
Bail Reform and Domestic Violence

Implications of New York's New Pretrial Statute

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On April 1, 2019, New York State passed a series of reforms intended to promote fairness and due process throughout the criminal justice system. A new bail reform law eliminates money bail and pretrial detention for nearly all misdemeanor and nonviolent felony defendants. Described in a separate publication,¹ this law requires drastic changes in bail practices, sharply curtailing the overreliance on money bail and pretrial detention that has disproportionately impacted lower-income communities and communities of color. The Center for Court Innovation estimates that bail reform will result in a minimum 43 percent reduction in New York City's pretrial jail population.

In response to the victim advocacy community and in consideration of the unique social and legal issues involved in cases of domestic violence, the new law contains several specific provisions intended to protect domestic violence victims. This document focuses on these components of bail reform and includes hard data indicating how cases involving domestic violence allegations might be affected in New York City.

Legal Definition of Domestic Violence

Where New York's bail statute refers to "domestic violence," it does not exclusively refer to cases involving intimate partners, but rather to relationships, as they have long been defined in the state's Criminal Procedure Law (CPL 530.11(1) (a-e)). The legal definition includes familial relationships (such as between siblings, parents and children, and extended kin), married or formerly married individuals, those who share a child in common, and individuals who are or have been in an intimate relationship. Living in the same household per se is not required.

Money Bail in Domestic Violence Cases

The bail reform law eliminates money bail in nearly all cases technically classified as misdemeanors and nonviolent felonies, while preserving bail as an option in nearly all violent felonies. However, three key exceptions implicate domestic violence cases.

- **Criminal Contempt:** In criminal contempt cases where (1) there has been an alleged violation of an order of protection, and (2) the protected party is in a domestic relationship (as defined above), money bail remains permissible—even though criminal contempt is technically a misdemeanor (PL 215.50) or nonviolent felony (PL 215.51 and 215.52). In 2018, there were 6,288 criminal contempt cases arraigned in the New York

City criminal courts, of which 4,370 (69 percent) involved an allegation of domestic violence.

- **Sex Offenses:** Money bail may be set in any sex offense case, including misdemeanor and nonviolent felony sex offenses, of which there were 1,216 in 2018. Of these cases, 174 (14 percent) involved an allegation of domestic violence.
- **Witness Tampering or Intimidation:** Money bail remains permissible in nonviolent felonies involving witness tampering (PL 215.11, 215.12, 215.13) or intimidation (PL 215.15). In 2018, there were only 35 cases, however, with these charges in New York City, of which six (17 percent) involved an allegation of domestic violence.

In addition, bail reform's allowance of money bail in nearly all violent felonies (excluding select second degree burglary and robbery charges) means that judges would have been able to set money bail in the 2,316 violent felonies involving domestic violence in 2018.

Consistent with the preexisting statute, remand is only permissible in felony cases. Thus, unlike bail, remand may *not* be used in misdemeanor criminal contempt or sex offense cases.

Electronic Monitoring in Domestic Violence Cases

Bail reform introduced the use of electronic monitoring to monitor an individual's location for two purposes: (1) to ensure their court appearance as an initial release condition set at arraignment; and (2) as a response to pretrial noncompliance with existing release conditions (further discussed below). In both scenarios, the statute clarifies that electronic monitoring may be considered only if the court determines that no other set of non-monetary conditions would suffice to reasonably assure court appearance.

When making an initial release determination, all felony charges can be subject to electronic monitoring, including felony domestic violence. There are also several misdemeanors that can be subject to electronic monitoring: (1) misdemeanor domestic violence (not limited to criminal contempt); (2) sex offenses; and (3) cases where the defendant has been convicted of a violent felony within the past 5 years.

Release Decision-Making in Domestic Violence Cases

Even where money bail or remand are permissible, the new law creates a presumption of release for all crimes—including domestic violence—and requires that judges release individuals on their own recognizance unless there is an individualized determination that they pose a "risk of flight." If the judge makes such a finding, the judge must consider what condition or set of conditions of release are the least restrictive to reasonably assure an individual's court appearance.

Non-Monetary Conditions and Money Bail

In determining what is the least restrictive condition necessary in cases where release on recognizance is deemed inappropriate, bail reform requires that judges have the option of setting non-monetary conditions, such as added court date reminders or supervised release. However, at present, supervised release is not widely available in domestic violence cases. (In New York City, it is only an option in non-intimate partner cases.)

In implementing the law, pretrial services agencies in each county will have to establish supervised release policies and protocols for enrolling defendants charged with domestic violence. If judges are not satisfied that non-monetary conditions will suffice, judges may set bail for the qualified offenses where money bail continues to be permissible.

General and Domestic Violence-Specific Bail Factors

For all cases, when determining the least restrictive condition, judges must consider:

- Activities and history.
- Charges of the pending case.
- Prior criminal convictions.
- Record of juvenile delinquency or youthful offender status.
- Prior record of flight to avoid criminal prosecution.
- Personal financial circumstances and ability to post bail (where bail is permitted).

When an individual is charged with a crime of domestic violence, the court must also currently consider:

- Any current or prior violations of a court issued Order of Protection.
- History of use or possession of a firearm.

These two latter factors, specific to domestic violence cases, remain in the reformed bail statute and will likely continue to inform judicial decision making. Prior research by the Center for Court Innovation indicates that a history of order of protection violations and/or firearms arrests are associated with a future domestic violence re-arrest.²

Noncompliance and Domestic Violence Cases

If a defendant has violated conditions of release in an “important respect,” the statute dictates that the court can revisit the conditions and determine whether the release status should be changed. A due process hearing is required, and additional conditions may be imposed. The court is still required to consider the least restrictive conditions to assure court attendance.

Electronic monitoring or bail can be ordered in response to noncompliance if, while the current case is pending, the individual: (1) violated an order of protection (as specified in PL 215.51); (2) persistently and willfully failed to appear in court; (3) was charged with witness intimidation; or (4) was rearrested on a felony while a felony case was already pending. In addition, remand can be ordered, as well as money bail, if the individual stands charged with a felony and was rearrested for a Class A felony, violent felony, or witness intimidation.

Further, the reform law specifically amends C.P.L. 530.12(11), the statute governing the issuance of orders of protection in a domestic violence context. It states that a non-monetary condition or set of conditions may be revoked where an individual has violated a temporary order of protection issued previously in either the family court or supreme court.

Desk Appearance Tickets and Domestic Violence

The reform statute requires that law enforcement issue a desk appearance ticket (DAT) in misdemeanors and most Class E felonies. However, officers have discretion to effectuate a custodial arrest in certain delineated exceptions—including when an individual is charged with domestic violence, a sex offense, or whenever an order of protection is likely to be issued at arraignment. Thus, officers have discretion when responding to an allegation of domestic violence to make an immediate arrest—meaning that the individual will be held in pre-arraignment detention until the arraignment up to 24 hours later.

Current Practices in Domestic Violence Cases

In 2018, of 30,128 domestic violence cases arraigned in the New York City criminal courts, 85 percent were charged with a misdemeanor, 7 percent with a nonviolent felony, and 8 percent with a violent felony.

New York State does not have a domestic violence charge per se. As shown below, the most common top charges in cases involving allegations of domestic violence were assault and criminal contempt. Criminal contempt is the top charge in 12 percent of domestic violence misdemeanors and 63 percent of domestic violence nonviolent felonies.

Although available data somewhat underestimates the total number of criminal contempt cases, because this charge is not indicated in the data when it is a lesser included charge, the results indicate that most domestic violence misdemeanors will not be eligible for money bail under the reform law—but judges will retain both bail and remand as options in the preponderance of domestic violence felonies.

Top Charges in New York City Domestic Violence Cases Arraigned in 2018

Technical Charge Classification	Misdemeanor	Nonviolent Felony	Violent Felony	All DV Cases
Number of Cases	25,479	2,107	2,542	30,128
Charge Category				
Assault	60.6%	3.1%	48.8%	55.6%
Criminal Contempt	11.7%	63.4%		14.4%
Aggr. Harassment	7.5%			6.4%
Menacing	3.1%			2.7%
Stalking	0.4%	0.1%	0.1%	0.3%
Strangulation	1.6%		15.5%	2.7%
Burglary		1.1%	13.3%	1.2%
Criminal Mischief	6.7%	1.6%		5.7%
Larceny	2.1%	8.1%		0.6%
Robbery		7.1%	10.4%	1.4%
Murder			1.8%	0.2%
Rape			3.0%	0.2%
Other Sex Offenses	0.5%	1.2%	3.6%	0.6%
Other Charges	5.8%	14.3%	3.5%	8.0%

Note: Data was obtained from the New York State Office of Court Administration.

Results in the next table indicate how domestic violence cases are currently handled. At arraignment, 24 percent of domestic violence cases had to make bail, while 76 percent were released. The latter group was almost exclusively released on their own recognizance. The data also makes clear that release rates were significantly lower in felony than in misdemeanor domestic violence cases. Whereas 83 percent of domestic violence misdemeanors were released, only 34 percent of domestic violence cases classified as nonviolent felonies (mainly criminal contempt) and 41 of violent felonies were released.

We also found that total release rates in 2018 were virtually identical between domestic violence (76 percent) and non-domestic violence cases (75 percent). Among misdemeanors only, release rates were somewhat lower for domestic violence matters (83 percent for domestic and 88 percent for non-domestic violence misdemeanors).

Release Decisions in New York City Domestic Violence (DV) Cases in 2018

	Misdemeanor	Nonviolent Felony	Violent Felony	All DV Cases
Number of Cases	25,479	2,107	2,542	30,128
ROR	82.6%	33.6%	40.6%	75.7%
Supervised Release	0.3%	0.6%	0.0%	0.3%
Bail Set	17.0%	65.3%	57.8%	23.8%
Remand	0.1%	0.5%	1.6%	0.3%
Total Released	82.9%	34.2%	40.6%	76.0%

Source: Data obtained from the New York State Office of Court Administration.

Implications of Bail Reform for Pretrial Options

Were bail reform in effect in 2018, money bail would have been a legally permissible option in 22 percent of all domestic violence cases. This fact does not mean that money bail would have been set 22 percent of the time; rather, it would have been an available option in these cases, but presumably judges would opt for release some of the time, as they do now.

By comparison to the 22 percent of domestic violence cases that would still have been eligible for money bail, only 7 percent of all other cases would have been bail-eligible. The difference mainly stems from carve out making cases classified as misdemeanors and nonviolent felonies eligible for bail whenever there is a domestic violence criminal contempt charge. Indeed, 12 percent of domestic violence misdemeanors and 64 percent of domestic violence nonviolent felonies would have been bail-eligible—but only 1 percent of misdemeanors and 1 percent of nonviolent felonies *not* involving domestic violence would have been bail-eligible if the new statute had been in effect in 2018.³

These results suggest that state legislators were especially concerned with maintaining bail as an option when domestic violence is alleged—particularly when there is an alleged violation of an order of protection leading to a criminal contempt charge.⁴

In this regard, orders of protection are customarily issued in the New York City criminal courts where the case involves a victim, and particularly in domestic violence cases (see CPL 530.13). Issuing orders of protection remains untouched by the bail reform law, and when such an order is issued, compliance with its terms will continue to be a condition of any release status, as it has been. Criminal contempt as it relates to the domestic violence context continues to be grounds for reconsidering pretrial release status, as discussed above.

At the same time, because judges will need to consider the least restrictive alternatives before individuals can face money bail beginning January 2020, some of the results reported above also demonstrate the need for counties to establish suitable non-monetary conditions of release that can be set when judges believe release on recognizance is inappropriate in a domestic violence matter. The results on the previous page show that in 2018, less than 1 percent of domestic violence cases were ordered to supervised release, but non-monetary conditions including supervised release will inevitably become more common under bail reform. To track the precise magnitude of these changes, the bail reform law (CPL 510.45) also provides for the public dissemination of annual reports documenting the number of defendants ordered to pretrial supervision, with a breakdown by race, ethnicity, gender, and charge.

Notes

¹ Rempel, M. & Rodriguez, K. (2019). *Bail Reform in New York: Legislative Provisions and Implications for New York City*. New York, NY: Center for Court Innovation.

² For the finding that prior order of protection violations and firearms arrests are associated with future domestic violence in a New York City sample, see Kerodal, A. & Rempel, M. (2018). [*Domestic Violence Case Processing in New York City: Results at the Pretrial and Dispositional Stages*](#). New York, NY: Center for Court Innovation. This study and others point to additional risk factors as well. See, for example, Capaldi, D. M., Knoble, N. B., Shortt, J. W., & Kim, H. K. (2012). “A Systematic Review of Risk Factors for Intimate Partner Violence.” *Partner Abuse* 3(2): 231–280; Hanson, R.K., Helmus, L. & Bourgon, G. (2007). *The Validity of Risk Assessments for Intimate Partner Violence: A Meta-Analysis 2007-07*. Report produced for the Department of the Solicitor General of Canada. Public Safety Canada; and Hilton, N. Z., G. T. Harris, M. E. Rice, R. E. Houghton, & A.W. Eke. (2008). “An In Depth Actuarial Assessment for Wife Assault Recidivism: The Domestic Violence Risk Appraisal Guide.” *Law and Human Behavior* 32(2):150–163.

³ The number of domestic violence cases technically classified as misdemeanors and nonviolent felonies that are eligible for money bail under the reform law may be underestimated, because available data did not enable determining when the top charge did not involve criminal contempt, but criminal contempt was a lesser included charge.

⁴ Similar to the bail reform provisions designed to protect victims when domestic violence is alleged, the state’s discovery reform similarly includes elements intended to promote victim safety. The new discovery law maintains provisions allowing courts to limit or redact information regarding the complainant in response to a successful application for a “protective order,” which in the discovery context could include the complainant’s contact information and address (CPL 245.70).