



CHRIS CHRISTIE  
Governor

State of New Jersey  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
PO BOX 080  
TRENTON, NJ 08625-0080

CHRISTOPHER S. PORRINO  
Attorney General

KIM GUADAGNO  
Lieutenant Governor

**ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2016-6**

**TO:** Director, Division of Criminal Justice  
Superintendent, New Jersey State Police  
All County Prosecutors  
Insurance Fraud Prosecutor  
All County Sheriffs  
All Police Chiefs  
All Law Enforcement Chief Executives

**FROM:** Christopher S. Porrino, Attorney General

**DATE:** October 11, 2016

**SUBJECT:** Directive Establishing Interim Policies, Practices, and Procedures to Implement Criminal Justice Reform Pursuant to P.L. 2014, c. 31

TABLE OF CONTENTS

1. INTRODUCTION AND OVERVIEW ..... 8

1.1 Preparing for Systemwide Changes ..... 8

1.2 The Compelling Need for Reform ..... 8

1.3 The Impacts of Reform on Law Enforcement Practices and Procedures ..... 10

1.4 The Emphasis on Public Safety and Victims’ Rights ..... 11

1.5 General Approach Taken by This Directive ..... 11

1.6 Scope of Directive ..... 13

1.7 Attorney General Order Issuing Directive ..... 13

2. LIVE SCAN FINGERPRINTING REQUIRED TO INITIATE THE AUTOMATED PRETRIAL RISK-ASSESSMENT PROCESS ..... 14

2.1 Statewide Report on Up-to-Date Live Scan Status ..... 14

2.2 Fingerprinting Requirements ..... 15



- 2.2.1 Requirement to Use Up-to-Date Live Scan System to Support eCDR System ..... 15
- 2.2.2 Prohibition of Filing Complaint for Certain Offenses without Initiating Automated Pretrial Risk-Assessment Process ..... 17
- 2.2.3 Transport of Arrestee to Live Scan-Equipped Police Facility ..... 17
- 2.2.4 Fingerprinting Plan for Agencies Not Equipped with Up-to-Date Live Scan ..... 18
- 3. PRE-CHARGING CASE SCREENING ..... 18
  - 3.1 Establishment of 24/7 On-Call Prosecutorial Screening/Approval System ..... 18
  - 3.2 Requirement to Obtain Charging Approval from On-Call Prosecutor upon Arrest for Certain Offenses ..... 18
  - 3.3 County Prosecutor’s Authority to Permit Police to Issue a Complaint-Summons and/or to Apply for a Complaint-Warrant without First Obtaining Prosecutorial Approval ..... 19
    - 3.3.1 Charging Directive Issued by County Prosecutor ..... 19
    - 3.3.2 Designation of Supervisory Officers Authorized to Approve Charging Decisions and to Overcome a Presumption ..... 21
    - 3.3.3 Required Notice to Prosecutor If Application for Complaint-Warrant Is Denied ..... 23
    - 3.3.4 Oversight and Strict Compliance with County Prosecutor’s Charging Directive ..... 23
    - 3.3.5 Expiration, Evaluation, and Indefinite Extension of County Prosecutor Charging Directive ..... 23
  - 3.4 County Prosecutor’s Authority to Require Direct Prosecutorial Participation in Complaint-Warrant Application ..... 23
  - 3.5 County Prosecutor’s Authority to Require Consultation/Charging Approval for Additional Offenses ..... 24
  - 3.6 Coordination of Charging Decisions When Offenses Are Committed in Multiple Counties ..... 24
- 4. DETERMINING WHETHER TO CHARGE BY COMPLAINT-SUMMONS OR COMPLAINT-WARRANT ..... 25
  - 4.1 General Policy Considerations ..... 25
  - 4.2 Charging Decisions Informed by Automated Pretrial Risk Assessment and Other Information Sources ..... 26
    - 4.2.1 Risk-Assessment Score Values and Flags ..... 26
    - 4.2.2 Law Enforcement Obligation to Consider Known Relevant Information Not Accounted for in the Automated Pretrial Risk Assessment ..... 28

4.2.3	Requirement to Check Domestic Violence Central Registry in Domestic Violence Cases	30
4.2.4	Requirement to Check Sexual Assault Survivor Protection Act Central Registry	30
4.2.5	Requirement to Check Young Adult Defendants' Juvenile History	30
4.2.6	Authority to Seek Superseding Complaint-Warrant When New Information Supports Upgrading Charges or Has a Material Bearing on Pretrial Release Risks	31
4.2.7	Procedures When Charges Actually Filed Are Different from Charges Initially Entered into Live Scan	32
4.3	Cases Where There Is a Presumption of Issuing a Complaint-Summons	32
4.3.1	Standard for Overcoming Presumption of Issuing a Complaint-Summons	32
4.3.2	Specifying Reasons for Overcoming Presumption of Charging by Complaint-Summons	34
4.4	Cases Where Law Enforcement Must Apply for a Complaint-Warrant without Exception	34
4.4.1	Specified Crimes That Must Be Charged by Complaint-Warrant	34
4.4.2	Extradition Cases and New Jersey, Federal, or Out-of-State Detainers	35
4.5	Cases Where There Is a Rebuttable Presumption of Applying for a Complaint-Warrant	36
4.5.1	Automated Pretrial Risk Assessment Indicates a Moderate or High Risk of Flight, New Criminal Activity, or Violence	36
4.5.2	Defendant Has Violated a Domestic Violence Restraining Order or a Sexual Assault Survivor Protection Act Order	36
4.5.3	Defendant Is Charged with Bail Jumping or Witness Tampering	36
4.5.4	Defendant Is Charged with a Crime Specified in <u>Rule 3:3-1(f)</u>	37
4.5.5	The Present Offense Was Committed While on Release for Another Offense or While on Any Form of Post-Conviction Supervision	38
4.5.6	Preliminary Automated Pretrial Risk Assessment Results Are Not Available or Would Result in Undue Delay in Making Charging Decisions	38
4.5.7	Defendant Was Recently Adjudicated Delinquent for a Violent Crime	39
4.5.8	Out-of-State Convictions/Charges	40
4.5.9	Overcoming the Presumption of Applying for a Complaint-Warrant	40
4.6	Special Considerations, Notifications, and Procedures in Domestic Violence and Sexual Assault Cases	41
4.6.1	Impact of Mandatory Incarceration on Domestic Violence Victims	41
4.6.2	Special Factors in Domestic Violence Cases	41

4.6.3	Situations Where Law Enforcement Must Apply for a Complaint-Warrant and Seek Special Conditions to Protect Domestic Violence Victims	42
4.6.4	Special Notifications in Domestic Violence Cases	43
4.6.5	Impact of Mandatory Incarceration on Sexual Assault Victims	43
4.7	Expunged Records	44
4.8	Juvenile Waiver Cases	44
4.9	Direct Indictments	45
4.9.1	Prosecutor Request for a Complaint-Warrant	45
4.9.2	Direct-Indictment Cases Where Automated Pretrial Risk-Assessment Results Are Not Available	45
4.10	Complaints Prepared Before Arrest or Indictment	46
4.11	Report When Application for a Complaint-Warrant Is Denied	46
4.12	Transport to County Jail After Complaint-Warrant Issued	47
4.13	Obligation to Forward Available Investigative Reports	47
4.14	Training Program and Instructional Materials for Police	47
5.	<b>AFFIDAVITS OF PROBABLE CAUSE AND PRELIMINARY LAW ENFORCEMENT INCIDENT REPORTS PREPARED AT TIME OF ARREST</b>	48
5.1	Electronic Submission of Affidavit of Probable Cause	48
5.2	Development of Uniform Preliminary Law Enforcement Incident Report	48
5.3	Limited Scope of Information in a Preliminary Law Enforcement Incident Report	51
5.4	Protection of Victim Contact Information	51
5.5	Use of Preliminary Law Enforcement Incident Report to Inform Charging Decisions	52
5.6	Capacity to Access and Prepare/Share Preliminary Law Enforcement Incident Reports	52
5.6.1	Police Agencies	52
5.6.2	Electronic Access to Preliminary Law Enforcement Incident Reports by On-Call Prosecutors	53
6.	<b>FIRST APPEARANCE AFTER ISSUANCE OF COMPLAINT-WARRANT</b>	53
6.1	Attendance by Prosecutor	53
6.2	Requests for Special Release Conditions	53
6.2.1	Requests for Restraints Concerning New Offenses	53
6.2.2	Requests for Restraints Concerning Contact with Victims/Witnesses	53
6.2.3	Domestic Violence, SORO, SASPA, and DORO Restraining Orders	54
6.2.4	Substance Abuse Intervention and Monitoring	54



6.2.5	Electronic Monitoring, House Arrest, Curfews, Restrictions on Personal Associations, and Other Release Conditions	55
6.3	Restrictions on Requests for Imposition of Monetary Bail	55
6.3.1	General Considerations	55
6.3.2	Presumption Against Seeking Monetary Bail	56
6.3.3	Overcoming the Presumption Against Monetary Bail	56
6.3.4	Presumptive Inquiry as to Defendant's Interest in Ensuring That Monetary Bail Is Not Forfeited	56
6.4	Documentation or Appeal When Specific Request for Special Release Condition Is Denied	57
7.	PRETRIAL DETENTION MOTIONS	57
7.1	General Policy and Decision Framework	57
7.2	Presumption Against Applying for Pretrial Detention	60
7.3	Cases Where a Motion to Seek Pretrial Detention Must Be Filed Absent Compelling and Extraordinary Circumstances	61
7.4	Cases Where the Prosecutor Is Presumed to Seek Pretrial Detention	61
7.4.1	Cases Invoking the Prima Facie Evidence Feature of Rule 3:4A(b)(5)	61
7.4.2	Serious Crimes Involving a High Risk Score	61
7.4.3	Serious Crimes Involving a Moderate Risk Score and Violent Juvenile History	61
7.4.4	Serious Crimes Committed While on Pretrial Release for Another Offense or While on Any Form of Post-Conviction Supervision	62
7.4.5	Cases Involving a New Violent Criminal Activity Flag	62
7.4.6	Overcoming the Presumption of Seeking Pretrial Detention	62
7.5	Specifying Legal and Factual Basis for Pretrial Detention Application	63
7.6	Relevant Facts and Circumstances	63
7.6.1	General Rule	63
7.6.2	Establishing Existence of Certain Relevant Facts and Circumstances	64
7.6.3	Accounting for Impact of Offense and Pretrial Release on Victim	64
7.6.4	Legal Position Concerning Eligibility for Pretrial Detention When Monitoring Services That Might Manage Risk(s) Are Not Available	65
7.6.5	Juvenile Waiver Cases	66
7.6.6	Expunged Records	66
7.7	Re-Considering Decision to Seek Detention and Re-Opening Detention Hearing	66
7.8	Designation of Supervisors	67
7.9	Training	67
7.10	Notification When Motion for Pretrial Detention Is Denied	67

8.	MOTIONS TO REVOKE RELEASE .....	68
8.1	General Authority to Revoke Release .....	68
8.2	Presumption Against Applying for Revocation of Release .....	68
8.3	Cases Where a Motion for Revocation of Release Must Be Filed Absent Compelling and Extraordinary Circumstances .....	69
8.4	Cases Where the Prosecutor Is Presumed to Seek Revocation of Release	
8.4.1	Presumption of Seeking Revocation of Release When Serious New Crime Is Committed While on Release for Any Offense Charged by Complaint-Warrant .....	69
8.4.2	Presumption of Seeking Revocation of Release When Any New Crime Is Committed While on Release for a Serious Crime .....	69
8.4.3	Presumption of Seeking Revocation of Release When Defendant Violates a Domestic Violence Restraining Order .....	69
8.4.4	Presumption of Seeking Revocation of Release When Defendant Violates a Sexual Assault Survivor Protection Order .....	70
8.4.5	Overcoming the Presumption of Seeking Revocation of Release .....	70
8.5	Relevant Facts and Circumstances .....	70
8.6	Electronic Filing of Application for Revocation of Release .....	70
8.7	Combining Revocation-of-Release and Initial Detention Motions .....	70
8.8	Notification When Application for Revocation of Release Is Denied .....	70
9.	NOTICE TO PROSECUTOR OF SUSPECTED VIOLATIONS OF PRETRIAL RELEASE CONDITIONS .....	71
10.	PRIORITIZATION TO EXPEDITE POLICE REPORTS AND TESTS IN DETENTION CASES .....	71
10.1	Reports Needed for Pretrial Detention Decision .....	71
10.2	Timely Submission of Requests for Laboratory Analysis .....	72
10.2.1	Time Limit for Submitting Evidence for Forensic Testing .....	72
10.2.2	Prompt Notification If Testing No Longer Needed .....	72
10.3	Prosecutor's Authority to Prioritize Completion of Investigative Reports and Forensic Examinations When Needed to Comply with Speedy Indictment/Trial Deadlines .....	72
10.4	Compliance with Prioritization Requests .....	73
11.	NOTICE TO ATTORNEY GENERAL OF SPEEDY INDICTMENT/TRIAL VIOLATIONS .....	73
12.	ESCALATING PLEA POLICY .....	74
12.1	General Policy Considerations .....	74

12.2	Issuance of Escalating Plea Policies	77
12.3	Required Features	77
12.4	Designated Supervisors	78
12.5	Strict Adherence with Victims' Rights	78
12.6	Strict Enforcement	79
12.7	Unauthorized Judicial Plea Offers	79
13.	UNIFORM INTERPRETATION OF BAIL REFORM LAW	80
13.1	Notice of Legal Issues/Appeals	80
13.2	Brief Bank	80
14.	ENHANCING PROFICIENT ADVOCACY	80
15.	EVALUATION STUDIES AND REPORTS	81
16.	ADVISORY/WORKING GROUPS TO FACILITATE UNIFORM AND EFFICIENT IMPLEMENTATION AND DEVELOP AND SHARE BEST PRACTICES	82
16.1	Criminal Justice Reform Advisory Group	82
16.2	Technology Advisory Group	82
17.	NON-ENFORCEABILITY BY THIRD PARTIES	82
18.	EXCEPTIONS	83
19.	QUESTIONS	83
20.	SUPERSEDURE	83
21.	EFFECTIVE DATE	83

## 1. INTRODUCTION AND OVERVIEW

### 1.1 Preparing for Systemwide Changes.

On August 11, 2014, Governor Christie signed P.L. 2014, c. 31 (“Bail Reform Law”), which will lead to sweeping changes to New Jersey’s adult criminal justice system. This unprecedented reform initiative, which takes effect on January 1, 2017, includes an amendment to Article I, paragraph 11 of the New Jersey Constitution that was approved overwhelmingly by voters. For the first time in the State’s history, courts will be authorized to order the preventive detention of dangerous defendants charged with non-capital crimes.

The Bail Reform Law will have a significant impact on police and prosecutors. Although the new statute focuses on the pretrial release decision, its provisions ultimately will affect how cases are handled at every stage of the criminal justice process, from the moment police make an arrest to the time when a defendant is tried or pleads guilty. It is essential, therefore, that New Jersey’s law enforcement community prepare to implement these reforms in a manner that maximizes public safety while controlling costs and collateral consequences. Certain steps must be undertaken before the January 1, 2017 effective date of the new statute and constitutional amendment<sup>1</sup> so that new practices and procedures can be developed and tested, and so that police and prosecutors can be trained on these new practices and procedures.

The purpose of this Directive is to facilitate the transition from our current bail laws and practices to the new pretrial release system. This promises to be a difficult task, as the new pretrial release framework presents challenges that will strain existing law enforcement resources. For example, this Directive requires prosecutors or designated supervisory police officers to be available to provide legal advice and charging instructions to police before a criminal complaint is filed. For most counties, the implementation of this Directive will represent a significant change in the manner in which cases are initially screened.

Given the breadth and scope of the impending reforms, police and prosecutors must work collaboratively to identify implementation problems and devise cost-effective solutions. This will be an ongoing process, and the policies, practices, and procedures outlined in this Directive therefore are subject to review and revision as necessary. See Section 16.

### 1.2 The Compelling Need for Reform.

For many decades, New Jersey’s pretrial release system has relied almost entirely upon

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Key public safety features of the new law, including especially the authority to order preventive detention, cannot become operative until the constitutional amendment takes effect on January 1, 2017. So too, the speedy indictment/trial deadlines prescribed by the Bail Reform Law do not take effect until January 1, 2017. Accordingly, select sections and/or subsections of this Directive specify either a date or event/precondition that triggers when the section/subsection becomes operational. See, e.g., subsection 2.2.1.



monetary bail. Although judges are allowed under current law to set non-monetary conditions of release to regulate the defendant's conduct while out in the community, until now New Jersey has never dedicated the resources to monitor released defendants. For that reason, many judges have been reluctant to impose non-monetary conditions,<sup>2</sup> choosing instead to rely exclusively on monetary bail.

As a result, in most cases the critical determination whether a defendant is released pending trial or instead incarcerated in a county jail is not made by a judge issuing a well-reasoned court order. Rather, for all practical purposes, defendants are released or detained based on whether they happen to have the financial means to post bail. Of particular concern to law enforcement, the release/detention decision is made without regard to the danger the defendant poses to the community, victims, or witnesses because under New Jersey case law a judge is *prohibited* from considering public safety in setting the amount of monetary bail. See State v. Steele, 430 N.J. Super. 24 (App. Div. 2013), appeal dismissed, 223 N.J. 284 (2014). In most cases, in other words, our current system all but ignores the interests of community protection.

That is not the only glaring flaw. Because our current monetary bail system focuses inexorably on the financial resources of a defendant, it tends inherently to discriminate against the poor. Defendants with limited financial means too often cannot afford even modest bail amounts. In contrast, more affluent defendants – including those who have access to ill-gotten wealth through their criminal activities or criminal associates – too often are released notwithstanding that they pose a significant threat to the community, victims, witnesses, and the criminal justice process.

In sum, the current “*resource-based*” system is neither fair nor effective. It is flawed not only because it results in the pretrial incarceration of too many low-risk defendants, but also because it allows dangerous defendants to pay their way out of county jail.

The Bail Reform Law replaces the current resource-based system with a “*risk-based*” approach, requiring courts to assess the likelihood that a defendant will flee, commit new criminal activity, or obstruct justice by intimidating victims and other witnesses. One of the most critical innovations undergirding the entire reform initiative is that this predictive process henceforth will be informed by an objective pretrial risk-assessment process that has been designed and validated through empirical research. See N.J.S.A. 2A:162-25(c). The use of a validated pretrial risk-assessment instrument represents a major advance toward a just and effective pretrial release system. However, because the pretrial risk-assessment process approved by the AOC depends on the general

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Cases involving domestic violence are a notable exception in that well-designed systems and procedures have been implemented to protect domestic violence victims through the issuance and enforcement of restraints and other special conditions to control the conduct of defendants released pending disposition of charges. See N.J.S.A. 2C:25-26 to -34 and the Domestic Violence Procedures Manual issued under the authority of the Supreme Court of New Jersey and the Attorney General of New Jersey (2008). See also subsection 4.6.4 (requiring officers to alert the court when the offense involves domestic violence, check the Domestic Violence Central Registry, and advise the victim of her/his right to seek a protective order).

nature of the present charge and defendant's adult New Jersey criminal conviction and court-appearance history, it may not account for all relevant facts and circumstances pertaining to the defendant or the specific manner in which the current offense was committed. It therefore is necessary and appropriate for police and prosecutors to fill the information gaps when feasible so that courts can make fully-informed pretrial release decisions that will best serve the interests of justice and public safety.

### 1.3 The Impacts of Reform on Law Enforcement Practices and Resources.

The Bail Reform Law does more than change the way in which pretrial release decisions are made. It also includes provisions to ensure that persons who are detained pending trial are indicted and tried swiftly. This is to be achieved in part by imposing specific deadlines for indictment and trial. To meet these deadlines – and thus avoid the prospect of having dangerous defendants released – it will be necessary for police to complete reports more expeditiously, and for prosecutors to screen, prepare, and present cases for indictment and trial more expeditiously.

The practical impact of the new law on law enforcement resources, moreover, will not be limited to cases involving high-risk defendants who are held in county jail pursuant to a pretrial detention order. Although the speedy indictment/trial deadlines set forth in the Bail Reform Law apply only to those defendants who are detained, the new pretrial release system also will have significant case-processing implications for the far larger number of defendants who will be released pending trial.

For one thing, it will be necessary for prosecutors – and courts – to devote more resources to detention cases to ensure that dangerous defendants are not set loose because a statutory deadline was missed. That means that fewer personnel resources and court dates will be available to deal with non-detention cases.

The re-prioritization of prosecutorial and judicial resources is not the only changed circumstance that will impact cases where the defendant is not detained. It is expected, indeed *intended*, that many low-risk defendants who are unable to make bail under current law will be released under the new system. That is likely to have an unintended but foreseeable impact on overall plea rates (the proportion of defendants who waive their right to a jury trial by pleading guilty), and on the timing of guilty pleas. Defendants who would have been detained under the current system but who will be released under the new system may have practical incentive to delay the resolution of their case to postpone their incarceration. The incentive to delay would be heightened if a defendant were to believe that the prosecutor's plea offer will become more generous if the case lingers. It will be necessary, therefore, for prosecutors to implement proven strategies and policies that provide practical incentives for guilty defendants to accept responsibility in a timely fashion. See Section 12 (requiring County Prosecutors to establish and enforce an "escalating" plea policy that encourages early guilty pleas and discourages delay).

#### 1.4 The Emphasis on Public Safety and Victims' Rights.

The New Jersey law enforcement community is committed to the full and fair implementation of all of the provisions of criminal justice reform, including those features that will result in fewer defendants being held in county jails while awaiting trial. We embrace the notion that presumptively innocent defendants who pose a low risk of flight or new criminal activity should not be held in county jails at taxpayer expense.

From the law enforcement perspective, of course, the most important feature of the Bail Reform Law is that dangerous defendants can be detained by court order. Consistent with law enforcement's core mission, our principal goal in implementing the new statute is to protect the safety of the community, victims, and witnesses. It is especially imperative to ensure that criminal justice reforms safeguard the rights of crime victims, including their state constitutional and statutory right to participate in the criminal justice process and to have meaningful input in prosecutorial decisions that affect their interests.

#### 1.5 General Approach Taken by This Directive.

This Directive is not intended to serve as an operational manual, explaining in detail how every law enforcement decision is to be made in accordance with the Bail Reform Law and amended Court Rules. It is intended, rather, to provide general policy guidance on how police and prosecutors should exercise their discretion in applying the Bail Reform Law. See, e.g., N.J.S.A. 2A:162-16(c) (requiring the Attorney General to issue guidelines on when a law enforcement officer may apply for a complaint-warrant).

This Directive does not attempt to address every implementation and statutory interpretation issue likely to arise. Nor does it attempt to account for every relevant circumstance that police and prosecutors should consider in making case-specific decisions. Rather, the Directive sets forth the general responsibilities for police and prosecutors, requiring them to establish systems, policies, and procedures for implementing the Bail Reform Law efficiently. This Directive, in other words, establishes a general framework within which case-specific decisions will be made. This is done with the understanding that more specific legal or policy guidance may be provided in the future if that becomes necessary and appropriate to achieve the benefits of a uniform and efficient administration of the new statute and the recent amendment to Article I, paragraph 11 of the New Jersey Constitution.

To establish a general framework to guide the exercise of law enforcement discretion in implementing the Bail Reform Law, this Directive establishes substantive standards for police and prosecutors to apply (e.g., rebuttable presumptions that inform when a defendant should be charged by a complaint-summons rather than a complaint-warrant, when prosecutors should file a motion for pretrial detention or to revoke a defendant's pretrial release, etc.), and imposes procedural requirements to ensure an appropriate degree of uniformity in exercising discretion (e.g., requiring that certain decisions be approved by designated prosecutors or supervisory police officers). This



combination of substantive standards and procedural safeguards will promote uniformity by channeling discretion while still affording police and prosecutors the flexibility to account for all relevant facts and circumstances, including those that are not accounted for in the automated pretrial risk-assessment process approved by the Administrative Director of the Courts pursuant to N.J.S.A. 2A:162-25(c).

The presumptions established in this Directive on when to issue a complaint-summons or to apply for a complaint-warrant, and on when to seek pretrial detention or revocation of release, should not be confused with the presumptions established in the Bail Reform Law and the recently-revised Court Rules. The presumptions set forth in this Directive are designed to guide the exercise of law enforcement/prosecutorial discretion, and generally are more detailed, comprehensive, and precise than the presumptions set forth in the statute and Court Rules. The presumptions established in this Directive in no way bind judges and other judicial officers, see note 24, but rather are used to promote consistency and uniformity in the positions that police and prosecutors take when presenting matters to those judges and judicial officers.

It also bears emphasis that the framework of rebuttable presumptions employed in this Directive is designed to channel law enforcement discretion, not eliminate it. A presumption is the starting point for case-specific analysis, but does not necessarily dictate the outcome of that analysis. Rather, it requires a prosecutor, or in certain instances a designated supervisory officer, to articulate and document specific reasons if the determination is made to diverge from a presumptive outcome.

Furthermore, nothing in this Directive restricts a prosecutor or designated supervisory officer from considering any relevant fact or circumstance, including those that do not automatically trigger a presumption. For example, in determining whether to apply for a complaint-warrant or to seek pretrial detention, a defendant's juvenile adjudications of delinquency for non-violent offenses that occurred more than 10 years ago may be considered, even though those adjudications would not trigger a presumption of applying for a complaint-warrant under subsection 4.5.7, or a presumption of moving for pretrial detention under subsection 7.4.3. So too, for example, a defendant's prior probation violations may be considered as an indication of disrespect for judicial authority or unwillingness or inability to obey court orders, notwithstanding that such violations do not invoke a presumption and are not otherwise specifically referenced in this Directive. Those types of historical facts would be relevant, not because they establish a presumption, but rather because they might become part of the totality of the circumstances used to overcome a presumption of issuing a complaint-summons, see subsection 4.5.9, or a presumption against seeking pretrial detention. See subsection 7.4.6.

Although it is important to develop uniform statewide standards for police and prosecutors to achieve the full benefits of criminal justice reform, and to control costs and mitigate unintended consequences, it is expected that County Prosecutors and police executives will devise and test innovative solutions adapted to the practical problems and available resources in their respective jurisdictions. This Directive contemplates an ongoing dialog where best practices are developed locally, shared, and replicated in other jurisdictions as appropriate. See Section 16.



## 1.6 Scope of Directive.

This Directive applies to all cases where a defendant is alleged to have committed an indictable crime or disorderly persons offense. See N.J.S.A. 2A:162-15 (defining an “eligible defendant” for purposes of the Bail Reform Law as a defendant charged by complaint-warrant with an indictable crime or disorderly persons offense). In accordance with Rule 3:26-1, this Directive also may apply to petty disorderly persons offenses. This Directive does not apply to cases where the most serious offense is an ordinance violation or a motor vehicle offense.

Note that this Directive is not limited to cases where the defendant is charged by complaint-warrant, because one of the major features of the Directive is to provide guidance on when to issue a complaint-summons or to apply for a complaint warrant. See Section 4. Nor is this Directive limited to domestic violence disorderly persons offenses where any of the grounds specified in N.J.S.A. 2C:25-21(a)(1) to (4) apply, or to any other disorderly persons offenses involving domestic violence. See note 5. Cf. Section 3.2 (limiting the general requirement that an arresting officer contact an assistant prosecutor for charging approval to indictable crimes and mandatory-arrest domestic violence disorderly persons offenses).

This Directive does not apply to fugitives charged with offenses under the laws of another State, or the United States, unless the defendant also is charged with an offense under New Jersey law that falls within the scope of the Bail Reform Law and this Directive. Persons arrested for an offense under the laws of another jurisdiction who are not charged with an offense under New Jersey law shall be handled in accordance with the laws, practices, and procedures currently in place, and nothing herein shall be construed to suggest that such persons are subject to the Bail Reform Law. Cf. subsection 4.4.2 (discussing out-of-state detainers).

## 1.7 Attorney General Order Issuing Directive.

Pursuant to the authority granted to me under the New Jersey Constitution, the Bail Reform Law, N.J.S.A. 2A:162-15 to - 25, and the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, and to implement the amendments to Article I, paragraph 11 of the New Jersey Constitution that take effect on January 1, 2017, I, Christopher S. Porrino, hereby DIRECT all law enforcement and prosecuting agencies operating under the authority of the laws of the State of New Jersey to implement and comply with the following policies, procedures, standards, and practices.

## 2. LIVE SCAN FINGERPRINTING REQUIRED TO INITIATE THE AUTOMATED PRETRIAL RISK-ASSESSMENT PROCESS

### 2.1 Statewide Report on Up-to-Date Live Scan Status.

Many of the criminal justice system reforms under the Bail Reform Law depend on an objective assessment of the risks that a defendant might fail to appear, might commit new criminal activity, or might commit a violent crime if released. Pursuant to N.J.S.A. 2A:162-25(c), the Administrative Director of the Courts has approved an automated pretrial risk-assessment process validated by extensive, state-of-the-art empirical research. That process relies on objective data stored in various law enforcement and judiciary databases that details the defendant's adult criminal and court-appearance history.

The Live Scan fingerprint system is needed to initiate the automated pretrial risk-assessment process approved by the AOC.<sup>3</sup> To access the data used in that process, unique characteristics to aid with identifying the defendant must be established through the Live Scan fingerprint system, which must be capable of transmitting fingerprints and the most up-to-date and accurate data tables in a standardized format. Those data tables include properly formatted pick lists, demographic descriptors, and current criminal statutes and codes. To ensure access to the automated pretrial risk-assessment process, therefore, a law enforcement agency will need to coordinate with its Live Scan vendor to continually receive the most up-to-date and accurate set of data tables, because the Live Scan vendor is the only authorized entity that can apply the data table updates to the agency's Live Scan fingerprint system.

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As used in this Directive, the phrase "automated pretrial risk-assessment process" generally refers to the process of initiating a computerized preliminary pretrial risk assessment run by using the Live Scan fingerprint system that is linked to the automated pretrial risk-assessment system approved by the AOC. The term "*preliminary* pretrial risk assessment" refers more specifically to the initial computer-generated pretrial risk assessment initiated by the law enforcement agency making the arrest that is provided to prosecutors and/or designated supervisory officers before the pretrial services program reviews and finalizes the pretrial risk assessment. The preliminary assessment is used under this Directive to inform the law enforcement/prosecution decision whether to issue a complaint-summons or instead apply for a complaint-warrant. Note that the pretrial risk assessment is reviewed and finalized by the pretrial services program after a defendant charged by complaint-warrant has been transported to a county jail. If that finalized assessment is different from the results of the preliminary pretrial risk assessment, the updated assessment should, once available to prosecutors, be used to inform prosecutorial decisions concerning pretrial detention or revocation of release in accordance with Sections 7 and 8 of this Directive.

The term "Public Safety Assessment (PSA)" generally refers to the numeric scores (on a 1-6 scale) and "flag" results of the pretrial risk-assessment process. See subsection 4.2.1. This Directive on occasion refers to various PSA scores in the 1-6 scale as indicating a "high," "moderate," or "low" risk that a defendant might commit new criminal activity if released, or fail to appear in court when required. See, e.g., subsections 4.5.1, 7.4.2, and 7.4.3. Those ordinal-ranking descriptions of the numeric scores generated by a PSA are used in this Directive to provide police and prosecutors a general understanding of how the PSA informs law enforcement/prosecution decisions that are made pursuant to this Directive (i.e., whether to charge by complaint-summons or complaint warrant, and whether to seek pretrial detention or revocation of release). Those characterizations of numeric score results are not used in the PSA.

The systems and policies established in this Directive depend on police and prosecutors following the correct sequence of steps to initiate the automated pretrial risk-assessment process. See also subsection 2.2.1. The State Police and AOC have established an interface between the Live Scan fingerprint system and eCDR. The interface transmits confirmed Live Scan records to the eCDR system so that when police generate a complaint, Live Scan record data automatically will populate many of the required fields on the eCDR. The interface in this way reduces the time needed to enter data, enhances data quality, and ensures positive identification of defendants.

Given the importance of Live Scan fingerprinting as the initial step in obtaining an objective pretrial risk assessment, it is necessary to confirm that law enforcement agencies upon making an arrest have the means to initiate the automated pretrial risk-assessment process. Accordingly, within 30 days of the issuance of this Directive, the State Police shall identify every law enforcement agency operating under the authority of the laws of the State of New Jersey to determine whether the agency is equipped with a Live Scan system that has up-to-date software capable of initiating the automated pretrial risk-assessment process approved by the AOC. Within 45 days of the issuance of this Directive, the State Police shall report to the agency, and to the Director of the Division of Criminal Justice and each appropriate County Prosecutor, if the agency is not so equipped, and shall indicate what steps the agency would need to take to achieve the capacity to initiate the automated pretrial risk-assessment process (e.g., obtain new hardware, update Live Scan software, update computer operating system, etc.). Nothing herein shall be construed to mandate any purchase or expenditure, and an agency that is not equipped with a Live Scan system capable of initiating the AOC-approved pretrial risk-assessment process will make other arrangements for fingerprinting defendants pursuant to subsections 2.2.3 and 2.2.4.

This Section shall become operational immediately upon issuance of this Directive.

## 2.2 Fingerprinting Requirements.

### 2.2.1 *Requirement to Use Up-to-Date Live Scan System to Support eCDR System.*

Upon the arrest of an adult for any offense for which fingerprinting is required by statute, see N.J.S.A. 53:1-15 and N.J.S.A. 53:1-18.1,<sup>4</sup> the law enforcement agency making the arrest shall take

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N.J.S.A. 53:1-15 provides in pertinent part that:

The sheriffs, chiefs of police, members of the State Police and any other law enforcement agencies and officers shall, immediately upon the arrest of any person for an indictable offense, or for any of the grounds specified in paragraph (1), (2), (3) or (4) of subsection a. of section 5 of P.L. 1991, c. 261 (C. 2C:25-21) or of any person believed to be wanted for an indictable offense, or believed to be a habitual criminal, or within a reasonable time after the filing of a complaint by a law enforcement officer charging any person with an indictable offense, or upon the arrest of any person for shoplifting, pursuant to N.J.S. 2C:20-11, or upon the arrest of any person for prostitution, pursuant to N.J.S. 2C:34-1, or the conviction of any



and submit the fingerprints of the person by using a Live Scan system capable of initiating the automated pretrial risk-assessment process approved by the AOC. Note that while this Directive generally applies to adult defendants, a juvenile who is waived to adult court pursuant to N.J.S.A. 2A:4A-26.1 (involuntary waiver) or N.J.S.A. 2A:4A-27 (waiver at election of juvenile), shall be treated as an adult. See also Section 4.8 (when a juvenile is waived to adult court, prosecutor must ensure that a complaint-summons or complaint-warrant is filed).

When a defendant is arrested and fingerprinted at the time of complaint processing, the Live Scan fingerprinting must be completed before beginning an eCDR complaint. Once the Live Scan confirmation is received, the law enforcement officer or agency shall proceed to the eCDR system to begin generating a complaint. After accessing the "Complaint Entry" tab, the officer shall choose the defendant's Live Scan record from the list displayed in eCDR. The Live Scan record will then automatically populate many of the eCDR data fields.

Note that to initiate the automated pretrial risk-assessment process, the agency must make a Live Scan Criminal Arrest Record submission, indicating the offense(s) for which the defendant was arrested. Although agencies are not precluded from using the Live Scan Criminal Inquiry function during the criminal investigation process, see note 4, any fingerprint check that does not submit fingerprints for inclusion in the AFIS database will not support or initiate the automated pretrial risk-assessment process approved by the AOC, and therefore shall not be used in place of a Live Scan Criminal Arrest Record submission. When indicating the offense(s) for which the defendant was arrested, the agency shall indicate the degree of the offense, using the highest degree of offense for which probable cause exists. Cf. subsection 4.2.7 (addressing the situation when a

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other person charged with a nonindictable offense, where the identity of the person charged is in question, take the fingerprints of such person, according to the fingerprint system of identification established by the Superintendent of State Police and on the forms prescribed, and forward without delay two copies or more of the same, together with photographs and such other descriptions as may be required and with a history of the offense committed, to the State Bureau of Identification.

N.J.S.A. 53:1-18.1 further requires fingerprinting immediately upon the arrest of any person charged with any offense "relating to narcotic or dangerous drugs, whether the same shall be indictable or otherwise."

Nothing in this Directive in any way limits the authority of a law enforcement agency or officer to ascertain an arrestee's criminal history by means of an NCIC/CCH or Interstate Identification Index query that does not depend on fingerprint verification.

In addition, this Directive does not preclude a law enforcement agency from conducting a Live Scan Criminal Inquiry fingerprint submission to help identify an offender and search the New Jersey State Police and FBI AFIS databases for matching prints. However, the Criminal Inquiry function submits prints on a "search and return" basis and thus does not result in issuance of an SBI or FBI number, and does not update or appear on a defendant's CCH. Nor does the Live Scan Criminal Inquiry function support or initiate the pretrial risk-assessment process approved by the AOC. Accordingly, a Criminal Inquiry submission shall not be used in lieu of a Live Scan Criminal Arrest Record submission, which is needed so that the AOC-approved automated pretrial risk-assessment system can generate a PSA.



prosecutor approves charging a different offense, or different degree of offense, than the one that had been used in the initial Live Scan Criminal Arrest Record submission).

This subsection shall become operational immediately upon issuance of this Directive.

*2.2.2 Prohibition of Filing Complaint for Certain Offenses without Initiating Automated Pretrial Risk-Assessment Process.*

Except as may be authorized by subsection 4.5.6, in cases where the defendant has been arrested for any indictable crime, an offense involving domestic violence where any of the grounds specified in N.J.S.A. 2C:25-21(a)(1) to (4) apply,<sup>5</sup> or any other offense for which fingerprinting is required by statute, see note 4, no complaint-summons shall be issued by a law enforcement officer, and no application for a complaint-warrant shall be submitted by a law enforcement officer to a judge or other judicial officer authorized to approve a complaint-warrant, unless the law enforcement agency making the arrest has initiated the automated pretrial risk-assessment process approved by the AOC.

Note that the Bail Reform Law applies not only to domestic violence disorderly persons offenses involving any of the grounds specified in N.J.S.A. 2C:25-21(a)(1) to (4), but also to all other disorderly persons offenses. See also Section 1.6 (scope of Directive includes all indictable crimes and all disorderly persons and petty disorderly persons offenses). The Bail Reform Law thus may apply to a disorderly persons or petty disorderly offense for which fingerprinting is not required by statute. See note 4. If the most serious offense for which a defendant is arrested is an offense for which fingerprinting is not required by statute, in which event it would not be possible to initiate an automated pretrial risk assessment, the determination whether to overcome the presumption of charging by complaint-summons set forth in Rule 3:3-1(c) and subsection 4.3.1 of this Directive shall be made by applying the provisions/presumptions set forth in Section 4 of this Directive that do not depend upon the results of an automated pretrial risk assessment. See note 8.

*2.2.3 Transport of Arrestee to Live Scan-Equipped Police Facility.*

If a defendant is arrested for an offense for which an automated pretrial risk assessment must be initiated pursuant to subsection 2.2.2 and the agency that made the arrest is not equipped with a Live Scan system capable of initiating the automated pretrial risk-assessment process approved by the AOC, the agency shall without delay transport the person to a law enforcement facility that has a Live Scan system capable of initiating the automated pretrial risk-assessment process in accordance with the plan established under subsection 2.2.4 of this Directive.

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Those grounds exist if (1) the victim exhibits signs of injury caused by an act of domestic violence; (2) a warrant is in effect; (3) there is probable cause to believe that the person has violated N.J.S.A. 2C:29-9, and there is probable cause to believe that the person has been served with the order alleged to have been violated; or (4) there is probable cause to believe that a weapon as defined in N.J.S.A. 2C:39-1 has been involved in the commission of an act of domestic violence.

#### 2.2.4 *Fingerprinting Plan for Agencies Not Equipped with Up-to-Date Live Scan.*

If a law enforcement agency is not equipped with a Live Scan system capable of initiating the automated pretrial risk-assessment process approved by the AOC, the agency shall develop and implement a plan to ensure compliance with the requirements of subsections 2.2.1, 2.2.2, and 2.2.3 of this Directive. The plan shall identify the other agency or agencies whose Live Scan system(s) will be used to comply with subsections 2.2.1, 2.2.2, and 2.2.3. A copy of the plan, along with any memorandum of understanding between cooperating agencies, shall be submitted for approval to the appropriate County Prosecutor, or the Director of the Division of Criminal Justice in the case of a plan submitted by a state agency. The plan shall remain in effect unless and until the agency is equipped with its own Live Scan system capable of initiating the automated pretrial risk-assessment process.

This subsection shall become operational immediately upon issuance of this Directive.

### 3. **PRE-CHARGING CASE SCREENING**

#### 3.1 Establishment of 24/7 On-Call Prosecutorial Screening/Approval System.

Each County Prosecutor and the Division of Criminal Justice shall establish a system of on-call assistant prosecutors and deputy attorneys general to be available on a 24/7 basis to provide real-time legal advice and charging approvals to law enforcement officers pursuant to this Directive.<sup>6</sup> All assistant prosecutors and deputy attorneys general assigned to on-call duty pursuant to this Directive shall have sufficient experience to perform the functions required for on-call duty, and shall receive training in accordance with Section 14 of this Directive. Advice and charging approvals may be provided by on-call assistant prosecutors and deputy attorneys general in person or by means of telephonic or other electronic communication. The County Prosecutor shall make contact information and procedures available to all agencies operating within the prosecutor's jurisdiction. The Director may specify the circumstances when a law enforcement agency or officer should directly contact the Division of Criminal Justice rather than a County Prosecutor's Office.

This Section shall become operational no later than January 1, 2017.

#### 3.2 Requirement to Obtain Charging Approval from On-Call Prosecutor upon Arrest for Certain Offenses.

Except as otherwise provided pursuant to Section 3.3, when a law enforcement officer

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As used in Sections 3 and 4 of this Directive, the term "assistant prosecutor" may include a prosecutor's agent or other employee of the County Prosecutor's office who has been specifically designated in writing by the County Prosecutor to perform on-call legal advice, review, and approval functions pursuant to Sections 3 and 4 of this Directive. As used throughout this Directive, the term "deputy attorneys general" includes assistant attorneys general in the Division of Criminal Justice.

operating under the authority of the laws of the State of New Jersey makes an arrest for any indictable crime, or for a disorderly persons offense involving domestic violence where any of the grounds specified in N.J.S.A. 2C:25-21(a)(1) to (4) apply, see note 5, the officer shall contact the appropriate County Prosecutor's Office, or the Division of Criminal Justice where appropriate, as soon as it is safe and feasible to do so. The consultation with the prosecutor may be made in person or by means of telephonic or other electronic communication. Except as may otherwise be authorized pursuant to Section 3.3, no complaint-summons for any indictable crime, or for a disorderly persons offense involving domestic violence where any of the grounds specified in N.J.S.A. 2C:25-21(a)(1) to (4) apply, shall be issued, and no application for a complaint-warrant for any such crime or offense shall be submitted to a judicial officer authorized to approve a complaint-warrant, without the express approval of an assistant prosecutor or deputy attorney general designated pursuant to Section 3.1. The general requirement established in this section to consult with an assistant prosecutor or deputy attorney general does not apply if the most serious offense for which a defendant is arrested is a disorderly persons offense other than one involving domestic violence where any of the grounds specified in N.J.S.A. 2C:25-21(a)(1) to (4) apply. Cf. Section 3.5 (authority of County Prosecutor to require prosecutor review/approval in cases where approval is not required by this Directive).

As noted in subsections 2.2.2 and 4.2.1, the decision to issue a complaint-summons or apply for a complaint-warrant should be informed by the results of the automated pretrial risk-assessment process, which is initiated after the defendant's fingerprints are taken at a police station with the Live Scan system. This means that the complaint-summons versus complaint-warrant decision ordinarily will be made after the defendant has been arrested within the meaning of the Fourth Amendment (i.e., taken into custody, handcuffed, and transported to a police station). When practicable, it would be beneficial for an officer to contact the prosecutor for legal advice and charging approval *before* the defendant is taken into custody and transported to the station. Although such on-scene, pre-arrest consultation is not required by this Directive, nothing herein limits the authority of a County Prosecutor to require officers to consult with a prosecutor before making a custodial arrest. Consultation at that stage in the investigative process would help to ensure that all appropriate on-scene investigative steps have been taken and that probable cause exists, and also would afford the prosecutor an opportunity to approve the specific charges that will be considered as part of the automated pretrial risk-assessment process initiated after the defendant is fingerprinted with the Live Scan system. Cf. subsection 4.2.7 (addressing the situation when a prosecutor approves charging a different offense than the one that had been used in the automated pretrial risk-assessment process). In any case where an assistant prosecutor or assistant or deputy attorney general is consulted before the automated PSA is generated, that prosecutor should be apprised of the PSA results before a final determination is made whether to issue a summons or apply for a complaint-warrant.

### 3.3 County Prosecutor's Authority to Permit Police to Issue a Complaint-Summons and/or to Apply for a Complaint-Warrant without First Obtaining Prosecutorial Approval.

#### 3.3.1 *Charging Directive Issued by County Prosecutor.*

Depending on personnel, caseload, and other factors, it may not be feasible for a County



Prosecutor's Office to review and approve initial charging decisions in all indictable-crime and mandatory-arrest domestic violence disorderly persons cases with existing resources. It is important, therefore, to afford flexibility to County Prosecutors so that they can make the best use of their resources and plan for and justify staffing and overtime allowance adjustments. It also may be appropriate to gain practical experience in implementing the Bail Reform Law before adopting permanent charge-approval policies.

Accordingly, notwithstanding any contrary provision of Section 3.2, a County Prosecutor may issue a directive that authorizes any or all police agencies operating within the Prosecutor's jurisdiction to issue a complaint-summons without first contacting an assistant prosecutor as otherwise required by Section 3.2 provided that issuance of a complaint-summons has been approved by a supervisory officer designated pursuant to subsection 3.3.2. Any such directive also may authorize any or all police agencies operating within the Prosecutor's jurisdiction to apply for a complaint-warrant without first contacting an assistant prosecutor as otherwise required by Section 3.2 provided that application for a complaint-warrant has been approved by a supervisory officer designated pursuant to subsection 3.3.2.

The County Prosecutor may impose such conditions or limits on the charging and approval authority granted under any directive issued pursuant to this subsection as the Prosecutor deems appropriate (e.g., authority granted to issue complaint-summons but not apply for complaint-warrant without prosecutorial approval; authority granted to charge without prosecutorial approval only in specified types of cases, such as, for example, offenses that are not subject to the No Early Release Act or the Graves Act, or offenses that do not involve domestic violence; etc.).

Any such directive shall specify whether and in what circumstances, if any, authority is granted to a specially designated supervisory officer to approve issuance of a complaint-summons when application for a complaint-warrant is presumed under Section 4 of this Directive, and whether and in what circumstances, if any, authority is granted to a specially designated supervisory officer to approve application for a complaint-warrant when issuance of a complaint-summons is presumed under Section 4 of this Directive. See subsection 3.3.2. The authority to overcome a presumption shall be granted to specially-designated supervisory officers only if the County Prosecutor determines, based on available resources, that such delegation of prosecutorial authority is necessary to prevent the Prosecutor's Office from being overburdened by charging consultations, and the Prosecutor shall remain responsible for ensuring that such delegated authority is exercised properly by specially-designated supervisory officers.

Although County Prosecutors are authorized by this Section to determine when and in what circumstances police must consult with an assistant prosecutor before the charging decision is made, County Prosecutors are strongly encouraged to require such pre-charging consultation to the greatest extent practicable consistent with existing resources. Prosecutorial consultation is especially important before the decision is made to apply for a complaint-warrant, not only to ensure that such applications are appropriate and in accordance with Court Rules, but also to provide prosecutors as much time as possible to decide whether to seek pretrial detention and to prepare for detention



hearings.

Accordingly, notwithstanding any other provision in Section 3.3, a designated supervisory officer at the time of the charging decision shall notify the prosecutor's office, either by calling the on-call duty assistant prosecutor telephonically or by email or other electronic means that shall be specified in the County Prosecutor's directive, if the supervisory officer has reason to believe that a motion for pretrial detention or revocation of release should be filed by the prosecutor (e.g., where this Directive establishes a presumption of seeking pretrial detention or revocation of release). Such immediate telephonic or electronic notification that a presumption of pretrial detention applies will provide the prosecutor's office additional time within which to make the determination to seek pretrial detention or revocation of release, and to prepare for the detention/revocation hearing that would be heard within a few days of the arrest. Although all designated supervisory officers shall be trained to recognize when this Directive establishes a presumption of seeking pretrial detention or revocation of release to ensure immediate notification to the on-call duty assistant prosecutor, nothing herein shall be construed to delegate a prosecutor's authority under this Directive to decide whether to seek pretrial detention or revocation of release.

If the County Prosecutor issues a directive pursuant to this subsection, a copy shall be provided to the Director of the Division of Criminal Justice. Furthermore, County Prosecutors who delegate charging approval authority pursuant to this subsection are responsible for ensuring that all police departments and officers within their jurisdiction are properly trained on and comply with the directive issued by the County Prosecutor and this Directive. See subsections 3.3.4 and 4.13.

This subsection shall become operational on October 31, 2016.

*3.3.2 Designation of Supervisory Officers Authorized to Approve Charging Decisions and to Overcome a Presumption.*

If a County Prosecutor issues or revises a directive pursuant to subsection 3.3.1, the directive may provide for the designation of one or more officers from a police department who shall be authorized to review and approve charging decisions that otherwise must be reviewed and approved by an assistant prosecutor pursuant to Section 3.2. Subject to the limitations set forth in subsection 3.3.1, the directive may provide for the special designation of supervisory officers who are authorized by the County Prosecutor to approve issuance of a complaint-summons notwithstanding that this Directive establishes a presumption that a complaint-warrant will be sought, and/or who are authorized by the County Prosecutor to approve an application for a complaint-warrant notwithstanding that this Directive establishes a presumption that a complaint-summons will be issued, provided that the County Prosecutor determines that such delegation of prosecutorial authority is necessary to prevent the prosecutor's office from being overburdened by charging consultations. In other words, a County Prosecutor may authorize specially selected designated supervisory officers to overcome presumptions under Section 4 of this Directive, provided, however, that if the County Prosecutor's directive authorizes anyone other than an assistant prosecutor to overcome a presumption, the directive shall require that the prosecutor's office be notified at the time of the

charging decision that the decision had been made by a specially-designated supervisory officer to overcome a presumption. Such notification may be made by communicating telephonically with the on-call duty assistant prosecutor, or by sending an email to the on-call duty assistant prosecutor or other designated person or email address in the prosecutor's office, as shall be specified in the County Prosecutor's directive.

Except with respect to the New Jersey State Police, the County Prosecutor, with the approval of the chief of the police department, shall specify in writing those officer(s) in the department who are designated as supervisory officers for the purposes of this Directive and who (1) are authorized to review and approve charging decisions, and (2) are authorized to overcome a presumption, after determining that such officers are qualified to perform those decision-making functions considering their duty assignment, experience, demonstrated judgment, and training. In addition or in the alternative, the County Prosecutor may specify a duty position within the department (e.g., head of the patrol or detective division, officer on duty in charge of booking procedures, highest-ranking officer on duty or in the police station, etc.), in which event the officer in that duty position may be authorized to review and approve charging decisions.

With respect to the New Jersey State Police, if the County Prosecutor issues a directive pursuant to subsection 3.3.1, the Superintendent shall specify in writing those members of the State Police who are designated as supervisory officers for purposes of this Directive and who (1) are authorized to review and approve charging decisions, and (2) are authorized to overcome a presumption, after determining that such State Police members are qualified to perform those decision-making functions considering their duty assignment, experience, demonstrated judgment, and training. In addition or in the alternative, the Superintendent may specify a duty position within a station (e.g., officer in charge of the station, station detective, etc.), in which event the member in that duty position may be authorized to review and approve charging decisions. Nothing in this paragraph limits a County Prosecutor's authority to impose conditions or limitations on the approval authority of a State Police member and/or duty assignment designated by the Superintendent.

A supervisory officer designated pursuant to this subsection shall have authority to review/approve charging decisions only in cases where the arrest was made by an officer from the supervisory officer's department. A designated supervisory officer shall not be authorized to review or approve a charging decision for an arrest made by any other agency.

The County Prosecutor may impose such conditions or limits on the approval authority granted to any or all designated supervisory officers as the Prosecutor deems appropriate (e.g., limit a supervisory officer's authority to approving a complaint-summons; limit authority to approve complaint-warrants only for offenses that are not subject to the No Early Release Act or the Graves Act, which crimes are more likely to warrant a motion for pretrial detention or revocation of release, or offenses that do not involve domestic violence).

This subsection shall become operational on October 31, 2016.

3.3.3 *Required Notice to Prosecutor If Application for Complaint-Warrant Is Denied.*

If the County Prosecutor issues a directive pursuant to subsection 3.3.1, the directive must provide that if a law enforcement officer applies for a complaint-warrant without first obtaining approval from an assistant prosecutor and the court or other judicial officer denies the application, the officer must notify the County Prosecutor's Office as soon as practicable. See also Section 4.11 (report to Division of Criminal Justice when application for a complaint-warrant is denied).

This subsection shall become operational on October 31, 2016.

3.3.4 *Oversight and Strict Compliance with County Prosecutor's Charging Directive.*

If the County Prosecutor issues a directive pursuant to subsection 3.3.1, the prosecutor shall take reasonable steps to ensure that all officers are trained on and comply with the provisions of the County Prosecutor's directive and this Directive. If the directive designates one or more supervisory officers from a police department who are authorized to overcome a presumption under Section 4 of this Directive, the prosecutor shall be responsible for ensuring that such designated officers are properly trained to perform this supervisory function, and for ensuring that such designated officers comply with the directive issued by the County Prosecutor and this Directive. See also Section 4.13.

This subsection shall become operational on October 31, 2016.

3.3.5 *Expiration, Evaluation, and Indefinite Extension of County Prosecutor Charging Directive.*

To promote fiscal planning and to ensure that law enforcement charging decisions are made in accordance with this Directive, any directive issued by a County Prosecutor pursuant to subsection 3.3.1 shall expire after six months, or at the start of the Prosecutor's next fiscal year following January 1, 2017, whichever is later. The County Prosecutor may order that the directive remain in force and effect indefinitely provided that at the conclusion of the initial operational period (i.e., six months, or the start of the next fiscal year), the Prosecutor evaluates the implementation of and compliance with the directive, and submits a report thereon to the Director of the Division of Criminal Justice. Nothing herein shall be construed to limit a County Prosecutor's authority to terminate or revise a directive issued pursuant to subsection 3.3.1 at any time.

This subsection shall become operational on October 31, 2016.

3.4 County Prosecutor's Authority to Require Direct Prosecutorial Participation in Complaint-Warrant Application.

To ensure that the State's interests are properly advocated during an application for a complaint-warrant, a County Prosecutor shall have the authority to require that an assistant prosecutor consulted pursuant to Section 3.2 participate directly in the colloquy with the judge or other court



official to whom an application for a complaint-warrant is submitted.

This Section shall become operational on October 31, 2016.

3.5 County Prosecutor's Authority to Require Consultation/Charging Approval for Additional Offenses.

Nothing in this Directive shall be construed to limit the authority of a County Prosecutor to require that agencies and officers operating within the Prosecutor's jurisdiction contact and/or obtain charging approval from designated assistant prosecutors for offenses where such approval is not required by this Directive (e.g., disorderly persons offenses other than those involving domestic violence where any of the grounds specified in N.J.S.A. 2C:25-21(a)(1) to (4) apply).

This Section shall become operational on October 31, 2016.

3.6 Coordination of Charging Decisions When Offenses Are Committed in Multiple Counties.

There may be cases where a defendant is arrested and may be charged with two or more offenses committed in multiple counties (e.g., a series of burglaries committed in different jurisdictions, eluding that crosses a county border, drug distribution activities occurring in multiple counties, etc.). In those instances, it is important to coordinate the charging/pretrial release decision so that one prosecutor's office assumes primary responsibility for determining whether to apply for a complaint-warrant, to request special release conditions, or to seek pretrial detention or revocation of release. Accordingly, notwithstanding Section 3.3 or any other provision of this Directive, if a law enforcement officer or agency making an arrest has reason to believe that the defendant may be charged with offenses committed in more than one county, the officer or agency shall immediately contact the on-call duty assistant prosecutor, who shall contact the prosecutor's office(s) in the other county(ies) where offenses were committed to coordinate the charging/pretrial release decision. Representatives from the affected prosecutors' offices shall consult as expeditiously as possible to identify the office that will serve as the lead prosecuting agency for purposes of initial charging/pretrial release prosecutorial decisions concerning the defendant, considering all relevant circumstances, including especially the seriousness of the offenses committed in the various jurisdictions. The Division of Criminal Justice shall be notified if it is necessary for the Division to cross-designate assistant prosecutors as special deputy attorneys general to handle matters or make court appearances in another jurisdiction. The purpose of this Section is to coordinate initial charging/pretrial release decisions, and nothing herein shall be construed as depriving a County Prosecutor of the authority to prosecute an offense committed within the prosecutor's jurisdictional authority.

This Section shall become operational on October 31, 2016.



#### 4. DETERMINING WHETHER TO CHARGE BY COMPLAINT-SUMMONS OR COMPLAINT-WARRANT

##### 4.1 General Policy Considerations.

The decision whether to charge by complaint-summons (commonly referred to as a CDR-1) or complaint-warrant (commonly referred to as a CDR-2) takes on enhanced significance under the Bail Reform Law. The issuance of a complaint-warrant is the triggering event for many of the provisions of the new law defining the universe of so-called “eligible defendants” under the statute. See N.J.S.A. 2A:162-15 (defining the term “eligible defendant” as used throughout the Bail Reform Law as a person “for whom a complaint-warrant is issued”). One of the significant practical consequences of the initial charging decision is that when a complaint-warrant is issued by a judge or other authorized judicial officer, the defendant must be taken to a county jail, where he or she will be held for up to 48 hours.<sup>7</sup> See N.J.S.A. 2A:162-16(a). During that period of statutorily-mandated confinement, the new pretrial services program will have an opportunity to prepare a recommendation to the court as to appropriate conditions of pretrial release and the level of monitoring the court should impose at the time of defendant’s first appearance.

The decision whether to charge by complaint-warrant rather than complaint-summons has other legally-significant consequences besides the initial incarceration of the defendant pending completion of the recommendation process conducted by the pretrial services program. A prosecutor cannot file a motion to have the defendant preventively detained pending trial unless the defendant has been charged by complaint-warrant. So too, if the defendant is charged by complaint-summons rather than complaint-warrant and thereafter commits a new crime while on pretrial release, the prosecutor cannot move pursuant to N.J.S.A. 2A:162-24 to revoke release and hold defendant preventively on that initial charge. Cf. note 30.

The Bail Reform Law provides that a defendant should be released on the least restrictive conditions necessary to assure his or her appearance at court proceedings and to prevent defendant from committing new crimes. See N.J.S.A. 2A:162-17. Consistent with that legislative policy, under this Directive a defendant need be charged by complaint-warrant only when some release condition or conditions are appropriate to manage the risk of flight, the risk to the safety of the community, witnesses, and victims, and/or the risk that defendant will obstruct the criminal justice process. Thus, for example, in any case where the State would not object to the defendant being released “on personal recognizance,” see N.J.S.A. 2A:162-17(a), it might be just as appropriate to charge by means

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N.J.S.A. 2A:162-17 provides that a court must make the pretrial release decision “without unnecessary delay, but in no case later than 48 hours after the eligible defendant’s commitment to jail.” Prosecutors when preparing for a first appearance in complaint-warrant cases should be advised that the Administrative Director of the Courts has indicated to stakeholders that the Judiciary’s goal is to have the pretrial services program prepare its recommendations as to appropriate release conditions within 24 hours of a defendant being taken to county jail after a complaint-warrant is issued. Accordingly, the court may schedule a first appearance well before the expiration of the 48-hour statutory deadline.

of a complaint-summons, obviating the need for police to transport the defendant to a county jail and detain him or her there for up to 48 hours. In other words, charging by complaint-summons rather than by complaint-warrant generally would be appropriate when the facts known at the time of the charging decision reliably indicate that the defendant requires no monitoring or only minimal monitoring upon release. A complaint-warrant, in contrast, generally should be sought when the defendant poses a moderate or high risk of flight, new criminal activity or violence, or threat to the criminal justice process that should be managed by monitored release conditions, if not by the defendant's pretrial detention.

Furthermore, a complaint-warrant should be sought in domestic violence cases where imposition of a no-contact or other restraint is reasonably necessary to assure the immediate protection of the victim. See subsection 4.6.3. Note, moreover, that issuance of a complaint-warrant would preserve the option of applying for pretrial detention, or revocation of release if defendant were to violate a release condition, and/or to seek electronic monitoring (an ankle bracelet) by the pretrial services program as a release condition. See Section 4.6.

Also note that the decision to issue a complaint-summons in a domestic violence case pursuant to this Directive does not impact the mandatory arrest policy set forth in the Prevention of Domestic Violence Act at N.J.S.A. 2C:25-21(a). The determination whether to apply for a complaint-warrant under this Directive generally occurs after the defendant has been arrested, transported to the police station for processing, and fingerprinted using the Live Scan system. Cf. Sections 4.9 and 4.10 (dealing with "direct" indictments and complaints issued before a custodial arrest is made). Nothing in this Directive, therefore, shall be construed to authorize, much less require, police to issue a complaint-summons in domestic violence cases in lieu of arresting and fingerprinting the defendant at a police station equipped with an up-to-date Live Scan system.

#### 4.2 Charging Decisions Informed by Automated Pretrial Risk Assessment and Other Information Sources.

##### 4.2.1 *Risk-Assessment Score Values and Flags.*

Except in cases involving specified serious charges that must be charged by complaint-warrant as required by Rule 3:3-1(e), as recently amended, or in cases involving non-indictable offenses for which fingerprinting is not required by statute, see subsection 2.2.2, the decision whether to issue a complaint-summons or to apply to a court for a complaint-warrant under this Directive will be informed by the results generated by the automated pretrial risk-assessment process approved by the Administrative Director of the Courts pursuant to N.J.S.A. 2A:162-25(c).<sup>8</sup> See, e.g., subsection 4.5.1.

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8

Although this Directive generally relies on the results of the preliminary automated pretrial risk assessment, some provisions rely on other factual grounds to guide the exercise of charging discretion. See, e.g., subsection 4.5.2 (establishing a presumption to apply for complaint-warrant based on a violation of a domestic violence restraining order or a Sexual Assault Survivor Protection Act order) and subsection 4.5.5 (establishing a presumption to apply for complaint-warrant when the present offense was committed while on release for another offense). In many instances,

The automated pretrial risk-assessment process is initiated by police after the defendant's fingerprints have been taken by Live Scan at a police station. A preliminary public safety assessment is made available to police and prosecutors before the complaint-summons versus complaint-warrant decision is made. If a complaint-warrant is approved by a judge or other judicial officer, the risk-assessment process will be completed by the pretrial services program while the defendant is detained for up to 48 hours at the county jail. Throughout Section 4 of this Directive, the term "automated pretrial risk assessment" generally refers to the *preliminary* pretrial risk-assessment process done by a computer program administered by the AOC and initiated by police before a defendant is transported to a county jail, where the assessment results will be reviewed and may be modified based on additional information input by the pretrial services program. See note 3. Throughout this Section, in other words, the term "automated pretrial risk assessment" generally refers to the automated assessment results that are provided to police and prosecutors before the case is reviewed by the pretrial services program. Cf. note 3 (noting that if the pretrial risk assessment reviewed and approved by the pretrial services program is different from the computer-generated preliminary pretrial risk assessment initiated by police/prosecutors at the time of initial charging, the updated pretrial risk assessment, when available, should be used to inform the decision to seek pretrial detention or revocation of release pursuant to Section 7 and 8 of this Directive).

The automated pretrial risk-assessment process accounts for the general nature of the present offense (e.g., whether it involves violence) and certain electronically-stored criminal case and court history data that documents the defendant's previous involvement, if any, in the adult criminal justice system. This automated process produces a Public Safety Assessment (PSA) that provides three pretrial risk indicators: a six-point "failure-to-appear" (FTA) scale, a six-point "new criminal activity" (NCA) scale, and a "new violent criminal activity" (NVCA) "flag."<sup>9</sup> The AOC's pretrial

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a case will invoke a presumption to charge by complaint-warrant under more than one subsection. In other words, a case may fall under a provision that is based on a risk-assessment score or new violent criminal activity flag and also fall under a provision that is based on a criterion independent of the risk-assessment results. That is to be expected given that the independent criteria to be used by prosecutors under this Directive (e.g., present offense committed while on release for another offense) often will overlap with the risk indicators used in the automated pretrial risk-assessment process (e.g., defendant has a pending charge). See also note 9 and accompanying text.

9

As part of the AOC's "Decision-Making Framework," the two six-point scales are used to generate a grid known as the "Pretrial Decision Making Matrix," where the FTA value is shown on the vertical axis of the matrix and the NCA value is presented on the horizontal axis. The intersection of the two scores creates a cell that indicates the level and type of release conditions and intervention/monitoring services that the pretrial services program will recommend to the court.

Although the matrix approach is helpful to the pretrial services program in determining the type and level of release conditions and monitoring services it will recommend to the court to manage the risks identified through the PSA, for purposes of the law enforcement decision whether to issue a complaint-summons or instead apply for a complaint-warrant, it is not necessary to juxtapose the FTA and NCA point values in a matrix grid. Rather, under this Directive, either a high FTA value or a high NCA value may be sufficient to trigger a presumption that police will apply for a complaint-warrant, which then would provide the pretrial services program an opportunity to recommend appropriate conditions of release. In other words, if the FTA score is low but the NCA score is high, a complaint-warrant should be sought. See, e.g., subsection 4.5.1. See also subsections 7.4.2 and 7.4.3 (presumptions guiding a prosecutor's



services program will monitor released defendants to address the risks identified through the PSA. Thus, while the PSA *measures* risks, the AOC's "Decision Making Framework" is designed to *manage* the identified risks by recommending the appropriate level of release conditions and monitoring.

#### 4.2.2 *Law Enforcement Obligation to Consider Known Relevant Information Not Accounted for in the Automated Pretrial Risk Assessment.*

The automated pretrial risk-assessment process may not account for all relevant circumstances. For example, it does not account for the fact-sensitive manner in which the present offense was committed that might suggest that the defendant is especially dangerous (e.g., the defendant inflicted more serious harm than that required to establish the elements of the charged crime; a firearms offense was not limited to "simple possession," but rather involved possession for an unlawful purpose, or involved brandishing or pointing the firearm, thereby creating a heightened risk of violence; the offense was committed against a particularly vulnerable victim; the offense was committed in the presence of children or otherwise posed a heightened risk to children, etc.). Nor does the automated pretrial risk-assessment process account for the strength of the case, which might suggest that the defendant would have greater incentive to avoid a likely conviction by fleeing (e.g., where the offense conduct is captured on an audio/video recording; the defendant confessed to the crime; the offense conduct was personally observed by a police officer; contraband was found on the person of the defendant, etc.).<sup>10</sup>

Furthermore, for purposes of informing the law enforcement decision whether to issue a complaint-summons or apply for a complaint-warrant, the automated pretrial risk-assessment software does not account for a pending charge or conviction from another state, although the computer system administered by the AOC will indicate to law enforcement that out-of-state criminal history information exists with respect to the defendant. See subsection 4.5.8 (explaining how out-of-state charges/convictions should be considered).

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discretion to seek pretrial detention that are triggered by either a high FTA score or a high NCA score). It also bears noting that under this Directive, a NVCA flag automatically triggers a presumption that law enforcement will apply for a complaint-warrant, see subsection 4.5.1, and also triggers a presumption that the prosecutor will seek pretrial detention. See subsection 7.4.5.

10

Certain supplemental facts might be relevant to flight risk, but may be less probative of the likelihood that the defendant would commit a new crime while on release, other than "bail jumping" under N.J.S.A. 2C:29-7. For example, the weight of the evidence indicating the probability of a guilty verdict at trial would be relevant to establish the defendant's incentive to flee to avoid an expected guilty verdict. The strength of the State's case generally would be less relevant, if relevant at all, to whether defendant poses a danger to the community, especially considering that all that is needed to detain a defendant preventively is probable cause to believe that he or she committed the present offense. See N.J.S.A. 2A:162-19(e)(2). In contrast, evidence of a defendant's involvement in a criminal street gang or other form of organized crime might be relevant both to the risk that defendant might fail to appear (the criminal organization could facilitate flight) and the risk that defendant might commit new criminal activity (the organization might expect or even require the defendant to engage in ongoing criminal activity or violence). See Section 7.5 (requiring a prosecutor seeking preventive detention to specify the type of risk justifying detention).

Furthermore, as addressed specifically in subsection 4.5.7, the automated pretrial risk-assessment process does not account for a defendant's juvenile justice history, even if the defendant recently was adjudicated delinquent for a serious violent crime. The automated pretrial risk-assessment process also does not account for expunged records, even though N.J.S.A. 2C:52-21 was recently amended to explicitly authorize expunged records to be used in conjunction with pretrial release determinations under the Bail Reform Law. Nor does the automated pretrial risk-assessment process account for any specific threat of future harm that a defendant may have made to a victim or witness. The automated pretrial risk-assessment process also does not account for a defendant's involvement with a violent street gang or other form of organized crime,<sup>11</sup> or a defendant's drug dependence or mental illness.

Finally, there may be instances when relevant criminal history information is not accounted for because of missing data in the databases that the automated pretrial risk-assessment software queries. For the foregoing reasons, the interests of public safety and protection of victims' rights require police and/or prosecutors to fill in the informational gaps whenever possible, providing information to the court not accounted for by the automated pretrial risk assessment where that additional information suggests that the defendant poses a greater risk of flight and/or new criminal activity or violence than is indicated by the FTA or NCA score or the lack of a violence flag (i.e., the NVCA indicator). (Note that the PSA is not designed to measure the risk that the defendant will obstruct the criminal justice process, although police and prosecutors must consider that risk in determining whether to issue a complaint-summons or apply for a complaint-warrant, and whether to seek special release conditions to manage that risk.) Moreover, the immediate effect of a complaint-warrant is that the pretrial services program will have an opportunity to recommend conditions needed to manage the risks that would be posed by defendant's release. Issuance of a complaint-summons, in contrast, has the practical effect of precluding imposition of monitored release conditions to manage identified risks.

Accordingly, when making the decision whether to issue a complaint-summons or apply for a complaint-warrant, it is important to consider any relevant facts or circumstances known or reasonably believed to exist that are not accounted for by the automated pretrial risk-assessment process. In the event that an application is made for a complaint-warrant, the court or other judicial

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11

Attorney General Law Enforcement Directive No. 2016-1 (deconfliction) does not require a law enforcement agency to initiate an automated deconfliction query when the agency applies for a complaint-warrant following an unplanned arrest. See Deconfliction Directive Section 1(c) (exempting routine booking procedures after an unplanned arrest, including an application for a CDR-2, from the definition of a "planned operation"). However, that Directive does not preclude an agency from conducting a deconfliction query to provide additional information that might inform the complaint-summons versus complaint-warrant decision. See also Section 9 of the Deconfliction Directive (authorizing County Prosecutors to issue supplemental directives and guidelines for conducting automated deconfliction queries). Any such deconfliction query following an unplanned arrest but before the decision is made whether to issue a complaint-summons or apply for a complaint-warrant may lead to information known by another agency that is relevant to the dangers that defendant's release might pose (e.g., involvement in a gang or other organized criminal activities). Accordingly, agencies are encouraged – and may be required by a County Prosecutor's directive – to conduct a deconfliction query when practicable before issuing a complaint-summons.



officer to whom the application is made shall be alerted to such additional relevant facts or circumstances.

#### *4.2.3 Requirement to Check Domestic Violence Central Registry in Domestic Violence Cases.*

In cases involving domestic violence, the police officer making the arrest shall, in accordance with the procedures set forth in the Domestic Violence Procedures Manual, check the Domestic Violence Central Registry<sup>12</sup> to determine whether the defendant is subject to a domestic violence restraining order. This mandatory query of the Central Registry shall be made before deciding whether to issue a complaint-summons or a complaint-warrant. Nothing herein shall be construed to preclude or discourage a police officer from checking the Domestic Violence Central Registry in all cases, and not just cases involving domestic violence, and a County Prosecutor may direct officers to check that central registry in all cases, or in such types of cases as the prosecutor may specify.

#### *4.2.4. Requirement to Check Sexual Assault Survivor Protection Act Central Registry.*

In cases involving a sexual offense under Chapter 14 of Title 2C, the police officer making the arrest shall check the central registry established under N.J.S.A. 2C:14-20 to determine whether the defendant is subject to a protective order issued pursuant to the Sexual Assault Survivor Protection Act, N.J.S.A. 2C:14-13 to -21 (P.L. 2015, c. 147 (effective May 7, 2016)). This mandatory query shall be made before deciding whether to issue a complaint-summons or to apply for a complaint-warrant. Nothing herein shall be construed to preclude or discourage a police officer from checking the central registry established under N.J.S.A. 2C:14-20 in all cases, and not just cases involving sexual offenses, and a County Prosecutor may direct officers to check that central registry in all cases, or in such types of cases as the prosecutor may specify.

#### *4.2.5 Requirement to Check Young Adult Defendants' Juvenile History.*

The automated pretrial risk-assessment process does not account for a defendant's involvement in the juvenile justice system. For this reason, the PSA results may not accurately reflect the risk that a young adult defendant may commit serious new crimes if released. To address this circumstance, the Judiciary has agreed that as part of the automated pretrial risk-assessment process, law enforcement will have access to defendants' prior juvenile records stored in the Juvenile Central

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12

The Domestic Violence Central Registry is a computerized inquiry system that allows law enforcement to access information about pending domestic violence cases without having to request this information from the Family Court DV units that operate only during the court's regular business hours. The Central Registry permits direct access at any time, and displays information about cases in which a restraining order previously was requested/issued and cases in which a previous violation of a restraining order has been alleged. The utility of this electronic inquiry system depends on the extent to which the database is complete. Accordingly all law enforcement agencies are strongly encouraged to utilize the Judiciary's eTRO system when seeking a domestic violence restraining order, and the Domestic Violence Procedures Manual will be reviewed and may be amended to require the use of the eTRO system.



Registry. Accordingly, in cases where the defendant is less than 28 years old at the time of arrest, before the decision is made whether to issue a complaint-summons or apply for a complaint-warrant, the Juvenile Central Registry shall be checked to determine whether the defendant has a juvenile record that might have a material bearing on the charging/pretrial release decision. See subsection 4.5.7 (presumption of applying for a complaint-warrant when a defendant has recent delinquency adjudications for violent or firearms-related crimes) and subsection 7.4.3 (presumption of seeking pretrial detention when defendant is charged with a serious crime, the PSA produces a moderate risk score, and defendant has a recent delinquency adjudication involving violence).

*4.2.6 Authority to Seek Superseding Complaint-Warrant When New Information Supports Upgrading Charges or Has a Material Bearing on Pretrial Release Risks.*

The general policy established in this Directive encourages police and prosecutors to charge by way of complaint-summons rather than complaint-warrant whenever that can be done without jeopardizing public safety. Prosecutors nonetheless may be reluctant in close cases to foreclose the possibility that the defendant would be subject to release conditions and monitoring by the pretrial services program given the limited information that may be available at the time of arrest. Accordingly, nothing in this Directive shall be construed to preclude a prosecutor from applying for a complaint-warrant in accordance with the provisions of Section 4 for an offense previously charged by complaint-summons when further investigation reveals information that supports new or upgraded charges (e.g., where the extent of injury is greater than originally suspected as to warrant prosecution for aggravated assault rather than simple assault; new information about the type or quantity of the seized controlled dangerous substance warrants prosecution for a higher-degree crime, or it is subsequently determined that the offense occurred in a public park zone; a firearms offense involves more than “simple possession,” such as possession for an unlawful purpose in violation of N.J.S.A. 2C:39-4, or pointing a firearm at another in violation of N.J.S.A. 2C:12-1(b)(4) (i.e., a crime against a specific person – not a mere possessory crime); subsequent investigation reveals that the amount of a theft warrants prosecution for a higher-degree crime than originally charged, or reveals that a seized firearm is stolen, defaced, or is an assault weapon, etc.).

Nor shall anything in this Directive be construed to preclude a prosecutor from applying for a complaint-warrant for an offense previously charged by complaint-summons when information not known to the officer or assistant prosecutor or deputy attorney general at the time of the initial charging decision indicates that pretrial release conditions are reasonably necessary to protect the safety of a victim or the community, to reasonably assure the defendant’s appearance in court when required, or to prevent the defendant from obstructing or attempting to obstruct the criminal justice process. Such new information might include, but need not be limited to, defendant’s conduct while on release on a complaint-summons.

If necessary and appropriate to achieve the purposes of this subsection, a prosecutor shall seek to dismiss one or more counts charged by complaint-summons and apply for a superseding complaint-warrant.

#### 4.2.7 *Procedures When Charges Actually Filed Are Different from Charges Initially Entered into Live Scan.*

As noted in Section 2.2, the automated pretrial risk-assessment process cannot be initiated until the defendant has been fingerprinted by the Live Scan system. That system requires the arresting officer to indicate the present offense(s), and that designation of offense(s) is then used in the automated pretrial risk-assessment process to determine, for example, whether a new violent criminal activity flag should be raised. There may be cases where the complaint-summons or complaint-warrant that is actually filed charges one or more offenses that are different from the offense(s) that had been entered initially as part of the Live Scan fingerprinting process. For example, a prosecutor or designated supervisory officer approving the charges pursuant to Section 3.2 may decide to downgrade the offense for which defendant was arrested (e.g., downgrade possession with intent to distribute a controlled substance to simple possession; downgrade an aggravated assault to simple assault; downgrade second-degree burglary to third-degree burglary, etc.), or may decide not to charge all, or any, of the offenses proposed by the arresting officer (e.g., where the prosecutor or supervisory officer approves a charge for the underlying crime for which the defendant was arrested but does not approve filing a complaint charging obstruction of administration of law or resisting arrest). Conversely, the prosecutor or supervisory officer may decide to upgrade the offense of arrest or add additional charges (e.g., supplement a third-degree drug distribution offense with a second-degree public park zone drug distribution offense; charge second-degree burglary instead of third-degree burglary; charge robbery in addition to theft or burglary, etc.).

In that event, when feasible, a new automated pretrial risk assessment should be run based on the actual offense(s) to be charged by a complaint-summons or complaint-warrant. If for any reason it is not feasible to initiate a new automated pretrial risk assessment and the decision is made to apply for a complaint-warrant, the court or judicial officer to whom the application for a complaint-warrant is made shall be advised that the initial automated PSA was based on different offense(s) than the offense(s) for which a complaint-warrant is being sought.

Furthermore, if either a complaint-summons or complaint-warrant is issued for a different offense(s), or different degree of offense(s), than the offense(s) that had been entered into the Live Scan system at the time of fingerprinting, or if the decision is made not to charge any offense falling within the scope of this Directive, the agency making the arrest shall as soon as practicable contact the Data Reduction Unit of the New Jersey State Police to make certain that the CCH system accurately reflects charges that were actually filed.

#### 4.3 Cases Where There Is a Presumption of Issuing a Complaint-Summons.

##### 4.3.1 *Standard for Overcoming Presumption of Issuing a Complaint-Summons.*

In any case where there is probable cause to believe the defendant has committed any indictable crime, disorderly persons offense, or petty disorderly offense and the case is not otherwise covered under Section 4.4 (mandatory charging by complaint-warrant) or Section 4.5 (presumption

of charging by complaint-warrant), a law enforcement agency shall issue a complaint-summons unless an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer designated pursuant to subsection 3.3.2 and authorized by the County Prosecutor to overcome presumptions under Section 4 of this Directive, determines that application for a complaint-warrant is reasonably necessary to protect the safety of a victim or the community, to reasonably assure the defendant's appearance in court when required, or to prevent the defendant from obstructing or attempting to obstruct the criminal justice process, and further determines that there is a lawful basis to apply for a complaint-warrant pursuant to Rule 3:3-1(d) as recently amended.<sup>13</sup> It is anticipated that the decision to overcome the presumption of charging by

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13

Rule 3:3-1(d), as recently amended, authorizes a judge to overcome the presumption of charging by complaint-summons where the judge finds that:

- (1) the defendant has been served with a summons for any prior indictable offense and has failed to appear;
- (2) there is reason to believe that the defendant is dangerous to self, or will pose a danger to the safety of any other person or the community if released on a summons;
- (3) there are one or more outstanding warrants for the defendant;
- (4) the defendant's identity or address is not known and a warrant is necessary to subject the defendant to the jurisdiction of the court;
- (5) there is reason to believe that the defendant will obstruct or attempt to obstruct the criminal justice process if released on a summons;
- (6) there is reason to believe that the defendant will not appear in response to a summons; or
- (7) there is reason to believe that the monitoring of pretrial release conditions by the pretrial services program established pursuant to N.J.S.A. 2A:162-25 is necessary to protect any victim, witness, other specified person, or the community.

The Part VII rules governing municipal court practice, which would apply to disorderly persons offenses heard in municipal court, include comparable provisions. Specifically, Rule 7:2-2(e), as recently amended, authorizes a judge or other judicial officer to overcome the presumption of charging by complaint-summons after considering the following factors:

- (1) the defendant has been served with a summons for any prior indictable offense and has failed to appear;
- (2) there is reason to believe that the defendant is dangerous to self or will pose a danger to the safety of any other person or the community if released on a summons;
- (3) there is one or more outstanding warrants for the defendant;
- (4) the defendant's identity or address is not known and a warrant is necessary to subject the defendant to the jurisdiction of the court;
- (5) there is reason to believe that the defendant will obstruct or attempt to obstruct the criminal justice



complaint-summons established in this subsection will not be overcome when the most serious charge is a petty disorderly persons offense absent extraordinary circumstances suggesting a high risk that the defendant, if released, would commit a new offense, fail to appear in court when required, or obstruct or attempt to obstruct justice.

#### 4.3.2 *Specifying Reasons for Overcoming Presumption of Charging by Complaint-Summons.*

If the decision is made to apply for a complaint-warrant notwithstanding the presumption of issuing a complaint-summons pursuant to subsection 4.3.1, the court or judicial officer to whom the application for a complaint-warrant is made shall be advised as to the specific criterion or criteria enumerated in Rule 3:3-1(d), see note 13, upon which the State relies to overcome the presumption of charging by complaint-summons established under Rule 3:3-1(c) (e.g., there is reason to believe that the defendant will not appear in response to a summons; there is reason to believe that the monitoring of pretrial release conditions by the pretrial services agency is necessary to protect any victim, witness, other specified person, or the community; etc.). In addition to identifying the applicable criterion/criteria listed in Rule 3:3-1(d), the law enforcement officer or prosecutor applying for a complaint-warrant shall advise the court or judicial officer as to the specific facts or circumstances the State relies upon to overcome the presumption of charging by complaint-summons set forth in Rule 3:3-1(c) (e.g., the results of the automated pretrial risk assessment; the manner in which the crime was committed; gang affiliation; etc.). See also Section 5 (Preliminary Law Enforcement Incident Report documenting certain case-specific facts to be incorporated by reference in the Affidavit of Probable Cause submitted as part of the application for a complaint-warrant).

#### 4.4 Cases Where Law Enforcement Must Apply for a Complaint-Warrant without Exception.

##### 4.4.1 *Specified Crimes That Must Be Charged by Complaint-Warrant.*

As required by Rule 3:3-1(e), and notwithstanding any other provision of Section 4 of this Directive, a law enforcement agency shall apply for a complaint-warrant if there is probable cause to believe that the defendant committed:

murder (N.J.S.A. 2C:11-3);

aggravated manslaughter (N.J.S.A. 2C:11-4(a));

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process if released on a summons;

(6) there is reason to believe that the defendant will not appear in response to a summons;

(7) there is reason to believe that the monitoring of pretrial release conditions by the pretrial services program established pursuant to N.J.S.A. 2A:162-25 is necessary to protect any victim, witness, other specified person, or the community.

manslaughter (N.J.S.A. 2C:11-4(b));  
aggravated sexual assault (N.J.S.A. 2C:14-2(a));  
sexual assault (N.J.S.A. 2C:14-2(b) or (c));  
robbery (N.J.S.A. 2C:15-1);  
carjacking (N.J.S.A. 2C:15-2);  
escape (N.J.S.A. 2C:29-5(a)); or  
an attempt<sup>14</sup> to commit any of the foregoing crimes.

#### 4.4.2 *Extradition Cases and New Jersey, Federal, or Out-of-State Detainers.*

Notwithstanding any other provision of Section 4 of this Directive, if the defendant has been extradited from another state for the current New Jersey charge,<sup>15</sup> the law enforcement agency making the arrest shall apply for a complaint-warrant and advise the court of the extradition. If the defendant is arrested for an offense under New Jersey law and a lawful detainer has been lodged against the defendant by any federal agency or a law enforcement agency from this State or any other state, the law enforcement agency having custody of the defendant shall apply for a complaint-warrant and advise the court of the detainer. If a defendant is arrested for an offense committed under the laws of another state, or the United States, and is not charged with an offense under New Jersey law, the Bail Reform Law does not apply, and the agency making the arrest or having custody of the defendant shall proceed in accordance with the laws, practices, and procedures currently in place. See also Section 1.6.

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14

The Court Rule does not refer specifically to conspiracies to commit an enumerated offense. However, as a practical matter, a person engaged in a conspiracy to commit a predicate crime that is enumerated in the Court Rule often can be charged with an attempt to commit that predicate offense, or with aiding and abetting the commission of that offense.

15

Rule 3:3-1(e), as recently amended, requires that the defendant be charged by complaint-warrant “where the defendant has been extradited from another state for the current charge.”

#### 4.5 Cases Where There Is a Rebuttable Presumption of Applying for a Complaint-Warrant.

##### 4.5.1 *Automated Pretrial Risk Assessment Indicates a Moderate or High Risk of Flight, New Criminal Activity, or Violence.*<sup>16</sup>

A law enforcement agency shall apply for a complaint-warrant if either the Failure to Appear (FTA) or New Criminal Activity (NCA) score determined by the automated pretrial risk-assessment process is 4, 5, or 6, or if there is a New Violent Criminal Activity (NVCA) flag, unless an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer who is authorized by the County Prosecutor to overcome presumptions under Section 4 of this Directive, determines that the presumption of charging by complaint-warrant is overcome pursuant to subsection 4.5.9.

##### 4.5.2 *Defendant Has Violated a Domestic Violence Restraining Order or a Sexual Assault Survivor Protection Act Order.*

A law enforcement agency shall apply for a complaint-warrant if there is reason to believe that the present offense (1) constitutes a violation of any domestic violence restraining order or release condition, or (2) constitutes a violation of any Sexual Assault Survivor Protection Act order or release condition, unless an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer designated pursuant to subsection 3.3.2 who is authorized by the County Prosecutor to overcome presumptions under Section 4 of this Directive, determines that the presumption of charging by complaint-warrant is overcome pursuant to subsection 4.5.9, giving special consideration to the interests and opinion of the victim and whether mandatory detention for up to 48 hours as required by N.J.S.A. 2A:162-16(a) would exacerbate the situation or discourage the victim from cooperating with the investigation or prosecution. See also subsections 4.6.1. and 4.6.5.

##### 4.5.3 *Defendant Is Charged with Bail Jumping or Witness Tampering.*

A law enforcement agency shall apply for a complaint-warrant if there is probable cause to believe that the defendant has committed the offense of bail jumping in violation of N.J.S.A. 2C:29-7, witness tampering/retaliation in violation of N.J.S.A. 2C:28-5, witness obstruction in violation of N.J.S.A. 2C:29-3(b)(3), or witness tampering in violation of N.J.S.A. 2C:29-3(a)(3), unless an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer designated pursuant to subsection 3.3.2 who is authorized by the County Prosecutor to overcome presumptions under Section 4 of this Directive, determines that the

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16

The research-based "Decision Making Framework" developed by the Judiciary instructs the pretrial services program to recommend that a court impose non-minimal release conditions and monitoring when the FTA and NCA scores are 4 or higher. In those cases, it generally would be inappropriate to charge by complaint-summons because that would have the practical effect of precluding the level of monitoring deemed necessary and appropriate by empirical research to manage the risks posed by defendant's release.



presumption of charging by complaint-warrant is overcome pursuant to subsection 4.5.9.

4.5.4 *Defendant Is Charged with a Crime Specified in Rule 3:3-1(f).*

In accordance with Rule 3:3-1(f) as recently amended, unless an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer designated pursuant to subsection 3.3.2 who is authorized by the County Prosecutor to overcome presumptions under Section 4 of this Directive, determines that the presumption of charging by complaint-warrant is overcome pursuant to subsection 4.5.9, a law enforcement agency shall apply for a complaint-warrant if there is probable cause to believe that the defendant committed:

a violation of Chapter 35 of Title 2C that constitutes a first or second degree crime;

a crime involving the possession or use of a firearm;

vehicular homicide (N.J.S.A. 2C:11-5);

aggravated assault that constitutes a second-degree crime (N.J.S.A. 2C:12-1(b));

disarming a law enforcement officer (N.J.S.A. 2C:12-11);

kidnapping (N.J.S.A. 2C:13-1);

aggravated arson (N.J.S.A. 2C:17-1(a));

burglary that constitutes a second-degree crime (N.J.S.A. 2C:18-2);

extortion (N.J.S.A. 2C:20-5);

booby traps in manufacturing or distribution facilities (N.J.S.A. 2C:35-4.1(b));

strict liability for drug induced deaths (N.J.S.A. 2C:35-9);

terrorism (N.J.S.A. 2C:38-2);

producing or possessing chemical weapons, biological agents, or radiological devices (N.J.S.A. 2C: 38-3);

racketeering (N.J.S.A. 2C:41-2);

firearms trafficking (N.J.S.A. 2C:39-9(i));

causing or permitting a child to engage in a prohibited sexual act (N.J.S.A. 2C:24-4(b)(3));

or

an attempt<sup>17</sup> to commit any of the foregoing crimes.

*4.5.5 The Present Offense Was Committed While on Release for Another Offense or While on Any Form of Post-Conviction Supervision.*

Except as otherwise provided pursuant to subsection 4.5.2, a law enforcement agency shall apply for a complaint-warrant if the present offense was committed while the defendant was on release for any other indictable crime, disorderly persons offense, or petty disorderly persons offense (i.e., defendant has a pending charge), whether that previous offense had been charged by complaint-warrant or complaint-summons, or while on probation, special probation, intensive supervision program (ISP), parole, or on pretrial intervention (PTI) where the defendant had pleaded guilty as required by N.J.S.A. 2C:43-12(g)(3) (see P.L. 2015, c. 98), or if defendant was on release pending sentencing or appeal, unless an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory police officer designated pursuant to subsection 3.3.2 who is authorized by the County Prosecutor to overcome presumptions under Section 4 of this Directive, determines that the presumption of charging by complaint-warrant is overcome pursuant to subsection 4.5.9.<sup>18</sup>

*4.5.6 Preliminary Automated Pretrial Risk-Assessment Results Are Not Available or Would Result in Undue Delay in Making Charging Decisions.*

Recognizing that administrative burdens are placed on police departments when the charging decision is delayed and police are required to maintain custody of a defendant pending that decision, notwithstanding the provisions of subsection 2.2.2, if either the Live Scan system or the Judiciary's automated PSA system is not operational, or if the results of a preliminary automated pretrial risk-assessment otherwise are not or will not be available within a reasonable period of time (e.g., within two hours of fingerprinting the defendant), an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer designated pursuant to subsection 3.3.2, may proceed to make the complaint-summons versus complaint-warrant determination by applying the provisions/presumptions set forth in Section 4 that do not depend on the results of an automated pretrial risk assessment. See note 8. The determination as to what constitutes a reasonable period of time to delay the charging decision while awaiting the results of

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See note 14.

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The Bail Reform Law expressly provides that a court, in deciding whether to detain a defendant before trial, may consider "whether at the time of the current offense or arrest, the eligible defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence for another offense under federal law, or the law of this or any other state." N.J.S.A. 2A:162-20(c)(2) (emphasis added). The Legislature thus recognized the importance of this case-specific circumstance as an indicator of risk. Because this circumstance might justify pretrial detention under the Bail Reform law, it clearly establishes a basis for issuing a complaint-warrant.

the automated pretrial risk-assessment process following Live Scan fingerprinting shall be based on the administrative burdens placed on the department by the delay (e.g., the need to re-assign an officer from patrol/call-for-service duties to stay in the station to monitor the defendant held in custody, the need for the arresting officer to return to patrol duty, etc.). Nothing in this subsection shall be construed to authorize delay to the extent that the defendant is not presented to a judge or other judicial officer within 12 hours of arrest as required by Rule 3:4-1.

If the results of an automated pretrial risk assessment are not available because of problems taking the defendant's fingerprints, the assistant prosecutor, deputy attorney general, or supervisory officer shall, when feasible, ascertain the defendant's criminal history by making an NCIC/CCH or Interstate Identification Index query that does not require fingerprint verification, provided, however, that nothing in this paragraph shall be construed to excuse the requirement to utilize an up-to-date Live Scan system capable of initiating the automated risk-assessment process. See subsections 2.2.2, 2.2.3, and 2.2.4.

In the event that the charging decision is made pursuant to this subsection without the benefit of a preliminary automated risk assessment, when determining whether to overcome a presumption of issuing a complaint-summons in accordance with subsection 4.3.1, the assistant prosecutor, deputy attorney general, or designated supervisory officer shall give special consideration to the interest of public protection served by providing the pretrial services program with an opportunity to conduct an objective assessment and to make recommendations as to any conditions that may be needed to manage the risks that would be posed by defendant's release.<sup>19</sup>

Nothing in this subsection shall be construed to require that the charging decision be made without the benefit of a preliminary automated pretrial risk assessment, and the assistant prosecutor, deputy attorney general, or designated supervisory officer may elect to postpone the charging decision pending the results of the preliminary automated pretrial risk-assessment process, provided that the matter is presented to a judge or judicial officer within 12 hours of arrest as required by Rule 3:4-1.

#### *4.5.7 Defendant Was Recently Adjudicated Delinquent for a Violent Crime.*

A law enforcement agency shall apply for a complaint-warrant if within the last ten years the defendant as a juvenile was adjudicated delinquent for a crime involving a firearm, or a crime that if committed by an adult would be subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, or an attempt to commit any of the foregoing offenses, unless an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer designated

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Rule 3:3-1(d), as amended, provides that in cases where there is a presumption of charging by complaint-summons and a law enforcement agency applies for a complaint-warrant based on reason to believe that the defendant will not appear in response to a summons, will pose a danger to the safety of any other person or the community, or will attempt to obstruct the criminal justice process if released on a summons, the court or judicial officer must consider the results of the assessment using the instrument approved by the Administrative Director of the Courts pursuant to N.J.S.A. 2A:162-25.



pursuant to subsection 3.3.2 who is authorized by the County Prosecutor to overcome presumptions under Section 4 of this Directive, determines that the presumption of charging by complaint-warrant is overcome pursuant to subsection 4.5.9.<sup>20</sup> Nothing in this subsection shall be construed to preclude consideration of other adjudications of delinquency (e.g., adjudications for violent or firearms-related crimes that occurred more than ten years ago, or adjudications for offenses other than firearms-related or NERA crimes) as may be relevant as part of the totality of the circumstances when determining whether to overcome the presumption of issuing a complaint-summons pursuant to Section 4.3.

#### 4.5.8 *Out-of-State Convictions/Charges.*

The automated pretrial risk-assessment process does not account for convictions or pending charges from other states. However, the Judiciary's electronic system will indicate that the defendant has an out of-state criminal history, and also may provide police and prosecutors with limited information concerning any such offenses. Notwithstanding the presumption of issuing a complaint-summons that would otherwise apply, a law enforcement agency may apply for a complaint-warrant if it reasonably appears that an out-of-state pending charge or conviction involves actual or threatened violence or unlawful possession or use of a firearm. In that event, there shall be a presumption of applying for a complaint-warrant unless an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer specially designated pursuant to subsection 3.3.2 who is authorized by the County Prosecutor to overcome presumptions under Section 4 of this Directive, determines that the presumption of charging by complaint-warrant is overcome pursuant to subsection 4.5.9. In the event that out-of-state pending charges or convictions do not appear to involve violence or firearms and a presumption of issuing a complaint-summons applies pursuant to Section 4.3, the prosecutor may consider an out-of-state offense as part of the totality of the circumstances in deciding whether to overcome that presumption.

#### 4.5.9 *Overcoming the Presumption of Applying for a Complaint-Warrant.*

In any case where there is a presumption of applying for a complaint-warrant pursuant to subsections 4.5.1 through 4.5.8, a law enforcement agency shall apply for a complaint-warrant unless an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer designated pursuant to subsection 3.3.2 who is authorized by the County Prosecutor to overcome presumptions under Section 4 of this Directive, determines that neither the interests of public or victim safety nor the interests of justice would be served by applying for a complaint-warrant. In making this determination, the assistant prosecutor, deputy attorney general, or supervisory officer shall consider whether, without the ability of the pretrial services program to monitor conditions of release, there are reasonable assurances that if defendant were to

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The recently-amended Court Rules expressly recognize the potential importance of a defendant's juvenile criminal history. Specifically, Rule 3:3-1(g) prohibits a judge from deciding to overcome a presumption that a complaint-warrant be issued without considering "whether within the preceding ten years the defendant as a juvenile was adjudicated delinquent for escape, a crime involving a firearm, or a crime that if committed by an adult would be subject to the No Early Release Act. . . or an attempt to commit any of the foregoing offenses."

be charged by a complaint-summons, he or she will appear in court when required, the safety of any other person or the community will be protected, and the defendant will not obstruct or attempt to obstruct the criminal justice process. If the determination is made to overcome the presumption of applying for a complaint-warrant, the assistant prosecutor or deputy attorney general shall document the reason(s) for that decision in the case file.

#### 4.6 Special Considerations, Notifications, and Procedures in Domestic Violence and Sexual Assault Cases.

##### 4.6.1 *Impact of Mandatory Incarceration on Domestic Violence Victims.*

In cases involving domestic violence, the police officer making the arrest and/or an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer designated pursuant to subsection 3.3.2, shall consider whether the mandatory detention resulting automatically from issuance of a complaint-warrant might exacerbate the domestic violence situation, might discourage a victim from pursuing the charge or cooperating with the prosecution, or otherwise would not serve the interest of justice. Given the repetitive nature of domestic violence offenses, the officer and/or assistant prosecutor or deputy attorney general also may consider whether it would be appropriate to apply for a complaint-warrant in recognition that if the defendant is charged by complaint-summons and thereafter commits a new crime while on pretrial release, the prosecutor cannot move pursuant to N.J.S.A. 2A:162-24 to revoke release. See subsections 4.5.2 and 8.4.3. Cf. note 30.

##### 4.6.2 *Special Factors in Domestic Violence Cases.*

In determining whether to apply for a complaint-summons or a complaint-warrant in domestic violence cases, the police officer or assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 or supervisory officer designated pursuant to subsection 3.3.2 shall give special consideration to the following circumstances relevant to the risks that would be posed to the victim if defendant were to be released on a complaint-summons:

- 1) whether the victim exhibited signs of injury, and the extent of such injury;
- 2) whether any type of weapon was used against the victim, or was threatened to be used;
- 3) whether the defendant has at any time previously violated a temporary or final restraining order, cf. subsection 4.5.2 (creating a presumption of applying for a complaint-warrant if the present offense was committed in violation of a restraining order or release condition), and the nature and seriousness of such previous violation(s);
- 4) there is reason to believe that the defendant possesses one or more firearms that for practical or other reasons cannot be seized or surrendered pursuant to the Prevention of Domestic Violence Act before the defendant's release from custody on a complaint-summons

(e.g., a firearm kept at a location other than the place of arrest such as another residence, or an office or business premises);

The foregoing circumstances shall be considered in determining whether there is a basis to overcome a presumption of issuing a complaint-summons pursuant to subsection 4.3.1. See also subsection 4.6.3 (requiring an application for a complaint-warrant when one or more special pretrial release conditions that can be imposed only on a complaint-warrant are necessary to reasonably assure the immediate safety of a domestic violence victim).

4.6.3 *Situations Where Law Enforcement Must Apply for a Complaint-Warrant and Seek Special Conditions to Protect Domestic Violence Victims.*

In any case involving domestic violence where the police officer or assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 or supervisory officer designated pursuant to subsection 3.3.2 has reason to believe, considering the totality of the circumstances, including but not limited to the special factors listed in paragraphs 1 through 4 of subsection 4.6.2, that issuance of a no-contact condition or other restraint, a requirement to surrender weapons, or any other special condition of pretrial release expressly authorized by N.J.S.A. 2C:25-26(a) is necessary to reasonably assure the immediate safety of the victim, the officer or prosecutor shall, notwithstanding any other provision of this Directive other than subsection 4.6.1, apply for a complaint warrant and seek imposition of the condition(s) needed to reasonably assure the immediate safety of the victim.<sup>21</sup> Nothing in this subsection shall be construed to preempt or in any way alter

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N.J.S.A. 2C:25-26(a), which is part of the Prevention of Domestic Violence Act and was not amended by the Bail Reform Law, provides:

When a defendant charged with a crime or offense involving domestic violence is released from custody before trial on bail or personal recognizance, the court authorizing the release may as a condition of release issue an order prohibiting the defendant from having any contact with the victim including, but not limited to, restraining the defendant from entering the victim's residence, place of employment or business, or school, and from harassing or stalking the victim or the victim's friends, co-workers, or relatives in any way. The court may also enter an order prohibiting the defendant from having any contact with any animal owned, possessed, leased, kept, or held by either party or a minor child residing in the household. In addition, the court may enter an order directing the possession of the animal and providing that the animal shall not be disposed of prior to the disposition of the crime or offense. The court may enter an order prohibiting the defendant from possessing any firearm or other weapon enumerated in subsection r. of N.J.S. 2C:39-1 and ordering the search for and seizure of any such weapon in any location where the judge has reasonable cause to believe the weapon is located. The judge shall state with specificity the reasons for and scope of the search and seizure authorized by the order.

Note that the provisions of this subsection of the Directive take precedence over subsection 4.5.9 (setting forth the general standard for overcoming a presumption of issuing a complaint-summons), reflecting the paramount goal of



the authority of the agency or the victim to apply for a temporary or final restraining order, and the special conditions of pretrial release in the criminal prosecution sought pursuant to this subsection shall be in addition to, not in lieu of, any such civil temporary or final restraining order.

#### 4.6.4 *Special Notifications in Domestic Violence Cases.*

In cases involving domestic violence, if the decision is made to apply for a complaint-warrant, the application shall clearly state that the offense involves domestic violence, and shall include any relevant information contained in the Domestic Violence Central Registry (e.g., concerning prior issuance or violation of a restraining order). See subsection 4.2.3 (requiring query of Domestic Violence Central Registry) and Section 5.4 (discussing factual information that may be provided to the court in a Preliminary Law Enforcement Incident Report prepared as part of the process for applying for a complaint-warrant). Whether the offense is charged by complaint-warrant or complaint-summons, the victim shall, in accordance with the requirements of the Domestic Violence Procedures Manual, be informed how to apply for a restraining order under the Prevention of Domestic Violence Act. This requirement to inform the victim shall not be construed to preclude the officer or prosecutor from seeking imposition of a no-contact or other appropriate restraint as a condition of release on a complaint-warrant as may be required pursuant to subsections 4.6.3 or 6.2.3.

#### 4.6.5 *Impact of Mandatory Incarceration on Sexual Assault Victims.*

In cases involving a sexual assault, the police officer making the arrest and/or an assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 of this Directive, or a supervisory officer designated pursuant to subsection 3.3.2, shall consider whether the mandatory detention resulting automatically from issuance of a complaint-warrant might discourage a victim from pursuing the charge or cooperating with the prosecution, or otherwise would not serve the interest of justice. Given the repetitive nature of sexual offenses, the officer and/or assistant prosecutor or deputy attorney general also may consider whether it would be appropriate to apply for a complaint-warrant in recognition that if the defendant is charged by complaint-summons and thereafter commits a new crime while on pretrial release, the prosecutor cannot move pursuant to N.J.S.A. 2A:162-24 to revoke release. Cf. note 30.

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this Directive to protect victims. However, the police officer or prosecutor shall still consider whether mandatory detention in county jail resulting automatically from issuance of a complaint-warrant would exacerbate the domestic violence situation in a manner and to a degree that outweighs the benefits of obtaining a no-contact, weapons surrender, or other special condition of pretrial release imposed on a complaint-warrant. See subsection 4.6.1. Note also that if a no-contact, weapons-surrender, or other special condition of pretrial release is deemed to be reasonably necessary to assure the immediate safety of the domestic violence victim, it also might be appropriate for the defendant to be ordered to wear an electronic monitoring device so that the defendant's movements can be monitored by the pretrial services program as a means to enforce the no-contact condition and thereby enhance the protection afforded to the victim. That presupposes that the defendant is an "eligible defendant" under the Bail Reform Law, that is, a defendant who has been charged by complaint-warrant.

#### 4.7 Expunged Records.

In determining whether to overcome the presumption of issuing a complaint-summons pursuant to Section 4.3, a prosecutor or supervisory officer designated pursuant to subsection 3.3.2 may consider expunged records as part of the totality of relevant circumstances. See N.J.S.A. 2C:52-21 (“expunged records . . . of prior arrests or convictions shall be provided to any court, county prosecutor, the Probation Division of the Superior Court, the pretrial services agency, or the Attorney General when same are requested for use in conjunction with a bail hearing, [or] pretrial release determination pursuant to sections 1 through 11 of P.L. 2014, c. 31 [the Bail Reform Law]”).

In any case where application for a complaint-warrant is required pursuant to Rule 3:3-1(e), or any case where a determination has been made pursuant to this Directive to apply for a complaint-warrant regardless of expunged arrests or convictions, the law enforcement agency and/or prosecutor shall not delay the charging process by waiting to obtain or access expunged records. If, however, expunged records might affect the determination whether to issue a complaint-summons or apply for a complaint-warrant, the assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2, or designated supervisory officer designated pursuant to subsection 3.3.2, may delay the charging decision for a reasonable period while efforts are being undertaken to obtain or access expunged records, considering the administrative burdens that would be placed on the police department by the delay, and further provided that the defendant can be presented to a judge or other judicial officer within 12 hours of arrest as required by Rule 3:4-1.

#### 4.8 Juvenile Waiver Cases.

In the event that a juvenile is waived to adult court pursuant to N.J.S.A. 2A:4A-26.1 (involuntary waiver) or N.J.S.A. 2A:4A-27 (waiver at election of juvenile), the prosecutor shall make certain that a new complaint-summons (CDR-1) or complaint-warrant (CDR-2) is issued by the adult court. Note that if a defendant is not charged by complaint-warrant, he or she is not an “eligible defendant” under the Bail Reform Law, and thus would not be monitored by the pretrial services program or be subject to the possibility of pretrial detention. Accordingly, when the prosecutor determines under this Directive that the juvenile upon waiver should be charged as an adult by means of a complaint-warrant, the prosecutor shall prepare a complaint-warrant and submit it to the court as part of the juvenile waiver motion packet. In deciding whether to issue a complaint-summons or to apply to the court for a complaint-warrant, the prosecutor shall apply the appropriate Section/subsection(s) of this Directive as if the person originally had been arrested as an adult. See subsection 2.2.1 (a juvenile waived to adult court shall be treated as an adult under this Directive). It is expected that the circumstances justifying an involuntary waiver (e.g., the nature and seriousness of the charges and/or the nature and extent of any prior history of delinquency) often will invoke a presumption under Rule 3:3-1(f) and subsection 4.5.4 of this Directive to apply for a complaint-warrant, if not require issuance of a complaint-warrant pursuant to Rule 3:3-1(e) and subsection 4.4.1. See also subsection 7.6.5.

## 4.9 Direct Indictments.

### 4.9.1 *Prosecutor Request for a Complaint-Warrant.*

A grand jury will on occasion return an indictment against a defendant who was not arrested for the offense and therefore has not already been charged by complaint-warrant or complaint-summons. These cases are referred to as “direct” indictments. Rule 3:25-4, as recently amended, provides that persons charged by “complaint-warrant on indictment” (i.e., a complaint-warrant issued following a direct indictment) are “eligible defendants” for purposes of the Bail Reform Law as if they initially had been charged by complaint-warrant. See N.J.S.A. 2A:162-15. This means that they are subject to pretrial detention or release on conditions that will be monitored by the pretrial services program.

Rule 3:7-8 provides that when a direct indictment is returned, the criminal division manager, as designee of the deputy clerk of the Superior Court, must issue either a complaint-summons or a complaint-warrant in accordance with Rule 3:3-1. Although Rule 3:7-8 does not specify the role that the prosecutor plays in the complaint-warrant versus complaint-summons determination, it is appropriate that, except in cases where a complaint-warrant is required pursuant to Rule 3:3-1(e), see subsection 4.4.1, or is presumed to be issued pursuant to Rule 3:3-1(f), see subsection 4.5.4, a complaint-summons should be issued following the return of a direct indictment unless the prosecutor establishes the basis for issuance of a complaint-warrant. Accordingly, at the time that a direct indictment is returned pursuant to Rule 3:6-8, the prosecutor shall advise the Assignment Judge or other designated judge before whom the indictment is returned whether the State is seeking issuance of a complaint-warrant on indictment, and if so, the prosecutor shall provide the judge with the factual basis for overcoming the presumption that a complaint-summons should be issued.

### 4.9.2 *Direct-Indictment Cases Where Automated Pretrial Risk-Assessment Results Are Not Available.*

Except as otherwise expressly provided in this subsection, all of the provisions and presumptions set forth in Section 4 of this Directive shall apply to the prosecutor’s determination whether to request the court to issue a complaint-warrant following the return of a direct indictment. Because the defendant in a direct-indictment case will not have been arrested for this offense and therefore will not have been fingerprinted by means of the Live Scan system, it may not be possible to run the automated pretrial risk-assessment software to inform the complaint-warrant versus complaint-summons determination.

When practicable, a prosecutor should ask the judge before whom a direct indictment is returned to order that the defendant be fingerprinted by Live Scan prior to the court making the complaint-warrant versus complaint-summons determination so that this decision can be informed by the automated pretrial risk-assessment process. If it is not feasible to have the defendant fingerprinted through the Live Scan system before the decision must be made whether to issue a complaint-summons or complaint-warrant, the prosecutor in making a recommendation to the judge



before whom the indictment is returned shall apply the provisions/presumptions set forth in Section 4 that do not depend upon the results of the automated pretrial risk assessment. See note 8; see also subsection 4.2.6 (discussing the authority to seek a superseding complaint-warrant based on new information bearing on pretrial release risks). In addition, the prosecutor shall when feasible ascertain the defendant's criminal history by making an NCIC/CCH or Interstate Identification Index query that does not require fingerprint verification.

#### 4.10 Complaints Prepared Before Arrest or Indictment.

There may be instances when a prosecutor decides to issue a complaint against a defendant who has not yet been arrested or indicted. For example, police may respond to a domestic violence incident and determine that a domestic violence offense had been committed, but that the suspect left the premises before the police arrived and therefore was not arrested and fingerprinted as would have been required pursuant to N.J.S.A. 2C:25-21(a)(1) to (4), N.J.S.A. 53:1-15 and N.J.S.A. 53:1-18.1. See note 5. Because the defendant will not have been arrested for this offense and therefore will not have been fingerprinted by means of the Live Scan system, it may not be possible to run the automated pretrial risk-assessment process to inform the decision whether to issue a complaint-summons or apply for a complaint-warrant.

In any case where the determination is made by a prosecutor to issue or apply for a complaint before arrest or indictment, the prosecutor instead shall apply the other provisions/presumptions set forth in Section 4 that do not depend on upon the results of the automated pretrial risk assessment. See note 8. In addition, the prosecutor shall when feasible ascertain the defendant's criminal history by making an NCIC/CCH or Interstate Identification Index query that does not require fingerprint verification. It should be noted that in many direct-complaint cases, the seriousness of the charge(s) will require issuance of complaint-warrant pursuant to Rule 3:3-1(e), see subsection 4.4.1, or may trigger a presumption of issuing a complaint-warrant pursuant to Rule 3:3-1(f), see subsection 4.5.4.

In any case where the defendant has not already been arrested, if a complaint-warrant is issued, the defendant upon arrest shall be fingerprinted in accordance with Section 2.2 to initiate an automated pretrial risk assessment for the benefit of the pretrial services program. In that event, the officer shall make certain that the fingerprint links to the defendant and offense(s) for which a complaint-warrant had been issued. If a complaint-summons is issued, the agency making the arrest, or the prosecutor, shall make certain that the defendant is fingerprinted by the Live Scan system on the date of the defendant's court appearance or within a reasonable time after the filing of the complaint upon written request by the appropriate law enforcement agency pursuant to N.J.S.A. 53:1-15, and N.J.S.A. 53:1-18.1, and shall make certain that the fingerprint links to the defendant and offense(s) for which a complaint-summons had been issued.

#### 4.11 Report When Application for a Complaint-Warrant Is Denied.

If a law enforcement agency applies for a complaint-warrant pursuant to this Directive and the judge or other court officer reviewing the application declines to issue a complaint-warrant but

instead issues or directs the issuance of a complaint-summons, to facilitate evaluation of the system the officer or the assistant prosecutor or deputy attorney general consulted in accordance with Section 3.2 shall document the circumstances of the denial on a form and in a manner as may be prescribed by the Director of the Division of Criminal Justice. Unless a report is transmitted automatically by electronic means, these reports shall be sent to the Division of Criminal Justice on not less than a monthly basis. See also Section 15 (ongoing study and evaluation of Bail Reform Law's effectiveness and impact).

This Section shall become operational on January 1, 2017, and the reporting requirement shall expire on January 1, 2019.

#### 4.12 Transport to County Jail After Complaint-Warrant Issued.

When a complaint-warrant is issued pursuant to this Directive, the defendant shall be transported to the county jail as soon as practicable, considering the need to conduct investigative activities (e.g., interview of defendant, witness identification procedures requiring defendant's presence or participation) and the availability of transport resources and the operating hours during which the pretrial services program is preparing recommendations as to release conditions in accordance with N.J.S.A. 2A:162-16.

#### 4.13 Obligation to Forward Available Investigative Reports.

Rule 3:2-1(c) provides that when a complaint-summons is issued "all available investigative reports shall be forwarded by law enforcement to the prosecutor within 48 hours." And it provides that when a complaint-warrant is issued "all available investigative reports shall be forwarded by law enforcement to the prosecutor immediately upon issuance of the complaint."

#### 4.14 Training Program and Instructional Materials for Police.

The Division of Criminal Justice, in cooperation with the County Prosecutors Association of New Jersey, the State Police, and the New Jersey Association of Chiefs of Police, shall within 60 days of the issuance of this Directive develop a training program for police officers, made available through the NJ Learn system or by other electronic means if feasible, to explain the policies established under the Bail Reform Law and the requirements of this Directive as they pertain to police agencies and officers. The Division also shall within 60 days of the issuance of this Directive prepare an instruction card for dissemination to police officers that concisely summarizes the key features of this Directive that pertain to police agencies and officers. The Division, in cooperation with the County Prosecutors Association of New Jersey, the State Police, and the New Jersey Association of Chiefs of Police, may develop a special training program for supervisory officers designated pursuant to subsection 3.3.2.

This Section shall become operational immediately upon issuance of this Directive.

## **5. AFFIDAVITS OF PROBABLE CAUSE AND PRELIMINARY LAW ENFORCEMENT INCIDENT REPORTS PREPARED AT TIME OF ARREST**

### **5.1 Electronic Submission of Affidavit of Probable Cause.**

The Division of Criminal Justice shall work with the AOC to develop and implement practices and procedures that allow an Affidavit of Probable Cause to be filed electronically through the eCDR system to support an application for a complaint-warrant and to supplement any oral statements made under oath by the law enforcement officer applying for the complaint-warrant. The Affidavit of Probable Cause shall include a check-box allowing the officer to certify that the statements in the Affidavit are true, and acknowledging that the affiant is aware that filing willfully false statements would subject him or her to punishment.

The Affidavit of Probable Cause shall include a concise description of relevant facts and circumstances that support probable cause to believe that the offense(s) was committed and that the defendant is the one who committed it. The Affidavit shall include a concise statement as to the officer's basis for believing that the defendant committed the offense(s) (e.g., the officer's personal observations, statements of eyewitnesses, defendant's admission, etc.), and shall indicate whether a victim was injured and, if so, the extent of the injury known to the officer submitting the Affidavit. The foregoing description of relevant facts and circumstances and statement as to the officer's basis for believing that probable cause exists may be established, or supplemented, by a Preliminary Law Enforcement Incident Report prepared pursuant to Section 5.2. See also R. 3:4-2(c)(1)(A). In that event, the Preliminary Law Enforcement Incident Report shall be appended to/transmitted with and expressly incorporated by reference in the Affidavit of Probable Cause.

This Section shall become operational immediately upon issuance of this Directive.

### **5.2 Development of Uniform Preliminary Law Enforcement Incident Report.**

It is appropriate to develop a process by which police officers may quickly and easily prepare an electronic document that succinctly describes the relevant factual circumstances pertaining to the offense for which the defendant was arrested and the basis for the arresting officer's belief that probable cause exists. This document could be reviewed/approved by a prosecutor consulted pursuant to Section 3.2 of this Directive or a supervisory officer designated pursuant to subsection 3.3.2, helping to inform the decision whether to issue a complaint-summons or apply for a complaint-warrant under this Directive. If a complaint-warrant is issued, the information captured in a Preliminary Law Enforcement Incident Report also might inform the prosecutor's decision whether to file a motion for pretrial detention, and may assist the prosecutor in preparing for a pretrial detention hearing. See R. 3:4-2(c)(1)(A) (requiring prosecutor at first appearance to "provide defendant with a copy of any available preliminary law enforcement incident report concerning the offense and any material used to establish probable cause").

Accordingly, the Division of Criminal Justice, in consultation with the State Police, the



County Prosecutors Association of New Jersey, and the New Jersey Association of Chiefs of Police, shall develop and periodically update or supplement as appropriate an electronic Preliminary Law Enforcement Incident Report form that could be used to capture information pertaining to a range of common offenses (e.g., domestic violence offenses, drug offenses, assaults, burglaries/thefts, robberies, sex offenses, etc.). The Preliminary Law Enforcement Incident Report should be designed so that recorded information that is not discoverable (e.g., victim contact information) can easily be segregated from material appended to and incorporated by reference in an Affidavit of Probable Cause, or any other material required to be provided under the State's discovery obligations. Cf. R. 3:4-2(c)(1)(b) (explaining the State's discovery obligations when the prosecutor moves for pretrial detention); R. 3:13-3(a) (general rule that pre-indictment discovery obligation is triggered only when the prosecutor makes a pre-indictment plea offer).

The Preliminary Law Enforcement Incident Report should be designed so that it can be completed by police officers quickly and with minimal effort. To the greatest extent feasible, the electronic form should feature "check-off" boxes to allow an officer quickly to indicate that, in this particular case, the officer has reason to believe the existence of certain commonly-occurring facts and circumstances. By way of illustration, the facts/circumstances documented by check-off boxes might include, but need not be limited to:

whether the offense involves domestic violence, and if so, whether the Domestic Violence Central Registry was checked (see subsection 4.2.3), and whether that query reveals any relevant information concerning past domestic violence episodes or restraining orders;

whether the offense involves a sexual crime, and if so, whether the Sexual Assault Survivor Act central registry was checked (see subsection 4.2.4), and whether that query reveals any information relevant to the pretrial release decision;

whether a law enforcement officer personally observed the offense conduct;

whether the arrest was based on observations/statements made by eyewitnesses;

whether a victim and/or eyewitness has given a statement, and whether such statement was in writing or electronically recorded (specifying the type of recording, e.g., dash camera, body worn camera, stationhouse interview room camera, etc.);

whether the defendant made an admission/confession;

whether any admission/statement by the defendant was electronically recorded (specifying the type of recording, e.g., dash camera, body worn camera, stationhouse interview room camera, etc.);

whether the offense conduct was captured on an electronic recording (specifying the type of recording, e.g., dash camera, body worn camera, surveillance camera, witness's cell phone

camera, etc.);

whether identification procedures were used (specifying the type of procedure, e.g., show up, photo array, line-up, etc.);

whether the suspect is a stranger or acquaintance of the victim/witness;

whether a victim was injured, the extent of the injury when known, and whether the victim was taken to the hospital or declined medical services;

the type of weapon involved, if any;

whether any physical evidence was seized or recovered (specifying type of evidence, e.g., drugs, paraphernalia, other contraband, weapons, cash, stolen merchandise, burglars tool or other implements or instrumentalities);

type of controlled dangerous substance (e.g., heroin, cocaine, crack, marijuana, prescription opiate, etc.);

whether physical evidence was recovered from the scene, or was seized from the person or control of the defendant, or from the defendant's vehicle;

whether the defendant attempted to conceal, discard, or destroy evidence (specifying method, e.g., hiding under furniture or car seat, dropping or throwing, flushing down sink/toilet);

whether the defendant attempted to flee or otherwise resist arrest (specifying type of flight, e.g., foot chase, motor vehicle pursuit);

whether flight or attempted flight resulted in injury or threat of injury to any person (e.g., whether a vehicle was operated in a manner that endangered public safety, whether police drew or fired weapons), and the extent of any resulting injury to any person;

whether an officer was assaulted and, if so, the extent of injury and whether taken to hospital;

whether children were present or otherwise placed at risk by the offense;

whether the defendant appeared to be under the influence of alcohol or drugs;

whether the defendant admitted to using drugs, and/or whether the officer or agency has reason to believe that the defendant is drug-dependent;

a general description of the type of merchandise or service stolen;

whether a burglary involved a residence (i.e., a home invasion), and whether any victims were present at the time of the burglary;

whether a stolen vehicle was operated in a manner that endangered public safety;

whether relevant information about the offense had been communicated to the officer(s) by a dispatcher (to alert the prosecutor of the need to preserve and obtain a recording of radio communications) and whether information had been provided to the agency by a 9-1-1 call (to alert the prosecutor of the need to preserve and obtain a recording of the 9-1-1 call).

This Section shall become operational immediately upon issuance of this Directive.

### 5.3 Limited Scope of Information in a Preliminary Law Enforcement Incident Report.

A Preliminary Law Enforcement Incident Report prepared pursuant to this Directive is intended only to document basic information known to the officer preparing the report at the time of arrest that may be needed to establish probable cause and/or to inform the decision whether to issue a complaint-summons or apply for a complaint-warrant. The fact that the officer preparing a Preliminary Law Enforcement Incident Report does not check a check-off box should not be construed to mean that such fact or circumstance does not exist, but rather only that the officer at the time of completing the preliminary report does not have sufficient basis, or immediate need, to indicate the existence or non-existence of such fact or circumstance in an initial, preliminary report that may be supplemented by subsequent reports that are more comprehensive and detailed. It should be clearly understood that the information documented in a Preliminary Law Enforcement Incident Report is prepared at the time of the arrest/booking process and is subject to being supplemented, clarified, or modified as additional information is learned or corroborated in the course of an ongoing investigation/prosecution.

A Preliminary Law Enforcement Incident Report shall be in addition to, not in lieu of, any regular police arrest, incident, or investigation report(s) subsequently prepared pursuant to the agency's standard operating procedure, policy, and/or customary practices, or at the prosecutor's request.

This Section shall become operational immediately upon issuance of this Directive.

### 5.4 Protection of Victim Contact Information.

It is important that the County Prosecutor's Office has information that would facilitate contact with the victim.<sup>22</sup> See note 29 and subsection 7.6.3. The Preliminary Law Enforcement

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Assistant prosecutors and deputy attorneys general should be cautious in having direct communications with a victim unless a detective is present to avoid the possibility that the prosecutor may become a witness in the case.



Incident Report therefore should, when feasible, document victim contact information, provided, however, that the electronic form shall be designed so that the field containing victim contact information is not shared with the defendant unless and until such information must be disclosed in accordance with the Court Rules governing discovery. In the alternative, the Division of Criminal Justice may work with the AOC to provide other means by which to transmit victim contact information to the judiciary through the eCDR system, to facilitate automated victim notification of court events, provided that any such system is designed so that victim contact information is not shared with the defendant unless and until such information must be disclosed in accordance with the Court Rules governing discovery.

This Section shall become operational immediately upon issuance of this Directive.

5.5 Use of Preliminary Law Enforcement Incident Report to Inform Charging Decisions.

Law enforcement officers making an arrest for an offense subject to the provisions of this Directive are encouraged, when practicable, to prepare a Preliminary Law Enforcement Incident Report before consulting a prosecutor pursuant to Section 3.2 or a designated supervisory officer pursuant to Section 3.3, or otherwise before applying for a complaint-warrant or preparing an Affidavit of Probable Cause in support of such application. It is especially important to prepare a Preliminary Law Enforcement Incident Report in cases where it might be appropriate to seek pretrial detention or revocation of release. Nothing herein shall be construed to limit a County Prosecutor's authority to require the preparation of a Preliminary Law Enforcement Incident Report by any law enforcement officer or agency subject to the prosecutor's jurisdictional authority.

This Section shall become operational immediately upon issuance of this Directive.

5.6 Capacity to Access and Prepare/Share Preliminary Law Enforcement Incident Reports.

5.6.1 *Police Agencies.*

Within 60 days of the issuance of this Directive, every law enforcement agency shall report to the appropriate County Prosecutor, or the Division of Criminal Justice in the case of a state law enforcement agency, on its capacity to equip officers with the means to prepare electronic Preliminary Law Enforcement Incident Reports (e.g., desktop computers, smart phones, tablets, or similar portable devices, or laptop or similar computing devices installed in police vehicles). Each agency, in consultation with the County Prosecutor or Division of Criminal Justice, shall develop a plan for preparing Preliminary Law Enforcement Incident Reports.

This subsection shall become operational immediately upon issuance of this Directive.

5.6.2 *Electronic Access to Preliminary Law Enforcement Incident Report by On-Call Prosecutors.*

Each County Prosecutor's Office and the Division of Criminal Justice shall develop and implement a plan to equip on-call assistant prosecutors and deputy attorneys general with the capacity to receive, read, edit, approve, and transmit Preliminary Law Enforcement Incident Reports and electronic Affidavits of Probable Cause prepared pursuant to this Directive.

This subsection shall become operational immediately upon issuance of this Directive.

6. **FIRST APPEARANCES AFTER ISSUANCE OF COMPLAINT-WARRANT**

6.1 Attendance by Prosecutor.

An assistant prosecutor, or a deputy attorney general in matters handled by the Division of Criminal Justice, shall attend the first appearance of a defendant who has been charged by complaint-warrant. See R. 3:4-2(b) (first appearances for indictable offenses shall occur at a centralized location before a judge designated by the Chief Justice). Such attendance may be by video-conference or other electronic means. Each County Prosecutor's Office and the Division shall establish procedures, in consultation with the AOC and the Chief Justice, to facilitate participation in first appearance hearings by electronic means. Nothing herein shall be construed to preclude or discourage prosecutors from appearing in person or by electronic means at the first appearance of a defendant charged by complaint-summons.

6.2 Requests for Special Release Conditions.

6.2.1 *Requests for Restraints Concerning New Offenses.*

If the court at the first appearance decides to release the defendant on personal recognizance pursuant to N.J.S.A. 2A:162-17(a), to achieve the benefits of specific deterrence, the assistant prosecutor or deputy attorney general shall request that the court instruct the defendant not to commit an offense during the period of release. The court's refusal to issue such instruction to the defendant shall not affect the prosecutor's authority to seek revocation of release pursuant to N.J.S.A. 2A:162-24 and Section 8 of this Directive in the event that the defendant commits a new offense while released on recognizance.

6.2.2 *Requests for Restraints Concerning Contact with Victims/Witnesses.*

If the assistant prosecutor or deputy attorney general has reason to request that the defendant have no contact with the victim of the alleged offense, or no contact with any other witness(es) who may testify concerning the offense, the prosecutor shall object to defendant's release on recognizance pursuant to N.J.S.A. 2A:162-17(a), and shall ask that the defendant be released, if at all, under N.J.S.A. 2A:162-17(b), and that the defendant be ordered as a condition of release to have no contact

with the victim and/or witness(es). See also subsection 6.2.3. The prosecutor shall as soon as practicable advise the victim and/or witnesses of the terms of any such pretrial release condition(s) imposed at the first appearance.

#### 6.2.3 *Domestic Violence, SORO, SASPA, and DORO Restraining Orders.*

If at the time of first appearance there is reason for issuance of a no-contact or release condition authorized by the Bail Reform Law or N.J.S.A. 2C:21-25(a), a sexual offender restraining order pursuant to N.J.S.A. 2C:14-12, or a drug offender restraining order pursuant to N.J.S.A. 2C:35-5.7, or if any such restraining order has previously been issued by any court, the assistant prosecutor or deputy attorney general shall request that such restraints be made special conditions of pretrial release. In addition, victims may apply for restraining orders under the Prevention of Domestic Violence Act and the Sexual Assault Survivor's Protection Act. The prosecutor shall as soon as practicable advise a victim of the terms of any such pretrial release condition(s) imposed at the first appearance.

#### 6.2.4 *Substance Abuse Intervention and Monitoring.*

The Bail Reform Law expressly authorizes a court setting conditions of pretrial release to order the defendant to refrain from use of any narcotic drug or other controlled substance without a prescription by a licensed medical practitioner, and to undergo available treatment for drug or alcohol dependency. N.J.S.A. 2A:162-17(b)(2)(h) and (i). Because many crimes are committed by persons while under the influence of a mind-altering drug (which may affect the ability to project future consequences and thus undermine the general deterrent effect of the threat of criminal punishment), or are committed to raise money to support the offender's drug habit, an untreated addiction can be a reliable indicator of future criminal activity. See also subsection 7.6.4. Accordingly, when a prosecutor has an objective basis for believing that a defendant is drug or alcohol dependent as defined in N.J.S.A. 2C:35-14, the prosecutor shall notify the court of the basis for this belief, and request that, as a condition of release, the defendant be ordered to refrain from use of any narcotic drug or other controlled substance without a prescription by a licensed medical practitioner, and to undergo available treatment for drug or alcohol dependency as authorized by N.J.S.A. 2A:162-17(b)(2). See also N.J.S.A. 2C:35-14.1 (defendant required to submit to professional diagnostic assessment).

In determining whether there is an objective basis to believe that the defendant is suffering from the disease of addiction, the prosecutor may consider all relevant circumstances, including but not limited to the following:

- (a) whether the defendant appeared to be under the influence of a controlled substance or alcohol at the time of the offense, or has admitted to being a drug user;
- (b) whether the defendant previously has been arrested or convicted for drug possession; and



(c) whether the defendant previously has been admitted to or found clinically eligible for the Drug Court Program.

6.2.5 *Electronic Monitoring, House Arrest, Curfews, Restrictions on Personal Associations, and Other Release Conditions.*

An assistant prosecutor or deputy attorney general shall as appropriate request that the court impose any other release condition authorized by N.J.S.A. 162-17(b)(2)(a) to (l) where the prosecutor has reason to believe that such condition is needed to reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process. See also subsection 6.2.2 (electronic monitoring by pretrial services program in domestic violence cases when a no-contact restraining order or release condition is imposed).

6.3 Restrictions on Requests for Imposition of Monetary Bail.

6.3.1 *General Considerations.*

Monetary bail remains an available option under the Bail Reform Law, but only as a last resort when the court finds that release on non-monetary conditions will not reasonably assure the defendant's appearance in court when required. N.J.S.A. 2A:162-17(c). The law makes clear that monetary bail must not be imposed for the purpose of preventing the defendant's release. Ibid. Furthermore, the statute provides that monetary bail can be used only to discourage flight; it may not be used to assure the safety of any other person or the community or to assure that the defendant will not obstruct or attempt to obstruct the criminal justice process. Ibid. Thus, if a prosecutor determines in accordance with this Directive that non-monetary conditions will not reasonably assure the protection of the safety of any other person or the community and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, a prosecutor shall not seek imposition of monetary bail, but rather shall seek pretrial detention in accordance with Section 7 of this Directive.

The Bail Reform Law is intended to end New Jersey's historical reliance upon monetary bail, replacing the current resource-based pretrial release system with a risk-based system. See Section 1.2. There may, however, be cases where monetary bail is authorized and appropriate. In some limited situations, it may be possible to discourage flight by setting monetary bail at an amount that the defendant can afford to post but could not afford to forfeit. To ensure that monetary bail is used only to incentivize a defendant to appear in court and is not sought for the purpose of preventing a defendant's release, a prosecutor shall not seek imposition of monetary bail without having information to indicate that the defendant has assets that could be used to post the requested amount of monetary bail. A prosecutor shall not seek imposition of monetary bail in an amount that the defendant cannot afford to satisfy.

### 6.3.2 *Presumption Against Seeking Monetary Bail.*

A prosecutor shall not request a court to impose monetary bail pursuant to N.J.S.A. 2A:162-17(c) except as may be authorized pursuant to this Section. Consistent with the statutory framework that relegates monetary bail as the last option for pretrial release conditions relating to flight risk, there shall be a presumption against seeking monetary bail that can be overcome only in accordance with the process and criteria set forth in subsection 6.3.3.

In determining whether to overcome the presumption against requesting imposition of monetary bail, a prosecutor shall consider only those facts and circumstances that have a material bearing on the risk that the defendant if released would not appear in court when required. Facts relevant only to the risk that defendant might commit new criminal activity, other than the offense of bail jumping in violation of N.J.S.A. 2C:29-7, or might commit a violent crime or obstruct or attempt to obstruct the criminal process, shall not be considered in deciding whether to overcome the presumption against seeking monetary bail established in this Section.

Note, however, that some case-specific facts, such as a defendant's affiliation with a gang, may be relevant both to the risk of flight and the risk of violence and/or witness intimidation. See note 10. Prosecutors, therefore, should be analytically precise in specifying the facts and circumstances relied upon to support the determination that defendant poses a flight risk, that this risk cannot be addressed adequately by imposing non-monetary release conditions, but could be managed if the court were to impose a monetary bail condition. See also Section 7.5 (prosecutor seeking pretrial detention must specify which of the distinct risks addressed in the Bail Reform Law would be posed if the defendant were to be released).

### 6.3.3 *Overcoming the Presumption Against Monetary Bail.*

A prosecutor may request the imposition of monetary bail only if the County Prosecutor or First Assistant Prosecutor, or the Director of the Division of Criminal Justice or a Deputy Director in cases prosecuted by the Division, determines that: (1) imposition of monetary bail as a condition of the defendant's release is authorized by the Bail Reform Law, (2) no non-monetary release condition or combination of conditions would be sufficient to reasonably assure the defendant's appearance in court when required, (3) the defendant is reasonably believed to have financial assets that will allow him or her to post monetary bail in the amount requested by the prosecutor without having to purchase a bond from a surety company or to obtain a loan, and (4) imposition of monetary bail set at the amount requested would, subject to the provisions of subsection 6.3.4, make it unnecessary for the prosecutor to seek pretrial detention.

### 6.3.4 *Presumptive Inquiry as to Defendant's Interest in Ensuring That Monetary Bail Is Not Forfeited.*

The Bail Reform Law does not repeal other statutory provisions that authorize, or in some cases require, a court to conduct a monetary bail source or sufficiency inquiry on application of the

prosecutor to determine, inter alia, “defendant’s interest in ensuring that the bail is not forfeited.” See N.J.S.A. 2A:162-13. Nothing in this Directive shall be construed to limit a prosecutor’s authority to examine the source and bona fides of the assets used to post monetary bail, or to argue that the manner in which a monetary bail condition actually was satisfied fails to provide adequate incentive for the defendant to appear when required.

Prosecutors should consider that if there is reason to believe that the defendant is inclined to abscond from the jurisdiction of a criminal court, the defendant also might be inclined to forfeit a monetary bail bond premium and default on any debt owed to a surety company. A flight-prone defendant prepared to flaunt the authority of the criminal judicial system, in other words, may be just as likely to flaunt a bail bond company’s authority to enforce a civil debt. Thus, if a defendant’s motivation to flee is sufficient to warrant imposition of monetary bail under the new statutory framework, the defendant might not have sufficient interest in ensuring that the surety company’s bond is not forfeited.

Accordingly, if the prosecutor has reason to believe that a defendant has satisfied a monetary bail condition by means of a bond posted by a surety company, or by posting money obtained from another, whether by gift or any form of loan, the prosecutor shall ask the court to conduct a monetary bail source/sufficiency inquiry pursuant to N.J.S.A. 2A:162-13, unless the County Prosecutor or First Assistant Prosecutor, or the Director of the Division of Criminal Justice or a Deputy Director in cases prosecuted by the Division, determines that such an inquiry is not needed to determine whether the defendant has an adequate interest in ensuring that monetary bail is not forfeited.

#### **6.4 Documentation or Appeal When Specific Request for Special Release Condition Is Denied.**

If a request for imposition of a special release condition is denied by the court, the assistant prosecutor or deputy attorney general shall document the request and denial in the case file.

There may be circumstances where a prosecutor refrains from seeking pretrial detention only because the prosecutor assumes that the court will impose maximum release conditions pursuant to the automated pretrial risk-assessment results and the AOC’s “Decision Making Framework.” If the prosecutor determines that only those maximum conditions and level of monitoring would be sufficient to manage the risk(s) posed by defendant’s release, see subsections 7.4.1 and 7.4.2, and the court does not impose such necessary conditions, the prosecutor shall object to defendant’s release on inadequate conditions, shall notify the Division of Criminal Justice, and shall, if necessary and when feasible, seek reconsideration by the court and/or initiate an appeal.

## **7. PRETRIAL DETENTION MOTIONS**

### **7.1 General Policy and Decision Framework.**

Under the Bail Reform Law, only certain “eligible defendants” as that term is defined in N.J.S.A. 2A:162-15 are subject to pretrial detention. Cf. Section 1.6. Specifically, the statute



authorizes pretrial detention of eligible defendants (i.e., defendants charged by complaint-warrant) who are charged with an indictable crime or a non-indictable offense involving domestic violence. See N.J.S.A. 2A:162-18(a) and N.J.S.A. 2A:162-19(a).

The Bail Reform Law creates a general presumption against preventive detention except in cases where a defendant is charged with murder or is facing an ordinary or extended term of life imprisonment. The statutory presumption of pretrial release that applies in all other cases is overcome only when the State establishes by clear and convincing evidence that no release condition or combination of conditions will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process. See N.J.S.A. 2A:162-19. Pursuant to that statutory standard, under this Directive it shall be the exception, not the norm, for a prosecutor to seek pretrial detention, and no motion for pretrial detention shall be filed except as may be authorized by this Directive.

In deciding whether to seek pretrial detention, prosecutors will be expected to give substantial weight to the results of the objective pretrial risk-assessment process approved by the AOC pursuant to N.J.S.A. 2A:162-25(c). However, as noted throughout this Directive, the pretrial risk-assessment process approved by the AOC does not account for all facts and circumstances that may have a material bearing on the risks posed by a defendant's release pending trial. See note 8 (noting that some provisions of this Directive establish grounds for invoking a presumption that are independent of the automated pretrial risk-assessment results). A prosecutor, therefore, should consider any additional relevant information that may be reasonably available, see subsections 4.2.2 to 4.2.5 and Section 7.6, provided, however, that the prosecutor shall not rely on any such additional information as the basis for deciding to overcome the presumption against pretrial detention pursuant to this Directive unless the prosecutor is prepared to establish that fact or circumstance at a detention hearing.<sup>23</sup>

To help achieve an appropriate degree of statewide uniformity in the exercise of prosecutorial discretion, this Section establishes a pretrial detention decision-making framework consisting of three categories of cases. For each category, there is rebuttable presumption<sup>24</sup> of whether to seek pretrial

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23

The Bail Reform Law expressly provides that “[t]he rules concerning the admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the [detention] hearing.” N.J.S.A. 2A:162-19(e)(1). Accordingly, a prosecutor may rely upon and present, for example, hearsay evidence to establish the legal basis for a pretrial detention order.

24

The presumptions on when to seek or refrain from seeking pretrial detention established in this Directive should not be confused with the statutory presumption of pretrial release under the Bail Reform Law, see N.J.S.A. 2A:162-17, or the statutory presumption of detention established under the Bail Reform Law when a defendant is charged with murder or is subject to an ordinary or extended term of life imprisonment. See N.J.S.A. 2A:162-19(b). Although those statutory presumptions are accounted for, this Directive creates additional presumptions *to be used by prosecutors* in deciding whether to file a pretrial detention and/or revocation of release motion. The presumptions established in Section

detention that serves to channel the exercise of prosecutorial discretion. In addition, this framework specifies the level of authority within a prosecutor's office needed to approve the decision to overcome a presumption.

The first category establishes a presumption against filing a motion for pretrial detention, which can be overcome only when the County Prosecutor or First Assistant Prosecutor, or Director or a Deputy Director of the Division of Criminal Justice in matters prosecuted by the Division, finds that certain special conditions exist to justify preventive detention. This first category includes all cases that do not fall under either the second or third categories. It is expected that a large majority of cases will fall under the first category.

The second category deals with especially serious crimes where the State will be expected to seek pretrial detention unless the County Prosecutor or First Assistant Prosecutor, or Director or a Deputy Director of the Division of Criminal Justice in matters prosecuted by the Division, determines that compelling and extraordinary circumstances exist to justify the decision not to seek preventive detention. See Section 7.3. This second category applies to cases where the Legislature has established a presumption that the defendant will be detained; that is, cases where defendants are charged with murder or otherwise are subject to an ordinary or extended term of life imprisonment. See N.J.S.A. 2A:162-19(b).

The third category deals with situations where this Directive establishes a more flexible presumption that the State will seek pretrial detention unless a supervisory prosecutor designated by the County Prosecutor or Director of the Division of Criminal Justice finds that maximum conditions of release will adequately control the risks posed by defendant's release, or where the supervisor otherwise determines that the interests of justice would not be served by pretrial detention. See subsections 7.4.2 and 7.4.3. This third category applies to cases where new Rule 3:4A(b)(5) recognizes a prima facie basis for meeting the clear-and-convincing evidence standard required to order pretrial detention, that is, those cases where the pretrial services program's recommendation is that the defendant not be released, or if released, only under the maximum level of monitoring. That recommendation by the pretrial services program is based on the results of the objective pretrial risk-assessment process approved by the AOC, which, in turn, is based on empirical research.

The third category also applies to cases where the automated pretrial risk-assessment results in a high Failure to Appear (FTA) or New Criminal Activity (NCA) score, see note 9 and subsection 7.4.2, or if a New Violent Criminal Activity (NVCA) flag is raised, see subsection 7.4.5, or where the pretrial risk-assessment process results in a moderate risk of Failure to Appear or New Criminal Activity and the defendant has a violent juvenile history. See subsection 7.4.3. This third category also includes cases where the current charge is serious and was committed while defendant was on

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7 and 8 of this Directive, in other words, are designed only to channel the exercise of prosecutorial discretion in deciding whether to *seek* pretrial detention or revocation of release, and nothing in this Directive should be construed as suggesting that courts are obliged to apply any presumption other than the ones codified in the Bail Reform Law or in Court Rules that implement the statute and constitutional amendment.

pretrial release for another offense or was subject to any form of post-conviction monitoring. See subsection 7.4.4. Note that because the risk indicators addressed in the third category are closely related and overlap, a particular case may fall under two or more subsections within this third category.

Note that in addition to establishing substantive standards and criteria to guide the exercise of prosecutorial discretion in deciding when to seek pretrial detention, this Directive establishes *procedural* safeguards to ensure consistency and uniformity. Certain decisions must be approved by the County Prosecutor or First Assistant Prosecutor, or by the Director of the Division of Criminal Justice or a Deputy Director in cases prosecuted by the Division, while certain other decisions may be made by other supervisory assistant prosecutors/deputy attorneys general designated by the County Prosecutor or Director. Specifically, County Prosecutor/First Assistant/Director/Deputy Director approval is required before a pretrial detention motion may be filed unless the Bail Reform Law creates a presumption of detention (i.e., where the defendant is charged with murder or is subject to an ordinary or extended term of life imprisonment), or unless this Directive establishes a rebuttable presumption of seeking pretrial detention. See Section 7.4. In addition, County Prosecutor/First Assistant/Director/Deputy Director approval is required if the decision is to *refrain* from seeking pretrial detention in a case where the defendant is charged with murder or is subject to an ordinary or extended term of life imprisonment. See Section 7.3. The approval of a designated supervisor is sufficient when the decision is made to seek pretrial detention, or refrain from seeking detention, in a case where this Directive establishes a rebuttable presumption of filing a pretrial detention motion. See Section 7.4. See also Section 7.8. (designation of supervisors).

## 7.2 Presumption Against Applying for Pretrial Detention.

In any case not otherwise covered under Sections 7.3. or 7.4, the prosecutor shall not apply for pretrial detention unless the County Prosecutor or First Assistant Prosecutor, or the Director or a Deputy Director of the Division of Criminal Justice in cases prosecuted by the Division, determines that:

- (a) specific facts or circumstances justifying pretrial detention were not adequately accounted for by the automated pretrial risk-assessment process;
- (b) the State will be able to present clear and convincing evidence at the detention hearing to overcome the statutory presumption against pretrial detention; and
- (c) if defendant were released, even on maximum conditions, there is a serious risk that defendant (i) will not appear in court when required, (ii) will pose a danger to any other person or the community, or (iii) will obstruct or attempt to obstruct the criminal justice process, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.



7.3 Cases Where a Motion to Seek Pretrial Detention Must Be Filed Absent Compelling and Extraordinary Circumstances.

If the defendant is charged with murder (N.J.S.A. 2C:11-3), or upon conviction of any other charged offense would be eligible for an ordinary or extended term of life imprisonment,<sup>25</sup> the prosecutor shall apply for pretrial detention unless the County Prosecutor or First Assistant Prosecutor, or the Director or a Deputy Director of the Division of Criminal Justice in cases prosecuted by the Division, finds that there are compelling and extraordinary reasons not to seek pretrial detention.

7.4 Cases Where the Prosecutor Is Presumed to Seek Pretrial Detention.

7.4.1 *Cases Invoking the Prima Facie Evidence Feature of Rule 3:4A(b)(5).*<sup>26</sup>

In cases not otherwise covered under Section 7.3, unless the presumption of seeking pretrial detention is overcome pursuant to subsection 7.4.6, the prosecutor shall apply for pretrial detention if the pretrial services program determines that release is not recommended, or if released that maximum conditions be imposed.

7.4.2 *Serious Crimes Involving a High Risk Score.*

In cases not otherwise covered under Section 7.3, unless the presumption of seeking pretrial detention is overcome pursuant to subsection 7.4.6, the prosecutor shall apply for pretrial detention if the present charge is for a first- or second-degree crime and the Failure to Appear (FTA) or New Criminal Activity (NCA) score determined by the automated pretrial risk-assessment process is 5 or 6.

7.4.3 *Serious Crimes Involving a Moderate Risk Score and Violent Juvenile History.*

In cases not otherwise covered under Section 7.3, unless the presumption of seeking pretrial detention is overcome pursuant to subsection 7.4.6, the prosecutor shall apply for pretrial detention if the present charge is for a first- or second-degree crime and the New Criminal Activity (NCA) score determined by the automated pretrial risk assessment is 4 and the defendant as a juvenile had been

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In these circumstances, the Bail Reform Law establishes a presumption that the defendant will be detained, N.J.S.A. 2A:162-19(b), unless the court finds that the presumption is rebutted by a preponderance of the evidence. See N.J.S.A. 2A:162-19(e)(2).

<sup>26</sup>

Rule 3:4A(b)(5) provides that a court may consider as prima facie evidence sufficient to overcome the presumption of release a recommendation by the pretrial services program that the defendant's release is not recommended (i.e., a determination that "release not recommended or if released, maximum conditions"). This recommendation, in turn, is based on the objective pretrial risk-assessment process approved by the AOC.

adjudicated delinquent within the preceding ten years for a crime involving a firearm, or a crime that if committed by an adult would be subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, or an attempt to commit any of the foregoing offenses. Nothing in this subsection shall be construed to preclude a prosecutor from considering other adjudications of delinquency (e.g., adjudications for violent or firearms-related crimes that occurred more than ten years ago, or adjudications for offenses other than firearms-related or NERA crimes) as may be relevant as part of the totality of the circumstances when determining whether to overcome the presumption against seeking pretrial detention in Section 7.2 or the presumption against seeking revocation of release in Section 8.2. See also subsection 7.6.1.

*7.4.4 Serious Crimes Committed While on Pretrial Release for Another Offense or While on Any Form of Post-Conviction Supervision.*

In cases not otherwise covered under Section 7.3, unless the presumption of seeking pretrial detention is overcome pursuant to subsection 7.4.6, the prosecutor shall apply for pretrial detention if the present offense is a crime of the first or second degree, and the defendant committed the present offense:

- (a) while on pretrial release for an indictable crime or a disorderly persons offense involving domestic violence as defined in N.J.S.A. 2C:25-19(a), whether that previous offense had been charged by complaint-warrant or complaint-summons, or
- (b) while on probation, special probation, intensive supervision program (ISP), parole, or was on pretrial intervention (PTI) where the defendant had pleaded guilty as required by N.J.S.A. 2C:43-12(g)(3) (see P.L. 2015, c. 98), or if the defendant was on release pending sentencing or appeal. See note 18.

*7.4.5 Cases Involving a New Violent Criminal Activity Flag.*

In cases not otherwise covered under Section 7.3, unless the presumption of seeking pretrial detention is overcome pursuant to subsection 7.4.6, the prosecutor shall apply for pretrial detention if the automated pretrial risk assessment raises a New Violent Criminal Activity (NVCA) flag.

*7.4.6 Overcoming the Presumption of Seeking Pretrial Detention.*

In any case where there is a rebuttable presumption of seeking pretrial detention pursuant to subsection 7.4.1, 7.4.2, 7.4.3, 7.4.4, or 7.4.5, the prosecutor shall file a motion for pretrial detention unless a supervisory prosecutor designated pursuant to Section 7.8 determines that: (1) the risks posed by defendant's release can be controlled adequately by imposing release conditions monitored by the pretrial services program, or (2) the interests of justice would not be served by applying for pretrial detention. If the determination is made to overcome the presumption of applying for pretrial detention, the supervisory prosecutor shall document the reason(s) for that decision in the case file.

## 7.5 Specifying Legal and Factual Basis for Pretrial Detention Application.

All motions for pretrial detention shall be filed electronically through the eCourts system. When the prosecutor files a motion for pretrial detention, the prosecutor shall specify whether the application is based on the risk that (1) defendant will not appear in court when required; (2) defendant will endanger the safety of any other person or the community; (3) defendant will obstruct or attempt to obstruct the criminal justice process, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror; or (4) any combination of the foregoing specified risks.<sup>27</sup>

## 7.6 Relevant Facts and Circumstances.

### 7.6.1 *General Rule.*

In determining whether to sustain or overcome a presumption established in this Section or Section 8, the prosecutor may consider any fact or circumstance that has a material bearing on the risk that defendant, if released, will not appear in court when required, will endanger the safety of any other person or the community, and/or will obstruct or attempt to obstruct the criminal justice process, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror. The Bail Reform Law provides a list of broad categories of information that a court may take into account in determining whether to order pretrial detention. See N.J.S.A. 2A:162-20(a) to (f).<sup>28</sup>

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<sup>27</sup>

This specification may limit the type of evidence or information that would be relevant to the pretrial detention decision, and thus limit the scope of the detention hearing.

<sup>28</sup>

N.J.S.A. 2A:162-20 provides that a court, when determining whether to order pretrial detention, may take into account information concerning:

- (a) the nature and circumstances of the offense charged;
- (b) the weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded;
- (c) the history and characteristics of the eligible defendant, including:
  - (1) the eligible defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
  - (2) whether, at the time of the current offense or arrest, the eligible defendant was on probation, parole, or other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal law, or the law of this or any other state;
- (d) the nature and seriousness of the danger to any other person or the community that would be posed by the eligible defendant's release, if applicable;



It should be noted that this Directive does not attempt to identify every specific fact or circumstance pertaining to an offense or an offender that might be relevant in presenting the risks that a defendant's release would pose.

#### *7.6.2 Establishing Existence of Certain Relevant Facts and Circumstances.*

Notwithstanding any other provision of this Section, with respect to any fact or circumstance that is not accounted for in the automated pretrial risk-assessment process (e.g., street gang or other organized crime involvement, especially heinous manner in which offense was committed, threatening statements made by defendant, untreated addiction or mental illness associated with violent or other criminal behavior, out-of-state charges or convictions, nature and extent of history of juvenile delinquency, expunged records, etc.), the prosecutor shall not consider such fact or circumstance as a basis for overcoming the presumption against pretrial detention pursuant to Sections 7.2 or 8.2 unless the prosecutor is prepared to establish that fact or circumstance at a detention hearing. See also note 23 and accompanying text (noting that the Bail Reform Law allows hearsay evidence at a pretrial detention hearing).

#### *7.6.3 Accounting for Impact of Offense and Pretrial Release on Victim.*

When the impact of the crime on a victim is relevant to the pretrial detention decision,<sup>29</sup> the

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(e) the nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the eligible defendant's release, if applicable; and

(f) the release recommendation of the pretrial services program obtained using a risk assessment instrument under N.J.S.A. 2A:162-25.

<sup>29</sup>

The Crime Victims' Bill of Rights, N.J.S.A. 52:4B-36, affords rights that may be implicated by the implementation of the Bail Reform Law and this Directive, including the right:

(k) To be advised of case progress and final disposition and to confer with the prosecutor's representative so that the victim may be kept adequately informed;

(m) To submit a written statement, within a reasonable amount of time, about the impact of the crime to a representative of the prosecuting agency which shall be considered prior to the prosecutor's final decision concerning whether formal criminal charges will be filed, whether the prosecutor will consent to a request by the defendant to enter a pre-trial program, and whether the prosecutor will make or agree to a negotiated plea;

(p) To be present at any judicial proceeding involving a crime or any juvenile proceeding involving a criminal offense, except as otherwise provided by Article I, paragraph 22 of the New Jersey Constitution;

(q) To be notified of any release or escape of the defendant;

(r) To appear in any court before which a proceeding implicating the rights of the victim is being held, with standing to file a motion or present argument on a motion filed to enforce any right conferred herein or by Article I, paragraph 22 of the New Jersey Constitution, and to receive an adjudicative decision by the court

prosecutor shall consider such impact as part of the consideration of the “nature and circumstances of the offense charged.” See N.J.S.A. 2A:162-20(a) (recognizing the relevance of the nature and circumstances of the offense charged as a factor a court may consider in determining whether to order pretrial detention). The prosecutor in deciding whether to seek pretrial detention also shall consider whether there is reason to believe that defendant’s release would pose a risk to a victim and that a no-contact release condition would not be sufficient to control any such risk. Nothing herein shall be construed in any way to suggest that a victim should be called as a witness at a pretrial detention hearing, see note 23 and accompanying text (noting that the Bail Reform Law allows hearsay evidence at a pretrial detention hearing), and a prosecutor shall object and, if necessary, seek an interlocutory appeal if the defendant attempts to call a victim as a witness at a pretrial detention hearing. See also Sections 13.1 and 16.1 (uniform positions on legal issues arising under the Bail Reform Law).

*7.6.4 Legal Position Concerning Eligibility for Pretrial Detention When Monitoring Services That Might Manage Risk(s) Are Not Available.*

There may be cases where the prosecutor determines that the risk(s) posed by the defendant upon release can be adequately managed only by some form of monitoring or intervention service that is not provided by the pretrial services program or otherwise is not available to mitigate the risk(s). By way of example, a defendant’s criminal activity that is related to his or her addiction (e.g., robberies or residential burglaries committed to acquire funds to support the defendant’s drug dependency) might be interrupted by participating in a court-ordered treatment program, as shown by the proven success of New Jersey’s Drug Court Program, which provides treatment opportunities and incentives to break the vicious cycle of addiction and crime. See N.J.S.A. 2A:162-17(b)(2)(i) (pretrial release conditions might include that the defendant “undergo available . . . treatment . . . for drug or alcohol dependency”) (emphasis added to note that the Legislature recognized that pretrial treatment might not be available). See also subsection 6.2.4. As a matter of reasonable statutory interpretation and sound public policy, a defendant should not be deemed to be immune from pretrial detention because unavailable release conditions in theory might have been sufficient to manage the identified risk(s) posed by defendant’s release pending trial.

In such cases, if the prosecutor determines in accordance with the other provisions of Section 7 of this Directive to seek pretrial detention, the prosecutor shall argue at the pretrial detention hearing that, for practical and legal purposes, no condition or combination of conditions would reasonably assure the defendant’s appearance in court when required, the protection of the safety of any other person or the community, and that defendant will not obstruct or attempt to obstruct the criminal justice process. In other words, the prosecutor shall argue that pretrial detention is authorized under the Bail Reform Law if the risk(s) posed by defendant’s release will remain serious and unabated due to the practical unavailability of a release condition that otherwise might have mitigated the risk(s).

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on any such motion.

Nothing in this subsection shall be construed as creating a presumption to seek pretrial detention. Rather, this subsection provides uniform guidance to prosecutors on how to address a defense argument that pretrial detention cannot be ordered as a matter of law if any condition expressly authorized by N.J.S.A. 2A:162-17(b) would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, and that defendant will not obstruct or attempt to obstruct the criminal justice process, even when that condition is not actually available. See also Section 13 (provisions to ensure uniform interpretation of the Bail Reform Law by prosecutors).

#### *7.6.5 Juvenile Waiver Cases.*

In the event that a juvenile is waived to adult court pursuant to N.J.S.A. 2A:4A-26.1 (involuntary waiver) or N.J.S.A. 2A:4A-27 (waiver at election of juvenile), and a complaint-warrant is issued pursuant to Section 4.8 so that the juvenile is an "eligible defendant" within the meaning of N.J.S.A. 2A:162-15, in deciding whether to seek pretrial detention the prosecutor shall apply the relevant facts and circumstances of the offense and the defendant's history of juvenile delinquency to the appropriate subsection(s) of this Section as if the person originally had been arrested and charged by complaint-warrant as an adult. See Section 4.8 and subsection 2.2.1 (a juvenile waived to adult court shall be treated as an adult under this Directive). It is expected that the circumstances justifying an involuntary waiver (e.g., the nature and seriousness of the charges and/or the nature and extent of any prior history of delinquency) often will invoke a presumption under this Directive to seek pretrial detention.

#### *7.6.6 Expunged Records.*

A prosecutor, in determining whether to overcome the presumption against seeking pretrial detention pursuant to Section 7.2, may consider expunged records as part of the totality of relevant circumstances. See N.J.S.A. 2C:52-21 ("expunged records . . . of prior arrests or convictions shall be provided to any court, county prosecutor, the Probation Division of the Superior Court, the pretrial services agency, or the Attorney General when same are requested for use in conjunction with a bail hearing, [or] pretrial release determination pursuant to sections 1 through 11 of P.L. 2014, c. 31 [the Bail Reform Law]").

#### 7.7 Re-Considering Decision to Seek Detention and Re-Opening Detention Hearing.

A prosecutor may at any time reconsider the decision to seek pretrial detention based on information that would be relevant pursuant to this Directive and that was not known to the prosecutor at the time an initial decision was made not to seek pretrial detention. Furthermore, if the court denies a prosecutor's motion for pretrial detention, the prosecutor may seek to re-open the hearing based on information not known at the time of the initial hearing that has a material bearing on the pretrial detention issue. See N.J.S.A. 2A:162-19(f).



7.8 Designation of Supervisors.

Each County Prosecutor, and the Director of the Division of Criminal Justice, shall designate one or more supervisor-level assistant prosecutors or deputy attorneys general who shall be authorized to approve the decision to overcome a presumption established pursuant to Section 7 or 8 of this Directive.

7.9 Training.

The Division of Criminal Justice, in cooperation with the Attorney General's Advocacy Institute and in consultation with the County Prosecutors Association of New Jersey, shall develop and periodically update one or more continuing legal education courses that discuss legal issues, best prosecutorial practices and procedures, and advocacy skills relating to preventive detention and revocation of release under the Bail Reform Law. Every County Prosecutor, First Assistant Prosecutor, Director and Deputy Director of the Division of Criminal Justice, and assistant prosecutors and deputy attorneys general designated pursuant to Section 7.8, shall be required to attend this course, and thereafter shall attend such additional courses or seminars as may be prescribed by the Director for persons who review and approve the decision to seek or refrain from seeking pretrial detention.

This Section shall become operational immediately upon issuance of this Directive.

7.10 Notification When Motion for Pretrial Detention Is Denied.

If a prosecutor files a motion for pretrial detention pursuant to this Directive and the court denies the motion and releases the defendant, the prosecutor shall notify the Director of the Division of Criminal Justice to consider appropriate remedies, including but not limited an appeal. Notification shall be made in the form and manner as prescribed by the Director. See also Section 15 (ongoing study and evaluation of Bail Reform Law's effectiveness and impact).

In the event that the defendant thereafter is charged with a new crime while on release or flees and the prosecutor seeks revocation of release pursuant to Section 8 or initial pretrial detention on the new charge pursuant to Section 7, the prosecutor shall provide a copy of the motions papers to the court that had denied the pretrial detention motion even if that court is not the court that will decide the revocation of release or new pretrial detention motion.

## 8. MOTIONS TO REVOKE RELEASE

### 8.1 General Authority to Revoke Release.<sup>30</sup>

N.J.S.A. 2A:162-24 authorizes a court on motion of a prosecutor to revoke a defendant's release and order the defendant detained pending trial when the defendant has been released from custody on a complaint-warrant pursuant to N.J.S.A. 2A:162-17 or -22, and the defendant while on release violated a restraining order or condition of release, or upon a finding of probable cause to believe that the defendant committed a new crime while on release. To order revocation of release, the court must find clear and convincing evidence that no condition of release would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process.

To achieve an appropriate degree of statewide uniformity in exercising prosecutorial discretion in deciding when to seek revocation of release, this Section establishes a decision-making framework similar to the one set forth in Section 7 governing the decision to seek initial pretrial detention.

### 8.2 Presumption Against Applying for Revocation of Release.

In any case where there is probable cause to believe that a defendant has committed an offense while on release for an offense charged by complaint-warrant and the case is not covered under Section 8.3 or 8.4, the prosecutor shall not file a motion for revocation of release under N.J.S.A. 2A:162-24 unless the County Prosecutor or First Assistant Prosecutor, or the Director or a Deputy Director of the Division of Criminal Justice in cases prosecuted by the Division, determines that:

- (a) the State will be able to present clear and convincing evidence at the revocation hearing to justify revocation, and
- (b) unless release is revoked and defendant is detained, there is a serious risk that defendant
  - (i) will not appear in court when required,

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Until now, prosecutors have been precluded from seeking initial preventive detention under Article I, paragraph 11 of the New Jersey Constitution, which was interpreted to establish a "right to bail" in non-capital cases. However, courts in this State always had the authority to revoke a defendant's release status if the defendant had been released on bail or non-monetary conditions and violated those conditions, thus forfeiting the state constitutional right to pretrial release by his or her wrongdoing. See Steele, supra, 430 N.J. Super. at 41 (recognizing that violation of a non-monetary condition of bail designed to protect the community may trigger revocation, referring to the court's "inherent power to confine the defendant"). The Bail Reform Law, moreover, expressly recognizes in this regard that "nothing [in the Act] would be construed to affect the court's existing authority to revoke pretrial release prior to the effective date of those sections [that depend on the effective date of the amendment to Article I, paragraph 11 to authorize the denial of pretrial release]." Statement to S. 946, Second Reprint, 216th Leg. (June 31, 2014) (emphasis added).

(ii) will pose a danger to any other person or the community, or

(iii) will obstruct or attempt to obstruct the criminal justice process, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

8.3 Cases Where a Motion for Revocation of Release Must Be Filed Absent Compelling and Extraordinary Circumstances.

In any case where there is probable cause to believe that a defendant has committed a crime subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, while on release for any first- or second-degree crime charged by complaint-warrant, the prosecutor shall file a motion seeking revocation of release pursuant to N.J.S.A. 2A:162-24 unless the County Prosecutor or First Assistant Prosecutor, or the Director or a Deputy Director of the Division of Criminal Justice in cases prosecuted by the Division, finds that there are compelling and extraordinary reasons not to seek revocation of release.

8.4 Cases Where the Prosecutor Is Presumed to Seek Revocation of Release.

8.4.1 *Presumption of Seeking Revocation of Release When Serious New Crime Is Committed While on Release for Any Offense Charged by Complaint-Warrant.*

In any case not otherwise covered under Section 8.3, except as authorized pursuant to subsection 8.4.5, where there is probable cause to believe that a defendant has committed a first- or second-degree crime while on release for any offense charged by a complaint-warrant, the prosecutor shall presumptively file a motion seeking revocation of release pursuant to N.J.S.A. 2A:162-24.

8.4.2 *Presumption of Seeking Revocation of Release When Any New Crime Is Committed While on Release for a Serious Crime.*

In any case not otherwise covered under Section 8.3, except as authorized pursuant to subsection 8.4.5, where there is probable cause to believe that a defendant has committed any indictable crime while on release for a first- or second-degree crime charged by complaint-warrant, the prosecutor shall presumptively file a motion seeking revocation of release pursuant to N.J.S.A. 2A:162-24.

8.4.3 *Presumption of Seeking Revocation of Release When Defendant Violates a Domestic Violence Restraining Order.*

In any case not otherwise covered under Section 8.3, except as authorized pursuant to subsection 8.4.5, where a defendant has been released for an offense involving domestic violence charged by a complaint-warrant and there is probable cause to believe that (1) the defendant has violated a restraining order issued pursuant to the Prevention of Domestic Violence Act or an imposed release condition under the Bail Reform Law and (2) has caused or threatened to cause bodily injury to any person protected by the order or condition of release, the prosecutor shall presumptively file



a motion seeking revocation of release pursuant to N.J.S.A. 2A:162-24.

**8.4.4 *Presumption of Seeking Revocation of Release When Defendant Violates a Sexual Assault Survivor Protection Order.***

In any case not otherwise covered under Section 8.3, except as authorized pursuant to subsection 8.4.5, where a defendant has been released for an offense involving sexual assault charged by a complaint-warrant and there is probable cause to believe that (1) the defendant has violated an order issued pursuant to the Sexual Assault Survivor Protection Act, N.J.S.A. 2C:14-13 to -21, and (2) has committed or threatened to commit an act of sexual contact or sexual penetration against any person protected by the restraining order or otherwise caused or threatened to cause bodily injury to any person protected by the restraining order, the prosecutor shall presumptively file a motion seeking revocation of release pursuant to N.J.S.A. 2A:162-24.

**8.4.5 *Overcoming the Presumption of Seeking Revocation of Release.***

In any case where there is a rebuttable presumption of seeking revocation of release pursuant to subsection 8.4.1, 8.4.2, 8.4.3, or 8.4.4, the prosecutor shall file a motion seeking revocation of release pursuant to N.J.S.A. 2A:162-24 unless a supervisory prosecutor designated pursuant to Section 7.8 determines that (1) the risks posed by defendant's release can be controlled adequately by imposing new enhanced release conditions and monitoring, or (2) the interests of justice would not be served by applying for revocation of release. If the determination is made to overcome the presumption of seeking revocation of release, the supervisory prosecutor shall document the reason(s) for that decision in the case file.

**8.5 Relevant Facts and Circumstances.**

All of the provisions of Section 7.6 shall apply to the decision to seek revocation of release pursuant to N.J.S.A. 2A:162-24.

**8.6 Electronic Filing of Application for Revocation of Release.**

All motions for revocation of release shall be filed electronically through the eCourts system.

**8.7 Combining Revocation-of-Release and Initial Pretrial Detention Motions.**

Nothing in Section 8 shall be construed to preclude the State from also seeking initial pretrial detention on new charges as authorized pursuant to Section 7 of this Directive.

**8.8 Notification When Application for Revocation of Release Is Denied.**

If a prosecutor files an application for revocation of release pursuant to this Section and the court denies the motion, the prosecutor shall notify the Director of the Division of Criminal Justice on a form and in a manner as shall be prescribed by the Director. See also Section 15 (ongoing study

and evaluation of Bail Reform Law's effectiveness and impact).

In the event that the defendant thereafter is charged with yet another new crime while on release and the prosecutor again seeks revocation of release pursuant to Section 8, or initial pretrial detention on the new charge pursuant to Section 7, the prosecutor shall provide a copy of the motions papers to the court that had denied the revocation of release motion even if that court is not the court that will decide the new revocation of release motion or a new initial pretrial detention motion.

**9. NOTICE TO PROSECUTOR OF SUSPECTED VIOLATIONS OF PRETRIAL RELEASE CONDITIONS**

In the event that a law enforcement agency or officer has reason to believe that a defendant has violated a condition of pretrial release, the agency or officer shall promptly notify the County Prosecutor handling the case, or the Division of Criminal Justice in cases prosecuted by the Division. The County Prosecutor or Division shall promptly notify the pretrial services program of the circumstances of the violation unless the Prosecutor or Director determines that such notification would jeopardize an investigation or law enforcement operation, or endanger an officer or other person. The prosecutor also shall promptly determine whether to (1) initiate a charge for criminal contempt or any other applicable offense and/or (2) seek revocation of release pursuant to Section 8, or request that additional conditions of release be imposed.

If the suspected violation occurred outside the jurisdiction of the County Prosecutor handling the matter on which pretrial release conditions were imposed, the agency or officer detecting the violation may notify the County Prosecutor having jurisdiction over the place where the violation occurred, in which event that prosecutor shall promptly notify the other County Prosecutor's Office of the violation.

If the violation constitutes a criminal offense and two or more Prosecutor's Offices are involved, the prosecutors shall confer and coordinate their efforts to ensure public and victim protection to the greatest extent possible.

**10. PRIORITIZATION TO EXPEDITE POLICE REPORTS AND TESTS IN DETENTION CASES**

**10.1 Reports Needed for Pretrial Detention Decision.**

Recognizing that pretrial detention decisions must be made by prosecutors and courts within days after the filing of a complaint-warrant, see N.J.S.A. 2A:162-19(d), when a prosecutor is compiling information to decide whether to seek pretrial detention, or is preparing for a detention hearing after having filed a motion for pretrial detention, the prosecutor may request a law enforcement agency that made the arrest or conducted the investigation leading to the arrest to give highest priority to and expedite preparation of any reports that would document information relevant to the pretrial detention decision. Upon receiving such request, the law enforcement agency shall complete and submit such reports to the prosecutor as expeditiously as possible. See also Section

10.4 (Director of the Division of Criminal Justice authorized to exercise Attorney General's authority as State's chief law enforcement officer to resolve disputes and order timely completion of required reports).

10.2 Timely Submission of Requests for Laboratory Analysis.

10.2.1 *Time Limit for Submitting Evidence for Forensic Testing.*

In cases where the defendant is detained before trial, the County Prosecutor or Division of Criminal Justice in cases prosecuted by the Division shall submit evidence for forensic analysis as promptly as possible.

*State Police Office of Forensic Science.* Absent compelling circumstances justifying a delay, requests for forensic analysis (e.g., analysis of suspected controlled substances, DNA, fingerprints, ballistics, etc.) by the New Jersey State Police Office of Forensic Science should be submitted within five business days of the date of arrest.

*Other Laboratories.* Absent compelling circumstances justifying a delay, requests for forensic analysis by any other laboratory operating in association with or under the authority of a County Prosecutor's Office should be submitted within five business days of the date of arrest unless the County Prosecutor has approved a different submission deadline.

10.2.2 *Prompt Notification If Testing No Longer Needed.*

To conserve laboratory resources, in all cases, including those involving defendants who are not detained, in the event that the case is resolved prior to the completion of requested forensic testing, the prosecutor shall within 24 hours of the resolution notify the Office of Forensic Science or other laboratory if no further testing is needed.

10.3 Prosecutor's Authority to Prioritize Completion of Investigative Reports and Forensic Examinations When Needed to Comply with Speedy Indictment/Trial Deadlines.

Recognizing that dangerous offenders may be released if the State fails to comply with a statutory deadline prescribed for indicting or trying a detained defendant, see N.J.S.A. 2A:162-22, in any case where a defendant is detained pending trial, the prosecutor may request any law enforcement agency involved in or supporting the investigation to (1) prepare any report concerning the investigation or otherwise documenting discoverable information, and/or (2) conduct any physical test or forensic examination and submit a report thereon, on a priority basis and by a date specified by the prosecutor that will permit the State to meet the statutorily-prescribed deadline for indictment and/or trial.

The State Police Office of Forensic Science may establish an electronic submission/reporting system to provide an efficient means by which to make and respond to prioritization requests. In that event, the prosecutor shall make a prioritization request to the Office of Forensic Science pursuant



to this Section by means of the system established by that Office.

An agency upon receipt of a prioritization request shall use all available means to submit a requested report and/or complete a requested test/examination and submit a report thereon on or before the date specified in the prosecutor's request. If it is not feasible to submit a requested report or complete a test/examination and submit a report thereon by the date specified by the prosecutor, the agency shall within five business days of receiving the request notify the prosecutor in writing and shall explain the reasons why it is not feasible to comply with the prosecutor's request. The agency also shall indicate the earliest possible date on which the requested report will be submitted or on which the requested test/examination will be completed and report thereon submitted to the prosecutor.

This Section shall be deemed to supersede and preempt any standard operating procedure or protocol of an agency operating under the authority of the laws of the State of New Jersey that otherwise would determine the priority to be given to preparing a report or conducting a test or examination (e.g., a general practice to prioritize tests by the order in which they had been submitted). See also Section 10.4 (Director of the Division of Criminal Justice authorized to exercise Attorney General's authority as State's chief law enforcement officer to resolve disputes and order timely completion of required reports).

#### 10.4 Compliance with Prioritization Requests.

If a prosecutor has reason to believe that an agency is not satisfactorily complying with any of the requirements of this Section, or is not using all available means to submit a requested report and/or conduct a requested test/examination to enable the prosecutor to meet a deadline imposed under the Bail Reform Law, the prosecutor may notify and consult with the Director of the Division of Criminal Justice. The Director is hereby authorized to exercise the Attorney General's authority as chief law enforcement officer of the State and to take such actions as are reasonably necessary to resolve any dispute and to ensure that requested reports are prepared and requested tests/examinations are conducted as expeditiously as possible to ensure that no defendant is released from custody because of a failure to indict or proceed to trial by a deadline established under the Bail Reform Law.

### **11. NOTICE TO ATTORNEY GENERAL OF SPEEDY INDICTMENT/TRIAL VIOLATIONS**

The Judiciary is establishing an automated system to track speedy indictment/trial time limits imposed under the Bail Reform Law and to alert judges, prosecutors, and defense counsel as statutory deadlines approach. Prosecutors are responsible to ensure that all necessary and appropriate steps are taken to ensure that cases are prepared for indictment and trial in a timely manner so that no dangerous defendant will be released due to delays attributed to law enforcement. See also Section 10 (prioritization of police reports and laboratory tests in pretrial detention cases). If a court determines that a deadline imposed under the Bail Reform Law has not been met, the prosecutor responsible for prosecuting the case promptly shall report the circumstances to the Attorney General through the Director of the Division of Criminal Justice. The report shall indicate the reasons for

delay, whether a court found pursuant to N.J.S.A. 2A:162-22(b)(2)(a) that the failure to commence trial in accordance with the time requirements set forth in the Bail Reform Law was due to unreasonable delay by the prosecutor, the steps that were taken by the prosecutor and law enforcement agencies to attempt to comply with the statutory deadlines, and whether a defendant was released from custody as a result of the failure to comply with the speedy indictment/trial requirements of the Bail Reform Law.

## 12. ESCALATING PLEA POLICY

### 12.1 General Policy Considerations.

The vast majority of convictions in this State are the result of a negotiated guilty plea, rather than a trial. As noted in Section 1.3, it is expected and intended that under the Bail Reform Law, many defendants who previously would have been unable to post monetary bail will be released on a complaint-summons, or if a complaint-warrant is issued, will be released on recognizance or on non-monetary conditions. These defendants, hoping to delay their incarceration upon conviction, may have a reduced incentive to accept responsibility and plead guilty in a timely fashion. This will have a significant impact on the goal of swift justice. It therefore is necessary to develop and adapt prosecution policies and practices to encourage those defendants who plead guilty to do so at the earliest opportunity, before the expenditure of significant prosecution and judicial resources.

A study conducted by the Office of the Public Defender reveals that under current practice, as the date for trial approaches, prosecutors often tender an eleventh-hour plea offer that contemplates a more lenient sentence than the one contemplated by a previously-tendered offer. As a result of this common de-escalating plea offer practice, defense attorneys perceive a tactical advantage in advising their clients to hold off accepting a prosecutor's plea offer in the expectation that a more generous offer will be forthcoming.

To prevent or at least minimize delays in both detention and non-detention cases under the Bail Reform Law, it will be necessary for every County Prosecutor's Office and the Division of Criminal Justice to implement and strictly enforce an *escalating* plea policy. One of the key features of any such graduated plea system is that all plea offers must account for the timing of the plea, and generally provide for a longer sentence if the defendant pleads guilty after indictment to account for the additional investment of resources to prosecute the case and the unwillingness of the defendant to accept responsibility in a timely fashion.

Barring a material change in circumstances warranting an exception, the general rule must be that plea offers grow tougher over time, not more lenient. Any such graduated plea system not only provides practical incentives for guilty defendants to plead guilty before significant time and effort is expended in grand jury presentations, post-indictment motion practices, and trial preparation, but also encourages defendants to cooperate and provide substantial assistance in investigating and prosecuting other offenders.

The concept of an escalating plea system, where plea offers become tougher over time, is

hardly new. The Division of Criminal Justice and some County Prosecutors' Offices already employ such a practice, at least in certain types of cases. Furthermore, in drug trafficking cases involving a mandatory term of imprisonment waivable only pursuant to N.J.S.A. 2C:35-12, all prosecutors are required to implement the escalating plea system established in the Attorney General's "Brimage" Guidelines. Similarly, in cases involving aggravated sexual assault against a victim who is less than 13 years old, all prosecutors are required by Attorney General Guidelines to enforce a strict escalating plea policy if they tender a plea offer that reduces the stipulated 25-year sentence pursuant to N.J.S.A. 2C:14-2(d). See Section 4, Uniform Plea Negotiation Guidelines to Implement the Jessica Lunsford Act, P.L. 2014, c. 7 (May 29, 2014).

This approach has been accepted by the courts. In State v. Thomas, 392 N.J. Super. 169, 182 (App. Div.), certif. denied, 192 N.J. 597 (2007), the Appellate Division rejected the defendant's challenge to the formal escalating plea system in the Brimage Guidelines, concluding that "[t]his policy is vital to the operation of the Guidelines and furthers the purposes of section 12 [N.J.S.A. 2C:35-12] waiver, which are to provide incentives for defendants to cooperate with law enforcement and to encourage plea bargaining. The [escalating plea] policy furthers the purposes of the CDRA [Comprehensive Drug Reform Act] to minimize pretrial delay and to ensure the prompt disposition of charges and the prompt imposition of punishment. We note that prompt disposition also aids in the rehabilitation of offenders by enabling them to accept responsibility for their conduct." Ibid. (citations to State v. Brimage, 153 N.J. 1 (1998) omitted).

In State v. Shaw, 113 N.J. 1 (1993), the New Jersey Supreme Court recognized in this regard that early disposition "is an important law-enforcement objective, thus harnessing the most efficient use of prosecutor, defense, and judge time." It also is important to note that the Supreme Court, by its adoption of the so-called "plea cut off" rule codified in Rule 3:9-3(g), has acknowledged that there comes a time when plea discussions must end. That rule provides that after the pretrial conference has been conducted and a trial date has been set, the court may not accept a negotiated plea absent the approval of the Criminal Presiding Judge based on a material change of circumstances or the need to avoid a protracted trial or a manifest injustice.

The escalating plea system required by this Directive will represent a change in practice for many County Prosecutors' Offices in non-Brimage cases, as shown by the Public Defender study that reveals that defense attorneys expect that plea offers routinely will become more lenient, not tougher, as a case progresses through the criminal justice process. It may take some time, therefore, before the defense bar and the judiciary fully appreciate the prosecutors' commitment to a graduated plea system where plea offers routinely become tougher over time. While assistant prosecutors and deputy attorneys general will be responsible for explaining the requirements of this Directive to defense counsel, there undoubtedly will be a transitional "learning curve" period during which defense attorneys will be skeptical of a prosecutor's resolve to enforce an escalating plea policy. This may result in trials in cases that might otherwise have pled guilty at the last minute under the current system. Such trials may be necessary at the outset to help change the legal culture to achieve the long-term speedy trial benefits of a graduated plea system that rewards the timely acceptance of responsibility rather than procrastination and delay tactics.



This Directive, unlike the Brimage Guidelines, does not specify the sentence that should be imposed pursuant to a plea agreement. Nor does this Directive encourage, much less require, that the escalating plea policies issued by County Prosecutors indicate the specific sentences or range of sentences to be imposed on conviction for various offenses. This Directive, in other words, differs from the Brimage Guidelines in that it does not limit a prosecutor's authority to determine the appropriate initial plea offer accounting for all relevant circumstances. Rather, the key feature of the escalating plea policy required by this Directive is that whatever the initial plea offer might be, once it expires, any second or subsequent plea offer must contemplate greater punishment than the expired offer unless a designated supervisor determines that there has been a material change of circumstances in the case warranting the same or lesser sentence than the previous offer contemplated.

Although escalating plea policies established pursuant to this Directive must be strictly enforced, prosecutors are not precluded from considering new information about a case. A material change of circumstances warranting an exception to the general plea escalation rule might include, but need not be limited to: a material change in the nature or strength of proofs available to the State or the defense; a trial court's determination of the inadmissibility of evidence or testimony that the State intended to introduce; new information pertaining to the credibility of a witness; new information pertaining to a defendant's willingness to cooperate; new information or legal/factual argument provided by the defense through discovery or plea discussions; the disposition of charges against a co-defendant, or a change in the position taken by the victim pertaining to a specific negotiated disposition or a change in the victim's general desire that the case be resolved by trial rather than a negotiated guilty plea.

Nothing in this Directive should be construed to limit or discourage negotiations between the prosecutor and defense counsel before a plea offer formally is tendered. Nor does this Directive preclude or discourage negotiations during the period when a tendered plea offer remains outstanding and before it expires. Furthermore, a plea offer should not be set to expire before all required discovery has been provided. See Rule 3:13-3(a) (establishing the State's pre-indictment discovery obligations that are triggered when the prosecutor makes a pre-indictment plea offer). Nothing in this Directive, therefore, would preclude a prosecutor from extending the time within which a defendant can accept or reject a plea offer before it expires and triggers the escalation policy.

The escalating plea system contemplated in this Directive relies on the case evaluation and screening process, which begins with the initial charging decisions made in accordance with Section 4 of this Directive. It cannot be emphasized strongly enough, moreover, that the effectiveness of an escalating plea system will depend on making certain that initial plea offers are reasonable and realistic. These initial offers must reflect an objective assessment of the available proofs in relation to the defense(s) likely to be raised at trial, the likely outcome of any motions to suppress evidence, the seriousness of the crime, the culpability of the defendant considering his or her background and role in the criminal event or scheme, and the sentence the court would likely impose if the defendant were to be convicted after a trial.

## 12.2 Issuance of Escalating Plea Policies.

Every County Prosecutor and the Director of the Division of Criminal Justice shall, no later than October 31, 2016, develop and issue a written escalating plea policy for their office that shall apply to all indictable crimes, not just to offenses that are charged by means of a complaint-warrant or to cases where the defendant is detained pending trial under the Bail Reform Law. The Prosecutor's policy shall take effect no later than January 1, 2017. The County Prosecutor or Director may periodically revise or supplement the escalating plea policy as appropriate.

This Section shall become operational immediately.

## 12.3 Required Features.

Each policy shall include, but need not be limited to, the following provisions/features:

(a) the policy must provide for tendering an initial plea offer based on an objective and realistic assessment of the seriousness of the criminal conduct, the strengths and weaknesses of the State's case, the defendant's culpability and background, the interests of any victim, the likely sentence that would be imposed if defendant were to be convicted after a trial, and such other relevant facts and circumstances as the policy may account for;

(b) the policy must require that an initial plea offer, and all subsequent plea offers, shall include an explicit date, or preferably a court event (e.g., indictment, pretrial conference, hearing on motions, etc.), at which the offer automatically expires unless the time within which to accept or reject the plea offer is extended by the prosecutor;<sup>31</sup>

(c) the policy must provide that once a plea offer is rejected or expires, any subsequent plea offer must call for greater punishment (e.g., a longer term of imprisonment, higher fine, elimination of offered downgrade, etc.) than the previous plea offer, unless a supervisory assistant prosecutor or deputy attorney general determines that a material change in circumstances warrants a sentence more lenient than the one contemplated in the previous plea offer;

(d) the policy must be designed to encourage defendants to plead guilty before indictment and

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Although prosecutors must be mindful of the need for swift justice and a defendant's timely acceptance of responsibility, an extension of the current plea offer may be warranted, for example, to ensure that defense counsel has a reasonable opportunity to review all required discovery and to consult with the defendant as to the likelihood of conviction at trial and the impact of the escalating plea policy on the defendant's penal exposure. In some instances, when feasible, it would be appropriate for a plea offer to announce specifically what the next plea offer will be once the current offer expires barring a material change in circumstances that might warrant a greater or lesser offer. See Brimage Guidelines, §4.7. Some defense counsel report that this practice helps them to convince their clients that the escalating plea policy will be enforced and that it is in their best interests to accept the current offer.

thus before any post-indictment evidentiary hearings (e.g., motions to suppress evidence);<sup>32</sup>

(e) the policy may permit negotiation between the prosecutor and defense counsel (e.g., arguments concerning the strength of the case and likelihood of a guilty verdict, outcome of suppression and other pretrial motions, defendant's culpability and role in the criminal scheme, etc.) before an initial plea offer is tendered, and during the period of time when a tendered plea offer remains outstanding and has not expired;

(f) the policy shall not require a defendant to agree not to apply for Drug Court, or otherwise categorically preclude a defendant from being sentenced to Drug Court, where the defendant is clinically and legally eligible to be sentenced to treatment in lieu of imprisonment pursuant to N.J.S.A. 2C:35-14 (special probation) or N.J.S.A. 2C:35-14.2 (compulsory Drug Court ordered by the court without application by the defendant); and

(g) the policy may provide that a plea offer is contingent on co-defendants pleading guilty.

This Section shall become operational immediately.

#### 12.4 Designated Supervisors.

Each County Prosecutor and the Director of the Division of Criminal Justice shall designate one or more supervisor-level assistant prosecutors or deputy attorneys general who are authorized to approve a determination that there has been a material change in circumstances sufficient to justify a departure from the general rule that a second or subsequent plea offer must call for a longer term of imprisonment than the previous plea offer.

This Section shall become operational immediately.

#### 12.5 Strict Adherence with Victims' Rights.

An escalating plea policy issued and implemented pursuant to this Directive shall comply with and protect all rights guaranteed to victims pursuant to Article 1, paragraph 22 of the New Jersey Constitution, N.J.S.A. 52:4B-36,<sup>33</sup> and any other statute or Attorney General Directive or policy

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See Brimage Guidelines, §4.3 (requiring that a pre-indictment or initial post-indictment plea offer include a condition that the defendant waive the right to file or further litigate any pretrial motions).

<sup>33</sup>

N.J.S.A. 52:4B-36(m) expressly entitles a victim "[t]o submit a written statement, within a reasonable amount of time, about the impact of the crime to a representative of the prosecuting agency which shall be considered prior to the prosecutor's final decision concerning . . . whether the prosecutor will make or agree to a negotiated plea." N.J.S.A. 52:4B-36(o) further guarantees a victim's right "[t]o have the opportunity to consult with the prosecuting authority prior to the conclusion of any plea negotiations, and to have the prosecutor advise the court of the consultation and the victim's position regarding the plea agreement . . . ."



concerning the rights of crime victims.

This Section shall become operational immediately.

#### 12.6 Strict Enforcement.

Every County Prosecutor and the Director of the Division of Criminal Justice shall take such steps as are necessary and appropriate to ensure the strict enforcement of the escalating plea policy. Any unauthorized deviations shall be brought to the County Prosecutor's or Director's personal attention, and shall be remedied as appropriate to ensure future compliance.

This Section shall become operational immediately.

#### 12.7 Unauthorized Judicial Plea Offers.

As noted in Section 12.1, defense attorneys understand that it has until now been an effective strategy to advise clients to decline the prosecutor's initial plea offer with the expectation that a more generous offer will be presented as the trial date approaches. This de facto "de-escalation" plea policy confirmed by the Public Defender's recent statewide study rewards delay and thus discourages guilty defendants from making a timely acceptance of responsibility.

The same practical effect results when a trial court indicates that the sentence it is inclined to impose if defendant were to plead guilty is less than the sentence contemplated by the prosecutor's latest plea offer. See R. 3:9-3(c) (if no tentative agreement between the prosecutor and defense has been reached, a court is authorized to indicate "the maximum sentence it would impose in the event the defendant enters a plea of guilty," provided that such judicial participation in plea discussions is done "with the consent of both counsel.>"). Although a court's indication as to the maximum sentence it is likely to impose is intended to forestall an imminent trial, from a broader resource management perspective, this practice may be penny wise and pound foolish, sending a message to other defendants that delay in accepting responsibility pays dividends. If a court offers the functional equivalent of a plea offer that is more generous than the offer tendered by the prosecutor, it encourages defendants to first exhaust the traditional plea-bargaining process, and then look to judges to offer the prospect of a more favorable sentence if the defendant pleads guilty. That practice would neutralize the beneficial effects of an escalating plea policy.

Accordingly, to limit the occurrence and impact of any such de facto de-escalation practice and to ensure strict compliance with the governing Court Rule, an assistant prosecutor or deputy attorney general shall not consent to judicial participation in plea negotiations pursuant to Rule 3:9-3(c) without obtaining express authorization for such consent from a supervisory assistant prosecutor designated by the County Prosecutor, or a supervisory assistant or deputy attorney general designated by the Director of the Division of Criminal Justice in cases prosecuted by the Division.

In the event that a court, without consent from the prosecutor as required under Rule 3:9-3(c), advises a defendant that if the defendant pleads guilty the court will impose a lesser term of

imprisonment than that contemplated by the plea offer tendered by the prosecutor pursuant to the escalating plea policy, the prosecutor shall alert his or her superiors, who shall promptly advise and consult with the Director of the Division of Criminal Justice to consider appropriate remedies. Such remedies might include, but need not be limited to: reporting non-compliance with the Court Rule to appropriate judicial authorities; issuing written submissions by the County Prosecutor, or the Director in cases prosecuted by the Division, confirming in particular cases that consent to judicial participation in plea bargaining is not given and that the assistant prosecutor or deputy attorney general handling the case has no authority to give such consent; or instructing an assistant prosecutor or deputy attorney general not to attend or otherwise participate in a Rule 3:9-3(c) proceeding.

This Section shall become operational immediately.

### **13. UNIFORM INTERPRETATION OF BAIL REFORM LAW**

#### **13.1 Notice of Legal Issues/Appeals.**

To promote uniformity in interpreting and implementing the Bail Reform Law, County Prosecutors shall notify and consult with the Division of Criminal Justice's Appellate Bureau on significant legal issues and challenges, and all interlocutory and final appeals relating to the interpretation of Article I, paragraph 11 of the New Jersey Constitution as amended, the Bail Reform Law, and the Court Rules that implement the Bail Reform Law.

This Section shall become operational immediately upon issuance of this Directive.

#### **13.2 Brief Bank.**

The Division of Criminal Justice shall collect, maintain, and make available to all County Prosecutors selected briefs and motion papers relating to the interpretation and implementation of Article I, paragraph 11 of the New Jersey Constitution as amended, the Bail Reform Law, and the Court Rules that implement the Bail Reform Law.

This Section shall become operational immediately upon issuance of this Directive.

### **14. ENHANCING PROFICIENT ADVOCACY**

The Division of Criminal Justice, in cooperation with the County Prosecutors Association of New Jersey and the Attorney General's Advocacy Institute, shall develop and present continuing legal education courses on the Bail Reform Law and this Directive for (1) all assistant prosecutors and Division of Criminal Justice deputy attorneys general, (2) all County Prosecutors and assistant prosecutors and deputy attorneys general designated as supervisors authorized pursuant to this Directive to approve decisions on whether to seek pretrial detention or revocation of release, and (3) assistant prosecutors and deputy attorneys general who conduct pretrial detention and/or release revocation hearings.

This Section shall become operational immediately upon issuance of this Directive.

## 15. EVALUATION STUDIES AND REPORTS

The Division of Criminal Justice, in cooperation with the County Prosecutors Association of New Jersey and in consultation with the Attorney General's Office of Law Enforcement Professional Standards, shall prepare two reports to the Attorney General on the implementation and impact of the Bail Reform Law and this Directive. The first report shall be completed by June 30, 2017. The second report shall be completed by June 30, 2018. The reports shall include a compilation and analysis of relevant statistics including:

the number of complaint-warrants and complaint-summons issued in each county pursuant to this Directive;

the number of complaint-warrant applications granted and denied in each county;

the number of pretrial detention motions granted and denied in each county;

the number of release-revocation motions granted and denied in each county.

The reports also shall include:

an analysis of the impact of the Bail Reform Law on plea rates and the timing of guilty pleas for both detention and non-detention cases, and the effectiveness of escalating plea policies in each county;

a discussion of significant crimes committed by persons while on release;

a discussion of instances where a court tenders a de facto plea offer that undercuts the prosecutor's plea offer (see Section 12.7);

such additional data or information as the Director of the Division of Criminal Justice deems relevant to evaluating the implementation and impact of the Bail Reform Law and this Directive.

These evaluations will be designed to impose minimal administrative burdens on County Prosecutor's Offices. Much of the data to be included in these reports to the Attorney General are already stored electronically and will be generated and maintained by the AOC. Other relevant information will have been sent to the Division electronically, or on an ongoing periodic basis. See, e.g., Section 4.11 (report when application for complaint-warrant denied), Section 7.10 (notification when motion for pretrial detention denied), Section 8.8 (notification when application for revocation of release denied). As may be necessary, the Director will provide electronic reporting forms to the County Prosecutors to facilitate the collection of any empirical data and other information to be compiled and analyzed pursuant to this Section that is not generated and maintained by the Judiciary



or otherwise available from electronic databases or previously-supplied reports/notifications.

This Section shall become operational immediately upon issuance of this Directive.

**16. ADVISORY/WORKING GROUPS TO FACILITATE UNIFORM AND EFFICIENT IMPLEMENTATION AND TO DEVELOP AND SHARE BEST PRACTICES**

**16.1 Criminal Justice Reform Advisory Group.**

The Director of the Division of Criminal Justice shall within 30 days of the issuance of this Directive establish a Criminal Justice Reform Advisory Group consisting of prosecutors, police executives, a victim-witness coordinator, and such other persons as the Director deems appropriate. The Advisory Group shall meet on a regular basis to review implementation of the Bail Reform Law and this Directive, to identify and share best police and prosecution practices, to identify implementation problems and legal and practical issues, to develop uniform positions, model briefs, model motions forms, and such other support materials as are needed to assist prosecutors who handle pretrial detention hearings, motions, and appeals under the Bail Reform Law and Article I, paragraph 11 of the State Constitution, and to advise the Attorney General on the need for revisions to this Directive or changes to the statutory law and/or Court Rules.

This Section shall become operational immediately upon issuance of this Directive.

**16.2 Technology Advisory Group.**

The Director of the Division of Criminal Justice, in consultation with the Superintendent of State Police, shall within 30 days of the issuance of this Directive establish a Criminal Justice Reform Technology Advisory Group consisting of law enforcement executives, prosecutors, technology experts, and such other persons as the Director deems appropriate. Representative(s) from the AOC shall be invited to participate. The Technology Advisory Group shall meet on a regular basis to discuss technology issues concerning implementation of the Bail Reform Law and this Directive, and shall advise the Attorney General on the need for revisions to this Directive and technology-related steps that should be taken to facilitate the uniform and efficient implementation of the law and this Directive.

This Section shall become operational immediately upon issuance of this Directive.

**17. NON-ENFORCEABILITY BY THIRD PARTIES**

This Directive is issued pursuant to the Attorney General's authority to ensure the uniform and efficient enforcement of the laws and the administration of criminal justice throughout the State. This Directive imposes limits on the exercise of discretion by police and prosecutors to facilitate the uniform and efficient implementation of the Bail Reform Law. Nothing in this Directive shall be construed in any way to create any rights beyond those established under the Constitutions of the United States and the State of New Jersey, or under any New Jersey statute or Court Rule. The

provisions of this Directive are intended to be implemented and enforced by police agencies, County Prosecutors, the Office of the Insurance Fraud Prosecutor, and the Division of Criminal Justice, and these provisions do not create any promises or rights that may be enforced by any other persons or entities.

This Section shall become operational immediately upon issuance of this Directive.

## **18. EXCEPTIONS**

Recognizing that it is not possible to anticipate every situation that might arise in the course of implementing the Bail Reform Law, Article I, paragraph 11 of the State Constitution, and applicable Court Rules, the Director of the Division of Criminal Justice is hereby authorized to grant a County Prosecutor's request for an exception from any provision of this Directive for good and sufficient cause as determined by the Director.

This Section shall become operational immediately upon issuance of this Directive.

## **19. QUESTIONS**

Questions concerning the interpretation and implementation of this Directive should be addressed to the Director of the Division of Criminal Justice, or the Director's designee.

This Section shall become operational immediately upon issuance of this Directive.

## **20. SUPERSEDURE**

Any provision of any directive, guideline, or law enforcement manual issued by or under the authority of the Attorney General that is inconsistent with any provision of this Directive is hereby superseded to the extent of such inconsistency.

## **21. EFFECTIVE DATE**

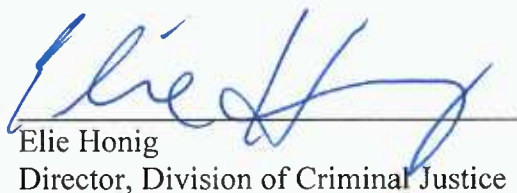
This Directive takes effect immediately. However, the provisions and requirements of this Directive shall become operational on January 1, 2017, except as may otherwise be expressly specified in a Section or subsection. See note 1. All prosecutors and police agencies are required to make such preparations as are necessary and appropriate to ensure that the requirements of each Section and subsection are complied with on the date that such Section or subsection becomes operational.

This Directive shall remain in force and effect unless and until it is repealed, amended, or superseded by Order of the Attorney General.



Christopher S. Porrino  
Attorney General

ATTEST:



Elie Honig  
Director, Division of Criminal Justice

Issued on: October 11, 2016