

# THE IMPACT OF BAIL CHANGES ON RIKERS

**ROLLBACKS REQUIRE A RENEWED FOCUS ON  
ARRAIGNMENT PRACTICES, PAROLE REFORM,  
AND ENDING CASE DELAYS**

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## The Impact of State Bail Changes on Rikers

*Legislative rollbacks require renewed focus on arraignment practices, parole reform, and ending case delays*

The recently passed New York State budget rolls back some of the important pretrial reforms that were enacted in April 2019. The new changes, which take effect July 1, 2020, will give judges discretion to set cash bail in certain cases that are currently ineligible for pretrial detention. This will result in increased incarceration in county jails across the state, including New York City's violent and dysfunctional Rikers Island jail complex, where corrections staff and incarcerated people are at high risk from COVID-19.

**The full impact of the changes depends on the manner in which the additional judicial discretion is exercised.** If courts and other institutional players act as they did before bail reform was implemented, the new changes could result in 450+ additional people in New York City jails on any given day according to the Center for Court Innovation, as compared to the pre-COVID jail population of early March 2020.

**With the right policies and practices from courts, district attorneys, and State and City government, however, the impact of the legislative changes can and should be significantly lessened.** Examples of improved policies and practices include: district attorneys asking for and judges setting bail in fewer cases; increasing the use of supervised release as an alternative to cash bail; bolstering the provision of pretrial services, including housing, along the lines of programs established during the COVID-19 pandemic; implementing an ability-to-pay assessment so that bail (if set) does not lead to indefinite jail; and expanding the options available for charitable bail payment.

**There is also an even greater urgency for State and City policymakers to tackle two of the major remaining drivers of jail in New York City:** the large number of people who are incarcerated on **parole warrants**; and the **case delays** that can keep people trapped in jail for months and years before their cases are resolved.

Over the past few years, there has been an increasing recognition of the harms of incarceration and the need to use jail as sparingly as possible. The spread of COVID-19 in the Rikers jails—and jails and prisons across New York—is a tragic, further demonstration of these lessons.

**The policies and practices described in this report would help make jail as a last resort, maintain a historically low jail population, and ensure that New York City moves as swiftly as possible towards closing Rikers.**

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## Overview of Legislative Changes

The changes in the state budget provide judges with discretion to set cash bail in the following new circumstances:

- **Additional charges.** Judges may now set bail on people charged with a range of offenses that were previously ineligible for bail or pretrial detention, including: burglary in the 2<sup>nd</sup> degree, if the charged person enters a living area of a building; any offense in which death occurred; drug possession in the 1<sup>st</sup> degree and drug sales in the 1<sup>st</sup> degree; and certain other alleged offenses involving domestic violence or a hate crime, or if the accused person has a prior sex offense conviction.<sup>1</sup>
- **Prior criminal convictions or charges.** Judges may now set bail on (1) people who are accused of any felony while on probation or parole or who are classified as “persistent felony offenders” because they have two or more prior felony convictions involving separate cases; and (2) people who are accused of a new felony or class A misdemeanor involving harm to an identifiable person or property while released on a previous alleged felony or class A misdemeanor charge also involving harm to an identifiable person or property.<sup>2</sup>
- **Between conviction and sentencing.** Judges may now incarcerate people who have been convicted of non-bail-eligible offenses while they await sentencing.<sup>3</sup>

## Projected Impact on NYC Jails

If judges, prosecutors, and other system players return to the pre-bail reform practices, the changes to the bail laws could result in 450+ additional people incarcerated pretrial in New York City above the early March 2020 daily population, according to a recent analysis from the Center for Court Innovation.<sup>4</sup>

Changes	Projected Impact
Additional detention-eligible charges <sup>5</sup>	+ 257 people
Additional eligibility for detention based on prior history or at point of conviction <sup>6</sup>	+ 212 people
<b>TOTAL</b>	<b>+ 469 people</b>

This projected increase in incarceration can and should be significantly lowered with improved policies and practices.

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## Recommendations

The recommendations below would increase fairness, reduce unnecessary incarceration, and blunt the impact of the recent changes on New York City jails.

1. **Fully implement policies and practices that guide judicial discretion so that fewer people are incarcerated before trial.** There are many reforms that can reduce the use of cash bail and continue the trend of using jail as sparingly as possible, including:

- a. **District attorneys should ask for cash bail, and courts should set cash bail, only when it is absolutely required to ensure the charged person's presence at court hearings.** While bail will be permissible for additional charges, that does not mean that it is appropriate in those cases. Under state law, courts may impose only the "least restrictive" conditions to "reasonably assure return to court." According to the New York City Criminal Justice Agency, 95 percent of people charged with nonviolent felonies and 97 percent of people charged with violent felonies appear for their court hearings.<sup>7</sup> With this data in mind, district attorneys should ask for cash bail only where there is a strong basis to believe it is truly required to secure an individual's attendance in court, and courts should set bail only when it is the least restrictive means to do so.
- b. **Courts, DAs, and the City should work together to increase the use of supervised release in lieu of cash bail, where release on recognizance is not appropriate.** The City's supervised release program (SRP) allows charged people to remain in their communities, subject to supervision through regular contacts with a case manager and frequent court date reminders. This program can also help connect charged people with services and treatment. Demonstrating its effectiveness, since 2016, supervised release participants have attended 95 percent of all required court dates, with 87 percent making every single court date. Less than 8 percent were rearrested for a felony offense.<sup>8</sup> And of the several hundred people released from jail through the City's 6A release program (modeled on SRP and implemented by SRP providers) to mitigate the spread of COVID-19, only 4.5 percent have been re-arrested.<sup>9</sup> Moving forward, courts should use supervised release as an alternative to cash bail in as many bail-eligible cases as possible that are not appropriate for release on recognizance. Expanding this program's usage in cases in which judges would otherwise have imposed cash bail should be a top priority for policymakers.
- c. **The City should bolster pretrial release services, including housing.** During the pandemic, the City has provided case management, treatment, services, and critically, temporary housing to anyone being released from Rikers who has needed it, and even to some people returning home from state prisons.<sup>10</sup> Building on these programs so that they are available to people who need them at arraignment would

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provide an opportunity for stability that jail cannot provide, at far less cost.<sup>11</sup> These types of programs would help keep people out of Rikers in the immediate term and help avert future involvement in the criminal justice system.

- d. **The City and courts should implement an ability-to-pay assessment for cases in which judges are considering cash bail.** State law requires that judges consider an individual's ability to pay when determining whether to set bail, and in what amount.<sup>12</sup> To facilitate this analysis, City government and the state courts should establish procedures to guide consideration of an individual's ability to pay, so that cash bail, if set, does not result in indefinite detention. The Vera Institute of Justice and the Center for Court Innovation have developed model assessments.<sup>13</sup>
  - e. **Albany should expand the capacity to post charitable bail.** In April 2019, the state legislature voted to permit charitable entities to post bail up to \$10,000 for people accused of felonies, but Governor Cuomo vetoed the bill. Revisiting this legislation now that additional offenses are bail-eligible could help ensure people are not incarcerated simply because they and their families cannot afford bail.<sup>14</sup>
2. **Pass the *Less Is More Act* to limit parole incarceration.** As of early March 2020, nearly 30% of the City's jail population was incarcerated due to State parole warrants—the only group that had increased over the prior three years. The *Less Is More Act* would reform State parole supervision to reduce the number of people incarcerated on parole warrants, and could result in 750 fewer people in NYC jails on any given day compared to mid-March 2020.<sup>15</sup> In late March 2020, State authorities ordered the release of several hundred people held in City jails for alleged non-criminal parole rules violations to mitigate the spread of COVID, further evidence these violations can be significantly and safely limited.<sup>16</sup>
  3. **End case delays.** Indicted felony cases in New York City take a median of 424 days to reach disposition – approximately 50% longer than New York's other 57 counties.<sup>17</sup> Particularly given the drop in cases over the past few years, courts, prosecutors, and defense attorneys should take steps to speed cases and increase fairness, such as by limiting the length of adjournments. These changes could result in 500 fewer people in jail on any given day.<sup>18</sup>

## Conclusion

The full impact of the recent changes to New York's bail laws depends on the behavior and policies of system players. Courts, district attorneys, and State and City government should focus on policies that safely reduce pretrial incarceration and double-down on already successful initiatives to limit cash bail. Lives and outcomes will improve, and New York City will continue to move towards the closure of the notorious and dysfunctional Rikers jail complex.

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<sup>1</sup> New York State Criminal Procedure Law § 510.10(4)(a)-(q) (effective July 1, 2020).

<sup>2</sup> *Id.* § 510.10(4)(r)-(t) (effective July 1, 2020).

<sup>3</sup> *Id.* § 530.45(2-a) (effective July 1, 2020).

<sup>4</sup> M. Rempel & K. Rodriguez, Center for Court Innovation, [Bail Reform Revisited: The Impact of New York's Amended Bail Law on Pretrial Detention](#) (May 2020) at 14.

<sup>5</sup> *Id.* More than half of the projected increase comes from people charged with drug offenses.

<sup>6</sup> *Id.* CCI assumed, conservatively, that courts would interpret “harm to an identifiable person or property” to incorporate any eligible charge that conceivably involved any physical threat or harm, including weapons charges, or damage or theft of property (other than theft of services). See M. Rempel & K. Rodriguez, [Technical Supplement](#) (May 2020) at 8.

<sup>7</sup> New York Criminal Justice Agency, [2017 Annual Report](#) at 37.

<sup>8</sup> New York City Criminal Justice Agency, Center for Court Innovation & CASES, [Rikers 6-A Early Release Program: Results After One Month of Operations](#) (April 2020) at 1.

<sup>9</sup> Beth Fertig, [With more releases from Rikers due to the Coronavirus pandemic, what's the real impact on crime?](#) (May 2020); see also New York City Criminal Justice Agency, Center for Court Innovation & CASES, [Rikers 6-A Early Release Program: Results After One Month of Operations](#) (April 2020) at 1.

<sup>10</sup> Mayor's Office of Criminal Justice, [Returning from Rikers: Supports and Services Available](#) (May 2020).

<sup>11</sup> Abigail Kramer, [Out of Jail and Homeless: City Struggles to Stop Covid-19's Spread](#), Center for New York City Affairs (May 2020); New York City Comptroller, [NYC Department of Correction: FYs 2009-19 Operating Expenditures, Jail Population, Cost Per Incarcerated Person, Staffing Ratios, Performance Measure Outcomes, And Overtime](#) (December 2019).

<sup>12</sup> New York State Criminal Procedure Law § 510.30(1)(f).

<sup>13</sup> See Vera Institute of Justice, [Bail Assessment Pilot Project](#). Center for Court Innovation. (2019). *Ability to Pay Assessment*. New York, NY.

<sup>14</sup> Mayor's Office of Criminal Justice, [New York City jail population reduction in the time of COVID-19](#) (May 2020).

<sup>15</sup> See Senate [Bill S1343C](#) For projections on Less Is More, see A More Just NYC, [Stopping Parole's Revolving Door: Opportunities for Reforming Community Supervision in New York](#) (June 2019) at 5.

<sup>16</sup> New York State Department of Corrections and Community Supervision, [COVID-19 Report – New Protocols](#) (April 2020).

<sup>17</sup> Independent Budget Office, [Does it take the court system longer in New York City to process indicted felony cases than elsewhere in the state?](#) (April 2019).

<sup>18</sup> See A More Just NYC, [Closing the Chapter on Rikers](#) (October 2019) at 8.