

#### **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 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

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<sup>7</sup> 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.

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 some level of~~ 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. The automated pretrial risk-assessment process is initiated

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<sup>8</sup> 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), subsection 4.5.4.b (establishing a presumption to apply for complaint-warrant when specified offenses are charged), 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, 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

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 services program will monitor released defendants to address the

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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.

<sup>9</sup> Risk levels that trigger action under the decision-making framework of this Directive are characterized as "elevated" (FTA or NCA value of 3 or higher), "moderate" (FTA or NCA value of 4 or higher), and "high" (FTA or NCA value of 5 or higher).

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 an elevated-high FTA value or an elevated-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 elevated, moderate, or high (depending on the degree of the offense), a complaint-warrant should be sought. See, e.g., subsection 4.5.1. See also subsections 7.4.2.a, 7.4.2.b, and 7.4.3 (presumptions guiding a prosecutor's discretion to seek pretrial detention that are triggered by either a high FTA or NCA score, or a moderate or high NCA score regardless of the FTA score). It also bears noting that under this Directive, a NVCA

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).

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

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.

<sup>10</sup> 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).

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 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

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<sup>11</sup> 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.

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 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).

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<sup>12</sup> 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.

*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, or 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~~

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<sup>13</sup> 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:

~~the decision to overcome the presumption of charging by 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

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- (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 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.

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));
- 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

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<sup>14</sup> 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.

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.

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

##### 4.5.1 Automated Pretrial Risk Assessment Indicates an *Elevated*, *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 3, 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.

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<sup>15</sup> 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.”

<sup>16</sup> 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.

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

#### 4.5.4.a *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.

#### 4.5.4.b Defendant is Charged with a Specified Offense.

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 any of the following offenses:

- (i) Second-Degree Eluding. A second-degree offense charged under N.J.S.A. 2C:29-2(b) alleging the defendant created a risk of death or injury to any person when the defendant knowingly fled or attempted to elude a police or law enforcement officer.
- (ii) Assault on Public Officials or Employees. A third-degree offense charged under N.J.S.A. 2C:12-1(b)(5) alleging the commission of a simple assault with bodily injury upon any of the statutorily enumerated public officials or employees (e.g., law enforcement officer, paid or volunteer fireman).
- (iii) Photographing, Filming, Sexual Exploitation, or Abuse of a Child. Any offense charged under N.J.S.A. 2C:24-4(b)(3), (b)(4), or (b)(5) involving the proscribed sexual exploitation or abuse of a child.

#### 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, or 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, community supervision for life (CSL), parole supervision for life (PSL), 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

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<sup>17</sup> See note 14.

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 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

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<sup>18</sup> 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.

| 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 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

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<sup>19</sup> 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.

<sup>20</sup> 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."

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 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

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<sup>21</sup> 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

construed to preempt or in any way alter 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,

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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 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.

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.

#### 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 Need to Prepare a Complaint-Warrant or Complaint Summons.

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. Despite the Rule, the criminal division manager will not prepare a complaint in direct indictment cases. If a prosecutor wishes to label a defendant an “eligible defendant,” and thereby seek release conditions or pretrial detention when a direct indictment is returned, law enforcement (not the criminal division manager) must prepare a complaint-warrant (CDR-2) in the eCDR system and have a judicial officer review the application. So too, when wishing to proceed with charges on a complaint-summons (CDR-1) when a direct indictment is returned, the charging document must be prepared in the eCDR system. The charges in the complaint-warrant or complaint-summons should mirror the charges in the indictment. The complaint-warrant or complaint-summons is necessary to link a defendant’s fingerprints taken with Live Scan after his or her apprehension or voluntary surrender. 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~~ will 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 Since Because~~ 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 amended 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

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 (note, however, that Rule 3:26-1, as ultimately adopted by the Supreme Court after Attorney General Law Enforcement Directive 2016-6 was issued, does not include petty disorderly persons offenses, and thus this Directive does not apply to petty disorderly persons offenses). 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 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

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<sup>23</sup> 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.

<sup>24</sup> 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 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.

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.a, 7.4.2.b, 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 either a high Failure to Appear (FTA) or New Criminal Activity (NCA) score, or a moderate or high New Criminal Activity (NCA) score regardless of the Failure to Appear (FTA) score, see note 9 and subsections 7.4.2.a and 7.4.2.b, or if a New Violent Criminal Activity (NVCA) flag is raised, see subsection 7.4.5.a, or where certain specified offenses are charged regardless of the PSA scores, see subsection 7.4.5.b, 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—the present offense is an indictable crime (regardless of degree) and was committed while defendant was on pretrial release for another offense or was subject to any form of post-conviction monitoring (including community supervision for life and parole supervision for life). 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.

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<sup>25</sup> 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).

## 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.a *Serious First- or Second-Degree Crimes Involving a High Risk Score or a New Criminal Activity Score of 4.*

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 (i) the Failure to Appear (FTA) or New Criminal Activity (NCA) score determined by the automated pretrial risk-assessment process is 5 or 6, or (ii) if the New Criminal Activity (NCA) score is a 4 regardless of the Failure to Appear (FTA) score.

### 7.4.2.b *Third- or Fourth-Degree Crimes Involving a Risk Score of 6 or a New Criminal Activity Score of 5.*

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 third- or fourth-degree crime and (i) the Failure to Appear (FTA) or New Criminal Activity (NCA) score determined by the automated pretrial risk-assessment process is 6, or (ii) if the New Criminal Activity (NCA) score is a 5 regardless of the Failure to Appear (FTA) score.

### 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 Failure to Appear (FTA) or New Criminal Activity (NCA) score determined by the automated pretrial risk assessment is 4, 5, or 6 and the defendant as a juvenile had been 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

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<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.

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-Indictable 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 an indictable crime ~~of the first or second degree (regardless of its degree)~~, and the defendant committed the present offense:

- | (a) while on pretrial release for (i) an indictable crime or (ii) 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, community supervision for life (CSL), parole supervision for life (PSL), 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.a *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.

| 7.4.5.b *Cases Involving Specified Offenses.*

| 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 includes any of the following specified offenses:

- | (i) Graves Act Firearms Offenses. Any offense involving a firearm (i.e., a firearm as opposed to any other “weapon” as defined by N.J.S.A. 2C:39-1(r)) that would require the imposition of a minimum sentence under the Graves Act, N.J.S.A. 2C:43-6(c) and (g). Firearms offenses under the Graves Act are myriad and vary in degrees of severity. Offenses can range from “simple” unlawful possession of a firearm, N.J.S.A. 2C:39-5(b), -5(c), to the possession of a firearm during the commission of certain crimes, N.J.S.A. 2C:39-4.1(a). Accordingly, it is imperative that prosecutors closely evaluate all relevant circumstances involved in any given case when making critical determinations (e.g., whether to apply for a complaint-warrant, move for pretrial detention). When assessing whether a presumption should be overcome in cases charging unlawful possession under

N.J.S.A. 2C:39-5 – particularly those matters involving handguns (N.J.S.A. 2C:39-5(b)) and rifles and shotguns (N.J.S.A. 2C:39-5(c)) – prosecutors shall consider the Attorney General Directive to Ensure Uniform Enforcement of the “Graves Act” as well as the Attorney General Memorandum entitled “Clarification of ‘Graves Act’ 2008 Directive with Respect to Offenses Committed by Out-of-State Visitors From States Where Their Gun-Possession Conduct Would Have Been Lawful.”

- (ii) Certain Persons Not to Have Weapons. A second-degree offense charged under N.J.S.A. 2C:39-7(b)(1) alleging the defendant is a person who purchased, owned, possessed, or controlled a firearm after having been convicted of certain offenses enumerated in the statute.
- (iii) Second-Degree Eluding Offenses. A second-degree offense charged under N.J.S.A. 2C:29-2(b) alleging the defendant created a risk of death or injury to any person when the defendant knowingly fled or attempted to elude a police or law enforcement officer.

#### *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>

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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.

## 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> 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

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<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;
- (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.

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 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-

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<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 on any such motion.

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).

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.

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

## 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,

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<sup>30</sup> 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).

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,
  - (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-indictable~~ 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-a~~ 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 any indictable~~ 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 ~~Defendant Tampers with an Electronic Monitoring Device While on Release with Conditions. Any New Crime Is Committed While on Release for a Serious Crime.~~*

~~Except as authorized pursuant to subsection 8.4.5, where there is probable cause to believe that a defendant, while on pretrial release for (i) an indictable crime or (ii) a disorderly persons offense involving domestic violence as defined in N.J.S.A. 2C:25-19(a), removed, tampered with, or rendered inoperable an electronic monitoring device required as a condition of pretrial release, the prosecutor shall presumptively file a motion seeking revocation of release pursuant to N.J.S.A. 2A:162-24.~~

~~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 or a Condition of Release.***

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.

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

**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.