



Pretrial Reform 2020:

A Closer Look at the Pretrial Provisions of the 2020 Budget

Introduction:

During the 2019 budget process, the New York legislature passed significant, long-awaited reforms to New York's pretrial system, including: provisions to eliminate cash bail and pretrial detention for most misdemeanor and nonviolent felony offenses, establishing a system of nonmonetary conditions for pretrial release, and creating expeditious timelines for discovery turnover in criminal cases. These reforms went into effect statewide on January 1, 2020.

Shortly after the new pretrial system went into effect, a campaign against the reforms was launched by opponents of criminal justice reform. Because of that campaign, much of which focused on characterizing individuals no longer eligible for bail as dangerous, several pretrial releases throughout the state garnered significant negative media attention. Additionally, law enforcement and other groups highlighted elevated arrest numbers for certain offenses such as grand larceny and robbery in the early months of 2020 as "proof" that new pretrial laws jeopardize public safety, despite establishing no causal link between the data and pretrial reform. Following several weeks of this scrutiny, local and state leaders resolved to amend the 2019 reforms in an effort to minimize negative consequences, while preserving the heart of these reforms, namely, to reduce the pretrial detention population, eliminate disparities along class and racial lines, and preserve the constitutional principle of speedy and fair trials.

Opponents called for a total repeal of the 2019 reforms. Many advocates called for no changes to be made. And so the process of amending these reforms required lawmakers, advocates, and members of the public to separate misinformation from fact and maintain a critical balance between the interests of public safety and the moral duty to create a more perfect system that does not discriminate based on race or poverty – discrimination that pervaded the old pretrial system.

On April 2, 2020, the New York Legislature and Governor Andrew Cuomo reached an agreement as part of the 2020 budget process to amend the 2019 reforms. These changes are outlined below.

#cut50 • Alliance for Safety and Justice • Brennan Center for Justice • Coalition for Public Safety • FAMM
FreedomWorks Foundation • Hispanic Federation • JCRC-NY • NAACP • NAACP New York State Conference
NACDL • NYSACDL • National Urban League • New York Urban League • REFORM Alliance

New Yorkers United for Justice is a fiscal project of Dream Corps.

Discovery:

Discovery Compensation Fund

The FY2020 budget established the Criminal Justice Discovery Compensation Fund. The new fund will be sourced by a \$40 million infusion from the deferred prosecution fund currently held within the Manhattan District Attorney's Office. The \$40 million contribution from the Manhattan District Attorney's office will occur annually. These funds will be made available for local assistance services and expenses related to the discovery reforms that went into effect on January 1, 2020 including but not limited to digital evidence transmission technology, administrative support, computers, hardware and operating software, data connectivity, development of training materials, staff training, overtime costs, litigation readiness, and pretrial services.

Changes to Discovery Timelines and Materials

The 2019 pretrial reform legislation brought an end to the longstanding "blind fold" law in New York by requiring the prosecution to adhere to their discovery obligations within 15 days of arraignment. The 2020 legislation creates new timelines based on the pretrial status of the charged individual and type of offense. Under the new law, if a charged individual is detained pretrial, the prosecution must turn over discovery within **20 days** of arraignment. If the charged individual is not being detain pretrial, the prosecution must turn over discovery within **35 days** of arraignment. If an individual is charged with a traffic violation or a petty municipal offense that does not carry a statutorily authorized sentence of imprisonment, the prosecution must turn over discovery within **15 days**. The new law allows for the possibility of extensions if, despite diligent and good faith efforts, the prosecution is not in actual possession of "voluminous" materials such as video footage from body worn or surveillance cameras.

The new legislation also provides that the prosecution does not need to seek a court order to withhold information identifying 911 callers, victims or witnesses of the offense, any other victim or witness of a crime where the defendant has substantiated affiliation with a criminal enterprise. The defense may motion for disclosure of this information. If the prosecution intends on calling any 911 caller as a witness, the prosecution must disclose the identity and contact information of the individual within **15 days**. The court may also allow a transcript of a 911 call in lieu of an audio recording to protect the identity of the caller.

Finally, the new law allows for the use of video hearings when a protective order is requested in a case involving a violent felony defined by section 70.02 of the penal law or a Class A felony, except for Class A controlled substance felonies.

Data Collection Related to Discovery

The new law requires that the Chief Administrator of the Court produce an annual report on the impact and implementation of the new discovery requirements. The report

will focus on procedures used to comply with the new requirements, resources needed for proper implementation, and information regarding cases where the discovery requirements were not met.

Pretrial Detention and Bail:

Additions to qualifying offenses

Under the 2019 pretrial reform, only people accused of a “qualifying offense” could have money bail imposed or otherwise be remanded to pretrial detention during the pendency of their trial. Under the 2019 law, the list of qualifying offenses included:

- All class A felonies with the exception of controlled substance related offenses;
- All violent felonies as defined by section 70.02 of the New York Penal Law (except for specific instances of Robbery in the Second Degree and Burglary in the Second Degree);
- A crime involving witness tampering under sections 215.15, 215.11, 215.12, and 215.13 of the New York Penal Law;
- A felony sex offense under section 70.80 of the New York Penal law;
- A crime of incest under section 255.25, 255.26 or 255.27 of the New York Penal Law;
- A misdemeanor sex offense under section 130 of the New York Penal Law;
- Conspiracy to commit a Class A homicide felony under section 125 of the New York Penal Law,
- Money laundering in support of terrorism in the first and second degree;
- A felony crime of terrorism;
- Aggravated criminal contempt, criminal contempt in the first degree, and criminal contempt in the second degree where the underlying allegation involves the violation of a protective order where the protected party is a member the defendant's same family or household; and,
- Facilitating a sexual performance by a child with a controlled substance or alcohol as defined in section 263.30 of the penal law, use of a child in a sexual performance as defined in section 263.05 of the penal law or luring a child as defined in subdivision one of section 120.70 of the penal law.

The new reforms add the following offenses to the list of qualifying offenses:

- Burglary or robbery in the second degree where an individual is charged with entering the living area of a home;
- Class A-1 controlled substance related offenses;
- A sex trafficking offense defined in section 230.34 or 230.34-a of the penal law;
- Money laundering in support of terrorism in the third and fourth degree;



- Promoting an obscene sexual performance by a child as defined in section 263.10 of the penal law or promoting a sexual performance by a child as defined in section 263.15 of the penal law;
- Any crime that is alleged to have caused the death of another person;
- Criminal obstruction of breathing or blood circulation as defined in section 121.11 of the penal law, strangulation in the second degree as defined in section 121.12 of the penal law or unlawful imprisonment in the first degree as defined in section 135.10 of the penal law, and is alleged to have committed the offense against a member of the defendant's same family or household;
- Aggravated vehicular assault as defined in section 120.04-a of the New York Penal Law;
- Vehicular assault in the first degree as defined in section 120.04 of the New York Penal Law;
- Assault in the third degree as defined in section 120.00 of the penal law or arson in the third degree as defined in section 150.10 of the penal law, when such crime is charged as a hate crime as defined in section 485.05 of the penal law;
- Aggravated assault upon a person less than eleven years old as defined in section 120.12 of the penal law or criminal possession of a weapon on school grounds as defined in section 265.01-a of the penal law;
- Grand larceny in the first degree as defined in section 155.42 of the penal law;
- Enterprise corruption as defined in section 460.20 of the penal law;
- Money laundering in the first degree as defined in section 470.20 of the penal law;
- Failure to register as a sex offender pursuant to section one hundred sixty-eight-t of the correction law or endangering the welfare of a child as defined in subdivision one of section 260.10 of the penal law, where the defendant is required to maintain registration under article six-C of the correction law and designated a level three offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law;
- A crime involving bail jumping under section 215.55, 215.56 or 215.57 of the penal law, or a crime involving escaping from custody under section 205.05, 205.10 or 205.15 of the penal law;
- Any felony offense committed by the principal while serving a sentence of probation or while released to post release supervision;
- A felony, where the charged individual qualifies for sentencing on such charge as a persistent felony offender pursuant to section 70.10 of the penal law; or
- Any felony or class A misdemeanor involving harm to an identifiable person or property, where such charge arose from conduct occurring while the defendant was released on his or her own recognizance or released under conditions for a separate felony or class A misdemeanor involving harm to an identifiable person or property, provided, however, that the prosecutor must show reasonable cause

to believe that the defendant committed the instant crime and any underlying crime. The underlying charges do not need to be a qualifying offense.

Additional non-monetary conditions of release

The new legislation adds to the “non-exclusive” list of conditions that may be imposed when releasing an individual pretrial. The 2019 legislation laid out the following possible non-monetary conditions:

- A requirement that the individual remain in contact with their county’s pretrial services agency;
- Restrictions on travel;
- A prohibition on the possession of a firearm or other dangerous weapons;
- Placement under the supervision of a pretrial services agency if no other non-monetary conditions could reasonably assure the return to court; or
- The use of electric monitoring¹ if no other non-monetary conditions could reasonably assure the return to court.

The new reforms add the following to the list of possible non-monetary conditions:

- A requirement that the charged individual refrain from associating with certain persons who are connected with the instant charge, including, when appropriate, specified victims, witnesses, or co-defendants;
- Placement in mandatory programming, including counseling, treatment, and intimate partner violence intervention programs. Where applicable, the court may direct the principal be removed to a hospital for mental health treatment;
- A requirement that the charged individual make diligent efforts to maintain employment, housing, or enrollment in school or educational programming;
- A requirement that the charged individual obey an order of protection issued by the court, including an order issued pursuant to section 530.11 of the criminal procedures law and,
- A requirement that the charged individual obey conditions set by the court for the safety of a victim of a family offense, including conditions that may be requested by or on behalf of the victim.

¹ The new law allows state and local agencies to contract with for-profit companies providing electronic monitoring services but provides that only governmental or non-profit entities may interact with anyone under supervision or access data produced by such monitoring.

Pretrial data collection

The 2020 legislation requires that the Chief Administrator of the court compile and report publicly data regarding the pretrial system in New York. This biannual report will include the following metrics:

- Gender, racial, and ethnic background of charged individuals;
- The nature of the criminal offenses, including the top charge of each case;
- The number and type of charges in each charged individual's criminal record;
- The number of individuals released on recognizance;
- The number of individuals released on non-monetary conditions, including the conditions imposed;
- The number of individuals committed to the custody of a sheriff prior to trial;
- The rates of failure to appear and rearrest;
- The outcome of such cases or dispositions; and,
- The length of the pretrial detention stay.

Conclusion:

New Yorkers United for Justice remains dedicated to the pursuit of fairness and effectiveness in our pretrial justice system. With the new changes set to go into effect later this month, our coalition will continue to closely monitor pretrial outcomes throughout the state and urge state and local leaders to be transparent and forthcoming with a wide array of data to present the most accurate and complete picture of pretrial success in New York.