

Senate Judiciary Committee

Jennifer Horgan 271-7875

SB 294-FN, relative to the release of a defendant pending trial.

Hearing Date: January 18, 2022

Time Opened: 3:48 p.m.

Time Closed: 4:32 p.m.

Members of the Committee Present: Senators Carson, Gannon, French, Whitley and Kahn

Members of the Committee Absent : None

Bill Analysis: This bill amends the statute governing bail and pre-trial release to include provisions for pre-trial detention for commission of certain offenses that would create a presumption that the defendant is a danger to the public.

Sponsors:

Sen. Bradley

Sen. Hennessey

Sen. Ricciardi

Sen. Carson

Rep. Deshaies

Rep. Abbas

Who supports the bill: Senator Bradley; Senator Carson; Senator Ricciardi; Senator Hennessey; Elizabeth Sargent, NH Association of Chiefs of Police; Kate Horgan, NHAC; Chief John Bryfonski; Captain Joe Ebert, NH State Police; Chief Joe Hoebeke, NHACOP; Chief Tara Laurent, NHACOP; Timothy Patterson; Greg Jordan; Mark Chase; John Drury; Mark Reams; Bradley Osgood; Charlie Dennis; Stephen Monier; Charles Reynolds; Mike McGillen; Brian Lord; Gary Duquette; Patrick Sullivan

Who opposes the bill: Frank Knaack, ACLU; Curtis Howland; Wiltrud Mott-Smith; Sarah Reed

Who is neutral on the bill: Mary Ann Dempsey, Judicial Branch

Summary of testimony presented in support:

Senator Bradley

- This is the Senate Passed version of SB92 minus two sections.
- Section I deals with criminal mischief and Section III deals with police standards and training, and they are both deleted in this bill.
- This is the balance of SB92 and SB294.
- This is one of the most important issues of how we provide for safety in our state.

- We need to look at some of the issues triggered by the bill passed a couple years ago.
- Bail should be available to people regardless of income, but at the same time we have seen in NH and across the country, people abusing the system, not showing up for court, or people who have committed violent crimes being released almost immediately and then reoffending almost immediately.
- There are 13 crimes: homicide, first degree assault, second degree assault, domestic violence, aggravated felonious sexual assault, felonious sexual assault, kidnapping, stalking, trafficking, robbery, possession of child sexual images, computer pornography, and felonious use of firearms, that would create a rebuttable presumption that that person is a danger to the community and therefore in order to receive bail that person would have to go before a judge.
- Part II deals with individuals not showing up for court appearances.
- If a person has three court appearances they miss in a three-year period, that person shall be detained in pretrial detention
- The Chief of Police in Nashua shared a case in December 2020, the Nashua police department received a call for a domestic assault and arrested the subject who had brought a firearm to the house, forced his way in, and assaulted the woman. His officers conducted a lethality assessment that put the victim at the highest risk possible of being killed by the perpetrator. Expressed three different times to the bail commissioner the subjects' violent history, that he brought a firearm, and that the lethality assessment was the highest possible. The bail commissioner still released the subject on \$200 bail. The subject then proceeded back to the victim's house, forced his way back in, and beat and raped the victim for the rest of the night.
- Believes NH is a state that protects victims, and this is a small but necessary step to fixing the issues that have arisen from the bill that passed a few years ago.
- Senator French asked what in the current law made that bail commissioner think that actor in Nashua wasn't a danger
 - That is the question. There is a long list of examples of this. According to the police chiefs the way the law is constructed, it has tied the hands of the bail commissioners and they feel they must release people. That is why we need change the law.
- Senator French asked what specifically in the law prevented them from holding that man.
 - Thinks it is an interpretation of the law that said even for these violent crimes people are not to be held.
- Senator Whitley asked if he agrees that adding more robust data collecting is necessary before shifting the paradigm.
 - We are not shifting the paradigm; we are assuring that these individuals who commit these kinds crimes with real victims don't commit them again.

- Senator Whitley asked if it is true that under this bill people are going to be detained for maybe 72 hours without consideration to the fact that they will lose their housing, if they have childcare, or if they might lose their jobs.
 - Currently we are not doing it without a consideration for the potential for re-offense. We can be very thankful that a murder hasn't occurred yet under this. We have seen in other states where this leads. The crimes listed in this bill are heinous offenses.
- Senator Whitley stated that when this bill was over in the House it was going to result in a \$3million increase to the court system. Asked why there is not a fiscal note attached to the bill.
 - Is surprised the fiscal note is what it is. What price do we put on safety? This is one of the core functions of what makes a civil society civil.
- Senator Whitley asked if we do not already have a mechanism in place to balance the interests, it perhaps just needs an increase in education on the interpretation of the current law.
 - Believes the original bill was passed in 2018-2019 and there is evidence there has been problems. NH is not as bad as other states, but it is just a matter of time.
- Senator Whitley stated that the trends for violent crime have gone down in NH from the time bail reform passed. Says to her that what we are doing is not perfect and more education about how to interpret it is needed. If we were seeing an increase in crime, would say there is a need for change but that is not what the state is seeing. Asked if he is seeing something different in the trends.
 - Yes, NH is among the safest states in the nation. But there are a lot of other things we have done right that have created that. We have not defunded the police, we support the men and women in uniform, and we allow people to defend themselves. That has helped significantly counter the types of situations we have seen in other states. Let's not make the mistake other states have made and say bail reform is working, when we know it is not working. This is not talking about simple victimless crimes; these are crimes with real victims, and we should be on the side of victims.

Chief John Bryfonski (NH Chiefs of Police) (provided written testimony)

- This bill is needed, and it is about the safety and quality of life for Granite Staters.
- Concerned about the trend in the country and the state.
- There is ample evidence of cases where people have been shot at, stabbed, child predation has occurred, and more, and the perpetrator was released on personal recognizance (PR) bail.
- This is not about money; it is about safety.
- There will be additional tragedies if we don't do something.
- Spoke to the challenges of going to victims and telling them their perpetrator is being released.

- There is nothing unconstitutional about this proposed legislation.
- Everyone charged with a crime will be afforded the opportunity for bail.
- Pleading that a judge gets to hear an argument from the prosecutor and defense with respect to whether a person who has committed the most violent heinous crimes should be afforded bail.
- This is about reoffenders leaving a wake of victims behind them.
- This may cost money, but Rep. Abbas calculated the number of cases judges would hear had SB92 been enacted, and he found it was not an onerous number.
- Senator French asked if bail be given to all of the people with the charges listed in Section III.
 - Yes. This bill is asking a judge to make a determination as to bail, not a bail commissioner. There is no amount of education that is going to assist in making these decisions under the current law. This needs to be in the hands of the judge. They will all be afforded a bail hearing. The judge may decide that there are no conditions that would allow the individual to be released to ensure the safety of the community
- Senator French asked if the difference is on the amount of bail.
 - Can't speak to what judges or bail commissioners will do. His sense is that it is pretty clear with this language that judges will probably continue to submit individuals to bail on the same calculations, levels, and thresholds we currently use.

Summary of testimony presented in opposition:

Frank Knaack (ACLU) (provided written testimony)

- Section 597:2 III(a) says regarding the standard for detaining a person for any offense, “the court may order preventive detention without bail, or, in the alternative, may order restrictive conditions including but not limited to electronic monitoring and supervision, only if the court determines by clear and convincing evidence that release will endanger the safety of that person or the public.”
- In current law there is a mechanism in place for those individuals to be held pre-trial with a lower standard of clear and convincing evidence.
- At the theoretical level this bill flips the presumption of innocent until proven guilty on its head.
- For those 13 offenses, it would mandate the incarceration of individuals based on unsubstantiated allegations.
- There is no data to support this bill.
- Since bail reform went into effect in 2018 crime has decreased 14%.
- This will result in at least a couple million dollars a year in cost.
- This legislation does not make communities safer.
- Often hears from proponents of this bill that we are talking about violent offenders, but there are numerous other sections of this bill that deal with non-

violent offenses, including the ability to be held pre-trial for a class B misdemeanor.

- It has been found that the majority of failures to appear (FTAs) are because of lack of childcare, lack of transportation, employment requirements, or the person simply forgot.
- There are solutions for addressing that like FTA text messaging.
- This bill is unnecessary and there is no evidence to support the need for it.
- Senator French asked which of the charges are class B misdemeanors.
 - Section III (c) deals people on release driving under the influence and Section VIII changes a ‘may’ to a ‘shall’, “A person charged with an offense who is, or was at the time the offense was committed, on release pending trial for a felony or misdemeanor under federal or state law, release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under federal or state law; or probation or parole for any offense under federal or state law, except as provided in RSA 597:1-d, III, shall be detained”
- Senator Gannon asked why he considers allegations to be unsubstantiated if they must meet the standard of clear and convincing.
 - When you are taking someone’s liberty there should be some standard there that ensures people are not wrongfully held.
- Senator Kahn asked if any of the offenses identified he believes ought to be separated from detention.
 - Concerned with categorizing people. In NH sometimes people are arrested, and when the prosecutor gets the case file, they may change the charge that is being brought. Concerned about having this broad swath of offenses where an individual is mandatorily held based just off a categorization rather than an individualized determination. Current law provides for individualized determination. We should be giving the courts broad discretion, and this is no different. We should allow the courts to do their jobs.
- Senator Kahn asked if we could meet the case load to ensure safety and still hold the hearings in a timely manner.
 - Would defer to the courts on their caseloads. Wants to ensure we are using the courts for things that are actually undermining safety. There is a whole host of things the Legislature could consider short of taking peoples liberty based on categorization.
- Senator Whitley asked if this is this taking us backwards in terms of trying to address racial inequities in our prisons.
 - Absolutely. Looking at any category in NH’s arrest rates the disparity is stark. The most recent data on marijuana showed that a Black person is 4.1 times more likely to be arrested. All our prisons and jails are disproportionately Black people. Anything we can do to reduce that is something this Legislature should care deeply about. This is something

outside of the scope of anything the Commission recommended and this is being brought forward when the system is working.

- Senator Carson asked if the statistics he gave are for NH or nationally.
 - The marijuana statistic is for NH and is based off a paper the ACLU released about two years ago. Pulled the most recent data and the disparity is still huge in marijuana arrests. It is the same across the boards in jails and prisons.
- Senator Gannon asked if those disparities could be due to economics rather than racial discrimination.
 - Marijuana is the best example of this. Nationally Black people and white people use marijuana at roughly the same rates. Therefore, arrest rates should be similar, but they never are.
- Senator Gannon asked if this could be because more minorities live in cities with a denser police presence.
 - There has been some geolocation mapping of arrests. In Washington DC they geo plotted all the arrests for marijuana possession. The east side of the city had a predominately Black population at the time and the west side had a predominately white population. The dots were all over the east side and there were barely any on the west side even though there was a college campus there.
- Senator Kahn asked for his comments on Section II.
 - Thinks what they are doing there is, II used to be I. Pre 2018 there were certain offenses where someone could be held. Bail reform passed and it said you could not be held regardless of the charge unless you meet the threshold of clear and convincing evidence that you pose a danger. They have to do that because they are adding in the offenses that create the categorization.
- The core component of ensuring someone is not being held simply because they are poor is the financial assessment. This is in Section III (b)(4).
- There is a curious strikeout in Section III (c) where they strikeout the financial assessment. Is concerned about what that is doing.

Neutral Information Presented:

Mary Ann Dempsey (Judicial Branch) (provided written testimony)

- When this was SB92 the Judicial Branch did submit a fiscal note. Provided a copy of that.
- Would ask LBA to ask them to submit a fiscal note for this bill. The Branch was not asked to submit a fiscal note on this bill.
- Of the crimes listed, two can be charged as misdemeanors and was able to get the data from the circuit court that that would be approximately 3,000 more bail hearings.
- The fiscal note for SB92 was a \$1.9million per year increase.
- Senator Gannon asked what the cost of one murder trial would be.

- Does not know the answer to that but will get that information to the Committee. The 3,000 are for the two misdemeanor charges. Of the 13 offenses, two could be charged as misdemeanors and result in those 3,000.

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Date Hearing Report completed: January 21, 2022