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New Jersey Bail Reform: An Analysis of Fourth Amendment Concerns

Jessica Guarracino

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I. Introduction

Since 1844, New Jersey constitutionally guaranteed monetary bail to all arrested persons not charged with a capital offense.[1] During this time, case law established that the only determination in setting monetary bail or conditions of pretrial release was to assess the arrestee's likelihood to appear in court.[2] On November 4, 2014, the voters of New Jersey drastically changed the bail laws in the State.[3] The constitutional right to monetary bail was replaced with a constitutional right to monetary bail, non-monetary conditions, or a combination of the both.[4] The constitutional amendment also permitted the courts to consider an arrestee's likelihood to appear in court, the risk the arrestee posed to the community or other person if released pretrial, and the arrestee's likelihood to obstruct the criminal justice process.[5] Finally, the New Jersey voters gave the legislature the power to establish applicable bail laws consistent with the amendment.[6]

On January 1, 2017, the New Jersey legislature's new bail laws—the Criminal Justice Reform Act (CJRA)—took effect.[7] The major change under the CJRA was practically erasing monetary bail as a consideration for judges in pretrial release.[8] Arrestees and bail bonds companies challenged the federal constitutional validity of the CJRA—even the former television star, Dog

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[1] N.J. CONST. OF 1844, art. 1 ¶ 10.
[2] State v. Korecky, 777 A.2d 927, 934 (N.J. 2001).
[3] *Official List: Public Question Results for 11/04/2014 General Election Public Question No. 1* (Dec. 2, 2014), http://www.nj.gov/state/elections/2014-results/2014-official-general-public-question-1.pdf.
[4] N.J. CONST. OF 1947, art. 1 ¶ 11 (amended Nov. 4, 2014). Pretrial detention is also authorized. N.J. STAT. ANN. § 2A:162-18 (West 2017).
[5] N.J. CONST. OF 1947, art. 1 ¶ 11 (amended Nov. 4, 2014).
[6] *Id.*
[7] *See* N.J. STAT. ANN. § 2A:162-15 to -26.
[8] N.J. STAT. ANN. § 2A:162-17(c).

the Bounty Hunter, did so.[9] The ACLU is a proponent of the CJRA and filed an amicus brief with the United States District Court for the District of New Jersey in support of the State.[10]

Part II of this Comment will provide a brief history of bail in New Jersey. Next, Part III will explain the present bail reform in New Jersey, the statutory language of the CJRA, and the effect this has had on the bail bonds industry. Part IV will discuss the Eighth and Fourth Amendments. Part V will discuss the Fourth Amendment concerns of removing monetary bail from consideration alongside other non-monetary restrictive conditions. Specifically, part V will analyze the reasonableness of the imposition of ankle monitors on arrestees following pretrial release and whether a less restrictive means of implementing the CJRA's purpose—monetary bail—affects the constitutionality of the CJRA. In sum, this Comment will argue that the CJRA is not unconstitutional under the Fourth Amendment.

II. A Brief History of Bail in New Jersey

The New Jersey Supreme Court discussed the CJRA for the first time in *State v. Robinson*.[11] The court recognized the similarities between the Federal Bail Reform Act of 1984 ("Federal Act") and the CJRA.[12] The court also noted one striking difference: the Federal Act places monetary bail alongside other restrictive conditions of pretrial release for a court's

[9] *See* Holland v. Rosen, No. 17-4317 (D.N.J. Sept. 29, 2017) (involving an arrestee released pretrial and subject to restrictive conditions pursuant to the CJRA, including house arrest and ankle monitoring, and a bail bonds company claiming the CJRA violated the Fourth, Eighth, and Fourteenth Amendments). The district court stayed all proceedings pending the plaintiffs' interlocutory appeal of the denial of preliminary injunction. *Id. See also* Rodgers v. Christie, No. 17-5556 (D.N.J July 31, 2017) (involving a mother whose son was killed by an arrestee released pretrial pursuant to the CJRA and a bail bonds company claiming the CJRA violates the Fourteenth Amendment); Collins v. Daniel, No. 17-776 (D.N.M. Oct. 30, 2017) (involving a similar change to the New Mexico bail laws where an arrestee was released pretrial and claimed, along with a bail bonds company, that the current New Mexico bail laws violated the Fourth, Eighth, and Fourteenth Amendments). Alan Feuer, *New Jersey Is Front Line in a National Battle Over Bail*, N.Y. TIMES (Aug. 21, 2017), https://www.nytimes.com/2017/08/21/nyregion/new-jersey-bail-reform-lawsuits.html.

[10] Brief for Rosen as Amicus Curiae Supporting Defendant, Holland v. Rosen, No. 17-4317 (D.N.J. July 28, 2017).

[11] 160 A.3d 1, 4 (N.J. 2017).

[12] *Id.* at 7; 18 U.S.C. §§ 3141–56 (2012).

consideration, whereas the CJRA removes monetary bail from consideration alongside other restrictive conditions.[13] The United States Supreme Court held the Federal Act was constitutional in *United States v. Salerno*.[14] The *Salerno* Court also held that courts were permitted to detain an arrestee pretrial based on dangerousness to the community—or, that it was not unconstitutional for the court to consider dangerousness at a bail hearing.[15]

Prior to the enactment of the CJRA, New Jersey long guaranteed a right to monetary bail.[16] New Jersey required by statute since 1682 that "all persons arrested shall be bailable by sufficient sureties, unless for capital offenses, where proof is evident or presumption great."[17] In 1844, New Jersey created a constitutional guarantee of monetary bail by including nearly identical language to the 1682 statute in the New Jersey Constitution: "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or presumption great."[18] This same language was included in the New Jersey Constitution of 1947.[19]

New Jersey previously guaranteed a constitutional right to monetary bail to all defendants not charged with capital offenses.[20] New Jersey later extended monetary bail to defendants charged with a crime that would have been a capital offense prior to the abolition of the death penalty in New Jersey. For example, in *State v. Johnson*, the defendant was indicted by a grand jury for first-degree murder.[21] The New Jersey Supreme Court held the "death penalty provision of the New Jersey homicide statute was invalid" and the defendant's motion for bail was granted.[22]

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[13] N.J. STAT. ANN. § 2A:162-17(b)(2), (c); 18 U.S.C. § 3142(c)(B).
[14] 481 U.S. 739, 741 (1987).
[15] *Id.*
[16] *Robinson*, 160 A.3d at 5.
[17] State v. Johnson, 294 A.2d 245, 247 (N.J. 1972) (citations omitted).
[18] N.J. CONST. OF 1844, art. 1 ¶ 10
[19] N.J. CONST. OF 1947, art. 1 ¶ 11.
[20] *Id.*
[21] 294 A.2d at 245.
[22] *Id.* at 247, 253.

The *Johnson* court referred to the constitutional right to monetary bail in New Jersey as a "fundamental right."[23] The court held that, because the crime the defendant was charged with was no longer considered a capital offense, the defendant was constitutionally entitled to be released on monetary bail.[24] The court, however, provided a list of considerations for determining the bail amount.[25] Based on these considerations, prior to the enactment of the CJRA, assessing an arrestee's danger to the community was not a concern of the New Jersey courts when determining bail.[26] When confronted with the question of an arrestee's effect on "public order and social welfare," the *Johnson* court declined to make a determination.[27] The court stated that "the primary purpose of bail in [New Jersey] is to insure [sic] presence of the accused at trial, and that the constitutional right to bail should not be unduly burdened."[28]

Subsequently, in *State v. Fann*, the New Jersey Superior Court discussed the purpose and significance of bail.[29] The court stated the purpose of bail was to guarantee the defendant would appear in court for pretrial or trial requirements.[30] The purpose of bail was not to punish the defendant or eliminate a risk of future criminal activity once the defendant was released on bail.[31] Bail was significant, because it was a New Jersey constitutional right.[32] The court also mentioned three constitutional issues with the (now former) bail system in New Jersey: (1) pretrial detention

[23] *Id.* at 248.
[24] *Id.* at 252.
[25] *Id.* at 252–53.
[26] *See id.*
[27] 294 A.2d at 252. It has been argued that, because judges were given such wide discretion in setting bail, the consideration of an arrestee's dangerousness to the community was likely a "secretive practice" that could not be proven. Timothy R. Schnacke, Michael R. Jones, & Claire B. Brooker, *The History of Bail and Pretrial Release*, PRETRIAL JUST. INST. 1, 14 (Sept. 24, 2010), http://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf.
[28] *Johnson*, 294 A.2d at 252.
[29] 571 A.2d 1023 (N.J. Super. Ct. Law Div. 1990).
[30] *Id.* at 1025.
[31] *Id.*
[32] *Id.*

of arrestees unable to financially afford bail effectively denies pretrial liberties; (2) a "substantial portion" of such arrestees would not serve any time in jail if they were able to post bail, because at trial they would not be convicted or would not be imprisoned; and (3) defendants that were detained pretrial were two or three times more likely to be sentenced to prison following trial.[33]

Over a decade later, New Jersey had not corrected some of these serious issues with the bail system. In 2013, Chief Justice Rabner created the Joint Committee on Criminal Justice (JCCJ) to report on issues in the criminal justice system, including bail.[34] To the first point of concern voiced by the *Fann* court—the denial of liberties to arrestee's detained pretrial due to a financial inability to post bail[35]—the JCCJ reported that arrestees being detained pretrial, even though they had not been convicted, was still an issue.[36] This includes separation from family members, loss of employment, inability to support their family, and a loss of freedom where arrestees are presumed innocent.[37] As to the third point of concern—arrestees detained pretrial are two or three times more likely to be sentenced to prison after trial[38]—the JCCJ reported that arrestees detained pretrial are more likely to plead guilty, be convicted, be sentenced to prison, and receive a harsher prison sentence than arrestees released pretrial.[39]

New Jersey abolished the death penalty by statute in 2007.[40] Following this decision, the constitutional right to bail was available for all criminal cases.[41]

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[33] *Id.* at 1027. *See also*, State v. Korecky, 777 A.2d 927, 930 (N.J. 2001) (stating the primary purpose of bail and any conditions is to assure a defendant appears at trial and it should not be used as a punishment or to prevent future crime after releasing a defendant on bail).
[34] REPORT OF THE J. COMM. ON CRIM. JUST. 1 (2014), https://www.judiciary.state.nj.us/courts/assets/criminal/finalreport3202014.pdf.
[35] *Fann*, 571 A.2d at 1027.
[36] *Supra* note 34, at 1–2, 17.
[37] *Id*.
[38] *Fann*, 571 A.2d at 1027.
[39] *Supra* note 34, at 33.
[40] *See* State v. Fortin, 969 A.2d 1133, 1134 (N.J. 2009); N.J. STAT. ANN. § 2C:11-3 (West 2017).
[41] State v. Robinson, 160 A.3d 1, 5 (N.J. 2017).

III. The Present Bail Reform

On November 4, 2014, New Jersey voters amended the New Jersey Constitution to replace the language of "[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or presumption great"[42] with "[a]ll persons shall, before conviction, be eligible for pretrial release."[43] While monetary bail is not dependent on whether the arrestee presents a risk to others or will obstruct the criminal justice process,[44] the CJRA allows for a combination of non-monetary conditions and monetary bail to assure the arrestee's appearance in court, protect the safety of others, and prevent obstruction of the criminal justice process.[45] This is a striking difference from prior New Jersey case law establishing bail was to secure an arrestee's appearance in court and could not be used to prevent a risk of future crime.[46]

The CJRA took effect on January 1, 2017. The statute's purpose is

> to reasonably assure an eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, and that the eligible defendant will comply with all conditions of release, while authorizing the court, upon motion of a prosecutor, to order pretrial detention of the eligible defendant when it finds clear and convincing evidence that no condition or combination of conditions can reasonably assure the effectuation of these goals.[47]

The statute permits monetary bail *only* when the court determines all other conditions of release are inadequate to assure the arrestee will appear in court.[48] The CJRA applies to an arrested "eligible defendant" (or "arrestee")—a person arrested under a complaint-warrant rather than a

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[42] N.J. CONST. OF 1947, art. 1 ¶ 10; *Official List: Public Question Results for 11/04/2014 General Election Public Question No. 1* (Dec. 2, 2014), http://www.nj.gov/state/elections/2014-results/2014-official-general-public-question-1.pdf.
[43] N.J. CONST. OF 1947, art. 1 ¶ 11 (amended Nov. 4, 2014).
[44] N.J. STAT. ANN. § 2A:162-17(c)(1).
[45] N.J. STAT. ANN. § 2A:162-16(2)(c).
[46] *See* State v. Fann, 571 A.2d 1023, 1025 (N.J. Super. Ct. Law Div. 1990).
[47] N.J. STAT. ANN. § 2A:162-15.
[48] *Id.*

complaint-summons.[49] Following the arrest, the arrestee is detained while pretrial services prepares a "risk assessment with recommendations on conditions of release."[50] The risk assessment must be completed and presented to the court within forty-eight hours following detention of the arrestee.[51] When making a pretrial release determination, the court will take into account the risk assessment, any other recommendations or information, and the totality of the circumstances.[52] The arrestee may be released pretrial "on personal recognizance or on the execution of an unsecured appearance bond" if the court is reasonably assured that the arrestee will appear in court, is not a danger to the safety and protection of people and the community, and will not obstruct the criminal justice process.[53]

If the court is not reasonably assured of the above criteria, the court may release the arrestee pretrial subject to a set of restrictive conditions.[54] The restrictive conditions require the arrestee to avoid (1) committing any offense while on release; (2) contacting any alleged victim; (3) contacting any witnesses that may testify[55]; and (4) any combination of non-monetary conditions found "in paragraph (2) of this section."[56]

If necessary, the court may impose additional non-monetary restrictive conditions.[57] The court orders restrictive conditions if it is necessary to reasonably assure the arrestee will appear in court, is not a danger to the safety and protection of people and the community, and will not

[49] N.J. STAT. ANN. § 2A:162-16.
[50] N.J. STAT. ANN. § 2A:162-16(a).
[51] N.J. STAT. ANN. § 2A:162-25(b).
[52] N.J. STAT. ANN. § 2A:162-17(a).
[53] *Id.*
[54] N.J. STAT. ANN. § 2A:162-17(b).
[55] It is understandable why a court would prevent an arrestee from speaking with witnesses before trial. This provision, however, may create a barrier for arrestees that are gathering important evidence for their case. Especially for *pro se* litigants who would not have the ability to speak with witnesses before trial.
[56] N.J. STAT. ANN. § 2A:162-17(b)(1).
[57] N.J. STAT. ANN. § 2A:162-17(b)(2).

obstruct the criminal justice process.[58] The court must use the least restrictive condition(s).[59] The restrictive conditions include: (1) "remain in the custody of a designated person"; (2) seek or maintain education or employment; (3) adhere to travel or living restrictions; (4) report regularly to an agency or program; (5) adhere to a curfew; (6) not possess a weapon; (7) not use alcohol or unlawful drugs; (8) participate in treatment programs; (9) return to custody under certain conditions; (10) participate in home supervision; (11) wear an ankle monitor, which the arrestee may be required to pay for if the court determines they are financially able; and (12) any other condition the court deems necessary to satisfy the CJRA's purpose.[60]

After the court considers the above non-monetary restrictive conditions, if the court is not reasonably assured the conditions would satisfy the CJRA's purpose, the court may order the arrestee post monetary bail only to reasonably assure the arrestee will appear in court, and not to protect the safety of people or the community, or to prevent obstruction of the criminal justice process.[61] In the event the court finds pretrial release under the above criteria is insufficient, the court may order the arrestee be released subject to a combination of the non-monetary restrictions and monetary bail or be detained pretrial.[62]

The CJRA is notably different from the prior manner of enforcing bail for pretrial release. Monetary bail was formerly a constitutional and fundamental right in New Jersey.[63] The New

[58] *Id.*
[59] *Id.*
[60] N.J. STAT. ANN. § 2A:162-17(b)(2).
[61] N.J. STAT. ANN. § 2A:162-17(c)(1)

> The court may only impose monetary bail pursuant to this subsection to reasonably assure the eligible defendant's appearance. The court shall not impose the monetary bail to reasonably assure the protection of the safety of any other person or the community or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, or for the purpose of preventing the release of the eligible defendant.

[62] N.J. STAT. ANN. § 2A:162-17(c)(1), (d)(1); N.J. STAT. ANN. § 2A:162-18(a)(1).
[63] State v. Johnson, 294 A.2d 245, 248 (N.J. 1972).

Jersey Supreme Court consistently rejected dangerousness in its consideration of an arrestee's pretrial release, stating that bail was meant to assure the arrestee's appearance at trial.[64] "Money bail may not be used to protect the community by preventing release."[65] Following the enactment of the CJRA, monetary bail became an afterthought, imposed only after all other non-monetary restrictive conditions were found to be insufficient by the court.[66] The arrestee's appearance in court remains a consideration under the CJRA, but dangerousness and obstruction to the criminal justice process are also included.[67]

A. The Effect on the Bail Bonds Industry

When an arrestee is released on monetary bail and is unable to pay, the arrestee will generally seek a bail bonds company to post the bail.[68] The bail bonds company usually charges a ten-percent fee, which the company retains following the arrestee's appearance in court irrespective of the outcome.[69] Some say the bail bonds industry is facing extinction due to the CJRA.[70] One previously successful company claimed it had not issued any bail bonds in 2017.[71] This concern has led to two cases that are currently before the United States District Court for the District of New Jersey.[72] These cases are challenging the constitutionality of the CJRA.[73] Both

[64] *Id.* at 252. *See* State v. Korecky, 777 A.2d 927, 934 (2001) (holding that bail is not meant to punish or to prevent an arrestee from committing future crimes).
[65] State v. Steele, 61 A.3d 174, 181 (N.J. Super. Ct. App. Div. 2013).
[66] N.J. STAT. ANN. § 2A:162-17(c)(1).
[67] N.J. STAT. ANN. § 2A:162-17.
[68] Joel Rose, *In New Jersey, Sweeping Reforms Deliver Existential Threat to Bail Bonds Industry* (July 6, 2017, 4:31 PM) NPR, http://www.npr.org/2017/07/06/535823170/in-new-jersey-sweeping-reforms-deliver-existential-threat-to-bail-bonds-industry.
[69] Nicholas Pugliese, *Bail Bond Industry Mounts Another Attack on N.J. Reforms* (Aug. 7, 2017, 11:09 AM) NORTHJERSEY.COM, http://www.northjersey.com/story/news/new-jersey/2017/08/07/bail-bond-industry-mounts-another-attack-n-j-reforms/539366001/.
[70] John Schuppe, *Post Bail* (Aug. 22, 2017) NBC NEWS, https://www.nbcnews.com/specials/bail-reform.
[71] Schuppe, *supra* note 70.
[72] *See* Holland v. Rosen, No. 17-4317 (D.N.J. Sept. 29, 2017); Rodgers v. Christie, No. 17-5556 (D.N.J July 31, 2017).
[73] *See id.*

cases have bail bonds companies as named plaintiffs.[74] In response to challenges faced by the bail bonds industry, former New Jersey Governor Chris Christie stated that "the bail bond industry makes a lot of money off poor people," and referred to this practice as "disgraceful . . . [because] you should not have to stay in jail for being poor."[75] The major changes to the bail system are what have sparked the constitutional debate over the CJRA.

B. Concerns and Successes of the CJRA

One of the major concerns that led to New Jersey's bail reform was the number of arrestees that remained in jail pretrial solely because they could not afford bail to be released.[76] Since the enactment of the CJRA, this concern has begun to change. A study conducted by the Pretrial Justice Institute in Maryland reviewed New Jersey's pretrial detention and granted New Jersey—and only New Jersey—an "A" grading.[77] The national average grade was a "D."[78] The available statistics show that bail reform in New Jersey has been effective to remedy the pretrial detention issue, but the CJRA authorized for the first time, pure pretrial detention.[79] The CJRA took effect on January 1, 2017.[80] As of December 31, 2015, 8,899 arrestees were detained pretrial.[81] This number has decreased to 5,718 as of December 31, 2017—a decrease of 35.7%.[82] Furthermore,

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[74] *See id.*
[75] Pugliese, *supra* note 69.
[76] Chief Justice Stuart Rabner of the New Jersey Supreme Court has stated the former bail system was unfair to poor defendants, because they were unable to post bail and therefore separated from their families, fired from their jobs, pressured into accepting plea deals, or serving a longer prison sentence compared to those defendants that were able to post bail. Criminal Justice Reform Information Center, N.J. CTS, https://www.judiciary.state.nj.us/courts/criminal/reform.html (last visited Nov. 1, 2017).
[77] Rebecca Everett, *Here's How N.J. Scores on Bail Reform (Hint: It's Better Than Other States)*, NJ.COM (Nov. 1, 2017, 4:15 PM), http://www.nj.com/news/index.ssf/2017/11/nj_only_state_to_get_a_grade_from_national_bail_re.html.
[78] Akira Suwa, *N.J. Bail Reform Gets Top Grade from Advocate*, THE INQUIRER (Oct. 31, 2017, 5:41 PM), http://www.philly.com/philly/news/n-j-bail-reform-gets-top-grade-from-advocates-20171101.html.
[79] N.J. STAT. ANN. § 2A:162-18.
[80] N.J. STAT. ANN. § 2A:162-15.
[81] New Jersey Courts, Criminal Justice Reform Report, Chart C, https://www.judiciary.state.nj.us/courts/assets/criminal/cjrreport.pdf (last visited Mar. 2, 2018).
[82] *Id.*

in 2017, as of December 31, 2017, the number of arrestees detained pretrial dropped from 7,173 to 5,718—a decrease of 20.3%.[83]

In addition to concerns over the jail population being flooded with arrestees unable to afford bail, the CJRA has created debates over the future of monetary bail in New Jersey and the country. There are serious concerns over the bail bonds industry and its ability to survive, considering only thirty-three arrestees were released with monetary bail in the first nine months following enforcement of the CJRA.[84] Additionally, there are concerns that the CJRA violates an arrestee's Fourth, Eighth, and Fourteenth Amendment rights. This is because the CJRA removes monetary bail from the court's consideration at the pretrial release hearing of which restrictive conditions the arrestee may be subject to—such as maintaining employment, obeying a curfew, being placed on house arrest, or wearing an ankle monitor.[85]

IV. Constitutional Amendments that Govern the Validity of Bail Reform Acts

Historically, pretrial release was tied to money.[86] After 1776, most states adopted a law guaranteeing bail in all but capital cases that was modelled after a Pennsylvania law.[87] In 1789, following this state law trend, federal law guaranteed bail in all but capital cases pursuant to section 33 of the Judiciary Act.[88] The federal Bail Reform Act of 1966 was the "first major reform of the federal bail system since the Judiciary Act of 1789."[89] The Bail Reform Act of 1966 provided that any person not charged with a capital offense was entitled to be released on his or her own recognizance or an unsecured bond, unless such a release would not reasonably assure the

[83] *Id.* (showing a decrease in 2016 from 8,907 to 7,058—a decrease of 20.8%).
[84] Suwa, *supra* note 78.
[85] *See* N.J. STAT. ANN. § 2A:162-17(b).
[86] *See* Schnacke, *supra* note 27, at 4–12.
[87] *Id.* at 4–5.
[88] *Id.* at 5.
[89] *Id.* at 12.

arrestee's appearance at trial.[90] Additionally, if it was determined the release would not reasonably assure appearance at trial, monetary bail and other conditions may be required, including travel restrictions or placing the arrestee under another's supervision.[91] Further bail reform occurred in 1984 via the Federal Act.[92] Only recently, however, has New Jersey overhauled its bail laws to become broader and include non-monetary restrictive conditions placed on an arrestee pretrial in lieu of monetary bail.[93] In New Jersey, pretrial release is no longer tied to money.

A. A Brief Discussion of the Eighth Amendment and Bail Reform

The Eighth Amendment[94] is relevant to bail, and the CJRA is similar to the Federal Act, which the Court held was constitutional.[95] *Salerno* changed the federal application of the Eighth Amendment to include consideration of dangerousness when issuing bail.[96]

Salerno stated the Eighth Amendment mentions "nothing about whether bail shall be available at all."[97] The courts may deny bail if the arrestee will threaten the judicial process.[98] The plaintiff argued his bail was determined based solely on whether he would appear in court.[99] The Court, however, found that "[n]othing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight."[100] The Court found the Eighth

[90] 18 U.S.C. § 3146 (1966).
[91] *Id.*
[92] 18 U.S.C. §§ 3141–56 (1984).
[93] *Compare* N.J. CONST. OF 1947, art. 1 ¶ 10 ("All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or presumption great."), *with* N.J. STAT. ANN. § 2A:162-15 (West 2017) ("Monetary bail may be set for an eligible defendant only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required.").
[94] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed." U.S. CONST. amend. VIII.
[95] *See* U.S. CONST. amend. VIII; 18 U.S.C. § 1342 (2012); United States v. Salerno, 481 U.S. 739, 755 (1987).
[96] *Salerno*, 481 U.S. at 755.
[97] *Id.* at 752.
[98] *Id.* at 753.
[99] *Id.* at 752–53.
[100] *Id.* at 754.

Amendment did not limit a bail determination to flight and Congress could include other compelling interests.[101]

The Federal Act permits a federal judge to order an arrestee to be detained pretrial if there is clear and convincing evidence no conditions of release will reasonably assure a person's or community's safety.[102] This is similar to the CJRA's purpose, which is to reasonably assure the arrestee will appear in court, is not a danger to the safety and protection of people and the community, will not obstruct the criminal justice process, and will follow the release conditions.[103] Additionally, because the CJRA[104] mirrors the Federal Act,[105] a judge may consider an arrestee's dangerousness to the community when imposing pretrial release conditions under the CJRA without violating the constitution. One main difference between the CJRA and the Federal Act is that the Federal Act permits the court to consider monetary bail alongside non-monetary restrictions, and the CJRA requires the court consider the non-monetary restrictions only before.[106]

B. A Brief Discussion of the Fourth Amendment and Bail Reform

1. Supreme Court Precedent: Searches and the Advancement of Technology

The Fourth Amendment of the United States Constitution states in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[107] This country has changed immensely since the enactment of

[101] *Id.* at 754–55.
[102] 18 U.S.C. § 3142(f)(2)(B).
[103] N.J. STAT. ANN. § 2A:162-15.
[104] N.J. STAT. ANN. § 2A:162-15(b)(1) ("If the court does not find, after consideration, that the release . . . will reasonably assure . . . the protection of the safety of any other person or the community, . . . the court may order the pretrial release of the eligible defendant subject to [certain conditions].")
[105] 18 U.S.C. § 3142(c) ("If the judicial officer determines that the release . . . will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person [will be subject to certain conditions].")
[106] 18 U.S.C. § 3142(c)(B); N.J. STAT. ANN. § 2A:162-17(b)(2), (c).
[107] U.S. CONST. amend. IV.

the Fourth Amendment. New technological advancements present new questions for the Court to decide on whether the use of particular technology is a search under the Fourth Amendment.

Most relevant to the within discussion is the Court's recent decision in *Grady v. North Carolina*, where the Court found the requirement to wear an ankle monitor on an individual released from prison after expiration of his sentence was a search under the Fourth Amendment.[108] *Grady* was not the Court's first analysis of evolving technologies, and the Court is still deciding what kinds of technology the Fourth Amendment extends to.[109] The doctrine applied today is based on the Court's previous considerations of new technology and how it may (or may not) be used in compliance with the Fourth Amendment.

In 1967, the Court in *Katz v. United States* held that the installation of an electronic listening device outside of a public telephone booth in order to listen to conversations was a search under the Fourth Amendment.[110] The Court found that, even though Katz had made phone calls in a public phone booth, he intended for the conversations to be private.[111] The Court stated that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[112] Furthermore, the Court overruled *Olmstead v. United States*,[113] which held that a Fourth Amendment inquiry required physical penetration of a place

[108] 135 S. Ct. 1368, 1371 (2015). Under the CJRA, a court may order an arrestee to wear an ankle monitor as a condition of pretrial release without considering monetary bail. N.J. STAT. ANN. § 2A:162-17(b)(2)(k), (c)(1).
[109] *See* United States v. Carpenter, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (U.S. June 5, 2017) (No. 16-402). *See also* SCOTUSblog, *Carpenter v. United States*, http://www.scotusblog.com/case-files/cases/carpenter-v-united-states-2/ (last visited Apr. 20, 2018) (deciding whether a "warrantless seizure and search of historical cellphone records revealing the location and movements of a cellphone user . . . is permitted by the Fourth Amendment").
[110] 389 U.S. 347, 348 (1967).
[111] *Id.* at 352.
[112] *Id.* at 351 (internal citations omitted).
[113] 277 U.S. 438 (1928).

and the seizure of tangible property.[114] The *Katz* Court concluded by stating that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[115] *Katz* is an early example of where the Court restricted the government's use of monitoring devices on a person who had not been found guilty of a crime.

In addition to listening devices, the Court has considered whether using and monitoring a tracking device is a search under the Fourth Amendment.[116] In *United States v. Karo*, law enforcement agents placed a beeper inside a container of ether—purchased by private citizens (the respondents) from a government informant—to track its location.[117] The agents used the beeper to track the ether to multiple locations, including Karo's house, two storage facilities, and three other parties' houses.[118] The agents did not obtain a warrant until after tracking the ether to all of these locations.[119] The Court stated that the installation of the beeper was not a search under the Fourth Amendment, but monitoring the beeper was.[120] The Court compared warrantless tracking of the beeper while inside the private residences to an agent entering the residence without a warrant to verify the ether was inside.[121] The beeper was tracked while inside private residences, "which the individual normally expects privacy free of governmental intrusion not authorized by a warrant."[122] This expectation is "one that society is prepared to recognize as justifiable."[123]

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[114] *Katz*, 389 U.S. at 352–53.
[115] *Id.* at 359.
[116] *See* United States v. Karo, 468 U.S. 705 (1984) (involving the installation of a beeper into a container of ether to track the location of the ether); United States v. Knotts, 460 U.S. 276 (1983) (involving the installation of a beeper into a container of chloroform to track the defendant's movement while in a vehicle).
[117] *Karo*, 468 U.S. at 708. *Cf.* United States v. Jones, 565 U.S. 400 (2012) (deciding a case where the FBI attached a GPS tracking device to a private citizen's car).
[118] *Id.* at 708–10.
[119] *Id.* at 710.
[120] *Id.* at 713.
[121] *Id.* at 715.
[122] *Id.* at 714.
[123] *Karo*, 468 U.S. at 714.

While the Court had not considered ankle monitoring prior to *Karo*, monitoring the beeper may be compared to monitoring an arrestee's location when wearing an ankle monitor.

In 2001, the Court continued to address the question of "what limits there are upon [the] power of technology to shrink the realm of guaranteed privacy."[124] In *Kyllo v. United States*, law enforcement agents believed that Kyllo was growing marijuana in his home.[125] To confirm this suspicion, the agents—while parked outside of Kyllo's house and without a warrant—used a thermal imager machine to detect high-intensity heat lamps that are often used to grow marijuana.[126] Based on the thermal imager results, the agents believed Kyllo was using heat lamps and obtained a warrant to search his residence, where the agents confirmed that Kyllo was growing marijuana.[127] The Court compared the use of the thermal imager machine to the electronic listening device used in *Katz*.[128] In both *Katz* and *Kyllo*, neither device physically infiltrated the area that the defendant reasonably expected to be private, but both cases involved the use of technology that allowed law enforcement agents to obtain information from within a private area that could not be obtained from observation.[129] The Court held that the use of the thermal imager machine was a search under the Fourth Amendment.[130] This case concerned how far the government may intrude into a person's activities while at home by using technology.

Another case from 2001, *United States v. Knights*, does not involve the use of technology to conduct a search.[131] *Knights*, however, is relevant to the issue of whether an ankle monitor is a search under the Fourth Amendment. *Knights* applied the Fourth Amendment balancing test for

[124] Kyllo v. United States, 533 U.S. 27, 34 (2001).
[125] *Id.* at 29.
[126] *Id.* at 29–30.
[127] *Id.* at 30.
[128] *Id.* at 35.
[129] *Id.* at 35–36.
[130] *Kyllo*, 533 U.S. at 34–35.
[131] 534 U.S. 112 (2001).

searches to a court order signed by the defendant when addressing whether the defendant consented to the search.[132] The court order included certain search conditions of the defendant's probation and allowed him to avoid prison time.[133] For Knights to be released on probation—rather than remain in prison—he signed a court order stating his "person, property, place of residence, vehicle, [and] personal effects [were subject] to search at anytime" by a law enforcement or probation officer, even without a warrant of arrest, search warrant, or reasonable cause.[134] After a detective searched Knights's apartment pursuant to the court order, the detective found evidence sufficient to indict Knights on multiple criminal charges.[135] The Court declined to decide whether Knights's signing of the order was a consent to the search, because the Court concluded the search was reasonable under the totality of the circumstances.[136]

The *Knights* court stated that when determining reasonableness under the Fourth Amendment, the court must balance "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[137] The Court looked at Knights's probation status and that the sentencing judge found it necessary to condition his probation on the search provision.[138] The Court reasoned that the government had an interest to encourage rehabilitation and "protect[] society from future criminal violations."[139] As to Knights's privacy interest, the Court determined that the probation order unambiguously stated the terms of the search provision and his reasonable

[132] *Id.* at 114.
[133] *Id.* at 118.
[134] *Id.* at 114.
[135] *Id.* at 115–16.
[136] *Id.* at 118.
[137] *Knights*, 534 U.S. at 119 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
[138] *Id.*
[139] *Id.*

expectation of privacy was significantly diminished.[140] The Court held that "the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment."[141]

In 2012, the Court decided a GPS tracking issue in *United States v. Jones*.[142] The FBI was investigating Jones and obtained a warrant to attach a GPS tracking device on Jones's wife's car.[143] The FBI did not follow the warrant when installing the GPS tracking device.[144] The Government used the GPS information to charge Jones with conspiracy and Jones was found guilty at trial.[145] The Court acknowledged that a visual observation of the vehicle would not have been a search, and a person does not have a reasonable expectation of privacy when travelling on public roads.[146] The Court, however, found that a vehicle is an effect under the Fourth Amendment.[147] The Court distinguished the use of the GPS tracking device from a visual search of the vehicle, because the Government attached the device to a protected area.[148] The Court held that GPS tracking of a vehicle is a Fourth Amendment search, because "[t]he Government physically occupied private property for the purpose of obtaining information."[149] The GPS tracking of the car in *Jones* and the restrictions the Court placed on doing so provide guidance when determining whether tracking an ankle monitor is a reasonable search under the Fourth Amendment.

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[140] *Id.* at 119–20.
[141] *Id.* at 112.
[142] 565 U.S. 400 (2012).
[143] *Id.* at 402–03.
[144] *Id.* at 403 (finding that the FBI was authorized to install the device in the District of Columbia within ten days, but did not install the device until the eleventh day and did so outside of the District of Columbia).
[145] *Id.* at 403–04.
[146] *Id.* at 412.
[147] *Id.* at 405.
[148] *Jones*, 565 U.S. at 410.
[149] *Id.* at 404.

Justice Alito's concurrence in *Jones* criticized the majority's focus on historical Fourth Amendment principle's, and the application of those principles to modern technology.[150] Justice Alito stated, "[I]t is almost impossible to think of late-18th-century situations that are analogous to . . . this case."[151] An individual's reasonable expectation of privacy in his or her daily activities may change as more electronic monitoring devices become available.[152] Justice Alito suggested that Congress should address this evolution,[153] but his concurrence illuminates the ongoing difficulty the Court experiences in deciding whether the government's use of new technology is a search under the Fourth Amendment, and whether such a search is unreasonable.

In 2014, the Court determined "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested."[154] *Riley v. California* involved two cases of cell phone use by police.[155] In the first case, Riley was stopped by police and his car was impounded.[156] Riley was arrested and a smart phone was recovered from his pants pocket.[157] Police searched the phone for evidence of gang affiliation without a warrant.[158] Police found a photograph in the phone depicting Riley standing in front of a car that matched a car involved in a shooting a few weeks prior; police charged Riley with that shooting.[159]

In the second case, Wurie was arrested after police witnessed him participating in a drug sale.[160] A flip phone was recovered from Wurie.[161] While the phone was in the police's

[150] *See id.* at 419.
[151] *Id.* at 420 ("Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?").
[152] *Id.* at 429.
[153] *Id.*
[154] Riley v. California, 134 S. Ct. 2473, 2480 (2014).
[155] *Id.* at 2480.
[156] *Id.*
[157] *Id.*
[158] *Id.* at 2480–81.
[159] *Id.* at 2481.
[160] *Riley*, 134 S. Ct. at 2481.
[161] *Id.*

possession, multiple calls were received from "my house."[162] Without a warrant, police opened the phone, pressed two buttons to obtain the phone number and searched online to find where the calls originated.[163] When the police arrived at the location of the calls, they obtained a search warrant, searched the home, and seized drugs, a gun, and cash.[164] Wurie was then charged.[165]

The Court stated that a search of the cell phone data could not be justified as a search incident to arrest because the arrestee cannot use the cell phone data as a weapon to endanger an officer or as a tool to escape.[166] The Court was concerned with the amount of personal information that an officer could access on a cell phone without a warrant, including GPS information.[167] GPS information can provide specific movements of an individual, and "'a wealth of detail about her familial, political, professional, religious, and sexual associations.'"[168] The Court held that a warrant is required to search cell phone data seized incident to an arrest.[169] This case demonstrates how invasive GPS data can be, which applies to ankle monitoring.

Finally, most important to the within analysis, the Court created a necessary connection between the Fourth Amendment and the imposition of an ankle monitor as a condition of pretrial release.[170] In *Grady v. North Carolina*, Grady was convicted of a crime, sentenced, and released upon completion of his prison term.[171] Pursuant to a North Carolina statute, the court determined that Grady should be released with the condition that he wear an ankle monitor for the rest of his

[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 2482.
[166] *Riley*, 134 S. Ct. at 2485.
[167] *Id.* at 2489–90.
[168] *Id.* (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).
[169] *Id.* at 2495.
[170] Grady v. North Carolina, 135 S. Ct. 1368 (2015).
[171] *Id.* at 1369.

life.[172] Grady appealed, challenging the constitutionality of the requirement, because it violated his Fourth Amendment right against unreasonable searches and seizures.[173] The Court concluded that "a State . . . conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."[174] The Court, however, left unanswered the question of whether such a search was unreasonable.[175]

2. The Fourth Amendment Reasonableness and the Least Restrictive Means

Some may say that requiring an arrestee to wear an ankle monitor is more restrictive than the option of release on monetary bail.[176] Others argue that wearing an ankle monitor is less restrictive when compared with pretrial detention due to an arrestee's inability to post bail.[177] While the least restrictive means are not required for a search to be reasonable,[178] the court must balance an individual's privacy interest against the government's interest.[179]

The Fourth Amendment protects against unreasonable searches and seizures.[180] The Court determines whether a search was reasonable under the Fourth Amendment.[181] The reasonableness of a search "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of

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[172] *Id.*
[173] *Id.*
[174] *Id.* at 1370.
[175] *Id.* at 1371.
[176] *See* Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2155 (2017) (discussing electronic monitoring, bail, and pretrial detention concerns in immigration detention). Available options the government may impose on the detainee in lieu of detention include release on the detainee's own recognizance, payment of monetary bail, and participation in electronic monitoring, with electronic monitoring being "the most restrictive and invasive of these options." *Id.*
[177] Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L. J. 1344, 1395 (2014) ("Electronic monitoring is clearly less restrictive than a monetary requirement resulting in detention.").
[178] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995) (citing Skinner v. Railway Labor Execs.' Ass'n, 489 U.S. 602, 629, n.9 (1989)).
[179] Samson v. California, 547 U.S. 843, 848 (2006) (quoting United States v. Knights, 534 U.S. 112, 118–19 (2001)). *See* discussion *infra* Part IV.B.2.
[180] U.S. CONST. amend. IV.
[181] *Samson*, 547 U.S. at 848 (quoting *Knights*, at 118).

legitimate governmental interests."[182] The present matter involves arrestees that are released pretrial with restrictive conditions. The Fourth Amendment reasonableness analysis is different under the CJRA than for parties that are searched incident to an arrest or matters where law enforcement agents must obtain a warrant prior to a search. Rather, the State and the courts are making a determination of which restriction(s) the arrestee will be subject to. The present matter is similar to parties sentenced to probation or released on parole and subject to restrictive conditions. Here, however, "unlike convicts, arrestees and pretrial detainees," the arrestees "are entitled to a presumption of innocence."[183] Furthermore, being arrested for a crime does not create an inference that the arrestee is more likely to commit a crime if released pretrial.[184]

When a court in the State of New Jersey orders an arrestee wear an ankle monitor as a condition of pretrial release, this creates a search under the Fourth Amendment.[185] Though not required, when determining which restrictive conditions to place upon an arrestee under the CJRA, the court must order "the *least restrictive condition*, or combination of conditions" to reasonably assure the arrestee will appear in court, is not a danger to the safety and protection of people and the community, and will not obstruct the criminal justice process.[186] Monetary bail is not included in this consideration.[187] The Supreme Court has "repeatedly refused" to state that only the least restrictive search is reasonable under the Fourth Amendment.[188]

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[182] *Id.* (quoting *Knights*, 534 U.S. at 118–19).
[183] United States v. Mitchell, 652 F.3d 387, 422 (3d Cir. 2011). The fundamental principle that defendants are innocent until proven guilty is recognized within the Federal Act, stating that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence." 18 U.S.C. § 3142. *See* United States v. Karper, 847 F. Supp. 2d 350, 358 (N.D.N.Y. 2011).
[184] *Karper*, 847 F. Supp. 2d at 363 (quoting United States v. Scott, 450 F.3d 863, 874 (9th Cir.2006)).
[185] *See Grady*, 135 S. Ct. at 1371.
[186] N.J. STAT. ANN. § 2A:162-17(b)(2) (emphasis added).
[187] *See id*.
[188] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995) (citing Skinner v. Railway Labor Execs.' Ass'n, 489 U.S. 602, 629, n.9 (1989)).

For example, in *Illinois v. Lafayette*, the Court determined whether the police may search an arrestee's shoulder bag upon arriving at the police station without a warrant.[189] The Court found that the search was reasonable in order to protect the police officers and to inventory the contents of the shoulder bag.[190] Other, less restrictive, means of effecting these goals would have been to seal the shoulder bag in a plastic bag.[191] The Court, however, rejected this argument, because reasonableness is not determined based on the existence of a less restrictive alternative.[192] The Court declined to second-guess police departments on the methods used to "best deter theft by and false claims against its employees" and protect the security of the police station.[193]

The Court also considered the least restrictive means in *Skinner v. Railway Labor Executives' Ass'n*.[194] The Court decided whether regulations imposed by the Federal Railroad Administration (FRA) requiring drug and alcohol tests of certain employees was a violation of the Fourth Amendment.[195] The Court considered the respondents' argument that "less drastic and equally effective means" existed where drug and alcohol tests were not necessary, such as training supervisors to detect employees that may be under the influence.[196] The Court rejected this argument and stated that reasonableness is not determined based on the existence of a less restrictive alternative.[197] The Court noted that the FRA did consider various alternatives and

[189] 462 U.S. 640, 641 (1983).
[190] *Id.* at 646.
[191] *Id.* at 647.
[192] *Id.* ("In *Cady v. Dombrowski*, . . . we held, '[t]he fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, by itself, render the search unreasonable.' [413 U.S. 433, 447 (1973)].").
[193] *Id.*
[194] 489 U.S. 602, 629, n.9 (1989).
[195] *Id.* at 607–08.
[196] *Id.* at 629, n.9.
[197] *Id.*

reasonably found them inadequate.[198] The Court declined to "second-guess the reasonable conclusions drawn by the FRA after years of investigation and study."[199]

V. Unreasonable Search Determination Following *Grady v. North Carolina*

A. An Ankle Monitor Required Under the CJRA Is a Search Under the Fourth Amendment

The Court made two determinations in *Grady*: (1) ankle monitoring that is not consented to is a Fourth Amendment search[200] and (2) if the ankle monitoring is found to be a search, the search must not be unreasonable.[201] First, although the *Grady* Court found the ankle monitoring was a search, the Court did not explain what "without consent" meant.[202] Furthermore, the United States Supreme Court has previously declined to decide whether an individual waives his Fourth Amendment rights by consenting to a search where the alternative is remaining in jail.[203] Some courts of appeals, however, have found that an individual does not consent to a search where the alternative is jail.[204] A similar conclusion can be reached when an arrestee is ordered to wear an ankle monitor as a condition of pre-trial release. If an arrestee refused to consent to a court's order to wear an ankle monitor, the arrestee would likely remain in jail pending trial. Nevertheless, this

[198] *Id.*
[199] *Id.*
[200] 135 S. Ct. 1368, 1370 (2015).
[201] *Id.* at 1371.
[202] *Id.* at 1370.
[203] *See* Samson v. California, 547 U.S. 843, 852 n.3 (2006) (declining to address the consent issue where the search was found to be reasonable). *But see id.* at 863 n.4 (Stevens, J., dissenting) (finding no consent because, when deciding between jail and search conditions, "to speak of consent in this context is to resort to a 'manifest fiction,' for 'the [parolee] who purportedly waives his rights by accepting such a condition has little genuine option to refuse'") (quoting WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.10(b), 440–41 (4th ed. 2004)).
[204] *See* United States v. Lara, 815 F.3d 605 (9th Cir. 2016) (holding that when a probationer accepted restrictive terms of his release, the probationer did not waive his Fourth Amendment rights and the search imposed by the restriction still needed to be reasonable); United States v. Isiofia, 370 F.3d 226, 232–33 (2d Cir. 2004) (finding the district court did not err in finding the defendant did not consent to the search, where consent was given after defendant allegedly was told that if he did not consent he would be jailed).

uncertainty is beyond the scope of this Comment. The Court has found it unnecessary to address the issue of whether the defendant consented to the search when the search is reasonable.[205]

B. An Ankle Monitor Required Under the CJRA Is Reasonable

To the *Grady* Court's second point, because there is no consent, the imposition of an ankle monitor is a search and the reasonableness test applies.[206] The Fourth amendment protects against unreasonable searches and seizures.[207] The reasonableness of a search "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[208]

1. The Arrestee Has Privacy Interests Against the Imposition of an Ankle Monitor

The ankle monitor imposed by the court under the CJRA creates a privacy concern for the arrestee. It is important to remember that an arrestee released pretrial has not been found guilty of the crime he or she is accused of. It is a fundamental principle that an individual is innocent until proven guilty.[209] Ankle monitoring is a restriction on a potentially innocent individual's liberty. The Supreme Court has stated that GPS information can provide specific movements of an individual, and "reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[210] All of this formerly private information is now within control of the government. Furthermore, certain clothing styles may make it difficult to cover up an ankle monitor, leaving the monitor exposed for family, friends, colleagues, and others to see when the

[205] *Samson*, 547 U.S. at 852 n.3.
[206] *Grady*, 135 S. Ct. at 1370.
[207] U.S. CONST. amend. IV.
[208] *Samson*, 547 U.S. at 848 (quoting United States v. Knights, 534 U.S. 112, 118–19 (2001)).
[209] *See* United States v. Karper, 847 F. Supp. 2d 350, 358 (N.D.N.Y. 2011).
[210] Riley v. California, 134 S. Ct. 2473, 2490 (2014) (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)) (discussing the use of cellphone GPS monitoring).

arrestee is in public.[211] If others witness the arrestee walking down the street wearing an ankle monitor, it may be assumed that the arrestee was already found guilty and released on probation or parole.[212] Even though the arrestee is innocent until proven guilty—or even just innocent—the ankle monitor becomes a social stigma.[213]

2. The State of New Jersey Has a Legitimate Governmental Interest Which Outweighs the Arrestee's Privacy Interest

The New Jersey government's stated purpose under the CJRA is to reasonably assure that the arrestee will appear in court, is not a danger to the safety and protection of people and the community, will not obstruct the criminal justice process, and will follow the conditions of release.[214] As mentioned earlier, the CJRA's purpose is similar to that of the Federal Act, which was found to be constitutional in *United States v. Salerno*.[215] The State's concerns are legitimate. To reasonably ensure the arrestee will appear in court has long been recognized as a constitutional purpose for imposing bail.[216] Additionally, the CJRA seeks to protect individuals and communities.[217] "States and municipalities are . . . vested with the [important] responsibility of protecting the health, safety, and welfare of its citizens."[218]

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[211] See M.M., *Living with an Ankle Bracelet: Freedom, with Conditions*, THE MARSHALL PROJECT (July 16, 2015), https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet#.1UaJaftgJ ("I wear [an ankle monitor,] afraid that someone at work will notice the bulge. When I go to school, I worry my friends will spot it and leave me. I push it up into my jeans, hoping they won't see.").

[212] Specific to New Jersey, in 2013, 1,401 parolees were subject to electronic monitoring—most of whom were high-risk sex offenders. The Associated Press, *Glance: How NJ Uses Electronic Monitoring*, THE TRENTONIAN (July 28, 2013 3:04 PM), http://www.trentonian.com/article/TT/20130728/NEWS03/130729620. It does not appear that an ankle monitor worn by a sex offender or parolee looks any different than an ankle monitor worn by an arrestee pending trial. It is therefore likely that a person seeing an arrestee wearing an ankle monitor may assume the arrestee was already found guilty of a crime.

[213] *See* Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2163 (2017).

[214] N.J. STAT. ANN. § 2A:162-15.

[215] 481 U.S. 739, 741 (1987).

[216] State v. Johnson, 294 A.2d 245, 252 (1972) (stating that bail's primary purpose in New Jersey is to ensure the arrestee's presence at trial).

[217] N.J. STAT. ANN. § 2A:162-15 (stating that part of the purpose of the CJRA is to reasonably assure the arrestee is not a danger to the safety and protection of people and the community).

[218] United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342–43 (2007) (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985)).

Furthermore, the Court has also stated that the states' traditional police power "is defined as the authority to provide for the public health, safety, and morals."[219] The Court has recognized this police power as a legitimate governmental interest. The CJRA certainly helps to accomplish this interest. Specifically, if the court finds it necessary to impose a non-monetary restrictive condition on the arrestee following pretrial release, the condition must be the least restrictive.[220] The court would need to find many other less restrictive conditions were insufficient to order an ankle monitor be worn at release. The imposition of an ankle monitor may allow the government to prevent the arrestee from committing a future crime, leaving the state, or attacking the victim of the arrestee's crime if there was one.[221]

The government has a strong interest in protecting its citizens and the stated purpose of the CJRA is a legitimate governmental interest. Furthermore, although the requirement that an arrestee wear an ankle monitor may raise privacy concerns, these concerns "seem, to some extent, intuitively reasonable."[222] The community should be protected, however, "[i]f evidence suggests that individuals could jeopardize the safety of their community while they awaited trial."[223] Prior to the enactment of the CJRA, some monetary bail amount would have been sufficient for an arrestee to be released pretrial.[224] Under the CJRA, however, it is reasonable to order an arrestee to comply with conditions of pretrial release, including wearing an ankle monitor, before ordering monetary bail, even if an arrestee is willing to pay any amount of monetary bail in lieu of the

[219] Egolf v. Witmer, 526 F.3d 104, 119 (2008) (Smith, J., concurring) (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991)).
[220] N.J. STAT. ANN. § 2A:162-17(b)(2).
[221] *See* N.J. STAT. ANN. § 2A:162-15 (stating that the purpose of the CJRA is to reasonably assure the arrestee will appear in court, is not a danger to the safety and protection of people and the community, will not obstruct the criminal justice process, and will follow the conditions of release).
[222] Wiseman, *supra* note 177, at 1351.
[223] *Id.*
[224] *See* N.J. CONST. OF 1947, art. 1 ¶ 11.

restrictions.[225] While complying with a court's order of pretrial release may be more burdensome on the arrestee than simply posting bail, it is not a violation of the Fourth Amendment to remove monetary bail from the consideration. This is because the least restrictive means are not required under the Fourth Amendment.

C. Least Restrictive Means Are Not Required Under the Fourth Amendment

Although the CJRA states that a court is required to impose the least restrictive means from a list of non-monetary restrictions, this was a determination of the New Jersey legislature and not a Fourth Amendment requirement. The test under the Fourth Amendment is reasonableness.[226] Where the search via an ankle monitor is reasonable, it is not constitutionally necessary for the search to be the least restrictive.[227] The argument can be made that monetary bail is less restrictive than an ankle monitor, and therefore should be considered prior to the court order of an ankle monitor. Others argue that wearing an ankle monitor is less restrictive than pretrial detention where an arrestee is financially unable to post bail.[228] Even where an arrestee considers monetary bail less restrictive, this is not the constitutional test. The imposition of an ankle monitor is an acceptable search when found reasonable and the existence of less restrictive monetary bail does not make the ankle monitor any less reasonable.

It is unlikely the court will order an arrestee to wear an ankle monitor pending trial. The percentage of parolees released with an ankle monitor can help determine how often judges are willing to impose such a restriction. In 2013, less than 4% of parolees were required to comply

[225] *See* N.J. STAT. ANN. § 2A:162-17.
[226] U.S. CONST. amend. IV.
[227] *See* Skinner v. Railway Labor Execs.' Ass'n, 489 U.S. 602, 629 (1989).
[228] Wiseman, *supra* note 177, at 1395 ("Electronic monitoring is clearly less restrictive than a monetary requirement resulting in detention.").

with an ankle monitor order as a condition of their release.[229] This percentage was the same in 2014 and slightly above 3% in 2015. The percentage of parolees released on "General Parole Supervision" was approximately 50% in 2013, 2014, and 2015.[230]

As mentioned earlier, pursuant to the CJRA a court is required to impose the least restrictive means from a list of non-monetary restrictions.[231] These restrictions range from maintaining employment or education, and complying with a curfew, to home supervision, wearing an ankle monitor, or any other condition the court finds necessary.[232] While the statute does not specify that the list be followed in order, a review of the options indicates that the list is ordered from less restrictive to more restrictive.

Now, consider what the monetary bail equivalent would be for each restriction. It is likely that a lesser amount of bail would be ordered for an individual released with only the requirement to remain in school than an individual required to wear an ankle monitor. While the amount of bail equivalent to ankle monitoring is uncertain, it is likely a high amount due to the liberty restrictions and the infrequency that such a restriction is imposed. This comparison of monetary bail and ankle monitoring relates to the previously discussed benefit of the CJRA, that arrestees are less likely to be detained pretrial solely because of an inability to afford monetary bail.[233] Rather than ordering an individual to pay some exorbitant amount of bail that he or she cannot afford and therefore remain in confinement, an individual may now be released with an ankle monitor pending trial. It may also be the case that no amount of monetary bail would be sufficient if an individual is ordered to submit to the invasiveness of an ankle monitoring.

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[229] New Jersey State Parole Board, *2015 Annual Report* 5 (2016), http://www.state.nj.us/parole/docs/reports/AnnualReport2015.pdf.
[230] *Id.*
[231] N.J. STAT. ANN. § 2A:162-17(b)(2).
[232] *Id.*
[233] *See* discussion *infra* Part III.B.

VI. Conclusion

It is undeniable that it is a burden for an arrestee to wear an ankle monitor. The liberty of the arrestee is restricted, and the arrestee may be uncomfortable and embarrassed. But, the State's interest in reasonably assuring the arrestee will appear in court, is not a danger to the safety and protection of people and the community, will not obstruct the criminal justice process, and will follow the conditions of release, would be found constitutional following *United States v. Salerno*.[234] Furthermore, as discussed above, an arrestee that is required to wear an ankle monitor would likely have remained in jail pending trial under the previous bail system, because the arrestee would be unable to post the large amount of monetary bail required, or no monetary bail amount would have been sufficient to release the individual. Moreover, the arrestee's liberty interest is less restricted while wearing an ankle monitor when the alternative is confinement. Therefore, the search created by the ankle monitor is reasonable under the Fourth Amendment. Thus, the exclusion of monetary bail alongside non-monetary restrictive conditions under the CJRA is not a violation of the Fourth Amendment.

New Jersey's bail reform was a drastic change from the longstanding history of bail in the State, which led to opposition. There are other constitutional challenges that may be raised concerning the CJRA under the Eighth and Fourteenth Amendment. The CJRA, however, should not be found unconstitutional under the Fourth Amendment. The removal of monetary bail from the consideration is not a violation of the Fourth Amendment protection against unreasonable searches and seizures.

[234] 481 U.S. 739 (1987); N.J. STAT. ANN. § 2A:162-15.