

January 15, 2014

## **Report and Recommendations on Bail Reform in New York State**

The New York County Lawyers' Association Criminal Justice Section ("the Section")<sup>1</sup> is an open membership committee comprising 150 defense attorneys, prosecutors, judges, and judicial personnel. The attorneys in our Section practice in both state and federal court, and our defense attorneys practice in both assigned counsel and retained counsel capacity. The Section has long been concerned about bail issues and their impact on poor New Yorkers charged with minor offenses. In December 2011, the Section sponsored a public forum titled, "When Bail Means Jail – Are NYC Criminal Courts Setting Bail Appropriately?," to explore these issues and recommendations for reform. In October 2012, the New York County Lawyers' Association (NYCLA), in partnership with the Brennan Center for Justice, National Association of Criminal Defense Lawyers, Association of Prosecuting Attorneys, and Center for NuLeadership on Urban Solutions, sponsored a three-day convening on racial disparities in the criminal justice system, which focused, in part, on pre-trial detention and the disparate impact on communities of color and which generated recommendations for bail reform similar to those in this report.

In the 2013 State of the Judiciary Address, the Chief Judge of the State of New York joined the call for bail reform and recommended legislation to accomplish that purpose.<sup>2</sup> After a careful analysis of the bill introduced in April 2013 (A. 6799/S. 4483), the Section concluded that the proposed legislation will do little to alter current problems with bail setting in New York City and may result in more onerous conditions being set upon defendants.

The Section's report first highlights the need for bail reform in the New York State court system due to the large numbers of people held in detention because of their inability to pay the amounts of bail being set by the court. The report then discusses the four main pieces of the bail reform legislation. Finally, the report lays out the Section's recommendations to address the problems in the Criminal Courts in New York City.

### **The Need for Bail Reform**

In New York City, bail is set in approximately one-third of cases that continue past arraignment, about 50,000 cases per year.<sup>3</sup> At any given moment, approximately 39% of the City's jail population are pre-trial detainees who have been charged with, but not convicted of, a crime,<sup>4</sup>

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<sup>1</sup> The views expressed are those of the Criminal Justice Section only, have not been approved by the New York County Lawyers' Association Board of Directors, and do not necessarily represent the views of the Board.

<sup>2</sup> New York State Unified Court System, The State of the Judiciary 2013, "Let Justice Be Done," Jonathan Lippman, delivered February 5, 2013 at Court of Appeal Hall, Albany, New York.

<sup>3</sup> Criminal Justice Agency Annual Report 2011 at 16.

<sup>4</sup> Jamie Fellner, *The Price of Freedom*, Human Rights Watch (2010) at 2, available at [www.hrw.org/sites/default/files/reports/us1210webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf).

and the average length of stay for pre-trial detainees is 53 days.<sup>5</sup> Eighty percent of defendants in state criminal cases are determined to be indigent, and thus provided with mandated representation.<sup>6</sup> Yet the average amount of bail set is \$2000; bail is set at less than \$500 in only 17% of cases.<sup>7</sup> While bail set at even \$500 may not appear onerous, a full 44% of defendants are never able to pay the bail amount and therefore cannot obtain release while their case is pending.<sup>8</sup> In New York City alone in 2011, bail was set on 25,296 defendants who were charged with crimes that were only misdemeanors or violations.<sup>9</sup>

The vast majority of people who are released on their own recognizance without bail or other conditions voluntarily appear for all court dates. According to 2011 data, 86% of defendants released on recognizance appeared for all subsequent court dates.<sup>10</sup> Of those who missed a court date, 52% returned to court within 30 days.<sup>11</sup> Thus, only 7% of defendants who were released on their recognizance missed a court date and failed to return within 30 days.<sup>12</sup>

In a 2010 Report, *The Price of Freedom*, Human Rights Watch condemned bail decisions in New York City courts and the number of defendants charged with low-level crimes who are jailed through their inability to pay even small amounts of bail.<sup>13</sup> The report highlighted the impact of financial bail on poor defendants charged in Criminal Court, a group comprising the vast majority of the criminal docket in New York City. The report made the additional argument that bail decisions were often set at amounts impossible for defendants to make as a “form of *sub rosa* preventive detention,”<sup>14</sup> as New York law does not specifically allow judges to consider public safety or dangerousness in bail decisions.

Despite the fact that bail is virtually always set in two forms—cash or fully secured bond—New York law actually authorizes nine different forms of bail. Many in the criminal justice community have criticized the failure of judges to use less financially onerous forms of bail, such as unsecured or partially secured bonds.<sup>15</sup> The American Bar Association Standards for Pretrial Release specify that financial conditions should be used only when no other conditions will provide reasonable assurance a defendant will appear in court.<sup>16</sup> The Standards further state that

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<sup>5</sup> New York City Department of Correction Statistics, Average Length of Stay (Detainee) FY2012, *available at* [http://www.nyc.gov/html/doc/html/stats/doc\\_stats.shtml](http://www.nyc.gov/html/doc/html/stats/doc_stats.shtml).

<sup>6</sup> Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, *available at* [http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html?\\_r=0](http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html?_r=0).

<sup>7</sup> Criminal Justice Agency Annual Report 2011 at 21.

<sup>8</sup> *Id.* at 24.

<sup>9</sup> *Id.* at 18.

<sup>10</sup> *Id.* at 26.

<sup>11</sup> *Id.* at 28.

<sup>12</sup> *Id.*

<sup>13</sup> *See* Note 2.

<sup>14</sup> *Id.* at 26.

<sup>15</sup> *See, e.g.*, Legal Aid Society Website *In the News*, February 8, 2013, *available at* <http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/currentbailssystempunishesnewyorkers.aspx>; Bronx Defenders Press Release March 22, 2012, *available at* <http://www.bronxdefenders.org/press/bronx-defenders-legal-director-marika-meis-successfully-argues-new-york-court-appeals-courts-m>; Note 2 at 17.

<sup>16</sup> American Bar Association Standards on Pre-Trial Release 10-1.4.

if financial conditions are imposed, the court should first consider releasing the defendant on an unsecured bond.<sup>17</sup> New York falls well short of these standards, using only the most financially burdensome forms of bail.

### **Summary and Critique of Bail Reform Legislation**

The proposed legislation (Appendix A) contains four major elements, explained and evaluated below.

#### *Public Safety Consideration*

The proposed legislation would make the assurance of the “safety of any other person or the community” a primary purpose of bail and of equal importance to securing a person’s court attendance under Crim. Proc. L. § 510.30(2). All of the factors listed in Crim. Proc. L. § 510.30(2)(a)—character, employment and financial resources, family ties, criminal record, prior juvenile delinquency or youthful offender adjudications, prior warrants, weight of the evidence, potential sentence—that are currently considered in determining the likelihood of return to court shall also be considered along with the safety of any other person or the community.

The fundamental problem with the proposed public safety consideration is that it is equated with the other factors in a judge’s evaluation of a defendant’s future court attendance. If a judge considers a person a threat to public safety and sets a high bail, a wealthy defendant may be able to make financial bail while a poor person is detained. There is no evidence that financial security deters a person from committing future crime.<sup>18</sup> Public safety may be jeopardized by the ability of a defendant to make bail. The public safety provision may also provide incentives for judges to set bail in amounts that defendants are unable to pay, which is contrary to the purpose of bail and is a practice that has been criticized.<sup>19</sup>

An additional problem is the lack of definition of “safety of any other person or the community.” The proposed legislation contains no guidance on what this phrase might encompass and whether “safety” is confined to a narrow definition of protection from injury, or is broadly defined to include protection from loss.<sup>20</sup> In the past 30 years, many scholars have criticized preventive detention statutes across the nation for their vague definitions.<sup>21</sup> Here, the phrase is similarly undefined and goes beyond mere “dangerousness,” leaving it open to broad application and the potential for a substantial increase in the number of people detained pre-trial.

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<sup>17</sup> *Id.*

<sup>18</sup> See generally John S. Goldkamp & Michael R. Gottfredson, *Policy Guidelines for Bail: An Experiment in Court Reform*, at 13 (1985); see also Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 Colum. L. Rev. 328 (1982); Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 Berkeley J. Crim. L. 1 (2008).

<sup>19</sup> *Supra* Note 11.

<sup>20</sup> See Merriam-Webster Dictionary definition number 1 of safety (noun) “the condition of being safe from undergoing or causing hurt, injury, or loss.”

<sup>21</sup> Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 Texas L. Rev. 497, 505 (2012).

There is also no specified quantum of proof needed for a court to use preventive detention and the district attorney need not make any arguments or meet any burdens. The court would be required to consider preventive detention in every case and give it equal weight with the defendant's likelihood of returning to court.

This is particularly problematic as the court is not required to state on the record the reasons for a bail determination. Thus, it will not be any clearer to attorneys and defendants whether bail is being set because of a belief that a defendant is unlikely to appear for court dates or that the defendant poses a threat to the safety of other persons or the community. As discussed above, one major criticism contained in the Human Rights Watch Report was that judges were setting bail in amounts defendants cannot afford as a *sub rosa* preventive detention determination. The proposed legislation does not address this problem, but, in fact, legitimizes it by making it appropriate for judges to fix unaffordable financial bail amounts to protect the community.

#### *Court Authority to Set Any Condition as Part of Release or Other Securing Order*

The proposed legislation would greatly increase a court's authority by allowing the court to make any securing order—release on recognizance, bail, or bond—subject to “any condition or conditions that, in [the court's] determination, will reasonably assure the appearance of the principal in court when required or that will reasonably assure the safety of any other person or the community.” The court's authority is only narrowly limited by the provision that the “conditions may include any that to the court seem appropriate provided that they represent the least restrictive condition or conditions necessary.” However, this last limitation does not apply to the court's authority to issue orders of protection as granted in Crim. Proc. L. §§ 530.12 and 530.13.

While this proposed legislative change explicitly authorizes the court to use innovative alternatives to financial bail, such as supervised release programs, the limitations are not enough to protect against abuse. This drastically enhances the court's authority to set conditions on a defendant even when public safety is not implicated, and it also contemplates conditions to assure public safety beyond that provided by orders of protection. For example, a court could require drug testing as a condition of recognizance in every marijuana possession case.

#### *Presumption of Release*

The proposed legislation requires the court to order recognizance on misdemeanors and non-violent felonies (except attempted class A felonies and manslaughter in the second degree) unless the court determines that “such a securing order will not reasonably secure the defendant's court attendance when required or will endanger the safety of any other person or the community in which event the court must order bail.”

A presumption of release without conditions is a step in the right direction to addressing existing bail issues. However, there is absolutely no guidance given to judges in applying the public safety standard, no limitation on the application of the standard, and no transparency in the decisions made under the standard. Thus, the presumption may not result in a significant change in the population being detained pre-trial.

Evidence compiled by the Criminal Justice Agency (CJA) supports applying the presumption of release absent an evidentiary showing even when more serious crimes are charged. The agency analyzed arrest data from defendants who were released pre-trial in 2001, either by being released on recognizance or by making bail. Overall the study found that those initially arrested for felony-level violent and property offenses were less likely to fail to appear in court or to be rearrested for violent crime.<sup>22</sup> Of the study sample of defendants who were released pre-trial, 17% were re-arrested pre-trial, and of those re-arrested, 82% were re-arrested for non-violent felony or misdemeanor charges.<sup>23</sup> Thus, the total risk that a person who was released pre-trial would be re-arrested for a violent felony was 2%.<sup>24</sup>

#### *Mandatory Review of Bail Orders Within 30 Days*

The bail reform proposal would require that on a defendant's first appearance in court, which cannot be more than 30 days after arraignment, the court must hear an application by the defendant for a change in the securing order and conduct a *de novo* review. However, this section will not apply when a defendant has been indicted or a Superior Court Information has been filed or where the defendant has already made an application and has received a determination while the felony complaint was pending. Thus, while this provision appears to grant a new right to the defendant, she or he continues to have only one bail determination review during the pendency of a case. This is, in practice, no different from the current rights to bail review afforded a defendant.

While this bail review provision may be helpful in some cases, particularly felony cases, the 30-day period is too long and will not solve the problem of defendants pleading guilty at arraignment to misdemeanors to avoid having bail set and spending longer amounts of time in jail.<sup>25</sup>

#### **Recommendations for Bail Reform**

With these comments in mind, the Section makes the following recommendations. We believe that for any bail reform proposal to achieve the stated goals of reducing the number of pre-trial detainees while increasing public safety, several reforms must be enacted simultaneously. It is the considered opinion of this Section, drawing from the wealth of experience of its members, including judges, prosecutors, defense attorneys, and academics, that if enacted alone, the proposed bail reforms might actually *increase* the number of pre-trial detainees. Thus, other policies must be advanced and enacted simultaneously to ensure that the twin goals of decreasing the number of defendants incarcerated pre-trial while ensuring public safety are achieved.

#### ***Recommendation #1: A Public Safety Bail Consideration Is Unnecessary, But Any Preventive Detention Based on Public Safety Should Follow ABA Guidelines***

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<sup>22</sup> Qudsia Siddiqi, *Predicting the Likelihood of Pretrial Failure to Appear and/or Re-arrest for a Violent Offense Among New York City Defendants: An Analysis of the 2001 Data Set 1* (2009) at 26.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> See note 2 at 31.

There is no evidence that there is a public safety problem in New York under the current bail statute. Thus, it is the Section's position that preventive detention based on a concern for public safety should not be a part of this or any legislation. However, if there were to be a public safety consideration, a set of rules and procedures must be put into place along with it. We feel the guidelines developed by the American Bar Association, contained in Appendix B, are effective and comprehensive. If preventive detention legislation is enacted, we urge that it and the guidelines be adopted in unison.

This Section's reasons for rejecting arguments in favor of preventive detention are myriad. Preventive detention based on a concern for public safety, while long used in other jurisdictions, would be a radical change from the traditional bail determination in New York State. Heretofore, the only factor a judge could consider was the likelihood of the defendant's return to court, without regard for his or her behavior if released. Not only would public safety detention represent a sea change in New York courts, it would afford judges significant new power. Unfortunately, as it is presently worded, the proposed legislation puts significant amounts of discretion and interpretation in the hands of the judge. We believe use of a new power like this must be regulated and circumscribed to reduce the chance for abuse, misinterpretation or over use, and to protect the due process rights of the defendant. It is worth noting that at arraignment, the court has the least amount of information that will ever be known about the case and the defendant before it. This may lead to unfair decisions to deny a person bail, or set a monetary equivalent of remand for persons of lesser financial means, based on allegations that have often not been rigorously investigated and the advocacy of a criminal defense attorney who likely had an unsatisfactory amount of time to gather information from and on behalf of his or her client.

Perhaps even more troubling is the issue that arises as a result of the disparity of wealth among defendants. As noted in the Summary and Critique above, if the court finds evidence that a defendant is truly a threat to the well-being of society, he or she should not be released under any condition. Wealth is irrelevant to a determination of a threat to society. It is illogical and inequitable to allow someone deemed a threat to others to be released simply because he or she is a person of means. While this Section is reluctant to support an increase in the number of people remanded to custody without bail, it recommends that if preventive detention becomes law, then all defendants held under it should be subject to mandatory remand. The Section is confident that if the ABA Guidelines are passed in conjunction with this legislation, there will be sufficient procedural grounds to assess remand status in a timely fashion.

***Recommendation #2: All Bail Decisions Should Include a Statement on the Record with the Reasons for the Determination***

New York State judges who set bail at arraignments, or at any stage of a case, need not state their reasons for doing so on the record. While a judge may engage in a discussion with the prosecutor and defense attorney about whether bail should be set and, if so, at what amount, the judge is not required to state which of the bail factors contained in Criminal Procedure Law §510.30 she or he finds lacking or persuasive.

The Section recommends that the Criminal Procedure Law be amended to require that every judge who sets bail must state a reason or reasons for doing so on the record. This policy is not unorthodox or even new; following a pre-trial motion to suppress evidence, the judge must make a record of his or her determination, findings of fact, and conclusions of law.<sup>26</sup> The reasons for this are obvious: a clear record makes the task of reviewing courts easier and more precise. Stating factual findings and conclusions of law, either in a written opinion or aloud from the bench and included in the record, helps ensure that judges will not act arbitrarily or capriciously, but instead will issue a determination based on a clear understanding of the facts and grounded in the law.

The same policy considerations compel a similar procedure for arraignments. As noted above, the proposed bail reform legislation includes the opportunity for an automatic *de novo* bail review as a matter of law, in addition to whatever superior court and appellate remedies a defendant may seek. A stated reason for setting bail—be it risk of flight based on prior bench warrants, the strength of the case, or any other reason—will assure that the reviewing court will consider the prior decision in full, taking account of any changes in circumstance or new evidence, as well as the legal and reasoned grounds for bail determinations.

### ***Recommendation #3: Three Forms of Bail Should be Required in Misdemeanor Cases***

Presently, if a judge in New York sets an amount of bail on a defendant, she or he must provide at least two methods of payment.<sup>27</sup> Traditionally in New York City, those two forms have been cash or insurance company bail bond. The requirement that at least two forms of bail be set does not prevent a judge from setting two different *amounts* of bail. Thus, a judge frequently sets a cash bail, and then a higher form of insurance company bond, knowing that the defendant or his or her family and friends will only be required to pay the bail bondsman a percentage of the bail amount set. However, the law does not require that these are the two forms that *must* be set, or that they must be set in tandem.

Rather, and as mentioned above, there are seven other forms provided by the Criminal Procedure Law that can assure the defendant's return to court.<sup>28</sup> Cash and insurance company bail bond are, in fact, the most onerous for the defendant to make. Every other type of bail requires either that less cash or none at all be put up front to ensure a defendant's release. The vast majority of criminal defendants in New York City exist at or below the poverty line. Ensuring that defendants have the option of partially secured or unsecured bail would allow more defendants to be released pre-trial. Defendants released on less onerous forms of bail are still responsible to the court for financial penalties if they fail to appear, just as with other forms of bail.

This Section recommends that the Criminal Procedure Law be amended to require a judge to set three forms of bail in all misdemeanor cases.<sup>29</sup> Judges would be free to set cash and insurance

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<sup>26</sup> CPL §710.60(6).

<sup>27</sup> *People ex rel. McManus v. Horn*, 18 N.Y.3d 660 (2012).

<sup>28</sup> CPL §520.10.

<sup>29</sup> This suggestion assumes that bail paid by credit card does not count as a third form, but rather is an alternative method of paying cash bail.

company bail bond, but would then also have to select a third type, which would inherently be less burdensome and more feasible for the defendant to make. This would ensure that defendants who might be considered flight risks would have a financial incentive to return to court, beyond the legal requirements and penalties for failing to do so, while also allowing far more defendants charged with low-level, non-violent offenses to be released from pre-trial custody.

We also recommend that funding be provided to study the rate of return for defendants who sign or post less restrictive forms of bail, such as partially secured or unsecured appearance or surety bonds, to determine if the law should be expanded to include those charged with non-violent felonies as well.

#### ***Recommendation #4: Other Criminal Law Reforms Should be Enacted to Reduce Pre-Trial Detention Problems***

The Section recommends other alterations to the Penal Law and Criminal Procedure Law that would also reduce problems related to the length of pre-trial detention and the number of detainees.

##### ***Decriminalize Public Possession of Small Amounts of Marijuana***

First, on several occasions since the beginning of Governor Andrew Cuomo's administration, there have been efforts to decriminalize public possession of marijuana,<sup>30</sup> currently codified in Penal Law §220.10 as a B misdemeanor. The Section recommends that public possession of small amounts of marijuana be reduced to a violation. As has been well documented, New York City arrested over 50,000 people for misdemeanor marijuana possession charges in 2011.<sup>31</sup> Many of those arrested receive Desk Appearance Tickets (DATs), and are thus not subjected to processing through central booking and the typical arraignment process. Those receiving DATs are far less likely to have bail set. Two lawsuits pending against the NYPD allege that there is a practice of falsely arresting people for the misdemeanor of possession of marijuana in public.<sup>32</sup> Decriminalizing public possession of marijuana would increase the number of arrestees receiving a Desk Appearance Ticket or a summons. This would, in turn, cut down on the number of people processed through central booking and traditional arraignments, ensuring that fewer people would be subject to a bail determination. Correspondingly, all of the players in the court system who must now work diligently to ensure that non-DAT defendants are arraigned within 24 hours will have more time to spend on clients with more serious charges.

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<sup>30</sup> See generally, Press Release, "Governor Cuomo Announces Legislation to Bring Consistency and Fairness to the State's Penal Law and Save Thousands of New Yorkers from Unnecessary Misdemeanor Charges." June 4, 2012, available at [www.governor.ny.gov/press/060412legislation](http://www.governor.ny.gov/press/060412legislation).

<sup>31</sup> "Federal Suit Claims Police Distort Marijuana Searches to Create Misdemeanors." Rivera, Ray; New York Times, May 1, 2013. Available at <http://www.nytimes.com/2013/05/02/nyregion/5-in-bronx-contend-police-distorted-marijuana-searches-to-create-misdemeanors.html?ref=searchandseizure&r=0>.

<sup>32</sup> See generally, "Out of One Gram of Marijuana, a 'Manufactured Misdemeanor.'" Dwyer, Jim; New York Times, March 21, 2013. Available at [www.nytimes.com/2013/03/22/nyregion/out-of-one-gram-of-marijuana-a-manufactured-misdemeanor.html](http://www.nytimes.com/2013/03/22/nyregion/out-of-one-gram-of-marijuana-a-manufactured-misdemeanor.html).



### *Reform the Discovery Process*

The Section also recommends the reexamination of the discovery process as codified in Criminal Procedure Law §240.20 and case law, most notably *People v. Rosario*.<sup>33</sup> Under New York's antiquated discovery procedure, the bulk of the evidence the prosecution has and intends to use need not be turned over until after a jury is sworn or during the pendency of a pre-trial hearing, dependent on various factors and the nature of the witness. Practically speaking, in counties that continue to abide strictly by the *Rosario* rule, most discovery is not turned over until immediately before a case begins a hearing or trial, regardless of the severity of the charge.

Some counties have developed a more flexible and fair discovery system. Known generally as Open File Discovery or Discovery by Stipulation, some evidence and documents are turned over early in the process, after arraignment but well before trial. However, as these systems are not codified in or mandated by law, there is considerable variance among jurisdictions in the breadth of materials turned over and the timing of disclosure, which can result in trial delays. For several years, the Criminal Justice Section has supported and advocated for comprehensive legislation on discovery reform, such as the proposal put forward by the Legal Aid Society.<sup>34</sup> The lack of timely discovery leaves the defendant at a substantial disadvantage in terms of information and the ability to prepare a case, develop a case theory, interview witnesses, and find favorable evidence. Early and regular disclosure of evidence remedies these concerns, and also reduces potential *Brady*<sup>35</sup> violations and wrongful convictions.

Discovery reform could also decrease the time that defendants spend incarcerated pre-trial at a substantial cost savings to taxpayers. When prosecutors turn over discovery earlier in the process, defense attorneys can review the documents with their clients and conduct their own investigations. Through this process, the strengths and merits of the case can be evaluated at a much earlier time, which will, in turn, assure that a substantial number of cases are resolved before trial. Depending on the sentence, defendants may be released, sentenced to upstate prison terms, or serve their time in City facilities. No matter the outcome, they will be removed from pre-trial detention status, reducing the backlog of cases in the City's Criminal Courts and saving money. Perhaps even more pertinently, enhanced pre-trial discovery will afford both sides the opportunity to use the materials to advocate for or against release during post-arraignment appearances where the issue is raised. While under the proposed legislation, an incarcerated defendant would have an automatic right to a bail review, a defense attorney armed with new discovery could argue at any point for a change in bail status based on changed circumstances. This would assuredly result in more otherwise incarcerated defendants securing release pre-trial.

### *Expand Pre-Trial Supervised Release Programs*

Finally, the Section recommends an expansion of pre-trial supervised release programs, like those run by the New York City Criminal Justice Agency in Queens and now in Manhattan. These programs select clients in arraignments who meet a specific set of criteria, chiefly that

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<sup>33</sup> *People v. Rosario*, 9 N.Y.2d 286 (1961).

<sup>34</sup> Available at <http://www.legal-aid.org/en/criminal/criminalpractice/discoveryreformproposal.aspx>.

<sup>35</sup> *Brady v. Maryland*, 373 US 83 (1963).

they are a moderate risk for failure to return to court according to CJA's own screening methodology, are charged with non-violent felonies, and have a minimal criminal history. This program was piloted in Queens County and has recently been expanded to Manhattan. The program conditions a defendant's release on meeting with CJA social workers, who screen for substance abuse and connect the defendant with benefits, job training, rehabilitation programs, and other needed services.

Pre-trial release supervision programs result in fewer pre-trial detainees, and provide a process for those ensnared in the criminal justice system to access needed services. These programs should be expanded to the other boroughs, if not statewide, and should eventually include those charged with violent felonies. The costs of these programs are far lower than the costs of housing inmates at Rikers Island and local jails and can be supported by reinvesting reduced corrections costs in community-supervision programs.

## **Conclusion**

The need for bail reform is clear. Evidence shows that far too many people are incarcerated pre-trial for low-level offenses because they cannot pay small amounts of bail. Unfortunately, the bail reform provisions in the pending legislation may increase the number of people detained pre-trial. Also the creation of a public safety consideration in bail determinations is an unnecessary change that does not address a demonstrated problem. Instead, to address the documented inequities of the current bail system, the Section recommends reforms such as requiring judges to state bail determinations on the record, requiring that three or more forms of bail be set, and expanding pre-trial release programs.

A06799 Text:

## S T A T E   O F   N E W   Y O R K

6799

2013-2014 Regular Sessions

I N   A S S E M B L Y

April 18, 2013

Introduced by M. of A. LENTOL -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to the issuance of securing orders

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1    Section 1. Legislative findings. The legislature finds and declares  
2    that there is a present need to revise New York's procedures regulating  
3    release of persons charged with criminal offenses pending trial. These  
4    procedures, which are set forth in title P of the criminal procedure  
5    law, require criminal courts to issue securing orders releasing such  
6    persons on their own recognizance, fixing bail upon the payment of which  
7    they must be released from custody, or remanding them to the custody of  
8    corrections officials.

9    Experience has shown that these procedures are ill-designed to meet  
10    today's community needs. First, New York remains one of very few states  
11    nationally that fails to require judges, in making bail decisions, to  
12    weigh defendant's threat to public safety. This makes little sense in  
13    modern American life where we as a state need to do all we can to be  
14    effective and principled in protecting communities from dangerous  
15    persons charged with crime who may otherwise be eligible for release  
16    pending trial. Second, as many have recognized, New York's bail rules,  
17    as applied, can be particularly unfair to poor persons and their fami-  
18    lies as bail beyond the financial wherewithal of a criminal defendant is  
19    frequently ordered in low-level offenses even where such defendant may  
20    pose little risk of flight.

21    Accordingly, this act has two purposes. First, it seeks to recognize  
22    what most other state jurisdictions and the federal government have long  
23    accepted -- that a defendant's danger to the community is a factor that  
24    must be considered by a court charged with determining whether that  
25    defendant should be released pending trial. Second, this act aims to

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

LBD08986-01-3

1 ensure that the state's bail statutes are implemented fairly and that  
2 poor persons charged with crime should not be at any special disadvan-  
3 tage when it comes to decisions regarding release pending trial.

4 S 2. The opening paragraph of paragraph (a) of subdivision 2 of  
5 section 510.30 of the criminal procedure law is amended to read as  
6 follows:

7 With respect to any principal, the court must consider the kind and  
8 degree of control or restriction that is necessary to secure his OR HER  
9 court attendance when required AND TO ASSURE THE SAFETY OF ANY OTHER  
10 PERSON OR THE COMMUNITY. In determining [that matter] THESE MATTERS,  
11 the court must, on the basis of available information, consider and take  
12 into account:

13 S 3. The section heading of section 510.40 of the criminal procedure  
14 law is amended and a new subdivision 1-a is added to read as follows:

15 Application for recognizance or bail; determination thereof, FIXING  
16 CONDITIONS THEREFOR, form of securing order and execution  
17 thereof.

18 1-A. THE COURT MAY MAKE ANY SECURING ORDER SPECIFIED IN PARAGRAPH (A)  
19 OR (B) OF SUBDIVISION ONE OF THIS SECTION SUBJECT TO ANY CONDITION OR  
20 CONDITIONS THAT, IN ITS DETERMINATION, WILL REASONABLY ASSURE THE  
21 APPEARANCE OF THE PRINCIPAL IN COURT WHEN REQUIRED OR THAT WILL REASON-  
22 ABLY ASSURE THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY. SUCH CONDI-  
23 TION OR CONDITIONS MAY INCLUDE ANY THAT TO THE COURT SEEM APPROPRIATE  
24 PROVIDED THAT THEY REPRESENT THE LEAST RESTRICTIVE CONDITION OR CONDI-  
25 TIONS NECESSARY. NOTWITHSTANDING THE FOREGOING, THIS SUBDIVISION SHALL  
26 NOT AFFECT A COURT'S AUTHORITY PURSUANT TO SECTIONS 530.12 AND 530.13 OF  
27 THIS TITLE.

28 S 4. Subdivision 1 and the opening paragraph of subdivision 2 of  
29 section 530.20 of the criminal procedure law, as amended by chapter 531  
30 of the laws of 1975, are amended to read as follows:

31 1. When the defendant is charged[, by information, simplified informa-  
32 tion, prosecutor's information or misdemeanor complaint,] with an  
33 offense or offenses [of less than felony grade only] OTHER THAN A  
34 VIOLENT FELONY OFFENSE AS DEFINED IN SUBDIVISION ONE OF SECTION 70.02 OF  
35 THE PENAL LAW OR THE COMMISSION OR ATTEMPTED COMMISSION OF A CLASS A  
36 FELONY OR MANSLAUGHTER IN THE SECOND DEGREE AS PROVIDED IN SECTION  
37 125.15 OF THE PENAL LAW, the court must order recognizance [or bail]  
38 UNLESS THE COURT DETERMINES THAT SUCH A SECURING ORDER WILL NOT REASON-  
39 ABLY SECURE THE DEFENDANT'S COURT ATTENDANCE WHEN REQUIRED OR WILL  
40 ENDANGER THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY IN WHICH EVENT  
41 THE COURT MUST ORDER BAIL.

42 When the defendant is charged, by felony complaint, with a VIOLENT  
43 felony OFFENSE AS DEFINED IN SUBDIVISION ONE OF SECTION 70.02 OF THE  
44 PENAL LAW OR THE COMMISSION OR ATTEMPTED COMMISSION OF A CLASS A FELONY  
45 OR MANSLAUGHTER IN THE SECOND DEGREE AS PROVIDED IN SECTION 125.15 OF  
46 THE PENAL LAW, the court may, in its discretion, order recognizance or  
47 bail except as otherwise provided in this subdivision:

48 S 5. Subdivisions 1, 2 and 3 of section 530.40 of the criminal proce-  
49 dure law, subdivision 3 as amended by chapter 264 of the laws of 2003,  
50 are amended to read as follows:

51 1. When the defendant is charged with an offense or offenses [of less  
52 than felony grade only] OTHER THAN A VIOLENT FELONY OFFENSE AS DEFINED  
53 IN SUBDIVISION ONE OF SECTION 70.02 OF THE PENAL LAW OR THE COMMISSION  
54 OR ATTEMPTED COMMISSION OF A CLASS A FELONY OR MANSLAUGHTER IN THE  
55 SECOND DEGREE AS PROVIDED IN SECTION 125.15 OF THE PENAL LAW, the court  
56 must order recognizance [or bail] UNLESS THE COURT DETERMINES THAT SUCH

1 A SECURING ORDER WILL NOT REASONABLY SECURE THE DEFENDANT'S COURT  
2 ATTENDANCE WHEN REQUIRED OR WILL ENDANGER THE SAFETY OF ANY OTHER PERSON  
3 OR THE COMMUNITY IN WHICH EVENT THE COURT MUST ORDER RECOGNIZANCE OR  
4 BAIL.

5 2. When the defendant is charged with a VIOLENT felony OFFENSE AS  
6 DEFINED IN SUBDIVISION ONE OF SECTION 70.02 OF THE PENAL LAW OR THE  
7 COMMISSION OR ATTEMPTED COMMISSION OF A CLASS A FELONY OR MANSLAUGHTER  
8 IN THE SECOND DEGREE AS PROVIDED IN SECTION 125.15 OF THE PENAL LAW, the  
9 court may, in its discretion, order recognizance or bail. In any such  
10 case in which an indictment (a) has resulted from an order of a local  
11 criminal court holding the defendant for the action of the grand jury,  
12 or (b) was filed at a time when a felony complaint charging the same  
13 conduct was pending in a local criminal court, and in which such local  
14 criminal court or a superior court judge has issued an order of recogni-  
15 zance or bail which is still effective, the superior court's order may  
16 be in the form of a direction continuing the effectiveness of the previ-  
17 ous order.

18 3. Notwithstanding the provisions of [subdivision] SUBDIVISIONS ONE  
19 AND TWO OF THIS SECTION, a superior court may not order recognizance or  
20 bail, or permit a defendant to remain at liberty pursuant to an existing  
21 order, after he OR SHE has been convicted of either: (a) a class A felo-  
22 ny or (b) any class B or class C felony defined in article one hundred  
23 thirty of the penal law committed or attempted to be committed by a  
24 person eighteen years of age or older against a person less than eigh-  
25 teen years of age. In either case the court must commit or remand the  
26 defendant to the custody of the sheriff.

27 S 6. The criminal procedure law is amended by adding a new section  
28 530.42 to read as follows:

29 S 530.42 ORDER OF RECOGNIZANCE OR BAIL: REVIEW OF SECURING ORDER.

30 NOTWITHSTANDING THE PROVISIONS OF SUBDIVISION ONE OF SECTION 510.20 OF  
31 THIS TITLE, UPON A DEFENDANT'S FIRST APPEARANCE BEFORE THE COURT IN A  
32 CRIMINAL ACTION OR PROCEEDING IN WHICH HE OR SHE IS CHARGED WITH ONE OR  
33 MORE OFFENSES, OCCURRING NOT LESS THAN THIRTY DAYS AFTER HE OR SHE WAS  
34 ARRAIGNED THEREON, THE COURT MUST ENTERTAIN AN APPLICATION BY THE  
35 DEFENDANT FOR A CHANGE IN ANY SECURING ORDER THEN APPLICABLE TO SUCH  
36 DEFENDANT IN SUCH ACTION OR PROCEEDING. UPON SUCH APPLICATION, THE  
37 DEFENDANT MUST BE ACCORDED AN OPPORTUNITY TO BE HEARD, AND THE COURT  
38 MUST DETERMINE THE APPLICATION DE NOVO, WITHOUT REGARD TO THE EXISTING  
39 SECURING ORDER AND IN THE SAME MANNER AS IT WOULD DETERMINE AN APPLICA-  
40 TION FOR RECOGNIZANCE OR BAIL MADE BY A DEFENDANT WHEN HE OR SHE FIRST  
41 COMES UNDER THE CONTROL OF THE COURT. NOTWITHSTANDING THE FOREGOING,  
42 THIS SECTION SHALL NOT APPLY WHERE (I) A DEFENDANT IS CHARGED WITH ONE  
43 OR MORE OFFENSES IN A SUPERIOR COURT BY INDICTMENT OR SUPERIOR COURT  
44 INFORMATION FILED AFTER THE DEFENDANT HAS BEEN HELD FOR ACTION OF THE  
45 GRAND JURY BY A LOCAL CRIMINAL COURT BEFORE WHICH A FELONY COMPLAINT  
46 CHARGING DEFENDANT WITH COMMISSION OF ONE OR MORE OFFENSES WAS PENDING,  
47 AND (II) WHILE SUCH FELONY COMPLAINT WAS PENDING, SUCH LOCAL CRIMINAL  
48 COURT RECEIVED AND DETERMINED AN APPLICATION BY DEFENDANT PURSUANT TO  
49 THIS SECTION IN RELATION TO A SECURING ORDER ISSUED BY SUCH COURT UPON  
50 DEFENDANT'S ARRAIGNMENT ON SUCH FELONY COMPLAINT.

51 S 7. This act shall take effect on the first of November next succeed-  
52 ing the date on which it shall have become a law.

## APPENDIX B

### ABA PRETRIAL RELEASE STANDARDS

#### **Standard 10-5.8. Grounds for pretrial detention**

(a) If, in cases meeting the eligibility criteria specified in Standard 10-5.9 below, after a hearing and the presentment of an indictment or a showing of probable cause in the charged offense, the government proves by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person, the judicial officer should order the detention of the defendant before trial.

(b) In considering whether there are any conditions or combinations of conditions that would reasonably ensure the defendant's appearance in court and protect the safety of the community and of any person, the judicial officer should take into account such factors as:

- (i) the nature and circumstances of the offense charged;
- (ii) the nature and seriousness of the danger to any person or the community, if any, that would be posed by the defendant's release;
- (iii) the weight of the evidence;
- (iv) the person's character, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, including the likelihood that the defendant would leave the jurisdiction, community ties, history relating to drug or alcohol abuse, criminal history, and record of appearance at court proceedings;
- (v) whether at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense;
- (vi) the availability of appropriate third party custodians who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community;
- (vii) any facts justifying a concern that a defendant will present a serious risk of flight or of obstruction, or of danger to the community or the safety of any person.

(c) In cases charging capital crimes or offenses punishable by life imprisonment without parole, where probable cause has been found, there should be a rebuttable presumption that the defendant should be detained on the ground that no condition or combination of conditions of release will reasonably ensure the safety of the community or any person or the defendant's appearance in court. In the event the defendant presents information by proffer or otherwise to

rebut the presumption, the grounds for detention must be found to exist by clear and convincing evidence.

**Standard 10-5.9. Eligibility for pretrial detention and initiation of the detention hearing**

(a) The judicial officer should hold a hearing to determine whether any condition or combination of conditions will reasonably ensure the defendant's appearance in court and protect the safety of the community or any person. The judicial officer may not order the detention of a defendant before trial except:

(i) upon motion of the prosecutor in a case that involves:

(A) a crime of violence or dangerous crime; or

(B) a defendant charged with a serious offense on release pending trial for a serious offense, or on release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence; or on probation or parole for a serious offense involving a crime of violence, a dangerous crime; or

(ii) upon motion of the prosecutor or the judicial officer's own initiative, in a case that involves:

(A) a substantial risk that a defendant charged with a serious offense will fail to appear in court or flee the jurisdiction; or

(B) a substantial risk that a defendant charged in any case will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate a prospective witness or juror.

(b) If the judicial officer finds that probable cause exists, except for a defendant held under temporary detention, the hearing should be held immediately upon the defendant's first appearance before the judicial officer unless the defendant or the prosecutor seeks a continuance. Except for good cause shown, a continuance on motion of the defendant or the prosecutor should not exceed [five working days]. Pending the hearing, the defendant may be detained.

(c) A motion to initiate pretrial detention proceedings may be filed at any time regardless of a defendant's pretrial release status.

**Standard 10-5.10. Procedures governing pretrial detention hearings: judicial orders for detention and appellate review**

(a) At any pretrial detention hearing, defendants should have the right to:

(i) be present and be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed;

(ii) testify and present witnesses on his or her own behalf;

(iii) confront and cross-examine prosecution witnesses; and,

(iv) present information by proffer or otherwise.

(b) The defendant may be detained pending completion of the pretrial detention hearing.

(c) The duty of the prosecution to release to the defense exculpatory evidence reasonably within its custody or control should apply at the pretrial detention hearing.

(d) At any pretrial detention hearing, the rules governing admissibility of evidence in criminal trials should not apply. The court should receive all relevant evidence. All evidence should be recorded. The testimony of a defendant should not be admissible in any other criminal proceedings against the defendant in the case in chief, other than a prosecution for perjury based upon that testimony or for the purpose of impeachment in any subsequent proceedings.

(e) In pretrial detention proceedings under Standard 10-5.8 or 10-5.9, where there is no indictment, the prosecutor should establish probable cause to believe that the defendant committed the predicate offense.

(f) In pretrial detention proceedings, the prosecutor should bear the burden of establishing by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court and protect the safety of the community or any person.

(g) A judicial order for pretrial detention should be subject to the following limitations and requirements.

(i) Unless the defendant consents, no order for pretrial detention should be entered by the court except on the conclusion of a full pretrial detention hearing as provided for within these Standards.

(ii) If, on conclusion of a pretrial detention hearing, the court determines by clear and convincing evidence that no condition or combination of conditions will reasonably ensure the appearance of the person as required, and the safety of any other person and the community pursuant to the criteria established within these Standards, the judicial officer should state the reasons for pretrial detention on the record at the conclusion of the hearing or in written findings of fact within [three days]. The order should be based solely upon evidence provided for the pretrial detention hearing. The court's statement on the record or in written findings of fact should include the reasons for concluding that the safety of the community or of any person, the



integrity of the judicial process, and the presence of the defendant cannot be reasonably ensured by setting any conditions of release or by accelerating the date of trial.

(iii) The court's order for pretrial detention should include the date by which the detention must be considered de novo, in most cases not exceeding [90 days]. A defendant may not be detained after that date without a pretrial detention hearing to consider extending pretrial detention an additional [90 days] following procedures under Standards 10-5.8, 10-5.9 and this Standard. If a pretrial detention hearing to consider extending detention of the defendant is not held on or before that date, the defendant who is held beyond the time of the detention order should be released immediately under reasonable conditions that best minimize the risk of flight and danger to the community.

(iv) Nothing in these Standards should be construed as modifying or limiting the presumption of innocence.

(h) A pretrial detention order should be immediately appealable by either the prosecution or the defense and should receive expedited appellate review. If the detention decision is made by a judicial officer other than a trial court judge, the appeals should be de novo. Appeals from decisions of trial court judges to appellate judges should be reviewed under an abuse of discretion standard.