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REPORT ON LEGISLATION

A.9505-A / S.7505-A (Budget Article VII) - Part C
AN ACT to amend the criminal procedure law, in relation to the issuance of securing orders and in relation to making conforming changes; and to amend the insurance law, in relation to the deposit of bail money by charitable bail organizations

BAIL REFORM

SUPPORT WITH MODIFICATIONS

The New York City Bar Association submits this report regarding Governor Cuomo's Executive Budget proposal to reform New York's bail statute (A.9505-A/S.7505-A, Part C). We commend the Governor for introducing legislation to fix New York's two-tiered criminal justice system that jails thousands of New Yorkers each year solely because they are unable to pay bail. As states around the country reform their discriminatory bail practices, New York's legislature must do the same.

While the proposed legislation includes several worthwhile reforms to the current bail statute, we have significant concerns that the proposal will not ensure that freedom before trial is the norm, not the exception, that race and wealth are not factors in pretrial decisions, and that profit motivations are removed from pretrial practices. As a result, we offer our support for the bail reform budget provision with modifications to resolve these concerns. In recommending revisions, we rely on the Assembly's bail reform proposal in their one-house budget bill (A.9505-B, "the Assembly bill")[1] and Senator Michael Gianaris's bill (S.3579-A, "the Gianaris bill").[2]

BACKGROUND - WHY BAIL REFORM IS NECESSARY

New York's bail statute was adopted in 1970, on the tail end of a major reform movement around bail in the 1960s. That movement was, in part, spurred by then-Attorney General Robert F. Kennedy who, in a 1964 speech, remarked that "[e]very year, thousands of

[1] A.9505-B, available at http://assembly.state.ny.us/leg/?default_fld=%0D%0A&leg_video=&bn=A9505&term=2017&Summary=Y&Text=Y (all websites last visited March 13, 2018). This bill language is identical to A.9955, sponsored by Assembly Member Dan Quart.

[2] S.3579-A, Bail Elimination Act of 2018, available at http://legislation.nysenate.gov/pdf/bills/2017/S3579A

persons are kept in jail for weeks and even months following arrest. They are not proven guilty. They may be innocent. They may be no more likely to flee than you or I. But they must stay in jail because, bluntly, they cannot afford to pay for their freedom."[3] Kennedy sponsored a National Bail Conference for judges, prosecutors, and defense lawyers from around the country that set in motion a "widespread awakening to the need for bail reform," including here in New York.[4]

New York's bail statute was designed to "reduce the unconvicted portion of our jail population" by creating less restrictive options to secure a defendant's future court attendance.[5] Under the bail statute, judges must consider the "kind and degree of control or restriction" needed to secure a defendant's return to court.[6] The statute provides judges with the option of imposing nine forms of bail, ranging from the traditional, restrictive forms of cash bail and insurance company bond (i.e., commercial bond) to the less restrictive forms of unsecured bond and partially secured bond.[7] An unsecured bond involves the defendant or his guarantor signing a contract promising to pay a sum of money if the defendant fails to appear in court,[8] whereas a partially secured bond involves the defendant or his guarantor depositing a "fractional sum of money fixed by the court, not to exceed ten percent of the" bond amount.[9]

But New York's bail statute has not fulfilled its intended purpose. Judges rarely impose unsecured or partially secured bond; instead, they routinely impose two of the most restrictive forms of bail: cash bail and commercial bond.[10] This reluctance to use less restrictive forms of bail persists despite studies demonstrating that they are as effective as cash bail or commercial bond at assuring a defendant's return to court.[11] Moreover, while the statute instructs judges to

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[3] Robert F. Kennedy, Att'y Gen. of the United States, U.S. Dep't of Justice, Address to the Criminal Law Section of the American Bar Association at 3, (Aug. 10, 1964), available at https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-10-1964.pdf.

[4] *Id.* at 4.

[5] Commission on Revision of the Penal Law and Criminal Code, Memorandum in Support of Explanation of Proposed Criminal Procedure Law, Memorandum in Support and Explanation of Proposed Criminal Procedure Law, S. Int. 7276, A. Int. 4561, 10 (March 1970) (on file at the New York City Bar Association).

[6] CPL § 510.30(2)(a).

[7] CPL § 520.10(1).

[8] Commission on Revision of the Penal Law and Criminal Code, Memorandum in Support of Explanation of Proposed Criminal Procedure Law, Memorandum in Support and Explanation of Proposed Criminal Procedure Law, S. Int. 7276, A. Int. 4561, 10 (March 1970) (on file at the New York City Bar Association).

[9] *See id.*

[10] *See* Insha Rahman, Vera Institute of Justice, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts* at 4, (Sept. 2017), *available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/against-the-odds-bail-reform-new-york-city-criminal-courts/legacy_downloads/Against_the_Odds_Bail_report_FINAL3.pdf; *see also* Jonathan Lippman, Independent Commission on Criminal Justice, *A More Just New York City* at 44 (April 2017), *available at* https://static1.squarespace.com/static/577d72ee2e69cfa9dd2b7a5e/t/595d48ab29687fec7526d338/1499285679244/Lippman+Commission+Report+FINAL+Singles.pdf.

[11] Insha Rahman, Vera Institute of Justice, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts* at 19, (Sept. 2017); *see also* Michael R. Jones, Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* at 6 (Oct. 2013), available at

consider a list of factors before imposing bail, including the defendant's financial resources, it does not require that judges determine whether defendants can afford to pay the bail amounts set.[12] And as former Chief Judge Jonathan Lippman observed, there is "little evidence" that judges actually consider a defendant's ability to pay bail.[13] The practice of judges routinely imposing two of the most restrictive forms of bail without regard to a defendant's ability to pay has resulted in the pretrial detention of thousands of indigent New Yorkers each year.[14] That practice, according to a recent decision by a New York Supreme Court, is unconstitutional.[15]

With 67% of the average daily population in jails across New York State consisting of pretrial detainees, bail is the main driver of incarceration in the state.[16] And the consequences are significant. For detained individuals, who are presumed innocent, pretrial incarceration hampers their ability to prepare a defense to their charges.[17] Pretrial incarceration can result in detainees losing their jobs, housing, and even custody of their children.[18] In addition, the costs to the public cannot be overlooked. In New York City alone, taxpayers spent $2.6 billion in 2017 to house individuals admitted to New York City jails—of whom 83% were pretrial detainees.[19]

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http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf; Thomas H. Cohen, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal Courts, 2008-2010* at 5 (Nov. 2012), available at https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf.

[12] CPL § 510.30(2)(a).

[13] *See* Jonathan Lippman, Independent Commission on Criminal Justice, *A More Just New York City* at 44 (April 2017).

[14] Ian Macdougall, *The Failure of New York's Bail Law*, The Atlantic at 1 (Nov. 24, 2017), available at https://www.theatlantic.com/politics/archive/2017/11/the-failure-of-new-yorks-bail-law/546212/; *see also* Nick Pinto, *The Bail Trap*, The New York Times Magazine, at 3-4, August 16, 2015, available at https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html.

[15] *People Ex Rel. Kunkeli v. Anderson*, Decision, Order, and Judgment, at p. 4, (Jan. 31, 2018) (holding that "the failure of a court imposing bail as a condition of pre-trial detention to consider an individual's ability to pay that bail . . . is a violation of the due process and equal protection clauses of the New York State Constitution and the United States Constitution."), https://images.law.com/contrib/content/uploads/documents/292/2018-01-31_decision_order_and_judgment_on_habeas_corpus_proceeding_and_action_seeking_declaratory_judgment_00061815xb2d9a.pdf.

[16] *Empire State of Incarceration, Correcting the Overuse of Jail*, Vera Institute of Justice, available at https://www.vera.org/state-of-incarceration/drivers-of-jail

[17] *Stack v Boyle*, 342 US 1, 4 (1951); *see also People v Johnson*, 27 NY3d 199, 208 (2016) ("Pretrial detention hampers a defendant's preparation of his defense by limiting his 'ability to gather evidence [and] contact witnesses' during the most critical period of the proceedings") (Pigott, J., concurring).

[18] *The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC*, Office of the New York City Comptroller Scott M. Stringer, at 18 (Jan. 2018), available at https://comptroller.nyc.gov/wp-content/uploads/documents/The_Public_Cost_of_Private_Bail.pdf; *see also* *The Price of Freedom, Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, Human Rights Watch, (Dec. 2, 2010) https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york.

[19] *The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC*, Office of the New York City Comptroller Scott M. Stringer, at 11, 17 (Jan. 2018), available at https://comptroller.nyc.gov/wp-content/uploads/documents/The_Public_Cost_of_Private_Bail.pdf.

More than 50 years after the Kennedy-led reform movement, there is once again widespread recognition for the need for bail reform.[20] This time, New York must enact comprehensive reform that, consistent with the U.S. Supreme Court's instruction, will ensure that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[21]

THE BENEFITS OF THE GOVERNOR'S BAIL REFORM PROPOSAL

The Governor's proposed legislation includes several encouraging provisions that the City Bar supports, including provisions that would:

- eliminate monetary bail for misdemeanor and nonviolent felony charges;[22]
- require that judges impose the least restrictive release conditions necessary to reasonably assure a defendant's return to court;[23]
- require that judges who impose bail set a minimum of three forms of bail, including either an unsecured or partially secured bond;[24]
- require that judges explain their choice for imposing bail or non-monetary conditions on the record;[25]
- require that detainees who are unable to pay their bail be granted automatic bail reviews, where judges must consider the person's ability to pay and either set bail that the defendant is able to pay or set a different release condition;[26] and
- require evidentiary hearings for individuals facing preventive detention, with the burden on the prosecution to justify such detention under a clear and convincing evidentiary standard.[27]

These provisions should improve New York's pretrial practices. In particular, the elimination of monetary bail for misdemeanor and non-violent felony charges, and the

[20] New Jersey, Maryland, Kentucky, Colorado, New Mexico, New Orleans, and Chicago have all recently adopted legislative or regulatory reforms to prevent the jailing of individuals solely because of their inability to pay bail.

[21] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

[22] FY 2019 New York State Executive Budget, Public Protection and General Government Art. VII Legislation, Part C, at 22:15-24, 35:4-13, 39:2-12, available at https://www.budget.ny.gov/pubs/archive/fy19/exec/fy19artVIIs/PPGGArticleVII.pdf.

[23] *See id*. at 22: 21-24, 35:10-13, 36:3-5, 39:9-12, 39:23-25.

[24] *See id.* at 30:23-27.

[25] *See id.* at 22: 24-25, 23: 10-11. 35:13-14, 36:5-6, 39:12. 39:25-26.

[26] *See id.* at 24:26-25:5.

[27] *See id.* at 45:24-46:4.

requirement that either unsecured or partially secured bond be set whenever monetary bail is imposed for other charges, should result in a decrease in the pretrial jail population. Moreover, the requirement that judges set the least restrictive release conditions should ensure that onerous pretrial supervision burdens are not imposed on defendants unless necessary to reasonably assure their return to court. These provisions provide a strong core for potential legislation. But as discussed further below, the overall proposal falls short of providing the comprehensive changes that are needed.

RECOMMENDATIONS

Below we identify specific provisions in the proposed legislation that should either be eliminated or revised to ensure (1) that freedom before trial is the norm, not the exception, (2) that profit motivations are removed from pretrial practices, and (3) that race and wealth are not factors in pretrial decisions.

1. Make Freedom before Trial the Norm, and Pretrial Incarceration the Carefully Limited Exception.

While the Governor recognizes that "freedom before trial should be the rule, not the exception,"[28] the initial bail reform proposal contains several provisions that undermine that principle. Any bail reform proposal should reduce the class of people subjected to detention.[29] Yet, the proposed legislation would do the opposite. As a result, the City Bar recommends the following changes to the proposal:

- eliminate the presumption of preventive detention;
- revise the provisions permitting preventive detention for an individual re-arrested while released on a pending charge to instead retain the current bail statute's limitation: permitting the revocation of release *solely* for re-arrests for class A offenses, violent felony offenses (including felony domestic violence offenses), or specified witness intimidation offenses;
- revise the provisions permitting preventive detention for willful failure to appear in court on *any* charge to instead limit such detention for those charged with felony offenses who willfully and persistently fail to appear in court after receiving notice of scheduled court appearances;
- eliminate the provisions permitting preventive detention for misdemeanor domestic

[28] New York Office of Governor Andrew M. Cuomo, *Governor Cuomo Unveils 22nd Proposal of 2018 State of the State: Restoring Fairness in New York's Criminal Justice System* at 2, (Jan. 3, 2018), available at https://www.governor.ny.gov/news/governor-cuomo-unveils-22nd-proposal-2018-state-state-restoring-fairness-new-yorks-criminal.

[29] Although the governor's proposal refers to detention imposed by a court to prevent flight or harm to a reasonably identifiable person as "pretrial detention," we refer to it here as "preventive detention" because that is the more accurate term and because that avoids confusion with the pretrial detention that occurs while an individual is detained on bail or awaiting an evidentiary hearing.

violence offenses;

- revise the provisions requiring that preventive detention hearings take place within five days of pre-hearing detention to instead require that such hearings take place within two days;

- revise the automatic pre-hearing detention provision so that such detention is only allowed where the prosecutor shows a likelihood of success on their preventive detention motion;

- revise provisions affording discovery before preventive detention hearings to incorporate the Gianaris bill's description of the type of discovery that must be afforded; and

- eliminate the motion-practice exception to the 180-day limit on preventive detention.

Eliminate the presumption of detention:

Under the proposal, individuals charged with certain offenses would have to rebut a presumption of preventive detention.[30] A presumption of detention runs counter to the fundamental constitutional principle that individuals accused of crimes are presumed innocent before trial and thus entitled to pretrial freedom.[31] That fundamental right to freedom can only be restricted if incarceration is necessary to satisfy a compelling government interest and, even then, only if no adequate alternative to incarceration exists to satisfy the government's interest.[32] Given this constitutional right to pretrial freedom, the prosecution must demonstrate that preventive detention is necessary.

The City Bar recommends that this presumption of detention be eliminated from the proposal.

Limit the use of preventive detention for re-arrests:

Under the proposal, individuals who are released on a pending charge and later charged with *any* new crime are eligible for pretrial detention.[33] The proposed legislation dramatically increases the class of people who can be subjected to preventive detention. Under the current bail statute, defendants charged with violations and misdemeanors have a right to release on

[30] *See* FY 2019 New York State Executive Budget, Public Protection and General Government Art. VII Legislation, Part C, at 46:13-47:3.

[31] *People ex rel. Wayburn v Schupf*, 39 NY2d 682, 686-87 (1976) (finding that "*any* pretrial detention impinges on the right to liberty, a fundamental right that is recognized in the constitutional sense as carrying a preferred status and so is entitled to special protection.")

[32] *See id.*

[33] FY 2019 New York State Executive Budget, Public Protection and General Government Art. VII Legislation, Part C, at 45:17-18.

recognizance or release on the condition they pay bail.[34] On the other hand, judges may remand felony defendants (i.e., order their preventive detention until the case is resolved) if incarceration is "necessary" to assure the defendant's court appearance.[35] The proposed legislation would permit preventive detention for individuals released on pending charges who later jump a turnstile in New York City, trespass in a public park after closing hours, or shoplift. That is counterproductive to the Governor's efforts to reduce unnecessary pretrial incarceration.

The City Bar recommends that the provisions permitting preventive detention for an individual re-arrested while released on a pending charge be revised to retain the current bail statute's limitation: permitting the revocation of release *solely* for re-arrests for class A offenses, violent felony offenses (including felony domestic violence offenses), or specified witness intimidation offenses.[36]

Limit the use of preventive detention for failing to appear in court:

Under the proposal, individuals who "willfully failed to appear in court" are eligible for preventive detention no matter their charges,[37] unlike the current statute, which does not permit preventive detention of individuals charged with violations and misdemeanors who fail to appear in court.[38] Instead, the current statute only permits courts to increase their bail amounts to further incentivize future court attendance.[39]

The City Bar recommends that the provision permitting preventive detention for failing to appear in court be limited to individuals charged with felony offenses who willfully and persistently fail to appear in court after receiving notice of scheduled court appearances. The Assembly and Gianaris bills both use this "willful and persistent" standard.[40] And both bills provide the defendant with notice of scheduled court appearances.[41]

Eliminate preventive detention for non-felony charges:

Under the proposal, defendants accused of misdemeanor domestic violence charges can, for the first time, be subjected to preventive detention for posing a current threat to the physical safety of the complaining witness.[42] We recognize that this provision is intended to protect

[34] CPL §§ 530.20(1); 530.40(1).

[35] CPL §§ 510.30 (2)(a); 530.20(2)(b); 530.40(4).

[36] CPL § 530.60(2).

[37] FY 2019 New York State Executive Budget, Public Protection and General Government Art. VII Legislation, Part C, at 45:10-19.

[38] CPL §§ 530.20(1); 530.40(1).

[39] CPL § 530.60(1).

[40] *See* S.3579A, 12:1-2; A.9505-B, 25:34-45.

[41] *See* S.3579A, 12:3-14; A.9505-B, 25:34-45, 19:6-13.

[42] FY 2019 New York State Executive Budget, Public Protection and General Government Art. VII Legislation, Part C, at 45:6-9.

complaining witnesses, but individuals who are not arrested on felony charges should not be subjected to preventive detention. As a condition of pretrial release, individuals accused of misdemeanor domestic violence are routinely subjected to orders of protection that prohibit any contact with the complaining witness, often restricting the defendant's freedom of movement and association.[43]

The City Bar recommends that the provision permitting preventive detention for misdemeanor domestic violence offenses be eliminated.

Reduce the time period for pre-hearing detention from five days to two days:

The proposed legislation provides that a preventive detention hearing must be held within five business days from the prosecution's motion for detention.[44] But the proposal does not explain why five days of pre-hearing detention is necessary before a hearing can be held. Such a lengthy period of time comes at a significant cost to the detainee.[45]

The City Bar recommends that this provision be revised to require a detention hearing within two business days, which is consistent with the Gianaris bill.

Require that the prosecutor show a likelihood of success on their preventive detention motion before allowing pre-hearing detention:

Under the proposal, a court *must* impose pre-hearing detention on a defendant simply because the prosecution expresses an intent to move for preventive detention.[46] Given the constitutional right to pretrial liberty, the government should not be able to deprive someone of their liberty merely because they plan to file a motion. The Gianaris bill resolves this concern by requiring that the prosecution demonstrate a likelihood of success on their detention motion, and, if successful, the court then may order pre-hearing detention or set any other release condition.[47]

The City Bar recommends that the proposed legislation adopt this Gianaris bill provision.

[43] CPL § 530.13.

[44] FY 2019 New York State Executive Budget, Public Protection and General Government Art. VII Legislation, Part C, at 45:24-46:4, 46:5-6.

[45] *See supra* n. 16.

[46] FY 2019 New York State Executive Budget, Public Protection and General Government Art. VII Legislation, Part C, at 23:12-15.

[47] *See* S.3579A, 12:3-14.

Incorporate the Gianaris bill provision affording specific discovery to the defense before a detention hearing:

Under the proposed legislation, defendants are entitled to receive the discovery afforded under the criminal procedure law. But, as the Governor recognizes, the criminal procedure law currently does not provide sufficient discovery to the defense.[48]

The City Bar recommends that the proposed legislation's discovery provision be replaced with the discovery provisions in the Gianaris bill, which specifies the types of discovery that should be disclosed to the defense.[49]

Eliminate the motion-practice exception to the 180-day limit on preventive detention:

Although the proposal requires that individuals subjected to preventive detention for 180 days be released if the trial has not begun, several exceptions to the rule undermine the rule's effect.[50] The most concerning of these exceptions is that if motions are filed in a timely manner the 180-day rule would not apply.[51] The routine filing of motions in almost every criminal prosecution makes this the "180-day exception", not the rule; the filing of motions does not justify the preventive detention of an individual charged with a felony in excess of 180 days without a trial.

The City Bar recommends that this exception be eliminated. We note that the proposal also applies the 180-day rule to detention orders for individuals charged with violations and misdemeanor offenses, which is inconsistent with the speedy trial periods for both offenses. This concern would be resolved, however, if the proposal adopts our position that eligibility for preventive detention be restricted to those charged with felony offenses, which is consistent with the current bail statute.

2. Ensure that Profit Motivations Are Removed from Pretrial Practices.

Profit motivations should not play a role in pretrial practices because when such motivations are present the poor are inevitably and disproportionately harmed. To eliminate such motivations in pretrial practices, the City Bar recommends the following changes to the proposed legislation:

- eliminate commercial bond from the list of nine forms of bail that judges can impose;

[48] New York Office of Governor Andrew M. Cuomo, *Governor Cuomo Unveils 22nd Proposal of 2018 State of the State: Restoring Fairness in New York's Criminal Justice System* at 2, (Jan. 3, 2018), available at https://www.governor.ny.gov/news/governor-cuomo-unveils-22nd-proposal-2018-state-state-restoring-fairness-new-yorks-criminal.

[49] S.3579A, at 12:15-48.

[50] FY 2019 New York State Executive Budget, Public Protection and General Government Art. VII Legislation, Part C, at 48:12-50:9.

[51] *See id.* at 49:25-26.

- require that pretrial services be provided by only public or non-profit entities; and

- eliminate the provision in the proposal that requires that defendants pay for electronic monitoring.

Eliminate commercial bond:

Although Governor Cuomo pledged in 2016 to end the "predatory pricing and contract practice" of bail bondsman, recognizing that such practices have a "disproportionate negative impact on low-income people,"[52] the proposed legislation fails to address commercial bonds. The for-profit bond industry has consistently engaged in pretrial practices that disproportionately harm the poor. Commercial bonds require that defendants pay a bondsman a non-refundable premium of up to 10 percent of the bond amount.[53] Cash bail, on the other hand, is paid to the court and returned to the defendant if he or she returns to court.[54] The City Bar has recommended the elimination of the for-profit commercial bail bond industry in New York, arguing that the for-profit surety system discriminates against and disproportionately harms poor defendants, creating the perception that different rules apply to rich and poor defendants in the criminal justice system.[55] This year, the New York City Comptroller released a report detailing several unlawful and harmful routine practices of the bail bonds industry: some bail bondsmen unlawfully charge more than a 10 percent premium, fail to timely post defendants' bonds thereby unnecessarily prolonging their pretrial incarceration, and operate unlicensed and unregulated businesses.[56] Noting these troubling practices, and noting that bail bonds paid to private bondsmen instead of to the courts represent a significant transfer of wealth from low-income communities to this for-profit industry, the City Comptroller called for the banning of bail bonds in New York City.[57]

The City Bar recommends that the proposal be revised to remove commercial bond from the list of nine forms of bail that judges can impose. Non-profit bail bonds, unsecured and partially secured bond, and pretrial supervision services provide much better alternatives to commercial bonds.

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[52] Andrew M. Cuomo, New York State: Built to Lead: 2016 State of the State, 190-91 (2016), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2016_State_of_the_State_Book.pdf.

[53] *The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC*, at 21.

[54] *See id.* at 24.

[55] "Recommendations Concerning the Bail Bond Industry in the State of New York," New York City Bar Association, April 2017, http://s3.amazonaws.com/documents.nycbar.org/files/201744-BailBondIndustryNYS_FINAL_4.26.17.pdf.

[56] *See id.* at 24-25.

[57] *See id*. at 24, 27-31.

Require that pretrial services be provided by public or non-profit entities:

Given the lessons learned from harmful practices of the for-profit bond industry, the final bail reform legislation should ensure that these practices are not carried forward by for-profit pretrial services agencies. Both the Assembly and the Gianaris bills require that pretrial services be provided only by public and non-profit entities.[58]

The City Bar recommends that the final bail reform legislation adopt the Assembly bill provisions requiring that pretrial services, including electronic monitoring, be provided by public or non-profit entities.

Eliminate the proposal's requirement that defendants pay for electronic monitoring:

The proposed legislation requires that defendants pay for the costs of electronic monitoring services.[59] Like similar payments to the bail bond industry, such payments will result in a transfer of wealth from largely low-income individuals.

The City Bar recommends that the proposal's provision requiring that defendants pay for electronic monitoring be eliminated.

3. Race and Wealth Should Not Be Factors in Pretrial Decisions.

As Governor Cuomo fittingly put it, "[r]ace and wealth should not be factors in our justice system."[60] To ensure that race and wealth are not factors in pretrial decisions, the City Bar recommends the following changes to the proposed legislation:

- include a requirement for data collection and reporting on pretrial decisions categorized by race and ethnic background;
- include a requirement that any risk assessment tool used to assess an individual's flight risk be free of discriminatory and disparate impact on detention, release, and monitoring outcomes;
- include a requirement that when courts first set bail that they set it at an amount the defendant can afford; and
- revise the provision requiring a bail review after a person has been detained for five days on unaffordable bail to instead require a bail review in such cases after 24 hours.

[58] A.9505-B, at 17:5-12, 48-55; S.3579A, at 6:9-22.

[59] FY 2019 New York State Executive Budget, Public Protection and General Government Art. VII Legislation, Part C, at 22:25-23:2, 35:14-18, 39:13-17.

[60] Transcript, Governor Cuomo State of the State Remarks, (Jan. 3, 2018), available at https://www.governor.ny.gov/news/video-audio-rush-transcript-governor-cuomo-outlines-2018-agenda-realizing-promise-progressive.

Require data collection and reporting regarding pretrial decisions:

While the bail reform proposal does not require data collection on pretrial decisions, Senator Gianaris's proposal does.[61] To remove race as a factor in pretrial decisions, the bail reform proposal should follow the Gianaris bill and include data collection and reporting regarding pretrial decisions categorized by race and ethnic backgrounds. Only by tracking this data can the public know the extent to which racial disparities exist in decisions to release, set conditions on, or detain individuals. Such transparency is essential to hold courts accountable and to root out implicit or explicit bias in pretrial decisions.

The City Bar recommends that the proposal be revised to include the annual data collection and reporting provision in the Gianaris bill.

Require that assessment tools that measure flight risk be free from discriminatory or disparate impact:

Although some jurisdictions rely on risk assessment tools to measure a defendant's flight risk, the proposed legislation does not regulate such tools. The Assembly bill on the other hand provides specific provisions requiring that such tools "be free from discriminatory and disparate impact" on detention, release, and monitoring outcomes.[62] To that end, the Assembly bill requires that such tools be regularly validated and that validation studies and non-identifiable data be made publicly available to ensure transparence and accountability.

The City Bar recommends that the final bail proposal adopt the Assembly bill provisions regulating the use of risk assessment tools.

Require that when courts first set bail they set an amount the defendant can afford and require that bail reviews occur within 24 hours of detention on bail:

The proposed legislation requires that when monetary bail is set in violent felony cases that an automatic bail review take place if the defendant has been in pretrial detention for five days because he or she was unable to pay bail.[63] At this bail review, the court is required to either set a different release condition or set bail at an amount the defendant can afford.[64] Because the purpose of bail is to incentivize the defendant's return to court,[65] it serves no public interest to have defendants waiting in jail for five days until courts finally set affordable bail.[66]

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[61] S.3579A, at 15:34-43.

[62] A.9505-B, 18:1-20.

[63] FY 2019 New York State Executive Budget, Public Protection and General Government Art. VII Legislation, Part C, at 26:23-25.

[64] *See id.*

[65] *Stack v. Boyle*, 342 US 1, at 4-5 (1951).

[66] *The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC*, Office of the New York City Comptroller Scott M. Stringer, at 13 (Jan. 2018), (stating that "short jail stays serve little public purpose, either in terms of public safety or ensuring defendants do not flee, even though incarceration involves a great expense for both taxpayers and

The City Bar recommends that the proposal be revised to require that, when bail is first set, the court set bail at an amount the defendant can afford. Recognizing that even with this change there may be rare instances when the defendant's credit card is declined or other unexpected circumstance prevents payment, the City Bar recommends that the proposal be revised to hold the bail review after a defendant remains incarcerated for more than 24 hours on bail.

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March 2018

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the individuals detained."), available at https://comptroller.nyc.gov/wp-content/uploads/documents/The_Public_Cost_of_Private_Bail.pdf.

* The positions set forth in this report should not be construed to reflect the position of any City or State agencies by which committee members are employed.