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REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE AND THE CORRECTIONS AND COMMUNITY REENTRY COMMITTEE

A.6799 **M. of A. Lentol**
S.4483 **Sen. Nozzolio**

AN ACT to amend the criminal procedure law, in relation to the issuance of securing orders.

THIS BILL IS OPPOSED

INTRODUCTION

This report is respectfully submitted by the Criminal Courts Committee and the Corrections and Community Reentry Committee (the "Committees") of the New York City Bar Association (the "City Bar"). The City Bar is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The members of the Criminal Courts Committee include prosecutors, criminal defense attorneys, law students and academics who analyze laws and policies that affect the criminal courts in New York. The Corrections and Community Reentry Committee addresses issues affecting people in jails, prisons and other detention facilities, as well as people on probation and parole and with conviction histories.

The Committees have thoroughly analyzed A.6799/S.4483 (the "Bill") and oppose its passage. The Bill proposes to make substantial changes to New York's statutory bail scheme by requiring judges to consider public safety as a factor in setting bail. The Bill also adds a provision of presumptive release, requires judges to set bail in least restrictive means and imposes a mandatory right to a *de novo* bail review within 30 days of bail being set by an arraignment court judge. The Committee opposes passage of the Bill for the following reasons:

- The existing bail statute accomplishes the stated goals of the Bill.
- The presumption in favor of release and the requirement that judges set the least restrictive securing conditions run counter to the public safety provisions and need to be strengthened.
- The Bill permits a judge to set prohibitively high bail and/or preventively detain an accused without the constitutionally required procedural safeguards and does not provide adequate definitions or tools to assist courts in assessing public safety effectively.

- There is no evidence that the Bill will be effective in protecting public safety; indeed, available data from states with statutes similar to the proposed Bill shows no difference in re-arrest rates.

In a 1996 report, the City Bar opposed preventative detention as a factor in the determination of bail. This prior report found that New York's statutory bail scheme complied with the constitutional proscription against excessive bail by adopting factors relevant to the bail determination and rejecting preventive detention. Further, the report opposed preventive detention on the grounds that a person charged with a crime is presumed innocent, and that pre-trial detention contributes substantially to a deterioration of an accused's morale, impacts the quality of a detainee's legal defense, artificially inflates the costs of preparing a defense and results in overcrowding of jails all at the most critical stage of the criminal process.

OVERVIEW OF THE BILL

The Bill states in its legislative findings that the current statutory bail scheme is "ill-designed to meet today's community needs," and notes that New York is one of the few states that does not require a judge to weigh a defendant's threat to public safety in making bail decisions. Thus, the Bill's first purpose is "[t]o recognize what most other state jurisdictions and the federal government have long accepted – that a defendant's danger to the community is a factor that must be considered by a court charged with determining whether that defendant should be released pending trial."

The second stated finding is that "New York's bail rules, as applied, can be particularly unfair to poor persons and their families as bail beyond the financial wherewithal of a criminal defendant is frequently ordered in low-level offenses even where such defendant may pose little risk of flight." Accordingly, the second purpose of the Bill "aims to ensure that the state's bail statutes are implemented fairly and that poor persons charged with crime should not be at any special disadvantage when it comes to decisions regarding release pending trial."

The Bill proposes to accomplish these goals by amending C.P.L. § 510.30(2)(a), to include language stating that a court "must consider" the kind of control or restriction required "to assure the safety of any other person or the community."[1]

[1] Currently, C.P.L. § 510.30(2)(a) reads, "With 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 nine factors a judge may consider in setting bail 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;

Further, the Bill proposes to amend C.P.L. § 530.20, which governs when bail is set in local criminal court, and C.P.L. § 530.40, which governs when bail is set in superior court, to require release for misdemeanors and non-violent felonies, unless release would not assure return to court or public safety.[2] Under the proposed C.P.L. § 530.20(1), when a person is charged with any offense

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6. His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution;

7. Where 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, the following factors:

    a. any violation by the principal of an order of protection issued by any court for the protection of 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, whether or not such order of protection is currently in effect; and

    b. the principal's history of use or possession of a firearm;

8. If he is a defendant, the weight of the evidence against [her] 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;

9. If he is a defendant, the sentence which may be or has been imposed upon conviction.

C.P.L. § 510.30(2)(a). These factors are presently only permitted to be considered in relation to assessing an accused's likelihood of returning to court.

[2] C.P.L. § 530.20 currently reads as follows:

When a criminal action is pending in a local criminal court, such court, upon application of a defendant, must or may order recognizance or bail as follows:

1. When the defendant is charged, by information, simplified information, prosecutor's information or misdemeanor complaint, with an offense or offenses of less than felony grade only, the court must order recognizance or bail.

2. When the defendant is charged, by felony complaint, with a felony, the court may, in its discretion, order recognizance or bail except as otherwise provided in this subdivision.

C.P.L. § 530.40 currently reads as follows:

When a criminal action is pending in a superior court, such court, upon application of a defendant, must or may order recognizance or bail as follows:

1. When the defendant is charged with an offense or offenses of less than felony grade only, the court must order recognizance or bail.

2. When the defendant is charged with a felony, the court may, in its discretion, order recognizance or bail. In any such case in which an indictment (a) has resulted from an order of a local criminal court holding the defendant for the action of the grand jury, or (b) was filed at a time when a felony complaint charging the same conduct was pending in a local criminal court, and in which such local criminal court or a superior court judge has issued an order of recognizance or bail which is still effective, the superior court's order may be in the form of a direction continuing the effectiveness of the previous order.

other than a violent felony offense as defined in P.L. § 70.02 or the commission or attempted commission of a class A felony or manslaughter in the second degree (meaning when a person is charged with a misdemeanor or non-violent felony offense), "the court must order recognizance unless the court determines that such a securing order will not reasonably secure the defendant's court attendance when required or will endanger the safety of any other person of the community in which even the court must order bail." Under the proposed C.P.L. § 530.20(2), when a person is charged with violent felony offense as defined in P.L. § 70.02 or the commission or attempted commission of a class A felony or manslaughter in the second degree, the court "may, in its discretion, order recognizance or bail."

Similarly, the proposed amendments to C.P.L. § 530.40 mirror those in C.P.L. § 530.20, with subdivision (1) providing that a court "must order recognizance" when the defendant is charged with a misdemeanor or non violent felony offense unless the court determines that recognizance will not secure the accused's return when required or will endanger the safety of any other person or the community in which case the court "must order recognizance or bail."[3] The proposed change to § 530.40, subdivision (2) provides that the ordering of recognizance or bail is within the court's discretion when the defendant is charged with a violent felony offenses or the commission or attempted commission of a class A felony or manslaughter in the second degree.

The Bill also adds a new provision, C.P.L. § 510.40(1-a), requiring that judges set the least restrictive securing conditions which reads as follows:

> The court may make any securing order specified in paragraph (a) or (b) of this section [(a) release on one's own recognizance, or (b) fixing bail] subject to any condition or conditions that, in its determination, will reasonably assure the appearance of the principal in court when required or that will reasonably assure the safety of any other person or the community. Such condition or conditions may include any that to the court seem appropriate <u>provided that they represent the least restrictive condition or conditions necessary</u>. (emphasis added)

Finally, the Bill proposes to add a provision for *de novo* review, § 530.42, which provides "upon a defendant's first appearance . . . occurring not less than thirty days after he or she was arraigned . . ., the court must entertain an application by the defendant for a change in any securing order then applicable." This provision also states that the court "must determine" such application "de novo without regard to the existing securing order," but the provision does not apply where an indictment or superior court information has replaced a felony complaint or where that defendant was heard on such application while the felony complaint was pending.

THE TOOLS TO ACCOMPLISH THE STATED GOALS OF PROTECTING PUBLIC SAFETY AND REDUCING THE POOR POPULATION OF PRE-TRIAL DETAINEES ARE ALREADY IN THE CURRENT BAIL STATUTE

The current statutory bail scheme in Title P, enacted along with the entire Criminal Procedure Law in 1970, effective September 1, 1971 (L. 1970, c. 996, §1, A- 4561), was intended to

[3] This may be an error as the identical language in C.P.L. § 530.20(1) reads "must order bail."

permit more defendants to be released on bail.[4] The Criminal Procedure Law represented a substantial reform of the entire system of bail that existed in the Code of Criminal Procedure, and a shift to "a presumption in favor of pretrial release" that included providing for "alternate methods of release" as well as a method for reducing the unconvicted portion of the prison population. People v. Burton, 150 Misc.2d 214, 225 (Sup. Ct., Bronx Co. 1990), overruled on other grounds, People v. Sielaff, 79 N.Y.2d 618 (1992) ("New York's statutory scheme [of bail under the Criminal Procedure law] manifests a continuing sensitivity for the rights of criminal defendants, and reflects an admirable attempt to reduce the cost of liberty for those citizens awaiting trial.").

To accomplish these goals, the Criminal Procedure Law added and defined less onerous forms of bail that did not previously exist. The Criminal Procedure Law, at the time of enactment, contained eight forms of bail and included partially secured and unsecured forms of bond, which were unavailable under the Code of Criminal Procedure and permitted bail to be posted with minimal or no security. *See* C.P.L. § 520.10(1).[5]

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[4] The "Memorandum in Support and Explanation of Proposed Criminal Procedure Law," Prepared by the Commission on Revision of the Penal Law and Criminal Code, described the Criminal Procedure Law as follows:

> In structure, substance, form, phraseology and general approach, the proposed Criminal Procedure Law bears little resemblance to the distinctly archaic Code of Criminal Procedure . . . it lays a new foundation and, in the process, proposes numerous significant changes of substance in an attempt to provide a workable body of procedure accommodated to modern times. Among the innovations are . . . a reformulated system of bail and release on recognizance (Arts. 500-540) . . . [the goal of which was] to reduce the unconvicted portion of our jail population.

(S. Int. 7276, A. Int. 4561).

[5] Section 520.10 provided the following forms of bail:

(a) cash bail, defined as a "sum of money," C.P.L. § 500.10(10);

(b) an insurance company bond, defined as " a surety bond, executed in the form prescribed by the superintendent of insurance," C.P.L. § 500.10(16);

(c) a secured surety bond, defined as "a bail bond secured by either (a) personal property" valued equal or greater to the total amount of the undertaking, or (b) "real property" with a value of at least twice the amount of the undertaking, C.P.L. § 500.10(17) ;

(d) a secured appearance bond, defined as the same as a secured surety bond except the only obligor if the defendant or "principal," C.P.L. § 500.10(14);

(e) a partially secured surety bond, defined as a bail bond "secured only by a deposit of a sum of money not exceeding ten percent of the total amount of the undertaking," C.P.L. § 500.10(18);

(f) a partially secured appearance bond, defined as a partially secured surety bond but where the sole obligor is the defendant/principal;

(g) an unsecured surety bond, defined as a bail bond, "not secured by any deposit of or lien upon property," C.P.L. § 500.10(19); and

(h) an unsecured appearance bond, defined as a unsecured surety bond with only the defendant/principal as obligor.

As the Practice Commentaries to these bail provisions explain, "[t]he principal importance of this section [520.10] lies in subdivision 1, which provides for the furnishing of bail in certain forms not formerly allowed." Practice Commentary by Richard G. Denzer, McKinney's Con. Laws of New York (1971); *see also* Practice Commentary by Peter Preiser, McKinney's Con. Laws of New York (2000) (stating the provisions for partially secured and unsecured bonds "were innovations initiated by the CPL and represent less burdensome forms of bail than those previously available. They were added to vest the court with the utmost degree of flexibility, including the ability to designate alternative forms with alternative amounts."). In 2012, the Court of Appeals held that judges must impose two forms of bail.[6] In so holding, the Court recognized that:

> "Providing flexible bail alternatives to pretrial detainees – who are presumptively innocent until proven guilty beyond a reasonable doubt – is consistent with the underlying purpose of article 520. The legislation was intended to reform the restrictive bail scheme that existed in the former Code of Criminal Procedure in order to improve the availability of pretrial release."[7]

If judges were to utilize the tools provided in the current bail statute, the disparate pre-trial detention of poor people accused of crimes could be effectively eliminated. The bail statute does not require financial bail. In addition to release on one's own recognizance, the law permits unsecured bond that does not require an accused to post any amount of money to be released, and partially secured bond, which requires an accused to post a maximum of 10% of the bond amount. In so far as C.P.L. § 510.30(2)(a)(ii) requires a judge to consider an accused's "employment and financial resources," that provision does not require financial bail. Instead, it requires judges to consider what financial bail, if any, is necessary to secure a person's return to court after making an individualized determination based on the accused's specific employment and financial situation. The current bail statute thus has adequate tools to reduce the pre-trial detention of individuals who lack the finances to post bail. Judges must be encouraged to use these tools provided to them back in 1970 with the specifically stated legislative intent of reducing the pre-trial jail population.

Further, the current bail statute includes several provisions that provide judges with flexibility to consider the nature and seriousness of the offense and the accused's likelihood of return to court, which can result in preventive detention in limited circumstances. Currently, for a non-misdemeanor offense, a court may refuse bail and remand an accused. *See* C.P.L. § 510.40(c) ("a court may "Deny the [bail] application and commit[] the principal to, or retain[] him in, the custody of the sheriff."). This provision is only to be utilized based on the statutory purpose of return to court, but seriousness of the offense is routinely considered as part of a "flight risk" analysis by

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The statute was amended to add a ninth form of credit card or similar device in 1986 and then again in 2005. *Id.* (L 1986, ch 708, § 2; amend. L 1987, ch 805, § 3; l 2005, ch 457 § 4).

[6] People ex rel. McManus v. Horn, 18 N.Y.3d 660, 666 (2012).

[7] *Id.* at 664 (citing Bellamy v Judges in N.Y. City Crim. Ct., 41 A.D.2d 196, 202 [1st Dept 1973], *affd* 32 NY2d 886 [1973]; Mem of Commn on Rev of Penal Law and Crim Code, Bill Jacket, L 1970, ch 996, at 10). The Court went on to say that "Subsequent amendments further loosened those strictures." *Id.* (Citing Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, C.P.L. § 520.10, at 51).

judges who are considering ordering remand.[8] Thus, defendants charged with homicide and similarly serious offenses are frequently remanded without bail, even when the case represents a first arrest and they are recommended for release.

In family offenses, involving "any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household, as members of the same family or household are defined in subdivision one of section 530.11," § 530.12(11)(a) provides for revocation of an order of recognizance or bail and remand where, after a hearing, the court is satisfied by competent proof that defendant willfully violated an order of protection. Similarly, in non-family offenses, § 530.13(8)(a) provides for revocation of recognizance or bail and remand "if a defendant is brought before the court for failure to obey any lawful order issued under this section and if, after hearing, the court is satisfied by competent proof that the defendant has willfully failed to obey any such order."

Additionally, § 530.60(1) provides for revocation of an order of recognizance or bail for "good cause shown." Only new evidence relevant to one of the criteria listed in C.P.L. § 510.30 can constitute "good cause."[9] Subsequent arrests can constitute "good cause" if they are evidence of increased risk of flight. A new arrest may "show that the court's initial appraisal of [the defendant's] character, reputation or habits was erroneous,"[10] or increase the sentence that a defendant faces upon conviction, which is one of the statutory criteria for risk of flight.[11]

Criminal Procedure Law 530.60(2)(a) also provides for revocation of recognizance or bail where a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance or bail and "the court finds reasonable cause to believe the defendant committed one or more specified class A or violent felony offenses or intimidated a victim or witness in violation of sections 215.15, 215.16 or 215.17 of the penal law while at liberty."[12] Under this provision, a defendant is entitled to important procedural safeguards. The court "must hold a hearing and shall receive any relevant, admissible evidence not legally privileged. The defendant may cross-examine witnesses and may present relevant, admissible evidence on his own behalf. . . . A transcript of testimony taken before the grand jury upon presentation of the subsequent offense shall be admissible as evidence during the hearing."[13] A defendant may be remanded until expiration of the

[8] Mary T. Phillips, "A Decade of Bail Research in New York City," (herein "A Decade of Bail Research") Final Report, New York Criminal Justice Agency, Inc. (August 2012) at 130.

[9] *See* People v. Mohammed, 171 Misc. 2d 130, 142 (Sup. Ct. Kings Co. 1996) ("After the first release determination all modifications must comply with C.P.L. § 510.30 and there must be a showing of change in circumstances warranting a bail modification."); People v. Saulnier, 129 Misc. 2d 151 (Sup. Ct. New York Co. 1985) ("The decision whether to revoke bail for 'good cause shown' is – like the discretionary decision whether to set bail – subject to the same mandatory goal and criteria set forth in C.P.L. § 510.30.").

[10] People v. Torres, 112 Misc. 2d 145, 150 (Sup. Ct. New York Co. 1981).

[11] *See* People v. Silvestri, 132 Misc. 2d 1015, 1019 (Sup. Ct. Kings Co. 1986).

[12] C.P.L. § 530.60(2)(a).

[13] *Id.*

shortest period of 90 days or until reduction or dismissal of felony charges or specified class A or violent felony offense.[14]

Finally, a recent amendment to the bail statute requires judges to consider public safety in domestic violence cases, where this issue is of particular concern. *See* C.P.L. § 510.30(2)(vii)(A) and (B)(L.2012, c. 491, pt. D, § 1, eff. Dec. 24, 2012). The provision specifies that judges must consider "any violation by the principal of an order of protection issued by any court for the protection of 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, whether or not such order of protection is currently in effect; and the principal's history of use or possession of a firearm." *Id.*

Collectively, these provisions, which include the constitutionally required procedural safeguards the Bill lacks, already permit judges to take steps that will ultimately protect public safety, making the Bill unnecessary.

THE BILL LANGUAGE IS VAGUE AND DOES NOT ACHIEVE ITS STATED PURPOSES

The provisions for presumptive release and for setting the least restrictive securing conditions are not strong enough and are in conflict with the provision mandating bail when release alone will not ensure the defendant's return to court or ensure public safety.

Proposed C.P.L. § 510.40(1-a) provides that a court must set "the least restrictive condition or conditions necessary." Yet, the proposed language of C.P.L. § 530.20 and C.P.L. § 530.40 confusingly reads that for misdemeanors and non-violent felonies, "the court must order recognizance unless the court determines that such a securing order will not reasonably secure the defendant's court attendance when required or will endanger the safety of any other person of the community in which event the court must order bail." (Emphasis added.) By requiring judges to set bail, when court attendance or public safety will not be satisfied by recognizance, the Bill ignores that there are less restrictive conditions a judge could set other than bail if the judge is concerned the accused will not come back, such as pre-trial supervision or other conditions of release.

Further, bail that is attainable does not assure public safety. The only way that judges can both consider what is necessary to protect public safety and comply with the requirement to set bail is to set a bail amount that is so high as to be tantamount to remand. Even when public safety is a concern, presumably, the court must also set "the least restrictive condition or conditions necessary," as required by C.P.L. § 510.40(1-a), but it is inconceivable that setting the least restrictive means of bail would accomplish protecting public safety. Under the current bail statute, the criticism is often made that judges use unattainable bail based on concerns about public safety and accomplish preventive detention otherwise not permitted.[15] The interplay between the language of these proposed provisions of the Bill does nothing to cure that problem and, in fact, seems to encourage it by requiring that judges must set bail when recognizance will not assure public safety which

[14] *See* C.P.L. § 530.60(2)(b).

[15] Mary T. Phillips, "A Decade of Bail Research in New York City," (herein "A Decade of Bail Research") Final Report, New York Criminal Justice Agency, Inc. (August 2012) at 27 ("New York City judges do not ignore safety; they address it by setting high bail to detain individuals who pose a threat to the community.")

implicitly suggests the setting of unattainable bail. As such, these provisions contradict each other and would seem to do little to accomplish either stated goal.

In fact, the Bill's proposed provision for misdemeanors permits the equivalent to remand, something prohibited under current law. Under C.P.L. §§ 530.20 and 530.40, when a person is charged with a misdemeanor offense, "the court must order recognizance or bail," and cannot order remand. Under the proposed amended provisions for misdemeanor and non-violent felonies, a court must order recognizance, but if it finds that recognizance "will not reasonably secure the defendant's court attendance when required or will endanger the safety of any other person of the community," the court must order bail. To achieve that goal, the bail would likely have to be set at an amount that the accused cannot make, which is the equivalent of remand.

To be effective, the presumption of release on one's own recognizance should be explicit and that presumption should only be overcome by a showing of clear and convincing evidence that other securing conditions or financial bail are required to assure return to court and public safety. Similarly, the requirement that judges impose the least restrictive securing conditions should be explicit by stating that when recognizance is denied, judges must consider securing conditions other than bail. This would be consistent with American Bar Association ("ABA") Pretrial Release Standard 10-1.4 which dictates that "[r]elease on financial conditions should be used only when no other conditions will ensure appearance." If financial conditions are imposed, the ABA advocates that the court should first consider releasing the defendant on an unsecured bond. The ABA explains its position as follows:

> The strong presumption in favor of pretrial release is tied, in a philosophical if not a technical sense, to the presumption of innocence. It also reflects a view that any unnecessary detention is costly to both the individual and the community, and should be minimized.

Second, the Bill fails to define what is meant by "endanger[ing] the safety of any other person of the community," leaving that determination entirely up to the individual bail-setting judge.[16] Without defining this term or providing factors for consideration, judges will likely differ drastically in their decisions as to when recognizance will "endanger the safety of any other person of the community." One judge might find that releasing a defendant who is accused of the misdemeanor sale of marijuana will endanger the safety of the community, while others might find that public safety is only endangered by releasing someone charged with a violent felony offense. Even using the category "violent felony offenses" to determine when the public safety is endangered is problematic. The term "violent felony" under Penal Law § 70.02 refers to over 100 offenses, including several that do not require the commission of violence as that word is commonly understood. For instance, the following are considered "violent felonies" in New York: rape in the second degree under P.L. § 130.30 (statutory rape) and falsely reporting an incident under P.L. §

[16] Criminal Procedure Law § 510.30(2)(a) provides the factors a judge "must" consider under the current bail statute, and no other factors are provided in the proposed Bill. Section 510.30(2)(a)(iv) lists an accused's "criminal record," (vii) lists "the weight of the evidence against [the accused] in the pending criminal action and any other factor indicating probability or improbability of conviction," and (viii) lists "the sentence which may be . . . imposed upon conviction." None of these provisions permits a court to consider charge severity as a basis for the bail determination, and the existing considerations seem ill-suited for a determination of whether an accused will endanger the safety of any other person of the community.

240.55. There is no support for the notion that such individuals are more prone to future dangerousness than others. The complete lack of guidance as to how a judge is "to assure the safety of any other person or the community" would make implementation of this provision difficult and likely lead to inconsistent results that will not further the stated purpose of improving community safety.

Third, the Bill does not require a judge to state on the record the reasons for setting bail. A record is an important requirement as it encourages a judge to engage in thoughtful consideration of the issue, especially as the Bill adds a new factor of the consideration of public safety.

As currently drafted, the Bill is subject to arbitrary and disparate application due to (1) the internal contradiction in the Bill's presumptive release/least restrictive securing condition provisions and the requirement that judges set bail when neither return to court nor public safety will be satisfied by recognizance, (2) the Bill's effect of mandating unattainable bail by requiring a judge to set bail to ensure public safety, (3) the lack of a definition of "endanger[ing] the safety of any other person of the community," and (4) the absence of a requirement that judges state the reason for setting bail.

THE PROVISION OF THE BILL SEEKING TO REQUIRE JUDGES TO CONSIDER PUBLIC SAFETY AND PERMITTING PREVENTIVE DETENTION ON SUCH GROUNDS IS UNCONSTITUTIONAL BECAUSE IT FAILS TO CONTAIN THE NECESSARY PRECEDURAL SAFEGUARDS

As amended by the Bill, C.P.L. § 530.20 and C.P.L. § 530.40 would provide that when the court "determines that [recognizance] will not reasonably secure the defendant's court attendance when required or will endanger the safety of any other person of the community . . . the court must order bail." (Emphasis added.) Bail adequate to assure public safety would only conceivably be satisfied by bail an accused could not make. In this way, subdivision (1) of the proposed amendments to C.P.L. § 530.20 and C.P.L. § 530.40 permits, and possibly even requires, the setting of bail an accused cannot make, and thus is *de facto* preventive detention.

For violent felonies and the commission or attempted commission of a class A felony or manslaughter in the second degree, proposed subdivision (2) of C.P.L. § 530.20 and C.P.L. § 530.40 would provide that a court "may, in its discretion, order recognizance or bail." By these provisions, a court may use either the return to court or public safety concern as a basis to deny bail and remand an accused, thereby permitting preventive detention.

While permitting preventive detention in these ways, the Bill fails to provide the constitutionally required safeguards. The Supreme Court of the United States has upheld the consideration of "dangerousness" as a basis for pretrial detention finding the procedural safeguards adequate to make a reliable finding of dangerousness. *See* United States v. Solerno, 481 U.S. 739 (1987). As detailed in that decision, the Bail Reform Act of 1984 "allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." *Id.* at 741. Further the Act provides as follows:

> § 3141(a) of the Act requires a judicial officer to determine whether an arrestee shall be detained. Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." Section 3142(f) provides the arrestee with a number of procedural safeguards. He may request the presence of counsel at the detention hearing, he may testify and present witnesses in his behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing. If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, § 3142(i), and support his conclusion with "clear and convincing evidence," § 3142(f).

Id. at 742-43.

The Court also noted that the judicial officer is not given "unbridled discretion" and that the statute specifies the relevant consideration, including the "seriousness of the charges" and "the nature and seriousness of the danger posed by the suspect's release." *Id.* (citing § 3142(g)). Finally, the Court noted that, "Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order." *Id.* (citing §§ 3145(b), (c)). These extensive procedural requirements led the Court, under a rational basis review, to determine that, "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat." *Id.* at 751. The ABA Standards on bail also recommend on guaranteeing equity and transparency in bail decisions through procedural safeguards and due process. *See* ABA Standards 10-5.9 through 10-5.16.

In contrast to the extensive procedural protections in the Federal Bail Act of 1984, the Bill lacks any such protections. The Federal Bail Act provides for detention only if, after a hearing, a judicial officer determines by clear and convincing evidence, stated in findings on the record that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." The Bill provides no adversarial hearing, much less one with procedural safeguards including with the presence of counsel, the right to testify and present witnesses or proffer evidence, and cross-examine other witnesses appearing at the hearing like the constitutionally-approved Federal Bail Act. The Bill does not require a judge to state his or her findings of fact in writing or support his conclusion with "clear and convincing evidence," or any other standard of proof. Nor does it provide for expedited appellate review as the Federal Bail Act does.

These failures alone provide grounds to oppose this Bill as unconstitutional. Yet, the Bill also fails, in the first instance, to provide guidance as to what judges are permitted to consider when evaluating a defendant's risk to public safety. As noted above, the Bill proposes to amend C.P.L. § 510.30(2)(a) to require judges to consider the securing order necessary "to assure the safety of any other person or the community," but, the Bill provides no definition or guidance for that

determination. Conceivably, the term could mean risk of re-offense, risk based on present charges, risk based on past record, etc. In upholding the Federal Bail Act, the Supreme Court specifically noted that a judicial officer is not given unbridled discretion in making the detention determination under that Act, and that Congress specified the considerations relevant to that decision, including "the nature and seriousness of the charges, and the nature and seriousness of the danger posed by the suspect's release." Salerno, 481 U.S. at 743.

Further, the Bill provides no assistance for ascertaining a risk to public safety. While presently, judges in New York City are provided with the assistance of a report prepared by the Criminal Justice Agency that includes a recommendation as to flight risk based on the application of factors provided in the bail statute, that report does not speak to public safety concerns. The volume of arraignments in New York City's five boroughs alone is over 300,000 cases annually.[17] This volume of cases far exceeds that in federal court.[18] Given the absence of a hearing in the Bill, the need for judges to be provided with assistance in the form of some risk assessment instrument to make the complicated determination of the risk an accused poses to public safety is a necessary component to adding public safety as a bail factor. Yet, the Bill lacks any such tool. Indeed, the Criminal Justice Agency has suggested that if New York State adds public safety as a consideration, it should also add a risk assessment tool.[19]

An approved or validated risk assessment instrument could greatly improve a judge's ability to measure an individual's threat to public safety. Arguably, there is no way to reliably predict a person's potentially dangerous behavior pending trial. In fact, the ability of anyone – even "experts" in the field – to determine prospective dangerousness is disputed. "Studies on predicting dangerousness have shown that experts are accurate in predictions of future dangerousness about one-third of the time and that experts overpredict dangerousness, yielding a false positive rate of sixty percent."[20] Mental health professionals, for example, are skeptical of the accuracy of their predictions of future dangerousness, and academics have accepted that such predictions are unreliable.[21]

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[17] *See* New York City Criminal Justice Agency Annual Report 2011 at 7, 8 (indicating a total of 346,834 cases prosecuted in 2011 of which CJA conducted interviews of 282,769 individuals held for criminal court arraignment).

[18] *United States Attorneys' Annual Statistical Report for Fiscal Year 2010*, U.S. Department of Justice Executive Office for United States' Attorneys at pp. 7-9 (reporting that nationally, the United States Attorneys' offices "received" between 109,173 and 172,511 cases annually in Fiscal Years 2002 to 2010, and "filed" between 56,658 and 68,581 and criminal cases during that same period).

[19] *See* Phillips "A Decade in Bail Research" at 130 ("an empirically validated risk assessment instrument could be developed to assist the courts in targeting individuals who are too dangerous to be released into the community.") Of course, using such a risk assessment tool to undertake such meaningful factual investigations would require increased court time and personnel.

[20] Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 333-34 (1994) (citations omitted).

[21] Megan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions it Supports*, 35 AM. J. CRIM. L. 145 (2008) (citing Mark David Albertson, *Can Violence Be Predicted? Future Dangerousness: The Testimony of Experts in Capital Cases*, 3 CRIM. JUST. 18, 21 (1989); and John Monahan, *Predicting Violent Behavior: An Assessment of Clinical Techniques*, 3 CRIM. JUST. 18, 21 (1981) ("[R]arely have research data been as quickly or nearly universally accepted by the academic

Without such a tool, the Bill leaves the decision on threat to public safety entirely to judges and prosecutors who must make a near-impossible prediction under the time constraints of a quick bail determination. There is little evidence at that stage of the proceeding from which to make a determination of a person's dangerousness. An arrestee is presumed innocent and thus the reliability and admissibility of evidence upon which a pre-trial determination of dangerousness is made is questionable. Judges may be inclined to "deny bail or recognizance to such an arrestee to be on the safe side."[22] "Because a prosecutor can decide whether or not to pursue pretrial detention, they can use pretrial detention as a bargaining chip during plea negotiations. This converts pretrial detention from a method of protecting society from crimes committed by criminals out on bail into a tool which helps prosecutors obtain information or convictions."[23]

Generally, where courts are concerned with a person's risk of re-offense or future dangerousness, they are often required to consider articulated guidelines from which they make a determination of risk. For example, a person convicted of a sex offense is subject to a risk level determination by the sentencing court.[24] The sentencing court makes its risk determination, relying on the Board of Sex Examiner's recommendation and risk assessment instrument.[25] While the validity of New York's risk assessment instrument is widely contested,[26] significantly, in making a determination about a person's risk of re-offense, the Board of Sex Examiners and sentencing court are required by statute to consider enumerated factors under the guidelines in reaching a decision. Under this Bill, a judge making a determination of dangerousness for pretrial detention purposes has no guide, no instrument, to inform his or her decision. Instead, a judge must rely solely on subjective instinct to detain or release a person at the most critical moment in the criminal case.

If judges attempt to predict a person's future dangerousness, relying on unsubstantiated factual allegations, the result will be uneven, and inaccurate determinations of future dangerousness and excessive pretrial detention in violation of the state and federal constitutions.

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and professional communities as those supporting the proposition that mental health professionals are highly inaccurate at predicting violent behavior.").

[22] Judge Robert Webster Oliver, District Court of Suffolk County, *Bail and the Concept of Preventative Detention*, 69-OCT N.Y. St. B.J. 8, 35 (Oct./Sept. 1997).

[23] Robert S. Natalini, Comment, *Preventive Detention and Presuming Dangerousness Under the Bail Refrom Act of 1984*, 134 U. PA. L. REV. at 289-90 (1985).

[24] New York State Sex Offender Registry, 2011 Annual Report, http://www.criminaljustice.state.ny.us/pio/annualreport/2011-sor-annual-report.pdf, at 5-6 (last visited July 16, 2013).

[25] *Id.* at 6.

[26] Memorandum from the New York State Senate in Support of Bill Number S.3138, 236th Session (N.Y. 2013), http://open.nysenate.gov/legislation/bill/S3138-2013 (last visited July 16, 2013).

THERE IS NO EVIDENCE THAT CONSIDERING PUBLIC SAFETY WILL PROTECT COMMUNITIES OR REDUCE RECIDIVISM

There is no empirical data showing that the Bill will be effective in protecting the public. In fact, the available data from states that have bail statutes that consider public safety and/or permit preventive detention show no decrease in re-arrest rates.

The findings supporting the Bill rely on the fact that the majority of other states have such provisions. Indeed, as noted in a 1996 City Bar report, by 1984, 32 states, the District of Columbia and the Federal Bail Act permitted pretrial detention for individuals found to be dangerous to the community.[27] Further, by 1995, ten bills in the New York State Assembly and four in the Senate proposed preventive detention but all were rejected. *Id.* By 2010, all but four states, New York, Connecticut, Mississippi and Missouri allowed the courts to consider public safety.[28] Twenty-seven states allow preventive detention, but five with extremely limited circumstances.[29]

New York's decision not to follow the lead of other states in this area has been thoughtful. The Legislature carefully considered, and rejected the consideration of public safety and preventive detention when it reformulated the bail statute as part of the enactment of the Criminal Procedure Law in 1970.[30]

Notably, the Federal Bail Act was based on "'the alarming problem of crimes committed by persons on release,'" Salerno, 481 U.S. at 742 (quoting S. Rep. No. 98-225, p. 3 (1983), U.S. Code Cong. & Admin. News 1984, pp. 3182, 3185). It is unclear whether the Act has accomplished this goal. It seems difficult to accurately measure the success of preventive detention as such a determination of a person's dangerousness has a self-fulfilling rationale. As Harvard Law Professor Lawrence Tribe noted,

> when the system detains persons who could safely have been released, its errors will be invisible. Since no detained defendant will commit a public offense, each decision to detain fulfills the prophecy that is thought to warrant it, while any decision to release may be refuted by its results. The inevitable consequence is a continuing pressure to broaden the system in order to reach ever more potential detainees. Indeed, this pressure will be generated by the same fears that made preventive detention seem attractive in the first place.[31]

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[27] A copy of the report is on file at the City Bar.

[28] *See* Phillips, "A Decade of Bail Research" at 25.

[29] *Id.*

[30] *See* Denzer, Practice Commentaries, in McKinney'sCons. Laws of NY, Book 11A, C.P.L. § 510.30, pp. 15-16 (1971)(the concept known as "preventive detention" was part of the initial proposal of C.P.L. § 510.30(2)(b) forwarded to the Legislature in 1969 but was rejected in favor of the current bail scheme that permits only a consideration of flight risk).

[31] Lawrence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 VA. L. REV. 371, 375 (1970).

Nonetheless, a recent report by the Criminal Justice Agency suggests that passage of bills permitting preventive detention and/or public safety in other states have done little to secure community safety as measured by re-arrest.[32] This report looked at pretrial misconduct in the form of failure to appear for court when required and re-arrest.[33] The report compared New York City to the rest of the nation and found that, while the re-arrest rates were somewhat higher for New York, Brooklyn and the Bronx, "[t]he difference was mostly accounted for by re-arrests for misdemeanor and lower level felonies, as felony arrest rates in New York (11% to 15%) did not differ much from the 11% national rate." The highest re-arrest rate in Dallas (37%) is in a state that considers public safety and permits preventive detention.[34] The report concludes that there is no relationship between release rates in jurisdiction and the likelihood for failure to appear or re-arrest.[35] This data also notes that New York has one of the highest release rates nationwide so its comparable re-arrest rate is even more remarkable.

There is no compelling proof either that releasing people accused of crimes on recognizance or bail under the current bail scheme has created a risk to public safety, or that allowing judges to consider public safety and/or preventive detention would reduce any such risk.

CONCLUSION

The Committees recognize the goals of this Bill and applaud the Legislature's attempts to revise New York's current bail scheme. However, passage of the Bill will not achieve the stated goals.

For the reasons stated above, the Committees oppose the Bill.

July 2013

[32] *See* Phillips, "A Decade of Bail Research (August 2012), *supra*, n. 8.

[33] *Id.* at 36.

[34] *Id.* at 38, 26.

[35] *Id.*