



New York State Justice Task Force

Report on Bail Reform

February 2019

Justice Task Force Recommendations

February 2019

I. Introduction

The New York State Justice Task Force (the “Task Force”) was formed in May 2009 by former Chief Judge of the State of New York Jonathan Lippman to work to eradicate wrongful convictions across the State. Nearly 10 years later, the Task Force continues this work under current Chief Judge Janet DiFiore, who has since expanded the Task Force’s mission to promote fairness, effectiveness, and efficiency in the criminal justice system; to eradicate harms caused by wrongful convictions; to further public safety; and to recommend judicial and legislative reforms to advance these causes throughout the State.

The Task Force is now chaired by former Court of Appeals Judge Carmen Beauchamp Ciparick and acting Supreme Court Justice Mark Dwyer. The Task Force’s members represent a broad cross-section of the criminal justice community in New York State, consisting of judges, prosecutors, defense attorneys, law enforcement officials, victim advocates, and others who are committed to investigating and building consensus around some of the most important and difficult issues in our criminal justice system.

Since its inception, the Task Force has studied and provided recommendations on a number of issues, including: expanding the State’s DNA databank; granting post-conviction access to DNA testing and databanks; utilizing electronic recording of custodial interrogations; implementing best practices in identification procedures; granting greater access to forensic case file materials; reforming criminal discovery; using root-cause analysis to prevent wrongful convictions; and addressing attorney misconduct, including through orders reminding both prosecutors and defense attorneys of their respective obligations. Meanwhile, Task Force members, in their individual capacities, have been proactive in implementing new measures to promote the Task Force’s mission.

II. Executive Summary

Since the 1960s, New York State has played an integral role in the national dialogue around bail reform.¹ In recent years, the issue has garnered increased attention across the country and in our State, where various stakeholders, including New York Governor Andrew Cuomo, the New York State Legislature, and Chief Judge DiFiore, have advocated for meaningful bail reform. Put simply, it has become abundantly clear that far too many defendants, who are presumed innocent, are nonetheless left to languish in our State’s jails because they cannot afford to pay bail. This has a profound toll on those individuals, who are disconnected from society and stand to lose jobs or housing, and who may also feel pressure to plead guilty even when they are not. And it has a

¹ See Center on the Administration of Criminal Law, Preventive Detention in New York: From Mainstream to Margin and Back (February 2017) (outlining the history of bail reform in New York State).

profound toll on society, which bears the burden of incarcerating individuals who simply should not be in jail.

In recent weeks, Governor Cuomo put forward his latest proposal, which would effectively eliminate bail in favor of releasing defendants on their own recognizance in most instances.² The New York State Assembly and Senate have put forward proposals of their own, which are now being discussed in Albany. Bail reform is inevitable, and it is important that we take this pivotal moment to ensure that the reform is done in a way that is safe and meaningful, on a systematic level.

Over the past 21 months, the Task Force has performed an in-depth study and analysis of how to improve the procedures through which defendants charged with criminal offenses are released prior to trial. The Task Force focused primarily on how to do so under our current statutory regime, but also recognized that changes involving the consideration of risk to public or physical safety might require legislative change. In the end, as detailed below, a narrow majority of the Task Force recommended that the New York Legislature consider adopting new legislation that would permit a court to consider whether a defendant currently poses a credible threat to the physical safety of an identifiable person or group of persons.

The Task Force began its work back in June 2017, with a comprehensive survey of bail systems and bail reform efforts across all 50 states and the District of Columbia. Beginning in September 2017, the Task Force heard from a number of presenters, including the Vera Institute of Justice, which spoke about the current state of bail and pretrial justice in New York State, and a panel of key stakeholders involved in New Jersey's recent bail reform efforts, including New Jersey Chief Justice Stuart Rabner, as well as representatives from the New Jersey Office of the Attorney General, the American Civil Liberties Union, and the New Jersey Office of the Public Defender. In addition, the Task Force heard from panels of practitioners from both New York City and Upstate New York, who noted the variance in bail practices across the State, especially between counties in New York City with significant and concentrated resources, and counties in Upstate New York with fewer and more diffuse resources.

In February 2018, the Task Force convened a bail reform subcommittee (the "Subcommittee") to further investigate various issues that had been raised during the Task Force's initial analysis. In the months that followed, the Subcommittee met more than a half-dozen times and heard from various other presenters, including from the Governor's Council on Community Reentry and Reintegration, the Arnold Foundation, Upturn, the New York Federal-State-Tribal Courts, the New York Criminal Justice

² Under the Governor's bill, when release on recognizance would not reasonably assure a defendant's future attendance in court, courts would be permitted to release the defendant under the least restrictive non-monetary conditions appropriate. The court would also be permitted to consider pretrial detention for a limited group of defendants charged with specific enumerated offenses, where the court finds clear and convincing evidence, after a hearing, that the defendant poses a high risk of flight before trial or a current threat to the physical safety of a reasonably identifiable person or persons.

Agency (“CJA”), and the Mayor’s Office on Criminal Justice. The Subcommittee also invited individuals from various other organizations to engage in these meetings, including representatives from the Vera Institute of Justice, the Legal Aid Society, Bronx Defenders, and the Innocence Project. The Task Force is indebted to all these organizations and individuals for their invaluable contributions.

In March 2018, the Task Force, in full consensus, released a statement on bail reform (the “Statement”),³ which set forth a number of bail reform recommendations based on current law and the Task Force’s analysis up to that point. At the outset, the Statement emphasized the need for sufficient funding for any bail reform efforts the State embarked on, including pretrial services and data collection, and called for enhanced training on the use of non-monetary alternative forms of bail. The Statement also endorsed a presumption that defendants facing misdemeanor and certain non-violent felony charges—who, together, make up the vast majority of those incarcerated—be released without any bail. This presumption could be rebutted, the Statement further explained, if a court determined that there were aggravating circumstances, whereupon the court would use the factors set forth in CPL § 510.30 to set the least restrictive conditions necessary to ensure the defendant’s future attendance in court, and explain its rationale on the record.

This Report on Bail Reform (the “Report”) builds on that March 2018 Statement, including by explaining which non-violent felony charges should not be included in the presumption of release, as well as which aggravating circumstances could cause that presumption to be rebutted. After four full Task Force meetings, eight Subcommittee meetings, and four Subcommittee subgroup meetings,⁴ the 24 voting members of the Task Force achieved consensus on a majority of the recommendations considered, in many instances reaching near-unanimous agreement. Along the way, the Task Force tracked and considered various other bail reform proposals that have been raised in recent years, including whether New York should consider public safety in making bail determinations or utilize some form of preventive detention, which it has never done before. As noted above, the issue of whether courts might consider physical safety sparked a robust debate and discussion, and was ultimately passed by a close margin.

Having considered all of this, the Task Force makes the following recommendations, which are explained more fully below:

- **Rebuttable Presumption of Release.** The Task Force recommends there be a presumption that defendants facing misdemeanor and certain non-violent felonies be released without imposing any bail, either on their own

³ The Statement can be found at **Appendix A**.

⁴ The full Task Force meetings were held on September 18, 2017, November 30, 2017, January 10, 2019, and February 4, 2019. The Subcommittee meetings were held on February 12, 2018, May 7, 2018, June 27, 2018, August 20, 2018, October 10, 2018, December 5, 2018, December 14, 2018, and January 28, 2019. The Subcommittee subgroup meetings were held on February 20, 2018, March 1, 2018, September 17, 2018, and January 4, 2019.

recognizance or with the least restrictive non-monetary conditions necessary to ensure their appearance in court.

- **Relevant Offenses.** This presumption would not apply to defendants who face a life sentence of imprisonment or who are charged with a non-violent Class B felony carrying a mandatory state prison term (excluding Class B drug offenses), nor would it apply if the defendant is charged with conspiracy to commit one of these offenses.⁵
- **Aggravating Factors.** The presumption may be rebutted if the court, in considering the factors set forth in CPL § 510.30, determines that there is a significant risk the defendant will not return to court. In such a case, the court must use the factors set forth in CPL § 510.30 to set the least restrictive conditions necessary to ensure the defendant's future attendance in court. In addition, the presumption may be rebutted if the court determines that the defendant currently poses a credible threat to the physical safety of an identifiable person or group of persons (e.g., in domestic violence cases). In any case where the court determines that the presumption has been rebutted, it must explain its rationale on the record.
- **Consideration of Physical Safety.** As noted above, courts may consider whether a defendant currently poses a credible threat to the physical safety of an identifiable person or group of persons in determining whether the presumption of release may be rebutted. In addition, courts should be permitted to consider—when making bail determinations for any offense, including more serious felonies—whether a defendant currently poses a credible threat to the physical safety of an identifiable person or group of persons.
- **Six Other Bail Reform Initiatives.** The Task Force recommends that the State: (1) improve its review and reconsideration process of any bail set in local criminal court under CPL § 530.30; (2) augment training and education, including for the court; (3) expand the use of pretrial services, including for supervised release (and ensure proper State-wide funding for the same); (4) expand data collection and reporting (and ensure proper State-wide funding for the same); (5) further study the use of risk-assessment tools, and use certain best practices if such tools are in fact implemented; and (6) further study the use of “\$1 bail” and how to mitigate any of its unintended harms.

⁵ This provision was added to exempt from the presumption of release certain offenses, including certain homicide crimes, that do not otherwise fall within the State's definition of a violent felony offense under Penal Law § 70.02.

III. Bail Reform Recommendations

a. Rebuttable Presumption of Release

i. Relevant Offenses

As initially stated in the March 2018 Statement, the Task Force recommends that there be a presumption that defendants facing misdemeanor and certain non-violent felony charges be released without imposing bail, as defined in CPL § 520.10(1). These defendants should be released either on their own recognizance or with the least restrictive non-monetary conditions necessary to ensure they appear in court as required.

That said, the Task Force recommends that the presumption of release not apply where the defendant faces a life sentence of imprisonment, or is charged with a non-violent Class B felony that carries a mandatory state prison term (excluding Class B drug offenses). Nor would the presumption apply if the defendant is charged with conspiracy to commit one of these offenses.

ii. Aggravating Circumstances

In addition, the Task Force recommends that, even for offenses receiving the presumption of release set forth above, the court may find that there are aggravating circumstances that rebut that presumption.

The Task Force recommends that the presumption may be rebutted if the court, upon considering the various factors set forth in CPL § 510.30, determines that there is a significant risk that the defendant will not return to court as required. In such a case, the court must use the factors set forth in CPL § 510.30 to set the least restrictive conditions necessary to ensure the defendant's future attendance in court.⁶

⁶ CPL § 510.30(2)(a) provides that “[w]ith respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required.” The factors that the court must consider are: (1) “The principal’s character, reputation, habits and mental condition”; (2) “His employment and financial resources”; (3) “His family ties and the length of his residence if any in the community”; (4) “His criminal record if any”; (5) “His record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 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”; and (6) “His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution.” Moreover, the court must consider additional factors “[w]here the principal is charged with a crime or crimes against a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title” If the principal is a defendant, the court must consider “the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal”; and “the sentence which may be or has been imposed upon conviction.” In addition, CPL § 510.30(2)(b) provides that, if the principal is a “defendant-appellant in a pending appeal from a judgment of conviction, the court must also consider the likelihood of ultimate reversal of the judgment.”

Moreover, a narrow majority of the Task Force recommends that the presumption may be rebutted if the court determines that the defendant currently poses a credible threat to the physical safety of an identifiable person or group of persons (e.g., in domestic violence cases). In any case where the court determines that the presumption has been rebutted, it must explain its rationale on the record.

As noted earlier, the Task Force engaged in a vigorous debate and discussion as to whether courts should be able to consider public safety, in any capacity, in making bail determinations. While New York State has long eschewed the notion that public safety may be considered, the topic has received renewed attention in recent years, as several recent bail proposals eliminate the alternative of bail. The Task Force ultimately determined that although a court should not consider whether a defendant poses a threat to public safety, it should be allowed to consider whether a defendant currently poses a credible threat to the physical safety of an identifiable person or group of persons, such as in domestic violence cases. During these discussions, several members of the Task Force acknowledged that, as a practical matter, there is a perception that courts do take into account threats to public or physical safety when considering the monetary conditions of bail, looking to, among other things, the factors set forth in CPL § 510.30. These members of the Task Force noted that there is a benefit to promoting transparency regarding when such considerations are appropriate, and to ensuring that there is proper due process regarding such determinations. Other members of the Task Force noted that the New York Legislature had long considered and rejected the notion of considering public safety, and should not adopt such a consideration at this juncture.

b. Factors to Consider in All Bail Determinations

In making any bail determination, regardless of whether the relevant offense falls within the scope of the presumption outlined above, the Task Force recommends that the court weigh the factors set forth in CPL § 510.30, and examine whether the defendant's release on recognizance is reasonable. Moreover, even when such release is deemed not reasonable, the court should set the least restrictive conditions necessary to ensure that defendant's future attendance in court as required.

In addition, as indicated above, a narrow majority of the Task Force recommends that courts—in making any bail determinations, including for more serious offenses that fall outside the scope of the presumption of release outlined above—be permitted to consider whether a defendant currently poses a credible threat to the physical safety of an identifiable person or group of persons. The Task Force, once again, recognizes that permitting a court to consider this factor would require legislative change, and recommends that the New York Legislature consider making such a change.

c. Six Other Bail Reform Initiatives

i. Bail Reviews and Bail Reconsiderations

The Task Force recommends that the bail review and bail reconsideration process of any bail set in local criminal court under CPL § 530.30 be improved. Specifically, the

Task Force recommends that in misdemeanor and unindicted felony cases, CPL § 530.30 bail reviews should be made upon oral request of the defense attorney and notice to the court and the prosecution, which is allowed but not expressly provided for in the current statute. In cases where bail review has been requested, the Task Force recommends that the judiciary adopt a uniform rule across the State that CPL § 530.30 bail reviews be held no later than 48 hours after the defense counsel's request (excluding weekends and holidays).

The Task Force further recommends that at each court appearance prior to the disposition of a case, the court must review the bail conditions of any incarcerated defendant. District Attorneys' offices and the institutional defense providers in each county, including Article 18-B assigned counsel, should implement systems within their offices to periodically consider whether there are incarcerated defendants for whom bail should be lowered or release should be granted.

ii. Training and Education

The Task Force recommends that there be enhanced training and education of judges, courtroom personnel, prosecutors, and defense attorneys regarding the diverse set of alternatives to cash bail and insurance company bail bonds available under the existing framework, including, but not limited to, unsecured and partially secured bonds.

In particular, the Task Force recommends that the judiciary augment its standardized and mandatory training programs on bail for judges and clerks who work on criminal cases, including civil court judges rotating into arraignments, and that this augmented training be conducted annually. In designing the training, courts should periodically include perspectives from individuals directly impacted by bail decisions. Trainings should include statistics about current bail-setting practices and discussion of any risk-assessment tools in use in the jurisdiction. In addition, the trainings should include a focus on less restrictive alternatives to incarceration, as well as assessing a defendant's ability to pay if monetary bail is being considered.

As part of their training, judges should also be required to visit the local county jail that houses pretrial detainees once within the first year of being elected or appointed, and every four years after that as currently required under 22 NYCRR 17.1 (which requires that judges and justices who sit in criminal parts visit facilities and institutions for detention every four years, including facilities and institutions for pretrial detention). Clerks should also be provided an opportunity to visit such jails.

iii. Pretrial Services

The Task Force recommends that the State provide sufficient funding for pretrial services, including supervised release as an alternative to bail, in order to ensure that such services are meaningful, robust, and effective. The Task Force further recommends the use of pretrial services across the State to increase the likelihood that defendants will appear in court as required, including through reminders of upcoming court dates by phone calls, texts, and letters. Over the course of its review, the Task Force heard from a

number of speakers about the effectiveness of pretrial services, including the fact that a simple reminder to appear in court can have a dramatically positive impact on a defendant's likelihood of showing up to court as required.

iv. Data Collection and Reporting

The Task Force recommends that the State provide sufficient funding for uniform data collection and reporting on pretrial practices in order to enable the thorough tracking and study of bail reform efforts.

Data collection should include, but not be limited to, detention requests by prosecutors and detention orders by courts across race or ethnicity groups. In addition, data collection should include the various types of bail set, including data about the use of partially secured and unsecured bonds, along with what form of bail the defendant relied upon to pay bail.

v. Risk-Assessment Tools

The Task Force heard from a number of speakers about the use of risk-assessment tools, including from the CJA, which claims to have a transparent risk-assessment tool that only measures flight risk, rather than propensity. In the end, the Task Force determined that the question of whether judges should be able to use risk-assessment tools that measure flight risk to assist them in making bail determinations requires further study.

Based on its own study of the issue, the Task Force recommends that certain best practices should be used if, in fact, risk-assessment tools are implemented in some capacity. In particular, the Task Force recommends that any such tool should be regularly updated to ensure its continued usefulness, and monitored to ensure that it does not foster racial disparity. In addition, the Task Force recommends that judges, prosecutors, and defense counsel be trained on the tool's strengths and weaknesses. Finally, the tool's methodology and the data it uses should be transparent and made accessible to third parties for testing and analysis.

vi. "\$1 Bail"

During the Task Force's discussions, the issue of "\$1 bail" arose, whereby defendants in New York City and some other jurisdictions across the State can be unnecessarily held in jail for minor offenses solely on \$1 bail.⁷ As a general matter, the

⁷ This form of bail is set when the defendant is ordered released on one case, but held on another case. The nominal bail is set on the case where release was available to make sure the defendant receives credit for time served for both cases. The problem, however, is that for various reasons, including the dismissal of the case that did not have the release order, certain defendants are held only on \$1, without timely notification that the other hold has been eliminated. Thus, at present, the process of releasing the detainee can be quite burdensome.

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Task Force believes that the issue of \$1 bail requires further study, including as to whether there should be legislative reform to, among other things, replace it with an administrative hold or other legislative solution, so that the goals of production and jail time credit do not result in some individuals being held only on \$1. For the time being, however, the Task Force recommends that judges, defense attorneys, and prosecutors in jurisdictions utilizing \$1 bail be trained on the nuances of the practice to limit any of its unintended harms.

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The Task Force is aware that a relatively new process has been implemented in New York City that seeks to address this \$1 bail issue. Every weekday morning, the Department of Correction's ("DOC") Information Technology department automatically generates a report of those individuals being held solely on \$1 bail. For each individual, an alert is sent to their housing facility and the individual is notified that they can post \$1 bail to be released. If the individual is not able to post \$1, they are notified that they can call a surety. If the individual can neither post \$1 nor locate a surety, DOC Social Services will post the \$1 bail for them.

Appendix A



New York State Justice Task Force

Statement on Bail Reform

March 21, 2018

The New York State Justice Task Force (the “Task Force”) applauds the efforts of Governor Andrew Cuomo, the New York State Legislature, Chief Judge Janet DiFiore, and many others across the State working to improve the procedures by which defendants charged with criminal offenses are released prior to trial. This is important and pressing work, and it is multifaceted, requiring thoughtful consideration and, at times, compromise.

The Task Force is currently conducting in-depth research and analysis on the State’s bail system and process for timely disposal of cases. The aim is for us, as a body consisting of judges, prosecutors, defense attorneys, law enforcement officials, victim advocates, and others across the criminal justice system, to build on the important work now being done and to develop consensus on a number of difficult issues connected to that work—including, but not limited to, the most prudent way to approach pretrial services, preventive detention, and bail alternatives. At the outset, however, we emphasize that it is critical for the State to provide sufficient funding in order for any of these bail reform packages to succeed.

In addition, at this early stage, the Task Force notes several points that we hope can help animate the current discussion about pretrial release of defendants charged with criminal offenses.

- First, the Task Force endorses a presumption that defendants facing misdemeanor and certain non-violent felony charges be released without employing cash bail or the traditional bail bonds, either on their own recognizance or with the least restrictive non-monetary conditions necessary to ensure those defendants’ presence in court as required. The presumption may be rebutted where a court determines that aggravating circumstances exist. To the extent the court determines that the presumption has been overcome, the court should set forth its rationale on the record.
- Second, we recommend that there be enhanced training and education of judges, courtroom personnel, prosecutors, and defense attorneys regarding the diverse set of alternatives to cash bail and insurance company bail bonds available under the existing framework, including, but not limited to, unsecured and partially secured bonds.

- Third, we recommend that the State provide sufficient funding for pretrial services, in order to ensure that such services are meaningful, robust, and effective.
- Finally, we recommend that the State provide sufficient funding for uniform data collection and reporting on pretrial practices, in order to enable the thorough tracking and study of bail reform efforts. Data collection should include, though not be limited to, detention requests by prosecutors and detention orders by courts across racial groups.

We look forward to further contributing to this important conversation in the months ahead.