



State Senator Velmanette Montgomery

25th New York Senatorial District

Ranking Democratic Conference Member, Children & Families

Dear Advocate,

With the passage of Raise of the Age reform last year and the ongoing discussions about the pending closure of Rikers Island, New York State has an opportunity to create institutional change in the criminal justice system. The issue of **bail, discovery** and **speedy trial reforms** are included in Governor Cuomo’s 2018-2019 budget. The following is an analysis of all three issues and compares the differences between the Executive’s proposal, the legislation supported by the Senate Democratic Conference and reforms included in the Assembly One-House Budget proposal.

As negotiations continue, I encourage you to contact your local elected officials and share your thoughts on these important issues.

In partnership,

Senator Velmanette Montgomery
25th Senate District

BAIL REFORM ANALYSIS

	EXECUTIVE BUDGET PROPOSAL	S.3579A (GIANARIS) - SENATE DEMOCRATIC CONF. PROPOSAL	ASSEMBLY ONE-HOUSE BUDGET PROPOSAL
Elimination of Cash Bail	Eliminates for Misdemeanors and Non-Violent Felonies	Eliminates for all crimes	Eliminates for Misdemeanors and Non-Violent Felonies, plus Burglary in the Second Degree, Robbery in the Second Degree, and Reporting a False Incident in the Second Degree

Options for Misdemeanors	Release on own recognizance, release with conditions	Release on own recognizance, release with conditions. Release on own recognizance is to be given preference.	Release on own recognizance, release with conditions.
Options for Non-Violent Felonies	Release on own recognizance, release with conditions	Release on own recognizance, release with conditions, pre-trial detention	Release on own recognizance, release with conditions
Options for Violent Felonies	Release on own recognizance, release with conditions, bail	Release on own recognizance, release with conditions, pre-trial detention	Release on own recognizance, release with conditions, bail
Options for Class A felonies	Release on own recognizance, release with conditions, bail, pre-trial detention	Release on own recognizance, release with conditions, pre-trial detention	Release on own recognizance, release with conditions, bail, pretrial detentions
Release on Own Recognizance	Available for all crimes. Defendant is released with instructions to appear at next court date	Available for all crimes. Defendant is released with instructions to appear at next court date	Available for all crimes. Defendant is released with instructions to appear at next court date
Release With Conditions	Available for all crimes. Conditions can include reporting to and supervision by a pretrial services agencies, electronic monitoring, or other conditions. Court must specify conditions in writing. Defendant cannot be required to pay for conditions except electronic monitoring (but can be exempt if indigent). Must use least restrictive means to ensure return.	Must use least restrictive means to ensure return to court. Defendant must be notified on conditions in writing. Can include supervision by pretrial services agency, travel restrictions, etc.	Available for all crimes. Conditions can include reporting to and supervision by a pretrial services agencies, electronic monitoring, restrictions on travel, or other conditions. Court must specify conditions in writing. Must use least restrictive means to ensure return. Defendant cannot be required to pay for any condition. Electronic monitoring is restricted.

Cash Bail	Available only for violent felonies and class A felonies. Court must consider defendant's ability to pay.	Entirely eliminated	Only available for most violent felonies and Class A felonies. Court must consider defendant's ability to pay.
Cash Bail Options	Bail may be paid with a credit card. Secured and Unsecured bonds may be used. Court must offer at least one bond option.	Not addressed	Bail may be paid with a credit card. Secured and Unsecured bonds may be used. Court must offer at least one bond option.
Post-Bail Hearings	If bail has not been posted within five days, court must have a hearing to reconsider the amount of bail and the defendant's inability to pay.	Not addressed	If bail has not been posted within five days, court must have a hearing to reconsider the amount of bail and the defendant's ability to pay. Defendant can continue to request additional hearings if bail continues to not be posted. Additional hearings must be held promptly following request.
Pre-trial detention	Only available in certain cases: domestic violence, "serious violence," witness intimidation, Class A felonies, committing a new crime while released, willfull failure to appear in court	Defendant must pose a high risk of intentional flight for the purpose of evading prosecution. Only available where defendant intended and caused serious physical injury, persistent felony offenders, witness intimidation, or has willfully and persistently failed to appear in the current case.	Defendant must pose a high risk of intentional flight for the purpose of evading prosecution. Only available for limited sex offenses, terrorism offenses, Class A felonies, persistent felony offenders, felony witness intimidation, and felonies where the defendant intended to cause

		Court can hold defendant for two days on prosecutor's motion. At that point, a hearing must be held.	serious physical injury or death and physical injury resulted.
Pre-trial detention Hearings	Prosecution must provide notice to seek remand. Defendant remanded until hearing, which must be held within five days. At the hearing, prosecution must prove by clear and convincing evidence that the defendant poses either a high risk of flight OR a current threat to an identifiable person or persons, and that no means other than pre-trial detention is available. "Reasonably identifiable person or persons" is not explicitly defined, but is not meant to be hypothetical.	Hearing must be held within two days of initial remand. Prosecution must disclose certain information to defendant prior to trial. Written opinion must be given by court.	Court must have hearing after five days to reconsider pre-trial detention. Defendant can request additional hearings if still detained, which must be held promptly following request.
Pre-trial detention Period	Defendant can only be held for 180 days awaiting trial. Pre-trial detention period can be extended by up to 20 days at a time on a motion from the people for good cause.	Defendant can be held for up to 120 days on a felony, 30 days on a Class A misdemeanor, 15 days on a Class B misdemeanor, 5 days on a Vehicle and Traffic Law violation.	Not addressed
Charitable Bail Organizations	Allowed to post bail up to \$5,000 and may operate in multiple counties.	Not addressed	Not addressed

Pretrial Services Agencies	Must be certified by OCA. One per county. County probation department can be certified as a pretrial services agency. Responsible for monitoring conditions of release.	Chief Administrative Judge responsible for establishing rules and appointing pretrial services agents. Agencies responsible for pre-release assessment and release recommendation for each defendant. One per county.	Must be either a governmental agency or a non-profit
Pretrial Services Assessments		Must be conducted before court determines type of release. Factors to consider are enumerated. Recommendation is not binding on the court.	Not required, but must be free from disparate impact based on protected class status, and empirically validated and regularly re-validated.
Reminder Systems	Not addressed	When defendant is released, with or without conditions, the court must notify the defendant of his or her next court date, some time between 5 and 14 days prior to the court date. The notification must be provided by mail, phone, text, or email, depending on the contact information provided by the defendant. Notices must include the time, date, and location of the appearance, as well as penalties for failure to appear.	Defendant must be notified of each court appearance prior to the appearance. Notifications can be provided by text, phone, email, or first class mail. No time frame is given.

Determining Type of Release	Least restrictive means must be used	Least restrictive means must be used. Preference must be given to release on own recognizance when the highest charge is a misdemeanor or violation.	Least restrictive means must be used. Release without conditions is always given preference. Conditions must be individualized to the defendant.
Algorithmic Risk Assessment	Not addressed	Not addressed	Not addressed
Reasoning for Type of Release	Court must issue written findings when remanding the defendant. Otherwise, not addressed.	Where release matches pretrial services' recommendation or the defendant is pre-trial detained or released with conditions, court must state on the record the reasons for the means of release.	Not addressed
Right to Counsel	Not addressed	Not addressed	Defendant is entitled to counsel, including appointed counsel, at all bail hearings
Use of Third-Party Vendors	Not addressed	Not addressed	Third-party vendors cannot be used to provide pre-trial services or electronic monitoring.
Bench Warrants	Not addressed	Not addressed	Defendant must be give 48 hours to appear before a bench warrant can be issued, unless there is evidence that the defendant's failure to appear is willful.

Changing or Revoking Release	May be revoked for new crime committed, willful failure to appear, any violation of release conditions	Either party may move to reconsider release status and conditions. When the prosecution moves to reconsider, court must consider, nature, willfulness, and seriousness of the violation and must select least-restrictive means of ensuring return	May only revoke after willful, persistent failures to appear, after violation of an order of protection, if defendant is charged with a new sex crime while released on charged of a sex crime, if the defendant is newly charged with witness intimidation, or if the defendant is charged with a new felony while released on a felony charge
Statistics on Pre-trial Release	Not addressed	OCA must collect information regarding how bail reform is working	Not addressed



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DISCOVERY REFORM BILL ANALYSIS

	EXECUTIVE BUDGET PROPOSAL	S.7722 (BAILEY) -- SENATE DEMOCRATIC CONF. PROPOSAL	ASSEMBLY ONE-HOUSE BUDGET PROPOSAL
Current Law	Expands upon existing statutory scheme	Repeals and replaces existing statute	Repeals and replaces existing statute
Initial Discovery	Automatic, 15 days after arraignment. Includes current material as well as new material	Immediate. Includes all material possessed by the prosecution.	Automatic, as soon as practicable but no later than 15 days after arraignment. Period can be expanded to 30 days if material is "exceptionally voluminous." Upon motion by defendant, disclosure must be made within 48 hours of when defendant is scheduled to testify in front of a grand jury

<p>Material Required in Initial Discovery</p>	<p>All material currently required by CPL § 240.20, as well as a list of objects obtained from defendant, statement regarding any search warrants executed and all related documents, documents regarding expert witnesses</p>	<p>Specifically includes defendant's statements, witness statements, photographs, tangible objects, audio/video recordings, electronic data (including cell phone triangulation and wire taps), scientific and medical testing and related data, exhibits and evidence the prosecution intends to introduce at trial, witness contact information, criminal history of defendant and all witnesses who may be called at trial, info of all law enforcement officers involved in the case, all impeachment material, all grand jury transcripts, information on identification proceedings, material favorable to the defendant, information on promises made to prosecution witnesses, information provided by jailhouse informants</p>	<p>All witness statements, grand jury testimony, names and contact information for witnesses and law enforcement (although may be withheld without a protective order), expert witness information, recordings, photos and drawings, law enforcement reports, exculpatory and mitigating information, summary of promises made to witnesses, search warrant info, criminal histories of prospective witnesses</p>
<p>Second Phase of Discovery</p>	<p>Within 30 days of arraignment, must disclose written or recorded statements made by witnesses who prosecutor intends to call at a pre-trial hearing or trial; reports of a factual nature prepared by prosecutor, police officer, or law enforcement.</p>	<p>None.</p>	<p>None.</p>
<p>Effort to Ascertain Existence of Material</p>	<p>Adds requirement that effort be prompt</p>	<p>Must make a diligent, good faith effort</p>	<p>Maintains current standard of "diligent, good faith effort"</p>

<p>Reciprocal Discovery</p>	<p>Requires reciprocal discovery within 15 days after the first phase of discovery. New material that the prosecution is required to disclose must also be disclosed by the defense. Defense must make a diligent, good faith effort to ascertain existence of discoverable material</p>	<p>Single phase, 90 days after prosecution files certificate of compliance. Includes expert witness information, photographs, tangible objects, recordings, witness statements.</p>	<p>Single phase, 30 days after filing of prosecution's certificate of compliance. Includes witness names, recorded statements made by witnesses, a list of promises and inducements, tangible property intended to be introduced in the defendant's case-in-chief, medical and scientific reports, expert witness information</p>
<p>Material Regarding Defendant's Credibility</p>	<p>Must be disclosed 15 days prior to jury selection</p>	<p>Must be disclosed in initial automatic discovery, or expeditiously upon receipt by prosecution.</p>	<p>Must be disclosed. No timeframe specified.</p>
<p>Protective Orders</p>	<p>Maintains current law, but explicitly allows protective orders based on gang affiliation. Allows for expedited appeals of rulings on motions for protective orders.</p>	<p>Must show by clear and convincing evidence that disclosure would negatively affect safety or security of a known person and that withholding information is necessary. Hearing must be held within three business days. Testimony and records must be sealed if order is granted.</p>	<p>Maintains current "good cause shown" standard. Prosecution must provide access to redacted copies. Court can order material to be provided only to defense attorney. Ex parte and in camera review allowed. Hearing on protective order must be held within 3 days. Testimony regarding need for protective order may be sealed. If the defendant is pro se, provides for protections to keep sensitive information from defendant. Not complying with protective order established as Criminal Contempt. Provides for expedited appellate review of rulings on protective orders.</p>

Redaction and Protection of Witness Information	Prosecution may redact any information, including witness contact info, if releasing the info would jeopardize an ongoing investigation. Defendant may challenge the redaction. The court <i>may</i> , but is not required to, disclose the information, unless the prosecution can show that disclosure would jeopardize an ongoing case or investigation, or demonstrates the need for a protective order.	Either party may redact Social Security and tax information numbers. Either party may withhold information for which it is seeking a protective order, but must disclose the information if the order is denied.	Witness contact information can be withheld without a protective order. Social Security and tax information numbers may be redacted. Either party may withhold information for which it is seeking a protective order, but must disclose the information if the order is denied.
Remedies	Adds permissive adverse inference jury instruction to non-exclusive list of available remedies. Current listed remedies include required discovery of undisclosed material, continuances, protective orders, prohibiting the introduction of certain evidence, prohibiting the calling of certain witnesses.	Can grant continuance, order hearing reopened, call or recall witness, jury instruction, etc.	Can require conference with parties, court conference, additional certificates of compliance, continuances, reopen hearings, recall or call witnesses, or other necessary measures. Failure of prosecution to disclose witness' prior recorded statement is not grounds to set aside a conviction.
Witness Tampering	Establishes class A felony, and establishes A misdemeanor for tampering through social media	Not addressed	Increases the penalty for each degree of Witness Tampering by one class
Witness Intimidation	Establishes class A felony	Not addressed	Not addressed
Disclosure of exculpatory and mitigating material	Explicitly required	Explicitly required	Explicitly required

Continuing Discovery	Newly obtained material must be disclosed "expeditiously"	Newly obtained material must be disclosed "expeditiously," but no later than the next scheduled court appearance.	Newly obtained material must be disclosed "expeditiously"
Court-Ordered Discovery	Not addressed	Permits the court to order the prosecution or a third party to disclose relevant information to the defendant.	Permits the court to order the prosecution or a third party to disclose relevant information to the defendant.
Depositions	Not addressed	Defendant can depose any prosecution witness.	Not addressed
Preservation of Evidence	Not addressed	Prosecution must act to preserve evidence and notify defendant of its existence. Court can order preservation of evidence. Police must preserve their own evidence. Court may also order that defendant may be granted access to a crime scene or other premises relevant to the case.	Court may order the preservation of evidence. Court may also order that defendant may be granted access to a crime scene or other premises relevant to the case.
Videotaping of Interviews	Not addressed	No statement made at a police station is admissible at trial or hearing unless it is accompanied by an audio or audiovisual recording.	Not addressed
Certificates of Compliance	Not addressed	At each stage of discovery, each party must certify in writing that they have exercised due diligence in complying with discovery rules, and specify each item provided.	At each stage of discovery, each party must certify in writing that they have exercised due diligence in complying with discovery rules, and specify each item provided.

Facilitating Discovery	Not addressed	Not addressed	In order to facilitate the discovery process, the court can order conferences between the parties, conferences with the court, additional certificates of compliance, and "other measures or proceedings" in order to further the goals of the discovery process
Flow of information with the police	Not addressed	Not addressed	Prosecutor is required to ensure that information is flowing between law enforcement and the prosecuting agency
Discovery Prior to Plea	Not addressed.	Discovery must be completed prior to the expiration of any plea deal offered to the defendant. The defendant does not need to request discovery.	Upon defendant's request, discovery must be completed prior to the expiration of any plea deal offered to the defendant.
911 and Body Camera Evidence	Not addressed	All audio, visual, and audiovisual recordings must be preserved by the police.	Must be preserved by the prosecutor. Sanctions and remedies can result from failure to preserve.
Waiver of Discovery	Not addressed	Not addressed	Defendant can waive right to discovery, but prosecution cannot require waiver as a term of a plea deal



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SPEEDY TRIAL ANALYSIS

	EXECUTIVE BUDGET PROPOSAL	S.7006A (BAILEY) – SENATE DEMOCRATIC CONF. PROPOSAL	ASSEMBLY ONE-HOUSE BUDGET PROPOSAL
Vehicle and Traffic Law Violations Covered by 30.30	Not addressed	Included	Not included
Court Inquiry Regarding Readiness	Court <i>may</i> inquire as to readiness whenever prosecutor declares ready.	Court <i>must</i> inquire as to readiness whenever the prosecutor declares ready.	Court <i>may</i> inquire as to readiness whenever prosecutor declares ready.
If Prosecution is Found Not to be Ready for Trial After Inquiry	If the Court determines People aren't ready, the statement of readiness is declared invalid for 30.30 purposes	If the Court determines People aren't ready, the statement of readiness is declared invalid for 30.30 purposes	If the Court determines People aren't ready, the statement of readiness is declared invalid for 30.30 purposes
Discovery and Readiness	Not addressed	If the People declare ready after discovery demands have been made, People must produce a certificate of compliance with discovery procedure	If the People declare ready after discovery demands have been made, People must produce a certificate of compliance with discovery procedure
Readiness on Misdemeanors	Not addressed	Not valid until all counts in the complaint are procedurally sound or have been dismissed	Not valid until all counts in the complaint are procedurally sound or have been dismissed
Granting Continuances	Court may, but is not required to, grant a continuance requested by prosecutor if the adjournment is in the interests of justice. Current	Not addressed	Not addressed

	language requires the granting of the continuance.		
Advising the Defendant of Speedy Trial Rights	Not specifically addressed	If a defendant does not have counsel, he or she must be advised of his or her speedy trial rights by the judge on the record in open court	Not addressed
Real-time Rulings on Whether Adjournments Toll the Speedy Trial Clock	Not addressed	Not addressed	At each appearance, court must rule on whether time until next appearance is counted towards the speedy trial time
Exclusion of Delays Due to Court Congestion	Not addressed	Delays due to court congestion are not to be excluded from the speedy trial time	Delays due to court congestion are not to be excluded from the speedy trial time
Time Frames for Continuances	Not addressed	Not addressed	Not Addressed

<p>Speedy Trial Waivers</p>	<p>Waivers must be made in writing and signed by the defendant. Waivers must make reference to the specific matter for which the defendant is charged. If the defendant is in custody, the waiver must be made in open court, on the record, and with judicial approval. Waivers are limited to 3 months where the top charge is a felony, 45 days where the top charge is a Class A misdemeanor, 30 days where the top charge is a Class B misdemeanor, and 15 days where the top charge is a violation. No more than 2 waivers per case may be granted, absent "extraordinary circumstances."</p>	<p>Not addressed</p>	<p>Not addressed</p>
<p>Motions to Dismiss</p>	<p>30.30 motions to dismiss must be filed at least 20 days before trial, and must contain sworn allegations of fact specifying which time periods should be charged to the prosecution and stating the supporting law. The court must summarily deny the motion if it lacks the proper statement of facts.</p>	<p>Not addressed</p>	<p>Not addressed</p>
<p>Right to Appeal After Guilty Plea</p>	<p>Not addressed</p>	<p>If a motion to dismiss on 30.30 grounds is denied, the defendant maintains his or her right to appeal the decision even after he or she has pleaded guilty to the crime charged</p>	<p>Not addressed</p>

Declarations of Un-Readiness After Previous Declaration of Readiness	Not addressed	If the prosecutor claims the People are not ready for trial, after already having declared ready, the court must inquire on the record as to the reasons for unreadiness. Declaration of unreadiness must be supported by sufficient facts.	Declarations that prosecutor is not ready, when they have already declared ready, must be accompanied by a statement of facts and must be approved by the court
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