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.[1] 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 appropriate when the facts known at the time of the charging decision reliably indicate that the

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[1] 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.

defendant requires no monitoring~~ or only minimal monitoring upon release~~. A complaint-warrant, in contrast, generally should be sought when the defendant poses 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~~11 and see Section 4.6 (requiring the completion of the Ontario Domestic Assault Risk Assessment (ODARA) in certain domestic violence cases). 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 and obtaining the Public Safety Assessment (PSA) and the ODARA scores when required.

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

4.2.1.a *~~Risk Assessment~~Public Safety 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).[2] See, e.g., subsection 4.5.1. The automated pretrial risk-assessment process is initiated

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[2] Although this Directive generally relies on the results of ~~the preliminary automated pretrial~~ risk assessment tools, 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

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" and "PSA" 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" and "PSA" 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."[3] The AOC's pretrial services program will monitor released defendants to address the

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results. That is to be expected given that the independent criteria to be used by prosecutors under this Directive (e.g., present offense committed while on release for another offense) often will overlap with the risk indicators used in the automated pretrial risk-assessment process (e.g., defendant has a pending charge). See also note 9 and accompanying text.

[3] 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 FTA value or an elevated 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, 7.4.2b, 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

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.

4.2.1.b *Ontario Domestic Assault Risk Assessment Score Values.*

In addition to the PSA, police officers are required in certain domestic violence cases to complete the Ontario Domestic Assault Risk Assessment (ODARA) utilizing a Scoring Form, which has been prescribed by the Director of the Division of Criminal Justice. See Section 4.6 (discussing ODARA in depth). Unlike the PSA, which is an automated process, the ODARA is administered "manually" by law enforcement officers through an interview with the victim and/or others and a review of the defendant's criminal history and related records (e.g., prior police reports, Computer Aided Dispatch reports, etc.). The ODARA assessment is comprised of 13 separate items including, among others, the victim's concern for future assault, whether there are children in the relationship, whether the victim was pregnant during an assault, substance use by either party, and domestic and non-domestic criminal history of the arrestee. Each item is scored by using a "1" for a "yes" response and a "0" for a "no" response. The raw score is the sum of the items, which ranges from 0 to 13. The assessment can be scored with up to five missing items, and the raw score is subject to proration for unknown or missing items. A defendant is placed in one of seven categories of risk utilizing his/her final score. Each risk category correlates to a research-validated statistical likelihood of recidivism (e.g., a defendant scoring a 5 is 53% likely to recidivate).

Like the PSA, the ODARA measures risk. Unlike the PSA, the AOC has yet to designate the ODARA for use by the Judiciary or the pretrial services program. Thus, no decision-making framework has been developed by the judiciary to manage the risks identified by the ODARA score. Nonetheless, law enforcement will utilize the ODARA to frame critical decisions in certain domestic violence cases. See Section 4.6.

Not all characteristics of domestic violence offenders are statistically significant in predicting a future assault on an intimate partner. The developers of the ODARA included in the tool only those characteristics that strongly and independently predict recidivism. Therefore, certain factors commonly believed to be typical of domestic violence offenders (e.g., childhood violence, suicide threats, and animal abuse) were not incorporated in the ODARA. Nonetheless, as with the PSA, law enforcement must consider all known relevant information when making critical decisions in the prosecution of domestic violence matters under Criminal Justice Reform. See subsection 4.2.2 and see subsection 4.6.10 (enumerating a non-exclusive list of special factors to be considered).

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

NCA score regardless of the FTA score). It also bears noting that under this Directive, a NVCA flag automatically triggers a presumption that law enforcement will apply for a complaint-warrant, see subsection 4.5.1, and also triggers a presumption that the prosecutor will seek pretrial detention. See subsection 7.4.5.

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.).[4]

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 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,[5] or a defendant's drug dependence or mental illness.

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[4] 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).

[5] 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

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. This includes consideration of the ODARA. See subsection 4.2.1b and see subsection 4.6.10 (enumerating a non-exclusive list of special factors to be considered in domestic violence cases).

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

In cases involving domestic violence, the police officer making the arrest shall, in accordance with the procedures set forth in the Domestic Violence Procedures Manual, check the Domestic Violence Central Registry[6] to determine whether the defendant is subject to a domestic

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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.

[6] 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

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).

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

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restraining order, and the Domestic Violence Procedures Manual will be reviewed and may be amended to require the use of the eTRO system.

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 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.[7]

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

(1) the defendant has been served with a summons for any prior indictable offense and has failed to appear;

(2) there is reason to believe that the defendant is dangerous to self, or will pose a danger to the safety of any other person or the community if released on a summons;

(3) there are one or more outstanding warrants for the defendant;

(4) the defendant's identity or address is not known and a warrant is necessary to subject the defendant to the jurisdiction of the court;

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

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

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(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.

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[8] to commit any of the foregoing crimes.

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

Notwithstanding any other provision of Section 4 of this Directive, if the defendant has been extradited from another state for the current New Jersey charge,[9] 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.

[8] 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.

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

4.5.1.a ~~*Automated Pretrial Risk*~~*Public Safety Assessment Indicates an Elevated, Moderate, or High Risk of Flight, New Criminal Activity, or Violence.*[10]

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.

4.5.1b *Ontario Domestic Assault Risk Assessment Score of 3 or Higher.*

In domestic violence cases that require completion of the ODARA, a law enforcement agency shall apply for a complaint-warrant when a defendant's final score (i.e., after any proration) is 3 or higher—regardless of the PSA scores—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. In domestic violence cases, the ODARA scores are to be considered *in conjunction with* and not *in lieu of* the PSA scores. As such, *either* assessment tool or *both* assessment tools could trigger a presumption to apply for a complaint-warrant. Likewise, there will be cases in which *neither* tool will trigger a presumption.

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

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

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

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[10] 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.

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[11] to commit any of the foregoing crimes.

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[11] See note 14.

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 (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 complaint-warrant is overcome pursuant to subsection 4.5.9.[12]

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[12] 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.

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 conditions that may be needed to manage the risks that would be posed by defendant's release.[13]

Nothing in this subsection shall be construed to require that the charging decision be

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[13] 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.

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.[14] Nothing in this subsection shall be construed to preclude consideration of other adjudications of delinquency (e.g., adjudications for violent or firearms-related crimes that occurred more than ten years ago, or adjudications for offenses other than firearms-related or NERA crimes) as may be relevant as part of the totality of the circumstances when determining whether to overcome the presumption of issuing a complaint-summons pursuant to Section 4.3.

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

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

[14] 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."

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.~~

4.6.1 *The Need for a Risk Assessment Tool in Domestic Violence Cases.*

The automated pretrial risk-assessment and the resulting Public Safety Assessment (PSA) do not account for certain risk factors that are widely recognized as predictive of the likelihood of a domestic violence offender's risk of re-offending. As such, the developer of the PSA has recommended evaluating the utility of implementing a risk assessment "trailer tool" to inform critical decisions (e.g., complaint-warrant vs. complaint-summons, release conditions, detention) in domestic violence cases. In addition, among the thirty recommendations made by the Supreme Court Ad Hoc Committee on Domestic Violence in its June 28, 2016 report was an endorsement that "New Jersey should develop a system wide, coordinated process for assessing risk and danger in domestic violence cases." See Report of the Supreme Court Ad Hoc

Committee on Domestic Violence (June 28, 2016) at Recommendation 20. The Supreme Court referred the Ad Hoc Committee's recommendation to the Attorney General for consideration in November 2016.

After considerable research and consultation with key stakeholders, the Director of the Division of Criminal Justice has designated the Ontario Domestic Assault Risk Assessment (ODARA) as the risk assessment tool to be utilized by law enforcement officers in New Jersey to assist in identifying the risk of future assaults between intimate partners. Simply stated, the ODARA scores indicate how likely an abusive partner is to assault again. The ODARA is an evidence-based, validated actuarial tool that was developed for use by police in the field. Its predictive accuracy is the highest predictive effect size reported for validated domestic violence risk assessment tools. No clinical expertise is required to administer an ODARA assessment, and officers can obtain necessary information for scoring the ODARA's 13 items during an interview with the victim and a review of the defendant's criminal history and related records (e.g., prior police reports, Computer Aided Dispatch reports, etc.). Training can be accomplished in a relatively swift and straightforward fashion.

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).

4.6.2 *Critical Definitions for the ODARA.*

For the purpose of scoring the ODARA, the following definitions shall apply:

- Index Assault: the most recent incident in which the person being assessed assaulted his/her current or former Partner. Assault is any act of violence that involved physical contact with the index Victim or a credible threat of death made with a weapon displayed in the presence of the Victim.

- Defendant: the person being assessed.

- Victim: the person upon whom the Index Assault was committed.

- Partner: a person who currently is, or previously was, involved with the Defendant in an intimate relationship. This includes current or former spouses, current or former intimate cohabitants, co-parents, and those currently or formerly in a dating relationship.

~~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.[15] Nothing in this subsection shall be~~

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

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

~~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.~~

4.6.3.a *Offenses for which the ODARA Shall be Completed.*

The ODARA's requirements of physical contact or a threat of death with a weapon will exclude from risk assessment some offenses that might be charged as domestic violence (e.g., harassment, N.J.S.A. 2C:33-4; criminal mischief, N.J.S.A. 2C:17-3; stalking, N.J.S.A. 2C:12-10; attempts to cause bodily injury, N.J.S.A. 2C:12-1(a)(1); acts of physical menace, N.J.S.A. 2C:12-1(a)(3); and terroristic threats made without a weapon, N.J.S.A. 2C:12-3). Accordingly, instances of domestic violence that do not involve physical violence or a threat of death with a weapon should not be assessed under the ODARA. It is acknowledged that harassment can include physical contact. See N.J.S.A. 2C:33-4(b) (striking, kicking, shoving, or other offensive touching). However, with a very limited exception, harassment constitutes a petty disorderly persons offense and, for that reason, does not fall within the realm of the Bail Reform Law, N.J.S.A. 2C:162-16 to -26. For this reason, harassment has not been included in the list of offenses triggering a mandatory assessment under the ODARA.

Law enforcement officers shall complete the ODARA in those cases of domestic violence (as defined by N.J.S.A. 2C:25-19) in which the following offenses are charged and the "Victim" is a "Partner" (as those terms are defined above):

- homicide (N.J.S.A. 2C:11-1);
- aggravated assault (N.J.S.A. 2C:12-1b);
- simple assault with contact or with a weapon (N.J.S.A. 2C:12-1a);
- sexual assault (N.J.S.A. 2C:14-2);
- criminal sexual contact (N.J.S.A. 2C:14-3);
- false imprisonment with contact or with a weapon (N.J.S.A. 2C:13-3);

~~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.~~

- kidnapping (N.J.S.A. 2C:13-1);
- burglary, 2nd degree with contact or with a weapon (N.J.S.A. 2C:18-2);
- terroristic threats with contact or with a weapon (N.J.S.A. 2C:12-3);
- robbery (N.J.S.A. 2C:15-1);
- any other crime involving risk of death or serious bodily injury (N.J.S.A. 2C:25-19a(18)).

4.6.3.b *ODARA Scores and Gender of Offender and Victim.*

The original study that resulted in the ODARA and many of the subsequent validations evaluated the predictive ability of the tool solely for assaults by males on their female partners. Subsequent validated studies focused upon cases of assaults by females on their male partners. However, an actuarial table articulating recidivist percentages for female offenders has yet to be developed (it is believed that the table currently used will overstate percentages of recidivism for female offenders). As for same-sex partner relationships, the use of ODARA continues to be studied, but sufficient research has not yet been achieved.

In New Jersey, an ODARA Scoring Form, which has been designated for use by the Director of the Division of Criminal Justice, shall be completed for offenses indicated in subsection 4.6.3a regardless of the gender of the person committing the Index Assault or the gender of the victim. However, until further notice and for the reasons stated above, law enforcement in New Jersey shall only utilize the ODARA scores to frame decision making in cases in which a male has assaulted a female partner. In all other cases, law enforcement should include a concise description of all ODARA items found to be present in any Affidavit of Probable Cause submitted with an application for a complaint-warrant. See subsection 5.1.2 (requiring the inclusion of present domestic violence risk factors in Affidavits of Probable Cause.

~~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.~~

4.6.4 Informing Victim about the Use of the ODARA.

Prior to administering the ODARA, a law enforcement officer shall inform the victim about the use of the information obtained and resulting score as well as the persons who or agencies that will have access to the results, and permit the victim to decline participation if the victim believes that participation will comprise the victim's safety. If a victim declines to participate in the ODARA interview, the law enforcement officer shall undertake to complete the ODARA without victim participation. In such instances, information to complete the ODARA can be obtained from persons knowledgeable about the circumstances of the victim and the defendant, police reports, law enforcement databases and the like (note: the gathering of information in this fashion can also be employed in those instances in which a victim is not capable of participating in an interview such as being hospitalized).

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

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

4.6.5 Transmission of the ODARA Scoring Form to the Prosecutor's Office.

The law enforcement officer shall transmit a copy of a completed ODARA Scoring Form to the applicable County Prosecutor's Office as soon as practicable after its completion, in accordance with the procedures prescribed by the County Prosecutor. The original ODARA Scoring Form shall be maintained in the case file.

4.6.6 Transmission of the ODARA Scoring Form to the Division of Criminal Justice for Centralized Data Collection.

In addition to transmitting a copy of the ODARA Scoring Form to the Prosecutor's Office, the law enforcement officer shall also scan and email a copy of the Scoring Form to the Division of Criminal Justice utilizing the email address ODARA@njdcj.org.

4.6.7 Prohibition of Communicating and Providing ODARA Scores and Scoring Forms to Judiciary.

The Judiciary has made clear that it currently is not prepared to utilize the ODARA. Thus, until further notice, ODARA scores shall not be communicated or disseminated to the

members of the Judiciary (i.e., judicial officers, including judges and court administrators, and pretrial service program personnel), and completed ODARA Scoring Forms shall not be offered in evidence. This prohibition applies to every stage of a criminal prosecution (e.g., applications for complaint-warrants, requests for conditions of release, hearings for pretrial detention, and trials). However, law enforcement should utilize any and all information learned from the ODARA to frame critical decisions during criminal prosecutions, including whether to seek a complaint-warrant and whether to seek detention. Additionally, the prosecutor can and should make reference to any facts learned through administration of the ODARA in support of a motion for complaint-warrant or detention, as appropriate.

4.6.8 *Confidentiality of ODARA Scores and Scoring Forms.*

Due to, among other things, the inclusion of criminal history information, ODARA scores and ODARA Scoring Forms are not subject to public access and shall only be disseminated amongst police or other law enforcement agencies authorized to investigate reports of domestic violence (similarly, PSA reports and related information are confidential). Along with other police reports, ODARA Scoring Forms are discoverable.

4.6.9 *ODARA Training.*

The Division of Criminal Justice, in cooperation with the Attorney General's Advocacy Institute, shall develop an ODARA training program for law enforcement officers and prosecutors to facilitate implementation of the ODARA as a statewide tool in accordance with the procedures set forth herein. The Division shall establish two components of the training program which, shall include (1) mandatory "live" training for Assistant Prosecutors who supervise Domestic Violence Units and Domestic Violence Liaison Officers from law enforcement agencies, and (2) computer- or web-based training for Assistant Prosecutors and sworn law enforcement officers whose duties can reasonably be expected to touch upon domestic violence incidents as further described below. To the extent feasible, the Division shall make the computer/web-based training available on-line through the NJLEARN system.

The chief executive of every law enforcement agency operating under the authority of the laws of the State of New Jersey shall take such steps necessary to ensure that every sworn officer assigned to patrol duty, every sworn officer who directly supervises officers assigned to patrol duty, and every sworn officer whose duties include investigating the circumstances of or related to a domestic violence incident receives the computer/web-based training developed pursuant to this subsection. Such officers shall receive training within 60 days of the training program being made available by the Division of Criminal Justice. A law enforcement officer must complete the training program before he or she can administer the ODARA.

Each County Prosecutor shall take such steps necessary to ensure that every Assistant Prosecutor under his or her command whose duties can reasonably be expected to touch upon domestic violence incidents (e.g., performing a screening function, handling a first appearance or an application for pretrial detention, and the actual prosecution of a defendant whose charges arise out of a domestic violence incident) must also complete the computer/web-based training program developed pursuant to this subsection. Such Assistant Prosecutors shall receive training

within 60 days of the training program being made available by the Division of Criminal Justice. An Assistant Prosecutor must complete the training program before he or she is assigned to any duty that can reasonably be expected to touch upon domestic violence incidents.

The Division may from time to time develop additional ODARA training programs and aids to achieve the goals of enhancing the thoroughness, timeliness, quality, and coordination of domestic violence investigations and prosecutions.

4.6.10 *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 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;

(2) whether, given the repetitive nature of domestic violence offenses, 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);

(3) whether the victim exhibited signs of injury, and the extent of such injury;

(4) whether any type of weapon was used against the victim, or was threatened to be used;

(5) 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);

(6) whether 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);

(7) whether the defendant exhibited suicidal behavior such as excessive sadness or moodiness or threatening self-injury;

(8) whether the defendant attempted to or did strangle the victim during an assault or at any point prior thereto; and

(9) whether the defendant threatened to or did harm a household pet.

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 4.6.11 (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). Moreover, in any application for a complaint-warrant, the presence of any of the foregoing circumstances shall be included in the Affidavit of Probable Cause. See subsection 5.1.2.

4.6.11 *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 9 of subsection 4.6.10, 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 4.6.10, apply for a complaint-warrant and seek imposition of the condition(s) needed to reasonably assure the immediate safety of the victim.[16] Nothing in this subsection shall be

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

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

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

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.

4.6.12 *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) and subsection 5.1.1 requiring the inclusion of certain information in Affidavits of Probable Cause. 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 4.6.11 or 6.2.3.

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

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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.

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 *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.

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 will not be possible to run the automated pretrial risk-assessment software to inform the complaint-warrant versus complaint-summons determination.

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. Actual implementation of the ODARA (i.e., the administration of the ODARA by law enforcement officers and the utilization of ODARA scores to frame decision-making in accordance with this Directive) shall begin on November 1, 2017, at which point all law enforcement agencies and County Prosecutors' Offices will have received training as set forth in this Directive. See subsection 4.6.9.

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

5.1 Form and Substance of Affidavit of Probable Cause

5.1.1 *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.

5.1.2 *Inclusion of Present Domestic Violence Risk Factors and Relevant Circumstances in Affidavit of Probable Cause and/or Preliminary Law Enforcement Incident Report.*

In domestic violence cases in which the ODARA is administered (see Section 4.6), the Affidavit of Probable Cause and/or the Preliminary Law Enforcement Incident Report shall include concise statements indicating the presence of all risk factors found to exist through the officer's investigation. For example, if it was determined that the victim was confined during the assault, the Affidavit of Probable Cause and/or the Preliminary Law Enforcement Incident Report shall indicate that the victim was confined. Moreover, in all domestic violence cases (whether the ODARA is scored or not), the Affidavit of Probable Cause and/or the Preliminary Law Enforcement Incident Report shall include circumstances relevant to the risks posed to a victim. See subsection 4.6.10.

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

5.2 Development of Uniform Preliminary Law Enforcement Incident Report.

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

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

obligations when the prosecutor moves for pretrial detention); R. 3:13-3(a) (general rule that pre-indictment discovery obligation is triggered only when the prosecutor makes a pre-indictment plea offer).

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

- ☐ whether the offense involves domestic violence, and if so, whether the Domestic Violence Central Registry was checked (see subsection 4.2.3), and whether that query reveals any relevant information concerning past domestic violence episodes or restraining orders;
- ☐ whether the offense involves a sexual crime, and if so, whether the Sexual Assault Survivor Act central registry was checked (see subsection 4.2.4), and whether that query reveals any information relevant to the pretrial release decision;
- ☐ whether a law enforcement officer personally observed the offense conduct;
- ☐ whether the arrest was based on observations/statements made by eyewitnesses;
- ☐ whether a victim and/or eyewitness has given a statement, and whether such statement was in writing or electronically recorded (specifying the type of recording, e.g., dash camera, body worn camera, stationhouse interview room camera, etc.);
- ☐ whether the defendant made an admission/confession;
- ☐ whether any admission/statement by the defendant was electronically recorded (specifying the type of recording, e.g., dash camera, body worn camera, stationhouse interview room camera, etc.);
- ☐ whether the offense conduct was captured on an electronic recording (specifying the type of recording, e.g., dash camera, body worn camera, surveillance camera, witness's cell phone camera, etc.);
- ☐ whether identification procedures were used (specifying the type of procedure, e.g., show up, photo array, line-up, etc.);
- ☐ whether the suspect is a stranger or acquaintance of the victim/witness;
- ☐ whether a victim was injured, the extent of the injury when known, and whether the victim was taken to the hospital or declined medical services;
- ☐ the type of weapon involved, if any;
- ☐ whether any physical evidence was seized or recovered (specifying type of evidence, e.g., drugs, paraphernalia, other contraband, weapons, cash, stolen merchandise, burglars tool or other implements or instrumentalities);
- ☐ type of controlled dangerous substance (e.g., heroin, cocaine, crack, marijuana, prescription opiate, etc.);

- ☐ whether physical evidence was recovered from the scene, or was seized from the person or control of the defendant, or from the defendant's vehicle;
- ☐ whether the defendant attempted to conceal, discard, or destroy evidence (specifying method, e.g., hiding under furniture or car seat, dropping or throwing, flushing down sink/toilet);
- ☐ whether the defendant attempted to flee or otherwise resist arrest (specifying type of flight, e.g., foot chase, motor vehicle pursuit);
- ☐ whether flight or attempted flight resulted in injury or threat of injury to any person (e.g., whether a vehicle was operated in a manner that endangered public safety, whether police drew or fired weapons), and the extent of any resulting injury to any person;
- ☐ whether an officer was assaulted and, if so, the extent of injury and whether taken to hospital;
- ☐ whether children were present or otherwise placed at risk by the offense;
- ☐ whether the defendant appeared to be under the influence of alcohol or drugs;
- ☐ whether the defendant admitted to using drugs, and/or whether the officer or agency has reason to believe that the defendant is drug-dependent;
- ☐ a general description of the type of merchandise or service stolen;
- ☐ whether a burglary involved a residence (i.e., a home invasion), and whether any victims were present at the time of the burglary;
- ☐ whether a stolen vehicle was operated in a manner that endangered public safety;
- ☐ whether relevant information about the offense had been communicated to the officer(s) by a dispatcher (to alert the prosecutor of the need to preserve and obtain a recording of radio communications); and
- ☐ whether information had been provided to the agency by a 9-1-1 call (to alert the prosecutor of the need to preserve and obtain a recording of the 9-1-1 call).

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

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

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

a Preliminary Law Enforcement Incident Report is prepared at the time of the arrest/booking process and is subject to being supplemented, clarified, or modified as additional information is learned or corroborated in the course of an ongoing investigation/prosecution.

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

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

5.4 Protection of Victim Contact Information.

It is important that the County Prosecutor's Office has information that would facilitate contact with the victim.[17] See note 29 and subsection 7.6.3. The Preliminary Law Enforcement Incident Report therefore should, when feasible, document victim contact information, provided, however, that the electronic form shall be designed so that the field containing victim contact information is not shared with the defendant unless and until such information must be disclosed in accordance with the Court Rules governing discovery. In the alternative, the Division of Criminal Justice may work with the AOC to provide other means by which to transmit victim contact information to the judiciary through the eCDR system, to facilitate automated victim notification of court events, provided that any such system is designed so that victim contact information is not shared with the defendant unless and until such information must be disclosed in accordance with the Court Rules governing discovery.

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

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

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

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

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

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

5.6.1 *Police Agencies.*

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

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

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

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

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

[SECTION 6 IS NOT CHANGED]

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), and, when applicable, the results of the ODARA. See Section 4.6. However, as noted throughout this Directive, ~~the pretrial risk-assessment process approved by the AOC~~ the risk assessment tools do ~~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~~ 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.[18]

To help achieve an appropriate degree of statewide uniformity in the exercise of prosecutorial discretion, this Section establishes a pretrial detention decision-making framework

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[18] 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.

consisting of three categories of cases. For each category, there is rebuttable presumption[19] 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 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. 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 PSA~~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 the ODARA results in a score of 5 or

[19] 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.

higher, see subsection 7.4.2.c, 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 PSA~~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 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,[20] the prosecutor shall apply for pretrial detention unless the County Prosecutor or First Assistant Prosecutor, or the Director or a Deputy Director of the Division of Criminal Justice in cases prosecuted by the Division, finds that there are compelling and extraordinary reasons not to seek pretrial detention.

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

7.4.1 *Cases Invoking the Prima Facie Evidence Feature of Rule 3:4A(b)(5).*[21]

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.

7.4.2.a *First- or Second-Degree Crimes Involving a High ~~Risk~~PSA Score or a New Criminal Activity PSA 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 PSA~~automated pretrial risk-assessment process~~ is 5 or 6, or (ii) if the New Criminal Activity (NCA) PSA score is a 4 regardless of the Failure to Appear (FTA) score.

7.4.2.b *Third- or Fourth-Degree Crimes Involving a ~~Risk~~PSA Score of 6 or a New Criminal Activity PSA 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 PSA~~automated pretrial risk-assessment process~~ is 6, or (ii) if the New Criminal Activity (NCA) PSA score is a 5 regardless

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[20] 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).

[21] 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.

of the Failure to Appear (FTA) score.

7.4.2.c *Ontario Domestic Assault Risk Assessment Score of 5 or Higher.*

In domestic violence cases that require the completion of the ODARA and 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 defendant's final score (i.e., after any proration) is 5 or higher—regardless of the PSA scores. In these domestic violence cases, the ODARA scores are to be considered *in conjunction with* the PSA scores and not *in lieu* thereof. As such, *either* assessment tool or *both* assessment tools could trigger a presumption to apply for pretrial detention. Likewise, it is anticipated that there will be cases in which *neither* tool will trigger a presumption.

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 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 *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(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.[22]

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).[23] It should be noted that this Directive does

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[22] 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.

[23] 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

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

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

When the impact of the crime on a victim is relevant to the pretrial detention decision,[24]

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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.

[24] 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

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-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

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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.

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.

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.