

Overview: Pretrial Bills in the New York State Budget (April, 2019)

Because of the unwavering advocacy of directly impacted people and organizations across the state, a historic package of bail, discovery and speedy trial legislation passed in the state budget on April 1, 2019 (with an enactment date of January 1, 2020). Together, these three bills will:

- Eliminate money bail and guarantee pretrial liberty for most misdemeanor and non-violent felony charges.
- Require that prosecutors turn over all evidence 15 days after arraignment and prior to any plea deal.
- Address some of the loopholes that violate our constitutional right to a speedy trial.

With the passage of this legislation, New York now has the strongest discovery law in the country. However, **the fight to #FREEnewyork is far from over**. While newly passed bail legislation will protect some from pretrial jailing, it fails to end money bail or guarantee meaningful due process for all New Yorkers. And further legislation is needed to address court delays and truly guarantee the right to a speedy trial. Below is an overview of each issue, what the new legislation accomplishes, and where we must continue to organize, advocate, and demand justice.

BAIL REFORM

The Problem

For decades, New Yorkers have been subject to a bail system that violates the most basic protections of our legal system, wreaks havoc on the lives of impacted people, and leads to the coercion of plea deals. Unable to afford bail, tens of thousands of New Yorkers have languished in local jails each year. New York's money-driven bail system has criminalized poverty, deprived people of their freedom, and targeted communities of color. As impacted people know, pretrial incarceration - whether for a week, a year, or more - has devastating consequences: people lose their jobs, homes and custody of children. With few options and no due process protections, many plead guilty to avoid spending months or years awaiting trial behind bars.

The New Bail Law

The newly passed bail legislation will protect pretrial liberty for those accused of most misdemeanors and non-violent felonies. However, it positions those charged with more serious offenses as unworthy of due process protections or the elimination of wealth-based incarceration. The new bail legislation will:

- Expand the use of mandatory DATs: Under the new law, police must issue a Desk Appearance Ticket (rather than holding someone in jail until arraignment) for most violations, misdemeanors, and E felonies, reducing time spent in jail in these cases. However, there are numerous exceptions where police are not required to issue a DAT.¹
- Guarantee pretrial liberty for people accused of misdemeanors and non-violent felonies: The legislation eliminates money bail and guarantees pretrial liberty for people charged with most misdemeanors and non-violent felonies, as well as robbery in the second

¹ For example, police officers do not have to issue a DAT if the person has missed court date in the last two years or if the police officer thinks the person may be subject to an order of protection. These exceptions will need to be monitored for abuse by local police departments.

degree and burglary in the second degree.² **This is the most important provision of the legislation as 90% of the arrests in New York State are for misdemeanors or non-violent felonies.**³ In these cases, the judge must release a person on their own recognizance or with non-monetary conditions.

- Ensure that no one is required to pay for the conditions of their release: The legislation prohibits counties from transferring the costs of any pretrial conditions to the individual. Counties are also prohibited from contracting with for-profit agencies.
- Limit the use of biased risk assessment instruments: The legislation requires that any “tool, instrument, or questionnaire” that is used as part of a judge’s determination of release, conditions of release, or bail be: 1) public 2) “free from discrimination” and 3) regularly validated (with the study results - including underlying data - made public).⁴
- Require court appearance alerts: The court or pretrial service agency must provide reminders by text message, telephone call, email, or first class mail prior to any court date. The court must provide 48 hours notice prior to issuing a bench warrant.
- Require limited data collection: The legislation requires that pretrial service agencies collect and make public data related to pretrial conditions or monitoring. However, the legislation fails to require data collection on bail or pretrial jailing. Without this data, it is substantially harder to track the impact of the legislation, identify discriminatory patterns of bail-setting and pretrial jailing, or hold counties, judges and prosecutors accountable.

The Fight Continues

While this bill limits some of the pretrial system’s harms, it fails to eliminate money as a determiner of freedom or provide sufficient due process protections for people at risk of pretrial detention. By allowing courts to impose money bail on people accused of many offenses, this bill does not protect against the abuse of power by prosecutors and judges - and permits the continued poverty-based jailing of people in our communities. The new legislation:

- Fails to end money bail or protect due process: For New Yorkers charged with a violent felony offense (with the exception of robbery in the second and burglary in the second) and certain misdemeanors and non-violent felonies, the status quo remains largely in place. A judge may set money bail, or if the charge is a felony, remand the person. Unlike in other proposed bail legislation, there is no evidentiary standard or due process hearing in the new law, leaving prosecutors (who decide the charge) and judges (who set bail or remand) unchecked discretion to jail someone pretrial. This means that many New Yorkers will continue to be treated as “guilty until proven innocent.”
 - Two additional protections have been added, although limited: If monetary bail is set, the court must set it in three forms including either an unsecured or partially secured bond. Courts will now have to issue findings on the record to justify their decision-making.
- Fails to include speedy trial release protections: To ensure that no one languishes in jail pretrial, legislation must require judges to release a detained person if their trial has not begun within an allowable period. The new legislation fails to provide any such protection.

² Robbery in the second degree and burglary in the second degree are two charges that are characterized in the New York State Penal Code as “violent felonies” but entail no act of violence. Kalief Browder, who allegedly stole a backpack, was charged with robbery in the second, a statutorily “violent” charge.

³ In 2018, out of the 408,475 total arrests in New York State, 270,288 were for misdemeanors and 100,897 were for non-violent felonies. This means that approximately 90% of people arrested last year would not be eligible for money bail or pretrial incarceration under the new law (New York State Department of Criminal Justice Services - <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/index.htm>).

⁴ The FREEnewyork Campaign opposes the use of risk assessment tools and many doubt whether a risk assessment can be “free of discrimination.” This will be an important provision to monitor.

- Fails to sufficiently limit electronic monitoring: Concerningly, the new legislation codifies the use of electronic monitoring without sufficient limitations to protect against mass community surveillance. Under the new law, judges are permitted to set electronic monitoring as a pretrial condition for a wide net of people, including New Yorkers charged with certain misdemeanors and any felony. The legislation does include some due process protections, such as on the record findings, a 60-day cap with the option of continuing only upon a de novo review, and speedy trial release provisions, but the potential for “e-carceration” and increased surveillance of already overpoliced communities is alarming.

We vow to continue the fight until New York State ends money bail and protects pretrial liberty and due process for all New Yorkers - regardless of charge. We will also demand legislation that further limits electronic monitoring and other punitive pretrial conditions, ensures speedy trial release protections, and requires the collection and publishing of all data related to the implementation of the new bail law.

DISCOVERY REFORM

The Problem

For years, New York’s discovery law was one of the worst in the country. The statute - known as the ‘Blindfold Law’ - denied New Yorkers access to critical information about their case until just before trial. Worse, New York did not require prosecutors to turn over evidence prior to a plea deal, contributing to wrongful convictions and coerced pleas.

The New Discovery Law

New York now has one of the strongest discovery statutes in the country. The new Discovery law makes the turnover of evidence:

- Early: Prosecutors are required to turn over all evidence no later than 15 days after arraignment.
 - Prosecutors can get a 30 day extension if there is a particularly large amount of evidence or if discovery materials are not in the DA’s actual possession “despite diligent, good faith efforts.” If DAs are allowed to invoke this extension, full discovery is required 45 days after arraignment.
- Open-file: Prosecution and law enforcement must turn over *all* evidence, “including but not limited to” all of the listed items. The legislation also states that when interpreting DA’s discovery obligations, there is a “presumption of openness” and “presumption in favor of disclosure.”
 - Prosecutors can request discovery protective orders to withhold particular materials for “good cause.” We will need to be vigilant to ensure that prosecutors do not abuse this provision.
- Automatic: Prosecutors must turn over evidence automatically (requiring no motion by the defense).
- Pre-plea: Prosecutors must turn over evidence prior to a plea deal and cannot condition a plea deal on waiver of discovery rights.
- Enforceable: Prosecutors must file a “certificate of compliance” stating that they turned over all evidence (aside from items under a protective order) and they cannot state “ready for trial” until they do so. If there are violations, the court may take “other appropriate action as necessary.” Because there are no mandated sanctions, we will need to monitor that prosecutors are fulfilling their discovery obligations and that judges are taking appropriate action if they fail to do so.

The Fight Continues

The new law does not require evidence to be turned over until 15 day after arraignment. This is particularly concerning in cases where judges can still set bail or remand. People can be sent to jail at first appearance, without the prosecution having to provide any evidence and with no avenue for the defense to interrogate or challenge the credibility of the charge. As organizations across the state push for District Attorneys to be accountable to the community, we must demand that prosecutors exceed their legal obligations and begin turnover of evidence at the beginning of the case rather than waiting 15 days, as well as fight to ensure that there is a higher burden for prosecutors to bring a case into court in the first instance. Our local organizing must also hold police accountable for gathering evidence completely and with an eye towards proving someone's innocence rather than just achieving a conviction. While the new discovery law requires police to turnover evidence to the prosecution (who are then required to turn it over to the defense), it will take local strategies hold police and prosecutors accountable.

SPEEDY TRIAL REFORM

The Problem

Despite the Sixth Amendment right to a "fair and speedy trial," New York's law does not set any concrete limits by when a trial must take place. Instead, the law only stipulates timeframes by which prosecutors must declare they are "ready for trial." This "readiness rule" - unique to New York - has been routinely abused by prosecutors who falsely declare readiness for trial in order to stop the speedy trial clock. As a result, New Yorkers frequently languish in jail pretrial for months or years as they await their day in court.

The New Speedy Trial Law

The new Speedy Trial Law addresses some loopholes, but additional legislation is needed to address the structural injustices of New York's law and protect our constitutional right to a speedy trial. The new Speedy Trial Law:

- Reigns in abuse by prosecutors who falsely claim "ready for trial" in order to stop the speedy trial clock and delay a case.
 - Judges will now be required to inquire on the record whether a prosecutor is actually ready for trial. If a court decides they are not ready, the prosecutor's statement of readiness is invalid and does not stop the speedy trial clock.
 - Prosecutors will not be able to state they are "ready for trial" unless they have met their discovery obligations - turning over evidence to the defense and signing a certificate of compliance.
 - Defense may challenge prosecutorial compliance on the record and must be heard by the court.
 - Prosecutors can no longer stop the speedy trial clock by claiming they are ready for trial on some charges and not on others, ending the abuse of "partial conversions."
- Includes Vehicle and Traffic Law offenses, subjecting them to Speedy Trial rules for the first time. (Previously, the statute gave no legal basis to dismiss these cases for speedy trial violations and it was not uncommon for traffic infraction cases to linger for three years or more).
- Provides the right to appeal denial of speedy trial motions after conviction, including in cases where someone pleaded guilty to a charge. (Currently, people who plead guilty to a crime cannot ask a higher court to review their case for speedy trial violations. This has

insulated prosecutorial and judicial mistakes from review by higher courts. With this change, appeals courts can retroactively dismiss cases where a defendant's speedy trial rights were violated, which will further help curb abuse.)

The Fight Continues

The new Speedy Trial law does not address delays due to court congestion. This means that a case can drag on if the justification is an overwhelmed court system, rather than delay by the prosecution. This is unacceptable. For a person languishing in jail pretrial or going back and forth to court - missing work, needing childcare - it does not matter whether this is the fault of the prosecution or the courts. For impacted people, time is time, and we need a true speedy trial law that guarantees specific timeframes by which we are entitled to our day in court.

WHAT COMES NEXT IN THE FIGHT FOR PRETRIAL JUSTICE

Legislative Advocacy

Our work in Albany is not over. Additional bail and speedy trial legislation is needed to truly protect the constitutional and human rights of all New Yorkers. Join us in the continued fight for:

- **Bail Legislation** that ends money bail and protects pretrial liberty and due process for all New Yorkers regardless of charge, protects against mass community surveillance and electronic monitoring, ensures speedy trial release protections, and requires that pretrial data be collected and made public.
- **Speedy Trial Legislation** that protects our right to a speedy trial by guaranteeing specific timeframes by which we are entitled to our day in court.

Organizing & Implementation

Alongside advocating for new legislation, we must build local power to hold judges, prosecutors, and county governments accountable. Together, we can:

- Demand that judges and prosecutors implement the new legislation immediately, rather than waiting until January 1, 2020. Under current law, it is fully within their discretion to turn over evidence 15 days after arraignment and to stop setting bail on misdemeanors, non-violent felonies, robbery in the second, and burglary in the second.
- Call on counties to ensure that pretrial services are supportive, not punitive by prohibiting probation departments from acting as pretrial services agencies.
- Organize and build systems for monitoring and public accountability so that when the legislation goes into effect we can assess its impact and ensure that judges and prosecutors are not violating or abusing their discretion under the new laws.

For more information or to join the fight, contact Katie Schaffer at Katie@justleadershipuse.org. You can also read the full text of the bills [here](#).⁵

⁵https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02009&term=2019&Summary=Y&Actions=Y&Text=Y