NEW YORK'S BAIL REFORM LAW

A BENCH BOOK FOR JUDGES

Prepared by Daniel Conviser, Acting State Supreme Court Justice
Manhattan Criminal Term

Revised July 11, 2019

TABLE OF CONTENTS

The statute was enacted through an omnibus SFY 2019-2020 "Article VII" budget bill, A-2009-c\S-1509-c, in Part JJJ of that legislation. For each topic, the bill section of this legislation is cited along with a statutory citation.

THE "LEAST RESTRICTIVE ALTERNATIVE" RULE (Bill section 2)

The new statute provides an overarching principle which applies to all securing orders unless otherwise required by law.

> [T]he court shall release the principal pending trial on the principal's own recognizance, unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution. If such a finding is made, the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court. The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing. CPL 510.10 (1).

Defendants have the right to counsel and to have counsel appointed if indigent regarding securing order determinations. CPL 510.10 (2).

AUTHORIZATION FOR "NON-MONETARY" CONDITIONS (Bill section 1-e)

The statute adds a new subdivision 3-a to CPL 500.10 to define "Release under non-monetary conditions". Such conditions are defined as "the least restrictive conditions" which will "reasonably assure the principal's return to court". Those conditions "may include, among other conditions reasonable under the circumstances" that:

- "the principal be in contact with a pretrial services agency . . ."

- "the principal abide by reasonable, specified restrictions on travel that are reasonably related to an actual risk of flight from the jurisdiction;"

- "the principal refrain from possessing a firearm, destructive device or other dangerous weapon;"

- when it is shown pursuant to CPL 510.45 (4) that "no other realistic monetary[1] condition or set of non-monetary conditions will suffice to reasonably assure the person's return to court, the person be placed in reasonable pretrial supervision . . . " or

- when it is shown that "no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure" a person's return to court, the person be subject to electronic monitoring.

---

[1] The word "monetary" here is apparently a typographical error and should likely be "non-monetary".

"A principal shall not be required to pay for any part of the cost of release on non-monetary conditions".

The examples of non-monetary conditions under the statute are not exclusive. Where a pretrial services agency will supervise a defendant, moreover, those agencies will likely recommend conditions. Among the possible conditions which might be considered are:

- Interim probation supervision;

- Home confinement;

- Curfews;

- Drug testing;

- Participation in treatment programs (such as drug, alcohol, anger management, mental health or sex offender treatment);

- Specification of a residence;

- Special conditions for driving while intoxicated or impaired crimes;

- Compliance with an order of protection;

- Limitations on the use of computers or phones;

- Restrictions on presence at particular places (for example, playgrounds for child sex offenders);

- Checking in with the court, or law enforcement agencies; or

- Surrender of a passport or other documents.

It should be noted, however, that the purpose of non-monetary conditions under the statute is to ensure a defendant's return to court, rather than facilitate a defendant's rehabilitation or promote public safety. Those goals, of course, are often not easily separable and indeed one of the five illustrative conditions under the statute is the surrender of firearms and other weapons.

NOTIFICATION OF NON-MONETARY CONDITIONS (Bill section 6)
NOTIFICATION OF COURT APPEARANCES (Bill section 7)

The court must inform defendants released on non-monetary conditions on the record and

in an "individualized written document . . . in plain language and a manner sufficiently clear and specific" of the conditions the defendant will be subject to and "that the possible consequences for violation of such a condition may include revocation of the securing order and the ordering of a more restrictive securing order". CPL 510.40 (5). These non-monetary condition notifications, under the statute's language, are required to be provided by the court (rather than a pretrial services agency) even if a defendant is being supervised by a pretrial agency.

The court or a pretrial services agency directed by the court must also inform all defendants released with non-monetary conditions or on recognizance of upcoming court appearances in advance by text message, telephone, email or first class mail. Each defendant can select his or her preferred notification method on a form developed by OCA which shall be offered to defendants at court appearances. Such forms shall be maintained in court files. CPL 510.43. Under the statute's language, the requirement to notify defendants of upcoming court appearances does not apply to defendants at liberty on bail.

MODIFICATION OF NON-MONETARY CONDITIONS (Bill section 6)

Under new CPL 510.40 (3), where non-monetary conditions have been set: "At future court appearances, the court shall consider a lessening of conditions or modification of conditions to a less burdensome form based on the principal's compliance with such conditions of release".

Upon non-compliance with non-monetary conditions in an "important respect" the Court can consider imposing additional conditions. However, that can only be done after providing the parties with notice of the alleged non-compliance and "affording [the parties] an opportunity to present relevant, admissible evidence, relevant witnesses and to cross-examine witnesses" and a finding by the court by clear and convincing evidence that a principal violated a condition of release. Following such a finding, a court can impose additional non-monetary conditions consistent with the "least restrictive alternative" rule, explaining its determination on the record or in writing.

Where a defendant fails to comply with non-monetary conditions, can the court set bail (or order remand) in an appropriate case, if the Court finds that is the least restrictive alternative available? The answer is "likely yes" for "qualifying offenses" and clearly "no" for non-qualifying offenses. "Qualifying offenses" are those specific crimes (outlined *infra*) for which the court has authority to set bail or order remand initially. There is a reasonable argument that for a qualifying offense, the authority to set bail or order remand may be exercised throughout the case so long as the general "least restrictive alternative" rule and the statute's other general requirements are met.

Bail can also be set where defendants "willfully" and "persistently" fail to appear after receiving "notice of scheduled appearances" or commit certain specified new crimes while at liberty, even if a defendant is not charged with a qualifying offense. *See* new CPL 530.60 (2) (b)

(discussed *infra*). But the statute does not allow bail to be set or remand to be ordered for a non-qualifying offense for a violation of other non-monetary conditions. The new legislation does not modify court contempt powers. Thus contempt might be considered as a remedy where a defendant fails to obey a court's non-monetary conditions order.

ELECTRONIC MONITORING ELIGIBLE CRIMES (Bill section 1-f)

Under new CPL 500.10 (21) & (22) electronic monitoring is an available condition only for:

- Felonies;

- Misdemeanor sex crimes defined by Article 130 of the Penal Law;

- A defendant who may have bail set by virtue of persistently and willfully failing to appear in court as directed or for committing specified new crimes while at liberty pursuant to new CPL 530.60 (2) (b) (discussed *infra*);

- A defendant charged with a misdemeanor crime of "domestic violence" (as defined in CPL 530.11 (1)); or

- Any other misdemeanor where a defendant has been convicted of a violent felony offense within the past five years (not including any period of incarceration).

ELECTRONIC MONITORING RESTRICTIONS (Bill section 6)

To impose electronic monitoring the court must first find through an individualized determination, made on the record or in writing, after providing an opportunity to be heard, that the defendant is eligible for electronic monitoring and that "no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure a principal's return to court". CPL 510.40 (4) (a). The specific electronic monitoring method must be approved by the court, be the "least restrictive procedure and method" which will reasonably assure a court appearance and be "unobtrusive to the greatest extent practicable". CPL 510.40 (4) (b).

Electronic monitoring may only be conducted by a public entity under the supervision of a county or municipality, or a non-profit organization under contract with a county, municipality or the state. Counties or municipalities can contract with other counties or municipalities to conduct monitoring but "counties, municipalities and the state shall not contract with any private for-profit entity for such purposes". CPL 510.40 (4) (c).

"Electronic monitoring . . . may be for a maximum period of sixty days, and may be renewed for such period, after notice, an opportunity to be heard and a de novo, individualized determination . . . which shall be explained on the record or in writing". CPL 510.40 (4) (d).

Defendants subject to electronic monitoring are considered "held or confined in custody" pursuant to CPL 180.10 and "committed to the custody of the sheriff" under CPL 170.70.

RELEASE APPLICATIONS (Bill section 3)

Under current law, where a defendant is confined on a securing order, he or she may apply for release on recognizance or on bail. CPL 510.20 (1). The statute has been amended to provide, not only that a defendant may be "heard" on such an application, but may also "present evidence". CPL 510.20 (2) (b).

CHANGE IN SECURING ORDER FACTORS (Bill section 5)

General Revised Structure

Existing CPL 510.30 lists numerous factors a court must consider in determining the "kind and degree of control or restriction that is necessary to secure" a defendant's court appearance. CPL 510.30 (2) (a). The new bail statute rewrites those provisions in significant ways, adding new considerations, deleting others and rewriting some. As outlined below, however, the new law also integrates in the middle of these provisions, as one factor, a new "catch-all" category: "information about the principal that is relevant to the principal's return to court, including . . . [t]he principal's activities and history". New CPL 501.30 (1) (a). This provision, unlike current law, would appear to allow *any* information relevant to flight risk to be considered.

These integrated revisions pose the question of how courts should reconcile the "catch-all" with the specific, detailed policy proscriptions contained in the same statute. The answer is clear in one respect. The new statute provides a list of issues courts *must* consider.

The more difficult question is how to think about provisions of current law which have been eliminated, limited or modified. The "catch-all" provides that a court can consider anything relevant to flight risk. On the other hand, it might also be argued that provisions which were eliminated or limited should not be considered, or considered only in their limited, amended form.

Perhaps the best way to read the statute is in its revised form, without considering how it was amended. Under that reading, the statute contains a new list of mandatory considerations. But it also now plainly allows any factor relevant to flight risk to be considered.

Specific Changes Made by the Statute

The new law first eliminates three prior considerations from the statute:

(i) "The principal's character, reputation, habits and mental condition";

(ii) "His employment and financial resources"; and

(iii) "His family ties and the length of his residence if any in the community".

Added to the statute is this new criterion:

"[I]nformation about the principal that is relevant to the principal's return to court, including:

(a) The principal's activities and history;

(b) If the principal is a defendant, the charges facing the principal;

(c) the principal's criminal conviction record, if any." (Here, the phrase under the former law, "criminal record" is changed to "criminal conviction record").

Current CPL 510.30 (2) (a) (vi) is amended to eliminate, as a consideration in setting securing orders, a defendant's record "in responding to court appearances when required" while leaving intact as a consideration the question of whether a defendant engaged in "flight to avoid criminal prosecution".

A new provision in this section, paragraph (f), adds as a consideration a principal's "individual financial circumstances" in cases where bail could be set and the "principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured or partially secured bond;".

Existing provisions requiring consideration of violations of orders of protection directed at members of a defendant's family or household and a defendant's history of using or possessing a firearm are substantively unchanged.

Existing CPL 510.30 (2) (viii) & (ix) are largely eliminated. The new bail statute eliminates as a consideration in issuing securing orders "the weight of the evidence against him [the defendant] in the pending criminal action and any other factor indicating probability of conviction" as well as the sentence which would be imposed on a conviction. Left intact is the proviso that a court can consider the merit of an appeal in any case where an appeal is pending as well as an additional provision of current law (CPL 510.30 (2) (b)) which further outlines how the merits of a pending appeal can be considered.

QUALIFYING OFFENSES FOR WHICH BAIL OR REMAND ARE AUTHORIZED
Bill section 2: General Provision
Bill section 16: Substantively Identical Provision for local criminal court securing orders

Bail may be set for a "qualifying offense" and remand may be set for a qualifying offense

which is a felony. CPL 510.10 (4); CPL 530.20 (1). A qualifying offense is:

(a): A "violent felony offense" as defined by Penal Law § 70.02, except Burglary in the Second Degree as defined in Penal Law § 140.25 (2) (burglary of a dwelling) or Robbery in the Second Degree as defined in § 160.10 (1) (a robbery aided by another). (While these burglary and robbery completed crimes are not qualifying offenses, attempts to commit such crimes *are* qualifying offenses, since such attempts are separately defined violent felony offenses. Courts will have to construe this anomaly).

(b) A "a crime involving witness intimidation under section 215.15 of the Penal Law". (Intimidating a victim or witness in the third degree, a Class E felony).[2]

(c): A "a crime involving witness tampering under section 215.11, 215.12 or 215.13 of the penal law".

(d): "a Class A felony defined in the Penal Law, other than in article two hundred twenty of such law with the exception of section 220.77 of such law." (Penal Law § 220.77 is the so-called "drug kingpin" statute: "Operating as a Major Trafficker"). The only narcotics crime which is a qualifying offense is a completed drug kingpin crime.

(e): "a felony sex offense defined in section 70.80 of the penal law or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law;"

(f): "conspiracy in the second degree as defined in section 105.15 of the penal law, where the underlying allegation of such charge is that the defendant conspired to commit a Class A felony defined in article one hundred twenty-five of the penal law".

(g): (part 1): money laundering in support of terrorism in the first or second degrees (Penal Law §§ 470.24; 470.23).

(g): (part 2): "a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law" (the crime of "Making a Terroristic Threat", a Class D felony).[3]

---

[2] In a number of these categories, it is not completely clear whether inchoate crimes: attempts, conspiracies, facilitation or solicitation crimes are qualifying offenses. Where the statute uses the term "involving", as here, a broad construction which includes inchoate crimes is arguably suggested.

[3] While this terroristic threat crime is excluded as an eligible offense here, it is *included* as an eligible offense under the "violent felony offense" category since it is a violent felony offense. It might be most reasonable to construe the exclusion of this crime as a qualifying

(h) "criminal contempt in the second degree as defined in subdivision three of section 215.50 of the penal law, criminal contempt in the first degree as defined in subdivision (b), (c) or (d) of section 215.51 of the penal law or aggravated criminal contempt as defined in section 215.52 of the penal law" where the underlying allegation is that the defendant violated an order of protection concerning a member of the defendant's family or household, as defined in CPL 530.11.

(i): facilitating a sexual performance by a child with a controlled substance or alcohol (Penal Law § 263.30) (a Class B felony), use of a child in a sexual performance (Penal Law § 263.05) (a Class C felony) or luring a child as defined in Penal Law § 120.70 (Class C, D or E felonies).

RETENTION OF JUSTICE COURT REMAND REQUIREMENTS (Bill section 16)

The bill makes only a grammatical change to CPL 530.20 (2) (a) which, in its amended form, provides that: "A city court, a town court or a village court may not order recognizance or bail when (i) the defendant is charged with a Class A felony, or (ii) the defendant has two previous felony convictions;". Many defendants in these categories will not have committed a qualifying offense.

Thus, for non-qualifying offenses, the bail statute's general "qualifying offense" provisions prohibit bail or remand while CPL 530.20 (2) (a) requires remand for certain crimes for the period prior to the transfer of a case to a non-justice court. It might be most reasonable to read this latter provision as an exception to the general rule, although the general rule does not provide such an exception.

REQUIREMENT FOR DOLLAR BAIL (Bill sections 2 & 16)

Where a defendant requests nominal bail (i.e., "dollar bail") in order to receive credit in an instant case for time incarcerated on another charge, the court must grant the request if it finds it is "voluntary". CPL 510.10 (5); 530.20 (d).

REQUIREMENT FOR WRITTEN REASONS WHERE BAIL REJECTED (Bill section 6)

If a court sets bail but does not approve the bail which is submitted, "the court shall explain promptly *in writing* the reasons therefor." CPL 510.40 (2) (emphasis added).

APPEAL OF NON-MONETARY CONDITION REQUIREMENTS (Bill section 17)

The statute allowing defendants to appeal local criminal court bail decisions to a superior court is expanded to also allow such appeals where a local criminal court sets non-monetary conditions which were "more restrictive than necessary to reasonably assure the defendant's

---

offense in paragraph (g) here as the controlling provision.

return to court". CPL 530.30 (1). With respect to appeals of both bail or non-monetary condition requirements, the statute adds the requirement that a court "shall explain its choice of alternative and conditions on the record or in writing".

CHANGE IN BAIL FORM REQUIREMENTS (Bill Section 10)

The bail legislation modifies CPL 520.10 (2) (b), which requires that two forms of bail be specified (if the court chooses to specify a bail form), in two important respects. First, the existing requirement that a court set bail in two or more of the specified bail forms is changed to a requirement that the court set bail in three or more forms. Second, the statute provides that "one of the forms shall be either an unsecured or partially secured surety bond, as selected by the court".

ESTABLISHMENT OF PRE-TRIAL SERVICES AGENCIES (Bill Section 8)

New CPL 510.45 sets rules for the establishment of pretrial services agencies to monitor defendants subject to non-monetary conditions. The statute provides that OCA must certify such agencies in each county. The law does not define what "certification" means or what OCA's responsibilities for such agencies should entail. Each entity shall either be a public agency or a non-profit under contract to the state, a county or a municipality. Counties or municipalities may contract with other counties and municipalities to provide services in the county where a defendant is supervised. Counties, municipalities or the state may not contract with for-profit entities "for such purposes".

Defendants are entitled to receive copies of any "questionnaire, instrument or tool" used by a pretrial services agency upon request. Such questionnaires, instruments or tools shall be designed and implemented to ensure they are not discriminatory. They shall be "empirically validated and regularly revalidated, with such validation and revalidation studies and all underlying data, except personal identifying information for any defendant, publicly available upon request". CPL 510.45 (3) (ii).

"Supervision by a pre-trial services agency may be ordered as a non-monetary condition pursuant to this title only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that no other realistic non-monetary conditions will suffice to reasonably assure the principal's return to court". CPL 510.45 (4).

OCA is directed to compile and publish detailed annual reports on pretrial agency monitoring. The reports are directed not to contain personal identifying information but must include information on "the race, ethnicity, age and sex" of each person supervised. CPL 510.45 (5)

ADDITIONAL AUTHORITY TO IMPOSE BAIL ON ABSCONDING DEFENDANTS OR FOR COMMISSION OF NEW CRIMES (Bill section 20) Amending CPL 530.60

Defendants at liberty can have bail set, even if they otherwise could not have bail set because they have not been charged with a qualifying offense, "when the court has found, by clear and convincing evidence, that the defendant:

> (i) persistently and willfully failed to appear after notice of scheduled appearances in the case before the court; or
>
> (ii) violated an order of protection in the manner prohibited by subdivision (b), (c) or (d) of section 215.51 of the penal law while at liberty [these are subdivisions of the Class E felony of Criminal Contempt in the First Degree, which occur when a defendant violates an order of protection by taking specific threatening or menacing actions or violates the "stay away" provisions of an order of protection while having a designated history of a previous violation]; or
>
> (iii) stands charged in such criminal action or proceeding with a misdemeanor or violation and, after being so charged, intimidated a victim or witness in violation of section 215.15, 215.16 or 215.17 of the penal law or tampered with a witness in violation of section 215.11, 215.12 or 215.13 of the penal law, law[4] while at liberty; or
>
> (iv) stands charged in such action or proceeding with a felony and, after being so charged, committed a felony while at liberty."

The new bail statute retains existing law (CPL 530.60 (2)) which also provides that a defendant at liberty under an order of recognizance or bail (or, in a conforming amendment under non-monetary conditions) who stands charged with a felony can have that order revoked if there is "reasonable cause" to believe the Defendant committed a Class A felony or violent felony offense or intimidated a victim or witness while at liberty.

Under this provision of existing law regarding the commission of specified new crimes while at liberty on a pending felony charge, there are special evidentiary rules not applicable to other securing order modifications, providing that "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." These hearings can be consolidated with CPL 180.80 hearings. "The district attorney may move to introduce grand jury testimony of a witness in lieu of that witness' appearance at the hearing".

Under the new bail law, however, all of these evidentiary requirements are made

---

[4] The repetition of the word "law" here appears to be a typographical error.

applicable to *any* proceeding in which a court may revoke a securing order or order bail pursuant to this new section CPL 530.60. That is, such hearings must be held if it is alleged a defendant did not commit any new crime but "persistently and willfully" failed to appear.

Under this section, bail can be set for otherwise non-qualifying offenses, provided that "the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court". New CPL 530.60 (2) (d) (ii).

The meaning of "willfully"

The mental state "willful" is not defined by the Criminal Procedure Law or the Penal Law, although it is used in statues other than the new bail law. For example, existing CPL 530.12 (11), authorizes a change in a securing order where a defendant "willfully failed to obey" an order of protection. The United States Supreme Court has observed that "willful . . . is a word of many meanings, its construction often being influenced by its context". *U.S. v. Bishop,* 412 U.S. 346, 352 (1973) (citation omitted). It is sometimes simply construed as a synonym for "voluntary" or "intentional". *See Kawaauhau v. Geiger,* 523 US 57 (1998) n. 3 (noting this as the definition provided by Black's Law Dictionary.)

On the other hand, it is also often construed as requiring a "conscious disregard" of a statute. *People v. Smith*, 34 AD2d 524 (1st Dept 1970) (citation omitted). Thus, the United States Supreme Court held, in construing the term "willfully" in a federal tax fraud statute, that the term meant "a voluntary, intentional violation of a known legal duty". *U.S. v. Pomponio,* 429 US 10, 12 (1976).

The meaning which may be most consonant with the legislative design under the new bail law may be the more exacting one, that is, that to establish a defendant's acts were willful, it must be demonstrated that he intentionally violated a known legal duty. The legal duty here would be the obligation to appear in court as directed.

The meaning of "persistently"

The word term "persistently" is also not defined in the new bail statute or under the Penal Law or Criminal Procedure Law. Dictionaries provide the following definitions, among others;

"persistent" "1: existing for a long or longer than usual time or continuously". (Mirriam Webster online dictionary);

"persistently" "happening repeatedly or for a long time, or difficult to get rid of". (Cambridge online English dictionary);

"persistent" "persisting, especially in spite of opposition, obstacles, discouragement, etc.; persevering". (Dictionary.com);

"persistently" "If something happens persistently, it happens again and again or for a long time". (Collins online English dictionary).

The meaning of "notice of scheduled appearances"

It is also a prerequisite to imposing bail under this section that a defendant have received "notice of scheduled appearances". The plural "appearances" appears to require that prior to imposing bail under this section, a defendant must have missed more than one scheduled appearance for which the defendant was notified.

The Argument That These Strictures Do Not Apply to Qualifying Offenses

The new authority provided under this paragraph allows bail to be imposed in cases where it could not be imposed at an initial appearance, because a defendant was not charged with a qualifying offense. But it can also be used where a defendant has been charged with a qualifying offense but is at liberty.

What is less clear is whether, where a court wishes to increase bail or set bail for a defendant charged with a *qualifying* offense who has absconded or committed a specified new crime under this section, the court is limited to the provisions of this subdivision (imposing a variety of requirements including willful and persistent absconding, a "clear and convincing evidence" standard and the requirement for an evidentiary hearing), or, alternatively, may simply increase bail or impose remand (consistent with the least restrictive alternative rule) without abiding by the provisions of this subdivision in reliance on its general authority to set securing orders for qualifying offenses.

As noted *supra*, there is a reasonable argument that the Court's power to set bail or order remand for a qualifying offense is plenary and thus could be used to set bail or order remand for a qualifying offense where a defendant absconded or committed a specified new crime, even if the provisions of CPL 530.60 (discussed here) were not complied with.

Securing Orders Pending Hearing Determinations

As noted here, before "revoking an order of recognizance, release under non-monetary conditions or bail" under this section, the court must conduct a "hearing at which it receives relevant evidence." As noted *supra,* "[t]he defendant may cross-examine witnesses and may present relevant, admissible evidence". Suppose the defendant is returned involuntarily on a bench warrant. The defendant says he wants to conduct a hearing concerning whether he "willfully" and "persistently" failed to appear, a right he has under the statute. Can the court order the hearing to be held forthwith? What kind of securing order can the court impose on the defendant during the hearing or during a period in which the hearing is adjourned?

As noted *supra,* the new bail law applies the provisions of existing law relevant to such evidentiary hearings, which apply when a defendant is charged with Class A, violent felony or witness intimidation crimes, to all of the circumstances under which bail may be imposed for non-qualifying offenses, including willful and persistent absconders. Existing law provides that, to accommodate the need for evidentiary hearings for defendants charged with such new crimes, a defendant may be held in custody for an initial 72 hour period with an additional 72 hour period authorized for good cause. CPL 530.60 (2) (e). (Of course, under existing law, the court might also opt to remand the defendant or set bail on the initial charge, dispensing with any need for such a 72 hour hold).

The new bail law, however, while imposing the hearing requirement on the authority to impose bail for non-qualifying offenses, affirmatively opted *not* to apply the "72 hour plus 72 hour" remand allowance in such cases, except where it already applies under existing law to the commission of new crimes. The result is that evidentiary hearings must be held in absconder or other CPL 530.60 (2) (b) cases where defendants have the right to present evidence, but the statute provides no authority to hold defendants in custody or have bail set pending the outcome of such hearings. The question for courts will be whether there is any inherent authority to set bail or impose remand pending a hearing determination, even though no such authority is provided by the bail statute.

Inconsistent Order of Protection Remand Authority

The bail reform legislation makes only conforming amendments to CPL 530.12 (11) & 530.13 (8) (Bill section 15) which provides that where a court determines a defendant has willfully violated an order of protection, it can revoke an order of recognizance or bail and commit a defendant to custody. These existing provisions provide broader authority and are inconsistent with the proviso outlined in new CPL 530.60 (2) (b) (ii)) (discussed in this section, *supra*) which only authorizes the imposition of bail in such cases (not remand) and then only if a defendant has violated an order of protection by engaging in specified aggravating conduct (not for generally violating an order). Where a conflict arises between these two provisions, it is not clear which would control.

The Clear and Convincing Evidence Standard

This subdivision requires "clear and convincing" evidence before bail may be set. However, with the exception of defendants who are alleged to have absconded, the other categories of new bail authority in this section concern the alleged commission of new crimes for which a defendant "stands charged" or has in fact committed a new crime. Even were a defendant indicted for any of those crimes, however, that would not answer the question of whether there was "clear and convincing" evidence the defendant had committed them. Defendants would then have the right to ask that the "clear and convincing evidence" standard be evaluated through an evidentiary hearing.

A different "reasonable cause to believe" standard for revoking a securing orders, however, exists for defendants charged with felonies who commit new Class A, violent felony offense or witness intimidation crimes under a provision of current law which is retained in the new bail statute. *Compare*, amended CPL 530.60 (2) (a) with new CPL 530.60 (2) (b) (both contained in bill section 20).

THE 48-HOUR BENCH WARRANT RULE (Bill section 9)

> Except when the principal is charged with a new crime while at liberty, absent relevant, credible evidence demonstrating that a principal's failure to appear for a scheduled court appearance was willful, the court, prior to issuing a bench warrant for failure to appear for a scheduled court appearance, shall provide at least forty-eight hours notice to the principal or the principal's counsel that the principal is required to appear, in order to give the principal an opportunity to appear voluntarily". CPL 510.50 (2).

In cases where a court applies the "48-hour rule", it may be more efficient to issue a bench warrant and then stay its execution for 48 hours rather than wait for 48 hours and then issue the warrant.

QUESTION OF WHETHER REMAND OR BAIL CAN BE IMPOSED UPON *CONVICTION* FOR NON-QUALIFYING OFFENSES

It is not clear the Legislature considered what authority courts should have to order defendants to be remanded or have bail set following the conviction for a non-qualifying offense but prior to the imposition of a sentence. It is clear such a remand or bail condition may be set following conviction for a qualifying offense. There is also a separate, largely overlapping category of cases in which remand after conviction is required under current law, a statute for which only conforming amendments were made in the new bail statute. That statute requires remand for defendants convicted of Class A felonies (which are qualifying offenses in any event, except if they are narcotics crimes) and Class B & C sexual assault felonies committed by adults against children (which are also qualifying offenses). (New CPL 530.40 (6) amended by bill section 18). But, except for Class A felony narcotics crimes, there is no authority under the statute to set bail or order remand because a defendant has been convicted but not yet sentenced.

Despite this, there is a reasonable argument that courts have such authority for non-qualifying offenses. First, the direction to release defendants on recognizance or under non-monetary conditions under the statute is described in three statutory provisions as requiring a release "pending trial".[5] This language arguably indicates the Legislature's intent to make these release requirements apply only prior to a conviction. Second, that construction is consistent

---

[5] CPL510.10 (1) (bill section 2); CPL 510.10 (3) (bill section 2); CPL 530.20 (1) (bill section 16).

with the statute's purpose. The purpose of the statute is to reduce the pre-trial incarceration of defendants who are presumed innocent, except in cases where such incarceration is necessary for particular kinds of offenses to prevent flight. That principle is not implicated for convicted defendants. Third, courts arguably have the inherent authority to remand defendants or set bail upon conviction, at least where a state prison sentence is mandatory.

There is also a reasonable argument that the general "least restrictive alternative" rule does not apply following conviction for either qualifying or non-qualifying offenses, since that rule is expressed in the statute, as outlined immediately *supra*, as applicable "pending trial".

QUESTION OF WHETHER REMAND OR BAIL CAN BE IMPOSED *DURING* A TRIAL FOR A NON-QUALIFYING OFFENSE.

The statutory term "pending trial", as discussed immediately *supra* with respect to the least restrictive alternative rule, also provides textual support for the argument that the rule does not apply and that bail or remand can be ordered for non-qualifying offenses *during* a trial. However, in contrast to the argument that such enhanced authority exists following a conviction, the argument for such authority during a trial is significantly weaker, because such a construction would not appear to comport with the statute's purpose. Defendants whose cases are being tried have the same presumption of innocence as defendants "pending trial" and thus construing the least restrictive alternative rule and the prohibition on bail or remand for non-qualifying offenses as applicable during a trial would appear to promote the statute's general intent.

PRE-ARRAIGNMENT DEFENDANT RAP SHEET REQUIREMENT (Bill section 16)

Under current law, a local criminal court cannot arraign a defendant unless the court is provided with a criminal history report, unless the report is not available and the People consent to proceed without it, or an emergency exists in which case the court can arraign a defendant without a criminal history report and without the People's consent. Under current law: "When the court has been furnished with any such report or record, it shall furnish a copy thereof to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant." CPL 530.20 (2) (b) (ii).

The new bail statute amends this provision to require that "counsel for the defendant" must be provided with a criminal history record at the same time as the court, subject to the same exceptions.

UNCLEAR IMPACT IN CPL ARTICLE 730 EXAMINATIONS

It is not clear the Legislature considered whether the new bail statute applies to CPL 730 examinations.

Under CPL Article 730, an examination to determine competency can be conducted on

either an out-patient basis or while a defendant is remanded or confined in a hospital. The existing authority to hold a defendant in custody in a hospital to conduct a CPL 730 examination where a hospital director informs the court that is necessary for an effective examination was not changed by the bail law and so would appear to still be effective. CPL 730.20 (2). It also seems clear that a defendant charged with a qualifying offense may be held in corrections custody for a CPL 730 examination, provided the Court finds that is the least restrictive alternative.

There does not appear to be any authority, however, to hold a defendant charged with a non-qualifying offense in custody (other than pursuant to a director-recommended hospital confinement or for defendants who abscond or commit certain new crimes while at liberty (under amended CPL 530.60, *supra)*) in order to have a CPL 730 examination conducted.

BAIL APPARENTLY NOT PROHIBITED FOR MATERIAL WITNESSES

It is not clear the Legislature considered whether or how the new bail statute should apply to material witness orders.

Under Article 620 of the Criminal Procedure Law a person alleged or adjudged to be a material witness may have bail set. In bill section 24, the new bail statute made conforming amendments to the material witness article, but did not limit the authority to set bail for material witnesses. There is a reasonable argument that courts continue to have authority to set bail for material witnesses under CPL Article 620 (and material witnesses will generally not be charged with committing either qualifying or non-qualifying offenses). But there are also many unanswered questions about how particular provisions of the new bail law might apply to material witness bail determinations.

MODIFICATION OF BAIL AUTHORITY WHERE SUPERIOR COURT WARRANT IS RETURNED TO A LOCAL CRIMINAL COURT (Bill section 12)

Under CPL 530.11 (4), where a person is arrested on a warrant issued by a supreme or family court and the court is not in session, the defendant is brought before a local criminal court. Under existing law, the local criminal court is required to "consider" any bail recommendation made by the supreme or family court. The new bail statute amends this provision to direct that the local criminal court shall consider such recommendations "de novo". It also provides that the local criminal court shall "consider de novo" any securing order issued by a supreme or family court.

LIMITED IMPACT IN DRUG DIVERSION PROGRAMS (Bill section 21)

The Legislature amended the drug diversion statute (CPL Article 216) in the new bail law.

The bail law amends CPL 216.05 (9) (a) to restrict the circumstances under which a court

can issue a bench warrant or direct the presence of a defendant participating in a drug diversion program. The authority to direct such appearances or issue a warrant for the violation of a release condition is amended to require that such a violation be in an "important respect" before a bench warrant or appearance order may be issued. The authority to direct such appearances or issue a warrant for the failure of a defendant to appear in court as requested is amended to require such a non-appearance be "willful".

The new bail law also cross-references amended CPL 530.60 to make it clear that the "relevant" provisions of this new section are applicable to drug diversion programs under CPL Article 216. Amended CPL 530.60 (discussed *supra*) provides authority to set bail for absconding defendants or those who commit certain new crimes while at liberty.

However, provisions of existing CPL Article 216 which were not amended by the new bail statute provide remand or bail authority for drug diversion defendants which is far more extensive than the new bail law. For example, although defendants participating in drug diversion programs will always be charged or convicted of "non-qualifying offenses", bail and remand may be ordered for such defendants under non-amended provisions of the drug diversion statute.

There is a reasonable argument that this existing more expansive authority continues to apply in diversion cases, especially once a defendant has entered a guilty plea during a diversion period. Thus, one way to read the diversion statute is that, except for the new strictures on warrants discussed here, the authority for bail or remand provided under CPL Article 216 was not diminished by the new bail statute.

EXTRADITION CASES APPARENTLY NOT IMPACTED BY BAIL LAW

It is not clear the Legislature considered whether the new bail statute should have any impact on defendants held for extradition to foreign jurisdictions. The bail statute did not purport to amend the Uniform Criminal Extradition Act (CPL Article 570) and it seems clear the bail statute does not limit the power of courts to hold defendants in custody pending extradition.

Under that statute, courts are also empowered to grant bail to defendants held for extradition (CPL 570.38) although that likely occurs in a minority of cases. There is a textual argument that the new bail statute applies to such bail setting decisions, but such a construction would produce obviously anomalous results. That is because in extradition cases, bail serves as a release mechanism for defendants awaiting extradition, who are generally remanded pending a foreign jurisdiction transfer. Thus, bail in extradition cases will most often be appropriate for less serious "non-qualifying" offenses (for which bail is prohibited under the new statute) rather than for bail-eligible "qualifying offenses". The better reading of the bail statute may be that it has no effect in extradition cases, which are subject to a uniform multi-state statute which the bail law did not amend.

ISSUES ARISING IN INDIAN NATIONS

The new statute raises significant questions with respect to proceedings in Indian Nations subject to its provisions. Most significantly, pretrial services programs in Indian Nations are administered through contracts with the federal government which may have requirements which conflict with the bail statute. These complex issues are not addressed here.

PROBATION VIOLATION CASES APPARENTLY NOT IMPACTED BY BAIL LAW

It is not clear that the Legislature considered whether the new bail statute applies to probation violation cases, but there is a strong argument that the bail law does not impact such proceedings, which are governed by CPL Article 410. First, the bail statute did not amend that article, and did not change its provisions authorizing remand or bail in probation violation cases. Second, persons on probation have been convicted of crimes and thus the underlying concern which motivated the bail statute: preventing the pre-trial incarceration of defendants charged with crimes who are presumed innocent, is not implicated in probation violation proceedings.

THE JANUARY 1, 2020 EFFECTIVE DATE (Bill section 25)

The new bail law provides, without further elaboration: "This act shall take effect on January 1, 2020". It is generally understood that the statute will apply to all cases pending on its effective date. It is also clear the law is not self-implementing and so changes in securing orders will require court determinations. In considering how the law will be implemented, courts could consider the following options:

- Modify securing orders to comply with the new statute before its effective date.

- Issue modification orders which would be effective on January 1 (or January 2) 2020. That is, to avoid a "rush on the court" on January 1 or 2, issue new securing orders in advance with an effective date which complied with the new statute.

- Schedule proceedings on January 1 (or 2) for all defendants subject to securing orders, other than those released on recognizance.

- Wait until previously scheduled court appearances and defense applications before issuing new securing orders. The statute, however, would appear to implicitly require a review of *any* securing order (other than a release on recognizance) to ensure it complied with the statute, at least by January 1, 2020. Thus, simply waiting for defense applications to review non-recognizance securing orders would risk subjecting defendants to unlawful securing orders on and after the law's effective date. Courts should take a proactive approach to ensure timely compliance with the statute's provisions.