NEW YORK'S BAIL REFORM LAW

A summary and analysis

Daniel Conviser, Acting Supreme Court Justice

HOW A BILL BECOMES A LAW

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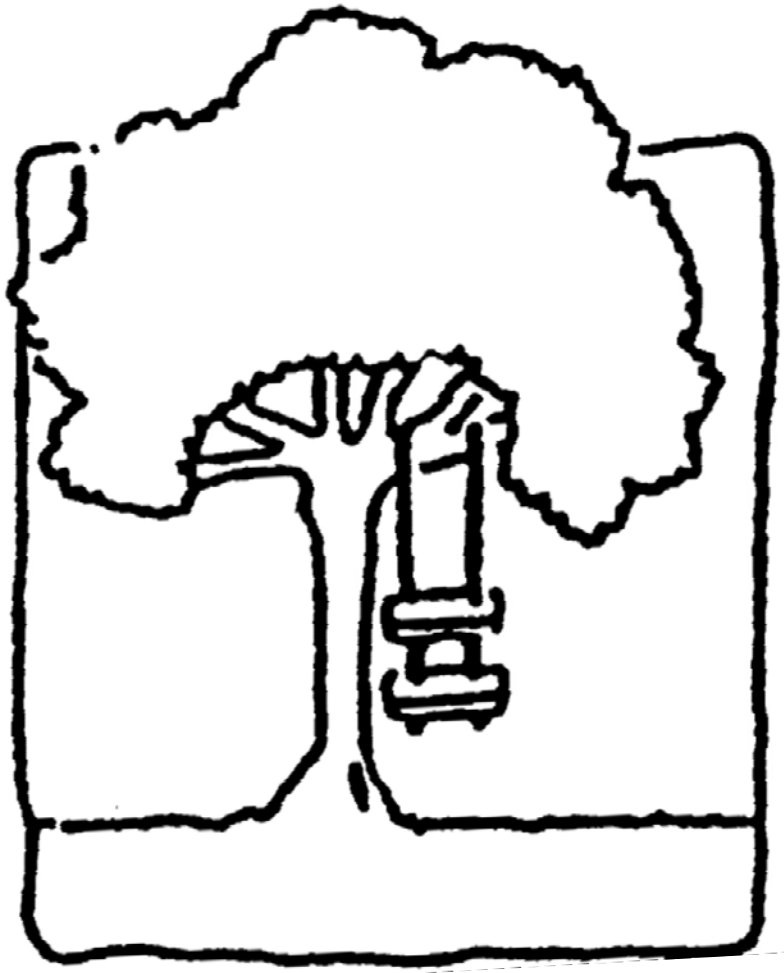

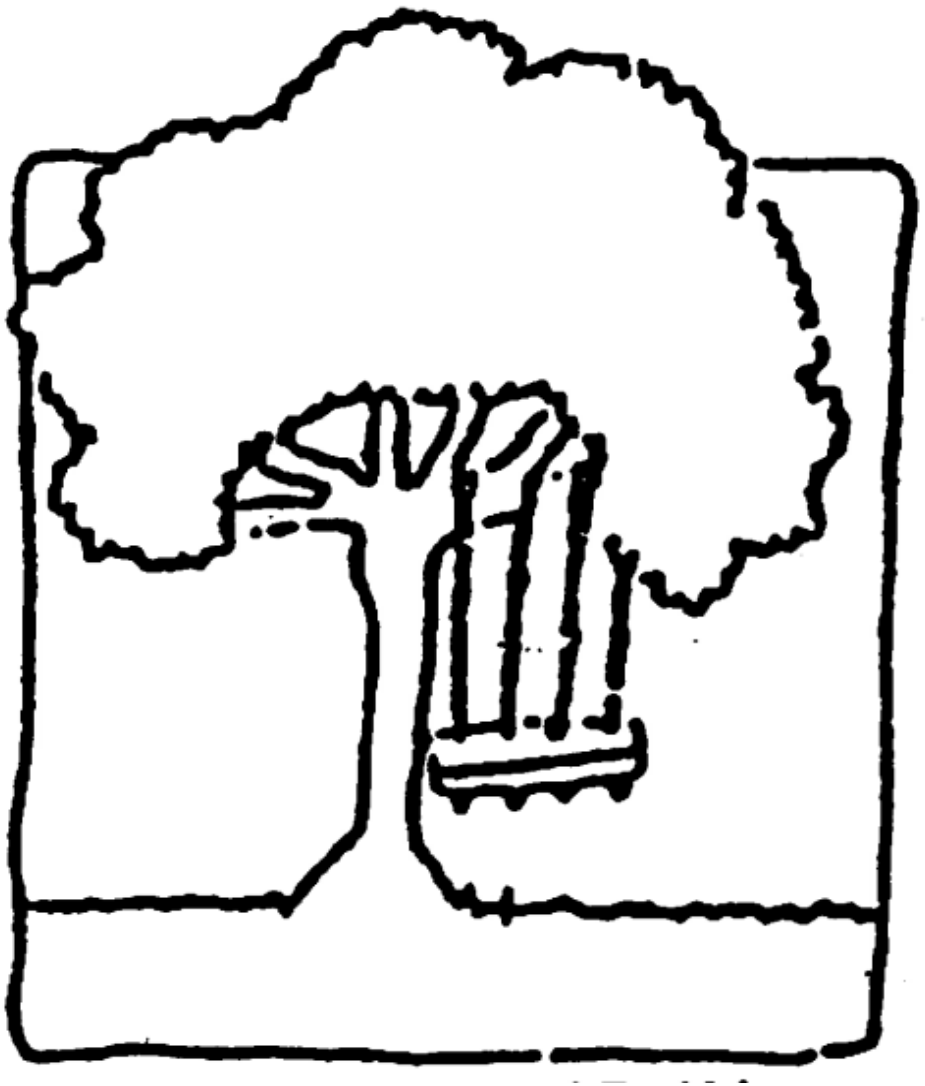

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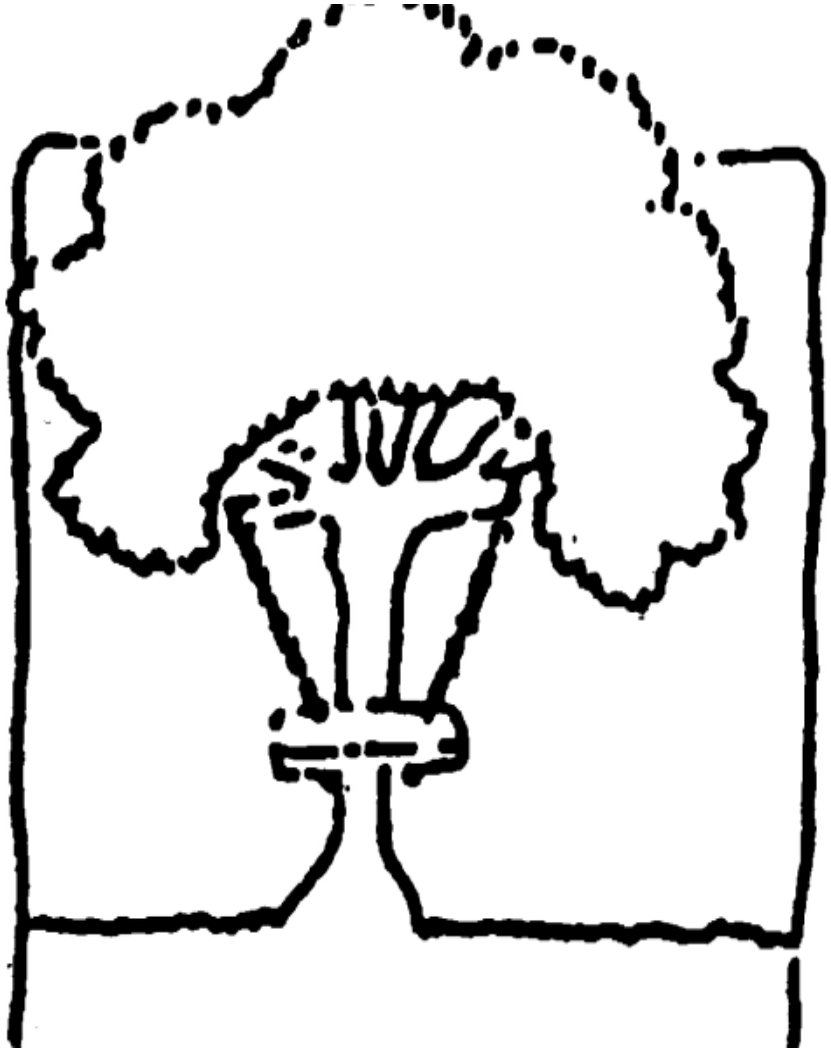

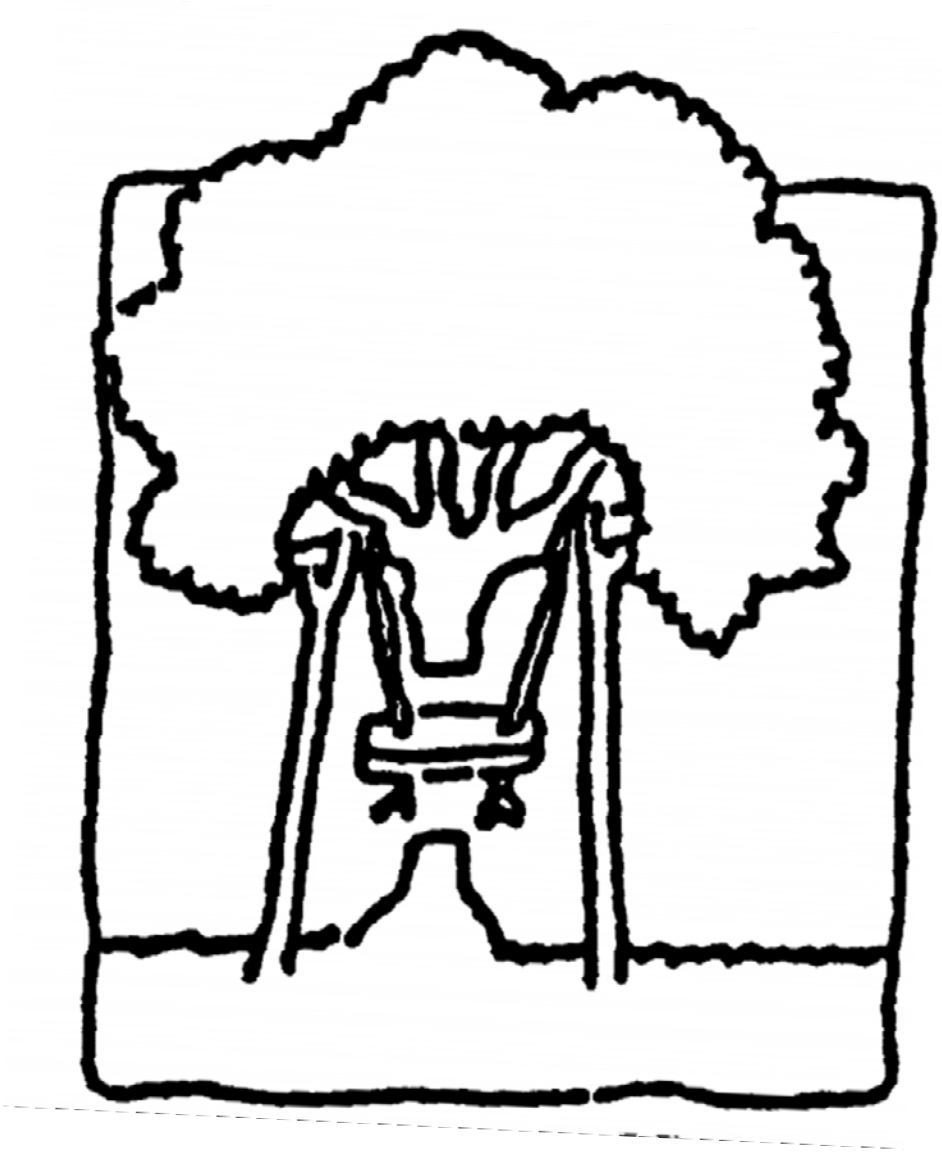

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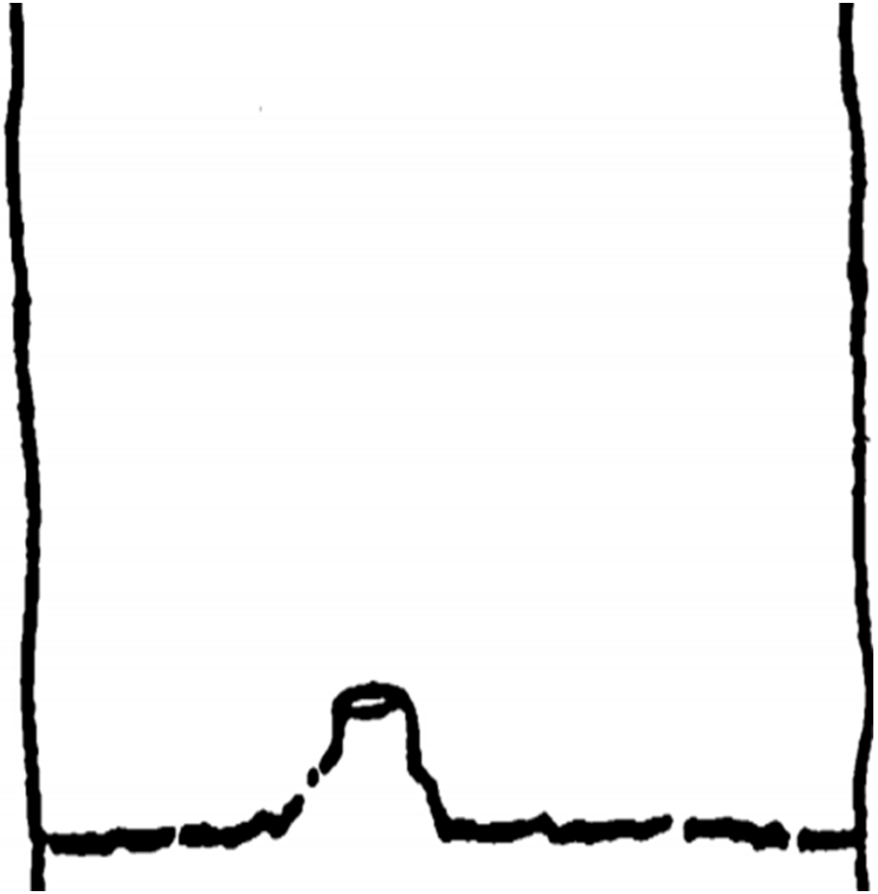

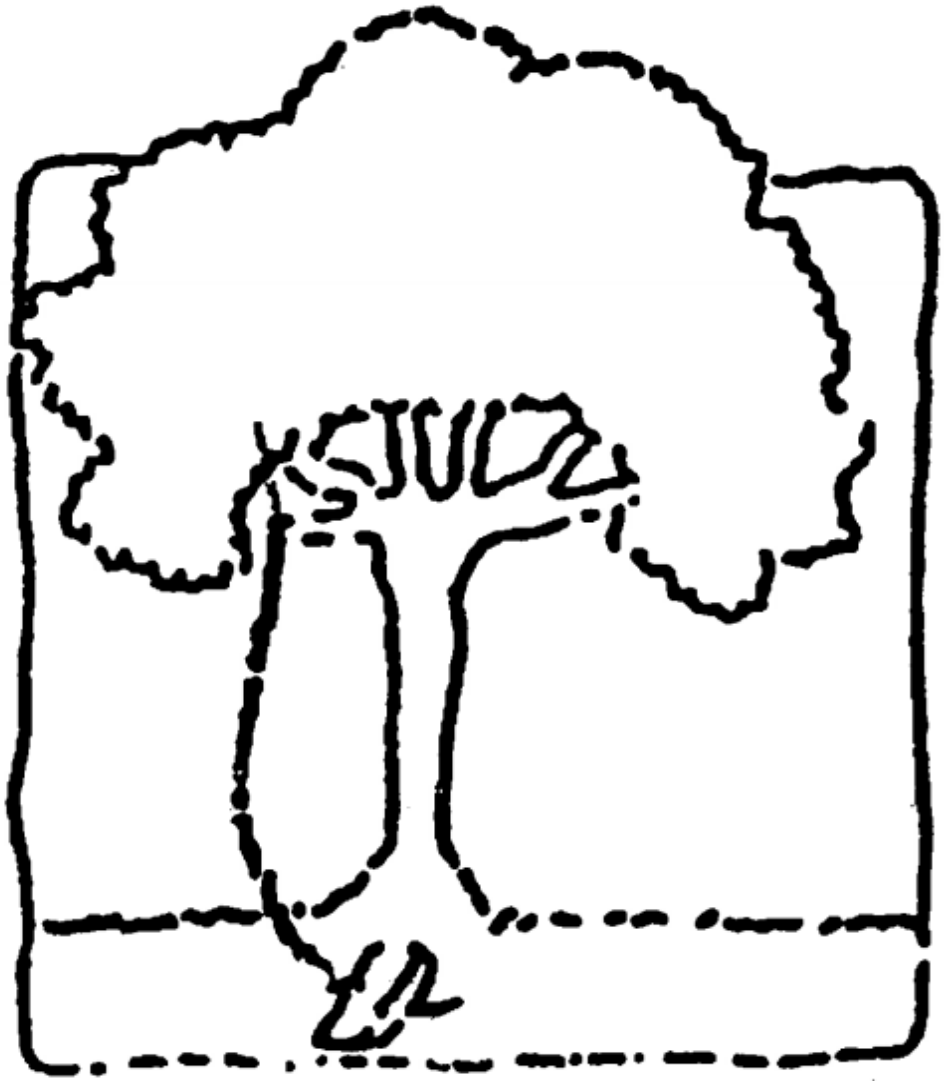

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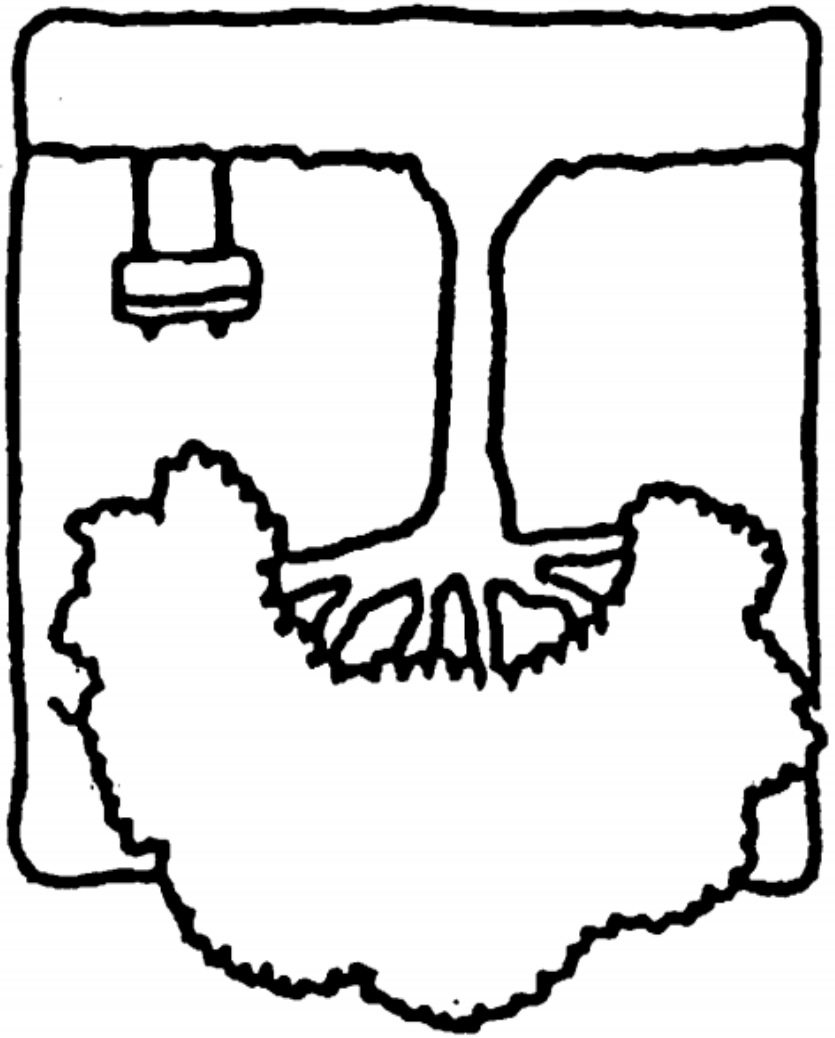

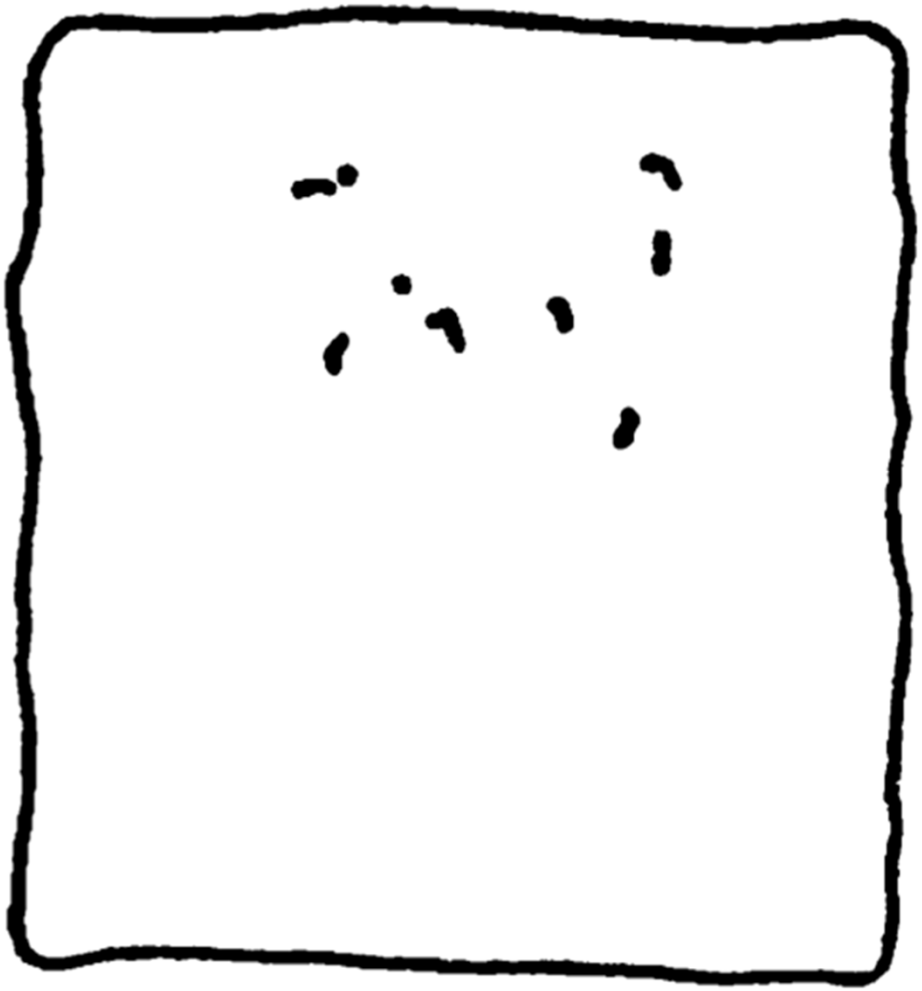

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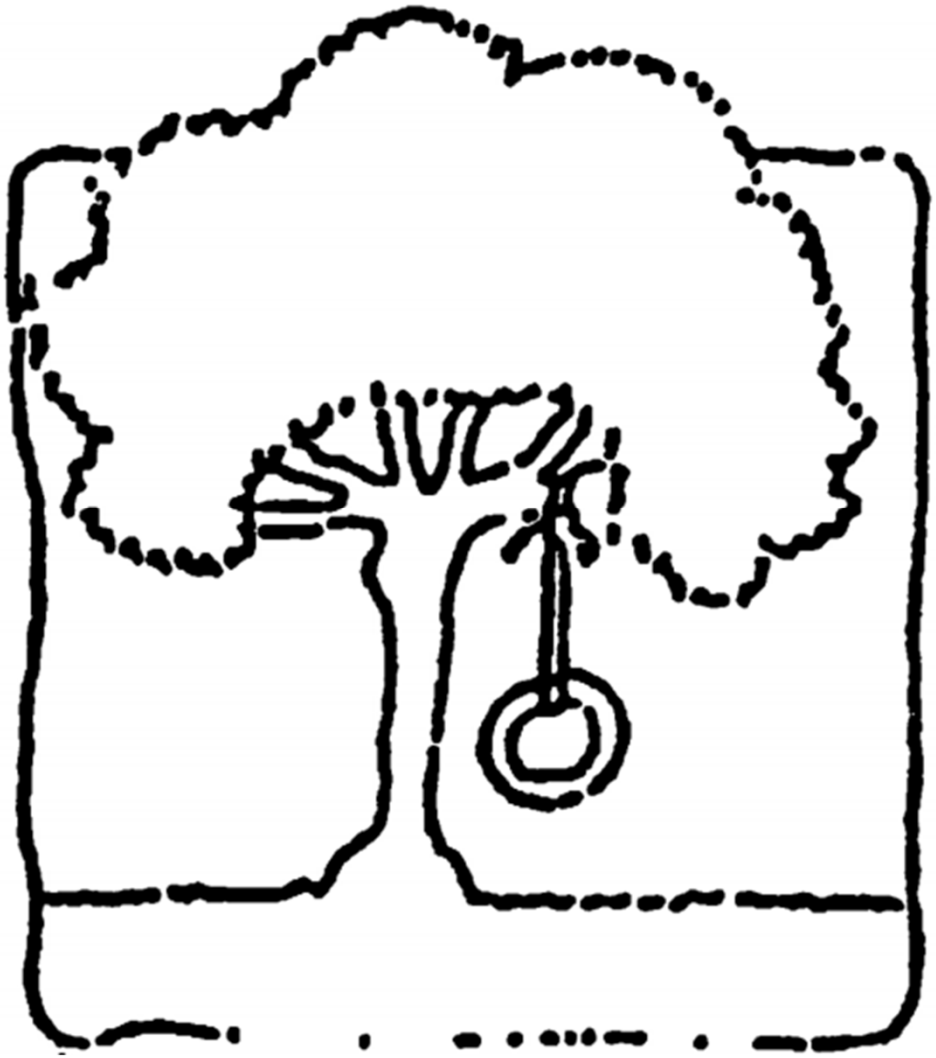

OUTLINE OF PRESENTATION

- **A run-through of the nuts and bolts.**

- **A deeper dive and discussion about some of the most significant practical issues.**

Three Kinds of Concerns

- **Policy choices you may disagree with.**
- **Issues the Legislature may not have considered.**
- **Apparent drafting errors.**

THE LEAST RESTRICTIVE ALTERNATIVE RULE

- **"[T]he 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." CPL 510.10 (1).**

Compare Prior Law on Same Issue

- **"the court must consider the kind and degree of control or restriction that is necessary to secure his [the defendant's] court attendance when required". Former CPL 510.30 (2) (a).**

COUNSEL REQUIREMENT

- **Defendants have the right to counsel and to have counsel appointed if indigent concerning securing order determinations. CPL 510.10 (2).**

“Qualifying” vs. “Non-Qualifying” Offenses

- **“Qualifying Offenses” are those for which you can initially set bail or, if felonies, can initially order remand.**

- **Bail or remand cannot be set initially for “Non-Qualifying Offenses”, but *can* be set later where defendants willfully and persistently abscond or commit certain new crimes while at liberty. (More on this later).**

AUTHORIZATION FOR "NON-MONETARY" CONDITIONS

- Non-monetary conditions are "the least restrictive conditions" which will "reasonably assure the principal's return to court". The statute provides a non-exclusive list of non-monetary conditions but allows any condition "reasonable under the circumstances". CPL 500.10 (3-a).

Listed Statutory Non-Monetary Conditions

- **"the principal be in contact with a pretrial services agency . . ."**
- **- "the principal abide by reasonable, specified restrictions on travel that are reasonably related to an actual risk of flight from the jurisdiction;"**
- **- "the principal refrain from possessing a firearm, destructive device or other dangerous weapon;"**
- **- when it is shown pursuant to CPL 510.45 (4) that "no other realistic monetary condition or set of non-monetary conditions will suffice to reasonably assure the person's return to court, the person be placed in reasonable pretrial supervision . . . " or**
- **- when it is shown that "no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure" a person's return to court, the person be subject to electronic monitoring.**

- **“A principal shall not be required to pay for any part of the cost of release on non-monetary conditions”. CPL 500.10 (3-a).**

COURT NOTIFICATION OF NON-MONETARY CONDITIONS

- **The court must inform defendants released on non-monetary conditions on the record and in an "individualized written document . . . in plain language and a manner sufficiently clear and specific" of the conditions the defendant will be subject to and "that the possible consequences for violation of such a condition may include revocation of the securing order and the ordering of a more restrictive securing order". CPL 510.40 (5).**

DEFENDANT COURT APPEARANCE NOTIFICATIONS (*I AM GLAD I AM NOT A CLERK!)*

- **The court or a pretrial services agency directed by the court must inform all defendants released with non-monetary conditions or on recognizance of upcoming court appearances in advance by text message, telephone, email or first class mail. Each defendant can select his or her preferred notification method on a form developed by OCA which shall be offered to defendants at court appearances. Such forms shall be maintained in court files. CPL 510.43.**
- **Under the statute's language, the requirement to notify defendants of upcoming court appearances does *not apply* to defendants at liberty on bail.**

LESSENING OF NON-MONETARY CONDITIONS

- Where non-monetary conditions have been set: “At future court appearances, the court shall consider a lessening of conditions or modification of conditions to a less burdensome form based on the principal’s compliance with such conditions of release”. CPL 510.40 (3).

IMPOSING MORE STRINGENT NON- MONETARY CONDITIONS

- **Upon non-compliance with non-monetary conditions in an "important respect" the Court can impose additional conditions after:**

- **providing the parties with notice of the alleged non-compliance and "affording [the parties] an opportunity to present relevant, admissible evidence, relevant witnesses and to cross-examine witnesses" and,**
- **a finding by the court by clear and convincing evidence that a principal violated a condition of release.**
- **Following such a finding, a court can impose additional non-monetary conditions consistent with the "least restrictive alternative" rule, explaining its determination on the record or in writing. CPL 510.40 (3).**

ELECTRONIC MONITORING ELIGIBLE CRIMES

- **<u>Electronic monitoring available for:</u>**
- **felonies;**
- **PL Article 130 sex offenses;**
- **Defendants who have "willfully and persistently" absconded or committed specified new crimes while at liberty;**
- **Charged with a misdemeanor domestic violence crime; or**
- **Charged with a misdemeanor with a prior violent felony conviction within five years.**

Electronic Monitoring Rules

- **The court must find through an individualized determination, made on the record or in writing, after providing an opportunity to be heard, that "no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure [the] principal's return to court". CPL 510.40 (4) (a). The specific electronic monitoring method must be approved by the court, be the "least restrictive procedure and method" which will reasonably assure a court appearance and be "unobtrusive to the greatest extent practicable". CPL 510.40 (4) (b).**

Electronic Monitoring Rules - Continued

- **“Electronic monitoring . . . may be for a maximum period of sixty days, and may be renewed for such period, after notice, an opportunity to be heard and a de novo, individualized determination . . . which shall be explained on the record or in writing”. CPL 510.40 (4) (d).**

- **Defendants subject to electronic monitoring are considered “held or confined in custody” pursuant to CPL 180.80 and “committed to the custody of the sheriff” under CPL 170.70.**

Release Applications

- **Under current law, where a defendant is confined on a securing order, he or she may apply for release on recognizance or on bail. CPL 510.20 (1). The statute has been amended to provide, not only that a defendant may be "heard" on such an application, but may also "present evidence". CPL 510.20 (2) (b).**

Securing Order Factors

- **Former law listed 11 factors courts should consider at trial and one factor to be considered on appeal.**

- **New statute significantly rewrites these factors, adding some, deleting others and modifying some. CPL 510.30.**

- **In the middle of these provisions, however, the statute also includes a new "catch-all" provision: "information about the principal that is relevant to the principal's return to court, including . . . the principal's activities and history". CPL 510.30 (1) (a).**

Securing Order Factor Changes

- **"If money bail is authorized . . the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured or partially secured bond". CPL 510.30 (1) (f).**

Securing Order Factor Changes Continued

- **“criminal record” is changed to “criminal conviction record”. CPL 510.30 (1) (c).**

- **the “principal’s previous record [if any in responding to court appearances when required or] with respect to flight to avoid criminal prosecution” is amended to delete as a consideration, as indicated by the bracket, the failure to respond to court appearances while leaving intact as a consideration “flight to avoid criminal prosecution”. CPL 510.30 (1) (e).**

- **the “weight of evidence” and “probability of conviction” as well as “the sentence which may be or has been imposed upon conviction” are stricken from the statute as securing order factors with respect to trial court orders.**

QUALIFYING OFFENSES

- **Bail can be set for a "qualifying offense" and remand may be imposed for a qualifying offense which is a felony. CPL 510.10 (a); CPL 530.20 (1).**

VIOLENT FELONY OFFENSES ARE GENERALLY QUALIFYING OFFENSES

- **Two violent felony offenses are not qualifying offenses:**
- **The Class C violent felony of burglary of dwelling. PL 140.25 (2).**
- **The Class C violent felony of second degree robbery, where it becomes a second degree crime because it is "aided by another". PL 160.10 (1).**
- ***Attempts* to commit these two crimes, however, are qualifying offenses under the statute.**

OTHER QUALIFYING OFFENSE CATEGORIES

- **Class A felonies, except narcotics crimes, other than one narcotics crime which *is* a qualifying offense, the so-called "Drug Kingpin" statute, "Operating as a Major Trafficker". PL 220.77.**

- **Sex offenses, including Class A and B misdemeanors.**

- **A conspiracy to commit murder.**

- **Terrorism crimes (except, apparently, Making a Terroristic Threat, PL 490.20, or Money Laundering in Support of Terrorism in the third or fourth degrees).**

OTHER QUALIFYING OFFENSE CATEGORIES

- **Any misdemeanor, Class E or Class D felony violation of an order of protection charge, but only if the defendant is charged with violating the order with respect to a member of the defendant's family or household.**

Establishment of Pretrial Services Agencies

- **OCA shall "certify" pretrial services agencies in each county. The statute does not describe what "certification" should entail.**

- **These agencies shall be either public agencies or non-profit organizations.**

- **Counties and municipalities can contract with other public entities to provide services in a locality, but public entities cannot contract with a private entity for such purposes.**

Pretrial Services Agencies Continued

- **Defendants may receive any "questionnaire, instrument or tool" used by a pretrial services agency upon request. Such instruments shall be "empirically validated and regularly revalidated, with such validation and revalidation studies and all underlying data, except personal identifying information for any defendant, publicly available upon request". CPL 510.45 (3) (ii).**

- **"Supervision by a pre-trial services agency may be ordered as a non-monetary condition pursuant to this title only if the court finds, after notice, an opportunity to be heard and an individualized determination explained on the record or in writing, that no other realistic non-monetary conditions will suffice to reasonably assure the principal's return to court". CPL 510.45 (4).**

Change in Bail Forms Requirement

- **Former bail forms requirement changed in two respects:**

- **The prior requirement that bail be set in two or more forms (where a court chooses to specify a form of bail) is changed to a requirement that bail be set in three or more specified forms.**
- **"[o]ne of the forms shall be either an unsecured or partially secured surety bond, as selected by the court". CPL 520.10 (2) (b).**
- **Note that a "partially secured bail bond" under existing law (not modified by the new bail statute) means a bond secured by money not exceeding ten percent of the undertaking. CPL 500.10 (18).**

Additional Authority to Set Bail on Absconding Defendants or For the Commission of New Crimes CPL 530.60

- **Bail can be set, even if an offense is not a qualifying offense, where the court finds, by clear and convincing evidence that:**

“the defendant persistently and willfully failed to appear after notice of scheduled appearances in the case before the court”.

Additional Bail Authorization for Non-Qualifying Offenses;

- **The defendant violated an order of protection by taking specified threatening actions, or violated a "stay away" provision of an order of protection while having a designated history of a previous violation, constituting the Class E felony of Criminal Contempt in the First Degree as defined in PL 215.51 (b), (c) or (d); or**

- **The defendant stands charged with a misdemeanor and committed specified victim or witness intimidation or tampering crimes; or**

- **The defendant stands charged with a felony and commits a felony while at liberty.**

The Evidentiary Hearing Requirement

- **Before revoking a previous order and imposing bail under this authority:**

- **“the court must hold a hearing and shall receive any relevant, admissible evidence not legally privileged. The defendant may cross-examine witnesses and present relevant, admissible evidence . . .”**

- **These hearings can be consolidated with preliminary hearings under CPL Article 180.**

- **Grand jury testimony is admissible to prove the commission of an offense while at liberty. CPL 530.60 (2) (c).**

The 48 Hour Bench Warrant Rule

- **“Except when the principal is charged with a new crime while at liberty, absent relevant, credible evidence demonstrating that a principal’s failure to appear for a scheduled court appearance was willful, the court, prior to issuing a bench warrant for failure to appear for a scheduled court appearance, shall provide at least forty-eight hours notice to the principal or the principal’s counsel that the principal is required to appear, in order to give the principal an opportunity to appear voluntarily”.” CPL 510.50 (2).**

Absence of Explicit Authority to Set Bail or Order Remand Upon *Conviction* for a Non-Qualifying Offense

- **It is not clear the Legislature considered what authority courts should have to set bail or order remand upon conviction for a non-qualifying offense prior to sentence.**
- **The statute provides no explicit authority to set bail or order remand in such circumstances and, indeed, retains a prohibition contained in former law which requires remand upon conviction for Class A felonies and for sexual offense felonies committed by adults against minors, but not for other convictions. *See* CPL 530.40 (6).**

Argument for Bail or Remand Authority Following Conviction for Non-Qualifying Offense

- **The "least restrictive alternative rule" is stated in three statutory provisions as applying "pending trial". CPL 510.10 (1); 510.10 (3) & 530.20 (1).**

- **The overall purpose of the statute was to significantly limit the pretrial incarceration of defendants who have not been convicted and are presumed innocent. These concerns are not implicated for convicted defendants.**

- **Courts arguably have some inherent authority to remand defendants (or set bail) where an incarceratory sentence will be imposed on a convicted offender.**

Does the Least Restrictive Alternative Rule Apply *During* a Trial?

- **As just noted, the least restrictive alternative rule is described in the statute as applying "pending trial". There is no explicit authority to order remand or set bail for a non-qualifying offense during a trial, but the phrase "pending trial" perhaps supports the argument that the least restrictive alternative rule may not apply once a trial begins.**

- **However, in contrast to the argument that this language arguably supports the authority to set bail or order remand *after* conviction, defendants being tried are presumed innocent, so the argument that courts have the authority to set bail or order remand during a trial is arguably much weaker than the argument that such authority exists following conviction.**

Additional Issues the Legislature May Not Have Considered:

- **Does the statute apply to the setting of bail for material witnesses under CPL Article 620? Article 620 was not substantively amended by the new bail law and there is a good argument that bail can continue to be set for material witnesses as under former law. Material witnesses will not generally be charged with either a "qualifying" or a "non-qualifying" offense.**

- **Does the statute apply to CPL Article 730? The new bail law did not amend CPL Article 730 and it is not clear that remand can be imposed or bail can be set for non-qualifying offenses during competency examinations.**

Additional Issues the Legislature May Not Have Considered Continued

- **Does the statute apply to extradition cases? The statute did not amend the "Uniform Criminal Extradition Act" (CPL Article 570) and so defendants held for extradition can apparently still be remanded pending extradition. However, the question of whether the new bail statute applies to the setting of *bail* in extradition cases is less clear. Applying the new bail statute to bail authority in extradition cases, however, would create a clearly anomalous result, since, in extradition cases, bail is a means to *release* defendants who are presumptively remanded pending extradition rather than a device which may *incarcerate* them. Thus, it may be reasonable to construe the bail statute as simply not applying to extradition cases.**

Impact on Proceedings in Indian Nations

- Significant concerns have been expressed about how provisions of the new statute will apply to proceedings in Indian Nations, since pretrial services in those nations are subject to contracts with federal entities which may conflict with provisions of the new bail statute.

Bail Law Apparently Does Not Apply to Probation Violation Cases

- **The bail statute did not amend the CPL Article which establishes rules for probation violation proceedings (CPL Article 410).**

- **Persons subject to probation violation proceedings have already been convicted of a crime. The new bail statute was intended to reduce the pre-trial incarceration of defendants with *pending charges* who are presumed innocent.**

Impact on Drug Diversion Cases

- **The new bail law amended CPL Article 216 (the drug diversion statute) to require that where a bench warrant is ordered or an appearance is directed because of a violation of a release condition the violation must be in an "important respect". Where such a warrant or order is issued because of a defendant's failure to appear, the failure must be "willful". (CPL 216.05 (9) (a)).**

- **The statute also amends the diversion statute to reference the authority to set bail for absconding defendants or for the commission of new crimes under the new bail law.**

Impact on Drug Diversion Cases

- **However, the new bail law left other provisions of the drug diversion statute, including the authority to set bail or order remand for non-qualifying offenses, intact. Thus, it may be most reasonable to construe the bail statute as not impacting the statutory authority to issue securing orders in drug diversion cases (except as noted immediately *supra*), especially where a defendant in a diversion program has already pled guilty.**

Miscellaneous Provisions: Part 1

- **The existing requirement that justice courts must remand defendants with two prior felony convictions or who stand charged with Class A felonies is retained in the new statute. CPL 530.20 (2) (a).**

- **If a defendant requests “nominal” i.e., “dollar” bail, the request must be granted if the court finds it is “voluntary”. CPL 510.10 (5); 530.20 (d).**

- **If the court does not approve submitted bail, it must promptly explain why “in writing”. CPL 510.40 (2).**

Miscellaneous Provisions: Part 2

- **Bail appeals to a superior court are expanded so such appeals now also apply where it is alleged a local criminal court set non-monetary conditions "more restrictive than necessary to reasonably assure the defendant's return to court". CPL 530.30 (1). Courts are required to explain their decisions on appeals on the record or in writing.**

- **Counsel for a defendant must be provided with a rap sheet at arraignment at the same time and manner as the court. CPL 530.20 (2) (b) (ii).**

The January 1, 2020 Effective Date

- **"This act shall take effect on January 1, 2020". (Bill section 25).**

Construing the Effective Date

- **Generally understood to apply to all cases pending on the effective date.**

- **Not self-implementing *i.e.*, you will have to issue new orders to implement the statute's provisions.**

Effective Date Implementation Choices

- **Modify securing orders to comply with the new statute before its effective date.**
- **Issue modification orders which would be effective on January 1 (or January 2) 2020.**
- **Schedule proceedings on January 1 (or 2) for all defendants subject to securing orders, other than those released on recognizance.**
- **Wait until previously scheduled court appearances or defense applications before issuing new securing orders.**

QUALIFYING OFFENSES

- This wasn't your idea - *and there is nothing you can do about it.*

From a Global Perspective:

- **The distinction between qualifying and non-qualifying offenses is based only on the pending charge – not anything else that might be relevant to flight risk.**

- **While the Legislature rejected a "public safety" standard for securing orders, the demarcation between qualifying and non-qualifying offenses appears to be based on perceptions about *imminent public safety risks* – not flight assessments.**

Non-Qualifying Offenses

- **The only narcotics crime which is a qualifying offense is the completed “kingpin” crime, “Operating as a Major Trafficker”. PL 220.77**

- **Among other requirements, this crime requires proof of narcotics sales or possession with intent to sell narcotics worth at least $75,000.**

Non-Qualifying Offenses

- **There are no financial crimes which are qualifying offenses, no matter how much money a defendant allegedly stole.**

Non-Qualifying Offenses

- **Bail Jumping is not a qualifying offense. Neither are escape or absconding from prison or jail crimes.**

Non-Qualifying Offenses

- **Mandatory persistent violent felony offenders charged with the Class C violent felonies of burglary of a dwelling or second degree robbery (aided by another) do not stand charged with qualifying offenses, although they face mandatory indeterminate sentences of 16-25 years to life imprisonment upon conviction.**

Non-Qualifying Offenses

- **While murder, attempted murder and first degree manslaughter, among other homicide crimes, are qualifying offenses, five completed or attempted homicide crimes are not qualifying offenses.**

- **These are: Manslaughter in the Second Degree (PL 125.15), Aggravated Vehicular Homicide (PL 125.14), Vehicular Manslaughter in the First Degree (PL 125.13), Vehicular Manslaughter in the Second Degree (PL 125.12), and Criminally Negligent Homicide (PL 125.10).**

There are some very fine distinctions here -

- **A person who "employs, authorizes or induces" a child under 17 to participate in the creation of child pornography (PL 263.05 "Use of a Child in a Sex Performance", a Class C felony) commits a qualifying offense. "Promoting a Sexual Performance by a Child", by being one who "produces, directs or promotes" a child pornographic film is not a qualifying offense. (PL 263.10; 263.15, Class D & E felonies).**

- **Money Laundering in Support of Terrorism in the First and Second Degrees (a value of at least $25, 000) is a qualifying offense. PL 470.23; 470.24). Money Laundering in Support of Terrorism in the Third and Fourth Degrees (monetary values of less than $25,000) are not qualifying offenses.**

Lack of Clarity Regarding Inchoate Crimes

- **The statute is not always clear about whether inchoate crimes: attempts, conspiracies, facilitation or solicitation crimes are qualifying offenses.**

- **In a couple places, the statute uses the phrase "a crime involving . . witness tampering or witness intimidation" suggesting a broad construction.**

- **Sometimes, a particular crime is listed, arguably indicating inchoate crimes are *not* included.**

- **Sometimes an article of the Penal Law is listed, leaving the question perhaps unclear.**

Qualifying Offense Authority is Arguably Plenary

- **There is a strong argument that for qualifying offenses, the authority to set bail or order remand exists throughout a case and may be exercised without complying with some of the particular strictures applicable to non-qualifying offenses, so long as the "least restrictive alternative" rule and other general statutory requirements are complied with.**

Importance of Plenary Authority for Qualifying Offenses

- **If the authority to set bail or order remand for qualifying offenses is plenary, then arguably bail or remand can be imposed after a securing order is initially set where, for example, a defendant absconds or commits a new crime, without a demonstration that absconding is willful and persistent, without the requirement for an evidentiary hearing and without requiring clear and convincing evidence.**

- **If the authority to set bail or order remand for qualifying offenses is plenary, then, where a defendant fails to comply with non-monetary conditions, there is an argument that bail or remand may be ordered without an evidentiary hearing (which would be required prior to the imposition of additional non-monetary conditions for a non-qualifying offense). The argument that additional non-monetary conditions might be imposed under such circumstances without an evidentiary hearing, however, is much weaker.**

Least Restrictive Alternative Rule Still Applies

- **Presuming the authority to set bail or order remand for qualifying offenses is plenary, however, it must still comply with the least restrictive alternative rule and the statute's other general requirements.**

Availability of Pretrial Services Agencies

- **The statute envisions robust pretrial services agencies in every jurisdiction to substitute for jail placements. However, such capacity varies greatly throughout the state and implementing effective pretrial services beginning on January 1, 2020 will be challenging everywhere.**

- **While the Legislature annually provides probation aid and funds not-for-profit organizations which provide pretrial services, there was no money appropriated in the SFY 2019-2020 budget to implement the bail law.**

Electronic Monitoring Implementation

- **Electronic monitoring may not be available at all court appearances or in all jurisdictions, especially initially.**

- **While electronic monitoring, to the extent it currently exists, is now generally conducted by private companies, the statute requires that such monitoring be conducted only by public or non-profit agencies. The statute also prohibits public agencies (but not non-profits) from contracting with private for-profit companies to conduct electronic monitoring. CPL 510.40 (4) (c).**

Enforcing Non-Monetary Condition Requirements

- **Where a defendant charged with a non-qualifying offense fails to comply with non-monetary conditions, but returns to court as directed and does not commit a felony (or certain specified misdemeanors), the court may not set bail or impose remand as a sanction for non-compliance. The court can impose additional non-monetary conditions after conducting an evidentiary hearing and making required findings.**

- **The bail legislation did not modify court contempt powers.**

What Does "Willfully" Mean

- **The United States Supreme Court has observed that "willful . . . is a word of many meanings, its construction often being influenced by its context". *U.S. v. Bishop,* 412 U.S. 346, 352 (1973) (citation omitted). It is sometimes simply construed as a synonym for "voluntary" or "intentional". *See Kawaauhau v. Geiger,* 523 US 57 (1998) n. 3 (noting this as the definition provided by Black's Law Dictionary.)**

- **On the other hand, it is also often construed as requiring a "conscious disregard" of a statute. *People v. Smith*, 34 AD2d 524 (1st Dept 1970) (citation omitted). Thus, the United States Supreme Court held, in construing the term "willfully" in a federal tax fraud statute, that the term meant "a voluntary, intentional violation of a known legal duty". *U.S. v. Pomponio*, 429 US 10, 12 (1976).**

What Does “Persistently Mean”?

- **Is defined in dictionaries primarily along two dimensions:**
- **The *length* of time, and**
- **The *number* of times.**
- **It is also sometimes defined with respect to obstinance, apart from these two quantitative measures**

Dictionary Definitions of Persistent

- **“persistent” “existing for a long or longer than usual time or continuously”. (Mirriam Webster online dictionary);**
- **“persistently” “happening repeatedly or for a long time, or difficult to get rid of”. (Cambridge online English dictionary);**
- **“persistent” “persisting, especially in spite of opposition, obstacles, discouragement, etc.; persevering”. (Dictionary.com);**
- **“persistently” “If something happens persistently, it happens again and again or for a long time”. (Collins online English dictionary).**

- **The Requirement for "Notice of Scheduled Appearances" is Plural.**

Lack of remand or bail authority for defendants who abscond or commit new crimes until conclusion of evidentiary hearing

- **Where a defendant charged with a non-qualifying offense is brought to court (perhaps involuntarily through a bench warrant) because the defendant allegedly "willfully and persistently absconded after notice of scheduled appearances" or, while charged with a felony, committed a new felony at liberty, or, while charged with a misdemeanor or felony committed certain other crimes, the defendant is entitled to an evidentiary hearing before a determination to set bail is made. There is no authority in the statute to set bail or order remand until the court makes a decision following the evidentiary hearing (if one is requested) subject to an exception for certain crimes committed while at liberty.**

The Exception: Authority to Hold Defendants Pending Hearing

- **Where a defendant charged with a non-qualifying offense is the subject of a criminal complaint charging the defendant committed a Class A, violent felony or victim or witness intimidation crime while at liberty, that defendant can be remanded for a period of up to 72 hours with a possible 72 hour extension for good cause pending the outcome of the hearing.**

Evidentiary Standards Applicable to Bail Authority for Non-Qualifying Offenses

- **Where a defendant charged with a non-qualifying offense is charged with committing a new Class A, violent felony or victim or witness intimidation crime while at liberty, the commission of this new crime must be demonstrated (through an evidentiary hearing, if requested) by a "reasonable cause to believe" standard. CPL 530.60 (2) (a).**

Evidentiary Standards Applicable to Bail Authority for Non-Qualifying Offenses Continued

- **Where, however, a defendant at liberty for a non-qualifying offense is alleged to have persistently or willfully absconded or committed other new crimes while at liberty which provide authority to set bail, the absconding or new crimes must be proven (through an evidentiary hearing if requested) by clear and convincing evidence. CPL 530.60 (2) (b).**

Additional Bail Authority Continued

- **This means that, where a clear and convincing evidence standard applies, defendants would be entitled to an evidentiary hearing regarding their alleged commission of new crimes while at liberty, *even if they had been charged or indicted for those crimes* (since such charges or indictments would not necessarily constitute clear and convincing evidence of a crime's commission).**

Making Initial Securing Order Decisions

- Initially determine whether there are any qualifying offense charges. If there are, bail (or remand if any qualifying offense charge is a felony) is an option.

Making Initial Securing Order Decisions

- **Consider whether release on recognizance will create a "risk of flight to avoid prosecution" and will "reasonably assure the defendant's return to court". If the answers to these questions are "no" and "yes" order release on recognizance.**

Making Initial Securing Order Decisions

- **If release on recognizance will not "reasonably assure the principal's return to court" and there are only non-qualifying offense charges, then impose the least restrictive non-monetary conditions which will "reasonably assure the principal's return to court". Explain your choice of conditions on the record or in writing. CPL 510.10 (3)**

Making Initial Securing Order Decisions

- **Remember that in imposing non-monetary conditions, electronic monitoring or pretrial supervision by a pretrial services agency may be imposed only upon a finding that "no other realistic . . . non-monetary conditions will suffice to reasonably assure the person's return to court". CPL 500.10 (3-a).**

Making Initial Securing Order Decisions

- **If there is a *qualifying* offense charge, and you find that release on recognizance will pose "a risk of flight to avoid prosecution" then choose the least restrictive alternative of non-monetary conditions, bail or remand (remand only if a felony) which will "reasonably assure the principal's return to court". Again, explain your choice of non-monetary conditions, bail or remand on the record or in writing. CPL 510.10.**

Written Notification of Non-Monetary Conditions

- **Where non-monetary conditions are imposed, provide defendant with a standard written notification form which describes these conditions and the consequences for violating them. OCA will likely develop such forms and provide them to judges prior to January 1, 2020.**

Addressing Absconding Defendants

- **In considering the issuance of a bench warrant, remember the 48 hour rule. The rule *does not* apply if the defendant has been charged with a new crime while at liberty or you find the failure to appear was "willful". The rule also does not appear to apply if a warrant is issued for a reason other than a defendant's "failure to appear for a scheduled court appearance", for example, where a warrant is issued to obtain a defendant's appearance because he or she has not complied with mandated non-monetary release conditions.**

- **If the rule does apply, consider issuing the warrant immediately and then staying its execution for 48 hours.**

Addressing Absconding Defendants

- **When an absconding defendant is returned to court, and is charged with a *qualifying offense*, consider the argument that the authority to set bail or order remand for qualifying offenses is plenary and that a new bail or remand condition may be imposed on an absconding defendant, subject to the "least restrictive alternative" rule, without finding the failure to appear was willful and persistent and without conducting an evidentiary hearing.**

Addressing Absconding Defendants

- **Bail (but not remand) can be set for non-qualifying offenses if a defendant "*persistently* and *willfully* failed to appear after *notice of scheduled appearances* in the *case before the court*" or committed certain new crimes while at liberty.**

Addressing Absconding Defendants

- **Defendants have the right to an evidentiary hearing prior to having bail set for a non-qualifying offense. With respect to the commission of new crimes, grand jury testimony is admissible at the hearing.**

- **At these hearings, the standard of proof is generally clear and convincing evidence. If, however, the Defendant is charged with a Class A, violent felony or victim or witness intimidation crimes while at liberty, the standard of proof with respect to the commission of these new crimes is reasonable cause to believe.**

Addressing Absconding Defendants

- **If a defendant initially charged with a non-qualifying offense is charged with committing a Class A, violent felony or victim or witness intimidation crime while at liberty, the defendant can be held in custody for 72 hours (with an additional 72 hours for good cause) pending the outcome of an evidentiary hearing concerning whether there is reasonable cause to believe such a crime was committed.**

Addressing Absconding Defendants

- **In all other cases, however, (including absconding defendants) there is no authority under the statute to hold a defendant in custody pending a determination under the statute, following an evidentiary hearing.**

Addressing Absconding Defendants

- **To address this problem, courts might consider directing the hearing to be held as soon as the Defendant is brought before the court, and determine that the court has the authority to hold the defendant until the hearing is completed on that same day. Alternatively, defendants might be able to consent to an interim securing order pending the completion of a hearing (although such interim orders are not authorized by the statute).**

We will get through this!

- **There is a good chance that some of the statute's most obvious anomalies will be corrected by the Legislature at some point.**

- **OCA has established a comprehensive planning process to offer judges and court staff support in implementing these laws.**

- **To the extent that some of these policies have negative consequences, those policies were established by the Legislature, not the courts. It is our job to implement the statute in accordance with the Legislature's intent as effectively as we can.**