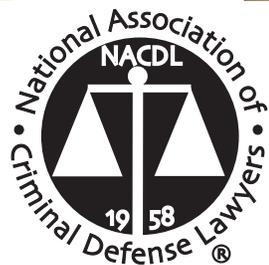


# THE NEW JERSEY PRETRIAL JUSTICE MANUAL



DECEMBER 2016



American Civil Liberties Union of New Jersey  
National Association of Criminal Defense Lawyers (NACDL)  
State of New Jersey Office of the Public Defender

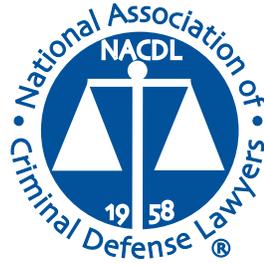
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## **ACKNOWLEDGEMENTS**

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Some sections of this manual were taken directly from The Colorado Bail Book, NACDL's first pretrial release manual. The authors wish to thank all those involved in the production of the Colorado Bail Book for their efforts, which created a template to follow in all future manuals.

Finally, the authors wish to thank Ivan Dominguez and Quintin Chatman of NACDL for their assistance in editing this manual; NACDL Art Director Cathy Zlomek and her staff for their expertise in preparing this manual for publication; Edward C. Monahan and B. Scott West for their groundbreaking work in developing the Kentucky Pretrial Release Manual and sharing their information with the defense bar nationwide; the Bureau of Justice Assistance for supporting this project; Pretrial Justice Institute for their continued support and assistance in this project; NACDL's leadership and Board of Directors for their enduring commitment to public defense reform and training; and the ACLU of New Jersey for its commitment to ending mass incarceration by fixing our broken bail system.



The American Civil Liberties Union of New Jersey, the National Association of Criminal Defense Lawyers, and the New Jersey Office of the Public Defender have joined together to craft this manual, The New Jersey Pretrial Justice Manual, in an effort to support New Jersey attorneys as they work to end pretrial injustice in the state. It is our hope that all defenders, both public and private, use this resource to aggressively and consistently challenge the pretrial system that punishes the accused before conviction, forces guilty pleas to obtain release, and incarcerates the poor simply because they cannot afford to post a money bond.

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We have attempted to be as comprehensive as possible, outlining both law and research while providing practical pointers for the courtroom lawyer. We encourage all to use our work to give voice to the incarcerated accused, who deserve dedicated and robust legal representation from the moment they are deprived of their liberty.

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**“In our society, liberty is the norm,  
and detention prior to trial  
or without trial is the carefully  
limited exception.”**

**Salerno v. United States**

481 U.S. 739, 755 (1987)

**“As we speak, close to three quarters  
of a million people reside in America’s jail system . . .  
Across the country, nearly two thirds of all  
inmates who crowd our county jails  
— at an annual cost of roughly nine billion  
taxpayer dollars — are defendants awaiting trial. . . .  
Many of these individuals are nonviolent,  
non-felony offenders, charged with crimes  
ranging from petty theft to public drug use.  
And a disproportionate number of them are poor.  
They are forced to remain in custody . . . because they  
simply cannot afford to post the bail required.”**

**Former U.S. Attorney General Eric Holder**

at the National Symposium on Pretrial Justice, June 1, 2011

**“Research during the past half century has clearly and  
consistently demonstrated that being incarcerated  
before trial can have significant consequences:  
defendants detained in jail while awaiting trial  
(1) plead guilty more often;  
(2) are convicted more often;  
(3) are sentenced to prison more often; and  
(4) receive harsher prison sentences than those  
who are released during the pretrial period.”**

**Report of the New Jersey Joint Committee on Criminal Justice**

March 10, 2014

# INTRODUCTION

Pretrial detention causes lost employment and housing, disruption in education, and damage to family relationships. Defendants detained in jail awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period.<sup>1</sup> Avoiding unnecessary pretrial confinement should be of paramount importance to every court system. Moreover, courts must move away from reliance on money bail set through an arbitrary schedule and instead make individualized determinations about who will return to court when required. Having money to post bond is not a predictor of compliance with court requirements.

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**Obtaining pretrial release is an essential part of the promise of *Gideon* that defense lawyers are committed to provide.**

Obtaining pretrial release is an essential part of the promise of *Gideon* that defense lawyers are committed to provide. This Manual is designed to give practitioners the guidance needed to achieve pretrial release for clients. It tells the story of how New Jersey came to reform its system of pretrial release and detention. It also presents the new risk assessment instrument and a decision making framework, which courts will be using to determine whether, and under what conditions, to release the accused pretrial. Because litigating pretrial release has such a critical impact on outcomes in criminal cases, the Manual provides a series of tools for litigating pretrial release, including: the initial client interview, taking advantage of the risk assessments, understanding the new statutes and applicable constitutional protections, and utilizing New Jersey case law on pretrial release. The Manual also provides advice for how to advocate on behalf of a client at both detention hearings and hearings designed to set conditions of release, before turning to a discussion of some problem areas, such as onerous conditions of release, costs of supervision, and the rights of domestic violence victims to receive notice of change of conditions. Finally, the Manual reviews the steps a practitioner must take to appeal an adverse determination regarding release conditions or detention.

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1. PRETRIAL JUSTICE INSTITUTE (PJI), EFFECTIVE PRETRIAL JUSTICE COMMUNICATION, GUIDELINES FOR CHAMPIONS & SPOKESPEOPLE (2014), available at [https://www.pretrial.org/download/pji-reports/Communication%20Guidelines%20\(October%202014\).pdf](https://www.pretrial.org/download/pji-reports/Communication%20Guidelines%20(October%202014).pdf).



**On a single day more than 5,000 people in New Jersey jails were able to be released on bail, but remained in custody simply because they lacked resources to post bail.**

## THE NEW JERSEY STORY

In March 2013, the Drug Policy Alliance released a study that confirmed what many defenders have known for a long time: New Jersey’s jails are filled with low risk pretrial detainees who sit in jail simply because they lack small amounts of money necessary to secure release.<sup>2</sup> Specifically, the study revealed that on a single day more than 5,000 people in New Jersey jails were able to be released on bail, but remained in custody simply because they lacked resources to post bail.<sup>3</sup> The report also showed the disparate impact on minorities: 71% of the population in New Jersey jails was composed of blacks and Latinos. Of the total population, 38% were held solely due to their inability to meet the conditions of the bail set for them. And 12% of the population (more than 1,500 people) were held because of their inability to pay \$2,500 or less.<sup>4</sup> The average length of stay in jail pending trial was about 10 months.<sup>5</sup>

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Inspired by that report, among other things, in the summer of 2013 New Jersey Supreme Court Chief Justice Stuart Rabner established and chaired a special committee of the Supreme Court, the Joint Committee on Criminal Justice (JCCJ), which included the Attorney General, the Public Defender, private attorneys, judges, court administrators, and representatives of the Legislature and the Governor’s Office.<sup>6</sup> The JCCJ was tasked with examining issues relating to bail and speedy trial to determine if reforms were needed. Drawing on data from the Administrative Office of the Courts, the JCCJ determined that “the average (median) length of stay for pretrial detainees is between 60-90 days,”<sup>7</sup> and that the average daily cost of housing a single inmate is approximately \$100.<sup>8</sup> Meanwhile, New Jersey’s resource-based bail system, in which defendants must pay for their release, risks a “dual system error,” in that it leads to a system in which poor defendants who pose little risk to the community are unable to be released because they cannot pay for their release, while more dangerous individuals who have substantial resources are able to be freed.<sup>9</sup> After a period of study of New Jersey’s existing system as well as systems that had implemented risk-based pretrial practices, the Committee concluded that reducing the number of pretrial detainees through the use of a risk-based approach could lead to substantial cost savings, as well as a “society that is freer, fairer and safer.”<sup>10</sup>

2. MARIE VANNOSTRAND, NEW JERSEY JAIL POPULATION ANALYSIS (March 2013), *available at*

[https://www.drugpolicy.org/sites/default/files/New\\_Jersey\\_Jail\\_Population\\_Analysis\\_March\\_2013.pdf](https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf).

3. *Id.* at 13.

4. *Id.*

5. *Id.* at 14 (“As of the day the jail snapshot was taken, inmates who had been indicted but had not yet had a trial had been in custody on average 314 days.”).

6. HON. GLENN A. GRANT, CRIMINAL JUSTICE REFORM, REPORT TO THE LEGISLATURE, JAN. 1, 2015 — DEC. 31, 2015, *available at*

[http://www.judiciary.state.nj.us/criminal/cjr/Criminal\\_Justice\\_Reform\\_Report\\_to\\_the\\_Legislature\\_12\\_01\\_15.pdf](http://www.judiciary.state.nj.us/criminal/cjr/Criminal_Justice_Reform_Report_to_the_Legislature_12_01_15.pdf).

7. Note that this average is skewed downward by people who are arrested, jailed, and almost immediately released. As noted above, among people who are indicted, the average amount of time in jail was 314 days.

8. REPORT OF THE JOINT COMMITTEE ON CRIMINAL JUSTICE (March 2014) [hereinafter JCCJ 2014 Report] at 12, *available at*

[https://www.judiciary.state.nj.us/pressrel/2014/FinalReport\\_3\\_20\\_2014.pdf](https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf).

9. *Id.* at 26.

10. *Id.* at 12.



The JCCJ ultimately recommended significant changes to the criminal justice system. The recommendations, memorialized in a March 2014 report, “represented the most comprehensive set of proposed reforms to the state’s criminal justice system since the adoption of the 1947 constitution.”<sup>11</sup> Specifically, the JCCJ recommended a shift from the resource-based system of pretrial detention and release to a risk-based system, the creation of a system of pretrial supervision, the ability to utilize preventive detention in rare circumstances where *no condition* or set of conditions could adequately protect the public and ensure that a defendant would appear in court, and the enactment of a statutory speedy trial scheme.<sup>12</sup>

Building on the JCCJ Report, in the summer of 2014 the Legislature passed and the Governor signed groundbreaking pretrial justice and speedy trial legislation that adopts many of the recommendations of the JCCJ, which is scheduled to take effect on January 1, 2017. In November 2014, New Jersey voters approved a constitutional amendment, also scheduled to take effect on January 1, 2017, to allow certain defendants to be detained pretrial without bail. The new law will require defenders to familiarize themselves with a totally new scheme in order to ensure that their clients are not unnecessarily detained or subjected to onerous conditions of release.

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**Switching from a system based solely on instinct and experience (often referred to as “gut instinct”) to one in which judges have access to scientific, objective risk assessment tools could further the criminal justice system’s central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.**

### **Risk Assessment and Release/Detention Decision Making in New Jersey**

The use of data, analytics, and technology has had a significant effect on the criminal justice system. Substantial research has led to the development of pretrial risk assessment instruments that assess the factors that correlate to successful pretrial release. Switching from a system based solely on instinct and experience (often referred to as “gut instinct”) to one in which judges have access to scientific, objective risk assessment tools could further the criminal justice system’s central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources.<sup>13</sup> Defendants who do not threaten public safety and are predicted to appear for scheduled court dates should not remain in jail simply because they cannot afford bail. Jurisdictions such as Kentucky that have been successfully using risk assessment tools have seen the numbers of pretrial detainees lowered while public safety and court appearances have remained constant.<sup>14</sup>

11. *Id.* at 1.

12. *Id.* at 9.

13. LAURA AND JOHN ARNOLD FOUNDATION (LJAF), DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT (2013), available at <http://ncja.org/sites/default/files/documents/LJAF-Developing-a-National-Model.pdf>.

14. PRETRIAL SERVICES ADMINISTRATIVE OFFICE OF THE COURTS KENTUCKY COURT OF JUSTICE, PRETRIAL REFORM IN KENTUCKY (Jan. 2013) (“pretrial jail populations have decreased by 279 people, while appearance and public safety rates have remained consistent.”) available at <http://www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf>.



**The LJAF's risk assessment tool is unique for two reasons: first, it predicts risk on three axes (risk of failure to appear, risk of new criminal activity, and risk of new violent criminal activity) and second, it does so without the need for a client interview.**

As required under the new law, the Judiciary sought to implement a comprehensive, evidence based risk assessment tool. To this end, the Judiciary partnered with the Laura and John Arnold Foundation (“LJAF”) to adapt the Public Safety Assessment (PSA), a risk assessment instrument tool that was validated using more than 750,000 cases in other jurisdictions and then retrospectively studied and validated for use in New Jersey.

The LJAF's risk assessment tool is unique for two reasons: first, it predicts risk on three axes (risk of failure to appear, risk of new criminal activity, and risk of new violent criminal activity) and second, it does so without the need for a client interview. Using information drawn from court records only, the PSA provides scores for defendants, predicting their risk of non-appearance and recidivism and identifying defendants who pose heightened risks of committing new, violent offenses. But the scoring of the risk assessment is just the first step in the process of securing a client's pretrial release. Regardless of the individual score, defenders should be prepared to argue the individual circumstances of the defendant. ***Defense attorneys should review the report, assess its accuracy, and be prepared to rely on the instrument or distinguish the client's situation, as appropriate.*** If the defendant scores as low or moderate risk, defenders should be prepared to argue why the score is appropriate for the client. If the defendant scores as high risk, defenders should review the factors to determine whether there are explanations for the adverse factors that would support the client's release despite the high score.

In order to advocate for a client's release, defenders must understand how the PSA functions. The PSA contains nine risk factors<sup>15</sup> that provide three pretrial failure indicators. The PSA draws on objective data available in the court's computer systems and therefore does not require the interview of a defendant. The PSA provides separate scores regarding defendants' risk of: **failure to appear** (using a six point scale), **new criminal activity** (using a six point scale), and **new violent criminal activity** (using a flag to indicate an elevated risk of violence).

15. There is a national debate among defense lawyers and pretrial researchers regarding whether some of these factors may have a disparate racial impact, since many of the factors are impacted by socio-economic status, which may disadvantage minority communities that are, on average, poorer than white communities. These factors may change over time as research develops. Nonetheless, many pretrial risk tools have been empirically tested to ensure they do not overestimate pretrial risk based on race or ethnicity. The PSA was found not to be biased based on race or ethnicity. Should this change, New Jersey courts will be prepared to address the issue. While the United States Supreme Court accepted that “disparities in sentencing are an inevitable part of our criminal justice system[,]” *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987), “New Jersey’s history and traditions would never countenance racial disparity in capital sentencing. As a people, we are uniquely committed to the elimination of racial discrimination.” *State v. Marshall*, 130 N.J. 109, 207 (1992). Though it has only addressed race disparity in the capital context, the New Jersey Supreme Court has experience in evaluating complex statistical models to confront race bias. See *In re Proportionality Review Project*, 161 N.J. 71 (1999); *In re Proportionality Review Project (ii)*, 165 N.J. 206 (2000).

The risk factors that the PSA draws from are:

1. age at current arrest;
2. current violent offense;
  - 2a. current violent offense and 20 years old or younger;
3. pending charge at the time of the offense;
4. prior disorderly persons conviction (does not include ordinance violations or petty disorderly persons offenses);
5. prior indictable convictions (degrees one to four)
  - 5a. prior conviction;
6. prior violent conviction;
7. prior failure to appear at a pre-disposition court date in the last two years (does not include ordinance violations, traffic offenses, or petty disorderly persons offenses);
8. prior failure to appear at a pre-disposition court date more than two years ago (does not include ordinance violations, traffic offenses, or petty disorderly persons offenses); and
9. prior sentence to incarceration (only sentences of 14 days or more).

8

Of course, not every risk factor impacts each of the PSA scores — nor does every factor impact each score to the same extent. The weighting and scoring for the PSA and the corresponding decision making framework are explained below.

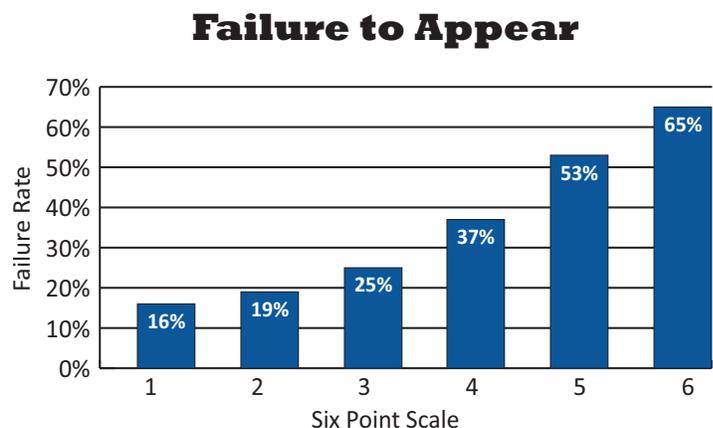
## Failure to Appear

### FTA Score Conversion

Raw Score	Six Point Scale
0	1
1	2
2	3
3-4	4
5-6	5
7	6

To calculate the risk of Failure to Appear (FTA), the PSA considers four factors: 1) if the defendant has a pending charge at the time of the offense he receives one point; 2) a prior conviction adds another point; 3) if the defendant failed to appear more than two years ago an additional point is added; 4) recent failures to appear — within two years — add two points if there is one and four points if there are two or more.<sup>16</sup> The defendant's raw score, which will be between zero and seven, is then converted into a six point scale as shown in the chart.<sup>17</sup>

Each point on the six point FTA scale corresponds to a different failure rate as shown in the chart below. A defendant who scores a one has, statistically, a 16% chance of failing to appear for his or her court date. A score of two corresponds



16. LJAF, PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA, at 3, available at <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf> [hereinafter RISK FACTORS AND FORMULA].

17. *Id.* at 4.

18. MARIE VANNOSTRAND, INTRODUCTION TO THE PUBLIC SAFETY ASSESSMENT AND DECISION MAKING FRAMEWORK: NEW JERSEY, at 24 (on file with the authors) [hereinafter INTRODUCTION TO PSA AND DMF].

to a failure to appear rate of 19%; a score of three yields a 25% failure rate; four reflects a 37% failure rate; a defendant with a score of five has a predicted failure rate of 53%; and a defendant at the top of the scale, with six points, corresponds to a 65% failure rate.<sup>18</sup>

## New Criminal Activity

### NCA Score Conversion

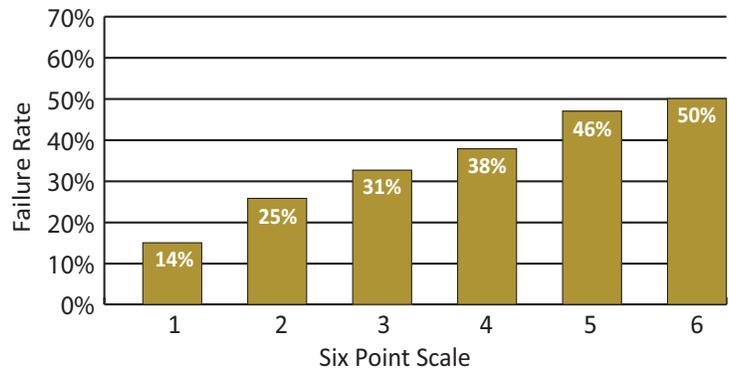
Raw Score	Six Point Scale
0	1
1-2	2
3-4	3
5-6	4
7-8	5
9-13	6

To calculate the risk that a defendant will commit new criminal activity (NCA) while on release, the PSA examines seven factors: 1) if the defendant is 22 or younger he receives two points; 2) a pending charge adds three points; 3) any prior disorderly persons offense convictions add a total of one point; 4) any prior convictions for indictable offenses add a total of one point; 5) if the defendant has been convicted of a violent crime on one or two occasions another point is added; if there are three or more convictions for crimes of violence, two points are added; 6) if the defendant failed to appear in the last two years one point is added; if the defendant failed to appear more than once, two points are added; 7) if the defendant has previously been sentenced to a term of incarceration, two points are added.<sup>19</sup> The defendant then has a raw score of between zero and thirteen converted

to a six point scale as shown in the chart.<sup>20</sup>

There are also failure rates associated with each point on the six point New Criminal Activity (NCA) scale. The failure rate in the NCA scale corresponds to the likelihood that the individual, if released, will be arrested for a new crime while the current case is pending. A score of one reflects a 14% chance that the defendant will be re-arrested; a score of two corresponds with a 25% failure rate; three reflects a 31% failure rate; four yields a 38% chance of new criminal activity; a defendant who scores a five has a 46% failure rate; when a defendant scores a six, the PSA predicts a 50% chance of criminal recidivism while on pretrial release.<sup>21</sup>

### New Criminal Activity



## New Violent Criminal Activity

The PSA flags defendants as posing an elevated risk of New Violent Criminal Activity (NVCA) during the pretrial release period in approximately 11% of cases in which the defendant is released. To calculate the NVCA score, the PSA examines five factors: 1) a defendant receives two points if the current offense is a violent one; 2) a defendant receives an additional point if the current offense is violent and the defendant is under 21; 3) an additional point is given when the defendant has pending charges; 4) a prior conviction adds a point; and 5) if the defendant has one or two prior violent convictions he receives one point; if he has three or more he receives two points.<sup>22</sup> If the raw score is between four and seven he receives an NVCA flag.<sup>23</sup> This flag, which will be based on both the nature of prior criminal convictions and the current charge, will make release less likely. Those clients who are released after receiving a flag will be released under more onerous conditions.

19. RISK FACTORS AND FORMULA at 3.

20. *Id.* at 4.

21. INTRODUCTION TO PSA AND DMF at 25.

22. RISK FACTORS AND FORMULA at 3.

## The Decision Making Framework

The PSA scores are only the beginning of the decision making process regarding pretrial release. While the PSA measures risk, New Jersey will also use a Decision Making Framework (DMF) to help manage that risk. The DMF produces a recommendation for a judge about conditions of release or detention. The ultimate decision about release or detention is held by judges, and therefore defense attorneys must concern themselves with convincing judges to release their clients on the least onerous condition or series of conditions.

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Using the DMF as a recommendation, courts assign defendants different levels of supervision, referred to as Pretrial Monitoring Levels (PML). A defendant released ROR will have no conditions, no face-to-face contact with a pretrial services officer, and no phone contact with the officer. At PML 1, there is only monthly phone reporting. At PML 2, defendants must report once a month in person, once a month by telephone, and be subject to some monitored conditions such as a curfew. At PML 3, defendants are monitored in person or by phone every week and are also subject to monitored conditions. Defendants at the next level, PML 3 plus electronic monitoring or home detention, are subject to all the same conditions but also may be confined to their home or required to wear a GPS monitoring device. Finally, if release is not recommended, the DMF suggests that the defendant should be detained pretrial or, if release is allowed, ordered released on PML 3 with electronic monitoring or home detention.<sup>24</sup>

The DMF is a four step process. First, the court<sup>25</sup> completes the PSA to produce scores for FTA and NCA



**Regardless of the risk assessment score or recommended release outcome, defense counsel should use the statistics regarding public safety rates and court appearance rates to the client's advantage.**

and a flag for NVCA. Second, the court determines whether any of the circumstances or charges are present which, in a majority of cases, would produce a recommendation of preventive detention, regardless of PSA score. Such a recommendation exists if the defendant is charged with escape, murder, aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery in the 1<sup>st</sup> degree, or carjacking.<sup>26</sup> It also exists where the PSA resulted in an NVCA flag and the current offense is a violent one.<sup>27</sup> In the event that any of these conditions exist, release is not recommended or, if released, it is recommended that the defendant be released on the most restrictive conditions. If none of the conditions exists, the court proceeds to step three. In the third step, the court applies the FTA and NCA scaled scores to a DMF matrix to determine a risk level and a preliminary recommendation.

23. *Id.* at 4.

24. INTRODUCTION TO PSA AND DMF at 29.

25. In the DMF, various entities, such as pretrial services, complete various tasks. Ultimately all the steps are completed on behalf of the court, so in the section we refer to the DMF steps as being undertaken by the court regardless of who completes them.

26. N.J.S.A. 2C:29-5a; N.J.S.A. 2C:11-3; N.J.S.A. 2C:11-4; N.J.S.A. 2C:14-2a; N.J.S.A. 2C:14-2b; N.J.S.A. 2C:14-2c(1); N.J.S.A. 2C:15-1; N.J.S.A. 2C:15-2.

27. INTRODUCTION TO PSA AND DMF at 31.

	NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
FTA 1	ROR 11.8% of population	ROR 7.7% of population				
FTA 2	ROR 0.5% of population	ROR 6.9% of population	PML 1 11.7% of population	PML 2 6.4% of population	PML 3 0.1% of population	
FTA 3		PML 1 2.0% of population	PML 1 8.8% of population	PML 2 6.0% of population	PML 3 2.9% of population	Release Not Recommended 0.5% of population
FTA 4		PML 1 0.6% of population	PML 1 1.5% of population	PML 2 3.5% of population	PML 3 4.8% of population	Release Not Recommended 0.9% of population
FTA 5		PML 2 0.0% of population	PML 2 0.4% of population	PML 3 2.0% of population	PML 3 + EM/HD 2.4% of population	Release Not Recommended 1.5% of population
FTA 6				Release Not Recommended 0.1% of population	Release Not Recommended 0.3% of population	Release Not Recommended 1.8% of population

Marie VanNostrand, INTRODUCTION TO THE PUBLIC SAFETY ASSESSMENT AND DECISION MAKING FRAMEWORK: NEW JERSEY (on file with the authors). Reformatted for this report.

Fourth, the court determines whether the defendant is charged with a No Early Release Act (NERA) crime not addressed in step three. If so, the level of recommended conditions increases one level (from ROR to release with PML 1; from PML 1 to PML 2 and so forth). If not, the preliminary recommendation is the final recommendation.<sup>28</sup>

Regardless of the risk assessment score or recommended release outcome, defense counsel should use the statistics regarding public safety rates and court appearance rates to the client’s advantage. Explaining to a judge that an individual who scores two out of six on each scale has an 81% chance of returning to court and a 75% chance of staying out of trouble is more effective than simply pointing out the defendant’s PSA scores. For example, if a client scores a three on the Failure to Appear scale, defense counsel should argue, “Based on Mr. Smith’s PSA score alone, he has a predicted 75% court appearance rate.” That sounds more persuasive than saying “Your honor, even though Mr. Smith scored a three, which is a moderate risk level, the court appearance rate for that category is 75%.”

But as should be plainly apparent, the factors used to arrive at the PSA risk scores are derived from limited sources. Where the PSA relies exclusively on administrative data such as the charge, the defendant’s criminal history, and the defendant’s court appearance history, defense attorneys must present courts with a host of other information that might convince a judge that a defendant’s PSA scores do not reflect the true extent of the defendant’s risk (or lack thereof). Note that just as defenders will argue that facts not contained in the PSA should be considered to support their clients’ release, prosecutors may argue that factors not contemplated by the PSA, such as petty disorderly persons convictions, ordinance violations, juvenile adjudications, and FTAs for those court events, counsel against release.

The new statutes grant strong deference to the recommendations of the Pretrial Services Program, and judges may depart from the recommendation, but have to explain their reasons for doing so.<sup>29</sup> Later sections of this Manual provide guidance for defense attorneys about getting appropriate information from their clients and presenting that information persuasively to the court.

28. *Id.* at 34.

29. N.J.S.A. 2A:162-23 provides, “If the court enters an order that is contrary to a recommendation made in a risk assessment when determining a method of release or setting release conditions, the court shall provide an explanation in the document that authorizes the eligible defendant’s release.” Judges may be hesitant, therefore, to depart from Pretrial Services recommendations, either due to fear of being held responsible for a defendant’s misconduct if they release on lesser conditions than recommended, or desire to avoid additional paperwork.

# SECTION 1: THE IMPORTANCE OF LITIGATING PRETRIAL RELEASE

## Why Litigate Pretrial Release? Because it Affects Both Short-Term and Long-Term Outcomes for the Client

The importance of helping clients achieve pretrial release cannot be overstated. Not only is such advocacy required by professional standards,<sup>30</sup> but the impact of pretrial incarceration on a client is substantial. Social science research demonstrates that persons who are released have better outcomes than those who stay in jail pending resolution of their cases.

### Clients who stay in jail pending trial get longer sentences.

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A study using data from state courts found that defendants who were detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial.<sup>31</sup> And their sentences were significantly longer — almost three times as long for defendants sentenced to jail, and more than twice as long for those sentenced to prison. A separate study found similar results in the federal system.<sup>32</sup>

**“The existing bail system is not fair to poor defendants who, because they cannot post bail, are cut off from families, may lose their jobs, and may go without access to medication for a period of time. In terms of the charges against them, studies have shown that they face tougher plea offers and pressure to plead guilty because of the amount of time they have already spent in jail, and they receive longer sentences as compared to similarly situated defendants who were able to make bail.”**

*Chief Justice Stuart Rabner*

### Clients who stay in jail pending trial are at greater risk to recidivate in both the short term and the long term.

Jail makes people worse, even short stays. Using statewide data from Kentucky, a study conducted by the Laura and John Arnold Foundation (LJAF) uncovered strong correlations between the length of time low and moderate risk defendants were detained before trial and the likelihood that they would re-offend in both the short term and the long term. Even for relatively short periods behind bars, low and moderate risk defendants who were detained for more days were more likely to commit additional crimes in the pretrial period — and were also more likely to do so during the two years after their cases ended.<sup>33</sup>

30. See NAT'L LEGAL AID AND DEFENDER ASS'N (NLADA) STANDARDS 2.1 and 2.3, ABA DEFENSE FUNCTION STANDARD 4-3.6, and NEW JERSEY RULE OF PROF'L CONDUCT 1.1(a).

31. See LJAF, *Pretrial Criminal Justice Research Summary* (2013), available at [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf).

32. *Id.*

33. Christopher T. Lowenkamp et al., LJAF, *THE HIDDEN COSTS OF PRETRIAL DETENTION 4* (2013), available at: <http://www.pretrial.org/download/research/The%20Hidden%20Costs%20of%20Pretrial%20Detention%20-%20LJAF%202013.pdf>.



**Even for relatively short periods behind bars, low and moderate risk defendants who were detained for more days were more likely to commit additional crimes in the pretrial period — and were also more likely to do so during the two years after their cases ended.**

### **Lawyers Make a Significant Difference at Pretrial Release Hearings**

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Research shows that counsel at the initial appearance before a judge or magistrate not only increases the accused’s chances for release but also his or her sense of fairness about the process. A defendant with a lawyer at first appearance:

- ★ Is 2 ½ times more likely to be released on recognizance;
- ★ Is 4 ½ times more likely to have the amount of bail significantly reduced;
- ★ Serves less time in jail (median reduction from 9 days jailed to 2, saving county jail resources while preserving the client’s liberty interests); and
- ★ More likely feels that he is treated fairly by the system.<sup>34</sup>

34. KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY, KENTUCKY PRETRIAL RELEASE MANUAL (Jun. 2013) at 6 (citing Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002)).

## SECTION 2: TOOLS FOR LITIGATING PRETRIAL RELEASE

There are **FIVE MAJOR TOOLS** that every defense attorney must use when advocating for a client's pretrial release:

- 1.** A thorough knowledge of the client gathered from a detailed initial interview;
- 2.** Awareness of any risk assessment tools used in the specific jurisdiction;
- 3.** An in-depth comprehension of the New Jersey pretrial release statutes;
- 4.** Familiarity with United States and New Jersey Constitutional provisions regarding pretrial justice; and
- 5.** An understanding of New Jersey case law regarding pretrial release.

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The sections that follow contain an overview of each of these tools.

### Tool #1: Initial Client Interview

A thorough knowledge of the client and his background is the most important tool that a lawyer possesses when litigating for release. Conducting a detailed initial interview gives the attorney the information needed to advocate fully and builds client confidence from the first meeting. Sample interviews forms that are easy to use and will obtain the necessary information are provided in Appendices 1 and 2. Note that the risk assessment scores in New Jersey rely exclusively on criminal justice data, not on interviews of defendants. The information that a defense attorney can learn in an interview may be a rich source of material that can be used to convince a judge to release a defendant who the judge would otherwise detain.

The National Legal Aid and Defender Association (NLADA) suggests that defense counsel should get the following information during his initial interview with the client:

#### 2.2 NLADA: Initial Interview<sup>35</sup>

- (A)** Preparation: Prior to conducting the initial interview the attorney should, where possible:
- (1)** be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;
  - (2)** obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;

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35. National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation, Guideline 2.2.

- (3) be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions; 📌

**Be prepared to conduct an interview with your client that addresses the risk assessment factors and be prepared to argue for ROR or release on the least restrictive conditions. Have the data available to argue probable success rates.**

- (4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;
- (5) be familiar with any procedures available for reviewing the trial judge's setting of bail.

**(B)** The Interview:

- (1) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.

- (2) Information that should be acquired includes, but is not limited to:

- (a) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history; 📌

**Get specific information from the client: names and ages of children and step children; addresses; telephone numbers; name and location of employer, and name and number of supervisor; whether client is receiving Social Security benefits, housing benefits, etc.**

- (b) the client's physical and mental health, educational and armed services records; 📌

**For physical and mental health: get dates, names of mental health treatment facilities and doctors. For military service: get branch, dates of active service, any injuries, any medication, and type of discharge. For education: ask about special schools and classes, individualized education plans (IEPs), instances where the client was held back in school, and other indicators of developmental or mental health issues. For all: get signed releases.**

- (c) the client's immediate medical needs; 

**Ask about type and dosage of medication; length of time client has been taking the medication; and names and addresses of doctors, therapists, or social workers. Additionally, it may be useful to learn about past health history including any significant injuries, operations, overnight hospital stays, or head trauma.**

- (d) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision; 

**Ask for an NCIC report prior to the client interview; if not available ask client detailed, specific questions about their prior criminal history including nature of charges, disposition, FTAs, probation violations, parole violations, and any reasons for non-compliance.**

- (e) the ability of the client to meet any financial conditions of release; 

**Ask about child support obligations, rent or mortgage, family support, education payments, and any other financial obligations.**

- (f) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals [...] 

**Names, addresses, emails, cell phone numbers. Get client's permission to talk to them and discuss what information about the criminal case can be shared before calling.**

In addition to the client's social factors, attorneys should attempt to get a workable understanding of the client's version of events as early as possible in order to appropriately advocate for release. Defense counsel should always strive to conduct this initial interview with his client in a private, confidential space. Consider the *ABA Ten Principles of a Public Defense Delivery System*, Principle 4:

#### #4: Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

Commentary: Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel. 

**Although the ABA commentary only addresses interviewing the client before a preliminary hearing or trial, it is equally essential to interview the client prior to the release hearing or any detention hearing. Defenders must ensure that they have ample confidential time and space to meet with the client during the initial interview. It is NOT appropriate to interview the client in the courtroom or lockup area surrounded by civilians, prosecutors, law enforcement agents, or other defendants.**

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See Appendix 3: ABA Ten Principles of a Public Defense Delivery System

### Tool #2: Risk Assessment Instruments

The Risk Assessment Instrument in use in New Jersey was discussed in depth at the beginning of this Manual. Refer back to “The New Jersey Story” section of this Manual for a thorough discussion of the PSA. Defense attorneys should always be aware of their clients’ scores on the PSA and be prepared to address them. If the scores indicate the defendant is low- or medium-risk, defenders should use that information as leverage to argue for ROR or release on conditions. If the score indicates that the client is high-risk, defenders must be prepared to counter those risk factors based on information gleaned from the client interview and be ready to suggest appropriate conditions of release that address the client’s specific risk factors.

### Tool #3: New Jersey Statutes

#### Summary of New Jersey Pretrial Release Statutes

New Jersey’s new pretrial release statutes, N.J.S.A. 2A:162-15 et seq., are designed to be “liberally construed to effectuate the purpose of primarily relying upon pretrial release by non-monetary means to” achieve the three purposes of pretrial release: ensuring defendants’ appearance in court; protecting the safety of any other person or the community; and preventing defendants from obstructing or attempting to obstruct the criminal justice process.<sup>36</sup> Throughout this Manual these purposes will be referred to as the goals of the pretrial release law. This section contains an overview of what the new statutes accomplish and is followed by a detailed explanation of the provisions of each new statute.

36. N.J.S.A. 2A:162-15.



**As a last resort, the court may detain a defendant without bail, upon a motion of the prosecutor and after a hearing.**

### **Process**

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The statute calls for every defendant who is charged following the issuance of a complaint-warrant — that is, every defendant who is not initially released on his own recognizance — to be temporarily detained to allow the preparation of “a risk assessment with recommendations on conditions of release . . . and for the court to issue a pretrial release decision.”<sup>37</sup> The statute requires that this initial decision occur within 48 hours, but the Judiciary aims to conduct risk assessments within 24 hours.

Once a risk assessment has been conducted, the statute requires a court to consider the assessment “*and any information that may be provided by a prosecutor or the . . . defendant*” in reaching its decision regarding whether the defendant should be detained or released and, if released, on what conditions.<sup>38</sup> The statute provides a hierarchy for making such decisions, favoring release on the least restrictive conditions that are appropriate for the individual. Ideally, defendants should be released on their own recognizance or on execution of an unsecured appearance bond. If a release without conditions does not sufficiently achieve the goals of the pretrial release law, a defendant may be released on the least restrictive non-monetary condition or combination of conditions. If non-monetary conditions fail to ensure the defendant’s presence, the court may set a monetary bail. As a last resort, the court may detain a defendant without bail, upon a motion of the prosecutor and after a hearing.

### **Release**

Courts are authorized to release defendants on any condition that achieves the purposes of the pretrial release law (ensuring a defendant’s presence in court, protection of the public, and prevention of obstruction of justice).<sup>39</sup> But, certain conditions can be expected to be imposed in virtually every case:

- (A)** the defendant shall not commit any offense during the period of release;
- (B)** the defendant shall avoid all contact with an alleged victim of the crime; and
- (C)** the defendant shall avoid all contact with all witnesses who may testify concerning the offense that are named in the document authorizing the eligible defendant’s release or in a subsequent court order.<sup>40</sup>

37. N.J.S.A. 2A:162-16.

38. *Id.* (emphasis added).

39. N.J.S.A. 2A:162-17b(2).

40. N.J.S.A. 2A:162-17b(1).

Additional conditions that may be imposed when necessary include:

- (A) abide by specified restrictions on personal associations, place of abode, or travel;
- (B) report on a regular basis to a designated law enforcement agency, or other agency, or pretrial services program;
- (C) refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (D) comply with a specified curfew;
- (E) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;
- (F) be placed in a pretrial home supervision capacity with or without the use of an approved electronic monitoring device;
- (G) remain in the custody of a designated person, who agrees to assume supervision of the defendant;
- (H) maintain employment, or, if unemployed, actively seek employment;
- (I) maintain or commence an educational program;
- (J) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose; and
- (K) return to custody for specified hours following release for employment, schooling, or other limited purposes.<sup>41</sup>



**Where a court orders that a defendant be subject to electronic monitoring, it may order that the defendant pay some or all of the costs of the monitoring, but the court is also authorized to waive the payment for an indigent defendant who has demonstrated an inability to pay all or a portion of the costs.**

There also exists a catch-all condition, authorizing courts to place any other condition on the pretrial release of a defendant that achieves the purposes of the pretrial release law. It bears repeating that the condition or combination of conditions must be the least restrictive condition or combination of conditions that the court determines will reasonably achieve the purposes of the law.<sup>42</sup>

Where a court orders that a defendant be subject to electronic monitoring, it may order that the defendant pay some or all of the costs of the monitoring, but the court is also authorized to waive the payment for an indigent defendant who has demonstrated an inability to pay all or a portion of the costs.<sup>43</sup>

41. N.J.S.A. 2A:162-17b(2) (Note that conditions (g)-(k), while statutorily permitted, are discouraged by the judiciary because of the cost of enforcement. Additionally, condition (f) should be reserved for high-risk defendants.).

42. N.J.S.A. 2A:162-17b(2)(l).

43. N.J.S.A. 2A:162-17b(2)(k).

Courts are authorized to impose monetary bail **only where non-monetary conditions are insufficient** to serve the purposes of the statute. Further, courts may only issue money bails to assure a defendant's appearance in court; money bails cannot be issued to protect public safety or to prevent obstruction of the criminal justice process.<sup>44</sup> Individuals who remain in custody because they cannot pay the monetary bail are entitled to the same speedy trial protections that those who are subject to preventive detention are.



**Where a prosecutor moves for preventive detention . . . “the prosecutor shall provide the defendant with all statements or reports in its possession relating to the pretrial detention application.”**

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## **Detention**

The statute also authorizes the prosecutor to seek detention of defendants under certain limited circumstances. Where a prosecutor moves for preventive detention, the defendant is entitled to significant discovery at the first appearance. Specifically, “the prosecutor *shall* provide the defendant with all statements or reports in its possession relating to the pretrial detention application. All exculpatory evidence must be disclosed.”<sup>45</sup> A model pre-hearing discovery demand is provided at Appendix 4.

The crimes where a prosecutor can specifically move for detention are:

- (1)** any crime *or offense* involving domestic violence;<sup>46</sup>
- (2)** any crime of violence subject to the No Early Release Act (NERA);<sup>47</sup>
- (3)** any crime which subjects the defendant to a life sentence (including extended term sentences);
- (4)** any crime if the defendant has twice previously been convicted of NERA crimes or crimes carrying life sentences;
- (5)** any sex crime;<sup>48</sup> and
- (6)** any weapons offense identified in the Graves Act.<sup>49</sup>

There is also, however, a catch-all that allows prosecutors to move for detention where they “believe[] there is a serious risk that” the defendant will not appear in court as required, will pose a risk to another person or the community, or will attempt to obstruct justice.<sup>50</sup>

But the prosecutor seeking detention is just the first step in the process.

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44. N.J.S.A. 2A:162-17c(1).

45. R. 3:4-2(c)(1)(B) (effective January 1, 2017) (emphasis added).

46. As defined in N.J.S.A. 2C:25-19; note this includes disorderly persons offenses which are not considered crimes under the Code of Criminal Justice. N.J.S.A. 2C:1-4(a), (b).

47. N.J.S.A. 2C:43-7.2.

48. Including those defined in N.J.S.A. 2C:7-2b(2), human trafficking (N.J.S.A. 2C:13-8) where the victim is a minor, or endangering the welfare of a child under N.J.S.A. 2C:24-4.

49. N.J.S.A. 2C:43-6c.

50. N.J.S.A. 2A:162-19a(7).

With respect to all triggering crimes other than murder and other crimes subjecting the defendant to a life sentence, there exists a presumption that some condition or combination of conditions will be sufficient to achieve the purposes of the pretrial release law — that is, there exists a presumption *against* detention.<sup>51</sup> A presumption of detention exists only where the court finds probable cause to believe that a defendant committed either murder or any crime eligible for a life sentence.<sup>52</sup>

Regardless of which presumption exists, in every case where the prosecutor moves for detention, the court shall conduct a hearing to determine whether any condition or set of conditions will achieve the three purposes of the pretrial release law. At the hearing, the defendant has a right to counsel and has a right to testify, present evidence, cross examine witnesses, and to present information by proffer. The Rules of Evidence do not apply at such hearings. If a detention hearing occurs after indictment, the State need not prove probable cause; otherwise the prosecutor must prove by a preponderance of the evidence that (1) there is probable cause that the defendant committed the charged offense, and (2) that no condition or set of conditions will achieve the goals of the law. Whether a presumption exists will govern who must present evidence first: if a presumption of detention exists, the defendant must first attempt to rebut it; otherwise, the State shoulders the burden of convincing the court that detention is appropriate.

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In determining whether any condition (monetary or non-monetary) or set of conditions will achieve the law's purposes, courts are told to consider:

- ★ the nature and circumstances of the offense charged;
- ★ the weight of the evidence against the eligible defendant (including consideration of what evidence might be excluded); 📌

**Because the court must consider both the strength of the State's evidence and the admissibility of it, defense attorneys should not hesitate to explore weaknesses in the State's factual and legal case. Such exploration may prove valuable for a future motion to suppress or at trial.**

- ★ the defendant's history and characteristics, including:
  - the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community and community ties; 📌

**Note that none of these factors will have been considered by the PSA so defense attorneys must be particularly conscious of bringing them to the court's attention.**

- the defendant's past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings;
- whether, at the time of the current offense or arrest, the defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence;

51. N.J.S.A. 2A:162-18b.

52. N.J.S.A. 2A:162-19b.

- ★ The nature and seriousness of the danger to any other person or the community that would be posed by the defendant’s release;
- ★ The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the defendant’s release;
- ★ The release recommendation of the pretrial services program obtained using the PSA.<sup>53</sup> Court Rules allow courts to “consider as prima facie evidence sufficient to overcome the presumption of release a recommendation by the Pretrial Services Program established” by statute.<sup>54</sup> But the Rules do not preclude the consideration of other evidence, even when such a recommendation is made.<sup>55</sup>

As a general rule, hearings should take place at the first appearance or within three business days of the filing of the motion. Courts may grant a continuance of up to five business days when sought by the defendant or up to three business days when sought by the prosecutor. If a defendant has not yet been released at the time the prosecutor files a motion, he must remain in jail pending the judge’s ruling; if the defendant had already been released, he will be ordered to appear at the hearing. After a hearing, if the court finds that material information that was not known to the prosecutor or the defendant is available, it may reopen the hearing at any time. Where a court determines that detention is proper, it must provide written findings of fact. These findings of fact, of course, can serve as the basis for an appeal. Appeals of detention orders and conditions are discussed below.

Defendants who are held pursuant to preventive detention are entitled to speedy trial protections outlined in N.J.S.A. 2A:162-22, discussed in detail below.

Note that the statute provides protections for the attorney-client relationship. For example, the court is authorized to temporarily release a defendant if the court determines that it is necessary for trial preparation or another compelling reason.

### Specific Provisions of New Jersey’s Pretrial Release Statutes

The following section explains the important provisions of the new pretrial release statutes that all practitioners must know.



**Under the new statutory scheme, courts should primarily rely on non-monetary means to release defendants from jail pretrial.**

53. N.J.S.A. 2A:162-20.

54. R. 3:4A(b)(5) (effective January 1, 2017).

55. *Id.*

### ***N.J.S.A. 2A:162-15. Liberal Construction.***

This section articulates the overall purpose of the new pretrial release laws. Under the new statutory scheme, courts should primarily rely on **non-monetary means** to release defendants from jail pretrial. Monetary bail should only be set if the court determines that “**no other conditions of release will reasonably assure**” that the defendant will appear for court. A defendant may only be detained pretrial if the court finds “**clear and convincing evidence that no condition or combination of conditions**” can reasonably assure that the defendant will appear in court, will not be a danger to the community, and will not obstruct the criminal justice process.

### ***N.J.S.A. 2A:162-16. Detaining eligible defendant during preparation of risk assessment prior to trial.***

This section requires that most defendants who are charged on complaint-warrants be “temporarily detained to allow the Pretrial Services Program [PSP] to prepare a **risk assessment with recommendations** on conditions of release.”<sup>56</sup> The statute puts a 48-hour limit on the length of time that may pass between detention and the court making a decision on the individual’s pretrial release conditions. The court, after considering the circumstances, the PSP’s assessment and recommendations, and any information presented by either the prosecutor or the defendant (or his counsel), must order one of the following:

- (A)** Release on **recognizance** or an **unsecured bond**;
- (B)** Release on the **least restrictive non-monetary conditions** that will reasonably accomplish the purposes of the pretrial release statutes (defendant’s appearance, safety of the community, and that the defendant will not obstruct justice);
- (C)** Release on a **monetary bond** or a **combination of non-monetary conditions and monetary bond**; or
- (D)** If the prosecutor moves for pretrial detention, **detention pending a hearing** pursuant to N.J.S.A. 2A:162-18 and N.J.S.A. 2A:162-19.

If a defendant is charged on a complaint-summons, he or she must be released from custody and not detained for a pretrial risk assessment. In the event that such an individual is subsequently arrested on a warrant for failing to appear in court, the defendant may be released on recognizance or on bail, in the court’s discretion. Monetary bail must be set within 12 hours of arrest if the amount of bail was not set when the warrant was issued. If a monetary bail is set that the defendant cannot pay, he or she may have that bail reviewed “promptly” and can seek a bail reduction, “which shall be heard in an expedited manner.” Any defendant who is incarcerated on a complaint-summons charge who does not post the bond set may not be held longer than the maximum jail or probation sentence associated with the offense.

56. Emphasis added. There are some defendants who are not subject to this screening and release procedure. See N.J.S.A. 2A:162-18 and N.J.S.A. 2A:162-19 for details.

### ***N.J.S.A. 2A:162-17. Consideration for pretrial release.***

This statute clearly articulates the order of preference for the type of release granted, and the kinds of conditions that may be imposed. **First**, the court must order either a **release on recognizance or an unsecured appearance bond** when doing so would reasonably accomplish the purposes of the pretrial release statute. **Second**, if the court finds that an ROR or unsecured bond would not provide appropriate assurances of appearance and safety, the court can order release on **non-monetary conditions**. Those conditions are that the defendant not commit any offense, avoid contact with any alleged victims, avoid contact with witnesses named in the release order, and one or more of a list of conditions set forth in N.J.S.A. 2A:162-17b(2) — provided that the conditions imposed must be the **least restrictive condition or combination thereof**. The permissible conditions (which include a catch-all “any other condition that is necessary”) are clearly listed in the statute and were discussed above in the summary section. **Third**, if the court finds that ROR, unsecured bond, or release with non-monetary conditions will not reasonably accomplish the goals of the pretrial release law, the court may set a **monetary bond**. A monetary bond can only be imposed if the court finds it is necessary to reasonably assure the defendant’s appearance, and is not able to be set in response to safety or obstruction concerns. **Finally**, if the court finds that none of the first three options is appropriate, a **combination of monetary and non-monetary conditions** may be set. Defendants who have monetary conditions set who are not able to pay the bail amount and thus remain in custody are entitled to the speedy trial provisions outlined in N.J.S.A.2A:162-22.

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**Although one of the concerns that the court is required to consider when setting release conditions is whether the defendant is a risk for obstructing justice, the last subsection of the statute, N.J.S.A. 2A:162-17e, puts the burden on the prosecutor to raise this concern.**

Although one of the concerns that the court is required to consider when setting release conditions is whether the defendant is a risk for obstructing justice, the last subsection of the statute, N.J.S.A. 2A:162-17e, puts the burden on the prosecutor to raise this concern. Per the statute, “this reasonable assurance may be deemed to exist if the prosecutor does not provide the court with information relevant” to the obstruction risk.

### ***N.J.S.A. 2A:162-18. Pretrial detention for certain eligible defendants ordered by court; appeal.***

This statute begins the discussion of when a defendant may be detained pretrial rather than having conditions of release set. Under this section, the court may order detention of a defendant who is charged with one of the crimes/offenses listed in the next section, 2A:162-19, if the prosecutor seeks detention and the court makes appropriate findings after a hearing. If the defendant is charged with one of the crimes covered by **N.J.S.A. 2A:162-19a**, a defendant may be detained if the prosecutor moves for detention and the court finds after a hearing that there is **clear and convincing evidence** that no amount of monetary bail, non-monetary conditions, or combination thereof would reasonably accomplish the purposes of the pretrial release statutes. A defendant charged with one of these crimes has in his favor a

**rebuttable presumption that some condition or set of conditions is appropriate** to reasonably assure his appearance, the safety of the community, and prevent obstruction of justice. If the defendant is charged with one of the crimes covered by **N.J.S.A. 2A:162-19b (murder or crimes carrying life imprisonment)**, the court may order pretrial detention if the prosecutor requests it and the **defendant “fails to rebut a presumption of pretrial detention”** that exists for those crimes.

If the court orders pretrial detention, the defendant may appeal that order pursuant to the Rules of the Court. If the court does not order pretrial detention, it must set release conditions as required in N.J.S.A. 2A:162-17 (above).

***N.J.S.A. 2A:162-19. Pretrial detention for certain eligible defendants requested by prosecutor.***

Prosecutors may file a motion for pretrial detention at any time — **including after a defendant has already been released** — when the defendant is charged with one of the crimes or offenses listed in this section. A prosecutor may move for detention if a defendant is charged with one of the following crimes:

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- (1)** Any crime of the first or second degree enumerated under subsection d of N.J.S.A. 2C:43-7.2;<sup>57</sup>
- (2)** Any crime carrying an ordinary or extended term of life imprisonment;
- (3)** Any crime at all, if the defendant has previously been convicted of two or more offenses listed in the prior two paragraphs;
- (4)** Any crime enumerated under paragraph (2) of subsection b of N.J.S.A. 2C:7-2<sup>58</sup> or crime involving human trafficking (N.J.S.A. 2C:13-8) where the victim is a minor, or endangering the welfare of a child under N.J.S.A. 2C:24-4;
- (5)** Any crime enumerated under subsection c of N.J.S.A. 2C:43-6;<sup>59</sup>
- (6)** Any crime or offense involving domestic violence as defined in N.J.S.A. 2C:25-19a;<sup>60</sup> or

57. The crimes listed in subsection d. of N.J.S.A. 2C:43-7.2 are N.J.S.A. 2C:11-3, murder; N.J.S.A. 2C:11-4, aggravated manslaughter or manslaughter; N.J.S.A. 2C:11-5, vehicular homicide; subsection b. of N.J.S.A. 2C:12-1, aggravated assault; subsection b. of section 1 of P.L.1996, c.14 (C.2C:12-11), disarming a law enforcement officer; N.J.S.A. 2C:13-1, kidnapping; subsection a. of N.J.S.A. 2C:14-2, aggravated sexual assault; subsection b. of N.J.S.A. 2C:14-2 and paragraph (1) of subsection c. of N.J.S.A. 2C:14-2, sexual assault; N.J.S.A. 2C:15-1, robbery; section 1 of P.L.1993, c.221 (C.2C:15-2), carjacking; paragraph (1) of subsection a. of N.J.S.A. 2C:17-1, aggravated arson; N.J.S.A. 2C:18-2, burglary; subsection a. of N.J.S.A. 2C:20-5, extortion; subsection b. of section 1 of P.L.1997, c.185 (C.2C:35-4.1), booby traps in manufacturing or distribution facilities; N.J.S.A. 2C:35-9, strict liability for drug induced deaths; section 2 of P.L.2002, c.26 (C.2C:38-2), terrorism; section 3 of P.L.2002, c.26 (C.2C:38-3), producing or possessing chemical weapons, biological agents or nuclear or radiological devices; N.J.S.A. 2C:41-2, racketeering, when it is a crime of the first degree; subsection i. of N.J.S.A. 2C:39-9, firearms trafficking; and paragraph (3) of subsection b. of N.J.S.A. 2C:24-4, causing or permitting a child to engage in a prohibited sexual act, knowing that the act may be reproduced or reconstructed in any manner, or be part of an exhibition or performance.

58. The crimes listed in N.J.S.A. 2C:7-2b(2) are aggravated sexual assault; sexual assault; aggravated criminal sexual contact; kidnapping pursuant to paragraph (2) of subsection c. of N.J.S.A. 2C:13-1; endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to subsection a. of N.J.S.A. 2C:24-4; endangering the welfare of a child pursuant to paragraph (3) or (4) or subparagraph (a) of paragraph (5) of subsection b. of N.J.S.A. 2C:24-4; luring or enticing pursuant to section 1 of P.L.1993, c.291 (C.2C:13-6); criminal sexual contact pursuant to N.J.S.A. 2C:14-3b. if the victim is a minor; kidnapping pursuant to N.J.S.A. 2C:13-1, criminal restraint pursuant to N.J.S.A. 2C:13-2, or false imprisonment pursuant to N.J.S.A. 2C:13-3 if the victim is a minor and the offender is not the parent of the victim; knowingly promoting prostitution of a child pursuant to paragraph (3) or paragraph (4) of subsection b. of N.J.S.A. 2C:34-1.

59. Weapons offenses enumerated in the Graves Act.

60. “Domestic violence” means the occurrence of one or more of the following acts inflicted upon a person protected under this act by an adult or an emancipated minor: (1) Homicide N.J.S.A. 2C:11-1 et seq.; (2) Assault N.J.S.A. 2C:12-1; (3) Terroristic threats N.J.S.A. 2C:12-3; (4) Kidnapping N.J.S.A. 2C:13-1; (5) Criminal restraint N.J.S.A. 2C:13-2; (6) False imprisonment N.J.S.A. 2C:13-3; (7) Sexual assault N.J.S.A. 2C:14-2; (8) Criminal sexual contact N.J.S.A. 2C:14-3; (9) Lewdness N.J.S.A. 2C:14-4; (10) Criminal mischief N.J.S.A. 2C:17-3; (11) Burglary N.J.S.A. 2C:18-2; (12) Criminal trespass N.J.S.A. 2C:18-3; (13) Harassment N.J.S.A. 2C:33-4; (14) Stalking P.L.1992, c.209 (C.2C:12-10).

- (7)** Any other crime for which the prosecutor believes there is a serious risk that:
- (a)** the defendant will not appear in court;
  - (b)** the defendant will pose a danger to another person; or
  - (c)** the defendant will obstruct or attempt to obstruct justice.



**The prosecutor must establish by clear and convincing evidence that the defendant should be detained.**

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Most of the time, the prosecutor must overcome a **rebuttable presumption that the defendant is eligible to have release conditions set** before detention can be ordered. The prosecutor must establish by **clear and convincing evidence** that the defendant should be detained. However, **if the court finds probable cause that the defendant committed murder** pursuant to 2C:1-3 **or committed any crime carrying an ordinary or extended term of life imprisonment**, there is instead a **rebuttable presumption that the defendant shall be detained**. The presumption can be rebutted by proof provided by the defendant, the prosecutor, or from other materials, and the standard of proof for rebutting the presumption to detain is **preponderance of the evidence**.

Regardless of where the presumption lies, a hearing must be held. Generally, the pretrial detention **hearing must be held no later than the first appearance**, unless a continuance is requested. If the prosecutor's request for detention is filed after the first appearance, or the offense is one for which no first appearance is required, **the pretrial detention hearing must be scheduled within three working days of the prosecutor's filing**. Unless good cause is shown, a prosecutor's motion to continue a pretrial detention hearing may not exceed three working days, and a defendant's motion to continue may not exceed five working days. While the pretrial detention hearing is pending, **the defendant will remain incarcerated** unless he was already released, in which case he will be served with a notice to appear. The court, either on its own or by motion of the prosecutor, may order that an incarcerated defendant be evaluated for drug dependency.

If there is no indictment, the prosecutor must establish probable cause at the detention hearing. At the hearing, the defendant is entitled to be represented by counsel, and is entitled to appointed counsel if he cannot afford to retain counsel. The defendant must be allowed the opportunity to testify, present witnesses, cross-examine witnesses, and to present information by proffer or otherwise. **The rules of evidence do not apply to the pretrial detention hearing**. The hearing may be reopened at any time before trial "if the court finds that information exists that was not known to the prosecutor or the eligible defendant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure" the goals of the pretrial release law.<sup>61</sup>

61. 2A:162-19f.

***N.J.S.A. 2A:162-20. Information considered in determination of pretrial detention.***

The factors that courts may take into account during a hearing on whether a defendant should be detained pretrial are:

- (A)** The **nature and circumstances** of the offense;
- (B)** The **weight of the evidence** — taking into consideration admissibility;
- (C)** The defendant’s **history and character**, including character; physical and mental condition; family ties; employment; finances; community ties and length of residence in the community; past conduct; drug or alcohol abuse history; criminal history; record of appearing for court; and whether s/he was on probation, parole, or other release pending trial, sentencing, or appeal in any state or federal court at the time of the offense or arrest;
- (D)** **Nature and seriousness of danger** to a person or the community that would be posed if the defendant were released;
- (E)** **Nature and seriousness of risk of obstruction of justice** that would be posed if the defendant were released; and
- (F)** The **recommendation of the pretrial services program.**



**If a court orders that a defendant be subject to pretrial detention, the court must enter an order including written findings of fact and the reasons for detaining the defendant.**

***N.J.S.A. 2A:162-21. Contents of pretrial detention order; temporary release.***

If a court orders that a defendant be subject to pretrial detention, the court must enter an **order including written findings of fact and the reasons for detaining the defendant.** The order must also direct that the defendant “be afforded reasonable opportunity for private consultation with counsel.” Even if a defendant is detained pretrial, the court may later allow temporary release under appropriate conditions if the court finds that such temporary release is “necessary for preparation of the eligible defendant’s defense or for another compelling reason.” So, for example, a detained defendant could be temporarily released to visit a crime scene with his or her lawyer or to attend a funeral for a loved one. Defense counsel would need to explain why such release is required to adequately defend the case, or why the reasons for release are unusual and compelling.

***N.J.S.A. 2A:162-22. Eligible defendant subject to pretrial detention, release; conditions.***

This section sets time limits for the period between arrest and indictment and the period between indictment and trial that apply to anyone who is detained pretrial, either due to a preventive detention order or due to the inability to pay a monetary bail.

A defendant **cannot be detained more than 90 days prior to indictment**, not counting “excludable time for reasonable delays” that are listed in the last section of the statute. If the indictment is not returned in that time, the defendant must be released, following the procedures in N.J.S.A. 2A: 162-17. This time may only be **extended for up to 45 days**, and only if the prosecutor makes a motion and the court makes findings that a “substantial and unjustifiable” safety risk would result from the defendant’s release *and* that the failure to indict was not a result of “unreasonable delay” by the prosecutor.

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A defendant **cannot be detained more than 180 days between indictment and trial**,<sup>62</sup> not counting “excludable time for reasonable delays” that are listed in the last section of the statute. As above, that time may only be extended if the prosecutor makes a motion and the court makes findings that a “substantial and unjustifiable” safety risk would result from the defendant’s release *and* there was no “unreasonable delay” by the prosecutor. If the court does not find a substantial risk or finds the prosecutor responsible for an unreasonable delay, the defendant must be released, following the procedures in N.J.S.A. 2A: 162-17. If **two years** (excluding delays attributable to the defendant)<sup>63</sup> pass after the issuance of the detention order and the defendant still has not been brought to trial, the defendant must be released, following the procedures in N.J.S.A. 2A: 162-17. A superseding indictment extends the time for trial. Additionally, if a defendant moves for dismissal of an indictment and the case is dismissed without prejudice, any subsequent indictment that is returned re-starts the clock.

A trial after mistrial or after reversal by an appellate court must begin within 120 days of the entry of the order.

Despite these time limits, **there are many events that cause the countdown clock to pause, at least for some period of time.** They include:

- (A)** Time resulting from an examination and hearing on competency, and any time that the defendant is incompetent;<sup>64</sup>
- (B)** The time between filing and disposition of a defendant’s application for pretrial treatment or supervisory programs;<sup>65</sup>
- (C)** The time between filing and disposition of a pretrial motion made by either the prosecutor or the defendant (up to 60 days for briefing, argument and hearings and 30 days for a decision may be excluded, unless extraordinary circumstances require up to 30 additional days);<sup>66</sup>

62. Per N.J.S.A. 2A:162-22a(2)(b)(i), “a trial is considered to have commenced when the court determines that the parties are present and directs them to proceed to voir dire or to opening argument or to the hearing of any motions that had been reserved for the time of trial.”

63. Court Rules provide that delays attributable to defendant are time resulting from: a competency evaluation where the defendant contends that he or she is incompetent; the filing of a motion for pretrial treatment or supervisory programs; motions filed by a defendant, not caused by “unreasonable actions of the prosecutor”; requests for continuance made by defendants, not caused by unreasonable prosecutorial actions; the defendant’s presence in another jurisdiction, if the defendant left the jurisdiction after receiving notice of the charges; defendant’s failure to appear; defendant’s failure to provide discovery; and other periods of delay caused by unreasonable acts or omissions of the defendant. R. 3:25-4(d)(2) (effective January 1, 2017).

64. R. 3:25-4i(1) (effective January 1, 2017).

65. R. 3:25-4i(2) (effective January 1, 2017).

66. R. 3:25-4i(3) (effective January 1, 2017).

- (D)** Any time resulting from a continuance requested by the defendant or by the prosecutor and defendant mutually (any request must specify the time sought);<sup>67</sup>
- (E)** Time when a defendant is held outside the jurisdiction, provided that the prosecutor has “been diligent and has made reasonable efforts” to have the defendant be present;<sup>68</sup>
- (F)** Time resulting from “exceptional circumstances,” such as natural disaster or “unavoidable unavailability” of the defendant or a material witness;<sup>69</sup>
- (G)** A prosecutor’s motion to declare the case complex (requires a showing by the prosecutor, typically in cases with more than two defendants, novel questions of law or fact, hard to locate or produce witnesses, or voluminous or complicated evidence; such a motion must be approved by the criminal presiding judge);<sup>70</sup>
- (H)** Time resulting from severance of codefendants such that only one trial can begin during the set period (subsequent trials must commence within 60 days unless the defendant consents or good cause is found, otherwise the time ceases to be excludable);<sup>71</sup>
- (I)** Time attributable to a defendant’s failure to appear;<sup>72</sup>
- (J)** Time resulting from a judge’s recusal or disqualification (not to exceed 30 days of excludable time);<sup>73</sup>
- (K)** Time resulting from defendant’s failure to provide discovery;<sup>74</sup>
- (L)** Any other periods if the court finds “good cause” (this provision is to be narrowly construed);<sup>75</sup> and
- (M)** Any other time provided by statute.<sup>76</sup>



**The final section of this statute makes clear that a non-monetary release is truly non-monetary — defendants may not be assessed any fees relating to their release if they are released on personal recognizance or on non-monetary conditions only.**

***N.J.S.A. 2A:162-23. Notification to eligible defendant by court, conditions of release.***

This section sets out what information the court must include in a release order. The order must contain a “sufficiently clear and specific” **notice of all of the conditions** that the defendant is subjected to on release, and the **consequences of violating** those conditions. However, the statute specifies that failure

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67. R. 3:25-4i(4) (effective January 1, 2017).  
 68. R. 3:25-4i(5) (effective January 1, 2017).  
 69. R. 3:25-4i(6) (effective January 1, 2017).  
 70. R. 3:25-4i(7) (effective January 1, 2017).  
 71. R. 3:25-4i(8) (effective January 1, 2017).  
 72. R. 3:25-4i(9) (effective January 1, 2017).  
 73. R. 3:25-4i(10) (effective January 1, 2017).  
 74. R. 3:25-4i(11) (effective January 1, 2017).  
 75. R. 3:25-4i(12) (effective January 1, 2017).  
 76. R. 3:25-4i(13) (effective January 1, 2017).

to notify the defendant of the consequences of violation does not preclude legal remedies against the defendant for his violation. **If the court departs from the recommendation of pretrial services**, either as to the method of release or the setting of conditions, **the order must include an explanation.**<sup>77</sup>

The final section of this statute makes clear that a non-monetary release is truly non-monetary — defendants may not be assessed any fees relating to their release if they are released on personal recognizance or on non-monetary conditions only.

***N.J.S.A. 2A:162-24. Violation of condition of release, motion by prosecutor.***

**Pretrial detention does not automatically result from a violation** of release conditions, violation of a restraining order, or a finding of probable cause that the defendant has committed a new crime while on release. Pretrial detention, even after such a violation, is only appropriate where the court finds clear and convincing evidence that no bail and/or conditions would reasonably assure appearance and safety. The statute requires the court to consider “all relevant circumstances including but not limited to the nature and seriousness of the violation or criminal act committed,” but does not specifically state the procedure that should be followed in making that determination.

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***N.J.S.A. 2A:162-25. Statewide Pretrial Services Program; risk assessment instrument.***

This statute directs the Administrative Director of the Courts to **establish and maintain a statewide Pretrial Services Program (PSP)**. The PSP must conduct a risk assessment and make recommendations regarding whether a defendant should be released on recognizance or an unsecured appearance bond, released on non-monetary conditions, released on monetary bail, or released on a combination of monetary bail and non-monetary conditions. The risk assessment must be completed and presented to the court in time for the court to make a release decision — no longer than 48 hours after arrest at most. The PSP is also responsible for monitoring defendants who are released, when ordered by the court.

The risk assessment used by the PSP must be approved by the Administrative Director of the Courts, and must be objective, standardized, and based on analysis of empirical data and risk factors relevant to failure to appear and danger to the community. The risk assessment instrument must also gather defendant demographic information, including race, ethnicity, gender, financial resources, and socio-economic status.



**The right to counsel at first appearance is also a protected Constitutional right. Defense attorneys should be familiar with the relevant Constitutional provisions and the case law interpreting them, and should refer to them in arguments for pretrial release.**

77. This provision grants tremendous deference to the recommendation of pretrial services.

## Tool #4: Guiding US and New Jersey Constitutional Provisions

It is important to remember that **the right to bail/pretrial release is a Constitutional right**, protected by both the Constitution of the United States and the New Jersey State Constitution. That means that the presumption should always be that the defendant will be released pending trial, subject to appropriate conditions. The right to counsel at first appearance is also a protected Constitutional right. Defense attorneys should be familiar with the relevant Constitutional provisions and the case law interpreting them, and should refer to them in arguments for pretrial release.

### Bail/Pretrial Release is a Constitutional right.

#### United States Constitution, Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

*“This Traditional right to freedom before conviction permits unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.... Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”* *Stack v Boyle*, 342 U.S. 1 (1951).

*“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”* *Salerno v. United States*, 481 U.S. 739, 755 (1987).

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**“It is the position of the United States that ... any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment’s Equal Protection Clause, but also constitutes bad public policy.”**

#### Guidance from U.S. Department of Justice

On February 13, 2014, the U.S. Department of Justice filed a statement of interest in the case of *Varden v. City of Clanton*, a civil lawsuit challenging the City of Clanton’s practice of setting bonds for municipal court offenses pursuant to a bond schedule based on offense alone, with no regard for a person’s ability to pay.<sup>78</sup> The Department of Justice’s statement of interest made clear that if such a system is in fact in place, it is unconstitutional, stating, “It is the position of the United States that ... any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment’s Equal Protection Clause, but also constitutes bad public policy.”<sup>79</sup> Asserting that the justice system should not work differently for the poor

78. *Varden v. City of Clanton*, Case No. 2:15-cv-34-MHT-WC (M.D. Ala. Feb. 13, 2015).

79. Statement of Interest of the United States, *Varden v. City of Clanton*, Case No. 2:15-cv-34-MHT-WC (M.D. Ala. Feb. 13, 2015), available at <https://www.justice.gov/file/340461/download>. See also NACDL’s summary of this and other statements of interest at <https://www.nacdl.org/criminaldefense.aspx?id=38532&libID=38502>.

than it does for the rich, the Department quoted powerful language from cases in the 1970s holding that imprisoning indigent people when those with financial means would not be imprisoned is an equal protection violation.

In addition to the Equal Protection concerns of a bail system that is based solely on money, the statement filed with the court by the Department of Justice discusses public policy concerns that are implicated by a system in which release of a defendant is determined solely by ability to pay. Such a system causes unnecessary detention of indigent defendants who cannot afford to pay, while allowing for the release of some high-risk defendants who have the resources to pay bond but “should more appropriately be detained without bail.”<sup>80</sup> The statement discussed many of the harms of pretrial detention and “urges that pretrial detention be used only when necessary, as determined by an appropriate individualized determination.”<sup>81</sup>

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**The Civil Rights Division of the Department of Justice sent a “Dear Colleague” letter warning state and local courts about serious constitutional concerns regarding imposing exorbitant fees, fines, and costs on poor defendants without any inquiry into their ability to pay.**

On March 14, 2016, the Civil Rights Division of the Department of Justice sent a “Dear Colleague” letter warning state and local courts about serious constitutional concerns regarding imposing exorbitant fees, fines, and costs on poor defendants without any inquiry into their ability to pay.<sup>82</sup> In addition to concerns about fines and fees used at sentencing, the letter addressed pretrial release practices that impact indigent defendants, reiterating that “any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment.”<sup>83</sup>

The Department of Justice again intervened in a pending lawsuit regarding bond practices by filing an amicus brief in the case of *Walker v. City of Calhoun*.<sup>84</sup> In the brief, the DOJ declared once again that “a bail scheme that mandates payment of fixed amounts to obtain pretrial release, without meaningful consideration of an individual’s indigence and alternatives that would serve the City’s interests, violates the Fourteenth Amendment.”<sup>85</sup> In addition, the brief discusses the problems that result from unnecessary pretrial detention, such as jail overcrowding and increased burdens on taxpayers. The brief concludes that bail practices like Calhoun’s are not only unconstitutional “but also conflict with sound public policy considerations.”<sup>86</sup>

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80. *Varden* Statement of Interest, *supra* note 79, at 11.

81. *Id.* at 14.

82. U.S. Department of Justice Civil Rights Division, Dear Colleague Letter Regarding Law Enforcement Fees and Fines (Mar. 14, 2016), available at <https://www.justice.gov/crt/file/832461/download>.

83. *Id.* at 7.

84. Brief for the United States as Amicus Curiae, *Walker v. City of Calhoun, Georgia*, No. 16-10521-HH (N.D. Ga. Aug. 18, 2016), available at <https://www.justice.gov/crt/file/887436/download>.

85. *Id.* at 12.

86. *Id.* at 23.

## New Jersey Constitution

The New Jersey Constitution contains two provisions relevant to the setting of pretrial release conditions:

Article I, Paragraph 11 of the State Constitution was amended in November 2014 to provide that “[a]ll persons shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.”

Article I, Paragraph 12 provides that “[e]xcessive bail shall not be required. . . .”

### Counsel at First Appearance is a Constitutional Right

The United States Supreme Court has held that the right to counsel attaches at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty, regardless of whether a prosecutor is aware of that initial proceeding or involved in its conduct.<sup>87</sup> In the civil case of *Rothgery v. Gillespie County, Texas*, the plaintiff/criminal defendant contended that if the county had provided a lawyer within a reasonable time after a probable cause hearing, he would not have been indicted, rearrested, or jailed for three weeks. The Supreme Court reversed a finding of summary judgment for the civil defendant county.

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## Tool #5: New Jersey Case Law on Pretrial Release

New Jersey courts have not yet addressed any features of the new pretrial release statute. Defense attorneys will need to be aggressive in creating new jurisprudence to ensure the best results for their clients. But, despite the new statute, defenders are not writing on a blank slate; the case law that developed under New Jersey’s old bail scheme can be a useful tool in anticipating how courts will decide cases under the new pretrial release statute.

In *State v. Tyrone Steele*,<sup>88</sup> the Appellate Division considered whether, under the old statute, courts could consider danger to the community in setting monetary bail. The new statute provides the precise answer to that question: money bails can only be used to ensure a defendant’s presence, not to protect the public.<sup>89</sup> But the case makes clear that New Jersey Courts will enforce that limitation. In *Steele*, the trial court set an artificially high money bail because it feared that the defendant would continue to violate the law; the court had no concerns about the defendant showing up in court. The appellate court held that non-monetary conditions are the *exclusive* method for ensuring a defendant complies with the law.<sup>90</sup> Defense attorneys should use *Steele*, in addition to the statute, to ensure that the use of money bail does not expand.

87. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008).

88. *State v. Steele*, 430 N.J. Super. 24, 36 (App. Div. 2013).

89. N.J.S.A. 2A:162-16b(2)(c).

90. It is worth noting that the New Jersey Supreme Court granted leave to appeal in *Steele*. *State v. Steele*, 214 N.J. 233 (2013). It later dismissed the appeal as improvidently granted. *State v. Steele*, 2014 N.J. LEXIS 895 (July 7, 2014).

The New Jersey Supreme Court considered the admissibility during a bail hearing of hearsay evidence in *State v. Engel*.<sup>91</sup> Again, changes in the statute answer the direct question: the rules of evidence do not apply in detention hearings.<sup>92</sup> But, *Engel* did place limitations — grounded in due process and reliability — on the use of hearsay statements. In order to consider at a bail hearing the hearsay confession of a codefendant, the Court held that (1) the confession must be “more probative on the point for which it is offered than any other evidence that the State can procure through diligent efforts under all of the circumstances;” and (2) the confession must be sufficiently trustworthy, either on its own or through “circumstantial corroboration.”<sup>93</sup> Thus, despite the permissive nature of the statute with respect to the Rules of Evidence, defense attorneys should seek to exclude harmful hearsay where it lacks indicia of reliability.

There is no doubt under the new pretrial release law that defendants have a right to counsel and to be present at detention hearings.<sup>94</sup> The statute is silent regarding a right to counsel and the right to be present for the setting of conditions of release. But prior case law provides support for the position that defendants have a right to appear and to be represented by lawyers in determining conditions of release. In *State v. Fann*,<sup>95</sup> the court examined when the right to counsel attached in the context of setting bails. It determined that the setting of bail constitutes a “critical stage” in the criminal proceedings that triggers the right to counsel and a right to be present. The trial court in *Fann* balanced these critical rights against what it perceived as practical necessities. As a result, it mandated a procedure whereby bails could be set without counsel or the defendant being present; but, upon request, courts must review the bail with the defendant and an attorney. If a judge refuses to allow a defendant to be present or represented by counsel when conditions of release are set, the defendant unquestionably has a right to appear with counsel as those conditions are reviewed. This principle is also supported by extensive federal case law: Because of the essential part that lawyers play in the fair administration of justice, the right to counsel attaches as soon as judicial proceedings are initiated.<sup>96</sup> Once the right to counsel attaches, the defendant is entitled to the presence of counsel at any “critical stage” of the proceedings.<sup>97</sup> The right to have counsel present applies whenever counsel can provide assistance by acting “as a spokesman for, or advisor to, the accused.”<sup>98</sup> As is apparent from this test, the right to counsel does not apply only at trial: “The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advice.”<sup>99</sup>

Under the former bail scheme, bail could be denied for defendants who were accused of violating conditions of their probation. In *State v. Garcia*,<sup>100</sup> the Appellate Division held that the right to bail applies only before conviction; because people on probation have already been convicted, they could be detained without bail on the charge for which they were on probation. Under *Garcia*, a defendant was entitled to bail on the new charge, but detained on the previous charge. The same appears to be

91. 99 N.J. 453 (1985).

92. N.J.S.A. 2A:162-19e(1).

93. *State v. Engel*, 99 N.J. at 468.

94. N.J.S.A. 2A:162-19e(1).

95. *State v. Fann*, 239 N.J. Super. 507, 519 (Law Div. 1990).

96. *Rothgery*, 554 U.S. at 212 (2008).

97. *Id.*

98. *United States v. Ash*, 413 U.S. 300, 312 (1973).

99. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).

100. *State v. Garcia*, 193 N.J. Super. 334, 338 (App. Div. 1982).

true under the new statute: in setting conditions of release for a person on probation the court may consider the fact that the defendant was on probation, but, in order to detain him must first determine that no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions would serve the three interests of the pretrial release law.<sup>101</sup> But, on the charge for which the defendant is serving probation, a separate statute still authorizes detention.<sup>102</sup>

Under the old bail laws, courts could legitimately consider a defendant's immigration status in setting bail. Specifically, in *State v. Fajardo-Santos*,<sup>103</sup> the New Jersey Supreme Court held that courts could, in setting bail, consider whether federal authorities had lodged a detainer against an undocumented immigrant in a criminal case. The court held that such information was relevant to a determination of the likelihood that the defendant would flee prior to trial.<sup>104</sup> The new statute does not explicitly allow for the consideration of immigration status in setting conditions of release or in determining whether detention is appropriate, but because the Court has held that immigration status bears on risk of non-appearance, defense attorneys should anticipate such arguments from prosecutors.

In *State v. Korecky*,<sup>105</sup> the New Jersey Supreme Court considered whether a defendant's monetary bail could be forfeited based on a violation of a non-monetary condition of release. The Court held that such forfeiture was appropriate where a defendant violated a no-contact provision of his release. New Jersey's new pretrial release statutes create a mechanism for addressing whether detention is appropriate after a violation of a condition of release.<sup>106</sup> The statute, however, is silent on the financial consequence where a defendant has posted a monetary bail. *Korecky* appears to still be good law.

Note also that juveniles (who are not waived to criminal court) do not have a statutory right to pretrial release in New Jersey.<sup>107</sup> Courts have consistently acknowledged the constitutionality of denying pretrial release to juveniles.<sup>108</sup>

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101. N.J.S.A. 2A:162-20.

102. N.J.S.A. 2C:45-3a(3).

103. 199 N.J. 520, 522 (2009).

104. *Id.* at 531.

105. 169 N.J. 364, 367 (2001).

106. N.J.S.A. 2A:162-24.

107. N.J.S.A. 2A:4A-40.

108. *See, e.g., In re Gault*, 387 U.S. 1, 14 (1967) (noting no right to bail in juvenile proceedings); *State v. Franklin*, 175 N.J. 456, 465 (2003) (explaining the juveniles being adjudicated delinquent are entitled to all adult criminal constitutional protections except indictment, trial by jury, and bail).

## SECTION 3: ADVOCATING FOR THE CLIENT AT THE RELEASE HEARING

### Making the Argument

Defenders must always remember there are only three legal and legitimate purposes of conditions of pretrial release: (1) to secure presence in court, (2) to maximize public safety by assessing whether the person might commit another crime while case is pending, and (3) to prevent the defendant from obstructing the criminal justice process. After looking at the statutes, defenders should:

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**In every pretrial release argument, counsel should presume unsecured release on personal recognizance and address the conditions that will meet any appropriate statutory concerns. Defenders should make the court aware of the research on money and its lack of connection to public safety or court appearance.**

- ★ Know the risk assessment scores and understand their meaning;
- ★ Review the complaint and any other police reports available;
- ★ Understand the defendant's criminal history;
- ★ Understand the defendant's prior FTA(s);
- ★ Check for any prior pretrial misconduct;
- ★ Know if the defendant has family or friends in the courtroom who can support him or her;
- ★ Know any personal information about job, military history, mental health issues, drug or alcohol problems, school, family, etc., that is still relevant under the new statutes;
- ★ Consider the strength of the case. Is it a case that is not serious in nature? Is it a minor offense?;
- ★ Consider what the final outcome of the case likely to be. Is the defendant likely going to get probation? Why require a monetary bail if the defendant can be adequately supervised?; and
- ★ Know New Jersey's pretrial program and what supervision services it offers.

In every pretrial release argument, counsel should presume unsecured release on personal recognizance and address the conditions that will meet any appropriate statutory concerns. Defenders should make the court aware of the research on money and its lack of connection to public safety or court appearance.<sup>109</sup>

109. See, e.g., Michael R. Jones, PRETRIAL JUSTICE INSTITUTE, UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION, (Oct. 2013), available at <http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf> (note that while the author examined bail setting practices in Colorado, he noted that the results could likely be extrapolated to other jurisdictions).

The argument to the court should be individualized to the client. Attorneys should talk about clients by name and outline the specific circumstances that make monetary conditions of bond or onerous non-monetary conditions unworkable. Where a judge sets a monetary bail that the client cannot afford, defenders should press the judge to rationalize the particular money bail; the statute prohibits the court from setting money bails designed to detain defendants.<sup>110</sup> Where applicable, defense attorneys should highlight the support he will get from family and other persons. It may also be helpful to describe why the services offered by the Pretrial Services Program will adequately secure the client’s appearance in court and protect public safety.

Defenders should always know the judge. Judges frequently have specific condition-setting proclivities and/or biases that defenders should try to address with factual information about the client. Defenders should endeavor to avoid irritating the court, if possible, by making the record succinctly and accurately, but not at the expense of zealous advocacy.

When appropriate, federal and state constitutional provisions and case law can be used to bolster arguments for release. Whenever something is unfair, unreasonable, irrational, or arbitrary, the Due Process Clause of the Fourteenth Amendment and Article I, Paragraph 1 of the New Jersey Constitution should be invoked. For example, one may argue that unnecessarily onerous conditions represent punishment without trial, in violation of the client’s substantive due process rights.

### Specific Problem Areas

#### Over-conditioning

Remember the statute requires the “least restrictive” condition or conditions. What that specifically means is subject to argument and there is not yet clear case law in New Jersey on the issue. So attorneys should always argue against **any** conditions that are not relevant to the case. Conditions such as restrictions on alcohol use, unwanted no contact orders, regular reporting to pretrial services, etc., should all be challenged unless they can be individually justified for the client and the case. Defenders need to be aware of the research (and pretrial services should support this) that **over-supervision can make people worse** and unnecessarily wastes tax payer dollars.<sup>111</sup>



**Video conferencing is a poor substitute for in-person hearings with the client standing directly before a judge. Among other problems, there are deficiencies related to access to counsel and presentation of evidence.**

110. N.J.S.A. 2A:162-17c(1).

111. See American Bar Association, *Criminal Justice Standards on Pretrial Release*, available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pretrialrelease\\_blk.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html). See also Roger Przybylsk, *What Works, Effective Recidivism Reduction and Risk-Focused Prevention Programs* (Feb. 2008), available at <http://www.jrsa.org/njiec/publications/przybylski-2008.pdf> (providing comprehensive discussion of effective interventions in criminal justice, including reports on the research about over-supervision).





**Lawyers should insist on having the opportunity for confidential communication with the client during the hearing if the client has any questions during the release hearing.**

### **First Appearance by Video**

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Some vicinages plan to conduct first and/or second appearances via video conferencing. These hearings present unique problems for defense counsel. Video conferencing is a poor substitute for in-person hearings with the client standing directly before a judge. Among other problems, there are deficiencies related to access to counsel and presentation of evidence. The hearings tend to be more impersonal with the client often in jail and the judge present in a courtroom miles away. If the lawyer is with the client, the lawyer should make sure to explain what is happening in the courtroom. Lawyers should ask the client if any family members might be in the courtroom for the hearing. If so, the lawyer should attempt to contact the family prior to the hearing to see if they will support an argument for release. Also, lawyers should caution both clients and family members to avoid making any statements about the factual allegations. If the client is charged with an offense that might trigger a no contact order (particularly domestic violence cases), the attorney should try to determine if the victim is in the courtroom and attempt to interview that victim prior to the hearing to determine if the victim is favorable for the client and whether the victim will support or oppose a no contact order. Defenders should try to get any information helpful to the client's release from the victim if possible.

Attorneys practicing in vicinages where the lawyer is in the courtroom and the client is at a remote location should ensure that they have had enough time to interview the client prior to the hearing. Additionally, lawyers should insist on having the opportunity for confidential communication with the client during the hearing if the client has any questions during the release hearing. Defenders should be especially aware of concerns regarding confidentiality of attorney/client communications that are transmitted via video or phone.

### **Bail Source Hearings and Cash-Only Bails**

While the new pretrial release law has changed courts' preferences for monetary bail — transforming it from the first option to the third option — it has not changed some of the rules associated with the posting of money bail. For example, for some crimes, where the court orders a monetary bail set, the prosecutor may move for a bail source hearing, at which the defendant is required to establish both the lawfulness of the source of funds and the connection between the defendant and the person posting the bail.<sup>112</sup> Also certain crimes remain "bail restricted," meaning a defendant must post the full amount of bail, post property, or rely on a commercial bond agent.<sup>113</sup> In the instances where a court imposes a monetary bail, these requirements and restrictions remain.

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<sup>112</sup>. N.J.S.A. 2A:162-13.

<sup>113</sup>. N.J.S.A. 2A:162-12.

## Costs of Supervision

In some other states, defendants are forced to bear the cost of pretrial supervision. New Jersey only allows such costs to be passed on to defendants in limited circumstances. The only condition for which a defendant can be required to pay is electronic monitoring.<sup>114</sup> And when that condition is imposed, the court retains the authority to waive the payment for an indigent defendant “who has demonstrated to the court an inability to pay all or a portion of the costs.” Defense attorneys should challenge any attempt by a court to pass on other costs of supervision to a defendant.

## Domestic Violence Cases

When New Jersey relied on money bails, special protections for victims of domestic violence prohibited judges from reducing bails in such cases “without prior notice to the county prosecutor and the victim.”<sup>115</sup> That law also limited the ability of judges other than the judge who set the bail to reduce the bail.<sup>116</sup> On its face, the statute appears to apply only to *monetary bail*, rather than non-monetary conditions. It does not appear that the statute would require notice prior to the modification of, for example, a curfew. Defense attorneys should, however, be mindful that a prosecutor may seek to convince a judge that the court lacks the authority to make favorable modifications of conditions of release without prior notice.

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**The only condition for which a defendant can be required to pay is electronic monitoring. And when that condition is imposed, the court retains the authority to waive the payment for an indigent defendant “who has demonstrated to the court an inability to pay all or a portion of the costs.” Defense attorneys should challenge any attempt by a court to pass on other costs of supervision to a defendant.**



114. N.J.S.A. 2A:162-17b(2)(k).

115. N.J.S.A. 2C:25-26e.

116. *Id.*

# SECTION 4: ADVOCATING FOR THE CLIENT AT A DETENTION HEARING

## The Mechanics of a Hearing

When a prosecutor files a motion for detention, it will be scheduled soon thereafter.<sup>117</sup> Usually the hearing will occur at the first appearance (unless the first appearance has already happened by the time the motion is filed, in which case it will occur within three business days of the filing date). But, both the prosecutor and the defense attorney have the right to request a *brief* adjournment. Unless good cause is shown, adjournments are limited to three business days when requested by the State and five business days when requested by the defendant. In other words, defense attorneys will generally have about a week to prepare for a detention hearing.

## Preparing for the Hearing

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In preparing for the hearing, defense attorneys must consider both legal and factual issues. Legally, defenders must understand:

- ★ Whether there is a presumption of detention (if the defendant is charged with murder or a crime carrying a life sentence) or a presumption against detention (for every other crime),<sup>118</sup> and
- ★ Whether the defendant is eligible for detention based on the crime charged, or only on the basis of the catch-all that the prosecutor believes there is a serious risk of non-appearance, danger to the community or obstruction of justice.<sup>119</sup>

Factually, defenders should:

- ★ Know the risk assessment scores and understand their meaning;
- ★ Review the complaint and any other police reports available;
- ★ Understand the defendant's criminal history;
- ★ Understand the defendant's prior FTA(s);
- ★ Check for any prior pretrial misconduct;
- ★ Know if the defendant has family or friends who can support him or her at a detention hearing;
- ★ Know any personal information about job, military history, mental health issues, drug or alcohol problems, school, family, etc., that is still relevant under the new statutes;
- ★ Consider the strength of the case. Is it a case that is not serious in nature? Is it a minor offense?;
- ★ Consider what the final outcome of the case likely to be. Is the defendant likely to be acquitted? Is the defendant likely going to get probation? Why detain a defendant if he can be adequately supervised?; and
- ★ Know New Jersey's pretrial program and what supervision services it offers.

117. See generally N.J.S.A. 2A:162-19.

118. N.J.S.A. 2A:162-19.

119. *Id.*

In preparation for a detention hearing, counsel should examine and seek copies of all pertinent police reports, names and addresses of all witnesses, and any relevant medical records. Counsel should move to preserve or, where appropriate, seek court orders for preservation of evidence, such as 911 tapes, notes of investigating officers, and biological and forensic evidence. Attorneys should consider whether witnesses may be needed for the detention hearing, subpoena them to appear and, if needed, request funds for an investigator and/or interpreter to interview potential witnesses. At the hearing, defenders should object to hearsay, such as officers simply reading from police reports, and insist that live witnesses be called.

Defenders should also remind prosecutors that the speedy trial provisions of the pretrial release law are only triggered when a defendant is detained. So, if a prosecutor is vacillating about whether to seek detention, a reminder that if the defendant is at liberty the State can be more deliberate about prosecuting the case might tip the balance.



**At the hearing, defenders should object to hearsay, such as officers simply reading from police reports, and insist that live witnesses be called.**

## Making the Argument

Remember that defendants can only be detained if the court is clearly convinced that no condition or set of conditions will achieve the three purposes of the pretrial release law: (1) to secure presence in court, (2) to maximize public safety by assessing whether the person might commit another crime while the case is pending, and (3) to prevent the defendant from obstructing the criminal justice process. In addition to that showing, the State must show probable cause to believe that the defendant committed the crime charged. Of course, if an indictment has been returned, it would satisfy that requirement.

In determining whether any condition (monetary or non-monetary) or set of conditions will achieve the law's purposes, courts are told to consider:<sup>120</sup>

- ★ the nature and circumstances of the offense charged; 🗨️

**Here, defenders should be prepared to explain why their client's case is not prototypical. For example, if the client is charged with an armed robbery, but the allegation is that he merely had a simulated weapon, defense counsel should argue that fact militates against detention because he represents less of a risk to the community than a typical armed robber.**

120. N.J.S.A. 2A:162-20.

- ★ the weight of the evidence against the eligible defendant (including consideration of what evidence might be excluded); 

**This factor gives defense counsel an opportunity to explore weaknesses in the State’s factual and legal case. While the judge will likely prevent defenders from turning detention hearings into discovery sessions, meaningful consideration of this factor requires analysis of the admissibility of evidence and that which is learned in a detention hearing may prove useful in a later motion to suppress evidence (or trial).**

- ★ the defendant’s history and characteristics, including:
  - the defendant’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community and community ties; 

**Because these factors are not considered in the PSA, defense counsel will need to present them to the court. While the Rules of Evidence do not apply in detention hearings, defenders should nonetheless consider the most effective method for eliciting helpful information.**

- the defendant’s past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; 

**Defense counsel should be prepared to present evidence that mitigates past misconduct, such as a limited role in the offense, remoteness, or evidence of subsequent rehabilitation.**

- whether, at the time of the current offense or arrest, the defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence;
- ★ The nature and seriousness of the danger to any other person or the community that would be posed by the defendant’s release;
- ★ The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the defendant’s release; 

**Defense attorneys should argue about the ways in which conditions of release can serve to lessen these dangers.**

- ★ The release recommendation of the pretrial services program obtained using the PSA.

Defenders can cross examine State’s witnesses, call their own witnesses, and call their clients. While the State will likely try to keep many of their trial witnesses off the stand — to avoid later impeachment — defenders may be able to subpoena and call those witnesses. Defense attorneys can call State’s witnesses if the attorney believes that they have information that either negates probable cause (perhaps an identification of someone else) or addresses the client’s risk to the community or risk of non-appearance.

The argument to the court should be individualized to the client. Attorneys should talk about clients by name and outline the specific circumstances that make monetary or non-monetary conditions of release workable. Where applicable, defense attorneys should highlight the support the client will get from family and other persons. It may also be helpful to describe why the services offered by the Pretrial Services Program will adequately secure the client's appearance in court and protect public safety.



**Whenever something is unfair, unreasonable, irrational, or arbitrary, the Due Process Clause of the Fourteenth Amendment and Article I, Paragraph 1 of the New Jersey Constitution should be invoked.**

When appropriate, federal and state constitutional provisions and case law can be used to bolster arguments for release. Whenever something is unfair, unreasonable, irrational, or arbitrary, the Due Process Clause of the Fourteenth Amendment and Article I, Paragraph 1 of the New Jersey Constitution should be invoked. For example, one may argue that pretrial detention is punishment without trial, in violation of the client's substantive due process rights. Or if the client is detained without a meaningful hearing, an argument could be made that this is a violation of his procedural due process rights.

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And remember: defenders must **always try to get their clients out of jail**. It will improve the outcome in most cases.

## Specific Problem Areas

### Overuse of the Catch-All

Prosecutors may seek detention if a defendant has been charged with committing an enumerated crime. But, a prosecutor may also move for detention if she believes that there is a serious risk of non-appearance, to public safety, or of obstruction of justice. The risk present in such cases must be exceptional. If a defender notices that prosecutors are routinely seeking detention under this exception — and that judges are granting it — the attorney should consider raising the issue on appeal. If this exception becomes the norm, prosecutors will wield more power than the Legislature intended and defendants will suffer greatly.

### Detention for Disorderly Persons Offenses

While generally detention is appropriately reserved for defendants charged with serious crimes, the Legislature did provide for its use for defendants charged with nonindictable domestic violence offenses. The fact that such detention is potentially authorized does not change the usual calculus: detention is only permitted if no condition or set of conditions will achieve the various purposes of the statutes. The fact that a defendant has not been charged with an indictable offense — and is therefore facing six months or less in jail — weighs heavily in favor of an understanding that conditions of release, rather than detention, can be used to manage risk.



**If courts do not comply with the statutory or constitutional requirements, defense counsel must appeal. . . . It is critical that practitioners become familiar with the process for appealing a court’s bail order.**

## **SECTION 5: APPEALING THE COURT’S RELEASE OR DETENTION ORDER**

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If courts do not comply with the statutory or constitutional requirements, defense counsel must appeal. The appellate procedure is essential to challenge courts that are not complying with the law. It is critical that practitioners become familiar with the process for appealing a court’s bail order. It is extremely important, for purposes of review and development of more robust case law on the issues related to bail and pretrial release, that a full record be made regarding the arguments and evidence considered by the court in making pretrial release or detention decisions.

### **Issue of Mootness — Applicable to All Methods of Appellate Review**

In cases dealing with conditions, the issue may be moot by the time an appeal is resolved because the client’s case has already been resolved. But that does not mean that an appeal should be dismissed. It is important that counsel continue with the appeal to address issues “capable of repetition yet evading review.” In New Jersey, courts can exercise “the discretion to decide an otherwise moot case that presents issues of significant public importance, or which stem from a controversy ‘capable of repetition, yet evading review’ because of the short duration of any [litigant’s] interest.”<sup>121</sup> It would, of course, be both unfair and inefficient to require a defendant to delay resolving the case — and thereby waive his speedy trial rights — in order to enforce his rights under the pretrial release law and the State and Federal Constitutions.

### **Procedures for Appeal**

Decisions regarding pretrial release are reviewed under an abuse of discretion standard.<sup>122</sup> Typically, courts find abuses of discretion where “a decision is ‘made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.’”<sup>123</sup>

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120. N.J.S.A. 2A:162-20.

121. *Finkel v. Township Committee of Tp. of Hopewell*, 434 N.J. Super. 303, 315 (App. Div. 2013) (citations omitted).

122. *Steele*, 430 N.J. Super. at 34 (“The setting of bail is vested in the sound discretion of the trial court, and we consequently review the trial court’s decision for an abuse of discretion.”).

123. *Flagg v. Essex County Prosecutor*, 171 N.J. 561, 571 (2002) (citations omitted).

In New Jersey, a defendant must seek “leave to appeal” any interlocutory decision — including decisions regarding pretrial release — unless the law explicitly provides for an appeal as of right.<sup>124</sup> The pretrial release law specifically provides for a right to appeal adverse *detention* decisions,<sup>125</sup> but provides no such right with respect to conditions of release. Detention decisions must be heard on an expedited basis.<sup>126</sup>

The procedure for filing an appeal, therefore, differs depending on what a defense attorney seeks to challenge. If a defendant is detained, he may appeal and the “appeal shall be heard in an expedited manner.”<sup>127</sup> While the exact procedure has yet to be finalized, the Appellate Division expects to create a streamlined mechanism for challenges to detention orders.<sup>128</sup> Attorneys will be required to use the court’s e-filing system and, rather than filing a full brief, will fill out a special form. The court will also set up a mechanism for lawyers to provide the court with transcripts in a timely fashion. Attorneys can, of course, seek leave to file a full brief, if the form does not provide a sufficient opportunity to explain the issues involved in the case. The statute requires a defendant to remain detained pending the resolution of the appeal.

If the Appellate Division rules against a defendant, the defense attorney can seek review from the Supreme Court. Review at the Supreme Court is discretionary. Defense counsel should begin by filling out the Supreme Court Emergent Matter Intake Form.<sup>129</sup> Even if the Supreme Court denies relief on an emergent basis, attorneys can seek Leave to Appeal in the ordinary course.

Where defense counsel seeks to challenge a condition of release, the order is interlocutory and review is completely discretionary. Depending on the nature of the condition, attorneys can file a Motion for Leave to Appeal or an Application for Permission to File Emergent Motion.<sup>130</sup> As with appealing detention decisions, if the Appellate Division rejects an appeal, defendants can seek discretionary review by the Supreme Court.

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124. See *R. 2:2-3* (providing for appeals as of right only for final judgments and for “cases as are provided by law”). Interlocutory orders, including the setting of conditions of pretrial release, are permitted “in the interest of justice.” *R. 2:2-4*.

125. N.J.S.A. 2A:162-18c.

126. *Id.*

127. *Id.*

128. Notice to the Bar: Criminal Justice Reform — Appellate Division Rule Recommendations Necessary to Implement the Bail Reform and Speedy Trial Law — Publication for Comment, available at <http://www.judiciary.state.nj.us/notices/2016/n160727a.pdf> (last checked Oct. 19, 2016).

129. Supreme Court Emergent Matter Intake Form, available at [http://www.judiciary.state.nj.us/prose/11641\\_sc\\_emergent\\_intake.pdf](http://www.judiciary.state.nj.us/prose/11641_sc_emergent_intake.pdf) (last checked Oct. 19, 2016).

130. Notice to the Bar: Appellate Division Guidelines for Entertaining Emergent Applications, available at [http://www.judiciary.state.nj.us/appdiv/forms/10498\\_appl\\_perm\\_file\\_emerg\\_motion\\_portal.pdf](http://www.judiciary.state.nj.us/appdiv/forms/10498_appl_perm_file_emerg_motion_portal.pdf) (last checked Oct. 19, 2016).

## **CONCLUSION**

Armed with a thorough understanding of the client, risk assessment instruments, and relevant laws, defense attorneys have the power to change the trajectory of their clients' criminal cases. Achieving pretrial release helps maintain clients' stability, increases trust in the attorney-client relationship, facilitates client participation in the defense of the case, helps preserve the presumption of innocence, and improves the likelihood of a better outcome. Increasingly compelling research supporting release for many accused persons coupled with growing budgetary concerns within the criminal justice system present defense attorneys with the perfect opportunity to sway even the most cautious judges. By using the laws, procedures, and techniques presented in this Manual, defense attorneys can succeed in helping the court identify the appropriate conditions of release to the maximum benefit of both the client and the community as a whole.

# APPENDIX 1: Client Interview Form For Bail

Name: \_\_\_\_\_ Case No: \_\_\_\_\_

Offense(s) charged: \_\_\_\_\_

Detention-eligible offense:  Yes  No Presumption:  Detention  Release

Currently on bond for pending matter(s):  Yes  No

Holds:  None  Parole  Probation: Felony  Probation: Disorderly  ICE  Other \_\_\_\_\_

PSA Scores:	Client Financial Obligations:
FTA Score _____ NCA _____	Rent/Mortgage <input type="checkbox"/> _____ Child Support <input type="checkbox"/> _____
NVCA Flag? <input type="checkbox"/> Yes <input type="checkbox"/> No	Car Payment <input type="checkbox"/> _____ Education <input type="checkbox"/> _____
Pretrial Services Rec: _____	Debt Payments <input type="checkbox"/> _____ Other <input type="checkbox"/> _____
	Client Income _____ <input type="checkbox"/> Weekly <input type="checkbox"/> Monthly <input type="checkbox"/> Yearly

**A.** Employment status, history of accused: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**B.** Nature and Extent of family relationships: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**C.** Past and Present Relationships: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**D.** Past and Present Residences: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**E.** Current and former mental health treatment (diagnosis; treatment; medications; dosage): \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**F.** Current and former drug/alcohol treatment: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**G.** Who will agree to assist accused to appear? Information re: that person: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**H.** Who to contact to vouch for/testify for client: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**I.** Prior Criminal History and FTAs: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**J.** Possible/probable sentence if convicted (i.e. will the person likely be granted probation or other community sentence if convicted of the offense?) Include here if any plea offers have been made.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**K.** Facts indicating possibility of law violation if person in custody is released without certain conditions: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**L.** Facts/lack of facts indicating the possibility of witness intimidation: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**M.** Ties to community/community involvement: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**N.** Military service history: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**O.** Any other factors indicating ties to the community, why won't flee, and absence of community danger concerns: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**a.** Years in New Jersey? \_\_\_\_\_

**b.** Education: \_\_\_\_\_

**c.** Pretrial Conditions to ensure appearance: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Attorney Signature:** \_\_\_\_\_

**Date:** \_\_\_\_\_

# APPENDIX 2: Client Intake Form

**Interviewer:** \_\_\_\_\_ **Today's Date:** \_\_\_\_\_

**Client Name As Charged:** \_\_\_\_\_  
(First) (Middle) (Last)

**CURRENT CHARGES**

Case Number	Charge	Class	Alleged Victim	Offense Date

**BAIL/FIRST APPEARANCE INFORMATION**

- |                              |   |  |
|------------------------------|---|--|
| <b>Conditions of Release</b> | <input type="checkbox"/> Secured bond \$ _____<br><input type="checkbox"/> Cash bond \$ _____<br><input type="checkbox"/> Unsecured bond \$ _____<br><input type="checkbox"/> Personal recognizance<br><input type="checkbox"/> Custody of _____<br><input type="checkbox"/> Citation only/No arrest made | <input type="checkbox"/> Drug/Alcohol Treatment<br><input type="checkbox"/> Anger management<br><input type="checkbox"/> No contact with _____<br><input type="checkbox"/> Stay away from _____<br><input type="checkbox"/> Other: _____ |
|------------------------------|---|--|

- Conditions met?**       Yes       Will Meet       No, held at \_\_\_\_\_  
**Warrants/Detainers?**       Yes       No      **Client Height:** \_\_\_\_\_  
**Serving sentence?**       Yes       No      **Client Weight:** \_\_\_\_\_  
**Distinctive features (scars, tattoos, etc.):** \_\_\_\_\_

**Unusual behavior at first appearance:** \_\_\_\_\_

**Other notes:** \_\_\_\_\_

**INCIDENT AND DEFENSE**

- |                                 |                                      |
|---------------------------------|--------------------------------------|
| <b>Offense Date:</b> _____      | <b>Report date:</b> _____            |
| <b>Warrant Issued:</b> _____    | <b>Arrest date:</b> _____            |
| <b>Arresting Officer:</b> _____ | <b>Department:</b> _____             |
| <b>Alleged Victim:</b> _____    | <b>Relationship to client:</b> _____ |

**FACTS OF CASE - Client's Version**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_



**Co-Defendants**  Yes  No

**Name:** \_\_\_\_\_  
**Relationship to Client:** \_\_\_\_\_  
**Address:** \_\_\_\_\_  
**Name:** \_\_\_\_\_  
**Relationship to Client:** \_\_\_\_\_  
**Address:** \_\_\_\_\_

**DOB/Approx. Age:** \_\_\_\_\_  
**Phone:** \_\_\_\_\_  
**Attorney:** \_\_\_\_\_  
**DOB/Approx. Age:** \_\_\_\_\_  
**Phone:** \_\_\_\_\_  
**Attorney:** \_\_\_\_\_

**Do you belong to any social networking sites?**  Yes  No List: \_\_\_\_\_

**Have you posted anything online about this case?**  Yes  No List: \_\_\_\_\_

**Are you aware of anyone else (victims, witnesses, co-defendants) having posted information about this case online?**

Yes  No List: \_\_\_\_\_

**BACKGROUND INFORMATION**

**Full Legal Name:** \_\_\_\_\_  
(First) (Middle) (Last)

**Goes By:** \_\_\_\_\_ **Former Name(s):** \_\_\_\_\_

**Date of Birth:** \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ **Age:** \_\_\_\_\_ **Sex:** \_\_\_\_\_ **Race:** \_\_\_\_\_

**Place of Birth:** \_\_\_\_\_ **SSN:** \_\_\_\_\_  
(if other than US, complete Immigration intake sheet)

**Primary Language:** \_\_\_\_\_ **Citizenship:** \_\_\_\_\_

**Interpreter needed?**  Yes  No **Green Card?**  Yes  No **Amnesty?**  Yes  No

**Current client address:** \_\_\_\_\_ **Apt:** \_\_\_\_\_

**Length of time at address:** \_\_\_\_\_ **in community:** \_\_\_\_\_

**Lives with:** \_\_\_\_\_

**Current client phone:** \_\_\_\_\_ **Alternate phone:** \_\_\_\_\_

**Marital Status:**  Unmarried  Married  Separated  Divorced  Widowed

*	Name	Address	Phone	Age	Job
	Partner				
	Mother				
	Father				
	Sibling				
	Sibling				
	Child				
	Child				
	Child				

\* Place check mark in this box if attorney may call this person to locate client if client's contact information is out of date

**EDUCATION AND EMPLOYMENT**

Last grade completed: \_\_\_\_\_ Current student  Yes  No GED  Yes  No

High School Name: \_\_\_\_\_ Last Attended: \_\_\_\_\_

College Name: \_\_\_\_\_ Last Attended: \_\_\_\_\_

Held back in school?  Yes  No Had an IEP?  Yes  No Special school/classes?  Yes  No

Notes: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Currently employed:  Yes  No Name of Employer: \_\_\_\_\_

Address/Location: \_\_\_\_\_

Contact: \_\_\_\_\_ Phone: \_\_\_\_\_

Type of job: \_\_\_\_\_ Since: \_\_\_\_\_

Prior employment:  Yes  No Name of Employer: \_\_\_\_\_

Contact: \_\_\_\_\_ Phone: \_\_\_\_\_

Type of job: \_\_\_\_\_ Dates: \_\_\_\_\_

Reason for leaving: \_\_\_\_\_

Public Benefits received: \_\_\_\_\_

Military Service:  Yes  No Dates: \_\_\_\_\_ Branch: \_\_\_\_\_

Type of Discharge:  Honorable  General  Other Notes: \_\_\_\_\_

**PHYSICAL AND MENTAL HEALTH HISTORY**

Alcohol History: Drinks/week: \_\_\_\_\_ Prior Treatment?  Yes  No Interested in treatment?  Yes  No

Year	Location of Treatment	Length of treatment

Notes: \_\_\_\_\_  
\_\_\_\_\_

Drug History: Drug of choice: \_\_\_\_\_ Age at first use: \_\_\_\_\_ Prior Treatment?  Yes  No

Current frequency of use: \_\_\_\_\_ Interested in treatment?  Yes  No

Year	Location of Treatment	Length of treatment

Notes: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Mental Health History:** Diagnosis \_\_\_\_\_ Prior hospitalization/Treatment?  Yes  No  Current

Year	Location	Doctor	Inpt/Outpt	Length

**Physical Health History:** Any significant injuries, operations, overnight hospital stays, or head trauma?  
 Yes  No

Notes: \_\_\_\_\_

**Current medications**

Name	Dosage/Frequency	Prescribing Dr.	Reason for taking	Started taking

**CRIMINAL HISTORY**

Is client currently on  probation?  parole?

Charge: \_\_\_\_\_

Suspended sentence: \_\_\_\_\_

Officer: \_\_\_\_\_

Officer phone: \_\_\_\_\_

Any prior violations? \_\_\_\_\_

Has client been on probation before?  Yes  No

Most recent term of probation: \_\_\_\_\_

How terminated: \_\_\_\_\_

Has probation ever been revoked?  Yes  No

Details: \_\_\_\_\_

Was client on pre-trial release for another offense at the time of this offense?  Yes  No

**OTHER PENDING CHARGES**

Case Number	Charge	Class	Alleged Victim	Offense Date	Attorney	Next Court Date

**PRIOR CHARGES**

Case Number	Charge	Class	Offense Date	Disposition	Disposition date	Jurisdiction

*This document was compiled based on review of client intake documents from the Massachusetts Committee for Public Counsel Services, the Delaware Office of Public Defense, and Ray Moses's Client Interview Criminal Cases, <http://criminaldefense.homestead.com/clientinterview.html>*

## APPENDIX 3:

### ABA Ten Principles of a Public Defense Delivery System

Adopted in 2002, the ABA Ten Principles serve as a “practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems.”<sup>1</sup> Cited frequently by courts and legal journals, these principles “constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”<sup>2</sup>

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel’s workload is controlled to permit the rendering of quality representation.
6. Defense counsel’s ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

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1. ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) (last visited July 30, 2015).

2. *Id.*

## **APPENDIX 4:** **Sample Pre-Hearing Discovery Request**

September 16, 2016

Assistant Prosecutor Smith  
Hudson County Prosecutor's Office  
595 Newark Ave  
Jersey City, NJ

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**Re:   *State v. David Jones***  
**Complaint No. W-2016-123456-0777**

Dear Ms. Smith:

As you know, *R. 3:4-2(c)(1)(B)* governs the discovery that must be provided in cases, such as this one, where the prosecutor is seeking pretrial detention. That *Rule* does not require defendants to make formal discovery requests (“the prosecutor shall provide”). Nonetheless, please accept this letter as a formal discovery request for all statements or reports in your possession relating to the pretrial detention application and for all exculpatory evidence.

As to the first category of information, the statements and reports relating to the pretrial detention application include any statements or reports that support or rebut the finding of probable cause do believe that Mr. Jones committed the crime charged and statements and reports that support or negate a finding that no condition or set of conditions will protect the public, prevent obstruction and ensure the his presence at required court hearings. If, for example, you seek to introduce evidence regarding an eyewitness identification, you must provide all statements and reports relating to any eyewitness identification, as those reports would relate to the pretrial detention application.

You must also disclose *any* exculpatory information. To be clear, while *Brady v. Maryland*, 373 U.S. 83 (1963) mandates reversal of convictions where information that is both exculpatory and material is withheld, *New Jersey Rules of Court* require more: all exculpatory evidence —

whether material or not — must be disclosed. Such exculpatory evidence includes information related to guilt or innocence, credibility, or both. It includes, but is not limited to:

1. Criminal arrest and conviction records for all prosecution witnesses (not just those people who will be called as witnesses at detention hearings, but also those people who have provided evidence upon which the testifying witness will rely).
2. Detailed description of criminal, immoral or other “bad acts” of each witness.
3. Written or oral cooperation agreements with witnesses, including informal agreements.
4. Any information that tends to show motive, bias or interest of a witness.
5. Any information tending to undercut the ability of a witness to provide accurate or reliable testimony, such as drug use, mental health issues or deficiencies with respect to hearing, eyesight or cognition.
6. Statements of witnesses that are arguably inconsistent (either internally inconsistent or inconsistent with statements of other witnesses).
7. Names and addresses of witnesses who failed to identify the defendant or identified or described someone else.
8. Any evidence tending to establish that defendant’s acts were legally justified or excused, tending to show the existence of an affirmative defense or affecting the degree of his culpability.
9. Any evidence tending to establish a basis to exclude or suppress any evidence.
10. Any scientific evidence, testing or result that is inconsistent with or undercuts the alleged guilt of the defendant.

You must make diligent efforts to obtain necessary statements and reports from other law enforcement agencies. *See Giglio v. United States*, 405 U.S. 150 (1972) (information known by one member of law enforcement is attributable to the government, regardless of whether the individual prosecuting attorney knew about the evidence).

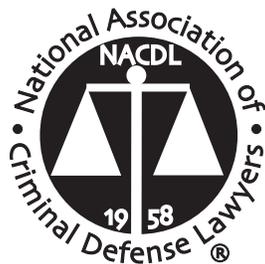
I appreciate your prompt accommodation with these requests.

Sincerely yours,

Jane Roberts, Esq.  
Attorney for Mr. Jones







NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
1660 L Street NW, 12th Floor, Washington, DC 20036  
Phone: 202-872-8600 | [www.nacdl.org](http://www.nacdl.org)