

From LWVNYS Criminal Justice Committee
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During the recent budget negotiations, reform of certain parts of our criminal justice system became a central piece of the discussions between the governor and the legislative leaders. There were significant differences with regard to this subject, but in the end a compromise was reached. That compromise resulted in amendments to the laws affecting bail and discovery in criminal cases. The following is an explanation of the changes that were enacted and some of the important proposed changes that were rejected.

In 2019, the legislature enacted significant changes to the bail laws existing at that time. These changes became effective in January 2020. Under the changes that were made, judges could no longer impose cash bail on defendants charged with misdemeanors and nonviolent crimes. Those charged with these crimes were to be free pending trial, although in some instances they could be subject to supervision. In those cases where a more serious crime was charged bail could continue to be imposed. In these cases, judges were to consider a defendant's ability to pay and to choose the least restrictive means necessary to ensure that the defendant would show up for future court proceedings. The objective of these changes was to end the inherent unfairness that cash bail posed to poor defendants.

Controversy surrounding these amendments resulted in further amendments that were enacted in April 2020 and took effect in July of that year. Under these amendments another two dozen crimes were added to the list of those allowing a judge to impose cash bail. These crimes included sex trafficking, grand larceny, second-degree burglary, vehicular assault and any crime resulting in a death. Furthermore, this 2020 revision allowed judges to consider a defendant's criminal history when setting bail. Persistent offenders would be subject to cash bail, especially if they were arrested for a new offense while serving probation or parole, even if the offense was nonviolent.

This was the status of the bail laws as the 2022 legislative session opened. During the recently completed budget discussions, the most significant change proposed would have allowed judges to consider the potential dangerousness of a defendant when contemplating bail. Under New York's law, the purpose of setting bail in cases where it is permitted is solely to assure that the defendant appears in court at future proceedings. The judge may not consider what she believes are the dangers posed by the defendant while free. Although a proposal to change this provision was vigorously pursued, it was not adopted in the recently enacted changes.

In addition, proposed changes to the provision that requires judges to consider the least restrictive means to ensure that a defendant who is released returns to court for all future proceedings were rejected.

Among the important changes that were adopted was a further addition to the list of crimes where judges are authorized to impose cash bail. One important addition is in cases where the defendant has a history of using or possessing a gun. In addition, crimes involving guns were added to this list. Furthermore, judges will now be permitted to weigh several factors when setting bail, including whether the defendant is accused of causing serious harm to another and whether the defendant has a history of using or possessing a gun. Lastly, even minor nonviolent crimes, such as shoplifting, are now bail-eligible, if the defendant is a persistent offender.

In addition to changes in the law affecting bail, changes were made in the law affecting discovery in criminal proceedings. Prior reforms, enacted with bail reform in 2019, included a requirement that prosecutors produce twenty-one types of evidence to defense counsel within thirty days of arraignment. This was to promote fairness, allowing the prosecutor and the defendant to have access to relevant documents and information before engaging in plea bargaining and to afford the defendant the opportunity to adequately prepare for trial. If the required evidence was not timely produced, the judge was empowered to dismiss the charges.

Prosecutors, especially upstate prosecutors, insisted that compliance with these new time requirements was extremely difficult, especially since they had not been given the funds needed to comply. The amendment adopted during the recent budget negotiations still requires timely production of evidence, but it offers judges discretion in deciding whether to dismiss a case for failure to comply. Cases will not be dismissed where the prosecutor can show a good faith effort to comply. In addition, prosecutors were given additional funds that they need to comply with the timetable imposed on them,