



COURTS IN REVIEW:

A 2019 Analysis of New Orleans' Courts

**COURT WATCH NOLA'S 2019 ANNUAL REPORT ON THE
STATE OF NEW ORLEANS' CRIMINAL DISTRICT COURT,
MAGISTRATE COURT, AND MUNICIPAL COURT**

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Table of Contents

I. Executive Summary	3
II. Introduction	6
III. Methodology	9
IV. Victim Rights	10
a. Domestic Violence Felony Refusals	12
b. Gun Transfers and Examining Risk in Domestic Violence Cases	15
c. District Attorney's Absence from Bail Hearings	17
d. Incarcerating Victims to Compel their Testimony	18
V. Bail, Fines and Fees	23
a. Lawsuit Compliance in Criminal District and Magistrate Courts	24
b. Bail, Bond, Fines and Fees in New Orleans Municipal Court	26
c. Felony Court Bail	29
VI. Efficiency	32
a. The Plea Bargain	33
b. Judicial Delay in Starting Court	36
c. Notice of Arraignments to Orleans Public Defenders	39
VII. Acknowledgements	40
VIII. Endnotes	41

Dedication

In recognition of the tremendous loss our community continues to face as the COVID-19 crisis unfolds, we dedicate this report in memory of all those we have lost to this novel virus. This includes Jack Zoller, beloved stepfather to board members, Matt and Arthur Wisdom. This also includes Orleans Parish Deputy Sheriff Eric Frazier, a Deputy Sheriff who worked in Orleans Parish Criminal District Court and who was always a friendly face as Court Watch NOLA volunteers walked into court. As these tragedies have unfolded--and our community faces devastating loss--we have seen our community come together to protect ourselves and each other. We've witnessed immense generosity and have been honored to stand with the community in demanding safer practices to protect deputies, law enforcement officials, and community members both in and outside of the jails.

The dedication and sacrifice of our doctors, nurses, medical professionals, first responders, and all essential workers cannot go unnoticed. We're proud of our community for coming together while staying apart and look forward to the day we are able to greet you all to discuss the criminal courts in person again.

I. Executive Summary

Court Watch NOLA is a non-profit organization whose mission is promoting reform in the Orleans Parish criminal court system through civic engagement and courtroom observation. This report encompasses the data collected and the observations made by 188 Court Watch NOLA volunteers from January 1, 2019 to December 31, 2019 in the Orleans Parish Criminal District Court, Orleans Parish Magistrate Court, and New Orleans Municipal Court. Court Watch NOLA volunteers observed a total of 987 court sessions in all three courts. This report explores the topics of victims' rights, constitutional rights, and efficiency in the Orleans Parish criminal courts during 2019.

Victim Rights: Domestic Violence Misdemeanor Dismissals and Felony Refusals

According to data analyzed by Court Watch NOLA, 47% of the felony domestic violence arrests seen in Magistrate Court in 2019 were refused by the District Attorney.¹ Domestic violence refusals can occur when, after an arrest, a victim is no longer willing to go forward and prosecute the case,² or when prosecutors believe that the evidence in the case is insufficient to proceed with the prosecution, even with the victim's participation.³ According to data provided by the Orleans Parish District Attorney's Office, 55% of felony refusals resulted from victim reluctance or disappearance, and only 5% resulted from evidence problems such as the victim being unbelievable or implausible, or the evidence being circumstantial.⁴

In jurisdictions where national best practices have been taken seriously, the conversation no longer centers on imprisoning victims to compel their testimony nor citing victims and others for a reluctance to testify. Instead, the public conversation has become one of whether:

- i. A prosecution should or can occur through evidence-based prosecution, using evidence other than the victim's testimony, or
- ii. Law enforcement and others should push for better resources to support a victim through the fraught process of providing testimony in open court.⁵

New Orleans must continue to discuss this issue publicly so that victims are treated with the appropriate respect and dignity, and victims are empowered by the necessary and proper resources to secure true safety in their lives and communities.

Recommendation 1: Victims need to be provided direct resources in order to achieve true safety. While some of those resources must be provided by law enforcement in the form of victim protection services, much of the therapeutic care can be provided to the victim through non-profit programs within the community. Adequate resources and support must be directly provided to victims if we expect them to testify against their aggressors; diligent care must be spent to ensure that those resources that are earmarked for witness and victim protection are, in fact, received by victims.

Victim Rights: Gun Transfers and Examining Risk in Domestic Violence Cases

Louisiana has consistently ranked at the top of the list of states with the highest rates of women killed by men.⁶ In Louisiana, where a woman was killed by a man and where the weapon was known, 69% of those female victims were killed with guns.⁷ The presence of a firearm in a domestic violence situation increases the risk of homicide by 500%.⁸ In 2018, a Louisiana state law went into effect requiring persons under an active domestic violence protection order to transfer all firearms in their possession to the sheriff or another third party.⁹ Since January 2019, when the program began in Orleans Parish, the Orleans Parish Sheriff's Office has overseen the third-party transfer of only 12 firearms and received the proof of sale of just three others.¹⁰ Of 232 first appearances observed in which an arrestee was charged with domestic violence, court watchers found that the Magistrate or Commissioner asked whether the criminal defendant possessed a firearm in only 30% of these cases. Over 98% of defendants for which the Orleans Parish Sheriff's Office received transfer forms reported that they did not possess firearms.¹¹ It is hard to say what would persuade accused domestic violence assailants to admit they owned a firearm.

A further effort to protect victim safety requires that police officers responding to a domestic violence offense ask victims four risk questions at the crime scene, and that the police department keep a record of the victims' answers. The New Orleans Police Department must provide this risk information to the Magistrate Court for the Magistrate's or Commissioner's consideration in deciding whether to release the criminal defendant. The Orleans Parish District Attorney's Office should be appearing at all Magistrate Court bail hearings to ensure that this risk information is being considered by the Commissioners. Court watchers observed the Magistrate or Commissioner mention these risk questions on the record in only 13% percent of bail hearings where an arrestee was charged with domestic violence. Court Watch NOLA volunteers found that factors such as risk to the victim were considered on the record in fixing bail in 37% of observed domestic violence bail hearings.

Recommendation 2: The Orleans Parish Magistrate and Commissioners must inform every criminal defendant subject to a pertinent domestic violence stay-away order that they are prohibited from possessing a firearm. The New Orleans Police Department, the Orleans Parish District Attorney's Office, and the Magistrate Court judges must work together to ensure a victim's expression of risk is taken into consideration at a bail hearing.

Victim Rights: District Attorney's Absence from Bail Hearings

Since March 2018, Assistant District Attorneys have been absent in 14 out of 19 Orleans Parish Magistrate Court sessions a week. This means that there is no Assistant District Attorney making bail arguments and speaking to or on behalf of victims in more than $\frac{2}{3}$ of Magistrate Court settings a week. Often, crime victims have pivotal information about the defendant's likelihood of returning to court and the defendant's likelihood of committing new crimes upon pretrial release.¹² Without the prosecutor in Magistrate Court, victims have lost a pivotal opportunity to guard against a defendant who is a danger to them or the larger community. Court Watch NOLA found that in 2019, District Attorney Cannizzarro was absent for bail hearings involving 879 violent offenses, 16 sex offenses, and 80 violent sex offenses.

Recommendation 3: The Orleans Parish District Attorney's Office should attend and take part in all first appearance bail hearings in Orleans Parish Magistrate Court. When victims have information that relates to the defendant's pretrial release, the prosecutor should ensure that such information is transmitted to the Orleans Parish Magistrate or Commissioner who is determining the defendant's pretrial release. This would not only improve our criminal courts generally but would increase community safety.

Victims Incarcerated to Compel their Testimony

If a judge issues a material witness warrant, a victim can be arrested for failing to come to court to testify when subpoenaed.¹³ With some crimes, such as sexual assault and domestic violence that are already serially underreported, research shows that the arrest of a victim who is unwilling to testify has a chilling effect on victims already reluctant to report the crime to law enforcement.¹⁴ Since Court Watch NOLA began to examine this issue in 2017, there has been a marked decrease in the number of material witness warrants seen in Orleans Parish Criminal District Court. However, District Attorney Cannizzarro has continued to seek the incarceration of victims who do not appear in court to testify through other mechanisms such as court subpoenas and instanter subpoenas. In 2019, Court Watch NOLA found one material witness warrant issued against a victim, instanter subpoenas requested against three victims, and regular court subpoenas issued against four victims. In one of these cases, a victim was jailed for three days to force him to testify against his accused assailant; in the other seven cases where District Attorney Cannizzarro attempted to incarcerate victims, either the judge refused to order the warrant to arrest the victim, or law enforcement failed to find the victim and incarcerate them. All victims who District Attorney Cannizzarro sought to incarcerate were African American; seven were women, and one was a man. Seven of the crime victims District Attorney Cannizzarro sought to incarcerate were domestic violence victims; the eighth victim had survived both an aggravated assault and an aggravated assault with a firearm.

Recommendation 4: The District Attorney should issue a policy discontinuing the incarceration of domestic violence and sex crime victims for failing to testify. In non-domestic violence and non-sex offense cases, the District Attorney should, at a minimum, publicly release a protocol that includes the different factors an Assistant District Attorney must consider before applying for a warrant to arrest a victim for failing to testify. For example, this protocol may include weighing the competing goals of victim safety and emotional trauma to the victim, as well as offender accountability, public safety, and the significance/necessity of the victim's testimony.

Bail, Fines & Fees: Lawsuit Compliance in Criminal District and Magistrate Courts

Both the *Cain* and *Caliste* lawsuits dealt with the same general requirement that defendants be asked whether they could afford the bail, bond, fines, or fees the court was imposing before the court imposed such costs.¹⁵ Both the *Cain* and *Caliste* court decisions declared that the defendant could not be incarcerated for nonpayment.¹⁶ It is insufficient for a judge to impose the fine, fee, bail or bond in an amount the judge believes is affordable; the question of affordability must be asked of the defendant.¹⁷

Court Watch NOLA volunteers found that in 39% of all observations in Criminal District Court in which a fine or fee was imposed upon a defendant, the judge failed to inquire into the defendant's ability to pay. In Orleans Parish Magistrate Court, Court Watch NOLA volunteers found that in 82% of all observations of first appearance bail hearings, the Magistrate or Commissioner failed to inquire into the defendant's ability to pay the bond.

Recommendation 5: The judges that preside over Orleans Parish Criminal District Court and Magistrate Court should follow the mandates of the *Cain* and *Caliste* lawsuit, whether or not they are a party to those lawsuits. Each judge should inquire into the defendant's ability to pay a fine, fee, bail, or bond before imposing such a cost.

Bail, Fines & Fees: Bail, Bond, Fines and Fees in Municipal Court

In 2019, the New Orleans Municipal Court heard all misdemeanors in Orleans Parish.¹⁸ In most circumstances, the New Orleans Police Department has the discretion to either arrest an individual for a municipal or state misdemeanor or to give that same individual a municipal misdemeanor summons where the arrestee would not face any immediate jail or face a bail hearing.¹⁹ As part of Court Watch NOLA's process in examining who is being incarcerated and who is not, Court Watch NOLA volunteers monitored who was incarcerated and forced to face a bail hearing rather than summoned to appear in New Orleans Municipal Court. Those who were booked, incarcerated, and required to face a bail hearing instead of remaining at large and receiving a paper summons to return to Municipal Court were 79% African American and 15% Caucasian, as compared to our city's estimated 2019 population which was 60% African American and 35% Caucasian.²⁰

As part of Court Watch NOLA's process in examining constitutional mandates in New Orleans Municipal Court, Court Watch NOLA volunteers monitored cases in which bail on a defendant's case was set or in which the defendant was asked to pay fines and fees. The New Orleans Municipal Court has never been sued over its bail practices nor its fines and fees collection process. Thus, the issue of whether Municipal Court judges follow the constitutional requirements of inquiring into the defendant's ability to pay bail, bond, court fines, and court fees has not been publicly raised in litigation. In 91% of the observed cases in which bail was set, the defendant was not asked whether they could afford the bail or bond. Likewise, in 21% of the fines and fees cases observed, the defendant was not asked if they could afford to pay the fine or fee before the fine or fee was instituted.

Recommendation 6: New Orleans Municipal Court judges should inquire into the defendant's ability to pay before imposing bail, bond, fines, or fees. The court should find alternatives where the criminal defendant has informed the court, they cannot pay the fine or fee.

Bail, Fines & Fees: Felony Court Bail

The crimes for which the New Orleans Police Department arrests a defendant are often entirely different from the charges the District Attorney eventually decides to bring via bill of information or indictment in felony court.²¹ When a Criminal District Court judge first receives the felony case in their court, the judge has the option of decreasing, increasing, or keeping the bail at the same amount set by the Magistrate Court. One would assume that if any of the charges for which a defendant was arrested have been dropped by the prosecutor and no additional charges have been added, the total bail amount would drop as well once the defendant arrives in felony court. If the prosecutor accuses the criminal defendant of fewer things than the defendant was accused of at arrest, should the bail not be lower than when the criminal defendant was first arrested? In fact, however, in 61% of the cases (368 cases), bail remained the same, even though in 225 of these cases, the defendant had fewer criminal charges than those that served as the basis for the bail decision in Magistrate Court. If the Criminal District Court judge increases bail against a defendant who is out of jail and appearing for court in person, the criminal defendant can be handcuffed and immediately detained without notice, although sometimes the defendant is given a few hours to come up with additional money for bail.²² Louisiana Law states that Orleans Parish Criminal District Court can increase the amount of bail required only for good cause;²³ good cause specifically includes the rearrest of the defendant and the violation of any condition by the defendant.²⁴

In 2019, a New Orleanian at the poverty line made \$1,041 per month²⁵ and yet Court Watch NOLA found that the median bail amount for an indigent defendant in Criminal District Court was \$4500, more than 4 times the amount of the monthly income of an indigent person. Bail is excessive when, in the words of one of Louisiana higher courts, "It has been fixed higher than reasonably calculated to insure the defendant's appearance."²⁶ It is concerning when a judge increases bail if a defendant has already appeared in court,²⁷ and no other conditions have been violated such as harassment of victims or witnesses. Where bail has served its purpose, it should not be increased.

Recommendation 7: Bail should not be fixed in an amount that is more than is reasonably calculated to ensure the defendant's appearance. A Criminal District Court judge should not increase bail where there is no justification that the current bail is insufficient to assure a defendant's appearance before the proper court, or where no other conditions of bail have been violated, such as victim or witness harassment.

Efficiency: Guilty Pleas of those Incarcerated

Most criminal defendants do not bring their case to trial. The vast majority of felony cases in Orleans Parish Criminal District Court end in the criminal defendant taking a plea.²⁸ Ideally, plea bargains are taken by guilty criminal defendants who take responsibility for their actions and do so in the presence of clear evidence of their guilt.²⁹ However, the reality can be very different. Criminal defendants often take pleas solely out of fear of the much

longer and more severe prison sentence they would receive if they were found guilty at trial.³⁰ In addition, criminal defendants sometimes take pleas to be released from jail to maintain a job, pay child custody, and pay rent.³¹ Sometimes a judge will threaten to incarcerate a defendant once they test positive for a drug test or violate a condition of their bond such as a nighttime curfew, but the same judge may also simultaneously offer the defendant a probation plea where they can avoid jail altogether as long as they plead guilty.³² Nationally, it has been found that 15% of known wrongful conviction exonerees pled guilty instead of going to trial;³³ the fewer the years the prosecutor or judge offered, the greater the number of exonerees who pled guilty to crimes they did not commit.³⁴ New Orleans has the highest wrongful conviction rates per capita of any county or parish over 300,000 people in the United States.³⁵ The number of incarcerated defendants (vs. non-incarcerated defendants) pleading guilty in Orleans Parish Criminal District Court should give New Orleanians real concern. Court watchers found that, depending on the felony court, up to 71% of pleas were taken by incarcerated defendants.

Recommendation 8: Judges should not pressure defendants to take a plea by threatening to raise bail based on a pretext or threatening jail time if a defendant has a positive drug test. While efficiency is an important goal for criminal court actors to embrace, efficiency should not be embraced over all other concepts. Court actors should keep in mind New Orleans' high rate of wrongful conviction when clearing their dockets through case disposition.

Efficiency: Law Enforcement Officers Waiting for Court to Begin

For over 12 years, Court Watch NOLA has been recording the time each judge takes the bench. Courts with regular, substantial delays waste the time of the victims, witnesses, defendants, and family members who often must take time off from work or find childcare that most can hardly afford in order to wait in court.³⁶ Delays are also costly because taxpayers fund the salaries of the public servants- the prosecutors, the public defenders, the deputy sheriffs, the court staff, and the law enforcement who are forced to wait.³⁷ For the New Orleans Police Department and Louisiana State Patrol officers, court delays mean that those officers are less available to patrol the streets and perform other duties integral to public safety. In 2019, 57% of observed court sessions started late, with 13% of courts starting over 30 minutes late. Of those courtrooms observed to start late, 88% of judges neither provided an explanation for their lateness nor apologized to the public or law enforcement. Of the Criminal District Court sessions observed to start late, 28% kept law enforcement officers waiting for court to begin in order to testify as witnesses.

Recommendation 9: Judges should make every effort to be timely to the bench and should consider the inconvenience to the public and the cost to the taxpayer that their untimely arrival creates. If the judge has an obligation that consistently delays the judge arriving timely to the bench, the judge should change the court subpoena time, so neither the public nor public employees are forced to regularly wait in court for the judge's arrival.

Efficiency: Notice of Arraignments to Orleans Public Defenders

Court Watch NOLA, along with Orleans Public Defenders and the Clerk's Office, worked together to create a more efficient system in which the Orleans Public Defenders are notified of scheduled arraignment times by the Clerk's Office.³⁸ Using this system of communication, public defenders now have the opportunity to appear at their own clients' arraignments, rather than having other attorneys stand in for the assigned attorney.

Commendation: Court Watch NOLA commends the Clerk of Court's Office for facilitating defense attorneys' effective and efficient representation by ensuring that the attorneys are timely notified of their clients' scheduled arraignments. Court Watch NOLA commends the Orleans Public Defenders Office for flagging the problem to Court Watch NOLA's attention and working alongside Court Watch NOLA and the Clerk of Court's Office to find a solution to this systemic inefficiency.

II. Introduction

Court Watch NOLA is a not-for-profit organization whose mission is to promote reform in the Orleans Parish criminal court system through civic engagement and courtroom observation. One of Court Watch NOLA's goals is to empower the New Orleans community through legal education to demand transparency and accountability of public officials. Court Watch NOLA is objective in its approach, siding with neither the prosecution nor the defense on individual cases. Rather, Court Watch NOLA tries to increase public confidence in the Orleans parish criminal courts by examining aggregate trends and bringing transparency to court practices largely hidden from public view.

Through its extensive legal training of volunteers, Court Watch NOLA seeks to shorten the gulf between "insiders" and "outsiders." Outsiders are the victims, witnesses, (often indigent) criminal defendants, jurors, and the community at large. Insiders are the public officials who run the system: the

judges, prosecutors, defense attorneys, clerks of court, police officers, sheriff department officials, and others. Court Watch NOLA teaches outsiders the language of the court so that outsiders can bring accountability and help to solve some of the problems that insiders have lived with so regularly that they often (and unfortunately) no longer see as problematic. These problems include some of the highest rates in the country for murder, gunfire, female homicide, wrongful conviction, and incarceration.

All Court Watch NOLA volunteers undergo eight hours of legal training before they are allowed into court to monitor. Court Watch NOLA volunteers are New Orleanians: poor and wealthy; old and young; black, white, Asian, and Hispanic; newcomers, and those from the most established New Orleanian families. Court Watch NOLA volunteers learn ethical standards, criminal procedure, the tenets of objectivity, best practices, constitutional rights, state law, and municipal law. These New Orleanians observe Orleans parish criminal courts and keep New Orleans' public officials accountable. They collected the data that comprise the report below.

This 2019 Annual Report presents some of the important recent trends and recalls the history that Court Watch volunteers and the community at large have witnessed during the year. Year-to-year, the New Orleans criminal justice system changes, sometimes incrementally, and sometimes in much larger ways. There are many change agents at work, both within and outside of the New Orleans criminal justice system. Many of these change agents have affected this report, either as whistleblowers or through official, more formal actions. There are many civil rights cases, criminal court cases, and local and national trends and occurrences that shape our understanding of public safety and our sense of justice. These events and facts shift our priorities through fear, the desire for change, and sometimes both. This 2019 history is chronicled below:

Civil Rights Litigation and Consent Decrees Against or Involving New Orleans Public Officials and Institutions with Court Activity in 2019:

- i. *Singleton v. Cannizzaro*³⁹ was originally filed in 2017 against District Attorney Cannizzaro for serving fraudulent subpoenas upon victims and witnesses.⁴⁰ In 2019, District Attorney Cannizzaro appealed the lower federal court decision against him claiming he had absolute immunity for his actions.⁴¹ The 5th Circuit Court of Appeals denied Cannizzaro's appeal in 2020.⁴²
- ii. *Maldonado v. Cannizzaro*⁴³ was originally filed in 2017 against District Attorney Cannizzaro for non-compliance with a public records request to produce the fraudulent subpoenas District Attorney Cannizzaro's office had created.⁴⁴ In 2019, *the Lens* won a \$30,000 judgement against District Attorney Cannizzaro for attorneys' fees, and the case was otherwise decided in favor of *the Lens*.⁴⁵
- iii. *Washington v. Cannizzaro*⁴⁶ was originally filed in 2017 against District Attorney Cannizzaro for non-compliance with a public records request relating to lawful subpoenas.⁴⁷ In 2019, the case was returned to the lower court, where it is currently being argued after the appeals court found against District Attorney Cannizzaro.⁴⁸
- iv. *Jones v. Cannizzaro et al*⁴⁹ is a wrongful conviction case originally filed in 2018 for suppression of evidence.⁵⁰ In 2019, the federal judge quashed Robert Jones's deposition notice and subpoena for a specific witness.⁵¹ Also in 2019, the federal court denied District Attorney Cannizzaro's motion (for summary judgement) to dismiss the case.⁵² The case is still pending.⁵³
- v. *Floyd v. Dillmann, London, Cannizzaro and Doe*⁵⁴ was filed in 2019 on behalf of John Floyd to demand damages for his wrongful conviction.⁵⁵ Also in 2019, District Attorney Cannizzaro filed a motion to dismiss; no decision has been issued at the date of this report.⁵⁶
- vi. *Morgan v. Connick, Cannizzaro, and Tamborella*⁵⁷ is a wrongful conviction suit filed in 2017. In 2018, District Attorney Cannizzaro's motion to dismiss was denied.⁵⁸ The case is still pending.⁵⁹
- vii. *Caliste v. Cantrell*⁶⁰ was filed against Orleans Parish Magistrate Harry Cantrell in 2017 for unconstitutional bail and bond practices.⁶¹ In 2019, Magistrate Cantrell appealed the federal court's decision against him but lost the appeal,⁶² as well as a rehearing of his case.⁶³
- viii. *Moran v. Keva Landrum- Johnson* was filed against the Orleans Parish Criminal District Court judges in 2019 for unconstitutional bail and bond practices.⁶⁴ In 2019, the Orleans Parish Criminal District Court judges filed a motion to dismiss.⁶⁵ As of the date of this report, the federal court has not issued a decision.
- ix. *Cain v. the City of New Orleans*⁶⁶ was filed in 2016 for the unconstitutional imprisonment of indigent defendants for nonpayment of court fines and fees.⁶⁷ By 2019, the only defendants left in the suit were the Orleans Parish Criminal District Court judges and the Judicial Administrator. A declaratory judgement against the judges was granted by the lower federal court, and the Fifth Circuit Court of Appeals denied the judges' appeal.⁶⁸
- x. *United States of America v. City of New Orleans*⁶⁹ was first filed against the New Orleans Police Department in 2012 and became the most expansive consent decree ever filed in the United States.⁷⁰ In 2019, the New Orleans Police Department was in its seventh year of the consent decree.⁷¹
- xi. *Ashawn Jones, et. al. and the United States of America v. Marlin Gusman, Sheriff* was filed against the Orleans Parish Sheriff's Office in 2012.⁷² In 2019, the Orleans Parish Sheriff's Office was in its sixth year of the consent decree.⁷³

Notable Criminal Cases⁷⁴ and Other Mentions in Criminal Court in 2019:

- i. *State v. Catina Curley*: In Judge Hunter's court, Catina Curley was acquitted of second-degree murder on March 1, 2019 after a retrial of her case. The Louisiana Supreme Court had previously overturned and required a retrial of Curley's case, stating that her defense attorney should have called experts on Battered Woman Syndrome at Curley's first trial.⁷⁵
- ii. *State v. Widner Degruy*: In Judge Flemings-Davillier's court, Widner Degruy, a rapper signed to Little Wayne's record label, was found guilty of double murder on April 8, 2019.⁷⁶
- iii. *State v. Reagan Preatto*:⁷⁷ In Judge Bonin's court, on September 20, 2019, Reagan Preatto was convicted by split decision of third-degree rape and an aggravated crime against nature. He received life in jail.⁷⁸ The case became well known after the victim retracted her statement, and Judge Bonin allowed the victim's original statement to the prosecution to be introduced to the jury. Subsequently, Judge Bonin denied the defense from presenting testimony of the victim's subsequent recantations and questioned the defense's contact with the victim. As a result of Judge Bonin's questions, the defense attorneys invoked their Fifth Amendment privileges and withdrew from representing the defendant.⁷⁹
- iv. *State v. Derrick Groves and Kendall Barnes*: In Judge Bonin's court, on October 25, 2019, Groves and Barnes were found guilty of murdering three people and hurting two others during Mardi Gras 2018 in the Ninth Ward. They received mandatory life sentences.⁸⁰
- v. *State v. Jabar Kensey*: In ad hoc Judge Waldron's court, on October 9, 2019, in a process called jury nullification, a significant number of jurors refused to deliberate over a felony marijuana possession case, stating their belief that marijuana should not be illegal. Kensey ended up pleading guilty to a much less serious misdemeanor offense, receiving 12 weekend days in jail, instead of the 15 to 20 years in jail he could have received if found guilty at trial due to his previous criminal record.⁸¹
- vi. *State v. Tashonty Toney*: In Judge White's court, on October 28, 2019, Tashonty Toney pled guilty to two counts of vehicular homicide, seven counts of vehicular negligent injuring, and seven counts of hit and run for killing two cyclists and injuring seven more in a drunk driving crash on Esplanade Avenue after the Endymion Parade.⁸² Judge White sentenced Toney to ninety years after hearing testimony from the victims' family members requesting a stiff sentence.⁸³
- vii. *State v. James Nero*: In ad hoc Judge Waldron's court, the defendant was acquitted of murder by a split jury on November 20, 2019 in a "stand your ground case." The killing took place outside a bar at the intersection of Bienville and Decatur Streets in the French Quarter.⁸⁴
- viii. *State v. Donny Maxwell*: In Judge Buras's court, Maxwell, a 17-year-old defendant, took a plea on December 16, 2019 to manslaughter, armed robbery, obstruction of justice, and conspiracy in connection with the murder of New Orleans rapper Young Greatness.⁸⁵ He has yet to be sentenced at the date of this report.⁸⁶
- ix. *State v. Crystal Baumann*: In Judge Pittman's court, Baumann was released pending trial on September 17, 2019, after being charged with murdering her ex-boyfriend. On March 3, 2020, Judge Pittman sentenced Bauman to five years in jail after defense attorneys argued that she was the victim of domestic violence at the hands of her deceased ex-boyfriend and suffered from Battered Woman Syndrome as a consequence.⁸⁷
- x. *The New Orleans Re-entry Court Workforce Development Program* received a Department of Justice COAP Grant for \$900,000 and a Louisiana Department of Public Safety and Corrections Justice Reinvestment (JRI) Grant for \$600,00 for financial years 2019 to 2021.⁸⁸ The Re-entry Court program relies on men serving life sentences at Angola Penitentiary to teach new inmates GED classes and job training in skilled trades like plumbing and carpentry.⁸⁹ Judge White and Judge Hunter received the American Correctional Association's Innovation in Corrections Award,⁹⁰ the Louisiana State Penitentiary State Re-Entry Service Award,⁹¹ and were named American Bar Association Legal Rebels for having created the program.⁹²

Federal Trends, Changes and Criminal Cases Related to Criminal Justice:

- i. *First Step Act*: Congress passed a comprehensive set of laws that reduced federal sentencing for drug crimes and ended automatic life sentences under the three-strike penalty for certain felonies. The reform package is estimated to affect four thousand prisoners who could immediately qualify for early release.⁹³ President Trump signed the reform package in December 2018, and it went into effect in July 2019.⁹⁴
- ii. *Marijuana Legalization*: By the time this report is published, 24 states (including Louisiana) have legalized medical marijuana, and 11 states have legalized recreational marijuana.⁹⁵
- iii. *Harvey Weinstein*: Sexual assault and harassment became more of a focus as the country watched New York City prosecutors charge Weinstein with several counts of rape and related charges. In 2019, Weinstein lost a bid to move the case out of New York City. In 2020, Weinstein was found guilty of first-degree rape, third-degree rape, and sexual assault.⁹⁶ He was sentenced to 23 years in jail.⁹⁷
- iv. *Drug Overdoses*: Between February 2018 and February 2019, there were an estimated 69,029 drug overdose deaths in the United States, a 2.9% decline from a year before. Nearly seven out of ten overdoses were for opioids (47% due to fentanyl or other synthetic opioids besides methadone, and 22% due to heroin), and one in five were overdoses of methamphetamine or other psychostimulants (23% due to cocaine).⁹⁸

- v. *Hate Crimes*: In 2019, the FBI reported that personal attacks motivated by bias or prejudice reached a 16-year high during 2018, with an increase in violence against Latinos and a decrease in assaults targeting Muslims and Arab Americans. Hate crimes against property decreased in 2018, while physical assaults against people increased.⁹⁹ The 2019 national hate crime rate has not been released at the date of this report.¹⁰⁰
- vi. *Sexual Assault*: In 2019, the Department of Justice reported that 734,630 people had been victims of threatened, attempted, or completed rape in 2018 and that reports to the police of rape and sexual assault declined from 40% in 2017 to about 25% in 2018.¹⁰¹ The 2019 sexual assault crime rate has not been released at the time of this report.¹⁰²
- vii. *Violent Crime*: In 2019, the Federal Bureau of Investigation reported that violent crime (murder, nonnegligent manslaughter, forcible rape, robbery, and aggravated assault) fell between 1990 and 2018.¹⁰³ All categories of violent crime offenses decreased between the first half of 2018 and the first half of 2019; robbery and rape both fell by over 7%, murder and nonnegligent manslaughter by over 3%, and aggravated assault by 0.3%.¹⁰⁴
- viii. *Property Crime*: In 2019, the Federal Bureau of Investigations reported that property crime offenses (burglary, larceny-theft, motor vehicle theft, and arson) declined 6.3% in 2018 compared with the 2017 estimate.¹⁰⁵ All categories of property crime offenses decreased between the first half of 2018 and the first half of 2019, burglary fell by 11%, motor vehicle theft by over 6%, and larceny-theft by over 4%.¹⁰⁶

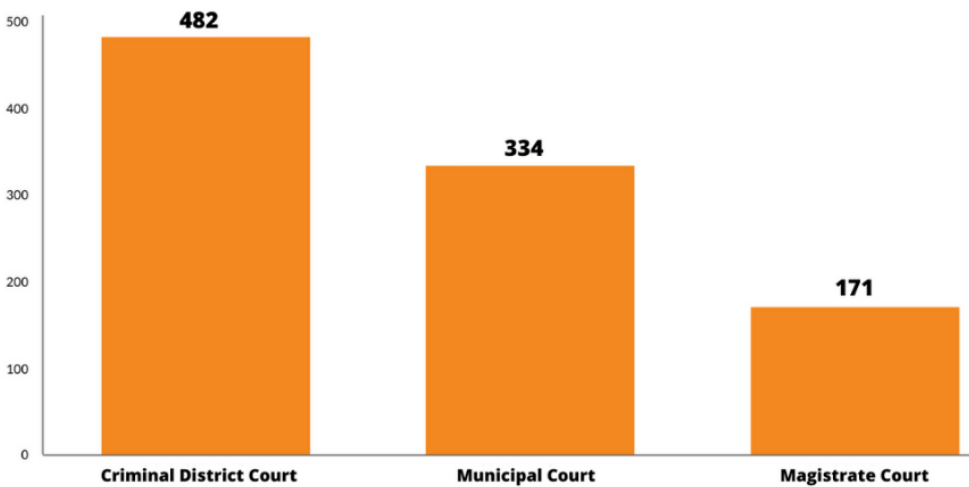
It is important for political officials to be challenged by the criminal justice trends, the stories that make the front page of the newspapers, the radio and television talk shows, and the conversations that occur in their courts and neighborhoods. It is important that political officials are challenged by the aggregate data they create, but which they often do not collect or examine. This is exactly what Court Watch NOLA does best: create the conversation and the community understanding that spurs change, so that New Orleans is not left behind and instead, pursues best practices in its criminal justice system.

Increasingly, the political officials we monitor are reading our reports and starting to institute the best practices we have tirelessly researched and recommended. Certainly, reading the reports and instituting the report recommendations is less painful and expensive for us as a city than spending the millions of dollars that litigation often incurs. However, we are absolutely certain: you, the concerned community, the journalists, the litigators, and the legislators who are reading this research and examining the aggregate data, will do what you do best: discuss next steps and initiate change whether by passing new laws, talking to your legislators, voting, becoming active in an election, or signing up to be trained as a court watcher.

III. Methodology

In 2019, Court Watch NOLA collected the observations of 188 volunteers in three different Orleans Parish criminal courts: Criminal District, Magistrate, and Municipal. All observers participated in a two-day, eight-hour training before they began independent observations, and some observers received a refresher training upon request. Court Watch NOLA volunteers used four physical data collection tools that were used to guide their observations and record the data in the courtrooms: one for each court, plus an additional data collection tool for Municipal Court first appearances. These data collection tools covered a wide variety of information, drawing primarily from Court Watch NOLA volunteers' in-court observations and information from individual courts' case dockets. Court dockets were provided to Court Watch NOLA volunteers by the Orleans Parish Clerk of Court and the New Orleans Municipal Clerk of Court. Volunteers then entered the data they recorded in the courtroom on the data collection tools, which was then entered into an online database using Survey Monkey, a cloud-based survey development software. Data was exported to SPSS (Statistical Package for the Social Sciences, V20) for data cleaning and analysis. Data was collected from January 1, 2019 to December 31, 2019.

Figure 1. Number of Observations Per Court



The total number of observations of each court are presented above. A total of 987 court session observations were conducted across all three courts, and a total of 1,591 arrestees' first appearance bail hearings were observed in Magistrate Court and Municipal Court. Court Watch NOLA strives to present data as accurately as possible; as such, whereas some data are presented per judge, some data are presented per court to ensure that the sample sizes upon which CWN draws its conclusions are sufficiently representative of court proceedings. The data presented in this report and collected by the Court Watch NOLA volunteers is both quantitative and qualitative in nature. Because Court Watch NOLA volunteers are not able to be present for all sessions in all courtrooms, it is important to note that Court Watch NOLA's data typically captures an underestimate of the number of occurrences of any one examined issue. The data presented in this report, therefore, represents a sample or a minimum number of incidents. Figure 1 shows the number of court session observations (hereafter referred to as "observations") conducted in 2019 in each of the three courts. Hereafter, "all courts" refers to all criminal courts that Court Watch NOLA currently monitors, namely Orleans Parish Criminal District Court, Orleans Parish Magistrate Court, and New Orleans Municipal Court. Court Watch NOLA volunteers have been monitoring

Whistleblowers aided Court Watch NOLA in compiling the information in this report. In these cases, Court Watch NOLA complied with whistleblowers' wishes to not reveal their identities. Court Watch NOLA also often agreed not to reveal, (in the case of a defense attorney) the identity of their clients, (in the case of a prosecutor) the cases which they prosecuted, or (in the case of victims) the cases in which they were victimized.

Court Watch NOLA volunteers have observed Orleans Parish Criminal District Court for 13 years, Orleans Parish Magistrate Court for four years, and New Orleans Municipal Court for three years.

IV. Victim Rights

Court Watch NOLA is greatly encouraged by the robustness of New Orleanians' public debate over victim rights in 2019. It is a universal human right for every person to live secure in their person. The Universal Declaration of Human Rights, adopted in 1948, guarantees the international right to security.¹⁰⁷ The United States Constitution Tenth Amendment guarantees "police power" to the states to ensure the protection of public safety, welfare, and health.¹⁰⁸ The Louisiana Crime Victim Bill of Rights gives victims "the right to reasonable notice and to be present and heard during all critical stages of pre- and post-conviction proceedings."¹⁰⁹ And yet victims are often left out of the process intended to ensure their safety and are not provided the resources to make them whole. In speaking on a constitutional amendment to protect the rights of the victim, the United States Senate Committee on the Judiciary stated,

"Too often [victims] are left uninformed about critical proceedings, such as bail hearings, plea hearings, and sentences. Too often their safety is not considered by courts and parole boards determining whether to release dangerous offenders. Too often they are left with financial losses

*that should be repaid by criminal offenders. Too often they are denied any opportunity to make a statement that might provide vital information for a judge. Time and again crime survivors testified before the Committee that being left out of the process of justice was extremely painful for them. One victim even found the process worse than the crime: 'I will never forget being raped, kidnaped [sic], and robbed at gunpoint. However, my disillusionment [with] the judicial system is many times more painful.'"*¹¹⁰

Because victims are often left out of the very process that has institutionally been put into place for their safety, victims and their advocates have begun to speak up.¹¹¹ Often victims have to speak for themselves, independent of the political officials they elect, when those officials do not support them with the resources and approaches that would help them be safe and secure in their person.¹¹² Often victims' voices have to be independent of the not-for-profits around them when those not-for-profits protect an ethically-challenged or ineffective public official who is not fulfilling their mandate to protect victims, but who is using victims' voices in a manner that serves only to increase the public official's power.¹¹³

Much of the recent public conversation on victim rights in New Orleans relates to the treatment of domestic violence and sex victims and the prosecution of the cases against their aggressors.¹¹⁴ Louisiana consistently ranks at the top of the list of states with the highest rates of women killed by men.¹¹⁵ According to a study from the Violence Policy Center, homicide data from 2012 to 2017 shows that Louisiana had between the second- and fourth-highest rates of women killed by men in the United States, depending on the year.¹¹⁶ According to the 2017 data, there were 63 homicides of women by men in Louisiana; 36 of the victims were African American, 25 were Caucasian, one was Asian, and one was of unknown race.¹¹⁷ In 50 of these homicide cases, the authorities reported there was a relationship, intimate or non-intimate, between the victim and the offender.¹¹⁸ Of the 28 victims killed by intimate partners, 20 were killed with a gun.¹¹⁹

However, intimate partner violence, both domestic and sexual abuse is challenging to combat. Public debate has centered around the best way to both prosecute these cases, as well as what the best treatment victims of domestic violence and sexual assault should be receiving. In October 2019, Amnesty International published a report with over 100 pages devoted to the treatment of intimate partner violence in Louisiana.¹²⁰ While the New Orleans Police Department was largely commended for its improved approach to intimate partner violence,¹²¹ other Louisiana law enforcement agencies, such as the Orleans Parish District Attorney's Office, were not.¹²² The New Orleans Police Department's improved approach to intimate partner violence was largely credited by Amnesty International to the work the New Orleans Police Department has done while under a consent decree.¹²³

The public debate in New Orleans has largely centered around the prosecutor's approach when a victim does not make themselves available to testify. After being victimized by a crime, a victim may want to work with law enforcement to investigate the crime. Alternatively, a victim may not want to cooperate and may fail to contact the police department or the district attorney's office or refuse to share information with either office.¹²⁴ Such reluctance may be in response to a perceived or actual threat of retaliation by the offender or their associates/family members. It may also be the result of more generalized community norms that discourage cooperating with police and prosecutors.¹²⁵ For example, a general lack of trust in law enforcement may deter some witnesses from cooperating.¹²⁶ Research has shown that victims sometimes refuse to cooperate with law enforcement because of emotional attachments, economic dependence, a desire for privacy, wanting to protect the offender from criminal prosecution, or wanting to protect children.¹²⁷

In 2017, it was revealed by Court Watch NOLA that District Attorney Leon Cannizzaro was incarcerating victims to compel them to testify against their aggressors.¹²⁸ Additionally, a whistleblower came to Court Watch NOLA and later revealed to *the Lens* that District Attorney Leon Cannizzaro's office had been creating fraudulent subpoenas, documents that looked like subpoenas but in fact were worthless since they were signed by a member of the district attorney's office and not by a judge. The whistleblower revealed that District Attorney Cannizzaro was serving the fraudulent subpoenas upon victims and witnesses.¹²⁹ There have been four lawsuits filed against District Attorney Cannizzaro for his activities around both real and fraudulent subpoenas served on victims.¹³⁰ One lawsuit ended with a verdict against District Attorney Cannizzaro.¹³¹ One lawsuit ended with a motion to dismiss filed by the entity who originally brought the lawsuit, once District Attorney Cannizzaro complied with the request to turn over the names of those assistant district attorneys who created the fraudulent subpoenas.¹³² The other two lawsuits were unsuccessful appealed by District Attorney Cannizzaro and are still pending.¹³³

The debate about what prosecutors should do when a victim does not want to testify has also been playing out on the national stage. In May 2019, the *New York Times* published an opinion piece lauding the approach of a few district attorneys who have prosecuted domestic violence cases without the cooperation of victims, pursuing evidence-based prosecutions using jail calls, 911 calls, crime scene photos, etc. The opinion piece argued that while every prosecutor would prefer that the victim testify, a prosecutor sometimes has sufficient evidence to establish the case beyond a reasonable doubt even when the victim fails to appear. The article counselled that where it can be proven in court that the defendant engaged in wrongdoing that caused

the victim to stay away from court, or when the victim persists in refusing to testify, the judge should, barring certain circumstances, allow the victim's previous statements to be entered as evidence to prosecute the case, the op-ed contends.¹³⁴

The week after the above opinion piece ran in the *New York Times*, a contrary opinion piece appeared that criticized prosecutions conducted without the victim's testimony, stating,

*"Survivors are not safer when cases are prosecuted without their participation. Rather than deny agency to these survivors, the justice system should transform the way it works with those who do opt to participate in the prosecution. Judges and prosecutors should be trained to consider risk assessment and management in each case, understand the complex trauma many victims experience, and gauge the dangerousness of people who abuse."*¹³⁵

Neither of the op-ed authors advocated for arresting, imprisoning, or misleading a victim to force them to testify against their aggressor. Instead, the two positions can be largely summarized as prosecute without the crime victim's participation or change the system of prosecution to hear from victims themselves, what they need in order to heal from and prevent the abuse.

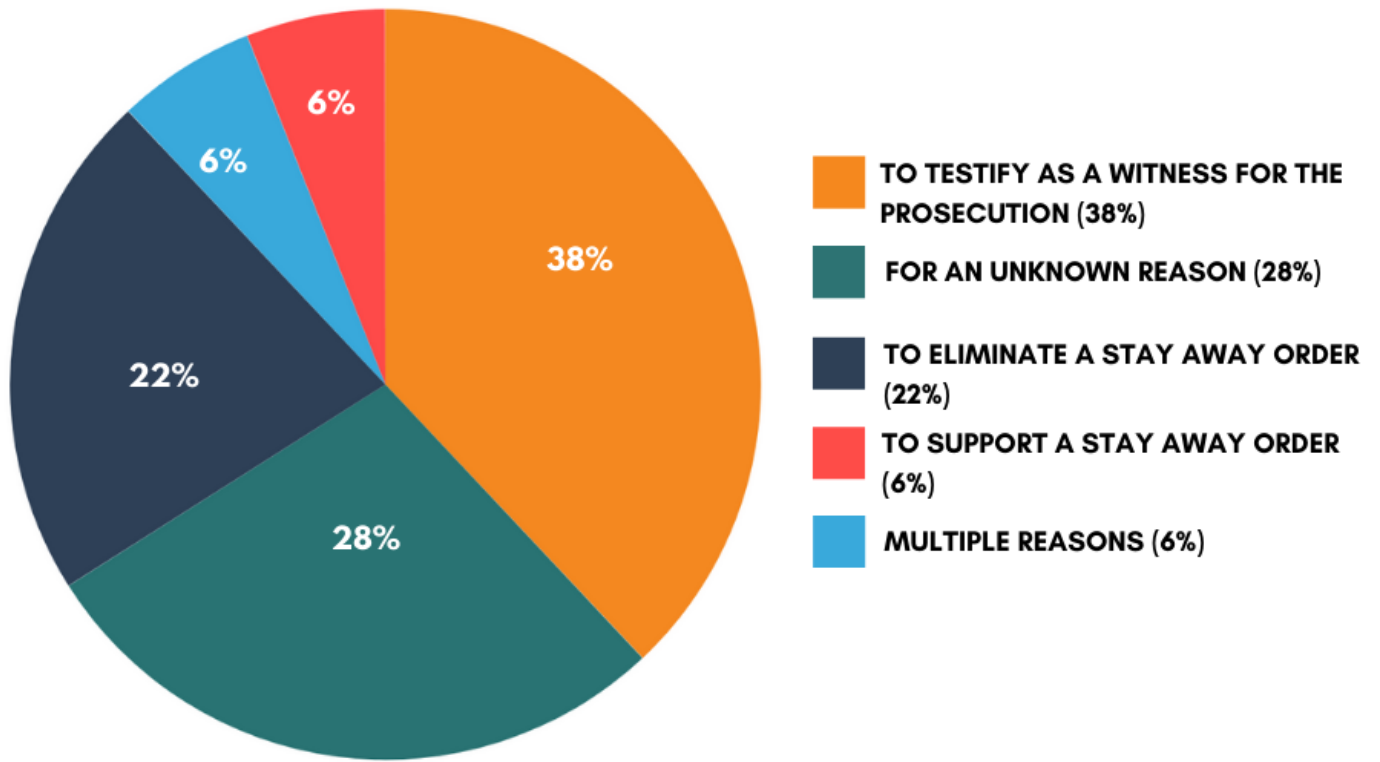
a. Domestic Violence Felony Refusals

In December 2019, victims whose crimes were prosecuted in New Orleans Municipal Court received more public attention than they had in the past. Jeff Asher, the crime analyst for the New Orleans City Council revealed that District Attorney Leon Cannizzaro had dismissed 91% of domestic violence misdemeanor cases and that only 7% of domestic violence misdemeanor cases resulted in conviction.¹³⁶ Jeff Asher also revealed that over a two-year period, between 2018 and the end of 2019, the district attorney dropped charges in about 83% of misdemeanor domestic violence cases.¹³⁷ In that two-year period, according to statistics gathered by the city council crime analyst, misdemeanor domestic violence defendants were found guilty only 6% of the time.¹³⁸

In reaction, District Attorney Cannizzaro contended that his office was "in line with national averages." However, a guide to best practices produced by the National District Attorneys Association did not include any domestic violence dismissal statistics. Instead, the guide stated that 80% of domestic violence victims recant before a case goes to trial.¹³⁹ The same National District Attorneys Association guide states, "Prosecutors should avoid dismissing a case simply because the victim is uncooperative and instead double their efforts to hold the defendant accountable."¹⁴⁰ The National District Attorneys Association provides training, technical assistance and services to prosecutors around the country,¹⁴¹

Court Watch NOLA volunteers recorded the reason, as was stated in court, that a victim came to Municipal Court for all misdemeanor crimes, not just domestic violence. The data below is based on Court Watch NOLA volunteers' observations and reflect the stated reason given by victims of all types of crimes, as to why they appeared in Municipal Court. It differs from the City Council data mentioned above since the City Council data reflects only domestic violence dismissals in Municipal Court. In 2019, all misdemeanor domestic violence cases were heard in New Orleans Municipal Court.

Figure 2. Why Victims Came to Municipal Court

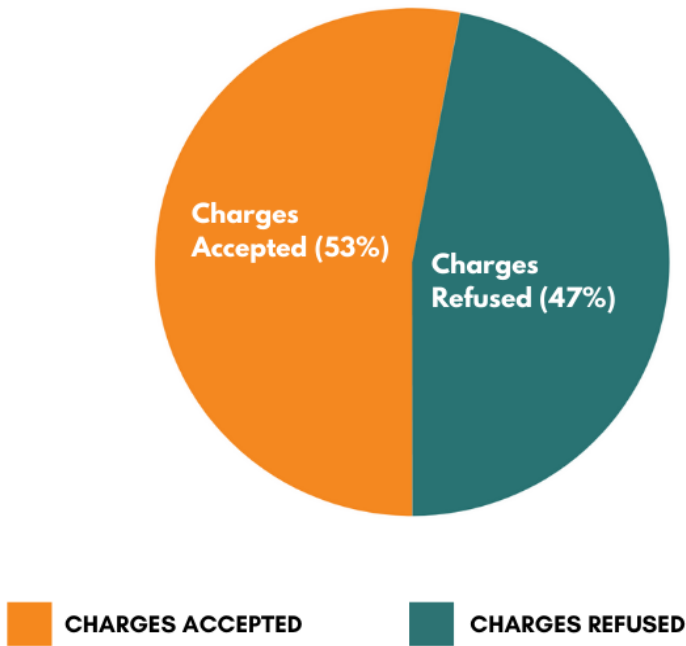


N = 32 Orleans Parish Municipal Court observations.

A felony case is different from a misdemeanor case in that defendants found guilty can be sentenced to hard labor (that is, to a state correctional facility rather than a parish jail).¹⁴² Felony offenses tend to be more serious offenses than misdemeanors and in the case of felony domestic violence, the injuries often must be more severe, the weapons used more dangerous. All felony cases in Orleans Parish are heard in Criminal District Court.¹⁴³ In order for a case to move from Magistrate Court to Criminal District Court, the New Orleans District Attorney’s Office has to determine that there is enough evidence to believe a felony offense has occurred.¹⁴⁴ A domestic violence charge can be refused by the District Attorney when, after an arrest, a victim is no longer willing to prosecute the case,¹⁴⁵ or when, even with the victim’s participation, the prosecutor determines the case and its evidence is insufficient to proceed with the prosecution.¹⁴⁶ It should be noted that the New Orleans Police Department has an internal policy encouraging an arrest in the majority of domestic violence calls.¹⁴⁷ However, in order for a case to move from Magistrate Court to Criminal District Court, it is the Orleans Parish District Attorney’s Office that has to determine there is enough evidence to believe a felony offense has occurred.¹⁴⁸ The evidentiary standards for the two offices are different.

Figure 3 shows that domestic violence felony charges were refused in 432 or 47% of 2019 felony domestic violence arrests.

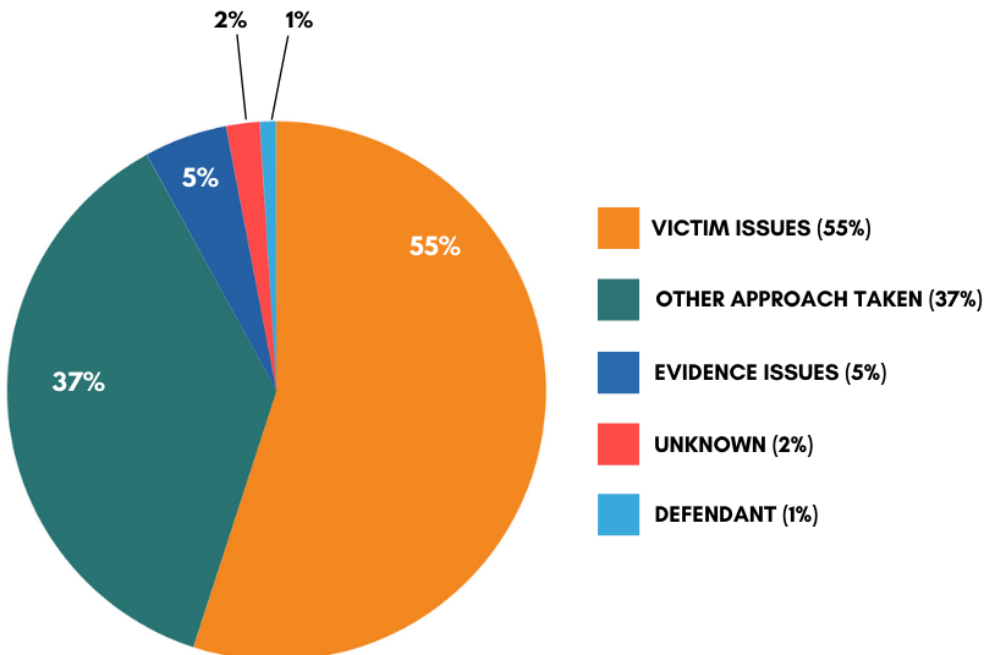
Figure 3. Frequency of Refused Felony Domestic Violence Charges



Source: Orleans Parish Sheriff's Office Docket Master; Orleans Parish District Attorney's Office. *N* = 924.

The Orleans Parish District Attorney's Office provided Court Watch NOLA with its reasons why 2019 felony domestic violence charges were refused. The data that the District Attorney's Office provided is presented in Figure 4.

Figure 4. The District Attorney's Reasons for Refusing Felony Domestic Violence Charges



Source: Orleans Parish District Attorney's Office. *N* = 498 felony domestic violence charges (Victim problems: signs off/refuses to prosecute, no show/unlocatable; Evidence problems: witness unbelievable or implausible, circumstantial testimony, other evidence problems; Defendant: good defense, D.A. diversion; Other approaches taken: prosecuting other charges (against the defendant), referral to Municipal Court, prescribed; Unknown: duplication, no reason provided).

Some advocates have tried to focus the debate about domestic violence prosecutions on better resources. In 2019, Mary Claire Landry of the Family Justice Center said "Pointing fingers at each part of the system is not helpful. Pointing fingers at victims is not helpful. Figuring out how we can come up with services to improve outcomes for victims is where we should be putting our efforts. I just hope we can drop the politicization of this and really address this as a community."¹⁴⁹

Where District Attorney Cannizzaro has talked about a need for increased resources, he has talked about how his office in general is underfunded and must have an increase in resources.¹⁵⁰ There has never been a request made to New Orleans City Council specifically allocated and earmarked for the protection of victims and their need for support and trauma services. This responsibility does not solely rest on the district attorney's office, instead the mayor and the New Orleans City Council must ensure victims and the community groups that support victims have adequate resources. There is ample evidence that the few community groups that provide direct victim support and services are deeply inadequately funded.¹⁵¹ New Orleans must continue to discuss this issue publicly until we arrive at a place where victims are treated appropriately and they, not public officials, are empowered by the proper resources to gain true safety, instead of those resources being allotted to public officials.

Recommendation 1: Victims need to be provided direct resources in order to achieve true safety. While some of those resources must be provided by law enforcement in the form of victim protection services, much of the therapeutic care can be provided to the victim through non-profit programs within the community. Adequate resources and support must be directly provided to victims if we expect them to testify against their aggressors; diligent care must be spent to ensure that those resources that are earmarked for witness and victim protection are, in fact, received by victims.

b. Gun Transfers and Examining Risk in Domestic Violence Cases

On a national level, abused women are five times more likely to be killed if the aggressor owns a gun. It is 12 times more likely that a domestic violence assault will end in death if a gun is involved than would be the case, if another weapon were used.¹⁵² It has already been mentioned that Louisiana consistently ranks at the top of the list of states with the highest rates of women killed by men.¹⁵³ In Louisiana, in cases in which a woman was killed by a man and the weapon was known, 69% of these women were killed with guns.¹⁵⁴ And closer to home, the New Orleans Family Justice Center reported that approximately 40% of domestic violence and sexual assault victims aided by the organization reported that their abuser had a gun.¹⁵⁵ Certainly gun possession and risk of harm are interrelated in New Orleans criminal courts.¹⁵⁶

In 2018, a state law went into effect requiring the transfer of a firearm possessed by a person with an active domestic violence protective order against them.¹⁵⁷ The law requires that sheriff's offices, clerks of court, and district attorneys develop forms, policies, and procedures, detailing how the firearm transfer process will be conducted.¹⁵⁸ In Orleans Parish, the Sheriff's Office has provided these memos and required forms to the Chief Judge of Criminal District Court.¹⁵⁹ Specifically, these forms include an instruction form for the defendant¹⁶⁰ and a firearm transfer order.¹⁶¹

Under the new law, the court must:

- inform the defendant that the defendant is prohibited from possessing a firearm;¹⁶²
- require the defendant to complete a firearm information form that states the number of firearms in their possession, the serial number, and location of each firearm;¹⁶³
- require the defendant to transfer all firearms in their possession to the sheriff no later than 48 hours after the transfer order is made or 48 hours after the defendant's release from incarceration.¹⁶⁴

From January 2019, when the program began until May 2020, the Orleans Parish Sheriff's Office has overseen the third-party transfer of only 12 firearms and received proof of sale of just three others.¹⁶⁵ Only 2% of defendants from whom the Orleans Parish Sheriff's Office received transfer forms reported that they possessed firearms.¹⁶⁶ It is hard to say what would persuade accused domestic violence assailants to admit they owned a firearm. And when domestic violence assailants who own firearms are not forced to admit their possession of a firearm, the new state law is rendered meaningless.

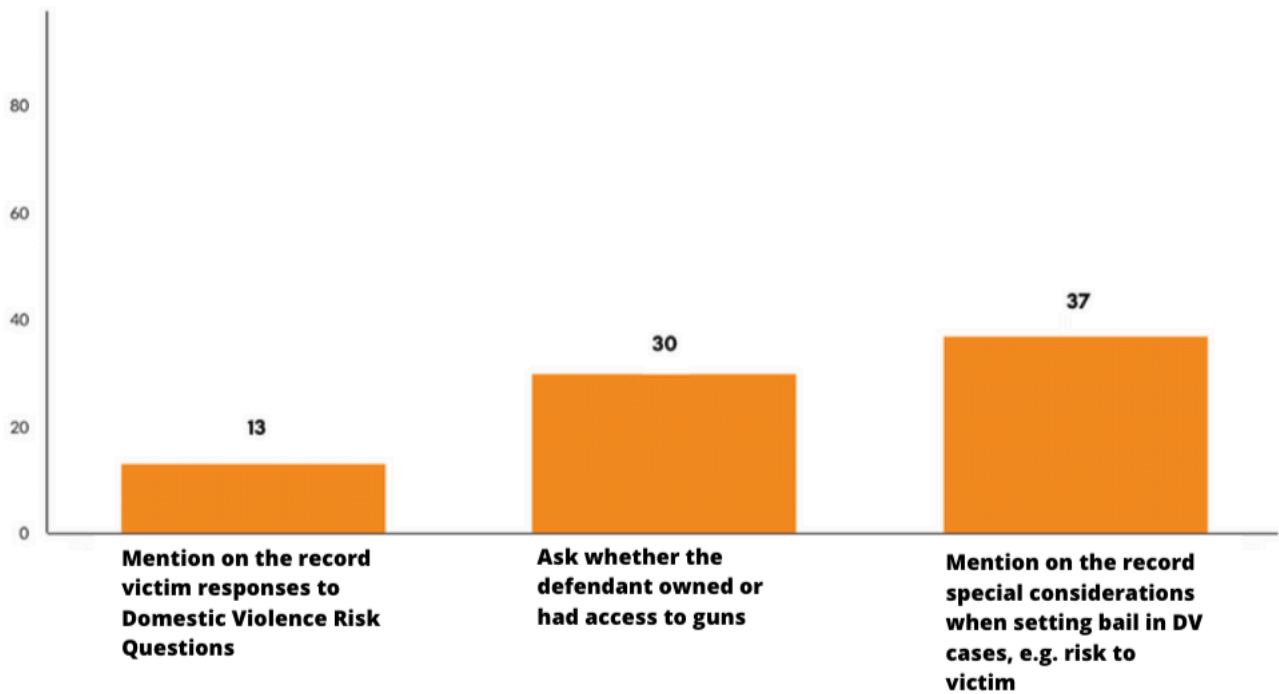
While the number of registered guns in New Orleans is unknown, the number of registered guns in Louisiana as of February 2020 was 116,831 guns.¹⁶⁷ Similar to many states, Louisiana law does not require registration for firearm purchases.¹⁶⁸ Likely, the number of unregistered firearms in New Orleans is many more than the 116,831 registered guns in Louisiana.¹⁶⁹ It is hard to believe how after a year of a firearm transfer program, the program is working if it netted 15 firearm transfers.

Risk of release and risk to public safety are key in deciding whether to release a criminal defendant. Responding New Orleans Police Department officers are required to ask domestic violence victims four risk questions while at the crime scene. These risk questions include:

- Do you think the defendant will seriously injure or kill you, your children, or someone else?
- How frequently do they intimidate, threaten, or assault you?
- Describe the time you were the most frightened or injured by them.
- Have you ever been threatened or intimidated by the defendant for seeking help or attempting to seek help from law enforcement, the courts, or others?¹⁷⁰

As seen in Figure 5, the Magistrate and Commissioners asked whether the defendant owned or had access to guns in only 30% of the court watch observations of domestic violence bail hearings. The victim’s response to the risk questions are mentioned on the record in only 13% percent of observed domestic violence bail hearings. Court Watch NOLA volunteers found that in 37% of observed domestic violence bail hearings, factors such as risk to the victim were considered on the record in fixing bail.

Figure 5. Did the Magistrate Court...



N = 232 Orleans Parish Magistrate Court observations.

One explanation as to why the risk questions are mentioned on the record in only 13% percent of observed domestic violence bail hearings may be that the answers to risk questions collected by the New Orleans Police Department have not been consistently placed in the court file by the New Orleans police Department.¹⁷¹ Additionally, if a prosecutor does not appear at the bail hearing, the Magistrate or Commissioner will often be unable to consider essential risk factors in fixing bail. The Magistrate or Commissioner can only take into account risk to a victim if provided with the supporting information.

In cases in which the Magistrate or a Commissioner does consider the risk questions or details relating to risk, this information should be mentioned publicly on the record by the Magistrate or Commissioner. This is important so that anyone reviewing the record can understand the factors the judge took into consideration when deciding whether to release a defendant. Community members may attend a hearing solely to hear these decisions, and it is important that they understand the factors that the Magistrate or Commissioner considered in making the decision whether to release the criminal defendant or not.

Recommendation 2: The Orleans Parish Magistrate and Commissioners must inform every criminal defendant subject to a pertinent domestic violence stay-away order that they are prohibited from possessing a firearm. The New Orleans Police Department, the Orleans Parish District Attorney's Office, and the Magistrate Court judges must work together to ensure a victim's expression of risk is taken into consideration at a bail hearing.

c. District Attorney's Absence from Bail Hearings

First appearances in Magistrate Court are important to victims since the Court might release the defendant, which is sometimes welcomed, but often is not.¹⁷² Victim rights advocates have established the right of victims to attend court hearings and trial, stating that "part of their recovery [depends] on their seeing—first hand, if possible—our system of justice at work."¹⁷³ The victim has more interest than anyone in making sure an arrestee is not a danger to be released.¹⁷⁴

In 2016, Court Watch NOLA persuaded the Orleans Parish Sheriff's Office to allow the general public, including victims, media, and family members of the defendant into all sessions of Magistrate Court. Previously, an Orleans Parish Sheriff Office deputy had barred general entrance to bail hearings at night and on weekends.¹⁷⁵ By persuading the Sheriff's Office to grant public access on nights and weekends, Court Watch NOLA made it possible for victims to observe pretrial release and bail/bond hearings that they had often previously been barred from attending. In 2016, Court Watch NOLA commended the Orleans Parish Sheriff's Office for opening access to the public for all first appearances in Magistrate Court.¹⁷⁶

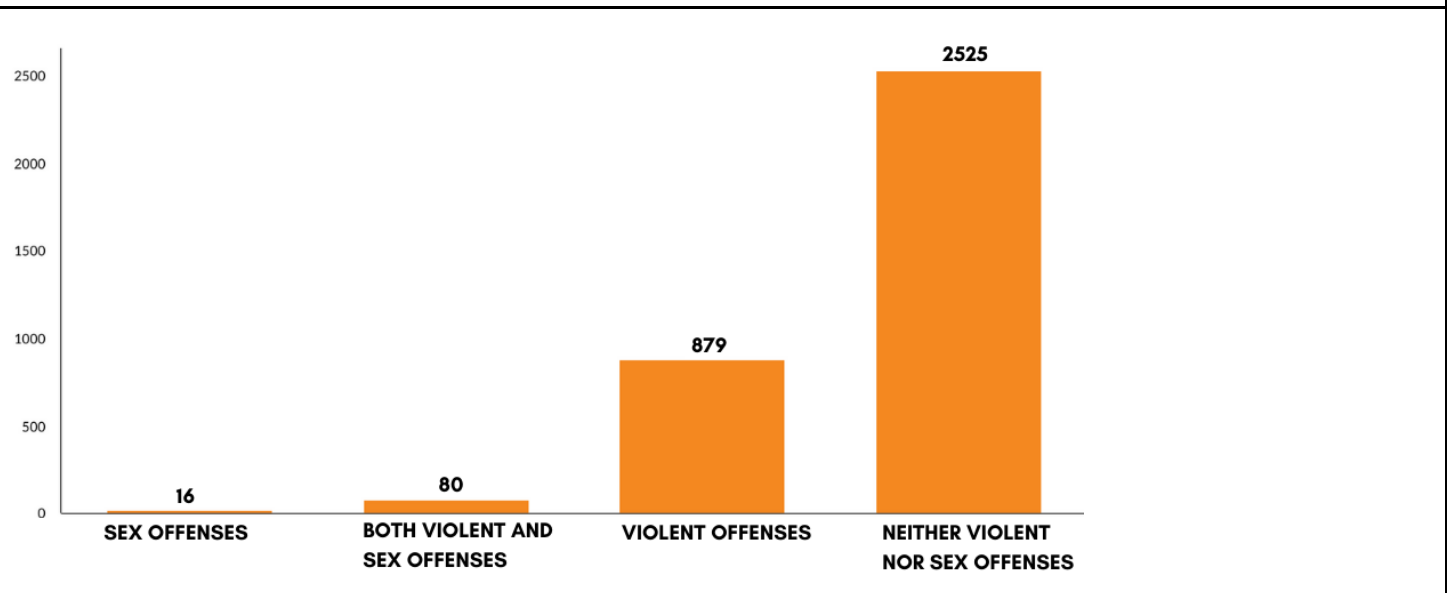
Both probable cause and pretrial release are determined by an Orleans parish magistrate judge or a commissioner, usually after arguments from both the prosecution and the defense.¹⁷⁷ However, since March 2018, assistant district attorneys have not appeared in 14 out of 19 Magistrate Court settings per week. In 2019, when pressed to answer why the District Attorney's Office did not staff bail hearings with assistant district attorneys, the District Attorney's Office cited budget problems.¹⁷⁸ This trend of absentia continued despite in 2019, the full restoration of the District Attorney's budget to its 2016 amount, 2016 being a year in which District Attorney Cannizzaro did staff all first appearances bail hearings with the budget he had.¹⁷⁹

The absence of assistant district attorneys in Magistrate Court, a regular occurrence in 2019, means that there was no one present to speak to victims or on their behalf during bail arguments in more than 2/3 of 2019 Magistrate Court settings.

While there is no explicit legal requirement that a prosecutor be present at a pretrial release or bail hearing,¹⁸⁰ there are responsibilities a prosecutor is unable to perform if not present. For example, without a prosecutor present in Magistrate Court, the Court cannot invoke a Gwen Law hearing,¹⁸¹ which permits incarceration of an arrestee without bail until a hearing within five days of the first appearance¹⁸² in cases in which the defendant is charged with domestic abuse battery, violation of protective orders, stalking, or any felony offense involving the use or threatened use of force or a deadly weapon upon the defendant's family member, household member, or dating partner.¹⁸³

In 2019, the District Attorney's Office chose not to appear in 3,500 bail arguments.¹⁸⁴ The figure below illustrates Court Watch NOLA's tracking of the type and number of each criminal case heard in Magistrate Court without a prosecutor present. Cases in Figure 6 were categorized as "violent" when the case involved any charges listed under Louisiana Revised Statute §14:2(B), as "sex offenses" when the case involved any charges listed under Louisiana Revised Statute §15:541(24)(a), as "both" when the case involved any charges listed under both the sex offense or the violent offense sections, and "neither" when the case's charges were not listed under either the sex offense or violent section. The analysis in Figure 6 assumes that representatives of the District Attorney's Office attended sessions only in court Section M1 in 2019 as this is what Court Watch NOLA volunteers experience showed and various court staff affirmed.

Figure 6. Types of Unindicted Felony Cases Heard for a Bail Argument without a Prosecutor Present



N = 3,500 cases heard in Orleans Parish Magistrate Court Sections M2-M5. Source: Orleans Parish Sheriff’s Office Docket Master.

Often, victims do not have any contact with the District Attorney’s Office until they appear in Magistrate Court.¹⁸⁵ Sometimes victims will not have spoken to a police officer unless they encountered one at the crime scene or during an earlier investigation.¹⁸⁶ Victims often have pivotal information about the arrestees’ likelihood of returning to court and their likelihood of committing new crimes if released pretrial.¹⁸⁷ Without a prosecutor in Magistrate Court for victims to speak with, this valuable pretrial risk information is often not transmitted to the court. The purpose of bail under the Louisiana Code of Criminal Procedure is to “ensure the presence of the defendant, as required, and the safety of any other person and the community.”¹⁸⁸ One of the factors the judge is required to consider in determining pretrial release is “the nature and seriousness of the danger to any other person or the community that would be posed by the defendant’s release.”¹⁸⁹ Without the prosecutor in Magistrate Court, the victim has lost a crucial opportunity to express their opinion about the defendant’s danger to them or lack thereof.

Recommendation 3: The Orleans Parish District Attorney’s Office should attend and take part in all first appearance bail hearings in Orleans Parish Magistrate Court. When victims have information that relates to the defendant’s pretrial release, the prosecutor should ensure such information is transmitted to the Orleans Parish Magistrate or Commissioner who is determining the defendant’s pretrial release. This would not only improve our criminal courts generally but would increase community safety.

d. Incarcerating Victims to Compel their Testimony

A number of states have material witness laws that permit the arrest and detention of any person (victim or witness) with knowledge of a crime who refuses to provide information in court.¹⁹⁰ In Louisiana, an assistant district attorney must apply to a criminal court judge to obtain a material witness warrant.¹⁹¹ The judge can grant or deny the material witness warrant based on whether “the testimony of [the] witness is essential... and it is shown that it may become impracticable to secure the presence of the person by subpoena.”¹⁹² If a judge issues a material witness warrant, a victim or a witness can be arrested and will remain in jail until they post bond, their testimony is taken, or the case is otherwise disposed of.¹⁹³ Only sex crime and domestic violence victims have the guaranteed right to counsel if the victim is incarcerated or subjected to a material witness warrant.¹⁹⁴ Other victims arrested on a material witness warrant are explicitly excluded from right to counsel.¹⁹⁵

In writing about intimate partner violence in Louisiana, Amnesty International made a point of criticizing the practice of incarcerating victims,

“Pre-emptive detention of victims is arbitrary in that it is inappropriate, unjust, as well as lacking reasonableness, necessity and proportionality. The inappropriateness and unjust nature of such arrests and detention is borne out of the fact that, as complainants in a criminal matter, these are the very victims the criminal justice system should be designed to protect. Survivors of intimate partner violence also face a significant risk of re-traumatization or re-victimization. Placing a victim of intimate partner violence in detention so as to secure their attendance in court proceedings is unlikely ever to meet the test of proportionality; that is to say it will always cause more harm than is proportionate to their refusal to testify through the trauma it will cause to the victim of an already significant crime. Pre-emptive detention will rarely be necessary as there are less draconian measures which can generally achieve the aim pursued, such as providing comprehensive support services to survivors, so they feel able to safely testify.”¹⁹⁶

Some prosecutors have taken a public stance against incarcerating victims for failure to cooperate with law enforcement.¹⁹⁷ For example, Houston District Attorney Kimberly Ogg promised to never incarcerate a victim for failing to cooperate with the prosecution. This promise came after her predecessor incarcerated a rape victim, and the victim had a mental breakdown while testifying against her aggressor in court.¹⁹⁸ The Brooklyn District Attorney’s Office has also taken a position against material witness warrants, believing that confining witnesses and victims until and unless they testify leads to false testimony and thus wrongful convictions.¹⁹⁹ Other major cities such as Chicago²⁰⁰ and Philadelphia²⁰¹ have taken similar positions. With some crimes, such as domestic violence²⁰² and sexual assault that are already serially underreported, research shows that the arrest of non-cooperative victims has a chilling effect on victims already reluctant to report the crime to law enforcement.²⁰³

There has been a groundswell of attention paid to District Attorney Cannizzaro’s attempts to incarcerate victims for failing to testify in the criminal cases against their aggressors. A count of online news articles finds more than 100 reports on the incarceration of victims in New Orleans, from Court Watch NOLA’s first mention of this practice in its 2016 Annual Report, published in Spring 2017 to present.²⁰⁴

On February 17, 2019, New Orleans City Council sponsored a resolution that requested “the Orleans Parish District Attorney, New Orleans Police Department, Orleans Criminal District Court, New Orleans Magistrate Court and the Orleans Parish Sheriff’s Office cease from jailing victims of domestic violence and sexual assault to compel them to testify via material witness warrants, and instead implement community-based approaches to rebuilding trust and encouraging the cooperation of victims.” This was the second such resolution. An earlier and similar resolution was passed in 2017.²⁰⁵ The second City Council resolution encouraged the state legislature to act.

On June 7, 2019, the Louisiana State Legislature enacted Senate Bill 146, which permitted the arrest and incarceration of domestic violence and sex crime victims only if a judge deems it “absolutely necessary” and “after all other remedies have been exhausted in order to prevent further victimization and trauma to the victims.”²⁰⁶ While the original legislative bill had proposed a blanket ban on the arrest and jailing of sexual assault or domestic violence victims under a material witness warrant, the bill’s sponsoring senator revised the bill to allow the victim’s arrest if a judge deems it “absolutely necessary.” This bill revision occurred after the Association of District Attorneys publicly announced its opposition, stating that “the practice of jailing rape crime and domestic violence victims was necessary in some rare cases.”²⁰⁷ In the words of Amnesty International, “The bill that was eventually passed falls short of international standards protecting victims from arbitrary detention,” because the law still allows district attorneys to incarcerate sex crime and domestic violence victims.²⁰⁸

The passage of this new Louisiana law does not appear to have stopped District Attorney Cannizzaro from requesting that domestic violence and sex crime victims be incarcerated for failing to come to court to testify. However, three years of national and local public pressure, along with the passage of the above-mentioned legislative bill, do seem to have caused District Attorney Cannizzaro to seek the incarceration of victims through mechanisms other than the now-notorious material witness warrant. In 2019, some victims were summoned to testify through a special subpoena called an instanter subpoena; if they failed to appear in court they could be arrested. In other circumstances, the assistant district attorney asked that a victim be served a subpoena in court and then arrested later on a *capias* warrant when the victim failed to return to court to testify. No matter the approach the District Attorney used, material witness warrant or another type of subpoena followed up with a *capias* warrant, the victim was still subjected to arrest and incarceration for failing to come to court. Some judges called for the arrest of victims for failing to appear in court, while other judges refused. Judges have much more discretion to decide whether or not to incarcerate under regular court or an instanter subpoena than they do with material witness warrants.²⁰⁹ In some circumstances, when a judge called for the arrest of a crime victim for failing to come to court on a subpoena (as compared to a material witness warrant), they did so after having seen the crime victim in court on an earlier court date.²¹⁰

Tables 1 and 2 below represent the minimum number of cases in which the prosecution sought to incarcerate a victim for failure to testify. There may be more of such cases that Court Watch NOLA has been unable to find. Court Watch NOLA cannot ascertain all the victims District Attorney Cannizzaro's office has sought to incarcerate. When Court Watch NOLA made a public records request for all the District Attorney's material witness warrant cases, the District Attorney's Office responded that there were no such warrants requested or obtained that year.²¹¹

Table 1: Victims who Served Jail Time for Failure to Testify

Victim Identifier	Type of Warrant/ Subpoena	DA & Judge Engagement	Type of Case in which the Victim did not Testify	Days in Jail
African American Male	Court Subpoena	The DA requested a subpoena in 2019. Judge Pittman issued the capias warrant and the victim was incarcerated for failing to appear in court. ²¹²	Battery upon a Dating Partner, Aggravated Assault of a Dating Partner, Simple Criminal Damage to Property, Child Desertion	3 days

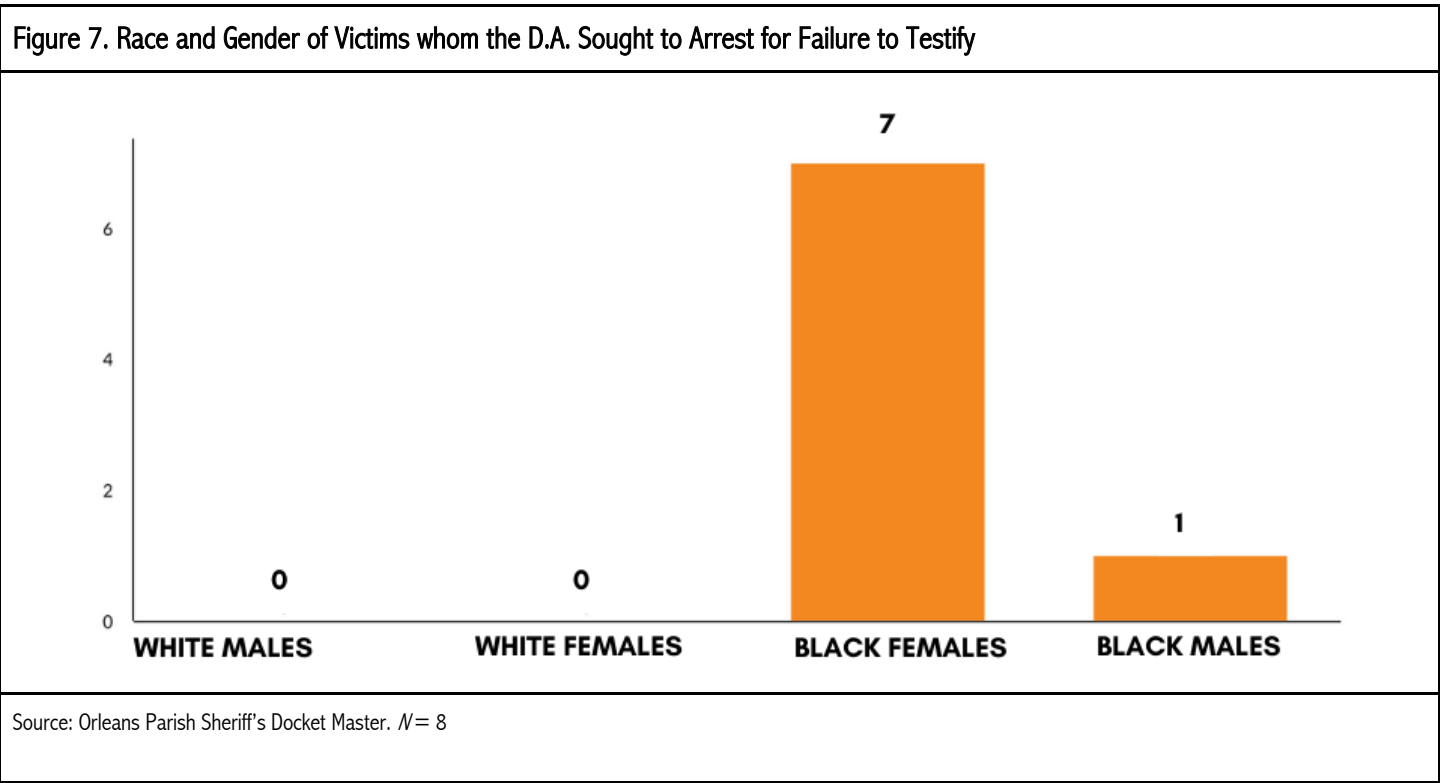
Table 2: Victims the Prosecution Attempted to Arrest for Failure to Testify

Victim Identifier	Type of Warrant /Subpoena used	DA/Judge Actions	Type of Case where the Victim did not Testify
African American Female	Material witness warrant	The DA requested the victim be arrested on a material witness warrant, and Judge Landrum denied the request.	Simple Battery, Unauthorized Entry of an Inhabited Dwelling, Illegal Carrying of a Weapon with Controlled Dangerous Substance, Aggravated Assault with a Firearm, Home Invasion ²¹³
African American Female	Instanter Subpoena	The DA applied for an instanter subpoena, asking for the victim to be arrested for failure to appear. Judge Landrum granted the request with a \$75,000 bond that the victim would be required to pay before being released.	Battery upon a Dating Partner, Simple Kidnapping, Simple Burglary of an Inhabited Dwelling, Violation of a Protective Order, Illegal Use of a Weapon
African American Female	Court Subpoena	The DA requested a subpoena in 2019. Judge Landrum issued the capias warrant, but the victim was not incarcerated for failing to appear in court.	Domestic Abuse Battery, Domestic Abuse Child Endangerment, Domestic Abuse Aggravated Abuse with a Dangerous Weapon, Possession of a Firearm or Weapon by a Felon, Theft under \$1000, Simple Criminal Damage to Property under \$1000
African American Female	Court Subpoena	The DA requested a subpoena in 2019. Judge Derbigny issued the capias warrant, but the victim was not incarcerated for failing to appear in court.	Aggravated Assault, Aggravated Assault with a Firearm
African American Female	Court Subpoena	The DA issued the victim a subpoena and Judge Buras refused to have the victim arrested for failure to appear.	Domestic Abuse Second Offense, Domestic Abuse Aggravated Assault with a Dangerous Weapon, Violation of Protective Order, Illegal Carrying of a Weapon by a Felon
African American Female	Instanter Subpoena	The DA applied for an instanter subpoena to force the victim into court to testify. Judge Hunter refused to issue the instanter subpoena.	Domestic Abuse Aggravated Assault with a Dangerous Weapon, Possession of a Firearm or Weapon by a Felon

African American Female	Instanter Subpoena	The DA applied for an instanter subpoena to force the victim into court to testify. Judge Hunter refused to issue the instanter subpoena.	Battery upon a Dating Partner, Aggravated Assault of a Dating Partner
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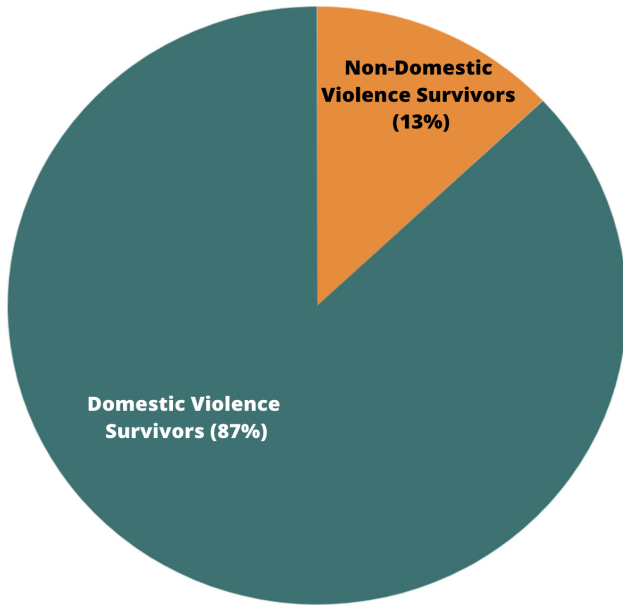
Source: Orleans Parish Sheriff's Office Docket Master, Clerk of Court Orleans Criminal District Court, Whistleblowers.

In addition to the victims who were incarcerated, Court Watch NOLA found one witness to an aggravated assault with a firearm who was incarcerated for five days on a material witness warrant.²¹⁴ Court Watch NOLA found another witness of an attempted murder and possession of a weapon by a felon who was incarcerated for three days on a material witness warrant.²¹⁵ As with victims, Court Watch NOLA does not identify crime witnesses by name or case number in order to keep their identities confidential.



In seven out of eight cases in which the district attorney sought incarceration for a victim, the victim had not testified on a domestic violence case. This number suggests that District Attorney Cannizzaro's office has not ceased the practice of requesting that domestic violence victims be incarcerated for failing to appear in court to testify.

Figure 8. Types of Victims the DA's Office Sought to Incarcerate for Failure to Testify



Source: Orleans Parish Sheriff's Office Docket Master, Clerk of Court Orleans Criminal District Court. *N* = 8.

When victims are connected to badly-needed supportive care resources at the start of a case, they are much more likely to cooperate with law enforcement and testify.²¹⁶ At the beginning of a case, especially in Orleans Parish, where public resources for victims are inadequate,²¹⁷ the prosecutor's office should always attempt to connect the victim to community-based services.²¹⁸ Beginning in 2018, as part of a commendable pilot project, some domestic violence victims who do not wish to cooperate were offered a louder voice in the process and provided more support in seeking supportive services at the Family Justice Center.²¹⁹

The decision to apply for a warrant or otherwise attempt to arrest a non-cooperative victim should not be made lightly.²²⁰ When the victim of an Orleans Parish criminal case is arrested on a material witness warrant, the victim is incarcerated in the same correctional facility as the aggressor.²²¹ Often the victim who already faces great pressure and trauma has little to no understanding as to why they have been subjected to arrest and incarceration.²²² If the charge is not domestic violence or a sex crime, the law does not give the victim the right to counsel.²²³ Experts have said that before applying for a material witness warrant, an assistant district attorney should consider factors including: the seriousness of the offense, the strength of the case, and the public interest in punishing the defendant and deterring others from committing similar crimes.²²⁴ A prosecutor should also consider the trauma and fear that is often associated with being a victim, the victim's fear of retribution from the aggressor or the community, and the great harm it causes the victim to be arrested and jailed in a corrections facility.²²⁵ As one expert has stated, "The tensions for an ethical prosecutor between convicting and punishing a dangerous offender while at the same time recognizing that his victim refuses to be the means to that end, and deferring to his victim's wishes, ultimately will leave one goal unattainable."²²⁶

Recommendation 4: The District Attorney should issue a policy discontinuing the incarceration of domestic violence and sex crime victims for failing to testify. In non-domestic violence and non-sex offense cases, the District Attorney should, at a minimum, publicly release a protocol that includes the different factors that an assistant district attorney must consider before applying for a warrant to arrest a victim for failing to testify. For example, this protocol may include weighing the competing goals of victim safety and emotional trauma to the victim, as well as offender accountability, public safety, and the significance/necessity of the victim's testimony.

V. Bail, Fines and Fees

Bail, bond, court fines, and court fees have become the object of four major federal lawsuits in New Orleans and one state lawsuit over the last four years. In order to fully understand the current system that is being challenged, it is best to define each relevant term.

Bail: In Louisiana, bail is defined as the security given by a person to assure an arrestee's appearance before the proper court whenever required.²²⁷ A Louisiana judge can set bail according to certain factors that include: the seriousness of the offense, the evidence against the defendant, the defendant's previous criminal record, the defendant's ability to pay bail, the danger posed by the defendant's release, the defendant's voluntary participation in a pretrial drug testing program, the use of drugs or alcohol, the defendant's other pending lawsuits, any other circumstances affecting the probability of defendant's appearance, and the type or form of bail.²²⁸

Bond: Bond is collateral used to keep a defendant out of jail before a court hearing.²²⁹ A bond is posted on a defendant's behalf, usually by a bail bond company, to secure their release. This compares to bail which is the money a defendant must pay in order to get out of jail.²³⁰ The bail bond is usually cosigned by a bail bondsman, who charges the defendant a fee in return for guaranteeing the payment.²³¹ In New Orleans, a defendant must pay the bond agent 12% of the bail amount,²³² at least 9% of which the bondsman keeps as a premium and 3% of which the bond agent then passes onto the government in the form of fees. This 12% of the bail amount is nonrefundable, regardless of whether the defendant is later found not guilty or their case is dismissed.²³³ The bond agent also collects from the defendant and passes onto the district attorney, public defender, clerk of court, and crime lab flat fees totaling at least \$44: \$29 of which is nonrefundable, and \$15 of which is refundable if the defendant is found not guilty or his case is dismissed.²³⁴ Lastly, jail fees may be assessed per charge before the defendant may be released.²³⁵

Court Fines: Court fines are imposed upon conviction and are institutionally designed as both a deterrence and a punishment.²³⁶ In general, the more serious the crime, the higher the fine.²³⁷ For example, a criminal defendant who pleads guilty to trespass as a state misdemeanor can be fined between \$100 and \$500.²³⁸ However, a criminal defendant who pleads guilty to home invasion, can be fined as much as \$5,000.²³⁹

Court fees: Court fees are different from court fines because court fees normally do not increase or decrease based on the criminal offense. Instead, fees are usually intended solely to raise revenue.²⁴⁰ For example, court fees include a \$40 fee an indigent person must pay to receive a public defender,²⁴¹ or the costs a defendant must pay when required to take a drug test.²⁴²

In Louisiana, bail, bond, fines, and fees are part of a user-pay system in which criminal defendants are required to pay to financially maintain both the court system and the agencies that work within the criminal courts.²⁴³ These agencies include but are not limited to the public defender's office, the district attorney's office, the judges, the clerk of court, and the sheriff.²⁴⁴ From at least 2013 until recently, all court fines and fees revenue has gone to the Judicial Expense Fund.²⁴⁵ From 2012 through 2015, the Judicial Expense Fund's annual revenue was approximately \$4 million.²⁴⁶ While roughly half of this revenue came from other governmental entities, such as the City of New Orleans, about \$1 million came from bail bond fees, and another \$1 million came from court fines and other court fees.²⁴⁷

In 2019, 85% of criminal defendants heard in all three Orleans Parish criminal courts were considered indigent and thus represented by the Orleans Public Defenders.²⁴⁸ All pending lawsuits related to bail, bond, court fines, court fees, and the public institutions this money supports, make the same argument; it is unfair and ill-advised to fund a criminal court system upon the backs of the indigent. A synopsis of those court cases are as follows:

Louisiana Public Defenders Office and the User Pay System: *Allen v. Edwards*²⁴⁹ is a civil rights lawsuit brought against the Governor of Louisiana for insufficiently funding Louisiana public defenders' offices through a user-pay system.²⁵⁰ Specifically, the 19th Judicial District Court (the state court in East Baton Rouge Parish) found that the Louisiana public defense system was insufficiently funded because "each district office depends primarily on a user-pay system of local fines and fees."²⁵¹ The court stated, "no other state in the United States relies primarily on local court fees and fines to fund public defender services."²⁵² This case is pending in Baton Rouge state court.²⁵³

Court Fines and Fees and the User Pay System: *Cain v. City of New Orleans*²⁵⁴ is a civil rights lawsuit filed against the Orleans Parish Criminal District Court (felony) judges and the Judicial Administrator for levying court fines and fees on mainly poor defendants to fund court operations.²⁵⁵ In ruling against the Orleans Parish Criminal District Court judges and the Orleans Parish Criminal District Court Judicial Administrator, the federal court found that the judges did not follow the United States Constitution's requirement to inquire into a defendant's ability to pay the fine or fee before imposing, detaining, and

incarcerating a defendant for failing to pay the fine or fee.²⁵⁶ Additionally, the federal court determined that Criminal District Court judges had a conflict of interest in collecting the fines and fees that criminal defendants paid since all of the fines and fees revenue goes directly into the Judicial Expense Fund.²⁵⁷ The Fifth Circuit Court of Appeals denied the judges' appeal of the lower court decision.²⁵⁸

Cash Bail and the User Pay System in Magistrate Court: *Caliste v Cantrell*²⁵⁹ is a civil rights suit brought against Orleans Parish Magistrate Cantrell for unconstitutional bail practices in New Orleans Magistrate Court.²⁶⁰ Specifically, the federal court found that Magistrate Cantrell had not complied with the minimum constitutional requirements of a bail hearing,²⁶¹ in failing to inquire into whether an arrestee can afford the proposed money bail amount, failing to consider alternative conditions of release other than setting bail, and failing to ensure that indigent arrestees were represented by counsel.²⁶² The federal court also found that Magistrate Cantrell's office receives a portion of the money from a specific type of bail bond that is almost always required by him, and it is a conflict for Magistrate Cantrell to be both the "sole source of essential court funds and an appropriator of them."²⁶³ Magistrate Cantrell appealed the federal court's decision and requested a rehearing, but both were denied.²⁶⁴

Cash Bail and the User Pay System in Criminal District Court: *Moran v. Keva Landrum- Johnson*²⁶⁵ is a civil rights suit brought against all of the Orleans Parish Criminal District Court (felony) judges for their bail practices.²⁶⁶ The complaint alleges that the Criminal District Court judges consistently and unlawfully imposed bail in an amount that indigent defendants could not afford, without inquiring into the defendant's ability to pay.²⁶⁷ The complaint also asserted that imposing bail creates a conflict of interest because the judges receive 0.8% of the bond amount directly into their judicial expense fund.²⁶⁸ In 2019, the judges filed a motion to dismiss,²⁶⁹ but to date, the federal court has not issued a decision. A second civil rights lawsuit, *Matthews v. Karen Herman*,²⁷⁰ was filed against the Orleans Parish Criminal District Court in April 2020 for failure to engage in the constitutional setting of bail and bond.²⁷¹

Below, Court Watch NOLA explores some of the practices its volunteers have observed relating to bail, bond, court fees, and court fines in the Orleans Parish Criminal District Court, the Orleans Magistrate Court, and the New Orleans Municipal Court.

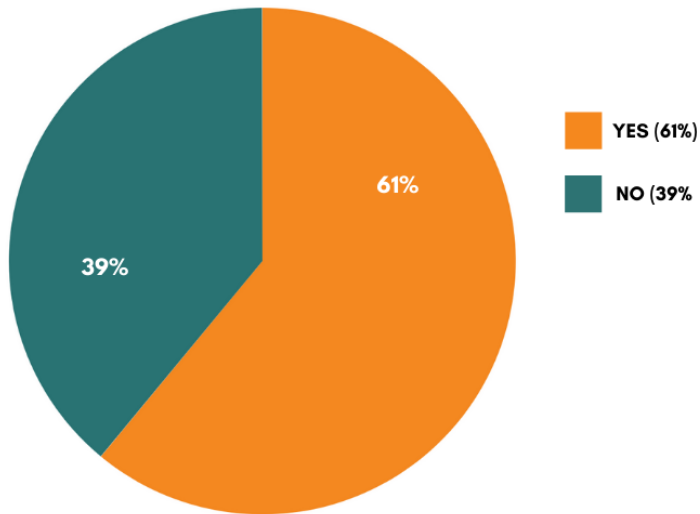
a. Lawsuit Compliance in Criminal District and Magistrate Courts

Both the *Cain* and *Caliste* lawsuits dealt with the same general premise that defendants must be asked whether they could afford the bail, bond, fines, or fees before the court imposed such costs.²⁷²

In the *Cain* lawsuit, the federal court found it unconstitutional for the felony judges to imprison criminal defendants for failing to pay court fines and fees without inquiring into the defendant's ability to pay.²⁷³ Orleans Parish Chief Judge (at the time) Keva Landrum testified at a 2019 New Orleans City Council budget hearing about the *Cain*²⁷⁴ litigation. Judge Landrum seems to have understood the general constitutional concepts of the litigation, stating "According to the federal law, the judges have to assess a person's ability to pay. And so if someone is not able to pay any fines and fees, then they are not assessed any fines and fees."²⁷⁵ However, this statement may have been more indicative of Judge Landrum individual concepts than representative of all the felony court judge's actions in their individual courtrooms.

The figure below shows the percentage of Court Watch NOLA observations where the Orleans Parish felony judges inquired into the criminal defendant's ability to pay a fine or fee before imposing one during sentencing.

Figure 9. Did the Criminal District Court Ask if the Defendant Could Afford Fines & Fees?



N = 115. Orleans Parish Criminal District Court observations.

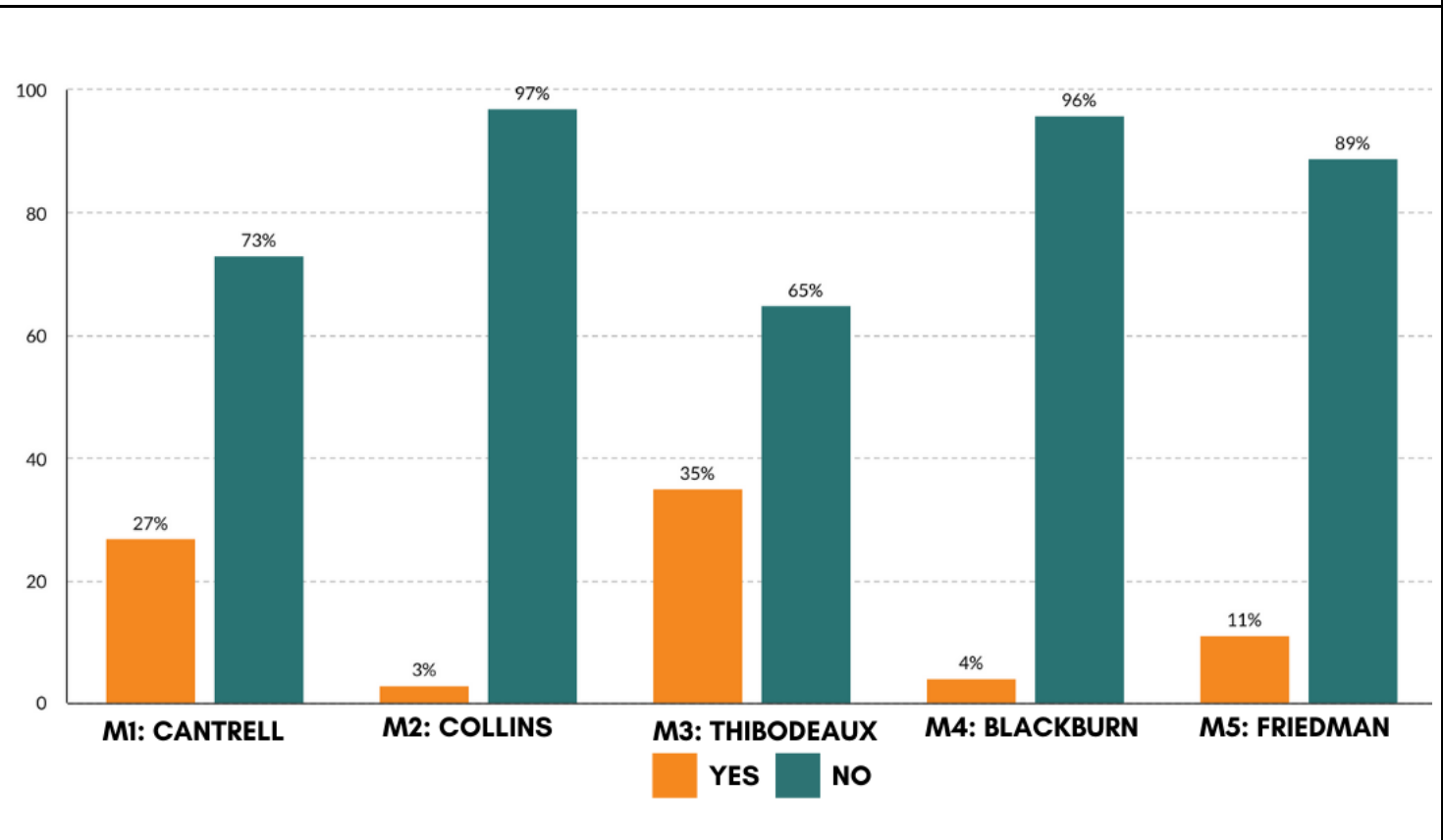
In the *Caliste*²⁷⁶ lawsuit, Orleans Parish Magistrate Harry Cantrell was sued, and there was a final decision against him for unconstitutional bail practices.²⁷⁷ Magistrate Cantrell is one of the five judges that preside over bail hearings in the New Orleans Magistrate Court. Specifically, the federal court in *Caliste*²⁷⁸ ruled that if the criminal defendant cannot pay the financial condition that the court determined was necessary, the court must explain by clear and convincing evidence on the record why the government has demonstrated that no other alternative conditions of release are sufficient to reasonably guard against the person's flight from prosecution or to reasonably ensure the safety of the community during the pretrial period.²⁷⁹ The federal judge went on to state that Magistrate Cantrell must make the inquiry about the defendant's ability to pay on the record.²⁸⁰ This inquiry is a more involved inquiry and determination. Specifically,

“To satisfy the Due Process principles articulated by Supreme Court precedent, Judge Cantrell must conduct an inquiry into criminal defendants' ability to pay prior to pretrial detention. This inquiry must involve certain procedural safeguards, especially notice to the individual of the importance of ability to pay and an opportunity to be heard on the issue. If an individual is unable to pay, then [he] must consider alternative measures before imprisoning the individual.”²⁸¹

In addition to Magistrate Cantrell, there are four appointed commissioners that preside over bail hearings in Orleans Parish Magistrate Court: Commissioners Collins, Thibodeaux, Blackburn, and Friedman. These Commissioners are appointed by and serve at the pleasure of the 12 judges of Criminal District Court and Magistrate Cantrell. Commissioners are not a party to the *Caliste* lawsuit, nor have Commissioners been a party to any of the lawsuits brought against the Orleans Parish Criminal or Magistrate Courts. Regardless of being a party or a non-party to a lawsuit, all judges must follow the United States Constitution. As has consistently been made evident by all the lawsuits against the criminal courts in New Orleans, judges must ask defendants whether they can afford the bail or bond before imposing that bail or bond. It is insufficient for a judge to set bail in an amount the judge believes is affordable; the question of affordability must be asked of the defendant. A more intricate inquiry must be made on the record as is required by constitutional law.²⁸²

Figure 10 shows the percentage of observations where Magistrate Cantrell and the Magistrate Court Commissioners asked a criminal defendant whether they could afford bail or bond before imposing it. Court Watch NOLA volunteers found that in 82% of all bail hearing observations, the Magistrate or Commissioner failed to inquire into the defendant's ability to pay the bail or bond.

Figure 10. Did the Magistrate Court Ask if the Defendant Could Afford Bond?



N = 1,124 (M1: 261, M2: 158, M3: 274, M4: 212, M5: 219). Orleans Parish Magistrate Court observations.

Where a criminal court fails to make an inquiry into the defendant's ability to pay or where the defendant has established a lack of ability to pay a court fine, the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution have long prohibited imprisoning a person for their failure to pay court fees.²⁸³ Likewise, judges must ask defendants about the affordability of bail or bond before imposing that bail or bond.²⁸⁴ While some judges have taken this constitutional mandate to heart after being sued for several years, others clearly have not.

Recommendation 5: The judges that preside over Orleans Parish Criminal District Court and Magistrate Court should follow the mandates of the *Cain* and *Caliste* lawsuit, whether or not they are a party to those lawsuits. Each judge should inquire into the defendant's ability to pay a fine, fee, bail, or bond before imposing such a cost.

b. Bail, Bond, Fines and Fees in New Orleans Municipal Court

In 2019 in New Orleans, all misdemeanor cases that had no felony offense associated with the case were heard in the New Orleans Municipal Court, located at 727 Broad Street, in the same building as the New Orleans Traffic Court, and next door to New Orleans Police Department Headquarters.²⁸⁵

A misdemeanor offense is any offense for which a person cannot be sentenced to hard labor.²⁸⁶ Misdemeanors are considered less serious in nature than the felony cases heard in Orleans Parish Magistrate and later Criminal District Courts.²⁸⁷ There are three types of misdemeanor offenses that were heard in the New Orleans Municipal Court in 2019:

- i. State misdemeanors, laws written and voted on by the Louisiana State Legislature in Baton Rouge and signed by the governor.²⁸⁸
- ii. New Orleans municipal offenses, laws written and voted on by the New Orleans City Council and signed by the Mayor of the City of New Orleans²⁸⁹ for which a defendant can serve a maximum of 8 months in jail;²⁹⁰

- iii. New Orleans traffic ordinances, traffic laws written, voted on, and endorsed by the New Orleans City Council and signed by the Mayor of the City of New Orleans²⁹¹ for which a defendant can serve jail time, but not jail time at hard labor.²⁹²

For many misdemeanor offenses, the New Orleans Police Department can either arrest an individual on the spot or issue that individual a municipal misdemeanor summons.²⁹³ An individual receiving a summons is not brought to jail, but instead receives a ticket specifying a date and time to appear in New Orleans Municipal Court.²⁹⁴ Where a New Orleans Police Department officer arrests an individual rather than giving them a summons, the individual will be booked into the Orleans Justice Center and subsequently face a bail hearing.²⁹⁵ Just as in Magistrate and Criminal District Court, bail must be paid before the defendant is released.²⁹⁶ Thus, often it is solely at the discretion of the New Orleans Police Department whether an arrestee will go to jail and possibly have to pay bail in order to be released, or whether that person can receive a summons and not face immediate jail at all.

The below figures (11 & 12) show the ethnicity and gender of those defendants who were in first appearance bail hearings. This chart shows who the New Orleans Police Department determined should not receive a summons, but instead should be arrested, jailed and receive a bail hearing.

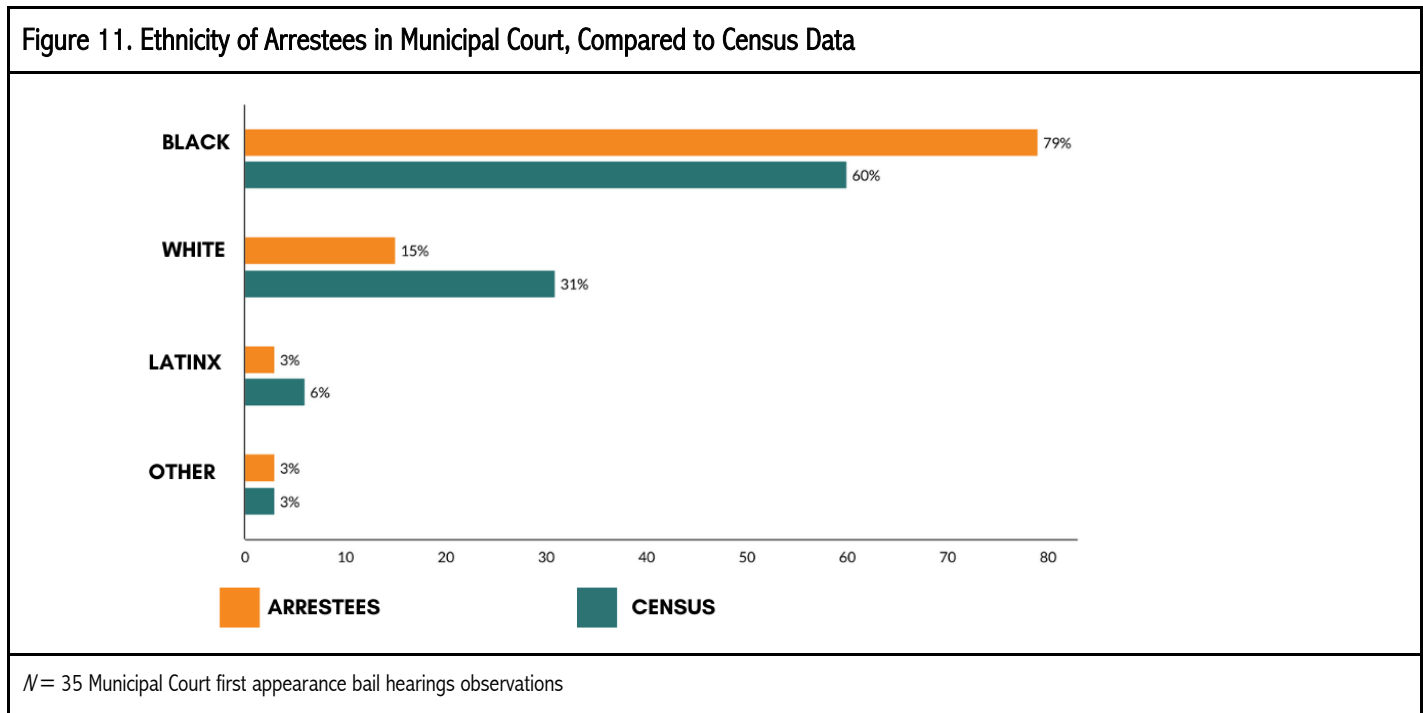
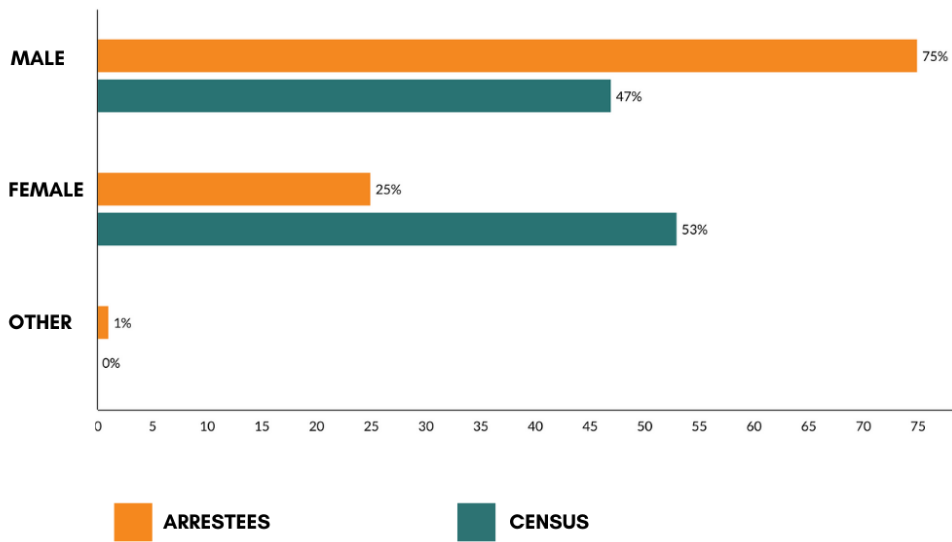


Figure 12. Sex of Arrestees in Municipal Court, Compared to Census Data

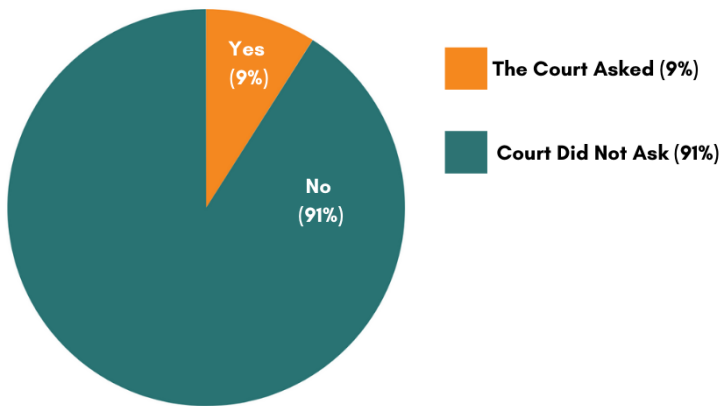


N = 35 Municipal Court first appearance bail hearings observations
 Source: *N* = 390,144 (census population estimate of Orleans Parish as of July 1, 2019), 163 (arrestees observed in New Orleans Municipal Court).²⁹⁷

Unlike the Orleans Parish Magistrate and Criminal District Courts, the New Orleans Municipal Court has never been sued over its bail practices or fines and fees collection process, and thus the issue of whether Municipal Court judges follow the constitutional requirements of inquiring into the defendant’s ability to pay bail, bond, fines, and fees has not been raised in litigation. However, this does not mean that the constitutional requirement that judges inquire into the defendant’s ability to pay bail, bond,²⁹⁸ fines, and fees²⁹⁹ is any less a requirement in New Orleans Municipal Court than it is in Orleans Parish Magistrate or District Courts.

In Figure 13, Court watchers found that Municipal Court judges failed to ask whether the defendant could afford bail in 91% of the observations and inquired about ability to pay in 9% of the observations.

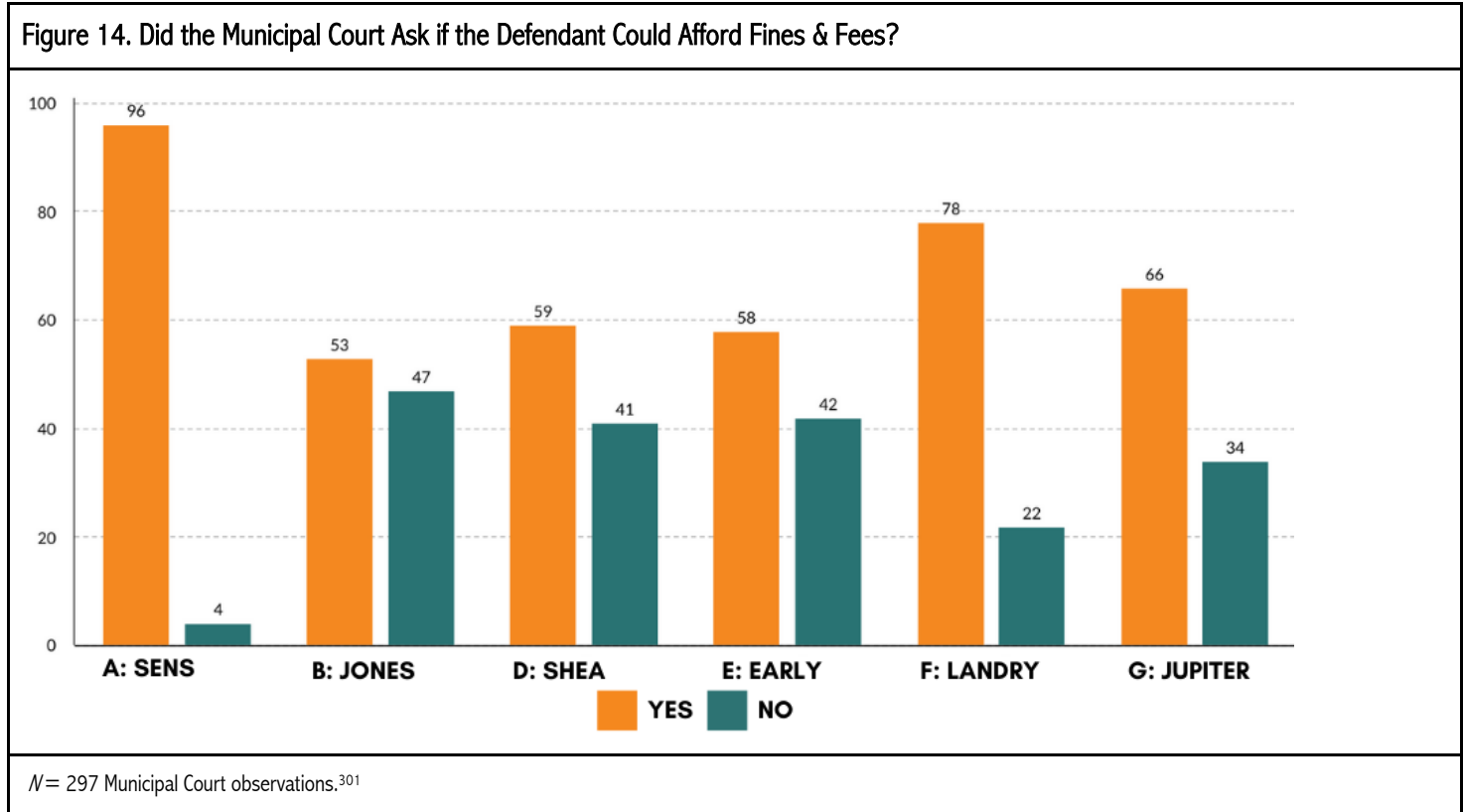
Figure 13. Did the Municipal Court Ask if the Defendant Could Afford Bond?



N = 35 Municipal Court first appearance bail hearings observations

Where the court fails to make an inquiry into the defendant's ability to pay or where the defendant has established a lack of resources to pay a court fine, it is violative of the due process and equal protection clauses of the Fourteenth Amendment of the United States constitution, which has long prohibited imprisoning a person for failure to pay court fees.³⁰⁰

Figure 14 shows the percentage of observations where individual New Orleans Municipal Court judges asked a criminal defendant whether they could afford a fine or fee before imposing it. Court watchers found that, overall, Municipal Court judges failed to ask whether the defendant could afford a court fine or fee in 21% of the observations and inquired about ability to pay in 79% of the observations.



In *Cain*, federal court judges have stated multiple times that the Orleans Criminal District Court judges must make an inquiry into the criminal defendant's ability to pay.³⁰² The Municipal Court judges should not make a similar mistake by failing to inquire into a defendant's ability to pay.

Recommendation 6: New Orleans Municipal Court judges should inquire into the defendant's ability to pay before imposing bail, bond, fine, or fees. The court should find alternatives where the criminal defendant has informed the court, they cannot pay the fine or fee.

c. Felony Court Bail

We are proud New Orleanians are engaged in robust dialogue surrounding bail and bond. On AM radio,³⁰³ FM radio,³⁰⁴ and prime time television,³⁰⁵ New Orleanians have discussed bail reform,³⁰⁶ questioned when it was being used,³⁰⁷ and questioned when it was not being used.³⁰⁸ This public discussion has been fueled by the larger national conversation and reforms occurring in many cities across the country, including New Orleans itself,³⁰⁹ with the initiation of the *Caliste*,³¹⁰ *Moran*,³¹¹ and *Matthews*³¹² lawsuits. Partly as a result of *Caliste*,³¹³ the public conversation has centered on the role of cash bail set at first appearances in New Orleans Magistrate Court. The term "first appearances" refers to a criminal defendant's initial date in front of a judge.³¹⁴ At first appearances, the Magistrate and Commissioners decide whether the defendant should be released from jail pretrial without any bail or conditions, or whether the defendant must pay bail and/or abide by certain conditions (such as drug testing or meeting with a pretrial services counselor) to ensure their return to court.³¹⁵

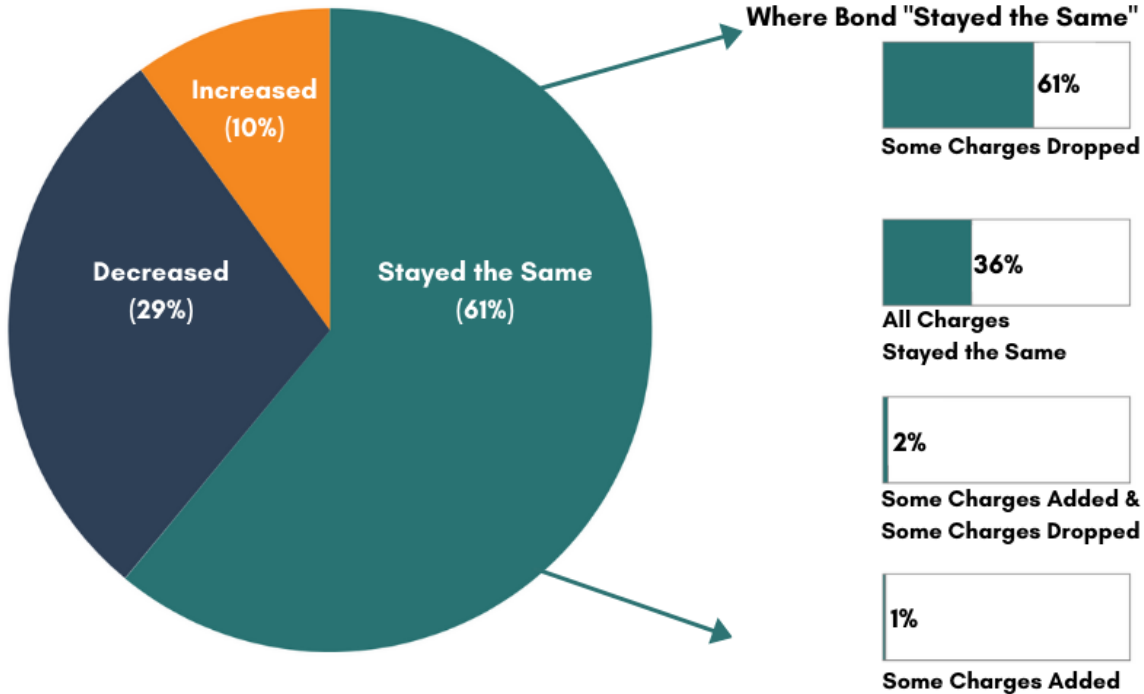
After the district attorney's office determines that there is enough evidence against the defendant to bring formal felony charges, the defendant's case leaves Orleans Parish Magistrate Court and moves to Orleans Parish Criminal District Court.³¹⁶ The District Attorney formally charges most defendants with a document called a bill of information in which the evidence against the defendant is documented; the district attorney does this much more often than the alternative, which is to present the case to a grand jury.³¹⁷ The defendant will then appear in Orleans Parish Criminal District Court for an arraignment, generally the first time they step into felony court for their case.³¹⁸

Bail becomes an important issue at a defendant's arraignment.³¹⁹ At this first juncture in front of a felony court judge, the judge can increase, decrease, or keep the same bail amount as was set on the case in Magistrate Court. If the Criminal District Court judge increases bail against a defendant who is out of jail and appearing for court in person, the criminal defendant can be handcuffed and immediately detained without notice, although sometimes the defendant is given a few hours to come up with additional money for bail.³²⁰ When the defendant has remained in jail because they could not afford to pay for bail, an increase in bail imposed in Criminal District Court can make pretrial release close to impossible.³²¹

The New Orleans Police Department often charges the criminal defendant with entirely different criminal charges than those which the District Attorney decides to formally bring in felony court, as the District Attorney has discretion over which charges to actually pursue.³²² For example, suppose the police arrest the defendant for theft and drug possession and a Magistrate Court Commissioner sets bail at \$6,000 on the theft count and \$5,000 bail on the drug possession count, for a total bail amount of \$11,000. The District Attorney's Office then decides it does not have enough evidence to prove the theft count and brings only the drug possession charge to Criminal District Court. In this case, the \$6,000 bail on the theft count should be dropped unless the judge has good cause to maintain the full \$11,000 bail.³²³ One would assume the total bail amount in felony court would be the remaining \$5,000 bail set on the drug possession charge, the only remaining charge in Criminal District Court. However, according to data Court Watch NOLA has collected, the judge will keep the bail amount at \$11,000, even though the theft count which had \$6,000 bail set on it has already been dropped. If the prosecutor accuses the criminal defendant of fewer things than the defendant was accused of at arrest, should the bail not be lower than when the criminal defendant was first arrested, barring if the defendant has not harassed witnesses or otherwise violated the conditions of the bond?

Court Watch NOLA analyzed all the cases heard in Magistrate Court from January to April 2019; 600 cases. The median bond amount set in Magistrate Court was \$5,000, while the median bond amount in Criminal District Court was \$4,750. The chart below describes whether bail was increased, decreased, or remained the same after those 600 criminal cases were heard in Criminal District Court but before sentencing. If some of the charges are dropped, one would assume that the bail amount would drop too. But as is seen below in Figure 15, in 61% of the cases (368 cases), bail remained the same amount in Criminal District Court as it was in Magistrate Court. However, in 225 cases out of the 368 cases where bail remained the same, one or more of the criminal charges had been dropped and none have been added.³²⁴ Again, why would bail remain the same if separate criminal charges against the defendant on which bail was set, were dropped.

Figure 15. Change in Bond Amount from Magistrate Court to Criminal District Court (January-April 2019)



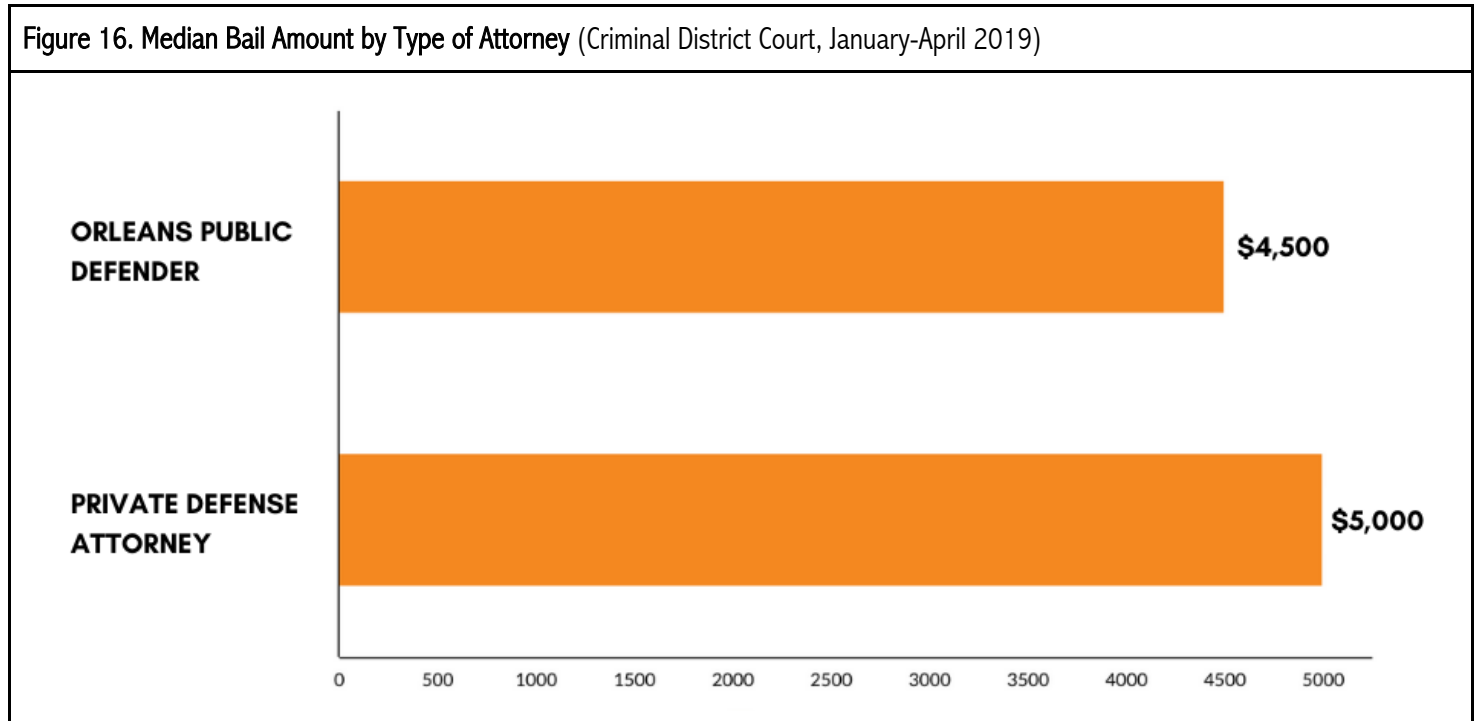
Source: Orleans Parish Sheriff's Docket Master. *N* = 600.

Bail is security given by a person to assure their appearance before the proper court.³²⁵ And bail must be reasonable. In the words of the Louisiana Supreme Court,

*"A bond must be reasonable. The public policy of the state favors bail, and under modern conditions criminals can be located and returned for trial or for service of sentence much more easily and efficaciously than in former years... The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense... Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice."*³²⁶

According to the complaint in both *Moran v. Landrum-Johnson*³²⁷ and *Matthews*,³²⁸ Orleans Parish Criminal District Court judges often maintain, increase a financial condition of release, or impose a financial condition of release where none was previously imposed by the Magistrate or Commissioners.³²⁹ Louisiana Law states that a district court can only increase or decrease the amount of bail required for good cause.³³⁰ The law further states that "good cause for increase of bail specifically includes but is not limited to the re-arrest of the defendant on offenses alleged to have been committed while out on a bail undertaking." Louisiana law also allows for an increase in bail due to the "violation of any condition by the defendant."³³¹ Conditions of bail include, but are not limited to, the requirement that the defendant will appear at all stages of their case, will submit to court orders, and will not leave the state without written permission of the court.³³²

Figure 16 shows the average bail amount set in Criminal District Court in cases in which the defendant was represented by a public defender (thus the defendant was considered by the court to be indigent) and when the defendant's attorney was a private attorney. It is important to note that in 2019, 85% of the defendants who had criminal cases in Orleans Parish were declared indigent.³³³ In 2019, a New Orleanian at the poverty line made \$1,041 per month³³⁴ and yet Court Watch NOLA found that the median bail amount for an indigent defendant in Criminal District Court was \$4500, more than 4 times the amount of the monthly income of an indigent person.



Source: Orleans Parish Sheriff's Docket Master. $N = 594$ (Orleans Public Defenders $N = 474$; private defense attorney $N = 120$).

Bail is excessive when, in the words of one of Louisiana higher courts, "it has been fixed higher than reasonably calculated to insure the defendant's appearance."³³⁵ It is problematic if a judge increases bail when a defendant has already appeared in court, thus having "assure(ed) his appearance before the proper court."³³⁶ and no other conditions have been violated, such as harassment of victims or witnesses.

Recommendation 7: Bail should not be fixed in an amount that is more than is reasonably calculated to ensure the defendant's appearance. A Criminal District Court judge should not increase bail where there is no justification that the current bail is insufficient to assure a defendant's appearance before the proper court, or where no other conditions of bail have been violated, such as victim or witness harassment.

VI. Efficiency

In 2007, Court Watch NOLA began by measuring the efficiency of Criminal District Court stakeholders with traditional efficiency markers such as the time a judge spent in court and the judge's arrival time on the bench in 2007. Today, Court Watch NOLA volunteers continue to gather data on the court start time and the numbers of law enforcement waiting in court for the judge to take the bench.

However, efficiency measurements cannot come at the expense of the people who find themselves within the criminal justice system, be they defendants, victims, witnesses, or the family members of defendants, victims and witnesses. Speed to trial was a traditional efficiency marker used by court think tanks in the 1980s and 1990s,³³⁷ but while easier to measure, it is antiquated to use speed alone as the best practice standard by which to measure either the efficiency or efficacy of a criminal court.³³⁸ A criminal court system must prioritize how accountability and responsibility is claimed after a person is wronged and hurt and what can be done to ensure such mistreatment and injury does not recur.³³⁹ The key to this process is the proper treatment of and approach toward people.³⁴⁰ A criminal justice system can work, indeed works better when those who must take responsibility for their crimes against others are provided all the rights they are afforded in the federal and state constitutions.³⁴¹ But the exercise of constitutional rights can be a messy, time-

consuming process and an obstacle to short-term concepts of efficiency.³⁴² When efficiency becomes the obstacle of constitutional rights, mistakes occur, and mistakes waste resources in addition to destroying lives.³⁴³ If the traditional markers of efficiency are money and time,³⁴⁴ a mistake in criminal court will waste both. Victims not afforded the rights within the Louisiana State Bill of Rights³⁴⁵ or not receiving the resources they need may be back in the criminal courts as an arrestee, either for taking the law into their own hands or for substance abuse issues related to the trauma of victimization.³⁴⁶ Studies have shown that victims exposure to trauma and post-traumatic stress disorder may increase the chances of both arrest and incarceration.³⁴⁷ Where a criminal defendant has been wrongfully incarcerated, time and money will also be at stake. Often, that criminal defendant will bring litigation against the state that will last for years and demand a large monetary sum as compensation for the many years the wrongfully incarcerated defendant is jailed for a crime they did not commit.³⁴⁸

a. The Plea Bargain

Most criminal defendants do not bring their case to trial, and the vast majority of felony cases in Orleans Parish Criminal District Court end in the criminal defendant taking a plea bargain.³⁴⁹ A criminal defendant takes a plea bargain by saying they are guilty of an offense and thus avoids going to trial.³⁵⁰ In addition to surrendering the right to a trial, the criminal defendant often surrenders other rights when they take a plea, such as the right to confront witnesses, the right to an appeal, etc.³⁵¹ In order to plead guilty, the defendant is required to do so intelligently, with competent counsel, and absent any threats, misrepresentations, or improper promises.³⁵²

A system in which criminal defendants did not take plea bargains and every defendant took their case to trial would overwhelm both the criminal courts and the resources provided to public defenders, prosecutors, the sheriff's office, the police department, the clerk's office, and judges.³⁵³ Many argue that the number of cases brought against criminal defendants in New Orleans already overwhelms the given resources, even with a large number of criminal defendants who take pleas.³⁵⁴ The plea bargain process decreases the case disposition time, since normally a criminal defendant will take a plea before they reach trial and the time between arrest and trial in Orleans Parish Criminal District Court can last anywhere from months to years.³⁵⁵

There are many reasons criminal defendants plead guilty. Ideally, plea bargains are taken by guilty criminal defendants who take responsibility for their actions and do so in the presence of clear evidence of guilt; in exchange, the guilty criminal defendant receives leniency from the court, district attorney, or both.³⁵⁶ In this way, a victim is relieved of the trauma of testifying, and the state and the court are relieved of a costly and time-consuming trial.³⁵⁷

However, the reality can be very different. Criminal defendants often take pleas due solely to the fear of receiving a larger and more severe prison sentence if they were found guilty at trial.³⁵⁸ For example, a Louisiana prosecutor is able to offer probation to a first-time criminal defendant indicted for heroin possession with the intent to distribute, whereas if the criminal defendant went to trial and lost, the criminal defendant would face imprisonment at hard labor for not less than five years nor more than forty years and may, in addition, be required to pay a fine of up to \$50,000.00.³⁵⁹

A criminal defendant may also take a plea simply to be released from jail. Often, a criminal defendant cannot pay the bail imposed, so that pleading guilty is the only way the defendant may be released from jail.³⁶⁰ Sometimes a judge will threaten to incarcerate a defendant once they test positive for a drug test or violate a condition of their release bond, such as a nighttime curfew, but the same judge may also simultaneously offer the defendant a probation plea where they can avoid jail altogether as long as they plead guilty (and thus clear their case from the judge's docket).³⁶¹ In Court Watch NOLA's 2018 Annual Report, it was reported that at least 77 pretrial defendants were held in contempt for purportedly positive drug tests,³⁶² with 59 pretrial defendants serving an average of 18 days in jail, including two pretrial defendants who served an average of 19 days in jail due to positive drug screens for marijuana.³⁶³ Remaining in jail may cause a criminal defendant to face job, child custody, or housing loss. A defendant may have the responsibility of financially supporting others in their family, a responsibility they are not able to uphold if incarcerated.³⁶⁴

"A positive drug test should be measured against other factors. Is the person being a father, husband, and worker? If yes, then that person should not be placed in jail for a positive screen." - Derwyn Bunton, Chief Orleans Public Defender³⁶⁵

The general horridness of jail is another incentive for many to plead guilty.³⁶⁶ In 2018, there were 442 inmate-on-inmate assaults in the Orleans Justice Center; in 2019, there were 440 inmate-on-inmate assaults.³⁶⁷ In 2018, there were 260 incidents where Orleans Parish Sheriff Office employees used force upon detained criminal defendants.³⁶⁸ By 2019, that number had increased to 358 use-of-force incidents.³⁶⁹ Drug overdoses in which the drugs were obtained by criminal defendants while incarcerated at the Orleans Justice Center are not infrequent,³⁷⁰ and neither are serious suicide attempts³⁷¹ or

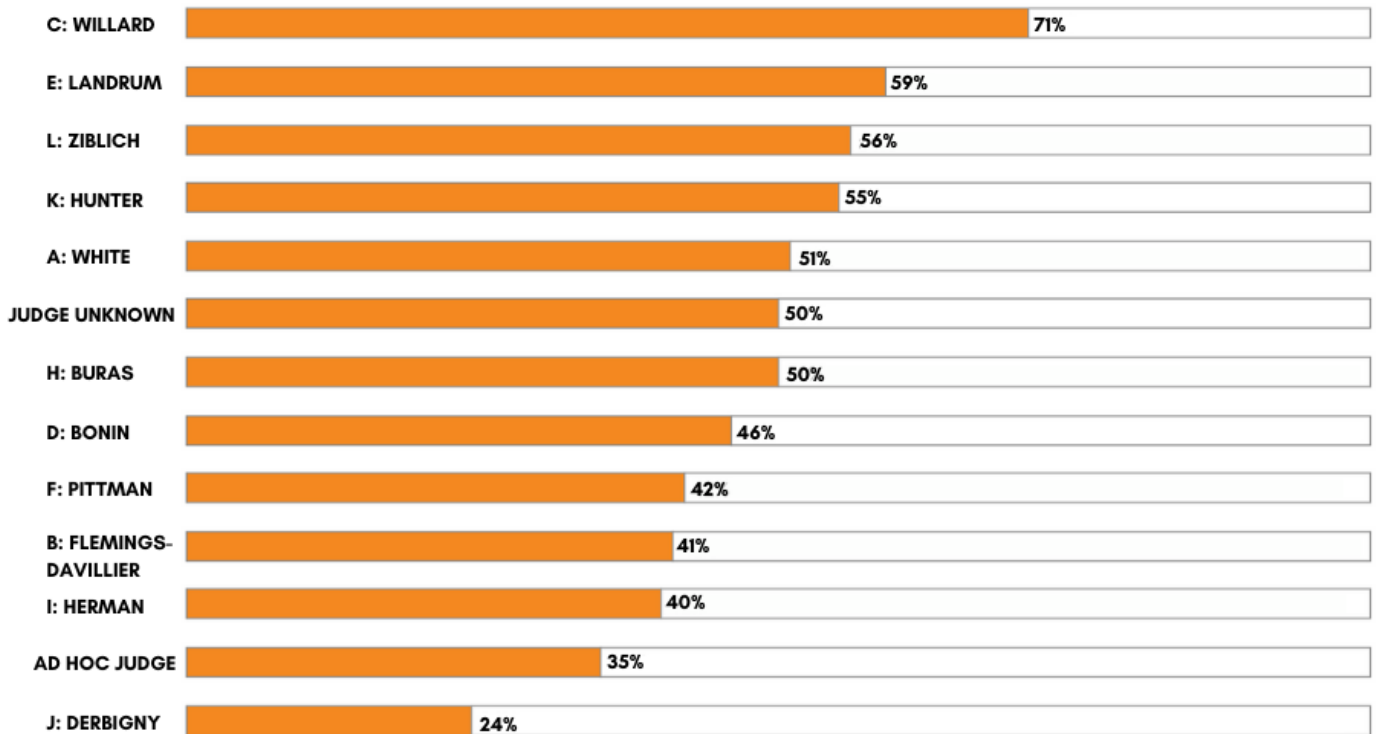
successful suicides.³⁷² In 2017, it was reported that the Orleans Justice Center’s jail’s death rate was more than four times the national average, with experts reporting the jail was “critically unsafe” and staffing “critically inadequate.”³⁷³ Although the death rate has decreased since 2017,³⁷⁴ the fear of being incarcerated has not.³⁷⁵ Add in general fear of inadequate health care³⁷⁶ and the real reason criminal defendants are taking pleas becomes more complicated; certainly guilt is not the only factor in all cases.³⁷⁷

It is unknown how often criminal defendants plead guilty in Orleans Parish Criminal District Court as compared to going to trial or having their case dismissed. However, national statistics show that some 94% of felony convictions are a result of plea bargaining at the individual state level, and 97% of felony convictions are a result of plea bargaining at the federal level.³⁷⁸

Several studies have shown an increase in the rate of guilty pleas when the criminal defendant is incarcerated versus when the criminal defendant has been released from jail. In one study examining felony and misdemeanor cases in Philadelphia between September 2006 and February 2013, pretrial detention was associated with a 13% increase in the defendant being convicted, which was “largely explained by an increase in guilty pleas among defendants who otherwise would have been acquitted or had their charges dropped.”³⁷⁹ Another study examining incarcerated pretrial felony and misdemeanor defendants in Miami and Philadelphia found that initial pretrial release decreased the probability of the defendant being found guilty by 14%.³⁸⁰ The study found the decrease in convictions was largely driven by fewer people pleading guilty, the decrease in convictions fell by 10.8% if the defendant was released.³⁸¹ A study of felony cases in New York City found that pretrial detention increased the probability of conviction by 7% to 13%.³⁸²

In 2019, Court Watch NOLA volunteers collected data on whether criminal defendants who plead guilty in Orleans Parish Criminal District (felony) Court were incarcerated or out of jail when they took the plea. Overall, 46% of guilty pleas observed in Criminal District Court were made by incarcerated defendants.³⁸³ See below the rates, based on court watcher observations that each felony judge accepted guilty pleas from incarcerated criminal defendants.

Figure 17. Frequency of Incarcerated versus Non-incarcerated Guilty Pleas



N = 472 Orleans Parish Criminal District Court observations.³⁸⁴

While it may be impossible to determine how many innocent defendants plead guilty in Orleans Parish Criminal District Court to criminal charges they did not commit, it is important to examine the national statistics for those who took pleas to crimes they did not commit. There have been several national studies relating to the number of exonerated defendants who have taken pleas to crimes they did not commit. Nationwide, 15% of known wrongful conviction exonerees pled guilty instead of going to trial.³⁸⁵ Two-thirds of drug crime exonerations involved a criminal defendant taking a guilty plea.³⁸⁶ Eight percent of sex offense and homicide exonerations involved criminal defendants who took pleas (compared to those found guilty at trial despite their innocence).³⁸⁷ The question remains why exonerated defendants would plead guilty to crimes they did not commit. The study found that the innocent defendants had spent months in jail before taking the plea, and faced many more years in jail if convicted at trial.³⁸⁸ Many of the homicide exonerees who took pleas did so to avoid the death penalty.³⁸⁹ Not surprisingly, the fewer years a prosecutor or judge offered, the greater the number of exonerees who pled guilty.³⁹⁰

In general, pretrial detention can impede a defendant from gathering exculpatory evidence and can obstruct confidential communication with attorneys, both obstacles to a wrongly incarcerated defendant being able to mount a successful defense.³⁹¹ Obstruction of confidential communication with attorneys is especially the case in New Orleans, where the Orleans Parish Sheriff's Office still records confidential attorney-client calls and provides the recording to the District Attorney's Office which has been found to use such attorney-client phone calls against the defendant.³⁹² Where defendants are concerned with their phone conversations being sent to the district attorney's office, they are less likely to tell their attorney's about key evidence and facts surrounding their case.³⁹³ In the words of Maddy DeLone, the former Executive Director of the Innocence Project, "Our system makes it a rational choice to plead guilty to something you didn't do."³⁹⁴

According to national criminologists, the overall rate of convicted felons who are innocent is between 2% and 8%. Approximately 2.2 million Americans are in prison, with 2 million incarcerated based on plea bargains; if even 1% of that proportion are in fact not guilty, an estimated 20,000 persons incarcerated nationwide are, in fact, innocent.³⁹⁵

In the most recent report of the National Registry of Exonerations', New Orleans was named as the top county or parish in exonerations per capita of all counties or parishes with populations over 300,000 between 1989-2015³⁹⁶ See the National Registry of Exonerations' chart of top counties or parishes per capita for exonerations:

Table 10: Exonerations Per Capita, Top Ten Counties with Population over 300,000

County	Rate per Capita, Standardized	Number of Exonerations
1. Orleans Parish, LA (New Orleans)	9.33	18
2. Suffolk, MA (Boston)	5.71	22
3. Kern, CA	5.47	24
4. Jefferson Parish, LA	5.03	11
5. Bronx, NY	4.99	36
6. District of Columbia	4.54	15
7. Cook, IL (Chicago)	4.37	115
8. Dallas, TX	4.11	52
9. Kings, NY (Brooklyn)	3.57	47
10. Harris, TX (Houston)	3.37	75
NATION	1.00	1,600

The fact that more incarcerated versus non-incarcerated people are pleading guilty in Orleans Parish Criminal District Court should give Orleans Parish Criminal District Court judges and New Orleanians in general real concern. In addition to destroying a human being's life and family,³⁹⁷ a wrongful conviction causes a community to lose confidence in the criminal justice system and those who preside over it (police, prosecutors, judges, defense attorneys, clerks, etc).³⁹⁸ Wrongful convictions can lead to unsafe communities, with the real perpetrator free to roam the streets to commit additional crimes.³⁹⁹

Recommendation 8: Judges should not pressure defendants to take a plea by threatening to raise bail based on a pretext or threatening jail time if a defendant has a positive drug test. While efficiency is an important goal for criminal court actors to embrace, efficiency should not be embraced over all other concepts. Court actors should keep in mind New Orleans's high rate of wrongful convictions when clearing their dockets through case disposition.

b. Judicial Delay in Starting Court

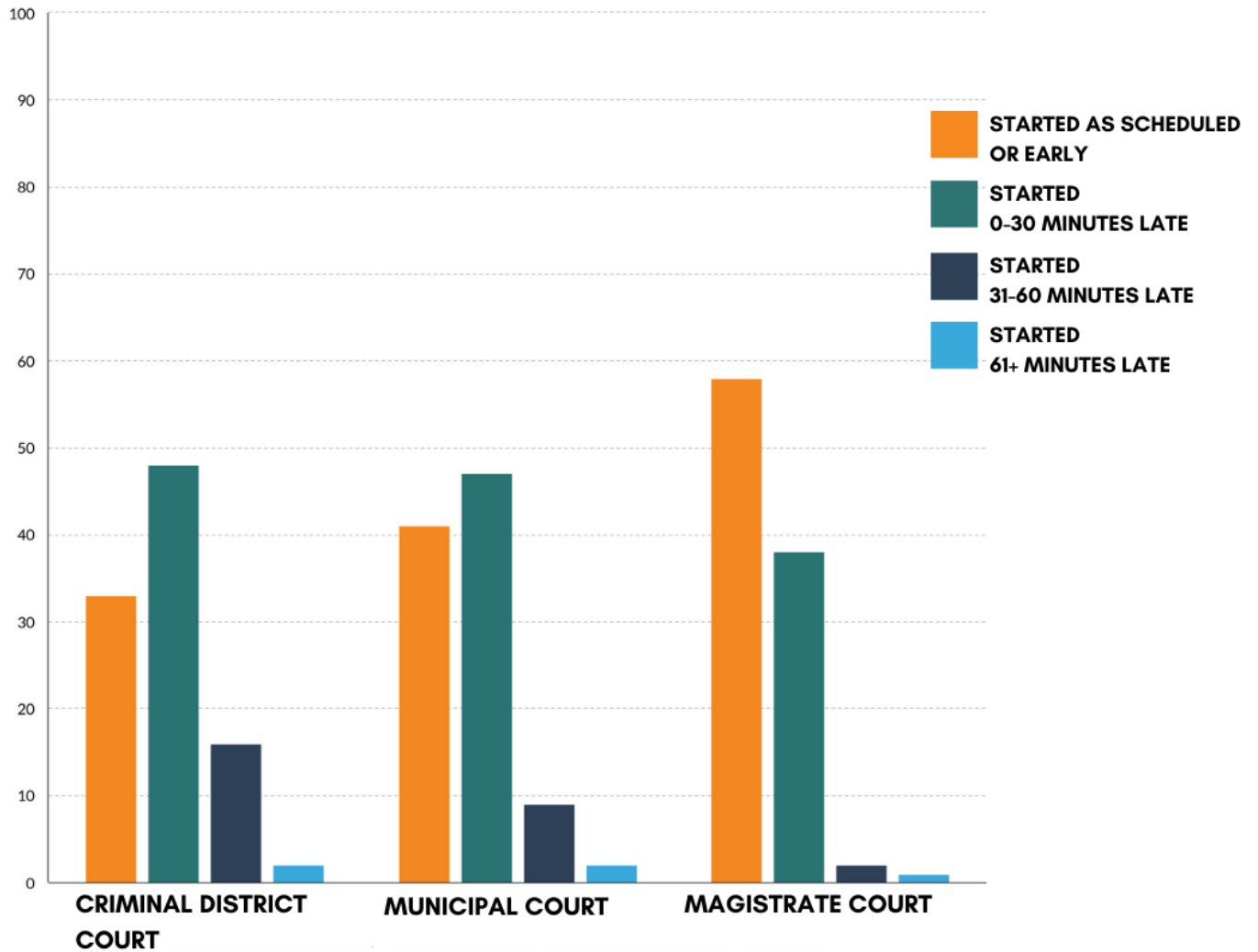
Court Watch NOLA, on behalf of all courtroom users, including attorneys, law enforcement, and the public, has been recording what time each judge takes the bench for twelve years. Courtrooms with regular, substantial delays waste the time of victims, witnesses, defendants, and family members who must take time off from work or find childcare they often can hardly afford in order to wait in court.⁴⁰⁰ Delays become costly as public servants, including prosecutors, public defenders, deputies, court staff, and law enforcement who are forced to wait, have taxpayer-funded salaries.⁴⁰¹ Some court sections also lock the public out until court starts, forcing visitors to wait in hallways with insufficient seating and no climate control (hot in the summer, cold in the winter).

For New Orleans Police Department officers, court delays mean officers are unavailable to patrol the streets and perform other duties integral to public safety. In fact, Federal Judge Susan Morgan, who presides over the New Orleans Police Department's consent decree, focused a portion of one of her public hearings on the amount of time New Orleans Police Department's officers must wait for criminal court judges who arrive late to the bench.⁴⁰² In 2019, law enforcement officers who were subpoenaed to testify in Criminal District Court waited an approximate total of 75 hours for judges to take the bench, or an average of 25 minutes per officer.

The below charts illustrate a comparison of timeliness among the three courts monitored by Court Watch NOLA.

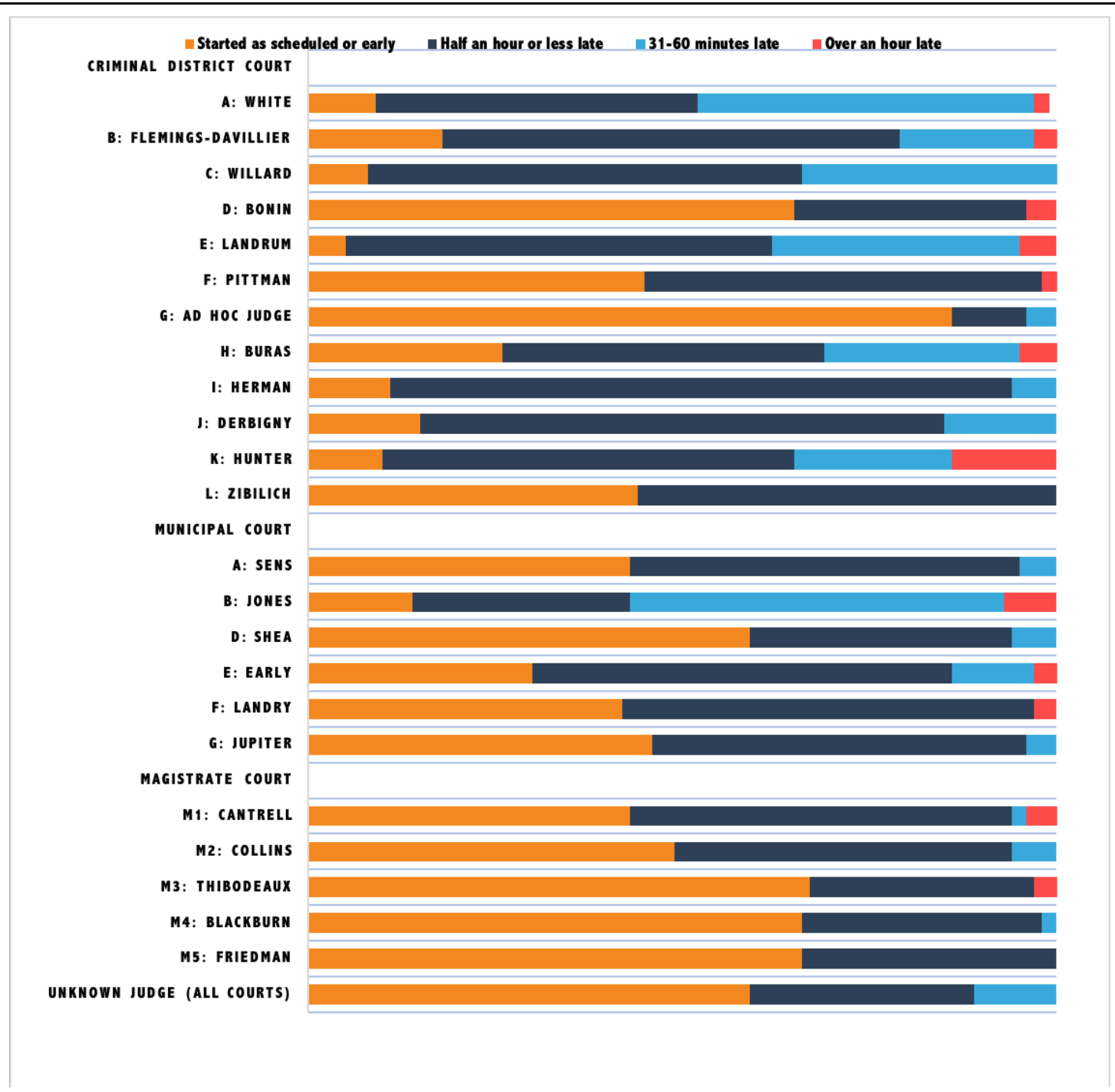
Following a first appearance in Magistrate Court, defendants are required to return to court for a status update on their case.⁴⁰³ In most cases, it is simply to notify the defendant if the charges have been accepted or refused.⁴⁰⁴ The defendant often does not need to meet with the Magistrate Judge or Commissioner in these circumstances and can receive an adjournment slip from the minute clerk. Magistrate Court Commissioner Friedman created an efficient approach where his minute clerk will call the docket and either provide a subpoena or other information on how to track their case if the case is still pending and has no disposition. The defendant is then released from court without the unnecessary delay of being called to the podium to receive the same information they would normally have to wait to receive from the Magistrate Judge or Commissioner.

Figure 18. Court Timeliness in 2019



N = 836 (Criminal District Court: 416; Magistrate Court: 268; Municipal Court: 150).⁴⁰⁵

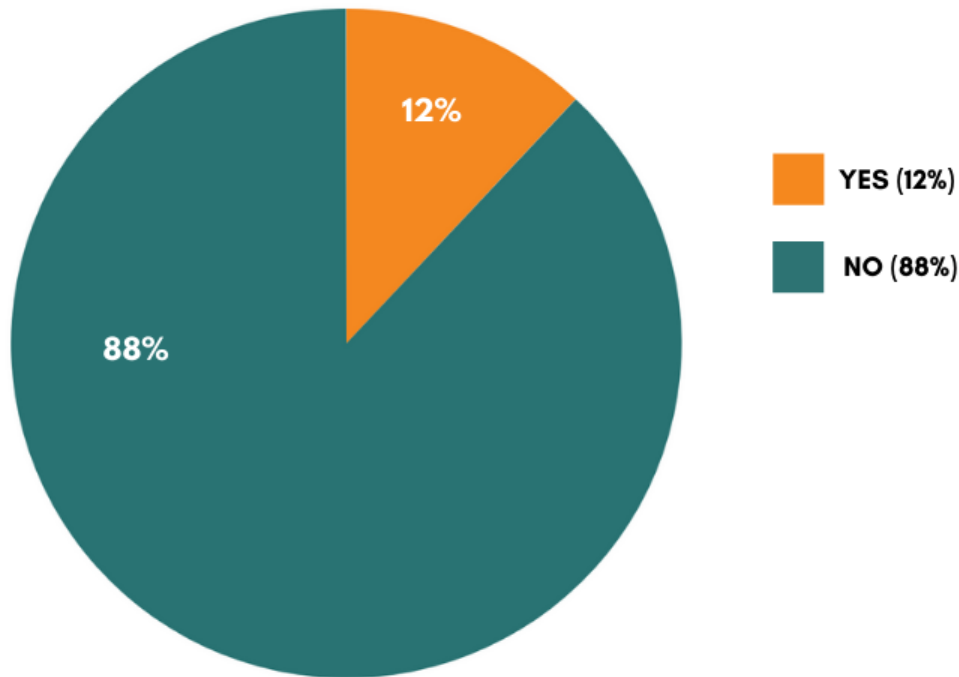
Figure 19. Judge & Commissioner Timeliness



N = 834 (Criminal District Court: 416; Magistrate Court: 268; Municipal Court: 150).⁴⁰⁶

Court Watch NOLA volunteers record the time the judge takes the bench and not the time the judge arrives in court. Court Watch NOLA data does not capture the considerable time that many judges may spend working in chambers, attending meetings, and performing administrative tasks. Court Watch NOLA, nevertheless, tracks the time of arrival on the bench with the aim of minimizing the amount of time our public servants and members of the public attending court must wait before the judge takes the bench.

Figure 20. When Court Started Late, Did Judges Explain Themselves or Apologize?



N = 490 (Orleans Parish Criminal District Court: 278, New Orleans Municipal Court: 88, Orleans Parish Magistrate Court: 124).

Court watchers found that the following judges had the lowest frequency of public apologies or explanations for their delay: Judge Derbigny (0%)⁴⁰⁷ in Criminal District Court, Judges Shea (0%)⁴⁰⁸ and Early (0%)⁴⁰⁹ in Municipal Court, and Judge Cantrell (3%)⁴¹⁰ in Magistrate Court. Court watchers found that the following judges apologized or explained delays most frequently: ad hoc judges in Criminal District Court Section G (29%),⁴¹¹ Judge Sens (33%)⁴¹² in Municipal Court, and Commissioner Friedman (28%)⁴¹³ in Magistrate Court.

Of Criminal District Court sessions observed to start late, 28% kept law enforcement officers waiting for court to begin in order to testify as witnesses.

Recommendation 9: Judges should make every effort to be timely to the bench and should consider the inconvenience to the public and the cost to the taxpayer their untimely arrival creates. If the judge has an obligation that consistently delays the judge arriving timely to the bench, the judge should change the court subpoena time, so neither the public nor public employees are forced to regularly wait in court for the judge's arrival.

c. Notice of Arraignments to Orleans Public Defenders

The defendant's first appearance in Orleans Parish Criminal District Court is a proceeding called an arraignment.⁴¹⁴ An arraignment occurs after criminal charges are filed either via a bill of information or through an indictment after the grand jury deliberation.⁴¹⁵ Court watchers have observed multiple arraignments in which attorneys employed by the Orleans Public Defenders were forced to stand in for the specific public defender who was assigned to the case because the assigned public defenders had not received notifications of the arraignment times.⁴¹⁶

At an arrestee's first appearance in Magistrate Court, one public defender represents all indigent defendants during the same court session.⁴¹⁷ After an arrestee's first appearance in court, the Orleans Public Defenders assigns a specific attorney to the case by entering the attorney's contact information into an online system called Court Notify, which is shared by multiple offices, including the Clerk of Court's Office.⁴¹⁸

Court Watch NOLA, along with the Orleans Public Defenders office and a member of the Clerk's office, worked together to create a more efficient and effective system of courtroom representation. In this new system, the Orleans Public Defenders sends a list of attorneys and case assignments to the Clerk's office, and a supervisor at the Clerk of Court's office notifies the attorney of record of the criminal court arraignment. Thereafter, the clerk's office enters the assigned public defender's contact information into Court Notify. Rather than the attorney who will not continue to represent the defendant having to relay all information they learn during the arraignment to the assigned attorney on the case, the assigned attorney may represent their client earlier in the case due to the new direct notification system created. Using this system of communication, public defenders now have the opportunity to better represent and more efficiently represent their clients starting from their first proceeding in Criminal District Court.

Commendation: Court Watch NOLA commends the Clerk of Court's Office for facilitating defense attorneys' effective and efficient representation by ensuring that the attorneys are timely notified of their clients' scheduled arraignments. Court Watch NOLA commends the Orleans Public Defenders Office for flagging the problem to Court Watch NOLA's attention and working alongside Court Watch NOLA and the Clerk of Court's Office to find a solution to this systemic inefficiency.

VII. Acknowledgements

Court Watch NOLA thanks its 2019 volunteers and interns, who were so generous with their time, and without whom this report would not have been possible. Court Watch NOLA thanks the Orleans Parish District Attorney's Office, the Orleans Public Defenders, the Orleans Parish Sheriff's Office, the Criminal District Court Clerk of Court, the Municipal Court Judicial Administrator, the Office of the Independent Police Monitor, Civil Rights Corp, the MacArthur Justice Center, the Fines and Fees Justice Center, the Family Justice Center, the Innocence Project of New Orleans, Amnesty International, the Brennan Center, the Workers Center for Racial Justice, ReThink Media, Silence is Violence, former US Attorney for the Eastern District Kenneth Polite, Judge Keva Landrum, Judge Laurie White, Commissioner Jonathan Friedman, Former New Orleans Police Department Chief Ronal W. Serpas, Nathaniel Weaver, Re-Entry Court Coordinator Lindsay Jeffrey, Nandi Campbell, Graham Bosworth, Jon Wool, Jacques Morial, Victoria Coy, Anthony Ibert, Marvin Arnold, Melia Cerrato, Andrew Becker, Alexis Dogan, and countless brave whistleblowers who chose to remain anonymous, for providing data, help, insight, research (legal and otherwise) or advice for this report. This report was edited by Graham da Ponte and Julia Cass.

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VIII. Endnotes

- ¹ Domestic violence charges were rejected in 432 out of 924 felony domestic violence arrests. Orleans Parish District Attorney's Office Chief of Appeals, Donna Andrieu, response to public records request (Mar. 12, 2020, May 22, 2020); Orleans Parish Sheriff's Office Docket Master. As of the date of this publication, the District Attorney's Office is still reviewing an additional thirteen cases to determine whether domestic violence charges were refused.
- ² Witness Refusal to Testify in a Domestic Violence Case, HG.org, <https://www.hg.org/legal-articles/witness-refusal-to-testify-in-a-domestic-violence-case-47157>.
- ³ Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849, 1867-68 (1996); see also Jeff Adelson, New Orleans Prosecutors Dropping Charges in 90% of Misdemeanor Domestic Violence Cases, Nola.com (December 3, 2019, 6:56 pm), https://www.nola.com/news/courts/article_f494905e-1630-11ea-a656-d3eff0872fe8.html.
- ⁴ Orleans Parish District Attorney's Office Chief of Appeals, Donna Andrieu, response to public records request (Mar. 12, 2020).
- ⁵ We Prosecute Murder Without the Victim's Help. Why Not Domestic Violence?, The N.Y. Times (May 4, 2019), <https://www.nytimes.com/2019/05/04/opinion/sunday/domestic-violence-recanting-crawford.html?searchResultPosition=1>.; Domestic Violence and the Law, The N.Y. Times (May 13, 2019), <https://www.nytimes.com/2019/05/13/opinion/letters/domestic-violence-law.html?auth=login-email&login=email>.
- ⁶ Fragmented and Unequal: A Justice System that Fails Survivors of Intimate Partner Violence in Louisiana, USA, Amnesty International (2019) at 27.
- ⁷ Susan Buchanon, La. Wants to Take Guns Away From Domestic Abusers, The La. Weekly (Jan. 22, 2019), <http://www.louisianaweekly.com/la-wants-to-take-guns-away-from-domestic-abusers/>.
- ⁸ Campbell, Jacquelyn C, Daniel Webster, Jane Koziol-McLain, Carolyn Block, Doris Campbell, Mary Ann Curry, Faye Gary, et al. "Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study." American Journal of Public Health. © American Journal of Public Health 2003, July 2003. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/>.
- ⁹ La. R.S. 46:2136.3, (LA R.S. 46:2136.3 prohibits a defendant "from possessing a firearm or carrying a concealed weapon for the duration of the injunction or protective order if both of the following occur: (1) The permanent injunction or protective order includes a finding that the person subject to the permanent injunction or protective order represents a credible threat to the physical safety of a family member, household member, or dating partner (2) The permanent injunction or protective order informs the person subject to the permanent injunction or protective order that the person is prohibited from possessing a firearm pursuant to the provisions of 18 U.S.C. 922(g)(8) and this Section); See also, Quick Reference Guide to Firearms Prohibitions, The Louisiana Supreme Court, https://www.lasc.org/court_managed_prog/LPOR/Qk_ref_firearms_criminal.pdf.
- ¹⁰ Email from Blake Arcuri, General Counsel Orleans Parish Sheriff's Office to Simone Levine, Executive Director Court Watch NOLA (May 1, 2020, 6:28 PM CST) (on file with author).
- ¹¹ Email from Blake Arcuri General Counsel Orleans Parish Sheriff's Office to Simone Levine, Executive Director Court Watch NOLA (May 1, 2020, 11:44 AM CST) (on file with author).
- ¹² Law Enforcement's Role in Supporting Victims' Needs Through Pretrial Just. Reform, Int'l Ass'n of Chiefs of Police Victim Services Comm. (June 2015), ("If the standard procedure for determining pretrial release is consistently informed by the results of a risk assessment and testimony provided by the victim(s), as opposed to a static bond schedule, better informed decisions can be reached. Institutionalizing this practice also helps meet the need of victims to be heard throughout the justice process").
- ¹³ La. R.S. 15:257
- ¹⁴ Daniel Victor, Texas Rape Victim Was Jailed for Fear She Would Not Testify, Lawsuit Says, N.Y. TIMES (Jul. 22, 2016), <https://www.nytimes.com/2016/07/23/us/texas-rape-victim-was-jailed-for-fear-she-would-not-testify-lawsuit-says.html>; Prosecuting Attorney-Charging Decisions, Charging Decisions in Domestic Violence-Related Crimes, Praxis International, Chapter 5 (2016), <http://praxisinternational.org/wp-content/uploads/2016/02/BlueprintChapter5.pdf> (last visited May 9, 2018) (Do not threaten to or place a victim in custody to ensure witness availability).
- ¹⁵ Caliste v. Cantrell, 329 F. Supp.3d 296 (E.D. La. Oct. 6, 2018); Cain v. City of New Orleans, 186 F. Supp. 3d 536, 548 (E.D. La. 2019).
- ¹⁶ Caliste, 329 F. Supp.3d 296 (E.D. La. Oct. 6, 2018); Cain, 186 F. Supp. 3d 536, 548 (E.D. La. 2019).
- ¹⁷ See Caliste, 329 F. Supp.3d 296 (E.D. La. Oct. 6, 2018); See Cain, 186 F. Supp. 3d 536, 548 (E.D. La. 2019).
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¹²¹ Id. at 9 (“The only law enforcement agency in Louisiana which is required to have an internal policy on domestic violence policing is the New Orleans Police Department (NOPD); this is due to a Federal Consent Decree. New law enforcement officers must receive a minimum of eight hours training on domestic violence as part of their basic training.”) at 10 (“Only NOPD requires officers to obtain approval from a supervisor before making a dual arrest and to document reasons for arrest in the incident report.”)

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¹⁷⁷ Orleans Parish District Attorney, supra note 143.

¹⁷⁸ New Orleans City Council, Orleans Parish District Attorney, 2020 Proposed Budget Hearing at 1:16:48 (Nov. 14, 2019), https://cityofno.granicus.com/MediaPlayer.php?view_id=42&clip_id=3486

¹⁷⁹ Michael Stein, DA to Use Most of City Budget Bump for Prosecutors, Not Diversion Program, The Lens (Nov. 20, 2018), <https://thelensnola.org/2018/11/20/da-to-use-most-of-city-budget-bump-for-prosecutors-not-diversionprogram/>.

¹⁸⁰ La. Code Crim. Pro. § 230.2(A).

¹⁸¹ La. Code Crim. Pro. § 313(B) (“Upon motion of the prosecuting attorney, the judge or Magistrate may order the temporary detention of a person in custody who is charged with the commission of an offense, for a period of not more than five days, exclusive of weekends and legal holidays, pending the conducting of a contradictory bail hearing. Following the contradictory hearing, upon proof by clear and convincing evidence either that there is a substantial risk that the defendant might flee or that the defendant poses an imminent danger to any other person or the community, the judge or Magistrate may order the defendant held without bail pending trial” [emphasis added]).

¹⁸² La. Code Crim. Pro. § 313(A)(2). (“This 5-day period is exclusive of weekends and legal holidays.”)

¹⁸³ Id.

¹⁸⁴ Orleans Parish Sheriff’s Office Docket Master.

¹⁸⁵ Telephone Interview with Tamara Jackson, Executive Dir., Silence is Violence (Apr. 28, 2019).

¹⁸⁶ Id.

¹⁸⁷ Int’l Ass’n of Chiefs of Police Victim Services Comm., supra note 12.

¹⁸⁸ La. Code Crim. Proc. art. 316.

¹⁸⁹ Id.

¹⁹⁰ Sarah Stillman, Why are Prosecutors Putting Innocent Witnesses in Jail, The New Yorker (October 17, 2017), <https://www.newyorker.com/news/news-desk/why-are-prosecutors-putting-innocent-witnesses-in-jail>.

¹⁹¹ La. R.S. 15:257; Although a defense attorney may make a material witness warrant application to the court, Court Watch NOLA has not found any examples of this activity in 2019

¹⁹² La. R.S. 15:257

¹⁹³ Id.

¹⁹⁴ S.B. 146, 2019 Reg. Leg. Sess. (La. 2019).

¹⁹⁵ Cooks v. Rapides Parish Indigent Defender Bd., 1996-811 (La.App. 3 Cir. Dec. 11, 1996), 686 So.2d 63, writ denied, 1997-0409 (La. Mar. 27, 1997), 692 So.2d 398.

¹⁹⁶ Amnesty Int’l, supra note 6, at 92.

¹⁹⁷ Joel Gunther, Why Are Crime Victims Being Jailed?, BBC News (May 6, 2017) <http://www.bbc.com/news/world-us-canada-39662428>.

¹⁹⁸ Samantha Ketterer, Ogg Says DA’s Office Needs Reform to Protect Rape Victims, Chron (July 26, 2016), <https://www.chron.com/news/houston-texas/article/Ogg-says-reform-needed-to-protect-rape-victims-8423671.php> (In Houston, Texas where the incumbent district attorney had jailed a rape victim for failing to cooperate with the prosecution. The incumbent was voted out of office and replaced by current Harris County District Attorney, Kim Ogg who promised, “I will never put a crime victim in jail to secure a conviction. . . There are so many other things we can do.”).

¹⁹⁹ Telephone Interview with Eric Gonzalez, Chief Assistant District Attorney (April 26, 2017).

²⁰⁰ Meeting with Kim Foxx, District Attorney, Cook County, in Washington, D.C. (April 19, 2018).

²⁰¹ Meeting with Larry Krasner, District Attorney, Philadelphia, in Washington D.C. (April 19, 2018).

²⁰² Prosecuting Attorney-Charging Decisions, Charging Decisions in Domestic Violence-Related Crimes, Praxis International, Chapter 5 (2016), <http://praxisinternational.org/wp-content/uploads/2016/02/BlueprintChapter5.pdf> (last visited May 9, 2018) (Do not threaten to or place a victim in custody to ensure witness availability).

²⁰³ Victor, supra note 14.

²⁰⁴ To save space, you can find these articles here: https://docs.google.com/document/d/115k8QmLaj1cxSkXne1xkeyJLrPv_6Jv4lsjG19lel0/edit

²⁰⁵ Natasha Robin, Resolution Introduced to Prevent Jailing of Sex Crime, Domestic Abuse Victims, Fox 8 Local First (Apr. 28, 2017, 8:38PM CST), <https://www.fox8live.com/story/35280572/resolution-introduced-to-prevent-jailing-of-sex-crime-domestic-abuse-victims/>.

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- ²⁰⁶ S.B. 146, 2019 Reg. Leg. Sess. (La. 2019). The bill also forbade a judge from ordering a material witness warrant to secure the presence of a victim in a misdemeanor prosecution for a sex offense, battery of a dating partner, or domestic abuse battery.
- ²⁰⁷ Bryn Stole, Louisiana Senate Backs Strict Limits on 'Abhorrent Practice' of Jailing Victims Unwilling to Testify, *The Advocate* (May 8, 2019, 7:50PM CST), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_ff8efbd8-71ef-11e9-9c77-c76fb775450f.html.
- ²⁰⁸ Amnesty Int'l, *supra* note 6, at 91.
- ²⁰⁹ Aviva Shen, 'Like a Bad Dream': In New Orleans, Witnesses Are Going to Jail Instead of Perpetrators, *The Appeal* (May 21, 2018), <https://theappeal.org/like-a-bad-dream-in-new-orleans-witnesses-are-going-to-jail-instead-of-perpetrators-604243d9faff/>.
- ²¹⁰ Email from Orleans Parish Judge Keva Landrum to Simone Levine, Executive Director Court Watch NOLA (May 13, 2020 10:36 AM CST) (on file with author).
- ²¹¹ Email from Donna Andrieu, Orleans Parish District Attorney's Office Chief of Appeals to Veronica Bard, Court Watch NOLA Deputy Director (March 5, 2020, 1:55 PM CST). (on file with author).
- ²¹² Orleans Parish docket master shows that the date the victim failed to appear in court for which they were arrested and incarcerated, the victim's testimony was not required for either a hearing or a trial. Instead, the domestic violence case was adjourned for that date in question in order that the criminal defendant determine who the defendant's attorney was.
- ²¹³ While the defendant was not criminally charged with a domestic violence offense, according to motions in the case file, this case was a domestic violence case.
- ²¹⁴ The judge in the case specifically stated on the record, "This is really just a matter of the material witness warrant that was issued as it relates to one of the other witnesses in this case. The State wants to leave it out there. It'll stay out there." Despite the judge's specific reference to the material witness warrant, the Orleans Parish District Attorney's Office contends the witness was incarcerated on a court *capias* for failing to appear in court after receiving a court subpoena and not on a material witness warrant. Email from Donna Andrieu, Orleans Parish District Attorney's Office Chief of Appeals to Veronica Bard, Court Watch NOLA Deputy Director (May 23, 2020, 8:48 AM). (on file with author).
- ²¹⁵ Orleans Parish District Attorney's Office admits this witness was incarcerated on a material witness warrant according to the Orleans Parish Sheriff's Office Docketmaster but believes that this was an error on the part of the Orleans Parish Sheriff's Office and the witness was not in fact incarcerated on a material witness warrant. Email from Donna Andrieu, Orleans Parish District Attorney's Office Chief of Appeals to Veronica Bard, Court Watch NOLA Deputy Director (May 23, 2020, 8:48 AM). (on file with author).
- ²¹⁶ U.S.C. § 13981 (1994).
- ²¹⁷ Stein, *supra* note 137
- ²¹⁸ Alliance for Safety and Justice, *supra*, note 111 at 27.
- ²¹⁹ Email from Eva Lessinger, Director of Programs Family Justice Center to Simone Levine, Executive Director Court Watch NOLA (May 18, 2020 5:29 PM) (on file with author).
- ²²⁰ Bennett L. Gershman, Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality, 9 *Lewis & Clark L. Rev.* 559 (2005).
- ²²¹ Gunther, *supra* note 197.
- ²²² Meagan Flynn, Senators Unanimously Approve Jenny's Law, named for Jailed Rape Victim, *Houston Press* (April 6, 2017), <https://www.houstonpress.com/news/jennys-law-named-for-jailed-rape-victim-passes-through-senate-unanimously-9334761>; Monica Simmons, Gov. Abbott Signs 'Jenny's Law' to Keep Prosecutors from Jailing Crime Victims, *San Antonio Current* (June 5, 2017), <https://www.sacurrent.com/the-daily/archives/2017/06/05/gov-abbott-signs-jennys-law-to-keep-prosecutors-from-jailing-crime-victims> ("Victims of sexual assault and other crimes will never again be jailed, and their traumas exacerbated, solely by prosecutors willing to sacrifice them for a conviction," said new Harris County DA Kim Ogg in a prepared statement Friday.).
- ²²³ Cooks, 686 So.2d at 66.
- ²²⁴ Gershman, *supra* note 220.
- ²²⁵ *Id.*
- ²²⁶ *Id.*
- ²²⁷ La. Code Crim. Proc. art. 311.
- ²²⁸ La.Code Crim. Proc. art 316.
- ²²⁹ What is Bail Bond? The Law Dictionary, <https://thelawdictionary.org/bail-bond/> (last visited May 25, 2020).
- ²³⁰ Bail and Bonds, Justia, <https://www.justia.com/criminal/bail-bonds/> (last visited May, 25, 2020).
- ²³¹ Bail Bond, Investopedia, <https://www.investopedia.com/terms/b/bail-bond.asp> (last visited May, 25, 2020).
- ²³² Mathilde Laisne, Jon Wool, and Christian Henrichson, Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans, Vera Institute of Justice, (p. 27, fn 13, January 2017).

²³³ LA. R.S. §22:822(A)(2) (2015); LA. R.S. §13:1381.5(B)(2) (2015).

²³⁴ LA. R.S. §13:5599 (2015); LA. R.S. §15:85.1 (2015).

²³⁵ Email from Ivy Wang, Southern Poverty Law Center & SPLC Action Fund Sr. Staff Attorney, to Veronica Bard, Court Watch NOLA Deputy Director (Thurs., May 28, 2020, 10:04AM) (on file with author).

²³⁶ Matthew Menendez, L.B. Elsen, N. Atchison, M. Crowley, The Steep Costs of Criminal Justice Fees and Fines, Brennan Center for Justice (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>.

²³⁷ *Id.*

²³⁸ La. R.S. 14:63(G).

²³⁹ La. R.S. 14:62.8.

²⁴⁰ Menendez, *supra* note 222.

²⁴¹ La. R.S. 46:432.

²⁴² Orleans Criminal District Court, Magistrate Court & Municipal Court: 2018 Review, Court Watch Nola 1, 52 (2018), <https://www.courtwatchnola.org/wp-content/uploads/2018-Annual-Report.pdf>.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Order at 7, Cain, 15-4479 (E.D. La. Dec. 13, 2017).

²⁴⁶ *Id.* at 6.

²⁴⁷ *Id.* at 7.

²⁴⁸ Email from Lindsey Hortenstine to Simone Levine (Tue, Mar. 3, 2020, 9:30PM CST) (on file with author).

²⁴⁹ Allen v. Edwards, WL 3246532 (La. App. 1 Cir. July 19, 2019).

²⁵⁰ *Id.*

²⁵¹ Complaint at 6, Allen v. Edwards, WL 3246532 (La. App. 1 Cir. July 19, 2019).

²⁵² *Id.*

²⁵³ Motion Denying Defendant's Motion for Summary Judgement, Allen v. Edwards, WL 3246532 (La. App. 1 Cir. July 19, 2019).

²⁵⁴ Cain, 15-4479, WL 2962912, at 1.

²⁵⁵ *Id.* at 1.

²⁵⁶ Cain, 184 F. Supp. 3d at 382.

²⁵⁷ *Id.* at 382.

²⁵⁸ Cain, 937 F.3d at 454.

²⁵⁹ See Caliste v. Cantrell, 329 F. Supp. 3d 296 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019).

²⁶⁰ *Id.*

²⁶¹ Caliste 329 F. Supp. 3d at 302.

²⁶² *Id.* at 305-6

²⁶³ Caliste, 329 F. Supp. 3d at 319-20.

²⁶⁴ Caliste, 937 F.3d at 533; Class Action Complaint, Caliste v. Cantrell, Case No. 2:17-cv-06197 (E.D. La. June 27, 2017).

²⁶⁵ See Moran et al v. Landrum-Johnson et. al., 2:19 13553 (E.D. La. Apr. 30, 2020).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* .

²⁶⁹ See Defendant's Motion to Dismiss, Moran et al v. Landrum-Johnson et. al., 2:19 13553 (E.D. La. Apr. 30, 2020).

²⁷⁰ See Class Action Complaint, Matthews Jr. et. al. v. Herman et. al., Case No. 20-cv-1275 (E.D. La. Apr. 24, 2020).

²⁷¹ *Id.*

²⁷² Caliste 329 F. Supp. 3d at 302 ; Cain, 186 F. Supp. 3d at 541.

²⁷³ Cain, 186 F. Supp. 3d at 541.

²⁷⁴ *Id.*

²⁷⁵ New Orleans City Council, Orleans Parish Criminal District Court, 2020 Proposed Budget Hearing at 40:42-40:50 (Nov. 13, 2019), https://cityofno.granicus.com/MediaPlayer.php?view_id=42&clip_id=3485&meta_id=467846

²⁷⁶ See Caliste, 329 F. Supp. 3d 296

²⁷⁷ *Id.*

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- ²⁷⁸ *Id.*
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- ²⁸⁰ Caliste, 329 F. Supp. 3d at 311.
- ²⁸¹ Caliste, 329 F. Supp. 3d at 312.
- ²⁸² *Id.*
- ²⁸³ *Bearden v. Georgia*, 461 U.S. 660, 667-68 (1983).
- ²⁸⁴ Caliste, 329 F. Supp. 3d at 312.
- ²⁸⁵ Orleans Parish District Attorney, *supra* note 140.
- ²⁸⁶ La. R.S. 14:2 (4); La. R.S. 14:2 (6).
- ²⁸⁷ Orleans Parish District Attorney, *supra* note 140.
- ²⁸⁸ Louisiana Misdemeanor Crimes and Sentences, Nolo (Last visited May 22, 2020)
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- ²⁸⁹ New Orleans, Louisiana, Municipal Code § 2-811 et. seq.
- ²⁹⁰ New Orleans, Louisiana, Municipal Code § 54.
- ²⁹¹ New Orleans, Louisiana, Municipal Code § 154-176 et. seq.
- ²⁹² *Id.*
- ²⁹³ Operations Manual *supra* note 17.
- ²⁹⁴ *Id.*
- ²⁹⁵ *Id.*
- ²⁹⁶ *Id.*
- ²⁹⁷ The data reflected in these figures do not total 100% due to rounding.
- ²⁹⁸ Caliste 329 F. Supp. 3d at 305-6
- ²⁹⁹ *Id.*
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- ³⁰² Cain, 186 F. Supp. 3d at 548.
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³¹⁹ The Booking and Bail Process, FindLaw (Mar. 20, 2019), <https://criminal.findlaw.com/criminal-procedure/booking-and-bail.html>.

³²⁰ Engelberg, *supra* note 22.

³²¹ Email from Meghan Garvey, Bond Advocacy Attorney to Simone Levine, Executive Director Court Watch NOLA (Sun., Apr. 26, 2020, 7:37PM CST) (on file with author).

³²² Batchelder, 442 U.S. 114.

³²³ La. Code Crim. Proc. art. 319; La. Code Crim. Proc. art. 320(k).

³²⁴ Court Watch NOLA obtained its data from the Orleans Parish Sheriff's Office Docket Master, the online system for tracking the Orleans criminal court cases, which is supplemented with data provided by various entities, including the Orleans Parish Criminal District Clerk of Court. Whether a count is added or dropped is data inputted by the Clerk of Court.

³²⁵ La. Code Crim. Proc. art. 311.

³²⁶ *State v. Jones*, 215 So.2d 108, 112-13 (La. Oct. 10, 1968) (citing *State v. Alvarez*, 161 So.17 (Apr. 8, 1935)).

³²⁷ Plaintiff's Amended Complaint, *Moran et al v. Landrum-Johnson et. al.*, 2:19 13553 (E.D. La. Apr. 30, 2020).

³²⁸ See *Matthews Jr. et. al.*, Case No. 20-cv-1275 1, 8.

³²⁹ *Id.*

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³³¹ La. Code Crim. Proc. art. 320(k).

³³² La. Code Crim. Proc. art. 320(b).

³³³ Hortenstine, *supra* note 248.

³³⁴ 84 FR 1167 (2019-00621).

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https://www.theadvocate.com/baton_rouge/opinion/letters/article_1da1bbd2-a044-11ea-a711-6b8eb7d87f3a.html

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- ³⁵⁰ *State v. Nall*, 379 So.2d 731, 733 (La. 1980).
- ³⁵¹ Yoffe, *supra* note 29.
- ³⁵² *Brady v. United States*, 397 U.S. 742, 755 (1970).
- ³⁵³ Elizabeth Carpenter, Plea Bargaining in Criminal Cases, Blog (Oct. 26, 2012), <https://www.neworleans-criminal-defense.com/attorney-blog/2012/10/26/plea-bargaining-in-criminal-cases-new-orleans-criminal-defense-attorney/>.; Yoffe, *supra* note 26.
- ³⁵⁴ Jarvis DeBerry, 3 Ways New Orleans' Criminal Justice System is in a Shambles, *Nola.com* (Jan. 14, 2016), https://www.nola.com/news/crime_police/article_0bfd7b85-4975-5b1f-b474-051a93c6e5d3.html.
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- ³⁵⁷ *Id.*
- ³⁵⁸ *Id.*
- ³⁵⁹ La. Rev. Stat. Ann. § 40:966(B)(3)
- ³⁶⁰ No Money, No Freedom: The Need for Bail Reform, ACLU of Wash. (Sept. 2016), <https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/Bail%20Position%20Paper%2C%20Final%20II.pdf>.
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- ³⁶² Court Watch NOLA reported in its 2018 Annual Report that Orleans Criminal District Court judges may be punishing defendants for non-definitive drug test results. While the Drug Testing Lab on the first floor of the Orleans Criminal District Courthouse is capable of running initial drug screens, which produce presumptive results, 33 scientific best practices require a secondary confirmatory test for the most accurate results.³⁴ The Drug Testing Lab lacks the technology for this definitive confirmatory test,³⁵ yet Criminal District Court judges are incarcerating, fining, and ordering community service for defendants who have presumptively positive drug test results. Orleans Criminal District Court, Magistrate Court & Municipal Court: 2018 Review, Court Watch Nola 1, 9 (2018), <https://www.courtwatchnola.org/wp-content/uploads/2018-Annual-Report.pdf>.
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- ³⁶⁶ Berman, *supra* note 355.
- ³⁶⁷ Margo L. Frasier et al, Case 2:12-cv-00859, *Jones et al. v. Gusman #11* (2020).
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³⁷⁶ Cary Aspinwall, K. Blakinger, A. Vansickle, C. Thompson, Coronavirus Transforming Jails Across the Country, *The Marshall Project* (Mar. 21, 2020, 7:00AM CST), <https://www.themarshallproject.org/2020/03/21/coronavirus-transforming-jails-across-the-country>.

³⁷⁷ Yoffe, *supra* note 29.

³⁷⁸ *Id.*

³⁷⁹ Megan Stevenson, Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes, *U. of P.A. L. Sch.* 26 (January 8, 2017), <https://www.law.upenn.edu/cf/faculty/mstevens/workingpapers/Stevenson%20Job%20Market%20Paper%20Jan%202016.pdf>. *Clvii.*; Paul Heaton et al., The Downstream Consequences of Misdemeanor Pretrial Detention, *U. of P.A. L. Sch.* (July 2016), (Last visited Sept. 22, 2017), <https://www.law.upenn.edu/live/files/5693-harriscountybail>.

³⁸⁰ Will Dobbie, The Effects of Pretrial Detention on Conviction, Future Crime and Employment: Evidence from Randomly Judges, 108 *Am. Econ. Rev.* 201, 203 (2018) (a 24.2 percent change from the mean for detained defendants).

³⁸¹ *Id.*

³⁸² Emily Leslie & Nolan G. Pope, The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments, 60 *J. of L. & Econ.* 529, 530 (2017).

³⁸³ N = 484 defendants observed pleading guilty in Orleans Criminal District Court in 2019.

³⁸⁴ Sample sizes per court: A 49; B 29; C 28; D 67; E 34; F 50; G 51; H 40; I 48; J 17; K 20; L 39. The Supreme Court of Louisiana assigned Retired Judges Dennis Waldron and Terry Alarcon to preside over Section G on an ad hoc basis in 2019. Retired Judges Raymond Bigelow, Michael Kirby, Robert Klees, and Jerome Winsberg also served as ad hoc judges in Criminal District Court in 2019.

³⁸⁵ Nat'l Reg. of Exoneration, *supra* note 33, at 1.

³⁸⁶ *Id.* While only 9 percent of total exonerations are for drug crimes, nationally drug offenses make up 40 percent of all cases in which criminal defendants plead guilty.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ Megan Stevenson, Note, Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes, 26 *U. of P.A. L. Sch.* 1, 6 (2017).

³⁹² Jamiles Larty 'Plainly unconstitutional': New Orleans jail records inmates' calls to lawyers (May 22, 2018 10.44 EDT)

<https://www.theguardian.com/us-news/2018/may/22/new-orleans-prison-phone-calls-attorney-client-privilege>

³⁹³ *Id.*

³⁹⁴ Yoffe, *supra* note 29.

³⁹⁵ Ali Shahrestani, Why the Innocent Plead Guilty and What We Should Do About It, Blog (last visited Apr. 30, 2020),

<https://www.aliesq.com/articles/2018/11/6/why-the-innocent-plead-guilty-amp-what-we-should-do-about-it>.

³⁹⁶ National Registry of Exoneration, The First 1,600 Exonerations (last visited May, 21, 2020)

http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf

³⁹⁷ Audrey Levitin, Wrongful Convictions are a Family Tragedy, *The Innocence Project* (Mar. 18, 2014), <https://www.innocenceproject.org/wrongful-convictions-are-a-family-tragedy/>.

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³⁹⁹ Maurice Chammah, When the Innocent go to Prison, How Many Guilty Go Free, *The Marshall Project* (Mar. 21, 2018, 10:00PM CST),

<https://www.themarshallproject.org/2018/03/21/when-the-innocent-go-to-prison-how-many-guilty-go-free>.

⁴⁰⁰ Wallin & Klarich, *supra* note 36.

⁴⁰¹ Sexton, *supra* note 37.

⁴⁰² Public Hearing – NOPD's Initiatives to Reduce Officer Burden & Maximize Police Resources, Federal Judge Susie Morgan, Federal Court, Eastern District of Louisiana February 22, 2018 2pm.

⁴⁰³ Interview with Commissioner Jonathan Friedman, May 29, 2020.

⁴⁰⁴ *Id.*

⁴⁰⁵ The data in this figure do not total 100% due to rounding.

⁴⁰⁶ The data in this figure do not all total 100% due to rounding. Sample sizes per court: Criminal District Court: A 44, B 28, C 26, D 49, E 21, F 38, G 51, H 35, I 36, J 27, K 29, L 27, unknown 5; Magistrate Court: M1 63, M2 49, M3 57, M4 44, M5 47, unknown 8; Municipal Court: A 21, B 14, D 17, E 27, F 33, G 24, unknown 14.

⁴⁰⁷ 0 of 23 observations.

⁴⁰⁸ 0 of 7 observations.

⁴⁰⁹ 0 of 19 observations.

⁴¹⁰ 1 of 38 observations.

⁴¹¹ 2 of 7 observations.

⁴¹² 4 of 12 observations.

⁴¹³ 5 of 18 observations.

⁴¹⁴ La. Code Crim. Proc. art 551(A).

⁴¹⁵ *Id.*

⁴¹⁶ Engelberg, *supra* 38.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*