New York's 2019 Bail Reform

Christopher Tyner, Legal Research Associate, UNC School of Government, November 2019

Responding to the realization that it had "for far too long needlessly incarcerated those meant to be guaranteed a presumption of innocence simply because of an inability to pay bail,"[1] New York passed legislation in April of 2019 reforming state bail and pretrial release law. In addition to "eliminating both money bail and pretrial detention in nearly all misdemeanors and nonviolent felonies,"[2] the law requires in many cases that law enforcement officers issue an appearance ticket rather than make a custodial arrest and provides for a court date reminder system.[3] This paper provides an overview of New York's new approach to pretrial justice, which is effective January 1, 2020.

Conditions of Pretrial Release

The keystone feature of New York's new approach is a clear statutory prohibition on the use of money bail in nearly all cases involving a misdemeanor or non-violent felony as the highest charge. This categorical elimination of money bail as a condition of pretrial release in a significant portion of criminal cases differentiates New York's approach to bail reform from that of other jurisdictions, many of which express a presumption of release without money bail but grant courts discretion to override this presumption.[4] Along with the elimination of money bail in many cases, the new law generally requires courts to release defendants on their own recognizance or, after finding that such release will not assure a defendant's return to court, on the least restrictive conditions that will reasonably assure his or her return to court. All defendants are entitled to representation by counsel at pretrial release proceedings and indigent defendants are entitled to appointed counsel.[5]

The new law accomplishes this reform by drawing a distinction between "qualifying offenses" for which money bail still may be set and all other offenses, for which money bail no longer is an option.[6] Generally speaking, qualifying offenses include violent felonies, sex offenses, witness intimidation or tampering, money laundering, terrorism, and violations of domestic violence protective orders.[7] Even in cases involving a qualifying offense, courts are not required to impose money bail and instead have discretion to release defendants on their own recognizance

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[1] FY 2020 NEW YORK STATE EXECUTIVE BUDGET, PUBLIC PROTECTION AND GENERAL GOVERNMENT ARTICLE VII LEGISLATION 182 (2018), https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ppgg-artvii.pdf.

[2] MICHAEL REMPEL & KRYSTAL RODRIGUEZ, CENTER FOR COURT INNOVATION, BAIL REFORM IN NEW YORK: LEGISLATIVE PROVISIONS AND IMPLICATIONS FOR NEW YORK CITY 1 (2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf.

[3] The legislation also made changes to the state's laws regarding discovery in criminal cases, but those changes are not discussed in this paper.

[4] INSHA RAHMAN, VERA INSTITUTE OF JUSTICE, NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW 11-12 (2019) (describing this feature of the law as "nothing short of remarkable" in comparison to bail reform efforts in other jurisdictions), https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf.

[5] N.Y. Crim. Proc. Law § 510.10 2 (McKinney). Note that the New York statutory citations provided in this paper refer to the versions of the statutes that are effective on January 1, 2020.

[6] N.Y. Crim. Proc. Law § 510.10 3 & 4 (McKinney) (prohibiting imposition of money bail unless a defendant is charged with a "qualifying offense").

[7] *See* N.Y. Crim. Proc. Law § 510.10 4 (McKinney).

or on non-monetary conditions.[8] Indeed, as a universal matter, whether a defendant stands charged with a qualifying offense or not, New York's new approach positions release on recognizance as the default pretrial release condition and, in those cases where the court finds this condition insufficient, mandates imposition of the least restrictive condition or set of conditions that will assure the defendant's return to court.[9]

In addition to limiting the cases in which bail may be imposed, the new distinction between qualifying offenses and all other offenses limits the cases in which the court has discretion to commit a defendant to the custody of the sheriff without setting conditions of release, a procedure known as "remand" that already was a feature of New York pretrial release law.[10] Under the new approach, remand may be ordered only in cases involving a felony qualifying offense.[11]

In cases where the court is authorized to set money bail and decides to do so after determining that release on recognizance or non-financial conditions will not assure a defendant's return to court, the new law requires the court to take into account the defendant's financial circumstances as well as his or her "ability to post bail without posing undue hardship."[12] In a significant change from previous practice, when a court sets money bail as a condition of release, the court is required to direct that the bail may be posted in either an unsecured or partially secured form,[13] the latter of which involves depositing up to 10 percent of the bail amount with the court.[14] It has been suggested that in those cases where bail still is set, this new approach "undermines the for-profit bail bond industry as it gives families and loved ones the option to pay a portion of the bail directly to the court instead of turning to a bail bond agency if they can't come up with the full bail amount."[15]

As mentioned, in cases that do not involve a qualifying offense, New York's new pretrial release law expresses a presumption that defendants be released on their own recognizance and eliminates money bail as a permissible condition of release.[16] As with cases involving qualifying offenses, only where a court finds that release on recognizance will not reasonably assure the defendant's presence at future proceedings may the court impose additional conditions of release.[17] In cases that do not involve a qualifying offense, additional conditions are limited to

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[8] *Id*.
[9] N.Y. Crim. Proc. Law § 510.10 1 (McKinney).
[10] N.Y. Crim. Proc. Law § 510.10 4 (McKinney). New York is "the only state in the country that precludes judges from taking into account any consideration of public safety when setting bail or imposing pretrial detention" and this continues to be the case after the bail reform discussed in this paper. RAHMAN, *supra* note 4, at 7. The discretion to commit a defendant to the custody of the sheriff discussed in the main text does not depend on a finding that a defendant poses a danger to the community or to any specific individual and, therefore, is not a form of preventative detention. Whether to authorize preventative detention in the new bail law was a controversial issue in New York, and, though proposed, no such provision was included in the law. *Id*.
[11] N.Y. Crim. Proc. Law § 510.10 4 (McKinney). Most but not all "qualifying offenses" are felonies.
[12] N.Y. Crim. Proc. Law § 510.30 1(f) (McKinney).
[13] N.Y. Crim. Proc. Law § 520.10 2(b) (McKinney).
[14] RAHMAN, *supra* note 4, at 10.
[15] *Id*.
[16] N.Y. Crim. Proc. Law § 510.10 3 (McKinney).
[17] In cases that do not involve a qualifying offense, the court's finding on this issue must be on the record or in writing. *Id*.

"non-monetary conditions" and the court must select the least restrictive non-monetary condition or set of non-monetary conditions that will assure the defendant's return to court.[18] The non-monetary conditions that a court may impose include, among others,[19] ordering a defendant to be in contact with a pretrial services agency, placing restrictions on a defendant's travel, prohibiting a defendant from possessing a firearm or dangerous weapon, ordering that a defendant be supervised by a pretrial services agency, and ordering electronic monitoring of a defendant.[20] The new scheme prohibits requiring a defendant to pay for any part of the cost of release on non-monetary conditions.[21]

When non-monetary conditions are imposed, they must be individualized to the defendant and must be recorded in writing by the court.[22] The new law provides that "[a]t future court appearances, the court shall consider a lessening of conditions or modification of conditions to a less burdensome form based on the [defendant's] compliance with such conditions of release."[23] In situations of non-compliance, the court is authorized to impose additional conditions.[24] Before doing so, however, the defendant is entitled to notice; an opportunity to be heard, present evidence, and cross-examine adverse witnesses; and a finding by the court of non-compliance under a clear and convincing evidence standard.[25] If additional conditions are imposed, the court still must select the least restrictive conditions that will reasonably assure the defendant's return to court.[26] As with other pretrial release proceedings, defendants are entitled to representation by counsel at non-compliance proceedings.[27]

The two most restrictive non-monetary conditions of release identified in the new law are supervision by a pretrial services agency and electronic monitoring. Imposing either of these conditions requires that a defendant be afforded a heightened level of process, specifically, the court, after notice, an opportunity to be heard, and an individualized determination, must make a finding on the record or in writing "that no other realistic non-monetary condition or set of non-monetary conditions will suffice to assure [the defendant's] return to court."[28] Pretrial service agencies are required to collect data about their caseloads and supervised population and prepare annual reports to the Office of Court Administration.[29]

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[18] *Id*.
[19] The term "non-monetary conditions" is defined by statute as a non-exclusive list of permissible conditions of release. N.Y. Crim. Proc. Law § 500.10 3-a (McKinney).
[20] *Id*.
[21] *Id*.
[22] N.Y. Crim. Proc. Law § 510.40 3 (McKinney).
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] N.Y. Crim. Proc. Law § 510.45 4 (McKinney).
[29] N.Y. Crim. Proc. Law § 510.45 5 (McKinney). As part of the reform, a new statute was enacted directing the New York Office of Court Administration to certify "one or more pretrial services agencies in each county." N.Y. Crim. Proc. Law § 510.45 1 (McKinney). A pretrial services agency must be either a public entity under the supervision and control of a county or municipality or a non-profit entity under contract to a county, municipality, or the state. N.Y. Crim. Proc. Law § 510.45 2 (McKinney). Counties and municipalities are permitted to contract with other counties and municipalities to provide pretrial supervision services but are prohibited from contracting with private for-profit entities. *Id*.

Risk assessment and other screening tools are addressed in the section of the new law dealing with pretrial services agencies. Under the new law, "any questionnaire, instrument or tool used to inform determinations on release conditions" must be designed such that its results are "free from discrimination on the basis of race, national origin, sex, or any other protected class" and must be "validated and regularly revalidated."[30]

In addition to requiring the heightened process described above, electronic monitoring may be imposed only for a limited category of defendants.[31] In cases where electronic monitoring is ordered, it must be "the least restrictive procedure and method that will reasonably assure the [defendant's] return to court, and unobtrusive to the greatest extent practicable."[32] Electronic monitoring may be ordered for a maximum period of 60 days, and may be renewed for additional 60 day periods only after a defendant is afforded notice, an opportunity to be heard, and a de novo determination that such monitoring is required because no other non-monetary conditions will assure the defendant's return to court.[33] As noted, defendants must not be required to pay for any part of the cost of release on non-monetary conditions, including electronic monitoring or pretrial supervision.[34]

One analysis of the expected effects of the reform suggests that under the new approach money bail would not have been an authorized condition of release in roughly 90% of the criminal cases that were arraigned in New York City in 2018.[35] That analysis further indicated that, had the new law already been in place, 43% of defendants who were being held pretrial in New York City jails on April 1, 2019 would not have been eligible for such detention, either because the unaffordable bail causing their detention would not have been a permissible condition of release for their charged offense or because their charged offense would be ineligible for remand, which, as mentioned, refers to a defendant being detained without conditions of release.[36] Another analysis similarly suggests that New York's pretrial jail population will be reduced by 40% after the new law is implemented.[37]

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[30] N.Y. Crim. Proc. Law § 510.45 3 (McKinney). Under New York law, release conditions ultimately are determined by the court but in many jurisdictions this determination is informed by recommendations made by pretrial services agencies, most of which are housed within probation departments. *See generally* CRIME AND JUSTICE INSTITUTE, ASSESSMENT OF PRETRIAL SERVICES IN NEW YORK STATE 6 (2014), https://www.criminaljustice.ny.gov/opca/pdfs/NYS-Pretrial-Release-Report-7-1-2014.pdf. It appears that the requirements related to non-discrimination and validation described in the text would apply to any questionnaire, instrument, or tool that informs a court's determination on release conditions, regardless of whether it is administered by the court or by a pretrial services agency.

[31] N.Y. Crim. Proc. Law § 500.10 21 (McKinney). Generally, a defendant qualifies for electronic monitoring if he or she is charged with a felony or certain enumerated misdemeanors or has been convicted of a violent felony within the past five years. *Id*.

[32] N.Y. Crim. Proc. Law § 510.40 4(b) (McKinney).

[33] N.Y. Crim. Proc. Law § 510.40 4(d) (McKinney).

[34] In addition, the new law prohibits the participation of "private for-profit entit[ies]" in electronic monitoring. N.Y. Crim. Proc. Law § 510.40 4(c) (McKinney).

[35] REMPEL & RODRIGUEZ, *supra* note 2, at 1. *See also* RAHMAN, *supra* note 4, at 8 (indicating that under the new law money bail would not be among the authorized conditions of release in "90 percent of all arrests statewide").

[36] *Id*.

[37] RAHMAN, *supra* note 4, at 4.

Appearance Tickets, Bench Warrants & Court Date Reminder System

As noted, New York's reforms include a requirement that in many cases law enforcement officers must issue an appearance ticket, which is similar to a North Carolina citation,[38] rather than make a custodial arrest.[39] Under the new approach, officers generally must issue appearance tickets for "class E" felonies and lesser offenses.[40] There are two categories of exceptions to this general rule. First, appearance tickets are not required for all class E felonies. Certain class E felony offenses involving sex crimes, escapes from detention, absconding, and bail jumping are specifically excluded from the appearance ticket requirement.[41] The second category of exception involves offenses for which an appearance ticket typically is mandated but which are committed by suspects who may be less likely to appear in court because of their individual circumstances. Officers are not required to issue an appearance ticket if a suspect has an outstanding arrest warrant, has failed to appear in court proceedings in the last two years, or refuses to identify and provide contact information for him or herself.[42]

Prior to issuing an appearance ticket, officers must inform a suspect that he or she may provide contact information so that he or she can be reminded of their court date by a newly created court date reminder system.[43] Under provisions of a new statute, local criminal courts are required to issue court appearance reminders by text message, telephone call, electronic mail, or first class mail to defendants who have received an appearance ticket.[44] Local criminal courts are permitted to contract with pretrial services agencies to provide the court date reminder notifications.[45] Similarly, a court that releases a defendant on recognizance or under non-monetary conditions also must provide, or have a pretrial services agency provide, the defendant with court date reminders in the same fashion as required for defendants who have received appearance tickets.[46]

A final feature of New York's reforms is a heightened requirement regarding the issuance of bench warrants in situations where a defendant has failed to appear in court. Under the new approach, except where a defendant has been charged with a new crime while on pretrial release and absent evidence demonstrating that the non-appearance was willful, the court must provide a defendant or his or her counsel "at least forty-eight hours notice" that he or she is required to

[38] Similar to a North Carolina citation, a New York appearance ticket "direct[s] a designated person to appear in a designated local criminal court at a designated future time in connection with his alleged commission of a designated offense." N.Y. Crim. Proc. Law § 150.10 1 (McKinney). *See also* G.S. 15A-302(a) ("A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges."). Unlike a North Carolina citation, a New York appearance ticket is not itself a charging instrument. When an officer issues an appearance ticket, separately he or she also must file with the local criminal court an "accusatory instrument charging the person named in [an] appearance ticket with the offense specified therein." N.Y. Crim. Proc. Law § 150.50 1 (McKinney). For purposes of this paper, appearance tickets and citations have the same practical effect in that they each spare defendants accused of lower-level offenses from custodial arrest.

[39] N.Y. Crim. Proc. Law § 150.20 1 (McKinney).

[40] William C. Donnino, Practice Commentary to N.Y. Crim. Proc. Law § 150.20 (McKinney).

[41] *Id*.

[42] *Id*.

[43] N.Y. Crim. Proc. Law § 150.10 3 (McKinney).

[44] N.Y. Crim. Proc. Law § 150.80 2 (McKinney). A reminder is not required if a defendant's court date is scheduled to be held within 72 hours of the issuance of an appearance ticket. N.Y. Crim. Proc. Law § 150.80 3 (McKinney).

[45] N.Y. Crim. Proc. Law § 150.80 2 (McKinney).

[46] N.Y. Crim. Proc. Law § 510.43 (McKinney).

appear before issuing a bench warrant.[47] This notice is intended to give defendants an opportunity to appear voluntarily without being arrested.[48]

Conclusion

The categorical elimination of money bail as a permissible condition of pretrial release in a significant portion of criminal cases distinguishes New York's approach to pretrial justice reform from that of many other jurisdictions. In those cases where bail still is set, the requirement that the financial hardship of posting bail be considered and the mandate that the bail may be posted in either an unsecured or partially secured form are significant changes from previous practice and are expected to result in bail being affordable for the defendants from whom it is required. In addition, new provisions regarding appearance tickets and bench warrants should result in fewer defendants being taken into pretrial custody in the first place. The effectiveness of New York's new approach will be of interest to criminal justice stakeholders in jurisdictions across the country.

[47] N.Y. Crim. Proc. Law § 510.50 2 (McKinney).
[48] *Id*.