



The Summons/Warrant Decision, Risk Assessments, and First Appearances: Mechanics and Strategies at the Earliest Stages

April 27, 2017

Federal Bail

- Eighth Amendment of US Constitution:
 - "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."
 - Supreme Court has interpreted this to prohibit the imposition of excessive bail without creating a right to bail in criminal cases.
 - *See United States v. Salerno*, 481 U.S. 739, 754-55 (1987) ("eighth amendment does not grant absolute right to bail").
- The Bail Reform Act of 1984 (18 U.S.C. §§ 3141-3156)
 - Governs release and detention determinations in federal criminal proceedings.



Federal Bail Trends:

- DOJ statistics prove monetary bonds and pretrial detention have been on the rise for decades
- For example, in 2009 (last year data are available):
 - 61% of all Federal defendants were required to post financial bond
 - 23% of felony defendants released pre-trial were ROR
 - Remaining defendants were released on other types of financial bail

Source: Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009-Statistical Tables* (Washington, DC: Bureau of Justice Statistics, Department of Justice, 2013)

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DOJ is Trying to Reverse This Trend by Filing:

- Statements of Interest: arguing that bail practices that incarcerate indigent individuals before trial solely because of their inability to pay for their release violates the Fourteenth Amendment.
 - See U.S. SOI, *Varden v. City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015).
- Dear Colleague Letters: advising state and local courts that due process and equal protection principles require, among other things, that they “must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.”
 - See Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Div., Dep’t of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues (Mar. 14, 2016),
- Amicus briefs: arguing that bail schemes that mandate payment of fixed amounts to obtain pretrial release, without meaningful consideration of an individual’s indigence and alternatives that would serve a municipality's interests, violates the Fourteenth Amendment.
 - See U.S. Amicus Brief: *Walker v. City of Calhoun*, <https://www.justice.gov/crt/case-document/walker-v-city-calhoun>



New Jersey's Bail Reform

- In 2013:
 - 39% of New Jersey inmates (over 5,000 individual inmates in total) were eligible to be released on bail but were detained because they could not meet amounts as low as \$2,500.
 - 71% of New Jersey's jail population composed of blacks and Latinos at that time.
 - The average length of stay in jail pending trial was about 10 months.

See Drug Policy Alliance, New Jersey Jail Population Analysis (March 2013), https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf

New Jersey's Prior Bail System

- Commercial / resource based system
- All defendants – regardless of severity of their accused crimes – were eligible for bail due to repeal of NJ's death penalty 2007.
- Defendant arrested on a Friday could legally be held until Monday before first appearance / bail review.
- No statutory requirements governing how quickly:
 - A case must be presented to the Grand Jury
 - A case must be brought to trial

New Jersey's New Bail Reform Law

- In effect since January 1, 2017
- Implements:
 - Public Safety Assessment (PSA) for eligible defendants
 - Expedited proceedings
 - Strong restrictions on use of monetary bail
- In the Law's first four weeks (January, 2017):
 - 3,382 cases statewide were processed yet judges set bail only 3 times.
 - An additional 283 defendants were held without bail because they were accused of a serious crime or were a significant flight risk, or both.

See New York Times, *New Jersey Alters Its Bail System and Upends Legal Landscape* (Feb. 6, 2017) https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html?_r=0

Sample Public Safety Assessment (PSA)

New Jersey Judiciary
Public Safety Assessment

Defendant: [REDACTED] DOB: [REDACTED] SBI #: [REDACTED] FBI #: [REDACTED]
Complaint Number: W 2017 [REDACTED] PSA Run Date: [REDACTED]

*** RECOMMENDATION TO COURT ***
RELEASE NOT RECOMMENDED. IF RELEASED, WEEKLY REPORTING + HD/EM

Risk Scale: Failure to Appear

Low 1 2 3 4 5 6 High *New Violent Criminal Activity Flag: No*

Risk Scale: New Criminal Activity

Low 1 2 3 4 5 6 High

Out of State Criminal History: No

Risk Factors:

1. Age at Current Arrest: 21
2. Current Violent Offense: No
 - 2a. Current Violent Offense and 20 Years Old or Younger: No
3. Pending Charge at the Time of Offense: Yes
4. Prior Disorderly Persons (DP) Conviction: Yes
5. Prior Indictable Conviction: Yes
 - 5a. Prior Conviction: Yes
6. Prior Violent Conviction: 1
7. Prior Failure to Appear Pretrial in Past 2 Years: 1
8. Prior Failure to Appear Pretrial Older Than 2 Years: No
9. Prior Sentence to Incarceration (14 Days or More): Yes