

Submitted



Joint Budget Hearing

Public Protection

General Government

Tuesday, January 29, 2019

~ Joint Testimony ~

Police Conference of New York , Inc.
(PCNY)

&

New York State Association of PBAs, Inc.
(NYSAP)

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Governor's Proposals for Bail Reform (2019)

The Governor has proposed as part of his budget legislation under the heading of Public Protection and General Government, Article VII Legislation, pages 183-219 of the budget bill, a complete elimination of New York State's system of bail in connection with criminal charges. The proposed legislation entirely replaces monetary bail with a system in which the only mechanism for assuring that a person facing criminal charges shows up for his court appearances, no matter what his criminal charges, are securing orders and/or electronic monitoring, with pretrial detention only available in limited cases and after a mandatory hearing in which the prosecution would face a very high standard of proof. The Governor's proposal would repeal outright Section 150.30 of the Criminal Procedure Law providing for pre-arraignment bail, Article 520 of the Criminal Procedure Law entitled "Bail and Bail Bonds", Section 530.60 of the Criminal Procedure Law entitled "Orders of Recognizance or Bail", Article 68 of the Insurance Law entitled "Bail Bonds" (thereby eliminating New York State's entire bail bond industry), and Article 240 of the Criminal Procedure Law entitled "Discovery" and replacing it with an entirely new structure of discovery in criminal proceedings. It would also establish a new and very complicated set of rules as to when a police officer would be required to issue an appearance ticket rather than make an arrest. The Police Conference of New York opposes this legislation for reasons that follow.

- **It isn't broken, so don't fix it.** As police officers, we have an abiding interest in seeing to it that the subjects we arrest on criminal charges be required to return to court after their arraignments to face the charges against them. It is a very serious matter to us that there be in place some system to compel them to return to court for an appropriate disposition of their case rather than simply skipping town and carrying on their criminal activities in some other jurisdiction. New York State currently has a commercial bail system that, so far as we are aware, serves its intended purposes and ensures that individuals charged with crimes appear when they are required to do so by the courts and that subjects who are simply too dangerous to be released be detained pending trial. The current system applies to all regardless of their race, creed, color or financial circumstances. In the absence of a demonstration that there is some problem with the current system, we feel there are far more important problems in the State of New York that deserve the attention of the legislature.
- **Replacing commercial bail with a system based on orders bearing non-monetary conditions is a bad idea and would be very costly to implement.** This proposal would put commercial bail bondsmen of our state out of business, not only by eliminating the product they provide but also by eliminating Article 68 of the Insurance Law which is the statutory authority for their existence. It is our commercial bail bondsmen who make our current system work. If their clients don't show up for their court appearances, the bail bondsmen forfeit their bonds. Since they have only been paid 10% of the amount of their bonds in cash, they have a very strong incentive to see to it that the charged individuals make their court appointments. If we substitute for that a system of non-monetary release orders bearing conditions, then

someone is going to have to see to it that those conditions are fulfilled, and it will not be the commercial bail bondsmen. This proposal requires that pretrial services be provided through a county probation department or nonprofit pretrial service agency certified by the Office of Court Administration. Either way, every municipality in the state that operates a criminal court will have substantial expenses for "pretrial services" that they don't now have to monitor compliance with the non-monetary conditional release orders. In even a minimally busy criminal court, that could be a large expense. Such pretrial service providers will require space, computers, equipment, training, pensions, health insurance, etc. The federal bail system works largely on such a system, and the federal courts employ very substantial pretrial staff to serve these functions. This additional cost would be very significant, but since this proposal is included in the Governor's budget at the present time, no fiscal note is required or provided. This is not the way to undertake such a costly and major structural change.

- **The standard of proof and other requirements on detention hearings are too severe.** This bill permits the prosecution to make a motion for pretrial detention in a broader spectrum of cases than the Governor's last proposal did, but the burden on the prosecution is too severe. Under this proposal the people could make a motion for pretrial detention of a defendant charged with a Class A felony, witness tampering, Class B or C crimes except burglary in the second degree and robbery in the first degree and who the people allege poses an immediate risk of physical harm to a member of his family or household or has persistently and willfully failed to appear in court in the current case and the relevant pretrial services agency certifies that the agency has made persistent efforts to assist the individual's appearance in court. The Governor's last proposal provided that upon such a motion by the people, the defendant "shall" be committed to the custody of the sheriff pending a hearing on the motion. The current bill changes the word "shall" to "may". The Governor's last proposal provided that a hearing be held within five working days from the people's motion: the current proposal shortens that period to three working days and requires that at least 24 hours prior to the hearing the people disclose all of their evidence to the defendant to inspect, copy or photograph.

The proposal requires that the people establish reasonable cause to believe that the eligible defendant committed the charged offence and that they establish by clear and convincing evidence that the defendant poses a high risk of flight or a current threat of physical danger to a reasonably identifiable person or persons and that no conditions or combination of conditions in the community will suffice to contain the aforesaid risk or threat. Clear and convincing proof is a very high standard of legal proof, second only to the criminal conviction standard of beyond a reasonable doubt and significantly beyond the civil standard of preponderance of the evidence. In effect, it requires the prosecution to try the case twice, once at the pretrial detention hearing and again at the trial on the substantive charge. We feel that this inappropriately elevates the rights of a perpetrator charged with a potentially very serious crime over the rights of his or her victims, any witnesses to the crime, prosecutorial staff and the general public. A standard of preponderance of the evidence on detention hearings would be sufficient and appropriate.

- **The rules as to when an officer can make an arrest are far too complicated.** Existing law provides at Section 150.20 of the Criminal Procedure Law that whenever a police officer is authorized pursuant to Section 140.10 to arrest a person without a warrant for an offense other than a Class A, B, C or D felony or a violation of Section 130.25, 130.40, 205.10, 205.17, 205.19 or 215.56 of the Penal Law he may instead issue an appearance ticket. In the

enumerated cases, an arrest is mandatory. This proposal would change the word “may” to “shall” and then graft on nine exceptions to the requirement that he issue an appearance ticket only, including if the person (1) has one or more outstanding warrants, (2) has a documented history of failure to appear in court proceedings, (3) has been given a reasonable opportunity to make their verifiable identity and a method of contact known and has been unable or unwilling to do so so that a custodial arrest is necessary to subject the individual to the jurisdiction of the court, (4) is charged with a crime or offense between members of the family or household, (5) is charged with a crime or offense involving sexual misconduct, (6) should, in the officer’s estimation, be brought before the court for consideration of the issuance of an order of protection based on the facts of the crime or offense that the officer has reasonable cause to believe occurred, (7) should, in the officers’ estimation, be brought before the court for consideration of a court ordered restriction on operation of a motor vehicle based on the facts of the crime or offense that the officer has reasonable cause to believe occurred, (8) should, in the officer’s estimation, be brought before the court for consideration of court ordered medical or mental health assessment based on the facts of the alleged crime or offense that the officer has reasonable cause to believe occurred and observed behavior of the individual when in contact with the police or (9) is unlikely to return to court on the return date of an appearance ticket for reasons specific to the facts of the case that the officer can articulate in the information or misdemeanor complaint. These reasons cannot rely solely on the defendant’s prior criminal history or place of residence.

This is an unreasonable burden to place on the officer in the street trying to decide whether to make an arrest or issue an appearance ticket. The old system was bad enough in that it gave the officer discretion to issue an appearance ticket rather than make an arrest only after ensuring that 10 separately specified categories of criminal conduct were not involved. Under this proposal, the officer would first have to make that calculation to see if he was required to issue an appearance ticket but then make an additional nine step calculation to determine if he has discretion to make an arrest. That is simply too complex a calculation to require officers to make in the real word context in which criminal arrests take place.

- **This matter needs further study.** A number of other jurisdictions have adopted bail reforms similar to what the Governor is proposing, including Kentucky, Illinois, Oregon, Wisconsin, New Jersey, Washington D.C. and the City of Philadelphia, and some of them did so many years ago. The Federal Courts have long employed a system much like what the Governor is proposing. There is a great deal of information available through those jurisdictions. Before the State of New York disrupts a bail system that is working just fine and undertakes reforms that will cost many millions of dollars, a study should be made to determine whether and to what extent the jurisdictions that have adopted such systems have eliminated the evils and injustices that the Governor claims to be addressing by this legislation and whether and to what extent criminal defendants actually show up for their court appearances. Cash bail has been with us since the Eighth Amendment to the U.S. Constitution precluding “excessive bail” was adopted. We should not abandon a system based on it without careful study and thorough reflection, and we should not be considering a plan to change such a fundamental part of our jurisprudence in the context of our State’s budget. This issue deserves to be fully aired through the legislative process in the form of a free standing bill that would be subject to memoranda for and against, a fiscal note, possibly legislative hearings and a vote completely separate from the vote on the State’s budget.