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To Release or Not to Release

A primer on criminal bail reform and pretrial release.

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IN FEBRUARY 2021, THE ILLINOIS GENERAL ASSEMBLY ENACTED SWEEPING CHANGES to the state's criminal justice system.[1] The 764-page bill (now Public Act 101-0652), which has since been amended in part, addresses police conduct, bail reform, and pretrial release among other issues. Many prosecutors across the state opposed the changes in the bill while many defense attorneys embraced them.

The criminal reform bill changed words and phrases such as "bail" or "bond conditions" to "pretrial release" or "conditions of pretrial release." The most notable change was to create a presumption that a defendant is to be released before trial with pretrial conditions effectively eliminating cash bond. This presumption of a recognizance bond will now be mandatory instead of discretionary.

When someone is arrested

When someone is arrested and a charge has been filed, the defendant is brought before a judge. Whether in or out of custody, at the initial appearance in court, the judge informs the defendant of the charge against him including all rights and penalties, advises of the right to counsel, schedules a preliminary hearing if needed, and determines bail.

Under current law, criminal offenses are distinguished into either category A or category B offenses to determine whether pretrial-incarceration credit applies to one's cash bond.[2] A defendant may also be initially released on his own recognizance if the judge believes the defendant will appear in court, not pose a danger, and comply with the conditions of bond.[3] The discretion to release the defendant lies solely within the purview of the court. The court also reviews the defendant's criminal history and the history of his voluntary appearance in court to determine whether he will comply with bond conditions.[4]

1. See H.B. 3653 (2021).
2. 725 ILCS 5/102-7.1; *id.* § 102-7.2.
3. See *id.* § 110-2.
4. See *id.*

ISBA RESOURCES >>

- Darren O'Brien, Guide to Sentencing Hearings, Bond Hearings, and Pretrial Release in Illinois (ISBA Books) (Mar. 29, 2022), law.isba.org/3OxVYwo.
- Ed Finkel, *Will Big Reforms Lead to Better Justice?*, 109 Ill. B.J. 22 (May 2021), law.isba.org/3K54jEo.
- ISBA Free On-Demand CLE, *Criminal Justice and Police Reform in Illinois* (recorded Feb. 2021), law.isba.org/3eQn2Yg.

Under the new law effective January 2023, the requirement of posting monetary bail will be abolished as will the law distinguishing category A and B offenses.[5] It will be presumed that a defendant is entitled to a personal recognizance bond as long as the defendant attends all court appearances, does not commit any criminal offense, and complies with any other term of pretrial release.[6]

For petty, business, and traffic offenses, and for class B and C misdemeanor offenses, law enforcement officers will be required to issue a citation instead of conducting a custodial arrest.[7] However, the officer must determine that the defendant "pose[s] no obvious threat to the community or any person" and "ha[s] no obvious medical or mental health issues that pose a risk to their own safety."[8] Without additional instructions from the General Assembly, law enforcement officers will have broad discretion in interpreting what they deem is a threat or risk to anyone's safety.

If released by law enforcement, the defendant must be scheduled to appear in court within 21 days.[9] Even though police officers may be

5. See *id.* § 110-1.5.
6. See *id.* § 110-2(a).
7. See *id.* § 109-1(a-1).
8. *Id.* § 109-1(a-1).
9. See *id.*

TAKEAWAYS >>

- As of Jan. 1 2023, most criminal defendants will be entitled to pretrial release unless the court believes the defendant is unable to comply with bond conditions, poses a danger to specific people or the community, or is likely to flee.
- The 90-day speedy trial timeline will remain in effect, with delays still charged to the defendant.
- Cash bonds will be eliminated in Illinois as of 2023.
- Placing release conditions on, or detaining, a defendant will require a high burden of proof; though, certain offenses may trigger greater conditions or even detainment.

ATTORNEYS SHOULD NOTE THAT BY USING THE LANGUAGE "IMMEDIATELY," SECTION 110-6.1(C)(1) TRUMPS ANY LOCAL JURISDICTIONAL RULES REGARDING NOTICE TO PARTIES ON MOTION HEARINGS.

granted initial discretion to determine whether to take someone into custody, the presumption of a recognizance bond still remains.[10] The same rules apply to someone who is arrested on an outstanding warrant.[11] The state will have to file a motion to overcome the presumption of a recognizance bond in their petition to deny pretrial release, and even then, certain criteria will need to be met.

When can pretrial release be denied?

With monetary bail abolished, there are still circumstances when bail or pretrial release may be denied. If the state's attorney wishes to keep a defendant incarcerated, the state must first file a verified petition to deny pretrial release, stating the grounds for denial.[12] The burden of proof for a petition to deny pretrial release is on the state, which must show by clear and convincing evidence:

1) the "proof is evident or the presumption great" that a crime under section 110-6.1(a)(1) to (a)(6) was committed;
2) the defendant poses a "real and present threat" to specific persons by certain conduct, and if needed, include the identity of those person(s); and
3) no conditions of bond can "mitigate the … threat … or the defendant's willful flight."[13]

Subsection 110-6.1(a)'s language stating "the court … may deny a defendant pretrial release *only if* …"[14] suggests that a judge is required to grant pretrial release if these conditions are not met. Prosecutors will have an uphill battle to deny someone's release from jail due to this high burden of proof.[15]

In determining a defendant's level of "dangerousness" (a statutory term) for granting or denying pretrial release, the court may consider:

- the nature of the offense;
- history and characteristics of the defendant;
- identity of persons claimed to be threatened by the defendant;
- any statements of the defendant;
- the defendant's age and physical condition;
- age and physical condition of a victim;
- whether the defendant possesses or has access to weapons;
- whether the defendant was on pretrial release, parole, or the like; or
- any other factors.[16]

The state is allowed to file its petition to deny pretrial release without notice to the defendant prior to the first appearance before a judge, or provide "reasonable notice" to the defendant within 21 calendar days after arrest or if any conditions under 725 ILCS 5/110-6 apply. The court is required to "immediately hold a hearing on the petition" unless a continuance is requested.[17] Attorneys should note that by using the language "immediately," section 110-6.1(c)(1) trumps any local jurisdictional rules regarding notice to parties on motion hearings. If a continuance is requested, a hearing on the petition must be held within 48 hours of the defendant's first appearance if the charge is a class 3 or greater felony or within 24 hours for a class 4 felony or misdemeanor.[18] If a continuance is requested, the judge has authority to release the defendant prior to a hearing on the state's petition to deny pretrial release.[19]

Prior to the hearing on its petition to deny pretrial release, the state will be required to provide to the defendant or defense counsel: 1) copies of the defendant's criminal history; 2) any oral or written statements; and 3) any police reports upon which the state intends to rely.[20] The defendant will be entitled to counsel at this stage (as is already the case for bond hearings).[21]

Prosecutors will have little time to prepare for such a labor-intensive motion hearing with such a high evidentiary standard. They will be allowed to present evidence by proffer, which may alleviate some of the burden (although documentation must still be provided to the defendant beforehand).[22] At the hearing, the defendant may request to call the "complaining witness" to testify; the judge will have discretion to grant or deny that request.[23]

If the defendant is charged with a nonprobationable forcible felony, the state must *also* allege in its petition that the defendant's release "poses a specific, real and present threat to any person or the community."[24] The state may also petition for pretrial release to be denied for any offenses listed under any felony offense except certain class 4 felonies if the defendant has a "high likelihood of willful flight to avoid prosecution."[25] Pretrial release may be denied when a defendant is charged with an offense under section 110-6.1 of the Code of Criminal Procedure or when the defendant has a "high likelihood of willful flight" and after the court has held a hearing on that issue.[26] Crimes under section 110-6.1 include: nonprobationable forcible felonies, stalking, violating an order of protection, domestic battery, certain sex offenses under Article 11 of the Criminal Code, and various weapons-related and trafficking offenses under section 24 of the Criminal Code.[27]

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10. See *id.* § 110-4(a).
11. See *id.* § 109-1(a-3).
12. *Id.* § 110-6.1(d).
13. *Id.* § 110-6.1(e).
14. *Id.* § 110-6.1 (emphasis added).
15. "The clear and convincing standard requires proof greater than a preponderance, but not quite approaching the criminal standard of beyond a reasonable doubt." *In re D.T.*, 212 Ill. 2d 347, 362 (2004).
16. 725 ILCS 5/110-6.1(g).
17. *Id.* § 110-6.1(c)(1).
18. See *id.* § 110-6.1(c)(2).
19. *See id.*
20. See *id.* § 110-6.1(f)(1).
21. See *id.* § 110-6.1(f)(3).
22. See *id.* § 110-6.1(f)(2).
23. *Id.* § 110-6.1(f)(4).
24. *Id.* § 110-6.1(a)(1).
25. *Id.* § 110-6.1(a)(7).
26. *Id.* § 110-4.
27. See *id.* § 110-6.1.

If the judge grants the state's petition to deny pretrial release, the court must: 1) include in its order for detention a summary of the evidence and the court's reasoning; 2) direct that the defendant be placed into custody pending trial; 3) allow the defendant time to consult with an attorney or others by visitation, mail, or telephone; and 4) direct the local sheriff to bring the defendant to all court appearances.[28] Neither the court's finding regarding pretrial release nor any transcript or record of the proceeding is admissible at the defendant's trial except for purposes of impeachment.[29] Unlike at a preliminary hearing or later in a case, a defendant may *not* move to suppress evidence or a confession at a pretrial release hearing; however, the judge may consider such an argument in assessing the weight of the evidence.[30]

So, what will happen to motions to reduce bond? Since cash bail will be gone, there will be no need to file motions to reduce bond. Presumably, though, defendants could file motions to reconsider orders denying pretrial release or may even appeal an order denying pretrial release, as is current law, for defendants being held without bond.[31] If the state's motion to deny pretrial release is denied, then the state also has statutory authority to appeal the judge's order.[32]

With the growing popularity of remote court, be aware that a defendant must appear in person for a hearing on the state's motion to deny pretrial release unless appearing in person endangers the defendant's physical health and safety or if the defendant waives the right to an in-person hearing.[33]

What will be the conditions of pretrial release?

In determining conditions of pretrial release, the court will look at various factors contained in section 110-5. When the charge involves a violent crime against a family or household member, the court will review factors contained in section 110-5.1 of the Code of Criminal Procedure.[34] Conditions of pretrial release may also be modified on the court's own motion or by motion of the state or the defendant.[35]

In deciding release conditions, the court must consider what will ensure the defendant's compliance with pretrial conditions, his presence in court, and the public's safety.[36] The judge must take into account: 1) the nature of the offense; 2) weight of the evidence; 3) the history and characteristics of the defendant; 4) the potential threat to an alleged or potential victim; and 5) the risk of possible obstruction of the criminal justice system.[37]

There are more specific factors related to offenses involving domestic battery, stalking, harassment, kidnapping, unlawful restraint, and attempted murder.[38] Validated risk-assessment tools may be used by the court but may *not* be the "sole basis to deny pretrial release."[39] The customary requirement of drug testing will no longer be a condition of pretrial release. Some current conditions of pretrial release may remain, but an important change is that a defendant's inability to pay for a condition of release (*i.e.,* GPS ankle monitoring) or some other ineligibility cannot be a basis for pretrial detention.[40]

Failing to comply with the terms of pretrial release

Under current law, if a defendant fails to comply with pretrial bond conditions, the state may file a written motion or make an oral motion to increase or alter the defendant's bond or bond conditions.[41] After a hearing on that motion, the judge may set an additional cash bond that the defendant would need to pay to be released from jail.[42] Alternatively, the judge may simply issue a warrant for a defendant's arrest upon failure to comply with pretrial bond conditions.[43] The defendant, in turn, may also file a motion to reduce his bond or alter his bond conditions.[44]

Under the new law, the court may revoke pretrial release only if the defendant is charged with a detainable felony under section 110-6.1 of the Criminal Code or due to a new criminal felony or class A misdemeanor outlined in subsection 110-6.1(b). The judge has ultimate discretion on whether to revoke pretrial release or amend its conditions.[45] If a defendant fails to attend a court appearance, is charged with a class B misdemeanor or lesser offense, or violates any other condition of release, section 110-6 refers back to section 110-3 of the Criminal Code to determine how to proceed.[46]

WITH THE GROWING POPULARITY OF REMOTE COURT, BE AWARE THAT A DEFENDANT MUST APPEAR IN PERSON FOR A HEARING ON THE STATE'S MOTION TO DENY PRETRIAL RELEASE UNLESS APPEARING IN PERSON ENDANGERS THE DEFENDANT'S PHYSICAL HEALTH AND SAFETY OR IF THE DEFENDANT WAIVES THE RIGHT TO AN IN-PERSON HEARING.

If a defendant fails to appear in court or fails to comply with pretrial conditions, the court may on its own motion issue (or the state can request) an order to show cause.[47] The order needs to set forth why the defendant should not be subject to revocation of pretrial release or require sanctions as set forth in subsection 110-6.[48] However, this section does not prevent the court from simply issuing a warrant for the defendant.[49] If an order is entered, it does not appear that any

28. *Id.* § 110-6.1(h).
29. See *id.* § 110-6.1(f)(5).
30. See *id.* § 110-6.1(f)(6).
31. See *id.* § 110-6.1(j).
32. See *id.* § 110-6.1(k).
33. See *id.* § 109-1(f).
34. See generally *id.* § 110-5; *id.* § 110-5.1.
35. See *id.* § 110.6(g).
36. See *id.* § 110-5(a).
37. See *id.* § 110-6.1(g).
38. See *id.* § 110-5(b), (c).
39. *Id.* § 110-5(d); see also *id.* § 110-6.4.
40. See *id.* § 110-5(e).
41. See *id.* § 110-6.
42. See *id.*
43. See *id.* § 110-3.
44. See *id.*
45. See *id.* §§ 110-6(b), (b)(5).
46. See *id.* § 110-6; *id.* § 110-3.
47. See *id.*
48. See *id.* § 110-6.
49. See *id.* § 110-3(a).

warrant may be issued until the defendant fails to appear at the show-cause hearing.[50]

The order to show cause shall state the facts alleged to constitute the hearing or why the defendant is subject to revocation of pretrial release. A certified copy of the order must be served upon the defendant at least 48 hours in advance of the scheduled hearing.[51] The certified copy must be served and an affidavit of service filed with the court to show that service has been effectuated.[52] A failure to appear shall not be recorded until the defendant fails to appear at the hearing to show cause.[53] Also, if a defendant appears for the hearing to show cause, his earlier failure to appear cannot be counted against him in further proceedings.[54] Failure to appear for the show-cause hearing may result in civil contempt, but not criminal proceedings.

Prosecutors should ensure that their warrants for the arrest of an individual are statutorily correct pursuant to subsection 110-3(c), as it gives the judge options on how the warrant should be written ("The contents of the warrant shall be the same as required for an arrest warrant issued upon complaint and *may modify any previously imposed conditions placed upon that person,* rather than revoking pretrial release or issuing warrant."[55]).

If a warrant is issued after the show-cause hearing, it must also contain "a directive to peace officers to arrest the person and hold such person without pretrial release and to deliver such person before the court for further proceedings."[56] Otherwise, a police officer may be required to issue a notice to appear after serving a warrant.

Defense counsel should be aware that if the defendant fails to comply with pretrial conditions, the law still allows for the state to proceed on new charges for their failure to comply.[57] Attorneys also should pay special attention to subsection 110-5(e), which states that if a defendant "remains in pretrial detention after his or her pretrial conditions hearing after having been ordered released with pretrial conditions, the court shall hold a hearing to determine the reason for continued detention."[58] (Perhaps a defendant could file a motion to have another hearing regarding his pretrial release, arguing that additional pretrial conditions could ensure the defendant's continued compliance of pretrial release.)

Speedy-trial issues

Under current law, if a defendant is held in jail without cash bond, commonly referred to as "no bond," he is subject to a 90-day speedy-trial timeline instead of the usual 120 days.[59] The new law made sweeping changes regarding hearings to deny pretrial release, but the 90-day-speedy-trial timeline remains effective, with any delays still charged to the defendant.[60]

If the defendant is not brought to trial within 90 days, then he shall be released on pretrial release. This may concern prosecutors who have defendants in jail who have been charged with violent felonies because bringing a defendant to trial in 90 days is going to be extremely difficult. Oddly, the speedy-trial statute still contains the 120-day requirement although it appears no longer necessary.[61] Attorneys should be acutely aware of the 90-day speedy-trial requirement for those cases where pretrial release has been denied.

Reforms and the criminal justice system

As of Jan. 1, 2023, the choice "to release or not release" will more than likely be "release." Jails will be emptier. Prosecutors will have to work faster to get proper documentation to defense counsel more quickly and will need to work faster to prepare for trials of defendants in custody. The changes and complexities of the new law will be ripe for the Illinois Appellate Court's taking. IBJ

50. See *id.* § 110-6(c).
51. See *id.* § 110-3(b).
52. See *id.*
53. See *id.*
54. See *id.*
55. See *id.* § 110-3(c) (emphasis added).
56. See *id.*
57. See 720 ILCS 5/5-32-10.
58. 725 ILCS 5/110-5(e).
59. See *id.* § 110-6.1.
60. See *id.* § 110-6.1(i).
61. See *id.* § 103-5.