

Cuomo's 2018 Criminal Justice Reform Package: Critical Amendments Needed

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**“Race and wealth should not be factors in our justice system. It’s that clear.”
--Governor Andrew Cuomo, State of the State Address, January 3, 2018**

In early January, Governor Cuomo outlined a set of values that our pretrial justice system should reflect – fairness, equity, and justice. To align the legislative proposals with the values outlined by the governor, critical improvements must be made to the bail proposal; the discovery and speedy trial proposals are inadequate and counterproductive to those values, and therefore must be entirely overhauled.

BAIL

There must be very strict limits on the use of preventive detention – referred to as ‘pretrial detention’ in the budget: Because the governor's proposal creates such broad eligibility for pretrial detention, people charged with misdemeanors and low level felonies could find themselves detained until trial, without the option of release. This framework creates presumptions of detention that are inconsistent with the constitutional right to the presumption of innocence. Cuomo guaranteed in his State of the State address that this form of detention would only be available if a person had a significant risk of flight or posed a real threat to public safety, yet the language in his proposal creates a massive net that will ensnare countless people posing neither of these risks. Much as the state bears the burden of proving its case beyond a reasonable doubt, it must bear the burden of demonstrating that detention is necessary. There must be separate hearings for these types of cases, so that the judge can evaluate the strength of the evidence, and there must never be a presumption of detention.

Prosecutors must not have unfettered power to detain someone until their hearing date. The current proposal gives prosecutors the unilateral power to detain people at first appearance for five days pending a detention hearing. Not only does this deprive the accused of the zealous advocacy they are entitled to at their first appearance; it also grants prosecutors the unchecked power to detain people, which will inevitably lead to abuse. Judges must retain discretion to decide whether to release or detain someone at first appearance.

Profit must be taken out of pretrial processes. The governor's proposal does not protect against the economic exploitation of the poor. It leaves the door open to the privatization of pretrial supervision or saddling people with the costs associated with their pretrial supervision, like GPS monitoring. It does not address the for-profit bail bond industry, which routinely exploits the poor. We must stop the practice of low-income communities of color having their wealth transferred to private entities or the state through pretrial supervision and detention decisions. The courts must bear the cost of any and every condition that is imposed on a person, and the for-profit bail bond industry must be abolished.

To ensure reform achieves its objective, there must be statewide data collection and reporting on pretrial practices. The governor's proposal does not include any provision for data collection. Currently, there is no statewide data collection process for bail practices. Data should be collected regarding: what type and amount of bail prosecutors request, whether defense attorneys ask for alternative forms of bail, and the judge's reasoning when making their bail determination. The absence of standardized data and reporting across the

state hinders accountability and limits transparency. There should be a provision for statewide data collection and reporting.

DISCOVERY

The discovery bill needs to be completely reframed with an eye toward transparency and fairness. There must be early and automatic disclosure all evidence including the names, contact information, and statements of all persons known to have relevant information about the case. The governor's proposal does not include disclosure of this information, contrary to the recommendations of the New York State Bar Association and the NYS Justice Task Force. It also does not require disclosure of grand jury minutes of testifying witnesses until 15 days prior to jury selection. As is, the governor's proposal will continue to keep defendants in the dark about the evidence presented to the grand jury and the identities of witnesses against them. It will not end the practice of defendants having to choose between pleading guilty or receiving evidence. True discovery reform requires disclosure of the names and contact information of all witnesses who have information relevant to the case, as well as early disclosure of all witness grand jury minutes, regardless of whether they will testify at trial.

The prosecutor's "right to redact" must be eliminated. The governor's proposal gives prosecutors a new and unfettered right to redact evidence without having to show good cause for a protective order. The language in the redaction provisions is far too broad, and will give prosecutors *carte blanche* to withhold information based merely on their opinions. The right to redact should be eliminated since prosecutors can currently redact information after seeking a protective order.

The reciprocal discovery mandates are unconstitutional and must be curtailed. The governor's proposal places earlier and broader mandates on the defense to turn over information even before the prosecutor has disclosed all of its evidence. These provisions violate the Constitutional, and place an unjust burden at the feet of the accused person. The defense should not be mandated to turn over any evidence until the prosecution has completely met their discovery obligation and has filed a certificate of compliance stating so.

SPEEDY TRIAL

The governor's speedy trial proposal completely misses the mark, does nothing to address the underlying structural problem presented by the prosecutorial readiness rule, and is a significant step backward. Speedy trial release needs to remain in the statute. The governor's proposal eliminates the release provision in CPL 30.30. Although there is a release provision in his bail proposal, that time frame (180 days) is lengthy and applies to all misdemeanors and felonies. It is conceivable, under that proposal, that someone charged with a misdemeanor may be incarcerated for up to six months with no avenue for release. Any release provision, no matter where it is, should include tiered time frames based on the severity of the charge.

The decision whether to waive time should be made in the context of the attorney-client relationship and strategic considerations. The governor's proposal mandates that the accused agree to waive speedy trial time. This provision undermines the attorney-client relationship and prevents defense attorneys from doing their jobs, including participating in plea negotiations. This proposal does not account for complicated legal contexts, or the varying

abilities, and even, at times, mental capacities of the accused. The decision whether to waive speedy trial time, like other strategic decisions, must be left to the defense attorney.

There should be no restrictions on when speedy trial motions can be filed. The governor's proposal requires speedy trial motions be filed at least 20 days before trial. This restriction not only deprives the accused of time which could be included in a speedy trial calculation, it also wrongfully presumes that the prosecutor will be ready on the next date. The provision would obstruct people from invoking their constitutional right to speedy trial. This is a significant step backwards from current practice.

CIVIL ASSET FORFEITURE

Reporting requirements should be more robust, and include mandatory reporting of how seized assets are used and distributed. Cuomo's mandate that the Division of Criminal Justice Services expand its reporting requirements represents an affirmative step forward from current practices. However, this data reporting must not be limited to just demographic and geographic data. Instead, police departments must be mandated to report on seized property data on a regular basis.

Asset seizure should not be conditioned on arrest. Under current practices, a person does not have to be found guilty to have their assets claimed by law enforcement. The governor's current proposal does nothing to change this, meaning presumptively innocent people will continue to have their property improperly seized. Asset seizure must not be conditioned on arrest, as an arrest only requires probable cause - far removed from the standard for findings of guilt.

REENTRY

Reentry efforts should be strengthened and expanded to include more people. The governor's reentry bill is a step in the right direction to reducing the prison population and helping people successfully reintegrate into society. The proposal allows merit time to be earned for completing college coursework, removes certain employment restrictions for people with convictions, and has geriatric parole for inmates who are affected by age related issues. These reforms could go further. The geriatric release should include a broader class of people over the age of 55, not just those suffering from debilitating diseases. NYC recently passed the Fair Chance Act, which prohibits employers from making any inquiry into or mention of an applicant's criminal record until after a conditional offer of employment has been made. This should be a statewide policy, to ensure applicants with criminal records are not shut out of the job market or driven into the underground economy.

Reentry reform must address how people accused of violating parole are adjudicated. The bill does not address the fact that people accused of violating conditions of their parole are contributing to mass incarceration in New York prisons and local jails. The majority of people under parole supervision in New York are returned to prison, and the overwhelming majority of those people are re-incarcerated on technical violations, not re-arrests. People accused of violating parole is the only population seeing a growth in numbers in New York City jails. True reentry reform must, at the very least, include: shortening parole terms overall, incentivizing good behavior by allowing people to earn accelerated discharge, creating a high legal threshold for jailing people on parole for minor offenses and expedite their hearings, and not jailing people for technical violations.