

DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000



ALVIN L. BRAGG, JR.  
DISTRICT ATTORNEY

January 3, 2022

To: All Staff  
From: Alvin L. Bragg, Jr.  
Re: Achieving Fairness and Safety

Growing up in Harlem in the 1980s, I saw every side of the criminal justice system from a young age. Before I was 21 years old, I had a gun pointed at me six times: three by police officers and three by people who were not police officers. I had a knife to my neck, a semi-automatic gun to my head, and a homicide victim on my doorstep. In my adult life, I have posted bail for family, answered the knock of the warrant squad on my door in the early morning, and watched the challenges of a loved one who was living with me after returning from incarceration. Late last year, during a stretch of multiple shootings within three blocks of my home, I had perhaps the most sobering experience of my life: seeing —through the eyes of my children— the aftermath of a shooting directly in front of our home, as we walked together past yellow crime scene tape, seemingly countless shell casings, and a gun, just to get home.

In large part because of these experiences, I have dedicated my career to the inextricably linked goals of safety and fairness. This memo sets out charging, bail, plea, and sentencing policies that will advance both goals. Data, and my personal experiences, show that reserving incarceration for matters involving significant harm *will make us safer*.

The policies are premised on several key principles.

- Invest more in diversion and alternatives to incarceration: Well-designed initiatives that support and stabilize people – particularly individuals in crisis and youth – can conserve resources, reduce re-offending, and diminish the collateral harms of criminal prosecution.<sup>1</sup>

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<sup>1</sup> Michael Mueller-Smith & Kevin T. Schnepel, *Diversion in the Criminal Justice System*, 8 THE REV. OF ECON. STUD. 2, 883–936 (2021), <https://doi.org/10.1093/restud/rdaa030> (finding that diversion cuts reoffending rates in half and grows quarterly employment rates by nearly 50% over 10 years); Amanda Agan, Jennifer Doleac & Anna Harvey, *Misdemeanor Prosecution* (Nat'l Bureau of Econ. Res., Working Paper No. 28600, 2021), [https://www.nber.org/system/files/working\\_papers/w28600/w28600.pdf](https://www.nber.org/system/files/working_papers/w28600/w28600.pdf) (finding non-prosecution of a nonviolent misdemeanor offense leads to large reductions in the likelihood of a new criminal complaint over the next two years); David Huizinga & Kimberly L. Henry, *The Effect of Arrest and Justice System Sanctions on Subsequent Behavior: Findings from Longitudinal and Other Studies*, in, THE LONG VIEW ON CRIME: A SYNTHESIS OF LONGITUDINAL RESEARCH 244 (Akiva M. Liberman, ed., 2008); John Laub & Robert Sampson, *Life-Course and Developmental Criminology: Looking Back, Moving Forward*, J. OF DEV. AND LIFE-COURSE CRIMINOLOGY (2020).

- Reduce pretrial incarceration: Particularly given the ongoing crisis at Rikers, we must reserve pretrial detention for very serious cases. The data show that the overwhelming majority of those released pretrial do not commit a violent crime while at liberty.<sup>2</sup> Studies show that even three days in jail can lead to a loss of housing, employment, and strain family connections and increase the likelihood failure to appear in court.<sup>3</sup> Studies also indicate that incarceration, in and of itself, can create public safety risks.<sup>4</sup>
- Focus on Accountability, Not Sentence Length: Research is clear that, after a certain length, longer sentences do not deter crime or result in greater community safety.<sup>5</sup> Further, because survivors and victims of crime often want more than the binary choice between incarceration and no incarceration, we will expand our use of restorative justice programming.<sup>6</sup>
- Limit Youth in Adult Court: Research shows that brain development continues until up to age 25,<sup>7</sup> youth are physiologically subject to more impulsive behavior, and are still capable

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<sup>2</sup> New York City Mayor's Office of Criminal Justice, *How many people with open criminal cases are re-arrested?* (December 2021), <http://criminaljustice.cityofnewyork.us/wp-content/uploads/2021/12/Pretrial-Docketed-Rearrest-Contextual-Overview-December-2021-Update.pdf> (finding that from January - June 2021 fewer than 1% of the 45,000- 50,000 people out pretrial are arrested for nonviolent or violent felonies each month); *see also*, Pretrial Release Dashboard, New York City Criminal Justice Agency, <https://www.nycja.org/pretrial-release-dashboard> (including pretrial outcome data through October 2021).

<sup>3</sup> Christopher Lowenkamp et al., *The Hidden Costs of Pretrial Detention*, THE LAURA AND JOHN ARNOLD FOUND., [https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf).

<sup>4</sup> Studies in New York City, Miami, Pittsburgh, Philadelphia, and Houston comparing similar people released and detained before trial consistently found a modestly greater risk of re-offending once the pretrial period ends for detained individuals. For New York City, *see* Emily Leslie & Nolan Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments* 60 J. OF L. AND ECON. 3, 529-557 (2017), [http://www.econweb.umd.edu/~pope/pretrial\\_paper.pdf](http://www.econweb.umd.edu/~pope/pretrial_paper.pdf); for Miami and Philadelphia, *see* Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* (Nat'l. Bureau of Econ. Research, Working Paper No. N22511, 2018), <https://www.nber.org/papers/w22511.pdf>; for Philadelphia and Pittsburgh.

<sup>5</sup> *Five Things About Deterrence*, NAT'L INST. OF JUST., NCJ No. 247350 (2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>; Daniel S. Nagin, *Deterrence in the Twenty-First Century*, in 42 CRIME AND JUSTICE IN AMERICA, 1975-2025, 201-202 (Michael Tonry, ed., 2013); Damon M. Petrich, et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 CRIME AND JUST. (2021), <https://www.journals.uchicago.edu/doi/10.1086/715100> (finding custodial sanctions have no effect on reoffending or slightly increase it when compared with the effects of noncustodial sanctions and that incarceration cannot be justified on the grounds it affords public safety by decreasing recidivism).

<sup>6</sup> Heather Strang, et al., *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review*. 9 CAMBELL SYSTEMATIC REVIEWS 1, 1-59 (2013), <https://onlinelibrary.wiley.com/doi/abs/10.4073/csr.2013.12> (reviewing 10 randomized control trials and finding face-to-face restorative justice conferences are cost-effective in reducing reoffending and increasing victim satisfaction).

<sup>7</sup> *See e.g.*, Jay N. Giedd, *Structural magnetic resonance imaging of the adolescent brain Adolescent Brain Development: Vulnerabilities and Opportunities*, 1021 ANN. N.Y. ACAD SCI. 77 – 85 (2004); Jay N. Giedd et al., *Brain development during childhood and adolescence: A longitudinal MRI study*, 2 NATURE AND NEUROSCIENCE 861-863 (1999); Jim Casey, *The Adolescent Brain: New Research and its Implications for Young People*

of growth and maturation. Prosecuting youth in our adult criminal court system can lead to recidivism,<sup>8</sup> making neighborhoods less safe.

- Actively Support Those Reentering: Supporting those returning from incarceration reduces recidivism and thereby makes communities safer.<sup>9</sup> We will scale up our support for services for those reentering and participate substantively in the parole process with a presumption in favor of release.

Please note that a number of the policies set forth below create presumptions requiring supervisory approval and/or a writing to overcome the presumption. These presumptions are intended to reflect the fact that no set of policies can cover all factual circumstances.

These policy changes not only will, in and of themselves, make us safer; they also will free up prosecutorial resources to focus on violent crime. To that end, new initiatives and policies on guns, sex crimes, hate crimes, and other matters will be announced in the coming weeks. We also are mindful that, in all of the work we do, discovery logistics are a constant challenge, and we will be dedicating significant resources to address this challenge.

Finally, while my commitment to making incarceration a matter of last resort is immutable, the path to get there through these policies will be dynamic, and, not static, and will be informed by our discussions (starting this week in the Trial Division) and our work together in the weeks and months ahead.

Attached are the day one policies and procedures relevant to the above.

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*Transitioning from Foster Care* YOUTH OPPORTUNITIES INITIATIVE 7-8 (2011), <https://assets.aecf.org/m/resourcedoc/AECF-theAdolescentBrain-2011.pdf>.

<sup>8</sup> David Wilson et al. *Police-initiated diversion for youth to prevent future delinquent behavior: a systematic review* 14 CAMBELL SYSTEMATIC REVIEWS (2018), <https://onlinelibrary.wiley.com/doi/full/10.4073/csr.2018.5> (finding police-led diversion of low-risk youth who come into contact with the justice system is more effective in reducing a youth's future contact with the justice system compared to traditional processing); Jeffrey Fagan, Aaron Kupchik & Akiva Liberman, *Be Careful What you Wish For: Legal Sanctions and Public Safety Among Adolescent Felony Offenders in Juvenile and Criminal Court*, Colum. Univ. Pub. L. & Legal Theory, Res. Paper Series (2007) (finding that serious adolescent offenders prosecuted in the criminal court are likely to be rearrested more quickly and more often for violent, property and weapons offenses, and they are more often and more quickly returned to incarceration); *see also*, Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?* 96 J. CRIM. L. & CRIMINOLOGY 1451, 1451 (2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=491202#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=491202#); Jill Wolfson, *CHILDHOOD ON TRIAL: THE FAILURE OF TRYING & SENTENCING YOUTH IN ADULT CRIMINAL COURT* (2005).

<sup>9</sup> *See E.g.*, Blair Ames, *NIJ-Funded Research Examines What Works for Successful Reentry*, *The National Institute of Justice*, National Institute of Justice, (Oct. 7, 2019), <https://ojp.gov/pdffiles1/nij/252734.pdf>



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

## **POLICY & PROCEDURE MEMORANDUM**

|                                               |                                            |
|-----------------------------------------------|--------------------------------------------|
| <b>TO:</b> All Staff                          | <b>DATE:</b> Monday, January 03, 2022      |
| <b>FROM:</b> Alvin L. Bragg, Jr.              | <b>EFFECTIVE:</b> Monday, January 03, 2022 |
| <b>CC:</b>                                    |                                            |
| <b>SUBJECT:</b> Day One Policies & Procedures |                                            |

The following policies and procedures are effective immediately.

### **A. CHARGING**

1. The Office will not prosecute the following charges, unless as part of an accusatory instrument containing at least one felony count:
  - a) Marijuana misdemeanors, PL §§ 222.30 and 222.50.
  - b) The act of refusing to pay the fare for public transportation under Theft of Services, PL §165.15(3).
  - c) Trespass, PL §§ 140.05, 140.10, 140.15, unless the trespass is a family offense pursuant to CPL § 530.11, accompanies any charge of Stalking in the Fourth Degree under PL § 120.45, or is approved by an ECAB supervisor.
  - d) Aggravated Unlicensed Operation, VTL § 511.1. Note that any vehicular collision resulting in any physical injury should be pursued as an act of reckless driving, reckless endangerment, negligent or reckless assault, failure to yield, or any other applicable statute. This policy addresses only criminalization of a failure to pay fines and does not address the criminalization of dangerous driving. Also, this charge may be prosecuted as part of any accusatory instrument containing a charge of Vehicle and Traffic Law 1212, 1192, or 511.2.
  - e) Any violation, traffic infraction, or other non-criminal offense not accompanied by a misdemeanor or felony.
  - f) Resisting Arrest, PL § 205.30, except for the act of resisting arrest for any crime not included on this declination list.
  - g) Obstructing Governmental Administration in the Second Degree, PL § 195.05, other than for the act of significantly physically interfering with the lawful arrest of another

person. Significant physical interference includes, at a minimum, the acts of shoving, tackling, pushing, punching, and other similar acts. Otherwise, this charge must be approved by an ECAB supervisor.

- h) Prostitution, PL § 230.00. ECAB supervisory approval required to prosecute Patronizing a Person for Prostitution under PL § 230.04. This does not include any felonies, or coercive practices regularly performed by those who traffic in the sex trade or related crimes such as money laundering.
  - i) Outdated offenses such as Obscenity, PL Article 235, and Adultery, PL § 255.17.
- 2. Misdemeanor charges for which a desk appearance ticket is required by law shall be offered diversion. Diversion is defined as the opportunity to complete a short but meaningful programming mandate after arrest through a community-based provider, based on the needs of the person arrested. Upon completion of the mandate, the Office will decline to prosecute the case.
  - a) Consistent with past policies, those arrested and offered diversion will be permitted to consult with an attorney regarding their options.
  - b) If the person accepts the diversion, the Office will work to ensure they do not need to appear in court, including if their diversion mandate is not complete before their scheduled appearance.
- 3. Cases for which a desk appearance ticket is issued but not required by law to be issued will be offered the diversion option defined herein, unless: a) the allegations include any sex offenses, assault, menacing, any allegation of harm or the threat of harm to another person, or offenses requiring an order of protection during the pendency of the case; or b) based on a holistic analysis of the case, diversion would be inconsistent with public safety goals.
- 4. The Office will continue to screen desk appearance ticket cases to ensure that diversion is not presumptively offered in rare but important instances of great public concern where such tickets are required by law, such as cases involving white collar theft, the death of another person by an act of driving, and other cases for which non-carceral sentences would not be presumed as per the policies on carceral dispositions described *infra*.
- 5. ADAs should use their judgment and experience to evaluate the person arrested, and identify people: who suffer from mental illness; who are unhoused; who commit crimes of poverty; or who suffer from substance use disorders. Immediately identify such cases to an ECAB supervisor. Charges should be brought consistent with the goal of providing services to such individuals, and leverage during plea negotiations should not be a factor in this decision.

6. The following offenses shall be charged as follows:

- a) An act that could be charged under PL §§ 160.15 (2, 3, or 4), 160.10(2b), or 160.05 that occurs in a commercial setting should be charged under PL § 155.25 if the force or threat of force consists of displaying a dangerous instrument or similar behavior but does not create a genuine risk of physical harm.
- b) The possession of a non-firearm weapon under Penal Law § 265.02(1) shall not be charged unless as a lesser included offense, and § 265.01 shall be charged instead.
- c) Residential burglaries: An act involving theft of property from a storage area or other portion of a dwelling that is not accessible to a living area that could be charged under PL § 140.25(2) should be charged only under PL §140.20 and not under PL §140.30 or PL §140.25(2).
- d) Commercial burglaries: An act involving theft of property from a commercial establishment that could be charged under PL § 140.25(2) because such establishment is technically part of a larger structure that contains dwellings shall only be charged under § 140.20.
- e) Drug cases: If there is a reasonable view of the evidence indicating that a person arrested for the sale of a controlled substance is acting as a low-level agent of a seller, such person shall be charged with 220.03 and no felonies and therefore offered diversion. Also, unless such charge is a lesser included offense or unless the defendant actually sold a controlled substance, the offense of Penal Law § 220.06 shall not be charged and 220.03 shall instead be charged.

7. Prosecution may be deferred if the discovery available at the time of arraignment is so sparse, or so potentially voluminous, that the ADA believes it poses a significant risk that the Office will not meet its discovery requirements in arraigning the case immediately, provided that doing so poses no public safety risk. Delaying a case while we gather all the evidence and make sure it is appropriate to file an accusatory instrument will ensure that we are in full compliance with the letter and spirit of discovery requirements.

## **B. PRETRIAL DETENTION**

- 1. There is a presumption of pre-trial non-incarceration for every case except those with charges of homicide or the death of a victim, a class B violent felony in which a deadly weapon or dangerous instrument causes serious physical injury, sex offenses in Article 130 of the Penal Law, domestic violence felonies or charges of PL § 215.50, public corruption, rackets, or major economic crimes, including any attempt to commit any such offense under Article 110 of the Penal Law. For any charge of attempt to cause serious physical injury with a dangerous instrument, ADAs must obtain the approval of an ECAB supervisor to seek pretrial detention.

- a) Exceptions will be granted in extraordinary circumstances, based on a holistic analysis of the facts presented, criminal history (particularly any recent history of not returning to court without sufficient cause or explanation), and any other information available.
  - b) An ADA may request pretrial detention in such extraordinary circumstances after submitting the Application for Pretrial Detention form to their ECAB supervisor.
2. Where release is recommended, the following rules apply:
  - a) The Office will consent to release on recognizance whenever release is recommended by the CJA risk assessment or if it is the defendant's first arrest. Exceptions to this rule apply in the following circumstances: a violent felony involving serious physical injury, a class A, B, or C violent felony; or where the defendant lacks a NYC address and does not have a phone to receive court appearance reminders.
  - b) In any other circumstance, the Office will consent to supervised release, or other support strategies to ensure returning to court.
3. For cases where there is no presumption of non-incarceration, the Office should carefully consider all known facts. Special consideration should be given to any request for pre-trial detention for following individuals who face unique hardships, such as individuals with health conditions that could suffer serious harm or death if incarcerated.
4. When requesting bail, ADAs must request a partially or unsecured bond in the same amount as the cash bail request.
5. If defense counsel requests, ADAs working in the arraignment parts shall inform defense counsel prior to their client's arraignment of the Office's bail request and any plea offer.
6. For those individuals whose conditions, particularly their physical and mental health, change during incarceration, the Pathways to Public Safety Bureau will review and consent to a change in bail or release conditions if necessary.
7. If individuals miss court dates, ADAs shall contact defense attorneys to request them to provide the reason for the violation or failure to appear in court. If the person fails to appear but there is no evidence that the person intentionally attempted to flee from law enforcement, such as evading police or giving a police officer an alias, then recommend release upon the original conditions.
8. If there is an allegation that an individual has violated a condition of release, ADAs shall contact the defense attorney to determine whether the violation of the condition is related to circumstances such as health issues, transportation or child care issues. If there is clear evidence that the person willfully violated conditions of release, ask for the next-least

restrictive condition to ensure they fulfill the conditions of release. Supervisory approval is required for any deviation from this policy.

9. In appropriate cases, the Office will consent to excusing the defendant from having to attend routine court appearances.

## **C. DISPOSITIONS**

1. The Office will not seek a carceral sentence other than for homicide or other cases involving the death of a victim, a class B violent felony in which a deadly weapon causes serious physical injury, domestic violence felonies, sex offenses in Article 130 of the Penal Law, public corruption, rackets, or major economic crimes, including any attempt to commit any such offense under Article 110 of the Penal Law, unless required by law. For any charge of attempt to cause serious physical injury with a dangerous instrument, ADAs must obtain the approval of an ECAB supervisor to seek a carceral sentence.
  - a. This rule may be excepted only in extraordinary circumstances based on a holistic analysis of the facts, criminal history, victim's input (particularly in cases of violence or trauma), and any other information available. ADAs shall also consider the impacts of incarceration on public safety, the impacts of incarceration on communities, the financial cost of incarceration, the racially disparate use of incarceration, and the barriers to housing, employment, and education created as a consequence on a period of incarceration.
  - b. An ADA may request incarceration in such extraordinary circumstances after submitting the Application for Carceral Sentence form to their supervisor at least 3 business days prior to the court date upon which such disposition is sought, and after such supervisor so approves.
2. For cases in which there is no presumption of non-incarceration, there is also no presumption that incarceration is the appropriate outcome. ADAs should consider whether a carceral sentence is appropriate based a holistic analysis of all known facts.
3. ADAs shall presumptively indict both top counts and lesser included counts when presenting cases to the grand jury, permitting a wider range of statutorily permissible plea bargaining options. This presumption can be overcome with supervisory approval.
4. When seeking a carceral sentence, the following rules apply, absent exceptional circumstances:
  - a. For a determinate sentence, the Office will request a maximum of 20 years.
  - b. For an indeterminate sentence other than one with a maximum of life, the Office will request no more than a maximum of 20 years, absent exceptional circumstances.

- c. For an indeterminate sentence with a maximum of life, the Office will request no more than a minimum of 20 years, unless required by law.
  - d. The Office shall not seek a sentence of life without parole.
  - e. In exceptionally serious cases such as homicides where lengthy periods of incarceration are justified, ADAs shall consider the use of restorative justice as a mitigating factor in determining the length of the sentence, only when victims or their loved ones consent.
- 5. If a case is determined to be appropriate for a disposition involving services, the Office will rely on outside professionals to determine the appropriate service and length of placement, and shall analyze cases involving substance use and mental illness through a public health lens. The Office shall not require proffers for such services.
  - 6. Restorative justice programming will be expanded significantly, including for violent felony cases in which the victim consents.
  - 7. For any case in which a person violates the terms of a non-carceral sentence or pre-plea programming mandate, the Office will seek a carceral “alternative” only as a matter of last resort. The Office will take into account that research shows that relapses are a predictable part of the road to recovery for those struggling with substance abuse, and the Office will reserve carceral recommendations for repeated violations of the terms of a mandate.

#### **D. SPECIAL PROCEDURES FOR CASES INVOLVING JUVENILES AND YOUNG ADULTS**

- 1. For adolescent offenders charged with offenses defined in subdivision 1 of CPL §722.23, the Office shall presumptively not file motions preventing removal to family court unless the charges are extremely serious and the young person does not demonstrate amenability to the services available in Family Court. An ADA may overcome this presumption only after submitting the Application Opposing AO Removal form to their supervisor no later than 10 days after arraignment, and after such supervisor so approves.
- 2. For adolescent offenders charged with offenses defined in subdivision 2 of CPL §722.23, the Office shall presumptively consent to removal to family court under CPL § 722.23(2)(e) unless the charges are extremely serious and the young person does not demonstrate amenability to the services available in family court. An ADA may overcome this presumption only after submitting the Application Opposing AO Removal form to their supervisor at least 3 days prior to the hearing held pursuant to § 722.23(2)(a), and after such supervisor so approves.
- 3. The Office will consent to the removal of all juvenile offenders to Family Court pursuant to CPL § 722.22, permitting the court to make its own analysis of the statutory factors,

where required, unless consent is not statutorily justified under paragraph b of subdivision 5 of § 722.22.

4. For those cases not removed to Family Court, determinations as to the appropriate disposition will be based on identifying underlying needs and what services and supports can be provided to the person charged and their caretakers to address those needs ultimately improving public safety. We will rely on community-based programs already in use in the Youth Parts as well as adding restorative justice practices to accomplish these goals.
5. For those cases not removed to Family Court, the Office will consider removals to Family Court based on continuing behavior while cases are pending in criminal court, and sealing of charges upon demonstration of rehabilitation.
6. For those cases involving adults under the age of 25, ADAs should make an individualized determination of the appropriate outcome for each case recognizing that the same brain development variables that illuminate our views on juveniles should play a role in our determinations of young adult cases. Some offenses committed by persons in this age range are attributable to lack of impulse control, peer pressure, and the lack of insight and appreciation of consequences that comes with age. Therefore, ADAs prosecuting those under the age of 25 should consider dispositions aimed at rehabilitation, including reducing charges, offering deferred prosecution, or offer pleas that permit a person to avoid a criminal record, depending on the circumstances of each case including the input of victims.

#### **E. SPECIAL PROCEDURES FOR CASES INVOLVING NONCITIZENS**

The Office will seek dispositions that avoid immigration consequences for all misdemeanors, and all felonies for which non-carceral outcomes are the presumptive outcome. The procedures for seeking a disposition that carries immigration consequences in any such case are the same as the procedures for seeking a carceral disposition for cases in which non-incarceration is the presumption.