

THEODORE ROOSEVELT INN OF COURT

A LOOK AT NEW YORK STATE BAIL REFORM LAW AND RELATED ISSUES

PROGRAM CHAIR: Judge Elizabeth Fox-McDonough

PROGRAM CO-CHAIRS: Hon. Randall Eng, Judge Gary Carlton, Dana Grossblatt, Esq. and David Schwartz, Esq.

- A. Introduction: Judge Fox-McDonough (10 Minutes)
- B. Historical Perspective of Bail and the Bail Laws in New York State:
Hon. Randall Eng (15 Minutes)
- C. Amendments to the Bail Reform Law (July 2020):
Dana Grossblatt, Esq. (15 Minutes)
- D. Problems Not Addressed or Corrected in the Amendments:
Judge Fox-McDonough (15 Minutes)
- E. Arraignments and Orders of Protection (People v. Crawford):
Judge Gary Carlton (20 Minutes)
- F. Arraignment Scenarios for Discussion:
David Schwartz, Esq. (15 Minutes)
- G. Questions and Answers (10 Minutes)

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Judge Elizabeth Fox-McDonough
Supervising Judge of the District Court

On November 7, 2017 Judge Elizabeth Fox-McDonough was elected to the position of Nassau County District Court Judge. As the elected Judge for the First District of Nassau County, Judge Fox-McDonough is also the President of the Board of Judges in District Court. In January of 2019, Judge Fox-McDonough was elevated to the position of Supervising Judge of District Court.

Judge Fox-McDonough began her legal career in the Queens County District Attorney's Office where she went on to have a ten-year career as a prosecutor.

In 1997, Judge Fox-McDonough became a Principal Law Clerk to Justice Arthur Cooperman in the Criminal Term of the Queens Supreme Court. Judge Fox-McDonough went on to work for Judge Barry Kron of the Queens Supreme Court as a Principal Court Attorney.

In 2014, Judge Fox-McDonough served as the Principal Law Clerk to Deputy Chief Administrative Judge, Justice Norman St. George, who was then the Supervising Judge of the Nassau County District Court. In that role, she gained significant knowledge of all the aspects of the operation of District Court.

Judge Fox-McDonough attended St John's University and received a Bachelor of Arts Degree in 1984. Judge Fox-McDonough then attended St. John's University Law School graduating with a Juris Doctor in 1987.

On November 2, 2021, Judge Elizabeth Fox-McDonough was elected to the position of Justice of the Supreme Court in the 10th Judicial District.

Hon. Randall T. Eng

Of Counsel at Meyer, Suozzi, English & Klein, P.C. and former Presiding Justice, Appellate Division, Second Department; Associate Justice, AD2; Justice of the Supreme Court, Queens County; Judge, New York City Criminal Court; Inspector General, New York City Department of Correction; Assistant District Attorney, Queens County; Adjunct Professor of Law at St. John's University.

Hon. Randall T. Eng

Meyer Suozzi English & Klein, P.C.
990 Stewart Avenue – Suite 300
Garden City, New York 11530
(516) 741-6565

GARY CARLTON

PROFESSIONAL EXPERIENCE:

DISTRICT COURT, NASSAU COUNTY –April 1, 2019 - Present
Judge

GOLDBERG & CARLTON, PLLC. - 1984 – April 2019

Founding Partner

31 East 32nd Street

New York, New York 10016

Areas of specialization:

Representation of defendants, individuals, municipalities, corporations and insurance carriers in general negligence litigation, medical, dental, legal, and other professional errors and omissions cases; products liability, construction, auto, civil rights, insurance law and appeals.

TORT COUNSEL FOR THE VILLAGE OF VALLEY STREAM - 2010-2019

COMMUNITY INVOLVEMENT:

Civil Rights Litigation-

Pro Bono Counsel - 2013

North Woodmere Civic Association

Former Co-President- Pro Bono Counsel

North Woodmere Park Foundation

Founding Member, Former Director of Volunteers, Pro Bono Counsel

Central Synagogue/Beth Emeth

Former Vice President, Trustee-Leadership Council, Pro Bono Counsel 1995 - 2018

OWWR- SUNY OLD WESTBURY - Community Volunteer

THEODORE ROOSEVELT AMERICAN INN OF COURT- 2021

EDUCATION:

Lawrence High School, Lawrence, NY – Diploma- 1972

The George Washington University, Washington, D.C. - B.A., (Phi Beta Kappa), 1976

Union University-Albany Law School, Albany, NY - J.D., 1979

Admitted to Practice in New York- 1980

Dana Grossblatt Bio

Dana Grossblatt started her career in the Kings County DA's Office. By the time she left some 6 years later she was trying homicides and other high publicity cases. In 2002 she opened her own law firm focusing on criminal defense. She has earned a reputation as a fierce and relentless litigator. Her cases have been featured in Newsday, ABC 7News, CBS News, NBC News, CNN, WPIX 11 News, NY Daily News and nonfiction book Notorious C.O.P. She has tried over 150 cases to verdict.

In 2014 Dana Grossblatt became President of the Criminal Courts Bar Association of Nassau County. She was only the 2nd woman and the first mother to have done so. While on the board she was instrumental in the creation of the Criminal Courts Bar Foundation Charity. The charity has supported the childcare center in Family Court, Westbury Middle School after school programming, the Prisoner Toy Project, and Youth Empowerment workshops. She was Criminal Court Practitioner of the Year in 2019.

Currently Dana is the Principal Law Clerk to Supreme Court Judge the Hon. Joseph Conway.



David Schwartz has spent his entire career practicing law as a litigator and for the past decade as a lobbyist and advocate on behalf of businesses, trade associations, not-for-profits and individuals. Whether it is in the courtroom defending and advocating on behalf of litigants in high profile criminal and civil cases or in the halls of the Capital, the same philosophy and attitude exists which is to advocate as aggressively and passionately for the client. Mr. Schwartz has represented clients at all ends of the spectrum including some of the largest companies in America to some of the least fortunate in our society on criminal matters. Every client gets the energy and attention needed to achieve positive results. It is this training as a trial attorney, trying dozens of felony cases and handling thousands, that makes him extremely effective in navigating the political process for his clients.

He lobbies for a wide variety of large corporations, not-for-profits, trade associations and individuals. He is also a prolific political fund raiser, having raised hundreds of thousands of dollars nationally. Mr. Schwartz uses his trial skills in the halls of Albany as a fierce advocate for his clients. Mr. Schwartz has been a regular guest legal and political commentator for the

Fox News Channel, NBC Today Show, MSNBC, Headline News, CNN, WABC News, Fox & Friends, WPIX, Court TV and for the ESPN morning show. Mr. Schwartz has been asked by these television networks to give legal and political analysis and his expert opinion on criminal cases, constitutional legal issues, political issues, civil cases, cases in front of the Supreme Court and local Political figures. He has also been quoted frequently on cases and political matters in the NY Post, NY Times, Daily News, Wall street Journal and NY Law Journal and hundreds of other periodicals nationally. Mr. Schwartz was appointed by the New York State Senate as a Commissioner on the Commission on Judicial Nomination which nominates Justices to the NYS Court of Appeals and also served as a Trustee of the Brooklyn Bar Association. Mr. Schwartz was also appointed by the Governor to serve on the Board of the NY Javits Convention Center. Mr. Schwartz is able to bring together for our clients, his vast experience in law, business, media and politics and uses every advocacy tool available in order to achieve results for our clients. When direct lobbying is not effective, you will see Mr. Schwartz using the media, grass roots campaigns, television and radio advocacy in order to get the point home and educate the public and government officials.

David Schwartz served the People of the State of New York as an Assistant District Attorney in Kings County from 1993 through 1997. As an Assistant District Attorney, Mr. Schwartz handled hundreds of criminal prosecutions. He successfully tried numerous felonies and misdemeanor cases which lead to the conviction and incarceration of many criminals. David Schwartz has been engaged in the private practice of law and government relations from 1997 to present. He has handled hundreds of criminal cases in private practice and has tried many of those cases. Mr. Schwartz presently concentrates his practice on lobbying and Government Relations. Mr. Schwartz also represents various businesses and counsels them on all legal issues and political issues. Mr. Schwartz is admitted and appears in the United States Supreme Court, United States District Court of New York, Eastern and Southern Districts, United States Tax Court, New York State Supreme Court, New York City Criminal and Civil Court, and Nassau County District Court.

Mr. Schwartz has argued appeals in the New York State Appellate Division, First and Second Departments and the United States Court of Appeals (2nd Department). Furthermore, he has appeared Pro Hoc Vice in the United States District Court of New Jersey.

Mr. Schwartz has worked tirelessly in; keeping Walmart out of NYC; stopping No Fault Insurance fraud; stopping illegal cigarettes in entering the market place; fighting government agencies in stopping progress; vigorous representation of supermarkets; campaign to change the standard of care in the reprocessing of endoscopes; Hedge Funds, Insurance Companies, special needs schools, major research institutes, towns and municipalities and many others.

Active in his profession and community, Mr. Schwartz has served as a board member of the Metropolitan Transportation Authority, Inspector General Management Advisory Board; a Board member of the New York Javits Center Convention Center Operating Corporation; Commissioner to the Commission on Judicial Nomination; The American Bar Association; Commissioner of the NYS Commission on Judicial Nomination; The New York State Bar Association, Board member of the Criminal Section representing the Second Judicial Department; Brooklyn Bar Association; Board Member and has served as Vice-Chairman to the Criminal Courts Committee and Criminal Justice Committee; Nassau County Bar Association; Respect for Law Alliance; District Attorney Alumni Association; Government Affairs Professionals; Temple Sinai, President; Sigma Alpha Mu Fraternity, Past Regional Governor; Senate Republican Roundtable; Senate Republican Club; Seneca Club, Man of the Year; Southern Poverty Law Center.

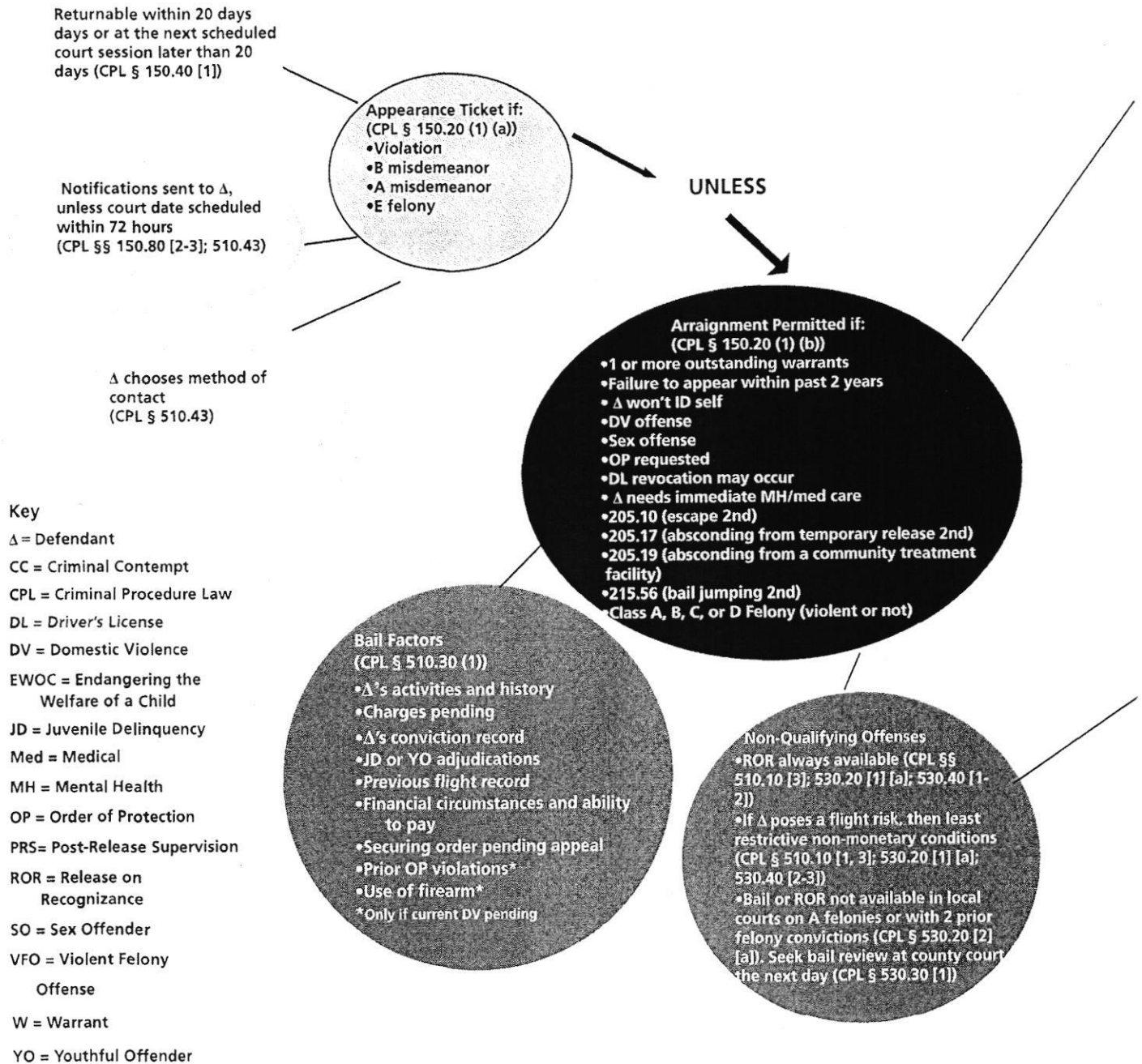
Working with the New Bail Statutes

By Leah R. Nowotarski

UPDATE TO THE CHART PREVIOUSLY PUBLISHED IN JANUARY 2020 TO REFLECT RECENT STATUTORY CHANGES IN BAIL. This flow chart is a simple, visual, and graphical description of the new bail statutes that will start on July 3, 2020. The Criminal Justice Section hopes that it will assist law enforcement, attorneys, and judges during arrest and arraignment. It is intended to help those parties incorporate the new changes in bail quicker and easier by consulting the chart whenever needed. The Section encourages those parties to review the new statutes to enhance their individual knowledge and experience. Spe-

cial thanks goes out to the invaluable assistance from Andrew Kossover, criminal defense attorney and former public defender, Ulster County.

LEAH R. NOWOTARSKI is an Assistant Public Defender in the office of the Wyoming County Public Defender and Secretary of the Criminal Justice Section.



**Qualifying Offenses for Bail
(CPL § 510.10 (4)) [LINK]**

One form must be unsecured or partially secured surety bond (CPL § 520.10 [b])

Monetary bail and remand allowed (CPL §§ 510.10 [4]; 530.20 [1] [b]; 530.40 [4])

3 forms of bail required (CPL § 520.10 [b])

ROR still available (CPL §§ 510.10 [4]; 530.20 [1] [b]; 530.40 [4])

GPS only for felonies and specified misdemeanors. Court's reasoning must be on record or in writing (CPL § 510.10 [1]). Reviewable and renewable every 60 days (CPL § 530.40 [4] [d]).

Imposed pursuant to particular defendant, case, and defendant's circumstances/situation

May be imposed singularly or in combination

Least Restrictive Non-monetary Conditions (CPL § 500.10 (3)(a)):

1. Pretrial services and/or supervision
2. Travel restrictions
3. Passport surrender
4. Refrain from firearm, destructive device, or weapon possession
5. Restrictions on associations (with victims, witnesses, or co-defendants)
6. Program placement (counseling, treatment, DV intervention, hospital under MHL § 9.43)
7. Maintain employment, housing, school, education
8. Obey OP
9. GPS monitoring

Practice Tips

- 510.50 (2) = anytime judge issues W, 48-hour stay to allow defendant to appear
- 170.70 and 180.80 apply, GPS = in custody
- 510.45(3)(a) = risk assessment instrument used for ROR purposes must be made available promptly upon written request
- Court may always set monetary bail upon Δ's request in any situation (CPL §§ 510.10 [5]; 530.20 [1][d]; 530.40 [5])

- 70.80 Sex Offense Felony
- 105.15 Conspiracy 2nd (to commit 125 A Felony)
- 120.00 Assault 3rd (charged as a hate crime under 485.05)
- 120.04 Vehicular Assault 1st
- 120.04-a Aggravated Vehicular Assault
- 120.12 Aggravated Assault
- 120.70 Luring a Child
- 121.11 Criminal Obstruction of Breathing (committed against member of Δ's same family or household under 530.11)
- 121.12 Strangulation 2nd (committed against member of Δ's same family or household under 530.11)
- 130 Sex Offense Misdemeanor
- 135.10 Unlawful Imprisonment 1st (committed against member of Δ's same family or household under 530.11)
- 140.25 (2) Burglary 2nd (only where the Δ is charged with entering the living area of the dwelling)
- 150.10 Arson 3rd (charged as a hate crime under 485.05)
- 155.42 Grand Larceny 1st
- 168-1 Failure to Register (where Δ is Level 3 SO and must register)
- 205.05 Escape
- 205.10 Escape
- 205.15 Escape
- 215.11 Witness Tampering
- 215.12 Witness Tampering
- 215.13 Witness Tampering
- 215.15 Witness Intimidation
- 215.50 (3): Criminal Contempt 2nd (underlying charge is that Δ violated duly served OP where protected party is a member of Δ's same family or household as defined by CPL 530.11)
- 215.51 (b), (c) or (d): Criminal Contempt 1st (underlying charge is that Δ violated duly served OP where protective party is member of Δ's same family or household as defined in CPL 530.11)
- 215.52 Aggravated Criminal Contempt (underlying charge is that Δ violated duly served OP where protected party is member of Δ's same family or household as defined in CPL 530.11)
- 215.55 Ball Jumping
- 215.56 Ball Jumping
- 215.57 Ball Jumping
- 230.34 Sex Trafficking
- 230.34-a Sex Trafficking
- 255.25 Incest
- 255.26 Incest
- 255.27 Incest
- 260.10 EWOC (where Δ is Level 3 SO and must register)
- 263.05 Use of a Child in Sexual Performance
- 263.10 Promoting an Obscene Sexual Performance by a Child
- 263.15 Promoting a Sexual Performance by a Child
- 263.30 Facilitating Sexual Performance by a Child
- 265.01-a CPW on School Grounds
- 460.20 Enterprise Corruption
- 470.20 Money Laundering 1st
- 470.21 Money Laundering Terror 4th
- 470.22 Money Laundering Terror 3rd
- 470.23 Money Laundering Terror 2nd
- 470.24 Money Laundering Terror 1st
- 490 Terrorism (excludes 490.20)
- Any felony committed while on probation or PRS
- A felony for which the Δ qualifies for persistent felony offender sentencing
- Any felony or Class A misdemeanor involving harm to identifiable person or property while Δ is otherwise released
- Any VFO (excludes 160.10 Robbery 2nd)
- Any crime that allegedly causes the death of another person
- Any Class A Felony (only A-1 felonies under 220, though)



< Previous

Next >

NY CLS CPL § 510.10

Copy Citation

Current through 2021 released Chapters 1-633

New York Consolidated Laws Service **Criminal Procedure Law (Pts. ONE — THREE)** **Part THREE Special Proceedings and Miscellaneous Procedures (Titles P — U)** **Title P Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants and Witnesses Under Control of Court—Recognizance, Bail and Commitment (Arts. 500 — 540)** **Article 510 Recognizance, Bail and Commitment—Determination of Application for Recognizance or Bail, Issuance of Securing Orders, and Related Matters (§§ 510.10 — 510.50)**

§ 510.10. Securing order; when required; alternatives available; standard to be applied.

1. When a principal, whose future court attendance at a criminal action or proceeding is or may be required, comes under the control of a court, such court shall, in accordance with this title, by a securing order release the principal on the principal's own recognizance, release the principal under non-monetary conditions, or, where authorized, fix bail or commit the principal to the custody of the sheriff. In all such cases, except where another type of securing order is shown to be required by law, the court shall release the principal pending trial on the principal's own recognizance, unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution. If such a finding is made, the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court. The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing.

2. A principal is entitled to representation by counsel under this chapter in preparing an application for release, when a securing order is being considered and when a securing order is being reviewed for modification, revocation or termination. If the principal is financially unable to obtain counsel, counsel shall be assigned to the principal.

3. In cases other than as described in subdivision four of this section the court shall release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's return to court. The court shall explain its choice of alternative and conditions on the record or in writing.

4. Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff. A principal stands charged with a qualifying offense for the purposes of this subdivision when he or she stands charged with:

(a) a felony enumerated in section 70.02 of the penal law, other than robbery in the second degree as defined in subdivision one of section 160.10 of the penal law, provided, however, that burglary in the second degree as defined in subdivision two of section 140.25 of the penal law shall be a qualifying offense only where the defendant is charged with entering the living area of the dwelling;

(b) a crime involving witness intimidation under section 215.15 of the penal law;

(c) a crime involving witness tampering under section 215.11, 215.12 or 215.13 of the penal law;

(d) a class A felony defined in the penal law, provided that for class A felonies under article two hundred twenty of the penal law, only class A-I felonies shall be a qualifying offense;

(e) a sex trafficking offense defined in section 230.34 or 230.34-a of the penal law, or a felony sex offense defined in section 70.80 of the penal law, or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law;





penal law,

(g) money laundering in support of terrorism in the first degree as defined in [section 470.24 of the penal law](#); money laundering in support of terrorism in the second degree as defined in [section 470.23 of the penal law](#); money laundering in support of terrorism in the third degree as defined in [section 470.22 of the penal law](#); money laundering in support of terrorism in the fourth degree as defined in [section 470.21 of the penal law](#); or a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law;

(h) criminal contempt in the second degree as defined in subdivision three of [section 215.50 of the penal law](#), criminal contempt in the first degree as defined in subdivision (b), (c) or (d) of [section 215.51 of the penal law](#) or aggravated criminal contempt as defined in [section 215.52 of the penal law](#), and the underlying allegation of such charge of criminal contempt in the second degree, criminal contempt in the first degree or aggravated criminal contempt is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this title;

(i) facilitating a sexual performance by a child with a controlled substance or alcohol as defined in [section 263.30 of the penal law](#), use of a child in a sexual performance as defined in [section 263.05 of the penal law](#) or luring a child as defined in subdivision one of [section 120.70 of the penal law](#), promoting an obscene sexual performance by a child as defined in [section 263.10 of the penal law](#) or promoting a sexual performance by a child as defined in [section 263.15 of the penal law](#);

(j) any crime that is alleged to have caused the death of another person;

(k) criminal obstruction of breathing or blood circulation as defined in [section 121.11 of the penal law](#), strangulation in the second degree as defined in [section 121.12 of the penal law](#) or unlawful imprisonment in the first degree as defined in [section 135.10 of the penal law](#), and is alleged to have committed the offense against a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this title;

(l) aggravated vehicular assault as defined in [section 120.04-a of the penal law](#) or vehicular assault in the first degree as defined in [section 120.04 of the penal law](#);

(m) assault in the third degree as defined in [section 120.00 of the penal law](#) or arson in the third degree as defined in [section 150.10 of the penal law](#), when such crime is charged as a hate crime as defined in [section 485.05 of the penal law](#);

(n) aggravated assault upon a person less than eleven years old as defined in [section 120.12 of the penal law](#) or criminal possession of a weapon on school grounds as defined in [section 265.01-a of the penal law](#);

(o) grand larceny in the first degree as defined in [section 155.42 of the penal law](#), enterprise corruption as defined in [section 460.20 of the penal law](#), or money laundering in the first degree as defined in [section 470.20 of the penal law](#);

(p) failure to register as a sex offender pursuant to [section one hundred sixty-eight-t of the correction law](#) or endangering the welfare of a child as defined in subdivision one of [section 260.10 of the penal law](#), where the defendant is required to maintain registration under article six-C of the correction law and designated a level three offender pursuant to subdivision six of [section one hundred sixty-eight-l of the correction law](#);

(q) a crime involving bail jumping under section 215.55, 215.56 or 215.57 of the penal law, or a crime involving escaping from custody under section 205.05, 205.10 or 205.15 of the penal law;

(r) any felony offense committed by the principal while serving a sentence of probation or while released to post release supervision;

(s) a felony, where the defendant qualifies for sentencing on such charge as a persistent felony offender pursuant to [section 70.10 of the penal law](#); or

(t) any felony or class A misdemeanor involving harm to an identifiable person or property, where such charge arose from conduct occurring while the defendant was released on his or her own recognizance or released under conditions for a separate felony or class A misdemeanor involving harm to an identifiable person or property, provided, however, that the prosecutor must show reasonable cause to believe that the defendant committed the instant crime and any underlying crime. For the purposes of this subparagraph, any of the underlying crimes need not be a qualifying offense as defined in this subdivision.

5. Notwithstanding the provisions of subdivisions three and four of this section, with respect to any charge for which bail or remand is not ordered, and for which the court would not or could not otherwise require bail or remand, a defendant may, at any time, request that the court set bail in a nominal amount requested by the defendant in the form specified in paragraph (a) of subdivision one of section 520.10 of this title; if the court is satisfied that the request is voluntary, the court shall set such bail in such amount.

6. When a securing order is revoked or otherwise terminated in the course of an uncompleted action or proceeding but the principal's future court attendance still is or may be required and the principal is still under the control of a court, a new securing order must be issued. When the court revokes or otherwise terminates a securing order which committed the principal to the custody of the sheriff, the court shall give written notification to the sheriff of such revocation or termination of the securing order.



MAJOR TAKEAWAYS:

- NOT A COMPLETE OVERHAUL OF LAST YEAR'S REFORMS
 - MONEY BAIL REMAINS
- MORE QUALIFYING OFFENSES
- MORE NON-MONETARY CONDITIONS
- DATA REPORTING REQUIREMENTS FOR OCA AND DCJS

ADDITIONAL QUALIFYING OFFENSES

- BURGLARY 2ND, IN LIVING AREA
- HATE CRIMES
- MISDEMEANOR ASSAULT
- ARSON 3RD
- DOMESTIC VIOLENCE
- CRIMINAL OBSTRUCTION OF BREATHING
- UNLAWFUL IMPRISONMENT 1ST
- ANY CRIME RESULTING IN DEATH
- LEVEL 3 REGISTERED SEX OFFENDERS
- ENDANGERING THE WELFARE OF A CHILD
- FAILURE TO REGISTER AS A SEX OFFENDER

NON-VIOLENT FELONIES

BAIL JUMPING AND ESCAPE

AGG'D ASSAULT UPON A PERSON
LESS THAN 11 YEARS OLD

CRIM. POSS OF A CONTROLLED
SUBSTANCE 1ST DEGREE

AGG'D & VEHICULAR ASSAULT 1ST

CRIM. SALE OF A CONTROLLED
SUBSTANCE

CRIM. POSSESSION OF A WEAPON
ON SCHOOL GROUNDS

MONEY LAUNDERING 1ST

GRAND LARCENY 1ST

MONEY LAUNDERING IN SUPPORT OF
TERRORISM 3RD AND 4TH

ENTERPRISE CORRUPTION

SEX TRAFFICKING (NON-VIOLENT
SUBSECTIONS)

BROAD CATEGORIES

- ANY **FELONY** OFFENSE COMMITTED WHILE ON PROBATION OR PAROLE RELEASE SUPERVISION
- ANY **FELONY** OFFENSE WHERE THE DEFENDANT WOULD QUALIFY AS A PERSISTENT FELONY OFFENDER IF SENTENCED ON THE INSTANT CHARGE
- ANY **FELONY** OR **A MISDEMEANOR** INVOLVING HARM TO AN IDENTIFIABLE PERSON OR PROPERTY, THAT OCCURRED WHILE RELEASED ON A FELONY OR A MISDEMEANOR INVOLVING HARM TO AN IDENTIFIABLE PERSON OR PROPERTY
- CONVICTED, BUT PRE-SENTENCE POPULATION

ADDITIONAL NON-MONETARY CONDITIONS

- REFRAINING FROM ASSOCIATION WITH CERTAIN VICTIMS, CRIMES OR CO-DEFENDANTS INVOLVED IN THE INSTANT CASE
- MANDATORY PROGRAMMING THROUGH A PRETRIAL SERVICES AGENCIES
- HOSPITALIZATION PURSUANT TO MENTAL HEALTH AND HYGIENE LAW § 9.43
- EMPLOYMENT, SCHOOLING, EDUCATION PROGRAMMING, HOUSING
- OBEYING AN ORDER OF PROTECTION, INCLUDING FOR FAMILY OFFENSES
- FOR DOMESTIC VIOLENCE OFFENSES, CONDITIONS TO ADDRESS VICTIM SAFETY, INCLUDING CONDITIONS REQUESTED BY OR ON BEHALF OF THE VICTIM

DATA TRACKING AND PUBLIC REPORTING

- CHIEF ADMINISTRATOR OF THE COURTS & DIVISION OF CRIMINAL JUSTICE SERVICES
- RACIAL AND ETHNIC BACKGROUND
- # OF PEOPLE IN DETENTION, PRETRIAL SERVICES, NON-MONETARY CONDITIONS.
- TIMELINE

Impact of the Original and Amended Reforms on Bail Decision-Making in New York City

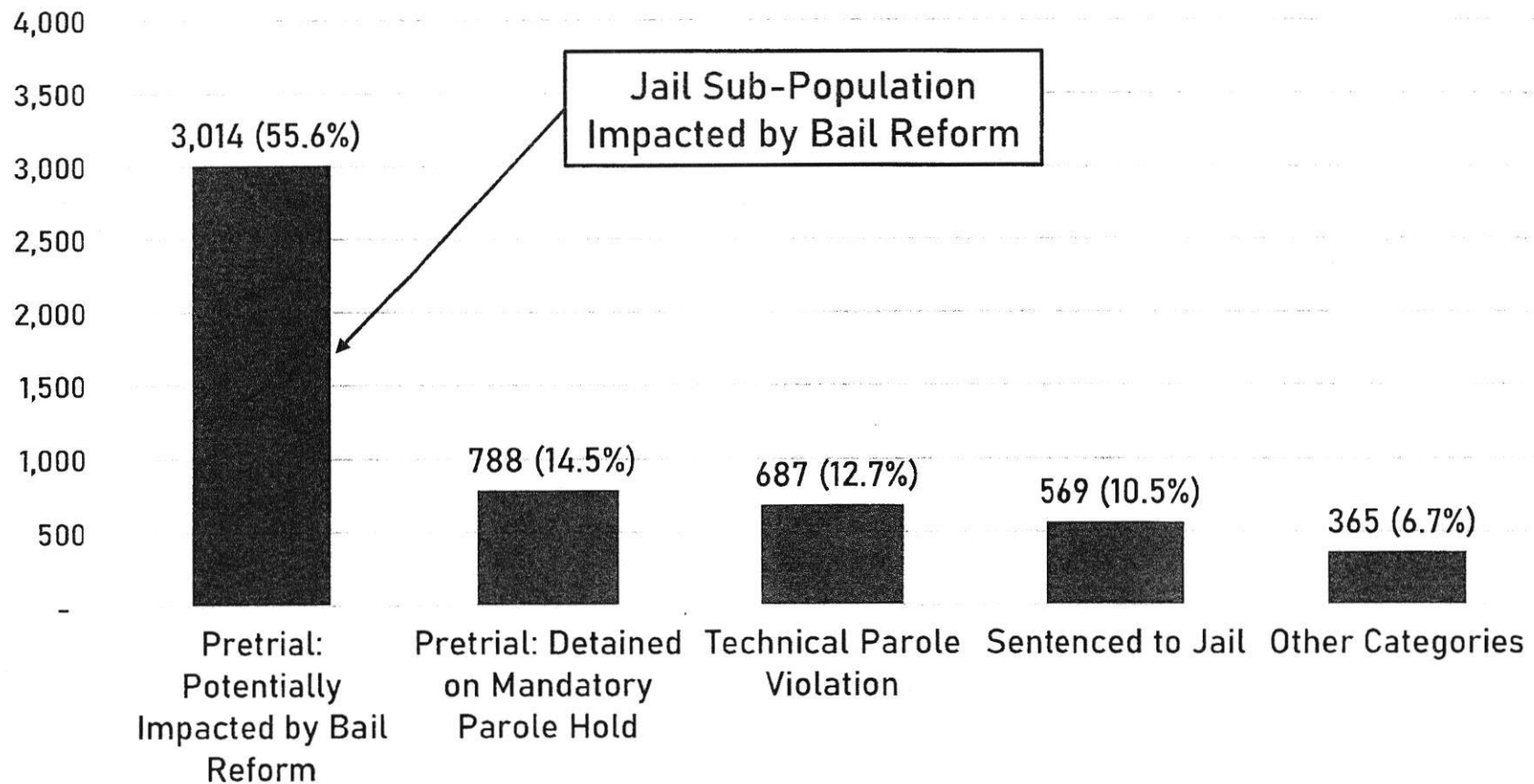
Impact of Bail Reform on Exposure to Bail and Detention: NYC Cases Arraigned in 2019

2019 NYC Criminal Arraignments	Misdemeanor	Nonviolent Felony	Violent Felony	Total
Total Cases Arraigned	128,453	22,760	15,730	166,943
Bailable Under Original Reform	4,382 3.4%	1,789 7.9%	14,030 89.2%	20,201 12.1%
Bailable Under Amended Reform	5,023 3.9%	2,939 12.9%	15,260 97.0%	23,222 13.9%
Bail or Remand Ordered	6,594	7,488	9,365	23,447
Bailable Under Original Reform	924 14.0%	1,135 15.2%	8,398 89.7%	10,457 44.6%
Bailable Under Amended Reform	1,040 15.8%	1,870 25.0%	9,141 97.6%	12,051 51.4%

Source: New York State Office of Court Administration (data analyzed by the Center for Court Innovation).

The NYC Jail Population: March 5, 2020 (Pre-COVID-19)

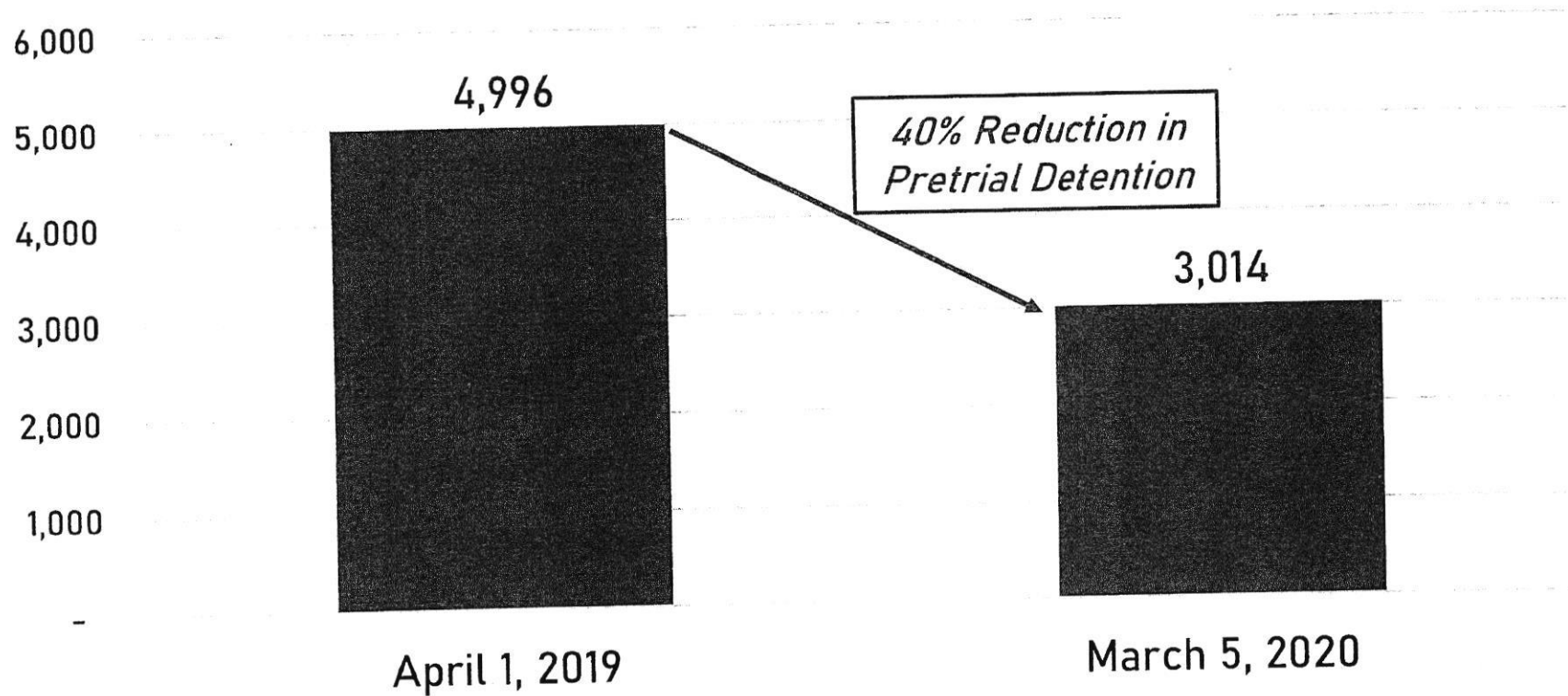
NYC Jail Population on March 5, 2020: Total = 5,423



Source: New York City Department of Correction data via NYC Open Data (analysis by the Center for Court Innovation).

Impact of the Original Reform on the Pretrial Jail Population: 40% Reduction NYC & ~45% Non-NYC

TOTAL Jail Population, April 1, 2019 v. March 5, 2020: 7,822 v. 5,423
PRETRIAL Jail Population, April 1, 2019 v. March 5, 2020 = 4,996 v. 3,014



Source: New York City Department of Correction data via NYC Open Data (analysis by the Center for Court Innovation).

Impact of the 2020 Amendments in NYC: Increase of ~12-14% (~358-~429) to March 5 Jail Population

Added Bailable Charges or Situations	Addition to Jail Population
Burglary 2° (PL 140.25(2))	35 to 106
Possession or Sale of Controlled Substance 1° (PL 220.21, 220.43)	143
Sex Trafficking (PL 230.34, 34-a)	4
Crime Causing Death (PL 125.10 to 125.27)	7
Grand Larceny 1° (PL 155.42)	6
Failure to Register as Sex Offender (Corr. 168-t)	3
Bail Jumping (PL 215.55, 215.56, 215.57)	2
Child Offense (PL 263.10)	1
Enterprise Corruption or Money Laundering 1° (PL 460.20, 470.20)	5
Felony While on Probation	39
Persistent Felony Offender if Sentenced on Current Case	13
Current & Open Case with Harm to Person or Property	68
Convicted of Non-Bailable Offense (Pre-Sentence)	32

Major Unknowns

- ▶ Burglary in the Second Degree (PL 140(2)): Percent in living area?
- ▶ Validity of Current Detention on Bail-Ineligible Charges: Detained on valid warrants or other holds? (Compared to October 16, 2019, on March 5, 2020, there were 36% as many people held on bailable charges under the amended law that were bail-ineligible under the original.)
- ▶ Underlying Charges: Detention on PL 121.11 when not the top charge?
- ▶ Persistent Felony Offender: Arraignment courts able to determine this status? Possible to accurately determine this through available data?
- ▶ Harm to Person or Property: Interpretation of this vague provision?
- ▶ Culture Change: Growing shift in judicial practices toward release?
- ▶ Non-Monetary Conditions: Decrease in bail stemming specifically from greater non-monetary condition options under the amendments?

2021 WL 2582799
Supreme Court, Appellate Division,
First Department, New York.

In the Matter of Shamika
CRAWFORD, Petitioner–Appellant,
v.
Honorable Shahabuddeen ALLY, etc.,
et al., Respondents–Respondents.
Lambda Legal Defense and Education Fund,
Inc., New York City Gay and Lesbian Anti-
Violence Project, the Sylvia Rivera Law Project,
Transgender Law Center, Brooklyn Defender
Services, the Legal Aid Society and Neighborhood
Defender Service of Harlem, Amici Curiae.

Appeal No. 13911
|
[M-1224 & M-1403]
|
Index No. 260054/20
|
Case No. 2020-04520
|
ENTERED June 24, 2021

Petitioner appeals from the order and judgment (one paper), of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 16, 2020, which denied as moot the petition seeking a writ of mandamus to compel respondent Criminal Court Judge to hold an evidentiary hearing concerning the appropriateness and scope of a temporary order of protection, and dismissed as moot this proceeding brought pursuant to CPLR article 78.

Attorneys and Law Firms

Covington & Burling LLP, New York (David L. Kornblau and Shira Poliak of counsel), for appellant.

Letitia James, Attorney General, New York (Blair J. Greenwald and Steven C. Wu of counsel), for Hon. Shahabuddeen Ally, respondent.

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen and Peter D. Coddington of counsel), for Darcel D. Clark, respondent.

Lambda Legal Defense and Education Fund Inc., New York (Richard Saenz and Ethan Rice of counsel), for Lambda Legal Defense and Education Fund, Inc., New York City Gay and Lesbian Anti–Violence Project, The Sylvia Rivera Law Project, Transgender Law Center, amici curiae.

Brooklyn Defender Services, Brooklyn (S. Lucas Marquez, Jessica Nitsche, Matthew Robinson and Jeffrey Blank of counsel), The Legal Aid Society, New York (Justine Luongo and Corey Stoughton of counsel), and Neighborhood Defender Service of Harlem, New York (Meghna Philip and Avinash Samarth of counsel), for Brooklyn Defender Services, The Legal Aid Society and Neighborhood Defender Service of Harlem, amici curiae.

Dianne T. Renwick, J.P., Troy K. Webber, Lizbeth González, Saliann Scarpulla, JJ.

Opinion

WEBBER, J.

*1 We are asked to decide whether Supreme Court properly denied as moot the petition for a writ of mandamus to compel respondent Criminal Court Judge to hold an evidentiary hearing concerning the appropriateness and scope of a temporary order of protection (TOP) and dismissed the proceeding as moot. The parties agree that this proceeding is moot, since the TOP in the underlying criminal proceeding was renewed without the condition that petitioner stay away from the complainant's home, as petitioner had sought, and the charges against petitioner were dismissed while the proceeding was pending in Supreme Court. They disagree as to whether the proceeding presents an exception to the mootness doctrine which would allow us nevertheless to rule on the petition. We find that the mootness exception applies here and accordingly, we reverse to the extent of declaring that the court should have held an evidentiary hearing.

On November 3, 2019, petitioner was arrested on a criminal complaint charging her with third-degree assault, petit larceny, obstruction of breathing or blood circulation, and second-degree harassment, based on sworn allegations by her partner, nonparty Keivian Mayers (Mayers), that she and two men assaulted him. This incident allegedly occurred inside 1232 Clay Avenue, Apt. 4B, Bronx, New York.

At petitioner's arraignment in Criminal Court, the People consented to petitioner's release but requested a TOP. The court issued a TOP prohibiting petitioner from contacting

Mayers and granted petitioner's request that it be "subject to [F]amily [C]ourt modification," but denied her request to issue a "limited" TOP. The TOP itself, effective until November 8, 2019, prohibited petitioner from entering Mayers's home, listed as the address where the alleged incident occurred, except to retrieve personal items the following day.

During argument, petitioner's counsel stated that the address listed on the TOP was petitioner's apartment, that she was the lessee of the residence, and that she resided there with her young children, for whom she was the primary caregiver. Counsel argued that barring her from the residence would result in barring the children as well. The People stated that there was no indication in their file that a limited TOP was "necessary or appropriate." The court declined to issue a limited TOP "without the People's consent," but stated that it would adjourn the case for an earlier date, "for that issue to be investigated." The case was adjourned to November 8, 2019.

On November 8, 2019, petitioner appeared in Criminal Court. The People asked that the TOP "remain full, considering the nature of the charges" and Mayers's visible physical injuries when he was interviewed on the date of petitioner's arrest. The Assistant District Attorney stated that it was his understanding that both petitioner and Mayers resided in the apartment. Apparently, this was based upon the information listed on approximately 17 prior domestic incident reports (DIRs) filed by petitioner against Mayers. There was no further inquiry as to the DIRs.

*2 Petitioner renewed her request for a limited TOP, noting that Mayers was residing in petitioner's home and that the effect of the order was to separate her from her two children. Counsel asserted that the lease allowed only petitioner, her brother, and her two children to live in the apartment. Counsel stated that Mayers refused to leave the residence and that the TOP created the risk of petitioner's losing the apartment.

The court denied petitioner's request for a modification to a limited TOP, noting that there was still a "remedy to see the children" and as to "gaining access to the home." Counsel then requested a short date in order to conduct a due process hearing to require the People to show that the TOP was actually needed, based on what counsel referred to as the property interest and family interest at stake. In reply, the court stated that it was "hearing ... the issues [now]." The court further stated that unless petitioner was prepared to present additional information as to the issuance of the TOP,

it would remain in effect. The case was then adjourned to December 20, 2019 with the full TOP in effect until that date.

On November 20, 2019, petitioner again moved the Criminal Court for a modification of the TOP. Petitioner attached a lease addendum and family composition, listing only herself, her brother, and her two children as authorized occupants of her New York City Housing Authority (N.Y.CHA) unit. The People opposed the motion, arguing that the issue had already been litigated, that petitioner already had an opportunity to make her arguments sufficient to satisfy due process, and, finally, that the Criminal Court was the least appropriate forum for resolving claims to a particular residence, since Mayers was not a party and as such did not have a meaningful opportunity to respond. The court denied the motion, finding there was "no change of circumstances." A new TOP was issued effective until January 30, 2020.

On January 22, 2020, petitioner sought "a writ of mandamus directing the Bronx Criminal Court to hold an evidentiary hearing concerning the appropriateness and scope of the [TOP]" issued in her criminal case.

At a proceeding on January 30, 2020, another Criminal Court judge presiding over the case modified the TOP. In doing so, the court reviewed the evidence presented, including the fact that while no prior order of protection had been issued against petitioner, there had been many prior incidents of abuse against petitioner by Mayers. The court also apparently reviewed the photographs of Mayers's injuries and noted that while they depicted injuries, there was "nothing of any specificity indicating that [petitioner] was in fact responsible for those injuries."

The court further stated that the record made that day indicated that Mayers had previously threatened petitioner and that he had an alcohol intoxication issue. The court concluded by stating that under CPL 530.12(1)(a), "it would not be appropriate to require [petitioner] to stay away from the home, school, business, or place of employment of the individual whom she has children in common with." However, the court found it appropriate to issue an order of protection requiring petitioner to "refrain from any act that would create an unreasonable risk to the health, safety, and welfare of any family member and in particular, that she is not to engage[] in any family offences [sic] against the complainant."

*3 The case was then adjourned to March 5, 2020. On that date, upon the application of the People, the case was dismissed. Based upon that dismissal, Supreme Court dismissed the petition for a writ of mandamus as moot.

We find that the Criminal Court's initial failure to hold an evidentiary hearing in accordance with petitioner's due process rights after being informed that petitioner might suffer the deprivation of a significant liberty or property interest upon issuance of the TOP falls within the exception to the mootness doctrine: "(1)[there is] a likelihood of repetition, either between the parties or among other members of the public; (2) [it involves] a phenomenon typically evading review; and (3) [there is] a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (*Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714–715 [1980]).

Although the issue is not likely to recur with respect to petitioner, the parties are in agreement that the issue is likely to recur "among other members of the public." As was stated by the Criminal Court judge who ultimately issued the limited TOP, "it is [the Bronx Criminal] [C]ourt's practice not to conduct a hearing" when a defendant challenges the prosecution's application for a TOP. The District Attorney's Office conceded that temporary orders of protection are "regularly" issued in domestic abuse cases in the Bronx, and Supreme Court in its decision stated that "similar circumstances may arise in another proceeding by someone else in the general public." The correct standard is whether the issue "typically"—not "necessarily"—evades review (*see Hearst Corp.*, 50 N.Y.2d at 715).

As to the second prong, pretrial temporary orders of protection typically last for only a short duration between court appearances, often for one or two months. This short duration between appearances results in little or "no opportunity to litigate a challenge to any one such order while it is still in effect" (*People v. Forman*, 145 Misc.2d 115, 122 [Crim Ct, N.Y. County 1989]). Thus, the temporary nature of short-term orders of protection serves in many ways to insulate them from legal challenge.

As to a showing of substantial and novel issues, the Court of Appeals has indicated that, if the issue is substantial, novelty is not a requirement of the mootness exception (*see People ex rel. McManus v. Horn*, 18 NY3d 660, 663–664 [2012]; *City of New York v. Maul*, 14 NY3d 499, 507 [2010]). The

impact of being barred from one's home, even temporarily, can be far-reaching; notably, petitioner faces the potential loss of specialized public housing. Depriving a person of her valuable property right in a lease or tenancy interest by issuing a Criminal Court order of protection triggers the due process requirement (*see People v. Forman*, 145 Misc.2d at 125–130). Moreover, in addition to the potential loss of her NYCHA apartment, petitioner was barred from access to her children for nearly three months.

The present circumstances are similar to those in *Matter of F.W. (Monroe W.)* (183 AD3d 276 [1st Dept 2020]), where a father appealed, on due process grounds, the Bronx Family Court's delay in holding an evidentiary hearing regarding the removal of his children from his care based on alleged parental neglect, and before the appeal was decided, the father prevailed at the evidentiary hearing, and the Family Court completed the neglect proceeding in its entirety, mooting the appeal. This Court found that the mootness exception applied, and reached the merits of the appeal. We held that the Family Court's delay in holding an expedited evidentiary hearing interfered with the father's fundamental liberty interest in the care, custody, and control of his children and violated due process in protecting that interest (183 AD3d at 281).

*4 In sum, while this proceeding is moot as to petitioner, it falls within the exception to the mootness doctrine because it implicates substantial issues that will likely recur elsewhere and that typically evade review, and we hold that the Criminal Court should have held a hearing.

In order to issue a TOP, and thereby deprive a defendant of significant liberty and property interests, there must be an articulated reasonable basis for its issuance. While consideration of whether the defendant poses a "danger of intimidation or injury" to the complainant (*see People v. Forman*, 145 Misc.2d at 125) is one factor, there are other factors that should be considered as well. The Criminal Procedure Law enumerates a non-exhaustive list of factors that a court "shall consider" when determining whether to order the defendant in a family offense case "to stay away from the home, school, business or place of employment of the family or household member or of any designated witness" (CPL 530.12[1][a]). Under this statute, the court must consider "whether the temporary order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, past or present injury, threats, drug or

alcohol abuse, and access to weapons.” Indeed, in the instant case, in the January 2020 proceeding, after being apprised of all of the relevant information, including the filing of 17 prior DIRs that alleged domestic violence against petitioner by Mayers, the Criminal Court articulated a reasoned basis for issuing a “limited” TOP, based in part on CPL 530.12.

This Court need not articulate the precise form of the evidentiary hearing required. At a minimum, however, when the defendant presents the court with information showing that there may be an immediate and significant deprivation of a substantial personal or property interest upon issuance of the TOP, the Criminal Court should conduct a prompt evidentiary hearing on notice to all parties and in a manner that enables the judge to ascertain the facts necessary to decide whether or not the TOP should be issued (*see Matter of Lopez v. Fischer*, 2009 N.Y. Slip Op. 32859(U), *4 [Sup Ct, Nassau County 2009]; *cf. Krimstock v. Kelly*, 306 F3d 40, 69 [2d Cir2002]).

Accordingly, the order and judgment (one paper), of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 16, 2020, which denied

as moot the petition seeking a writ of mandamus to compel respondent Criminal Court Judge to hold an evidentiary hearing concerning the appropriateness and scope of a temporary order of protection, and dismissed as moot this proceeding brought pursuant to CPLR article 78, should be reversed, on the law, without costs, to the extent of declaring that the petition should have been granted.

All concur.

*5 Order and judgment (one paper), Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 16, 2020, reversed, on the law, without costs, to the extent of declaring that the petition should have been granted.

Motions to file amicus curiae briefs granted, and the briefs deemed filed.

All Citations

--- N.Y.S.3d ----, 2021 WL 2582799, 2021 N.Y. Slip Op. 04082

Not more than one hundred and twenty (120) hours from the issuance of this order, the defendant may appear at the residence (and in the presence) of the complainant in order to retrieve personal belongings and effects. Such appearance in presence of the complainant will not violate the stay-away stipulations of this order provided of the following conditions is met:

1. Prior to coming into the presence of the complainant, the defendant shall contact the Police Department having jurisdiction in order to make arrangements for the police to be present with him/her during the retrieval of the property.
2. The defendant shall remove only such personal belongings as is appropriate. In the event of conflicting views regarding the removal of property, said property shall remain with the complainant; in such cases, the defendant shall be referred to the appropriate court for redress.
3. The defendant shall remain in the presence of the complainant only for such time as is reasonable to collect his/her personal property.

Note: The Police Department responsible for carrying out the provisions of this order shall be the agency which has jurisdiction over the place the retrieval of property is to occur. The purpose of the police presence is to preserve order and ensure the safety of the individuals involved.

ARRAIGNMENT SCENERIOS FOR PANEL DISCUSSION

ARRAIGNMENT FACTS FOR CASE ONE

Defendant is charged with Assault in the Third Degree (PL 120.00(1)), a Class A Misdemeanor

The allegation is that defendant had an argument with his neighbor and then punched the neighbor in the face causing a cut to his lip and swelling and bruising to his right cheek. The incident was alleged to have occurred in Nassau County.

Criminal History: Defendant has a prior misdemeanor drug possession conviction (PL 220.03) from 2018.

Defendant also has a pending felony Criminal Mischief in the Third-Degree charge (PL 145.05(2)) in Nassau County in which it is alleged that defendant hit his girlfriend's car with a bat causing damage to the car in excess of \$ 1000. Defendant was Released on his Own Recognizance (ROR) on that matter.

ARRAIGNMENT FACTS FOR CASE TWO

Defendant is charged with Criminal Possession of a Controlled Substance in the Third Degree (PL 220.16(1)) a Class B felony. The allegation is that defendant was in possession of a controlled substance with an intent to sell the controlled substance in Nassau County.

Defendant has no Criminal History.

ARRAIGNMENT FACTS FOR CASE THREE

Defendant is charged with Robbery in the First Degree (PL 160.15(1)). The allegation is that defendant pointed a gun at the complainant and then took the complainants wallet in Nassau County.

Criminal History: Defendant has a prior conviction for Criminal Sale of a Controlled Substance in the Third Degree (PL 220.39) in 2020. Defendant is currently on probation for that crime.

Defendant has an additional 3 misdemeanor convictions for Petit Larceny (PL 155.25) in 2019, 2018 and 2017.