States.¹ Pretrial incarceration disproportionately harms Black women, both those incarcerated and those who are left to bear the cost while a loved one is incarcerated. We at Essie Justice Group are the women who have scraped together every last penny, put up our cars, our houses and our last dimes as collateral to secure our loved ones' freedom. We are the women whose household assets have decreased by 64% as a result of our loved one's incarceration.² We are the women who have languished in

¹ Hedwig Lee et al., Racial Inequalities in Connectedness to Imprisoned Individuals in the United States, 12 Du Bois REV. 269 (2015).

² Bryan L. Sykes & Michelle Maroto, *A Wealth of Inequalities: Mass Incarceration, Employment, and Racial Disparities in U.S. Household Wealth, 1966 to 2011*, 2 RSF J. OF Soc. Sci. 129, 141 (2016).



jail cells, and have been separated from and even lost custody of our children, simply because we didn't have anyone who could afford to bail us out. That is why it is critically important that the U.S. Commission on Civil Rights has called upon the leadership, and expertise of Black and Brown women, trans women, and gender non-conforming people in its deliberations about pretrial reform.

There are three primary concerns we have in regards to bail and pretrial outcomes in the United States.

1. The Harms of Pretrial Detention Are Disproportionately Borne by Black Women

*"If you **can** afford bail, you're suffering. If you **can't** afford to make bail, you're suffering, because you're going without, in my case, a father."*

-Tanea, Essie Justice Group Member

Black and Brown women disproportionately bear the harms of pretrial detention and cash bail. Almost one-quarter of the 231,0000 women incarcerated in the United States are being held in jails pretrial and Black women make up 29% of incarcerated women³ despite only being 13% of the total population of women in the U.S.⁴ These high rates of pretrial detention for Black women have rippling effects on our children and community. Eighty percent of women in jails are mothers, and most of them are the primary caregivers of their children.⁵

Women's, and especially Black women's, vulnerability to being jailed pretrial stem from the larger intersecting issues of patriarchy, structural racism, and economic precarity. Many women remain in cages solely because they are unable to afford the bail set in their cases. This is due to bias in judicial decisions as well as the systematic exclusion of Black and Brown women from access to jobs that pay a living wage. Studies show that Black and Brown people charged with a crime are ten to twenty-five percent more likely to be detained pretrial or to receive financial conditions of release, and those bail amounts are twice as high as bail set for white people charged with a crime.⁶ Women, particularly Black women, are least likely to be able to afford bail because they are systemically relegated to the most precarious sectors of the economy. U.S. Bureau of Labor Statistics show that the percentage of Black women who are full-time minimum-wage workers is higher than that of any other racial group, and they are more likely to work in lower-paying service occupations (like food service, domestic work and health care assistance)

³ Press Release, Prison Policy Initiative, Women's Mass Incarceration: The Whole Pie 2019 (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html>.

⁴ *Women of Color in the United States: Quick Take*, CATALYST (Feb. 1, 2021), <https://www.catalyst.org/research/women-of-color-in-the-united-states/>.

⁵ Press Release, Prison Policy Initiative, *supra* note 3.

⁶ Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POLICY INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.



than any other industry.⁷ According to the U.S. Census, on average, Black women working full-time and year-round were paid 63% of what non-Hispanic white men were paid in 2019. That means it takes the typical Black woman 19 months to be paid what the average white man takes home in 12 months.⁸ For women caught up in the criminal legal system, the economic reality is even more dire. Analysis of Bureau of Justice data shows that although people in jail had a median income of \$15,109 prior to incarceration, women were less likely to be able to afford bail because their median incomes were \$11,071. Black women had the lowest median incomes before incarceration at \$9,083.⁹

The inability to afford bail and subsequent pretrial detention has a meaningful impact on the outcome of a person's criminal case. Pretrial detention is a powerful coercive tool for prosecutors that significantly reduces the chances of a person's ability to win their case or get a reduced charge.¹⁰ People who are unable to afford bail are three to four times more likely to receive a sentence to jail or prison, and their sentences are two to three times longer.¹¹ According to the Vera Institute of Justice, even as little as two days in detention is associated with an increased likelihood of re-arrest, in part due to disruption to interpersonal relationships, loss of housing, educational and employment opportunities, increased challenges in securing future employment, and threatened child custody.¹²

2. Ending Money Bail and Pretrial Detention is a Gender Justice Issue

"For us, help came at a high cost. The one thing that was ours was dangled over our families head—my mother's house. At that time, terms and conditions weren't a consideration for us, my brother's safety was the only thing that mattered. Less than an hour later, a bail bondsman became the co-owner of everything my family worked for."

-Le'Char, Essie Justice Group Member & Community Organizer

In Essie Justice Group's report, [Because She's Powerful](#), our analysis reveals that mass incarceration, including pretrial detention, is the direct cause of significant to extreme

⁷ *Workplace & Economic Equity: Black Women & the Pay Gap*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW), <https://www.aauw.org/resources/article/black-women-and-the-pay-gap/> (last visited Feb. 18, 2021).

⁸ *Id.*

⁹ Press Release, Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html>.

¹⁰ *See id.*

¹¹ CHRISTOPHER T. LOWENKAMP, ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES, 3 (Arnold Foundation, 2013) <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=172dd7bf-96cf-aa8d-75d0-399b1a9b17e3&forceDialog=0>.

¹² Leon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INSTITUTE OF JUSTICE (Apr. 2019), <https://www.vera.org/publications/for-the-record-justice-denied-pretrial-detention>.



psychological distress and trauma, as well as a serious obstacle to the financial health and economic agency of women with incarcerated loved ones. A majority (63%) of women with incarcerated loved ones reported that their physical health had been significantly or extremely affected by a loved one's incarceration. Eighty-six percent of women with incarcerated loved ones reported that the strain on their emotional and mental health was significant or extreme, and reported increased depression, anxiety, anger, stress, and loneliness.¹³ Isolation and loneliness are correlated to increased suicides, accelerated physiological aging and cognitive decline over time, as well as greater cardiovascular disease and mortality.¹⁴ The heart of our work at Essie Justice Group is breaking isolation because mass incarceration systematically isolates women, exposing them to isolation's disastrous mental and physical health consequences, which impacts entire communities.¹⁵ When women are isolated individually, the results are emotional, physical, and psychologically devastating. When women are isolated at scale by the system of mass incarceration, the result is political.

The financial implications of money bail and having an incarcerated loved one wreak havoc on women and family's economic well-being. The incarceration of a family member is associated with a 64% decline in household assets.¹⁶ Criminal cases cause the average family to go into over \$13,000 in debt due to court fees and fines.¹⁷ Women typically bear the brunt of this devastation, as they make up more than 80% of family members primarily responsible for covering court-related costs.¹⁸ Money bail especially depletes women's earnings at a time when their households have diminished means for bearing these costs. A third (32%) of women with incarcerated loved ones lose their household's primary source of income when their loved one is incarcerated.¹⁹ Although 70% of women with incarcerated loved ones reported being their family's only wage earner, more than half (54%) of women are unable to afford the bail set for an incarcerated loved one. Too often, women are forced to forgo their basic needs in their desperation to bring a loved one home. Nearly fifty percent (48%) of women with incarcerated loved ones who have owed money to private, for-profit bail bonds agencies have faced housing insecurity.²⁰ Thirty-five percent of women we surveyed reported experiencing homelessness, eviction, or the inability to pay rent or mortgage on time as a result of their loved ones

¹³GINA CLAYTON ET AL., ESSIE JUSTICE GROUP, BECAUSE SHE'S POWERFUL: THE POLITICAL ISOLATION AND RESISTANCE OF WOMEN WITH INCARCERATED LOVED ONES 16 (2018), https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Powerful-Report.pdf.

¹⁴ Louise C. Hawkey et al., *Loneliness Matters: A Theoretical and Empirical Review of Consequences and Mechanisms*, 40 ANNALS BEHAV. MED. 219 (2010);

¹⁵ See *id.*

¹⁶ Bryan L. Sykes & Michelle Maroto, *supra* note 2.

¹⁷ SANETA DEVUONO-POWELL, ET AL., ELLA BAKER CENTER, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 19 (2015) <https://ellabakercenter.org/who-pays-the-true-cost-of-incarceration-on-families/>.

¹⁸ *Id.*

¹⁹ GINA CLAYTON ET AL., *supra* note 13 at 12.

²⁰ Hedwig Lee et al., *Racial Inequalities in Connectedness to Imprisoned Individuals in the United States*, 12 DU BOIS REV. 269 (2015); GINA CLAYTON ET AL., *supra* note 13 at 62.



incarceration.²¹ A loved one's detention pretrial also costs women their futures. Forty-three percent of women with an incarcerated loved one reported sacrificing educational and career opportunities or being forced to work more hours to fill the gap when a loved one was incarcerated.²² Given these widespread and rippling harmful impacts on women, and especially Black women, it is clear that ending unjust pretrial jailing, and mass incarceration, is a matter of gender justice.

3. All Reform is Not Equal: Why Women with Incarcerated Loved Ones and Formerly Incarcerated Women Are Uniquely Discerning Stalwarts of Good Policy

"When my son was arrested, bail wasn't offered to us. He has been in jail for 2 years and his trial hasn't even started. He hasn't been convicted of anything. His mental health declines every day that he sits in Santa Rita. He is suffering inside, while I, his mother, cannot do anything to get my boy out. What happened to innocent until proven guilty?"

-Cheryl, Essie Justice Group Member

Women with incarcerated loved ones have a unique stake in real pretrial and bail reform that abolishes the use of cash bail as a condition of pretrial release. More than half (54%) of women are unable to afford the bail set for an incarcerated loved one and the remaining half (45%) have paid a loved one's bail.²³ Thus, women stand to economically benefit enormously from the elimination of a predatory bail industry. And yet, women with incarcerated loved ones intimately understand that the purpose of pretrial reform is to bring our loved ones home. For Black women like Venida Browder, the crux of the fight to end money bail was never even really about money. The unlivable injustice she faced was not her inability to afford bail. It was not the fact that for-profit bail companies were predatorily extracting resources from her and her community. It has always been about the fact that her beloved teenaged child was left to languish in a cage for three years; about the fact that he was subject to so much violence, abuse and torture that it led him to take his own life; and about the fact that Venida herself then died of a broken heart, one year and one day after she lost him. These experiences give us expertise in navigating the interconnected harms of the pretrial system, and well-position women with incarcerated loved ones to be discerning stalwarts of good, responsible policy. Our loved ones give us the clarity to remain vigilant against well-intentioned but ultimately harmful reforms that lead to more pretrial incarceration, further codify bias in the system, and aggrandize judges and law enforcement who have long abused their discretion to harm our Black and Brown communities.

The lessons learned in California's movement for bail reform can and should offer important insights for the broader civil rights struggle for pretrial justice. Particularly, Essie Justice

²¹ GINA CLAYTON ET AL., *supra* note 13 at 17.

²² *Id.*

²³ *Id.*



Group's ultimate position on California pretrial bill SB10 serves as an illustrative example of both a reform with unintended, harmful consequences and of the leadership and discernment of women with incarcerated loved ones in the fight for pretrial liberation. After a years-long movement to end money bail and bring pretrial justice to California, in August of 2019, then California Governor Jerry Brown signed SB 10 into law. SB10 was originally seen as a model policy that had broad support from advocates and directly-impacted people from across the state and country. However, women with incarcerated loved ones were among the first to recognize the substantively harmful nature of the eleventh-hour amendments written into the bill at the urging of CA's powerful judicial lobby. The amended bill eliminated money bail by replacing it with a new and more carceral system of preventative detention that eliminated the possibility of pretrial release for a broad category of people based on risk assessments. The bill expanded judges' discretion to jail more people by creating a "rebuttable presumption," of detention. This provided judges with legislative cover to regularly make rulings that "no condition of pretrial supervision will reasonably assure public safety" for a very large category of legally innocent people charged with specified felony offenses. Ultimately dozens of policy experts and over one-hundred decarceration advocates, civil rights, racial justice and criminal justice reform organizations nationwide concluded that the changes made in the CA bail reform bill would very likely result in higher pretrial incarceration rates, at the worst. At best, it would have made it more challenging for people charged with certain offences to be released and easier for others, problematically cleaving across lines of race.

That is why even though women with incarcerated loved ones have a disproportionate financial stake in the elimination of the for-profit bail bond industry, Essie Justice Group ultimately opposed SB10 and helped lead the effort to overturn the law. We understand that bail reform that makes it more difficult for our loved ones to be released, or more likely that they will be preventively detained pretrial, is antagonistic to the purposes of pretrial reform that liberates more of our loved ones. Although the ultimate unfolding of SB10 was fraught and difficult for those fighting to end money bail and those subject to the harms of unjust pretrial jailing, there has been enormous progress made towards pretrial freedom in its wake. Counties like Los Angeles have elected progressive District Attorneys like George Gascon, who has pledged to end the use of cash bail in his office. California legislators Senator Skinner, Assemblyman Bonta, and Senator Hertzberg have introduced another [bail reform bill](#), SB 262. If passed, SB 262 will significantly reduce the number of people detained pretrial by eliminating the use of bail for many offenses. It also decreases the profit incentives for private bail bonds companies through regulation, without expanding the use of preventative detention. The bill must go farther. It must protect people charged with more serious offenses from unjust pretrial jailing and end money bail entirely. The bill should be strengthened to reduce judicial discretion to enact their biases in pretrial detention decision making, and to protect Black and Brown communities from potential unintended consequences like the expansion of electronic monitoring and upcharging by law enforcement. Nonetheless, this step in the right direction demonstrates the strength of a movement led by Black



women like Venida Browder, families, and directly impacted people to advance meaningful pretrial justice and end money bail by bringing people home.

Our Recommendations

“As women with incarcerated loved ones, the mothers, the daughters, the partners, and the sisters, we know that keeping people behind prison walls is deadly. We are fighting to close prisons and bring our loved ones home, safe to us.”

Rasheeda & Betty, Members, Essie Justice Group

We are fighting for a world where our loved ones are free from all cages — physical, electronic, or pervasive surveillance. A world where women with incarcerated loved ones — primarily Black and Brown— do not have to plead with the system for our loved ones’ freedom or personally bear the fallout for a loved one’s incarceration. It is our view that true pretrial justice **limits judicial discretion** to incarcerate people pretrial and offers several opportunities for diversion and release under the least restrictive conditions. **Pretrial freedom should be the rule**, not the exception. Pretrial justice requires an **end to the carceral surveillance and profiteering off of our communities**. Nobody should profit from human caging. Nobody should be financially enriched by stealing resources from Black women already struggling to stay afloat. Our freedom should not be sold or traded for electronic shackles like electronic monitoring or supervision that violate our privacy and impose surveillance on our households and communities. A person charged with a crime should never remain incarcerated because they and their loved ones cannot afford to pay for any condition of release. This includes, most importantly, the **abolition of cash bail nationwide**, entirely eliminating the bail bonds industry’s ability to profit off the backs of women with incarcerated loved ones, particularly Black women.

Money bail does not incentivize court appearance, as places that don’t use money bail have high court appearance rates of around 87% (District of Columbia)²⁴ to upwards of 90% (New Jersey).²⁵ Court date reminders are the cheapest and most effective way to boost court appearance by more than 10%.²⁶ For example, using text reminders in New York City for cite and

²⁴ Memorandum from the Pretrial Services Agency for the District of Columbia on Washington D.C. Pretrial Facts and Figures (Mar. 2018), <https://www.psa.gov/sites/default/files/Pretrial%20Facts%20and%20Figures%20-%20Updated%203.2018.pdf>.

²⁵ Press Release, Judiciary Releases Annual Criminal Justice Reform Report, N.J. Courts (Apr. 2, 2019), <https://www.njcourts.gov/pressrel/2019/pr040219a.pdf>.

²⁶ *Pretrial Research Summary: Court Date Notification Systems*, ADVANCING PRETRIAL POLICY & RESEARCH (APPR) (Oct. 2020), <https://cdn.filestackcontent.com/security=policy:eyJleHBpcnkiOjQwNzg3NjQwMDAsImNhbGwiOlsicGljaylslnJlYWQiLCJ3cmI0ZSIsIndyaXRlVXJsliwic3RvcmluLjJib252ZXJ0liwicVtb3ZlliwicVvV29ya2Zsb3ciX0=,signature:9df63ee50143fbd862145c8fb4ed2fcc17d068183103740b1212c4c9bc858f63/qc4SjkvTTHWTU98nQ8XA>.



release cases cut failure to appear rates by 26%.²⁷ The myth that bail reform and fewer people behind bars undermines public safety is simply fear mongering, as re-arrest rates for violence or serious crimes are less than 2% in jurisdictions that collect this data.²⁸ For instance, in New Jersey, 99.6% of people were released pretrial and not rearrested for a serious offense.²⁹ In Washington DC, 98% of all people released are not rearrested for a new violent crime pretrial.³⁰

Instead, pretrial justice requires an **investment in community-based and non-punitive solutions to harm and enduring safety for Black women** that operate apart from law enforcement and probation departments. That is why Essie Justice Group, alongside a coalition of more than 25 organizations, is pushing for a vision of pretrial reform in California that preserves the presumption of innocence by expanding opportunities for release, divests resources from jails and ensures public safety by making front-end investments in in community-based resources. Our legislation incorporates best practices from other jurisdictions to make robust investments into local pretrial services and survivor support agencies that would collaborate to generate Individualized Care and Safety Plans (ICSPs). ICSPs would utilize non-carceral resources and safeguards (such as stay away orders) to ensure the safety of all parties. Additionally, this legislation eliminates the commercial bail bond industry, ends the use of risk assessments, bans electronic monitoring as a condition of release, and solely reserves pretrial detention to circumstances where no community based alternatives can prevent harm to a particularly identifiable person.

The system of incarceration costs governments and directly-impacted families at least \$182 billion every year.³¹ Local communities spend at least \$14 billion every year to detain people who have not been convicted of the charges against them.³² At Essie Justice Group, we harness the collective power of women with incarcerated loved ones to generate the solutions that fundamentally shift how we envision community care and invest in our communities. Our mandate is to divest our tax dollars from bloated correctional budgets nationwide and invest in life affirming community resources, including a living wage through universal basic income, education and job training, housing, food security, healthcare, and community recreation. This vision comes alive in the BREATHE Act, the most audacious civil rights legislation ever put forth by a social movement:

²⁷ *New Text Message Reminders For Summons Recipients Improves Attendance In Court And Dramatically Cuts Warrants*, IDEAS 42, <https://www.ideas42.org/new-text-message-reminders-summons-recipients-improves-attendance-court-dramatically-cuts-warrants/> (last visited Feb. 18, 2021).

²⁸ E.g. GLENN A. GRANT, J.A.D., NJ COURTS, REPORT TO THE GOVERNOR AND THE LEGISLATURE 6-7 (Jan. 1-Dec. 31, 2019), <https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=zf0> ; PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA, OUTCOMES FOR LAST FOUR YEARS: PSA PERFORMANCE OUTCOMES (2013-2016), <https://www.psa.gov/?q=node/558>.

²⁹ REPORT TO THE GOVERNOR AND THE LEGISLATURE (Jan. 1-Dec. 31, 2019), *supra* note 28.

³⁰ PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA, OUTCOMES FOR LAST FOUR YEARS, *supra* note 28.

³¹ Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POLICY INITIATIVE, (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

³² Bernadette Rabuy, *Pretrial Detention Costs \$13.6 billion Each Year*, PRISON POLICY INITIATIVE, (Feb. 7, 2017), https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/.



the Electoral Justice Project of the Movement for Black Lives. The BREATHE Act posits four main principles:

1. Divest federal resources from incarceration and policing.
2. Invest in new, non-punitive, non-carceral approaches to community safety that lead states to shrink their criminal-legal systems and center the protection of Black lives—including Black mothers, Black trans people, and Black women.
3. Allocate new money to build healthy, sustainable, and equitable communities.
4. Hold political leaders accountable to their promises and enhance the self-determination of all Black communities.

We are honored by your invitation to provide our testimony before the U.S. Commission on Civil Rights. At Essie Justice Group, we know that isolation breaking, sisterhood, and radical love are the building blocks of power building, organizing, and social change. We organize within a lineage of Black led movements to break isolation, distill strategies for resilience and survival, and challenge the laws and policies that control us and our loved ones. We invite you to continue to trust and follow the leadership and expertise of directly impacted people, particularly women with incarcerated loved ones. Alongside the trauma and scars of incarceration lives the fierce resilience and brilliant strategies that women bring, over and over again, to healing ourselves, liberating our loved ones, and ending incarceration's harm to all of our communities. Our strategies for liberation recognize that when we center the most marginalized in society, we will all live and breathe more freely as a result.

Sincerely,

Gina Clayton-Johnson

Rena Karefa-Johnson

Titilayo Rasaki

Founder & Executive Director

Director of Campaigns & Advocacy

Policy Associate