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## ROLLBACKS TO BAIL & DISCOVERY REFORM IN THE 2020 BUDGET

### Overview

This year's New York State Budget included rollbacks to the bail and discovery reform laws that took effect only three months prior. Pushed for by Governor Cuomo and the Senate Majority, these rollbacks represent a capitulation to racist fear-mongering and a coordinated campaign of opposition led by prosecutors and police across the state. **These rollbacks will potentially subject tens of thousands more New Yorkers to pretrial jailing and will take effect in just 90 days when experts predict the coronavirus will still be spreading in New York. In short, these cruel rollbacks will subject people to illness, isolation, and death behind bars during a global health pandemic.** The discovery provisions also deny people facing criminal charges access to crucial and potentially exculpatory witness information. These are not small tweaks; these changes represent a significant retreat and will undoubtedly lead to more incarceration and more wrongful convictions.

### Bail Reform Rollbacks

**Expand the number of people who can be incarcerated pretrial.** The changes to the bail reform law vastly expand the number of people who can be incarcerated pretrial. These changes will dramatically increase jail populations across the state.

- Now, judges can set bail on people charged with a range of misdemeanors and non-violent felonies that were not previously bail-eligible.
- New Yorkers can also be incarcerated pretrial if they are charged with a misdemeanor and re-arrested for a misdemeanor "involving harm to an identifiable person or property," a phrase so vague and broad that it sets no meaningful limits. In addition, because misdemeanor re-arrests are a function of policing tactics, not behavior or crime rates, this provision will disproportionately impact Black and Latinx communities that have historically been targeted by the criminal legal system.
- In addition, judges will be able to set bail when a person on probation or parole is arrested for a felony or when a person is charged with a felony that would qualify them as a "persistent felony offender" at sentencing. "Persistent felony offender" is defined in the law as someone who has two prior felony convictions (from separate instances) that led to prison sentences. The statute has no timeframe, so these felony convictions could have occurred decades prior. This rollback provision will overwhelmingly target people accused of drug offenses because under the prior bail reform law, people accused of violent felonies were already subject to pretrial incarceration. As Black people are disproportionately convicted of drug offenses, despite the fact that white people have higher rates of drug use, the brunt of this rollback will also be borne by Black communities.

**Allows courts to impose additional non-monetary conditions including** (1) prohibiting contact with other people involved in the case including co-defendants; (2) mandatory programming including counseling, treatment and DV programs; (3) “diligent efforts to maintain employment, housing, or schooling”; and (4) obeying conditions requested by or on behalf of complainants in DV cases. Collectively, these provisions will allow judges to impose highly intrusive state surveillance and control despite a presumption of innocence. Onerous conditions also set individuals up for failure. For example, judges will be able to punish people if they deem their efforts to find employment insufficient. We do not yet know how this will play out in courtrooms, but as New York enters what may be the next Great Depression, this is a concerning provision.

**Enables an increase in the use of electronic monitoring, as well as profiteering.** Counties may now contract with for-profit companies to supply electronic monitoring as long as contact with the data and clients is conducted by a nonprofit or government agency. By creating a profit motive and making electronic monitoring easier to access, this will inevitably expand the use of e-carceration throughout the state.

**Requires data reporting.** The Office of Court Administration (OCA) and the Department of Criminal Justice Services (DCJS) will now be required to collect and report data on charges, bail status, and other factors, disaggregated by gender, race and ethnic background. This is a positive provision, but not one that in any way undoes the harm of the substantial rollbacks.

#### *The Rollbacks We Successfully Fought to Prevent*

- **Dangerousness:** Proposals from the Senate and Governor that would have allowed judges to indefinitely detain people based on their perceptions of the threat that individual poses to “public safety” were ultimately rejected. This proposal would have dramatically exacerbated racial disparities, as “dangerousness” has served as a proxy for race since the time of slavery.
- **Remand for misdemeanor charges:** The Senate’s and Governor’s proposals would also have allowed judges to indefinitely detain (also known as remand) people accused of misdemeanors, a practice that has never before been allowed in New York. We successfully fought off this and other provisions that would have created a system of mass indefinite detention.

#### Discovery Reform Rollbacks

**Pushes back the timeframe for prosecutors to turn over evidence.** Last year’s discovery reform required prosecutors to turn over all evidence 15 days after arraignment (the first court appearance). Now, that timeframe has been pushed back so that prosecutors do not have to turn over discovery until:

- 35 days after arraignment if the person is released pretrial;
- 20 days after arraignment if the person is incarcerated;
- 15 days *before trial* in traffic infraction and summons cases.

**Fails to hold law enforcement accountable.** Under these rollbacks, the prosecution is explicitly granted an extra 30 days to turn over video from body-worn, dashboard or surveillance cameras - crucial and potentially exculpatory evidence. Moreover, they can move for *even more time*

whenever the evidence is “exceptionally voluminous” or “is not in the actual possession of the prosecution.” Under last year’s reform, the “exceptionally voluminous” provision was included, but prosecutors had an affirmative obligation to locate and turnover *all* evidence. Now, under these rollbacks, prosecutors and law enforcement are given permission to drag their feet in obtaining and turning over all evidence.

**Allows prosecutors to withhold critical 911 call information without court oversight.** Under the new law, prosecutors will be able to withhold potentially exculpatory information and undermine the defense’s ability to investigate a case by hiding the identity of 911 callers without having to move for a protective order. Prosecutors will also be able to ask the court to substitute a transcript of a call for the actual 911 recording. 911 calls regularly contain crucial exculpatory information and investigatory leads; preventing full transparency and equal access will inevitably lead to lost evidence and wrongful convictions.

**Limits turnover of names and identifying information for witnesses.** Under the prior reform, prosecutors were required to turn over all evidence, but could file for discovery protective orders to withhold victim or witness information for “good cause.” Now, prosecutors can automatically withhold names and identifying information - from the defense as well as the court - of 911 callers, the victim or witness of an alleged sex offense, and any victim or witness where the defendant has a “substantiated affiliation with a criminal enterprise.” This last provision will allow prosecution to withhold victim and witness names in any case where they claim the defendant is in a gang - a notoriously racially discriminatory and often specious designation. In addition, prosecutors may request that a discovery protective order hearing be held outside the presence of the defendant in some cases, a provision which is both of dubious constitutionality and will inevitably drive a wedge in the lawyer-client relationship.

#### *The Rollbacks We Successfully Fought to Prevent*

- **“Materiality” or “relevance” standard:** This standard would have given prosecutors the discretion to determine what they deem “relevant” or “material” and allows them to keep it from not only the defendant and their counsel, but also from the court. This would fundamentally gut the discovery reform.
- **“Substantial compliance” standard:** This standard would have been disastrous for the criminal justice system. Prosecutors often believe they are in “substantial compliance” even when they have left out entire categories of necessary discovery. By leaving decisions on what is “substantial” to prosecutors and judges, the legislature would invite endless litigation and unjust outcomes. It would effectively paralyze the criminal justice system, since there would then be no way to enforce discovery time-frames: piecemeal discovery and delays would become the norm. The landmark discovery reform was intended to eliminate wrongful convictions. This change would only return us to the injustices of the past.

**Full text of the bail and discovery rollback legislation [here](#).**