

Garden State CLE Presents:

New Jersey Criminal Justice Reform – **Tactical and Practical**



Lesson Plan

Glossary

PSP - Pretrial Services Program

PLEIR - Preliminary Law Enforcement Information Report

PSA - Public Safety Assessment - A risk assessment - based upon scientific algorithm and prepared By PSP with recommendations on conditions of release

Decision Matrix - Dual scores and flag for crime of violence

Affidavit of Probable Cause - Required for issuance of warrant

Live Scan - Online fingerprint investigation and record retrieval

Eligible Defendant - Anyone charged with a offense on a warrant for a charge on/after 1/1/17



Step 1.) Process begins....

The journey through the newly revised criminal justice system an arrest for indictable or D/P-level offenses. [N.J.S.A. 2A:162-25(c)]. Cases involving only traffic tickets or ordinance violations are not included under the law. Initially, most defendants will be in police custody.





Step 2.) On-call prosecutor review:

- 1.) Each County Prosecutor and the Division of Criminal Justice shall establish a system of on-call assistant prosecutors and deputy attorneys general to be available on a 24/7 basis to provide real-time legal advice and charging approvals to law enforcement officers.**
- 2.) An arrest for any indictable crime, or for a disorderly persons offense involving domestic violence where any of the grounds specified in N.J. S.A. 2C:25-21(a)(1) to (4) apply, the officer shall contact the appropriate County Prosecutor's Office, or the Division of Criminal Justice where appropriate, as soon as it is safe and feasible to do so.**
- 3.) The consultation with the prosecutor maybe made in person or by means of telephonic or other electronic communication.**
- 4.) No complaint-summons for any indictable offense, or for a disorderly persons offense involving domestic violence where any of the grounds specified in N.J.S.A. 2C:25-21(a)(1) to (4) apply, shall be issued, and no application for a complaint-warrant for any such crime or offense shall be submitted to a judicial officer authorized to approve a complaint-warrant, without the express approval of an assistant prosecutor or deputy attorney general.**
- 5.) The general requirement established to consult with an assistant prosecutor or deputy attorney general does not apply if the most serious offense for which a defendant is arrested is a disorderly persons offense other than one involving domestic violence where any of the grounds specified in N.J.S.A. 2C:25-21(a)(1) to (4) apply.**

Step 3.) Prosecutor will approve or adjust the specific charges and degree of offenses to be charged.

1.) With permission of the county prosecutor, supervisory police officials may make the warrant/summons preparation determination without prosecutorial review.



Step 4.) Initial Presumption of release on a summons

1.) Regardless of the charge, every defendant begins the process with a presumption that he will be released from police custody on a complaint-summons. (See Rule 3:3-1(c)).



Step 5.) Live scan – The Automated Preliminary Pre-trial Risk Assessment

- 1.) Fingerprinting** =-Current statutory post-arrest identification procedures mandate finger-painting for all indictable and a variety of disorderly persons' offenses, including "shall-arrest" domestic violence cases, shoplifting, prostitution and dangerous drug offenses. [See NJSA 53:1-15].
- 2.) Use of "Live Scan"**- Using the prosecutor-approved charges, the police will take defendant's fingerprints through a device called "Live Scan" in order to receive an "Automated Preliminary Pre-trial Risk Assessment" as an aid to determining the type of process to use in the defendant's case (summons or warrant).
- 3.) "Live Scan" analysis** - takes an arrestee's fingerprints and links it to a broad database which contains information related to his criminal case history. The available data are considered and scored by an objective risk-assessment program which uses a variety of factors to determine whether the criminal complaint should be prepared on a summons or a warrant.



4.) Live Scan criteria - Among the criteria are:
Nature and degree of offenses charged i.e. crime of violence);
Likelihood of re-offending while on release;
Prior arrest history;
Prior record of FTA;
Outstanding warrants in other jurisdictions;
Factors demonstrating disregard for the justice system;
Likelihood defendant will flee;
Likelihood defendant will re-offend or obstruct justice;
Likelihood defendant is a danger to himself or others.



5.) Public Safety Assessment (PSA) - One of the outputs from the Preliminary Pre-trial Risk Assessment is the Public Safety Assessment (PSA). The PSA 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." 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.

6.) Functions of the PSA – The PSA provides the police with information that can be used to make the summons v. warrant decision. A law enforcement agency shall apply for a complaint-warrant if either the Failure to Appear (FTA) or New Criminal Activity (NCA) score determined by the automated pretrial risk-assessment process is 4, 5, or 6, or if there is a New Violent Criminal Activity (NVCA) flag, unless an assistant prosecutor or deputy attorney general consulted or a supervisory officer who is authorized by the County Prosecutor to overcome presumptions determines that the presumption of charging by complaint-warrant has been over-come.

The PSA will also be used by pre-trial services division of the judiciary to recommend terms and conditions to manage defendant's who are detained on an arrest warrant and then subsequently released.

7.) Defendant at large - In those circumstances where a complaint has been prepared, but the defendant is not yet in custody, the lack of "Live Scan" data will not permit the preparation of a preliminary risk assessment. In these instances, the prosecutors should rely upon other available data, including criminal history and prior offenses in making the warrant/summons decision.



Step 6.) Summons or warrant

1.) Presumption of release on summons - In general, Rule 3:3-1(c) creates a presumption that all arrested defendants will be released on a summons. Police officers can make their own probable cause determinations on issuing a complaint on a summons. The Rules of Court do not permit conditions of release to be placed on a summons. However, a wide variety of conditions can be attached to release when a warrant has issued.



2.) Grounds for overcoming the summons presumption (Rule 3:3-1(d)). A warrant is needed because:

- 1.) The need to assure defendant's appearance at future court events;**
- 2.) The need to protect the safety of any person or the community;**
- 3.) The need to prevent the defendant from obstructing justice;**
- 4.) Defendant has previously failed to appear in response to a summons for an indictable offense;**
- 5.) Defendant will be dangerous to himself others or the community if released on a summons;**
- 6.) Defendant has other outstanding warrants;**
- 7.) Defendant's true identity or address remains unknown;**
- 8.) Defendant will obstruct justice (PSA consideration required);**
- 9.) Defendant won't appear in response to a summons (PSA consideration required);**
- 10.) Pre-trial services monitoring is needed to protect victims/witnesses/community (PSA consideration required);**
- 11.) Any other information provided by police or prosecutor.**



3.) Arrest warrants - In General - 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, 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.



4.) Probable cause determination - In order to have a complaint issued on a warrant, first step is a probable cause determination made by a neutral and detached judicial officer (judge, court clerk, court administrator, deputy court administrator). If probable cause is not found by a judge, the complaint is to be dismissed (Rule 3:3-1(h))

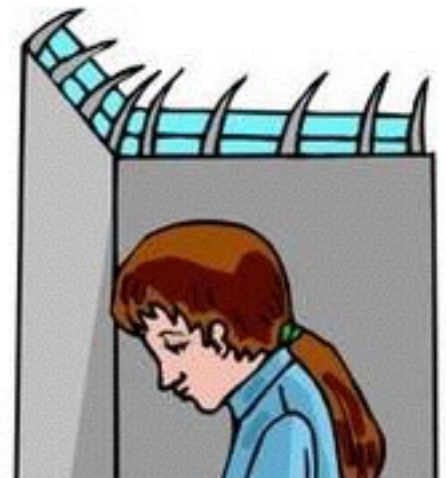
5.) Certain specific crimes must always be charged on a warrant (Rule 3:3-1(e)):

Murder;
Aggravated manslaughter;
Manslaughter;
Aggravated sexual assault;
Sexual assault;
Robbery;
Carjacking;
Escape;
Attempts to commit any of the foregoing crimes;
Defendant has been extradited to New Jersey.



6.) Certain specific crimes carry a presumption they will be charged on a warrant (Rule 3:3-1(f)):

Drug offenses of the 1st or 2nd degree;
Crimes involving the use/possession of a firearm;
Crimes of the 1st or 2nd degree subject to NERA
Racketeering
Child pornography
Possession of chemical/nuclear/biological weapons



7.) Overcoming the presumption of a warrant (Rule 3:3-1(g))

A judicial officer may authorize issuance of a summons rather than an arrest warrant if the judicial officer finds that were the defendant to be released without imposing or monitoring any conditions authorized under N.J.S.A. 2A:162-17, there are reasonable assurances that the defendant 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. The judicial officer shall not make such finding without considering the results of a preliminary public safety assessment using a risk assessment instrument approved by the Administrative Director of the Courts pursuant to N.J.S.A. 2A:162-25, and without also 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 (N.J.S.A. 2C:43-7.2), or an attempt to commit any of the foregoing offenses. The judicial officer shall also consider any additional information provided by a law enforcement officer or the prosecutor relevant to the pretrial release decision; or (2) a law enforcement officer may issue a summons in accordance with guidelines issued by the Attorney General pursuant to N.J.S.A. 2A:162-16.

8.) Eligible defendant under N.J.S.A. 2A:162-15 is a person "for whom a complaint-warrant is issued".



9.) Mandatory confinement for 48 hours - 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. 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.



Step 7.) First Appearance – Venue (Rule 3:4-2)



- 1.) D/P offenses on a summons - If the defendant has been charged on a summons with disorderly persons' level offenses, the first appearance shall be in the municipal court that has territorial jurisdiction over the offenses.**
- 2.) Indictable offenses on a summons – If the defendant has been charged with indictable offenses and released on a summons, the first appearance shall take place in CJP court within 60-days of issuance or arrest. Rule 3:4-2(a)(2))**
- 3.) Offenses charged on a warrant – The first appearance for any offense charged on a warrant shall be held in CJP court within 48 hours. (Rule 3:4-2(a)(1) and Rule 3:4-2(d)).**

Note:

CJP appearances can be by way of remote video. Despite the somewhat informal nature of the hearing, counsel are reminded that this is a public court event and appropriate standards of dress court room demeanor and conduct should be observed. County prosecutor must appear to represent the State. The State Public defender has agreed to appear on behalf of detained defendants.



Step 8.) Conditions of release – NJSA 2A:162-17

1.) Release without conditions - Based upon the completed pretrial risk assessment, pre-trial services recommendations and the prosecutor, a defendant is to be released from custody if the court finds that the release would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

2. Release with conditions – A defendant who's release constitutes a potential threat, may be released upon non-monetary conditions. The non-monetary conditions of a pretrial release ordered by the court shall be the least restrictive condition, or combination of conditions, that the court determines will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, which may include that the eligible defendant:

- Have no contact with the victim or witnesses**
- Not commit any new offenses**
- Periodic reporting to pre-trial services**
- Home detention**
- Bracelet monitoring**
- And others set forth in NJSA 2A:162-17(d)(2)**



3.) Cash bail that the defendant can reasonably afford - When these non-monetary conditions are insufficient, court can also demand cash bail as an additional condition for the purpose of discouraging flight. Bail is considered to be a last option for pre-trial release. For this reason, asking for cash bail requires approval from the county prosecutor, first assistant or DCJ.

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



5.) Escalating plea policy – It is expected that defendant who are facing mandatory minimum jail terms and have been released from custody may demand trials or delay in entering negotiated guilty pleas. Under current practice, as the date for trial approaches, prosecutors often tender an eleventh-hour plea offer that contemplates a more lenient sentence than the one contemplated by a previously-tendered offer. As a result of this common de-escalating plea offer practice, defense attorneys perceive a tactical advantage in advising their clients to hold off accepting a prosecutor's plea offer in the expectation that a more generous offer will be forthcoming.

To prevent or at least minimize delays in both detention and non-detention cases under the Bail Reform Law, it will be necessary for every County Prosecutor's Office and the Division of Criminal Justice to implement and strictly enforce an escalating plea policy.

One of the key features

of any such graduated plea system is that all plea offers must account for the timing of the plea, and generally provide for a longer sentence if the defendant pleads guilty after indictment to account for the additional investment of resources to prosecute the case and the unwillingness of the defendant

to accept responsibility in a timely fashion.



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

This may new procedure will certainly result in trials in cases that might otherwise have pled guilty at the last minute under the current system. Such trials may be necessary at the outset to help change the legal culture to achieve the long-term speedy trial benefits of a graduated plea system that rewards the timely acceptance of responsibility rather than procrastination and delay tactics.





Step 9.) Pre-trial detention – Rule 3:4A

1.) Who is eligible - Eligible defendants are those who have had their complaints prepared on a warrant. They are subject to pre-trial detention. This includes defendants charged with indictable offenses and petty offenses related to domestic violence.

2.) Presumption against pre-trial detention - 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. Accordingly, it is the exception, not the norm, for a prosecutor to seek pretrial detention.

3.) Criteria for seeking detention - The attorney general has promulgated criteria for seeking pre-trial detention that include serious crimes with a high risk assessment scores, new violent criminal activity, a serious crime committed while on release, and others.

4.) Defendant has right to discovery, counsel, to testify, present witnesses, cross-examine witnesses, be present at the hearing and Rules of Evidence do not apply. Rule 3:4A(2). See State v. Robinson, ___ N.J. Super. ___ (App. Div. 2017):

In summary, we hold that Rule 3:4-2(c)(1)(B) obligates the prosecutor to provide a defendant with those materials in the State's possession that relate to the facts on which the State bases its pretrial detention application. Those "facts" are the factual assertions contained in the probable cause affidavit. The materials, which must be produced, include those referenced in the affidavit and in the PLEIR. In this case, the identification of defendant as the shooter was central to the State's application, and the trial court properly ordered the State to produce the eyewitness statements, the photo arrays, the surveillance video listed in the PLEIR, and the initial police reports.



Step 10.) Appeals by defendant from pre-trial detention

1.) NJSA 2A:162-18(d) - An eligible defendant may appeal an order of pretrial detention pursuant to the Rules of Court. The appeal shall be heard in an expedited manner. The eligible defendant shall be detained pending the disposition of the appeal.



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