

FY 2023 New York State Budget's Impact on Bail, Discovery, and Other Criminal Justice Reforms

Gun Offenses

What changed? The state budget makes changes to the crime of “Criminal Sale of a Firearm,” including lowering the threshold number of guns to constitute second degree criminal sale from five to two guns over a year-long period; and for a first degree charge, the number of guns is reduced from 10 to three over the same timeframe. The number of guns to trigger a presumption of intent to sell is reduced from five to three.

Analysis: These revisions to the law do not address the “[iron pipeline](#)” problem that they are purporting to solve, and have the additional function of expanding punishment. Moreover, the lowered threshold for gun possession will mean more low-level individuals will be detained, rather than targeting illegal gun traffickers.

Cash Bail

Repeat offender provision

What changed? A repeat offender provision included in the original pretrial reform was expanded to allow bail to be set for people who are charged with a new crime after they were issued a desk appearance ticket (DAT) on a prior crime, but before the person could be arraigned on the charge. The repeat offender provision originally only applied to people who had been issued DATs on low-level felonies or Class A misdemeanors, and the Budget bill newly inserted criminal possession of a firearm to that list. Another limit on the repeat offender provision is that it only applies to allegations that involve “harm to an identifiable person or property,” a term that had not previously been defined in the code.

Analysis: This repeat offender provision, coupled with the new, broad definition of “harm to an identifiable person or property” (see below) will effectively convert certain non-bailable crimes into bailable ones (on subsequent offenses).

Addition of “Harm to an identifiable person or property” definition and negligible exception

What changed? “Harm to an identifiable person or property,” which had previously been undefined, was loosely defined in the Budget bill to “include but not be limited to theft of or damage to property.” This unqualified definition means that stealing deodorant or diapers and other very minor shoplifting charges would subject people to pretrial incarceration. In an apparent attempt to prevent people from being held pretrial for minor theft crimes of economic desperation, the new Budget adds an exception: “However, based upon a review of the facts

alleged in the accusatory instrument, if the court determines that such theft is negligible and does not appear to be in furtherance of other criminal activity, the principal shall be released on his or her own recognizance or under appropriate non-monetary conditions.”

Analysis: The unfettered definition of “harm to an identifiable person or property”—along with the aforementioned repeat offender provision—will render a variety of low-level thefts bail-eligible that had been purposely removed from eligibility. The final version of the budget added the failsafe exception quoted above. The exception permits courts to make a determination that a theft was “negligible,” which would then require the court to release the person on recognizance or with non-monetary conditions.

While the “negligible” finding could avoid some incarceration and thereby blunt the effects of the “harm to an identifiable person” definition, its true impact is uncertain because “negligible” is not explicitly defined.¹ Thus, even though the inclusion of the negligible exception language was aimed at avoiding imposition of bail for crimes of desperation, its effect may be dwarfed by the effects of the overarching definition, elevating any theft as harm to property.

Exceptions to Requirement to Issue Appearance Tickets Instead of Arrest

What changed? The Budget adds new exceptions to the appearance ticket requirement for warrantless arrests, so that “(b) An officer is not required to issue an appearance ticket if” any of these three new conditions are met, in addition to the seven existing exceptions:²

1. A person 18 or older is charged with possessing a weapon on school grounds
2. A person 18 or older is charged with a hate crime
3. The case involves a criminal possession of a firearm charge or criminal possession of a weapon in the third degree or sale of a firearm to a minor

Analysis: This provision will increase jail bookings for low-level weapons and hate crimes that don’t involve violence. These provisions seem to be based on concerns around people being released from jail pretrial and then committing new gun-related violent crimes.

A [recent analysis from the Data Collaborative for Justice at John Jay College of Criminal Justice](#) of this provision concluded that these changes would “produce an estimated 17% increase in NYC cases facing a custodial arrest and overnight detention in lieu of receiving a ticket and a future court date.” Among the impacted individuals, the analysis estimates that 51% would be Black and 33% would be Hispanic/Latinx.

Additional Bailable Offenses

¹ According to a *New York Times* analysis, “In an effort to avoid imprisoning people who have committed crimes of poverty, lawmakers included an exception for thefts that are considered “negligible,” though it is not yet clear how that term will be defined.” <https://www.nytimes.com/2022/04/11/nyregion/new-york-bail-laws.html>.

² Amends Subpart B, Section 130.20 of the criminal procedure law.

The budget adds a few more offenses to the list that allows judges to set cash bail:³

1. Any charge of criminal possession of a firearm if the person was out on recognizance, under conditions, or had not yet been arraigned for a charge for which the person was given a desk appearance ticket.⁴
2. Criminal possession of a weapon in the third degree or criminal sale of a firearm to a minor.

Analysis: [Observers have noted](#) that the few remaining gun crimes not already bail-eligible were rarely charged at all,⁵ let alone as a charge that would define bail eligibility. To the extent they are charged, there would be a related increase in pretrial incarceration.

Factors for Judges to Consider | De Facto “Dangerousness Standard”?

The Budget contains a list of factors judges must “consider and take into account” when making decisions about releasing or setting bail for an individual. Some argue the introduction of these factors effectively amounts to setting a “dangerousness standard.”

These newly added set of factors is as follows:

- (a) the principal’s activities and history;
- (b) if the principal is a defendant, the charges facing the principal;
- (c) the principal’s criminal conviction record if any;
- (d) the principal’s record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.1 of the family court act, or of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any;
- (e) the principal’s previous record with respect to flight to avoid criminal prosecution;
- (f) if monetary bail is authorized, according to the restrictions set forth in this title, the principal’s individual financial circumstances, and, in cases where bail is authorized, the principal’s ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond;
- (g) any violation by the principal of an order of protection issued by any court;
- (h) the principal’s history and use or possession of a firearm;

³ Section 2 of Part UU of the Budget amends Section 510.10 of the criminal procedure law.

⁴ Firearms as defined in section 265.01-b, which is the lowest firearm possession charge (a Class E felony).

⁵ Meaning a judge would not be able to set a cash bail requirement that would result in most poor defendants to be held in jail before they are found guilty of a crime.

(i) whether the charge is alleged to have caused serious harm to an individual or group of individuals; and

(j) if the principal is a defendant, in the case of an application for a securing order pending appeal, the merit or lack of merit of the appeal.

The addition of the serious harm consideration in Section (i) above is especially concerning to some advocates. The Budget applies the new provisions—additional bailable offenses delineated above, and the additional requirements to consider the list of factors for cases, including the serious harm consideration—to all cases pending in superior courts and local courts as well.

Discovery

What changed? The Budget will allow prosecutors to file subsequent Certificates of Compliance (COCs), as long as they use good faith and due diligence, or if the material did not exist when the prior COC was filed. Where a remedy or sanction is forthcoming, the new provision requires that remedy or sanction to be proportionate to prejudice suffered by the party entitled to disclosure.

The new language also provides that if the court dismisses any charges as a sanction for a discovery violation, and the prosecutor appeals the dismissal, the court can issue a securing order (release or set bail pursuant to the bail statutes) pending the appeal.

In addition, prosecutors will not be obligated to provide automatic discovery for traffic infractions and petty municipal offenses.

Analysis: For decades, the flow of discovery was controlled by the prosecution, and information was not required to be provided until the eve of trial; defenders have long complained that this amounted to ambush litigation, and made it impossible to prepare a proper defense. In 2019, important reforms were adopted to require discovery to be provided automatically and early in the life of a case. While prosecutors have complained that this increases their burden, the reforms leveled the playing field somewhat.

Rollbacks were not warranted since there was no concrete evidence of problems providing the relevant discovery in a timely fashion. Additionally, the advent of the pandemic shortly after the enactment of the reforms impeded the development of jurisprudence that might have demonstrated the efficacy of the long overdue reforms. These changes may allow prosecutors to regain some power over the flow of information, and are destined to produce significant litigation. That said, changes that had been proposed that would have undermined the crux of the reform were softened significantly in the negotiated final Budget.

Raise the Age

Statute of Limitations

The Budget bill included a change to the recently adopted 2019 [Raise the Age](#) law. The amendment to this statute extended the statute of limitations, allowing cases for conduct occurring at age 16 or 17 to be brought up until age 20 in some instances.

Analysis: The final Budget did not include a widely circulated [problematic proposal](#) that would have sent more juveniles to adult court. What is now included is the above-described statute of

limitation extension. These changes to the legislation therefore will allow some cases to be brought that would have been previously barred, but still aligns with the Coalition’s principle that children should not be tried as adults.

Judicial Accountability

The Budget requires some additional record-keeping with respect to young offenders, including bail requests and negotiations.⁶

Analysis: Collecting information on these aspects of bail negotiations is critical to understanding the kinds of incentives that are applied to individuals—especially youths—to secure pleas. These records will help assess the impact of the changes to “Raise the Age” made in this Budget, as well as inform future reforms.

Kendra’s Law | Mental Health Commitments

The budget reauthorizes [Kendra’s Law](#) through June 30, 2027. Effective since November 1999, Kendra’s Law is a New York State law concerning involuntary outpatient commitment, also known as assisted outpatient treatment. The law grants judges the authority to require people who meet certain criteria to regularly undergo psychiatric treatment.

In addition, the budget expands the ability for judges to involuntarily commit people who are suffering from a mental health crisis.⁷

Analysis: Opinions about Kendra’s Law have been varied, and policy makers need to balance concerns of some mental health advocates and others reticent about use of involuntary treatment against worries among other stakeholders that individuals experiencing untreated mental health needs will harm themselves or others in the community.

⁶ Subpart G amends subdivision 5 of section 216 of the judiciary law.

⁷ Subpart F of the budget amends section 500.10 of the criminal procedure law.