CHIEF DEFENDERS ASSOCIATION OF NEW YORK

Legislative Memo

With the tragic death of NYPD officer Randolph Holder, New York City Mayor Bill de Blasio has urged lawmakers to revisit the possibility of considering public safety as a factor when setting bail. As public defenders in every county in New York State, we have been on the front lines of the criminal justice system and have seen first-hand the devastation our broken criminal justice system brings to families in New York. The death of Officer Holder is an event none of us wish to see reoccur. However, legislating public safety in this way is not the solution. Based on all of our experience, we oppose the inclusion of dangerousness as a statutory requirement in bail determinations and detail our concerns in this letter.

1. ***Including dangerousness as a statutory requirement in making bail determinations is unnecessary given that re-arrest for a violent felony is a rare occurrence.***

Re-arrest for a violent felony offense is a rare occurrence. A study from the Criminal Justice Agency, examining pretrial failure to appear and rearrests among defendants who were released on recognizance or bail, found minimal misconduct among released defendants.[1] Only 17 percent of defendants in the study who were released were rearrested for any offense pretrial. More importantly, only 3% of the defendants were re-arrested for a violent offense. While tragic cases like the one involving Officer Holder may leave the impression that re-arrest for violent felony offenses among the release population is a widespread problem, the reality is, re-arrests for violent offenses happens very infrequently. Such a rare occurrence should not be the basis for a major legislative overhaul.

2. ***There is no evidence that legislative change will bring about a decrease in the already low rates of re-arrest in New York.***

There is no empirical data showing that considering dangerousness will be more effective in protecting the public. In fact, the available data from states with bail statutes that consider public safety and/or permit preventive detention show no decrease in re-arrest rates.

1 See Qudsia Siddiqi, "Predicting the Likelihood of Pretrial Failure to Appear and/or Rearrest for Violent Offense Among New York City Defendants: An Analysis of the 2001 Dataset" (January 2009).

A recent report by the New York City Criminal Justice Agency suggests that passage of bills permitting preventive detention and/or the consideration of public safety in pre-trial release decisions in other states has done little to secure community safety as measured by re-arrest.[2] This report looked at pretrial misconduct, including failure to appear for court when required and re-arrest. The report compared New York City to the rest of the nation and found that, while the re-arrest rates were somewhat higher for New York, Brooklyn and the Bronx, "[t]he difference was mostly accounted for by re-arrests for misdemeanor and lower level felonies, as felony arrest rates in New York (11% to 15%) did not differ much from the 11% national rate." The highest re-arrest rate in Dallas (37%) is in a state that considers public safety as a bail factor and permits preventive detention.

The research demonstrates there is no compelling proof either that releasing people accused of crimes on recognizance or bail under the current bail scheme has created a risk to public safety, or that allowing judges to consider public safety and/or preventive detention would reduce any such risk.

3. The current bail statute provides judges with the tools they need to protect the public.

The current bail statute includes several provisions that either requires judges to consider public safety or permit preventive detention in appropriate circumstances.

For example, the bail statute requires that judges consider public safety in domestic violence cases.[3] The provision dictates that judges must consider "any violation by the [defendant] of an order of protection issued by any court for the protection of a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, whether or not such order of protection is currently in effect; and the [defendant's] history of use or possession of a firearm."

More broadly, in any family offense, Section 530.12(11) (a) provides for revocation of an order of recognizance or bail and remand where, after a hearing, the court is satisfied by competent proof that the defendant willfully violated an order of protection.

Similarly, in non-family offenses, § 530.13(8)(a) provides for revocation of recognizance or bail and remand "if a defendant is brought before the court for failure to obey any lawful order issued under this section and if, after hearing, the court is satisfied by competent proof that the defendant has willfully failed to obey any such order."

Currently, although not an explicit assessment of dangerousness, New York's bail statute allows a court to decline to set bail altogether and remand the accused on felony matters.[4] Although this provision does not specifically address the issue of preventive detention, the seriousness of the offense and the effect on a person's likelihood of returning to court are the factors judges are

2 See Mary T. Phillips, "A Decade of Bail Research in New York City" (August 2012).
3 See C.P.L. § 510.30(2) (vii) (A) and (B) (L.2012, c. 491, pt. D, § 1, eff. Dec. 24, 2012).
4 See C.P.L. § 510.40(c) ("a court may "[d]eny the [bail] application and commit [] the principal to, or retain [] him in, the custody of the sheriff.").

allowed to consider and are routinely considered by judges in ordering remand.[5] Thus, defendants charged with serious offenses, including those charged with homicide, are frequently remanded without bail, even when the case represents a first arrest and is not a flight risk.

Additionally, § 530.60(1) provides for revocation of an order of recognizance or bail for "good cause shown." Subsequent arrests can constitute "good cause". A new arrest may show that the court's initial appraisal of [the defendant's] character, reputation or habits was erroneous, or result in an increased sentence, which is one of the statutory criteria for determining risk of flight.

Finally, Criminal Procedure Law 530.60(2) (a) also provides for revocation of recognizance or bail where a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance or bail and "the court finds reasonable cause to believe the defendant committed one or more specified class A or violent felony offenses or intimidated a victim or witness … while at liberty."[6]

Collectively, these provisions already permit judges to protect public safety in carefully proscribed circumstances, making the proposed amendments unnecessary.

4. The procedural protections that would need to be established to add consideration of public safety as a statutory requirement for release decisions are costly, cumbersome and would exhaust an already overburdened criminal justice system.

If New York were to move to a bail system that required judges to consider public safety, the legislature would have to put into place the kind of extensive procedural protections that exist in the Federal Bail Act. The Federal Bail Act provides for detention only if, after a hearing, a judicial officer determines by clear and convincing evidence, stated in findings on the record, that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." [7] Changing the bail law to consider dangerousness would require similar safeguards. New York would have to amend the law to allow for an adversarial hearing, including the presence of counsel, the right to testify and present witnesses or proffer evidence, and cross-examine other witnesses appearing at the hearing. Judges would be required to make findings of fact and conclusions of law and New York would have to create an expedited appellate review process.

Taking into account the already overburdened nature of our criminal justice system, the establishment of such procedures would bring us to the breaking point. New York's under-resourced and over-burdened criminal justice system could not handle the demands of such hearings. The volume of arraignments in New York City's five boroughs alone is over 300,000 cases annually. This volume of cases far exceeds that in federal court. The United States Attorney's Office filed 56,218 criminal cases in the 2014 fiscal.[8] The State's criminal justice system would collapse under the added strain of these necessary constitutional safeguard and would add further delay to the already slow administration of justice.

5 See Phillips, "A Decade of Bail Research" at 130.
6 See C.P.L. § 530.60(2) (a).
7 See 18 U.S.C. § 3142(e) (1).
8 See United States Attorneys' Annual Statistical Report (2014).

Summary

Officer Holder's death has rejuvenated the argument of including public safety as a basis for bail setting – an argument that was rejected by the State Legislature in 1970 and has continued to be rejected by New York ever since. As described in this letter, expanding the purpose of bail to include public safety would not decrease the rate of re-arrest, is unnecessary given the current provisions in our law that grant judges the necessary authority to act, and would only exhaust an already overburdened criminal justice system. We oppose the inclusion of dangerousness as a statutory requirement in making bail determinations.