



DANIEL K. WRIGHT
SANGAMON COUNTY
STATE'S ATTORNEY

Room 402 County Complex
200 South Ninth Street
Springfield, IL 62701

Telephone: 217/753-6690

PRESS RELEASE

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RE: Pre-Trial Detention Standards Under P.A. 101-652 as of January 1, 2023

The “Pre-Trial Fairness Act”, which comprises a portion of legislation commonly referred to as the “SAFE-T Act”, was signed into law as Public Act 101-652 on January 22, 2021. The new law has been the subject of significant media coverage and public discussion as the January 1, 2023 effective date of the new pre-trial detention standards approaches.

While there are significant public safety concerns with the new pre-trial detention rules currently scheduled to replace the cash bail system, I remain optimistic that common sense and pragmatic leadership will result in necessary changes prior to January 1, 2023. Notwithstanding the potential for legislative action to fix the new law as drafted, a clear, impartial, and realistic assessment of the pre-trial detention system under the current version of P.A. 101-652 is an obligation owed to the People of Illinois.

There are undeniably valid public policy objectives related to the elimination of cash bail. For example, pre-trial detention should not be determined by financial resources. However, details of the pre-trial detention rules scheduled to replace the cash

bail system in Illinois involve a matter of fundamental public interest and should be addressed in an objective and transparent manner by those entrusted with the authority to make and enforce our laws.

Under the pre-trial detention provisions of P.A. 101-652, **any assessment of dangerousness/risk of harm to the community/public safety evaluation by a Judge is permitted only in cases involving the specific list of offenses explicitly enumerated in 725 ILCS 5/110-6.1 (a)(1-6). This means that a Judge will no longer possess the authority to detain someone based upon an evaluation of danger to the community unless they are charged with a non-probationable forcible felony or other offense specifically listed in Section 110-6.1(a) (*i.e.* domestic violence, certain firearms offenses, certain sex offenses, and human trafficking).**

Some have claimed that, while the new law eliminates cash bail, Judges will retain the authority to conduct a dangerousness/risk of harm/public safety assessment in every case regardless of the offense charged. This is incorrect under the plain language of the statute as currently written. Various violent or otherwise dangerous offenses for which a Judge will not be permitted to consider potential danger to the community regardless of criminal history or circumstances of the charged offense include, among others:

Aggravated Battery (including great bodily harm or permanent disfigurement);

Aggravated DUI (including cases involving a fatality);

Aggravated Fleeing and Eluding a Peace Officer;

Arson;

Burglary;

Drug-Induced Homicide;

Intimidation (including pre-trial communication with witnesses or potential jurors);

Kidnaping;

Robbery;

Second-Degree Murder;

Threatening a Public Official;

Possession of a Firearm by a Gang Member

Possession of a Stolen Firearm

Aggravated Assault (including use of a firearm); and

All offenses involving lethal drug distribution¹

While it is also incorrect to characterize individuals charged with the above offenses as categorically “non-detainable” under any circumstances after January 1st, a Judge will have no authority to detain an individual charged with these offenses based upon any assessment of dangerousness to the community. Those who suggest the new Illinois law mirrors the pre-trial detention standards of the federal courts, or similar legislation in states like New Jersey, are misinformed. The plain language of P.A. 101-652 imposes new, explicit, and substantial restrictions on a Judge’s discretion to evaluate the totality of the circumstances in making pre-trial detention decisions that will impact public safety across the State. The new law removes the traditional role of Judges to engage in a comprehensive analysis of the facts to assess potential danger to the community where an individual is charged with a broad range of violent and otherwise dangerous offenses.

¹Such offenses would include distribution of deadly narcotics like fentanyl, a substance that can be lethal in very small amounts and is often unknowingly ingested by users who believe they are consuming a different substance. The DEA states that “Fentanyl remains the deadliest drug threat facing this country.” <https://www.dea.gov/press-releases/2022/08/30/dea-warns-brightly-colored-fentanyl-used-target-young-americans>. However, after January 1, 2023, Judges will not have the authority to consider potential danger to the community posed by the pre-trial release of someone charged with an offense related to distribution of fentanyl or other lethal narcotics which threaten the lives of Illinoisans every day.

The new law does not permit Judges to evaluate potential danger to the community unless the charged offense is among those specifically listed in Section 110-6.1 **or** there is “clear and convincing evidence” that an individual presents a “high likelihood of willful flight” where the charged offense is a Class 3 or above. The consensus of prosecutors and Judges across the State is that detention under the “willful flight” standard will not be available in the vast majority of cases. While the “high likelihood of willful flight” analysis is available to a Judge for consideration of pre-trial detention of anyone charged with a Class 3 or above, the definition of “willful flight” precludes consideration of prior repeated failures to appear as the sole basis for pre-trial detention. Objectively, the definition eliminates any reasonable probability of detention in nearly any conceivable scenario short of “clear and convincing evidence” of pre-arrest flight and concealment to avoid apprehension for the charged offense or a direct statement from the defendant that they plan to flee the jurisdiction and hide from authorities if released. Judges will have no authority to consider pre-trial detention under either the dangerousness or “willful flight” standards for any Class 4 felony not otherwise specified in Section 110-6.1 regardless of criminal history or surrounding circumstances.

Despite the narrowly-defined standard of “willful flight” applicable to Class 3 or greater offenses, P.A. 101-652 **eliminates judicial discretion to order pre-trial detention based upon a comprehensive assessment of potential danger to the community in cases of violent or other dangerous offenses not specifically listed in Section 110-6.1(a)**. However, sponsors of the legislation and other key stakeholders have publicly stated their willingness to make critical changes before January 1. While there are good-faith legal arguments raised in recently filed litigation related to whether the new law is constitutional, productive discussions toward fixing P.A. 101-652 are cause for measured optimism.

Below is a link to the Supreme Court Pretrial Implementation Task Force draft flowcharts:

<https://www.illinoiscourts.gov/courts/additional-resources/pretrial-implementation-task-force/>

Page 28 (“Denial of Pre-Trial Release”) of the attached document includes an informative graphic regarding the pre-trial detention standards under the current language of P.A. 101-652. This resource was generated through the collaborative efforts of the AOIC Office of Statewide Pretrial Services, the Illinois Supreme Court Commission on Pretrial Practices Implementation Task Force, and the Illinois Judicial College.

The operative pre-trial detention provisions of P.A. 101-652 are below. The entire text of the 764-page legislation is available at:

<https://www.ilga.gov/legislation/publicacts/101/PDF/101-0652.pdf>

(725 ILCS 5/110-6.1) (from Ch. 38, par. 110-6.1)
Sec. 110-6.1. Denial of <u>pretrial release</u> bail in non-probationable felony offenses.
(a) Upon <u>verified petition by the State</u> , the court shall
hold a hearing and may deny to determine whether bail should be
denied to a defendant pretrial release only if:
<u>(1) the defendant who is charged with a forcible felony</u>
offense for which a sentence of imprisonment, without
probation, periodic imprisonment or conditional discharge,
is required by law upon conviction, <u>and when it is alleged</u>
that the defendant's <u>pretrial release poses a specific,</u>
<u>real and present threat to any person or the community.</u>
admission to bail poses a real and present threat to the
physical safety of any person or persons ; -

(2) the defendant is charged with stalking or aggravated stalking and it is alleged that the defendant's pre-trial release poses a real and present threat to the physical safety of a victim of the alleged offense, and denial of release is necessary to prevent fulfillment of the threat upon which the charge is based;

(3) the victim of abuse was a family or household member as defined by paragraph (6) of Section 103 of the Illinois Domestic Violence Act of 1986, and the person charged, at the time of the alleged offense, was subject to the terms of an order of protection issued under Section 112A-14 of this Code, or Section 214 of the Illinois Domestic Violence Act of 1986 or previously was convicted of a violation of an order of protection under Section 12-3.4 or 12-30 of the Criminal Code of 1961 or the Criminal Code of 2012 or a violent crime if the victim was a family or household member as defined by paragraph (6) of the Illinois Domestic Violence Act of 1986 at the time of the offense or a violation of a substantially similar municipal ordinance or law of this or any other state or the United States if the victim was a family or household member as defined by paragraph (6) of Section 103 of the Illinois Domestic Violence Act of 1986 at the time of the offense, and it is alleged that the defendant's pre-trial release poses a real and present threat to the physical safety of any person or persons;

(4) the defendant is charged with domestic battery or aggravated domestic battery under Section 12-3.2 or 12-3.3 of the Criminal Code of 2012 and it is alleged that the defendant's pretrial release poses a real and present threat to the physical safety of any person or persons;

(5) the defendant is charged with any offense under Article 11 of the Criminal Code of 2012, except for Sections 11-30, 11-35, 11-40, and 11-45 of the Criminal Code of 2012, or similar provisions of the Criminal Code of 1961 and it is alleged that the defendant's pretrial release poses a real and present threat to the physical safety of any person or persons;

(6) the defendant is charged with any of these violations under the Criminal Code of 2012 and it is alleged that the defendant's pretrial releases poses a real and present threat to the physical safety of any specifically identifiable person or persons.

(A) Section 24-1.2 (aggravated discharge of a firearm);

(B) Section 24-2.5 (aggravated discharge of a machine gun or a firearm equipped with a device designed or use for silencing the report of a firearm);

(C) Section 24-1.5 (reckless discharge of a firearm);

(D) Section 24-1.7 (armed habitual criminal);

(E) Section 24-2.2 2 (manufacture, sale or transfer of bullets or shells represented to be armor

<p>piercing bullets, dragon's breath shotgun shells, bolo shells or flechette shells);</p>
<p>(F) Section 24-3 (unlawful sale or delivery of firearms);</p>
<p>(G) Section 24-3.3 (unlawful sale or delivery of firearms on the premises of any school);</p>
<p>(H) Section 24-34 (unlawful sale of firearms by liquor license);</p>
<p>(I) Section 24-3.5 (unlawful purchase of a firearm);</p>
<p>(J) Section 24-3A (gunrunning); or</p>
<p>(K) Section on 24-3B (firearms trafficking);</p>
<p>(L) Section 10-9 (b) (involuntary servitude);</p>
<p>(M) Section 10-9 (c) (involuntary sexual servitude of a minor);</p>
<p>(N) Section 10-9(d) (trafficking in persons);</p>
<p>(O) Non-probationable violations: (i) (unlawful use or possession of weapons by felons or persons in the Custody of the Department of Corrections facilities (Section 24-1.1), (ii) aggravated unlawful use of a weapon (Section 24-1.6, or (iii) aggravated possession of a stolen firearm (Section 24-3.9);</p>
<p>(7) the person has a high likelihood of willful flight to avoid prosecution and is charged with:</p>
<p>(A) Any felony described in Sections (a) (1) through (a) (5) of this Section; or</p>
<p>(B) A felony offense other than a Class 4 offense.</p>

Definition of "willful flight"

(725 ILCS 5/110-1) (from Ch. 38, par. 110-1)
Sec. 110-1. Definitions. (a) (Blank). "Security" is that
which is required to be pledged to insure the payment of bail.
(b) "Sureties" encompasses the monetary and nonmonetary
requirements set by the court as conditions for release either
before or after conviction. "Surety" is one who executes a bail
bond and binds himself to pay the bail if the person in custody
fails to comply with all conditions of the bail bond.
(c) The phrase "for which a sentence of imprisonment,
without conditional and revocable release, shall be imposed by
law as a consequence of conviction" means an offense for which
a sentence of imprisonment, without probation, periodic
imprisonment or conditional discharge, is required by law upon
conviction.
(d) (Blank.) "Real and present threat to the physical
safety of any person or persons", as used in this Article,
includes a threat to the community, person, persons or class of
persons.
<u>(e) Willful flight means planning or attempting to intentionally evade prosecution by concealing oneself. Simple past non-appearance in court alone is not evidence of future intent to evade prosecution.</u>