Hobbs Lecture: Criminal Justice Reform in New Jersey

The Honorable Stuart Rabner [*]

It is an honor to be invited to deliver an address named for Dean Patrick Hobbs, whose leadership of the Seton Hall University School of Law has helped shape many gifted lawyers over the years. Their service to the bar and the public should be an enormous source of pride to Dean Hobbs, Dean Kathleen Boozang, and the law school as a whole.

This afternoon, I would like to talk about a subject that dozens of states and the federal government are focused on: criminal justice reform, in particular, the heavy reliance on monetary bail in the system of pretrial release.

New Jersey has been hard at work on that issue for the past six years. I am pleased to walk through the story of the reform effort: how it began; what steps have been taken along the way; the results of those efforts to date; and a look at what lies ahead.

[*] Chief Justice, Supreme Court of New Jersey. This article is adapted from the Hobbs Lecture delivered on April 8, 2019. The Lecture is dedicated to the spirit of civil discourse and diversity of opinion on matters of national importance.

I. INTRODUCTION

The criminal process often begins with an arrest. Decisions that follow about how and whether to release a defendant prior to trial are among the most important questions the criminal justice system faces.

Prior to 2017, in the vast majority of cases in New Jersey, judges set an amount of bail that defendants had to post to be released pretrial. That is still the situation in a large majority of states today.

Looking back in time, the system here presented two problems. First, too many poor defendants, who posed a minimal risk of danger or flight, sat in jail too long while awaiting trial because they could not post even modest amounts of bail.[1] In those cases, not surprisingly, there were real-life consequences. Some defendants were cut off from family members; others lost jobs.[2] Defendants also faced pressure to plead guilty to "time served." Studies have shown that defendants held in jail before trial "plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released" before trial.[3]

Second, on the other end of the spectrum, defendants accused of violent crimes who posed a serious risk of danger or flight were eligible for bail because the State Constitution guaranteed that right in all cases.[4] As a result, defendants who had access to untainted funds could post high bails and be released even if they posed a serious threat to witnesses and the community at large.

II. EARLY STEPS TOWARD REFORM

In 2012, then-Governor Chris Christie announced his support for a system of pretrial detention for high-risk defendants.[5] The concept was similar to what exists in the federal system.[6] The proposal would have required an amendment to the State Constitution and the enactment of a corresponding statute. At the time, the Legislature did not respond, and the issue remained unresolved.

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[1] JOINT COMM. ON CRIM. JUST., REPORT OF THE JOINT COMMITTEE ON CRIMINAL JUSTICE 1–2, 15 (Mar. 10, 2014), https://njcourts.gov/courts/assets/criminal/finalreport3202014.pdf?c=xio [hereinafter JCCJ REPORT].

[2] *Id.* at 17.

[3] *Id*. at 2, 33–34.

[4] N.J. CONST. art. I, para. 11 (2014).

[5] N.J. JUDICIARY, 2016 REPORT TO THE GOVERNOR AND LEGISLATURE 1 (2016), https://www.njcourts.gov/courts/assets/criminal/2016cjrannual.pdf.

[6] *See* 18 U.S.C. § 3142(e)–(g) (2018).

A report on New Jersey's jail population, prepared by Marie VanNostrand, Ph.D., served as a catalyst for change.[7] Dr. VanNostrand examined the county jail population on a single day in October 2012. The published study revealed, among other things, that 38.5% of inmates were held in custody only because they could not satisfy the terms of their bail.[8] In other words, had they been able to post cash or a bond, or take advantage of an option to pay 10% to a bail bond company, they would have been released.[9] Even more alarming, one out of eight inmates—12% of the jail population—was held in custody pretrial because they could not pay $2500 or less (for bail amounts ranging up to $25,000).[10]

A. *Advisory Committee on Criminal Justice*

Dr. VanNostrand's report presented an opportunity to broaden the conversation. In June 2013, the Judiciary announced the formation of a broad-based committee to focus on pretrial release and delays in bringing criminal cases to trial. The Joint Committee on Criminal Justice had more than thirty members, representing various stakeholders and all three branches of government. Members included the former Chief Counsel to the Governor, Executive Director of the Senate Majority Office, General Counsel of the Assembly Majority Office, judges, prosecutors, defense counsel, Policy Counsel of the American Civil Liberties Union, and staff.[11]

I chaired the Committee and asked the Acting Attorney General, John Hoffman, and the Public Defender, Joseph Krakora, if they would participate personally at Committee meetings. They both agreed. And their reasonableness on the issues throughout the process made an enormous difference.

The Committee met for six months, starting in the fall of 2013. It examined both the question of pretrial release and the need for a speedy trial act. In March 2014, the Committee issued a report with twenty-seven recommendations,[12] as to which the members were nearly unanimous. A core recommendation asked that the Committee's key proposals on bail "not be considered individually but rather as an interdependent proposal for

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[7] MARIE VANNOSTRAND, NEW JERSEY JAIL POPULATION ANALYSIS (Mar. 2013), https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf. The study was provided by Luminosity in partnership with the Drug Policy Alliance.

[8] *Id.* at 13.

[9] *Id.*

[10] *Id.*

[11] JCCJ REPORT, *supra* note 1, at 97.

[12] JCCJ REPORT, *supra* note 1, at 8–10.

change to New Jersey's system of pretrial release."[13]

The two most important recommendations, for our purposes here, were the following: (1) to move away from the State's heavy reliance on a money- or resource-based system of release and rely instead on an objective, risk-based system to assess the risk of danger and flight a defendant poses; for lower risk defendants, judges would impose non-monetary conditions of release for pretrial services officers to monitor;[14] and (2) to amend the State Constitution and enact a statute to provide for preventive detention for high-risk defendants.[15]

The report also called for a speedy trial act.[16] At the time, New Jersey was one of only twelve states without a statutory speedy trial framework.[17] We will briefly return to that subject later because of its connection to pretrial detention.

B. *The Constitutional Amendment and the Enactment of the Criminal Justice Reform Act*

Not lost on anyone was the fact that the Committee's recommendations came from people and groups who do not always see eye to eye. The responses from the Executive and Legislative Branches were very positive. They drafted legislation on bail reform and a new speedy trial law, and solicited comments from the Judiciary.

Ultimately, with strong support in the Senate and Assembly, the Legislature passed the Criminal Justice Reform Act (CJRA) on August 4, 2014.[18] Governor Christie signed the bill into law on August 11, 2014—about six months after the Committee's report.[19] In short, the law enacted a risk-based system for pretrial release decisions under which low-risk defendants are released—most often subject to conditions that Pretrial Services officers monitor—and defendants who pose a significant risk of danger, flight, or obstruction can be detained until trial.[20] The law also includes a speedy trial component.[21] Two months later, the public approved

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[13] JCCJ REPORT, *supra* note 1, at 8, 50 (Recommendation 7).

[14] JCCJ REPORT, *supra* note 1, at 8 (Recommendations 1–5).

[15] *Id.* (Recommendation 6).

[16] JCCJ REPORT, *supra* note 1, at 8–9 (Recommendations 10–15).

[17] JCCJ REPORT, *supra* note 1, at 4.

[18] S. 946, 216th Leg., Reg. Sess. (N.J. 2014); Assemb. 1910, 216th Leg., Reg. Sess. (N.J. 2014).

[19] Criminal Justice Reform Act, 2014 N.J. Laws 31 (effective Jan. 1, 2017) (codified at N.J. STAT. ANN. §§ 2A:162-15 to -26).

[20] N.J. STAT. ANN. §§ 2A:162-15 to -20, 2A:162-25 (West Supp. 2019). A more detailed summary of the statute appears in *State v. Robinson*, 229 N.J. 44, 55–59 (2017).

[21] N.J. STAT. ANN. § 2A:162-22.

an amendment to the Constitution by a wide margin of 61.8% to 38.2%, which allowed the reform measures to proceed.[22]

III. PREPARING FOR THE NEW LAW

The CJRA was slated to go into effect on January 1, 2017. That provided two years to prepare to implement the statute—time that was critically needed. The Judiciary worked together with the Attorney General and the Public Defender during that period and also drew on experiences of other jurisdictions in Washington, D.C., Kentucky, Arizona, and elsewhere. The Judiciary's efforts focused on five principal areas.

First, the Judiciary worked closely with the Laura and John Arnold Foundation to develop an objective risk-assessment tool that judges now use as they make decisions on pretrial release and what, if any, conditions to impose.

The risk-assessment tool is designed to measure whether a defendant will appear in court and whether he or she will commit a new criminal offense while on release. We made available to the Foundation data from tens of thousands of actual New Jersey cases to help with the development of an objective Public Safety Assessment (PSA). The PSA measures nine common-sense risk factors:

> (1) the defendant's age at the time of the current offense; (2) whether the offense is violent, and, if so, whether the defendant is age 20 or younger; (3) any additional pending charge(s) at the time of the current offense; and whether the defendant has any prior (4) disorderly persons convictions, (5) indictable conviction, (6) violent convictions, (7) failures to appear pretrial in the past two years or (8) more than two years ago, or (9) prior sentences of incarceration of fourteen days or more.[23]

Those factors have been available on the Judiciary's website[24] and are listed in every PSA prepared.

The PSA assesses the level of risk for failure to appear on a scale of 1 to 6, with 6 being the highest.[25] The same scale is used for the risk of new

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[22] N.J. DIV. ELECTIONS, PUBLIC QUESTION RESULTS FOR 11/04/2014 GENERAL ELECTION 1 (Dec. 2, 2014), https://www.state.nj.us/state/elections/assets/pdf/election-results/2014/2014-official-general-public-question-1.pdf; *see also Robinson*, 229 N.J. at 54.

[23] *Robinson*, 229 N.J. at 62; *see also* N.J. JUDICIARY, 2017 REPORT TO THE GOVERNOR AND THE LEGISLATURE 11 (2018), https://njcourts.gov/courts/assets/criminal/2017cjrannual.pdf?c=Vt2 [hereinafter 2017 REPORT].

[24] *Id.* at 11; PUBLIC SAFETY ASSESSMENT NEW JERSEY RISK FACTOR DEFINITIONS – DECEMBER 2018 (2018), https://njcourts.gov/courts/assets/criminal/psariskfactor.pdf?c=Ox7.

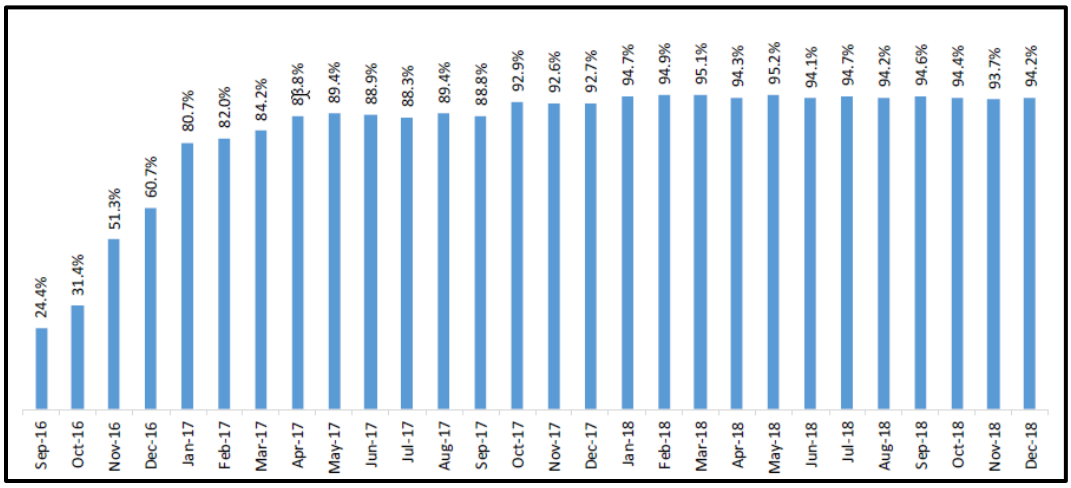
[25] *Robinson*, 229 N.J. at 62.

criminal activity.[26] Judges consider the PSA in each case, "but [they] make the ultimate decision on release after reviewing other relevant information as well."[27]

Fortunately, the development of the PSA was free to the taxpayers of our State. The Arnold Foundation covered the full cost.

Second, the Judiciary worked on developing new uses of technology to ensure that judges have ready access to information about a defendant's background within 24 or 48 hours of an arrest. For example, we needed to make certain that police departments throughout the State took digitized fingerprint samples from defendants at the time of arrest and did not use old-fashioned ink pads. With digitized fingerprints, staff can quickly access a defendant's criminal history and related information. In September 2016, months before the start date for the CJRA, just under one quarter (24.4%) of police departments used the Live Scan system to gather fingerprints electronically.[28] Thanks to the Attorney General's office and the cooperation of law enforcement officers across the State, that number steadily increased to 94% by January 2018.[29]

Live Scan Compliance Statewide, 9/2016 to 12/2018



[Source: 2018 REPORT, *supra* note 28, at 43.]

[26] *Id.*

[27] *Id.* (citing N.J. STAT. ANN. § 2A:162-20 (West Supp. 2019)).

[28] N.J. JUDICIARY, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 43 (2019), https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=5fO [hereinafter 2018 REPORT].

[29] *Id.*

The Judiciary also worked with departments throughout state government to be able to gather other information rapidly. We obtained the same quick access to other federal and state databases. As a result, a wealth of electronic information now automatically populates the PSAs that Judiciary staff members prepare.

Third, consistent with the CJRA, the Judiciary created a new Pretrial Services Program that operates in each vicinage today.[30] It is responsible for preparing more than 40,000 individual evaluations a year for judges, which recommend whether a defendant should be released, and if so at what level of supervision, or whether a defendant should be detained pretrial. Pretrial Services also monitors each defendant's compliance with applicable conditions of release set by the court.[31]

As depicted in the following chart, conditions of release vary, and they intensify based on the increasing levels of risk that individual defendants present:

Pretrial Monitoring Level	Description
ROR	Defendant released on his or her own recognizance and not required to report to Pretrial Services staff for monitoring. Automated reminder notices for court events by text, email, or phone made available to the defendant.
PML1	Defendant required to report to Pretrial Services staff telephonically once per month. Automated reminder notices for court events and monitoring appointments by text, email, or phone made available to the defendant.
PML2	Defendant required to report to Pretrial Services staff telephonically once per month and in person once per month. Automated reminder notices for court events and monitoring appointments by text, email, or phone made available to the defendant.
PML3	Defendant required to report to Pretrial Services staff telephonically once every other week and in person once every other week. Automated reminder notices for court events and monitoring appointments by text, email, or phone made available to the defendant.
PML3+	Defendant required to remain at home with limited exceptions and may be required to wear an electronic monitoring (EM) device. Defendant also required to report to Pretrial Services telephonically once every other week and in person once every other week. Automated reminder notices for court events and monitoring appointments by text, email, or phone made available to the defendant.

[Source: 2017 REPORT, *supra* note 23, at 17.]

Conditions range from periodic text messages—to remind defendants released on their own recognizance to appear in court—to home detention

30 *See* N.J. STAT. ANN. § 2A:162-25(a).

31 *See id.* § 2A:162-25(d).

and electronic monitoring for defendants who pose a significantly higher risk and are placed on pretrial monitoring level 3+.

From a practical standpoint, creating a new agency required the Judiciary to recruit and hire more than 250 officers and staff, find office space in each vicinage, design protocols to guide new officers, and properly train them for their new posts.

Fourth, a group of judges, attorneys, and staff on the Criminal Practice Committee studied and proposed revisions to court rules to conform them to the new statute.[32] Judges, representatives of the Attorney General and the Public Defender, assistant county prosecutors, and private counsel volunteer their time on that committee. The result of their painstaking efforts—too numerous to summarize—appear in the revised version of the Court Rules.

The Attorney General undertook an equally demanding task: the office developed detailed guidelines for prosecutors throughout the State on how to apply the new law.[33] That represents only part of the impressive efforts by both the Attorney General and Public Defender to prepare to implement the CJRA.

Fifth, the Judiciary, Attorney General, and Public Defender engaged in outreach efforts to prepare judges, prosecutors, defense lawyers, and the bar as a whole for changes on the horizon—and to encourage a new mindset on the issue of pretrial release. For years, more than 400 judges in Municipal and Superior Court had been accustomed to setting monetary bail in criminal cases. In line with the CJRA, the Judiciary needed to adjust to a new approach: the release of most defendants subject to conditions to be

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[32] *See* SUP. CT. COMM. ON CRIM. PRAC., REPORT OF THE SUPREME COURT COMMITTEE ON CRIMINAL PRACTICE ON RECOMMENDED COURT RULES TO IMPLEMENT THE BAIL REFORM LAW, PART I: PRETRIAL RELEASE (May 9, 2016), https://njcourts.gov/courts/assets/supreme/reports/2016/bailreform2016.pdf; SUP. CT. COMM. ON CRIM. PRAC., REPORT OF THE SUPREME COURT COMMITTEE ON CRIMINAL PRACTICE ON RECOMMENDED COURT RULES TO IMPLEMENT THE BAIL REFORM LAW, PART II: PRETRIAL DETENTION & SPEEDY TRIAL (May 12, 2016), https://njcourts.gov/courts/assets/supreme/reports/2016/bailreformlaw2016.pdf.

[33] *See* Christopher S. Porrino, ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2016-6: DIRECTIVE ESTABLISHING INTERIM POLICIES, PRACTICES, AND PROCEDURES TO IMPLEMENT CRIMINAL JUSTICE REFORM PURSUANT TO P.L. 2014, C. 31 (Oct. 11, 2016), https://www.nj.gov/oag/dcj/agguide/directives/2016-6_Law-Enforcement.pdf; Christopher S. Porrino, ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2016-6 V2.0: MODIFICATION OF DIRECTIVE ESTABLISHING INTERIM POLICIES, PRACTICES, AND PROCEDURES TO IMPLEMENT CRIMINAL JUSTICE REFORM PURSUANT TO P.L. 2014, C. 31 (May 24, 2017), https://www.nj.gov/lps/dcj/agguide/directives/ag-directive-2016-6_v2-0.pdf; Christopher S. Porrino, ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2016-6 V3.0: MODIFICATION OF DIRECTIVE ESTABLISHING INTERIM POLICIES, PRACTICES, AND PROCEDURES TO IMPLEMENT CRIMINAL JUSTICE REFORM PURSUANT TO P.L. 2014, C. 31 (Sept. 27, 2017), https://www.nj.gov/lps/dcj/agguide/directives/ag-directive-2016-6_v3-0.pdf.

monitored by Pretrial Services officers.[34] Judges and attorneys alike also needed to prepare to conduct detention hearings for the first time.[35]

Overall, well more than 100 sessions were held throughout the State with various groups—to help train and get buy-in from stakeholders in the criminal justice system, local officials, community groups, and the public. Many sessions included guidance from judges, representatives of the Attorney General and Public Defender, and other law enforcement officials. The sessions were time consuming—and valuable.

I recall one training session in particular that took place at Judicial College, a three-day educational program that all judges must attend each November. In 2015, Dr. VanNostrand made a presentation to all trial court judges who preside over criminal cases. One judge commented with frustration, "I don't need anyone to tell me how to set bail and run a courtroom." The judge had been handling a criminal docket for about twenty years, and I suspect others were thinking the same thing. Hold onto that thought for a moment, and we will come back to it.

IV. THE CJRA GOES INTO EFFECT

On January 1, 2017, honest conversations about pretrial release began to take place in courtrooms across the State. If judges decided an individual could be released, they had the power to order appropriate conditions for officers to monitor—to try to ensure the defendant showed up in court and did not commit a new offense while awaiting a trial date. Judges also knew that if they found a defendant posed a serious risk of danger, flight, or obstruction, they could order the person detained pretrial—for the first time ever.

The judges have the final say—not a risk-assessment tool or a public safety assessment. Here are the results for 2018—the second year of the CJRA:

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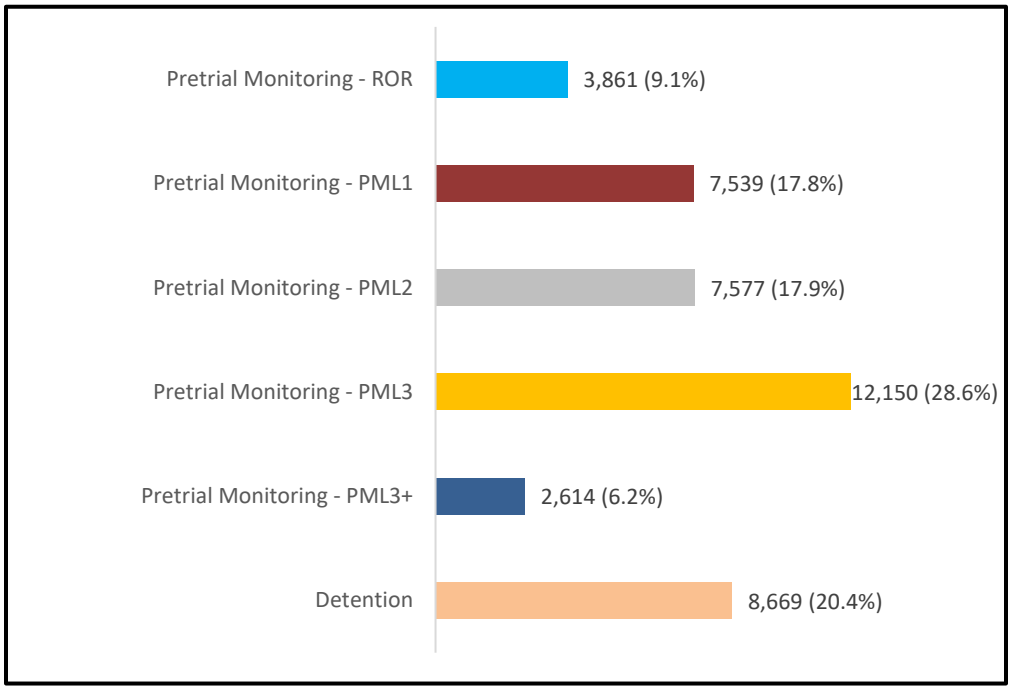
[34] *Robinson* outlines the hierarchy of release decisions under the CJRA: "(i) release on personal recognizance or an unsecured appearance bond, *N.J.S.A.* 2A:162-16(b)(2)(a), -17(a); (ii) if that is inadequate, release on non-monetary conditions that are the least restrictive conditions necessary, *N.J.S.A.* 2A:162-16(b)(2)(b), -17(b); (iii) if that is inadequate, release on monetary bail—but only to reasonably assure the defendant's appearance in court, *N.J.S.A.* 2A:162-16(b)(2)(c), -17(c); (iv) if that is inadequate, release on both monetary and non-monetary conditions, *N.J.S.A.* 2A:162-16(b)(2)(c), -17(d); and (v) if that is inadequate and the prosecutor has moved for pretrial detention, order that the defendant remain detained pending a pretrial detention hearing, *N.J.S.A.* 2A:162-16(b)(2)(d)." State v. Robinson, 229 N.J. 44, 55–56 (2017). In addition, the CJRA specifically states that "[a] court may set monetary bail 'only when . . . no other conditions of release will reasonably assure the eligible defendant's appearance in court.'" *Id.* at 55; N.J. STAT. ANN. § 2A:162-15 (West Supp. 2019).

[35] *See* N.J. STAT. ANN. §§ 2A:162-18 to -20.

Initial Release Decisions for Criminal Justice Reform Eligible Defendants, 2018



[Source: 2018 REPORT, *supra* note 28, at 32.]

The results reveal a remarkable change in practice. Out of more than 44,000 defendants arrested on a warrant, about 3800 or 9% were released on their own recognizance, roughly 30,000 or 70% were released on conditions, and more than 8600 or 20% were ordered detained. As discussed below, the proportion of defendants detained drops to 6.4% when all defendants charged on an arrest warrant or a summons are taken into account.

Bail is still an option under the new law; it is third in the hierarchy of release decisions after release on one's own recognizance and release on conditions.[36] It has hardly been used since January 1, 2017, however. In 2017, judges ordered only 44 defendants to post bail. In 2018, bail was ordered in 102 matters, 90 of which involved violations of conditions of release. Altogether, judges making initial release decisions have ordered bail in fewer than 1 out of 1000 cases since the CJRA went into effect.

That did not happen by accident. It was the result of a collaborative effort both within the Judiciary and with stakeholders across the criminal justice system: prosecutors, public defenders, local law enforcement officers,

[36] *See Robinson*, 229 N.J. at 55–56.

wardens, and others. It is a tribute to judges, in particular, who were understandably skeptical at first. They deserve considerable credit for being open to and embracing a new approach.

The upshot today is that defendants who pose the highest risk of danger, flight, or obstruction are held in custody while they await trial, which represents a legitimate response to public safety concerns. And no one arrested in the two-year period since January 1, 2017—aside from up to about 150 defendants out of more than 88,000 defendants[37] overall—sat in jail pretrial because the person could not afford to post bail.

V. EVALUATING THE RESULTS

With the help of experts, the Judiciary has carefully tracked data under the new system to be able to monitor results, identify trends, and head off potential problems. We are also in a position to share information with others. Dozens of states have been considering reforms to their systems of pretrial release that rely heavily on monetary bail,[38] and many have contacted New Jersey in the past two years.

To that end, we track initial release decisions county by county, and on a statewide basis, each month.[39] We track detention decisions in the same way,[40] along with other results.

Using that data, the Judiciary worked with social science researchers and data scientists to complete two comprehensive studies designed to evaluate the effect of criminal justice reform. The first study compared data from 2014, under the money-bail system, with data from 2017, under the current reformed approach. The second study updated the jail population study from October 3, 2012. We repeated the study six years later—on the same calendar day in 2018—and compared the results.

A. Trends

Both sets of studies identified a number of trends worth reviewing. For example, the analysis revealed a significant reduction in the use of arrest warrants, from about 60,000 in 2014 to 40,000 in 2017:

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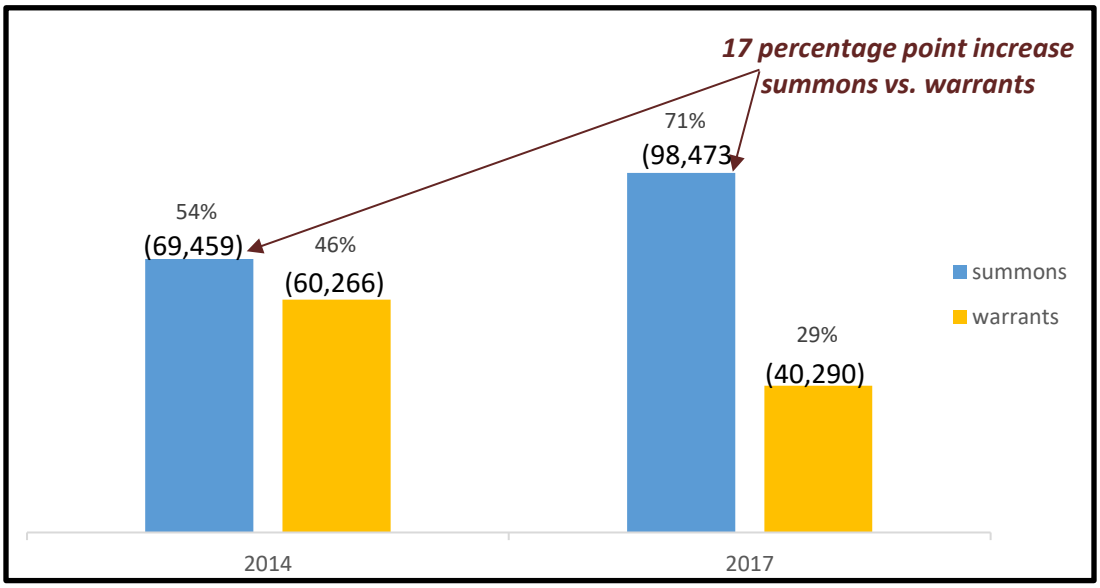
[37] 44,319 defendants were charged by a warrant in 2017. 2017 REPORT, *supra* note 23, at 15.

[38] NAT'L CTR. FOR STATE CTS. DATA VISUALIZATIONS, FINES, FEES & BAIL PRACTICES, https://public.tableau.com/profile/ncscviz#!/vizhome/FFBP2_0/StateResourcesMap (last visited July 19, 2019).

[39] *See, e.g.*, N.J. JUDICIARY, INITIAL RELEASE DECISIONS FOR CRIMINAL JUSTICE REFORM ELIGIBLE DEFENDANTS, JAN. 1, 2019–JUNE 30, 2019 Chart A, https://njcourts.gov/courts/assets/criminal/CJR_Statistics_June_2019.pdf?c=OFy (last visited Nov.19, 2019).

[40] *See, e.g.*, N.J. JUDICIARY, DETENTION MOTIONS FOR CRIMINAL JUSTICE REFORM ELIGIBLE DEFENDANTS, JAN. 1, 2019–JUNE 30, 2019 Chart B, https://njcourts.gov/courts/assets/criminal/CJR_Statistics_June_2019.pdf?c=OFy (last visited Nov. 19, 2019).

Summons vs. Warrants, 2014 & 2017



[Source: 2018 REPORT, *supra* note 28, at 18.]

Police officers instead made greater use of summonses, which direct defendants when to appear in court. The above chart depicts an increase of about 29,000 summonses from 2014 to 2017, reflecting an increase from 54% to 71% of all defendants charged.

That change matters for a simple reason: all defendants arrested on a warrant are taken to jail; in the 24 to 48 hours that follow, Pretrial Services prepares a risk assessment that is presented to a judge at an initial hearing. By contrast, the many thousands of lower-risk defendants who receive a summons are released right after their encounter with the police—without first going to jail for processing and a hearing, let alone being held in custody under the old system until they could post bail.

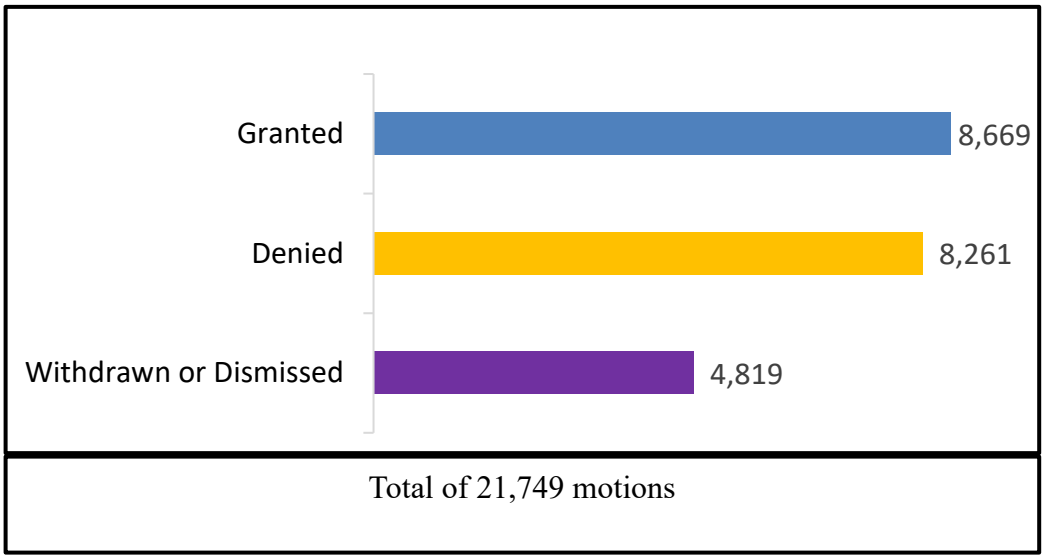
What accounts for the trend? We believe it reflects police officers and prosecutors assessing more cases at the outset and separating serious offenses from less serious matters. The trend also shows how law enforcement can benefit from additional objective information early in the process. Officers can now run preliminary PSAs on their own to help decide how to handle a case.

The effect of the summons/warrant decision can be seen in another way—in terms of the number and percentage of defendants ordered detained pretrial. With the change to the State Constitution, judges can now detain defendants who present a substantial risk of danger, flight, or obstruction.

Only prosecutors can seek detention under the new law;[41] if no motion is filed, the defendant must be released.

44,383 defendants were charged by warrant in 2018. Here is what happened relating to pretrial detention:

Detention Motions Filed, 2018



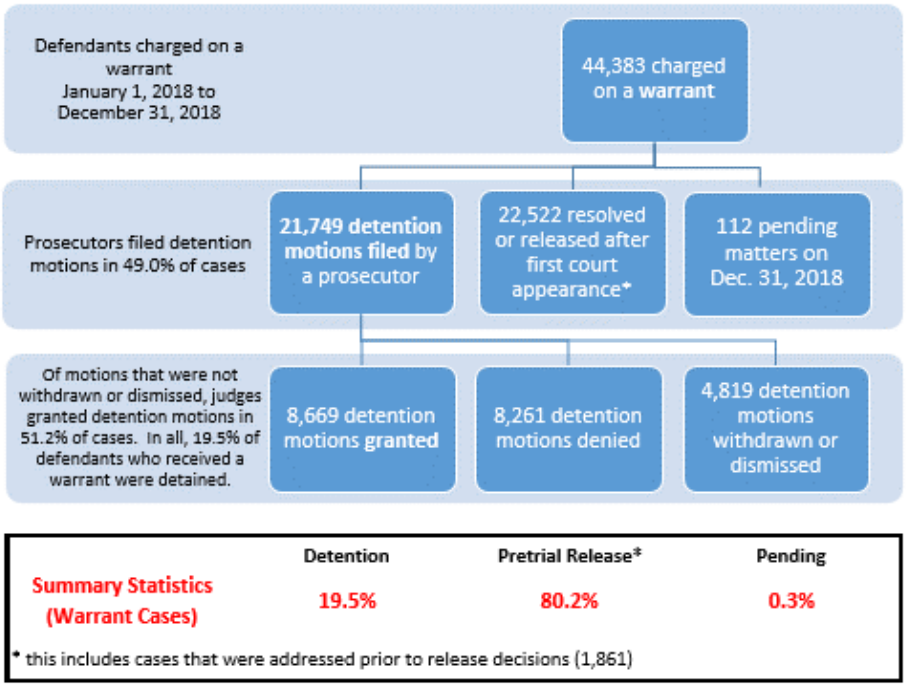
[Source: 2018 REPORT, *supra* note 28, at 35.]

In short, prosecutors filed 21,749 detention motions. Within days, they withdrew or dismissed 4800 of them; in many instances, those cases were resolved or downgraded in an exercise of prosecutorial discretion. Of the remaining cases, trial judges granted slightly more than half of the motions and detained 8669 defendants.

Let's consider that from a broader perspective. The following chart highlights detention decisions as a percentage of all cases in 2018 in which defendants were charged on a warrant:

[41] N.J. STAT. ANN. § 2A:162-18(a)(1) (West Supp. 2019).

Pretrial Detention Decisions, Warrants, 2018

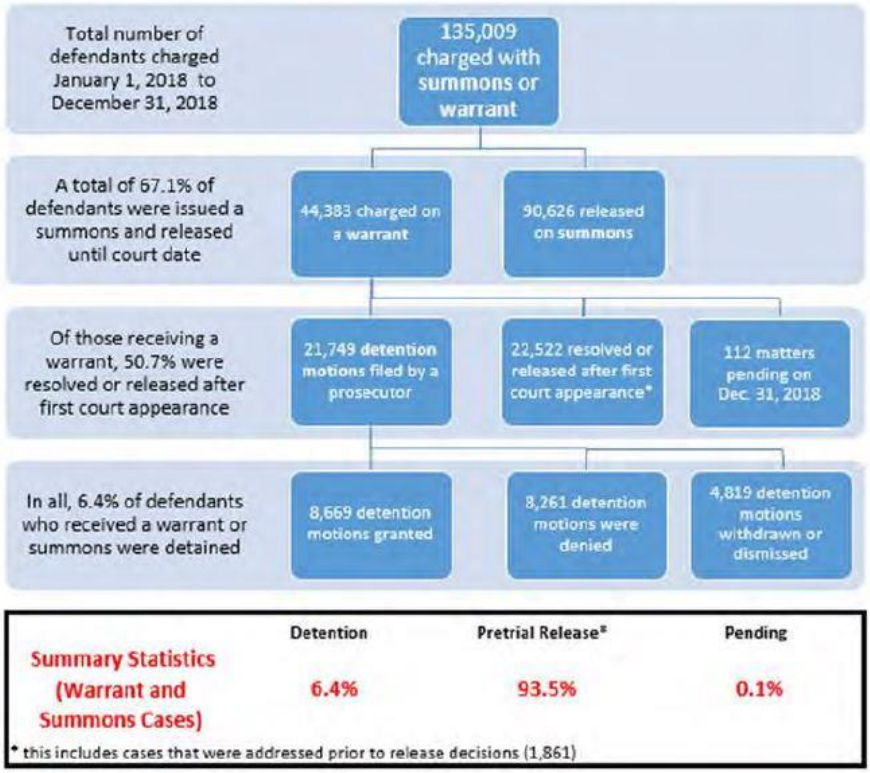


[Source: 2018 REPORT, *supra* note 28, at 36.]

Out of more than 44,000 defendants charged, prosecutors filed motions in nearly half of those cases, and judges ultimately detained the same 8669 defendants—a total of 19.5% of all warrant cases.

But that is only part of the picture because the pool of defendants arrested on a warrant looks quite different today. After officers and prosecutors screen individual matters, we are left with a smaller group of higher-risk defendants charged with warrants, as compared to before the CJRA took effect. The following chart examines the issue in an even broader context by considering all 135,000 defendants charged in 2018—those arrested on a warrant as well as those charged and released on a summons:

Pretrial Detention Decisions, Warrants and Summonses, 2018



[Source: 2018 REPORT, *supra* note 28, at 37.]

The 8669 defendants ordered detained pretrial amounted to 6.4% of the overall number of defendants charged.

Analysts have identified another trend as well: more cases are being disposed of at the earliest stages, within weeks of an arrest. Once again, we believe that partly reflects greater involvement by prosecutors earlier in the process as they screen and evaluate cases. That makes particular sense in light of the discovery obligations now imposed on prosecutors when they seek detention.[42] Prosecutors are required to gather and disclose certain discovery before a detention hearing. As a result, cases get closer attention from both sides early in the process, which can spur more productive discussions among the parties to resolve matters sooner.

B. *Failure to Appear and New Criminal Activity*

The Judiciary has been able to track how many defendants have been released or detained since January 1, 2017. But we could not answer two

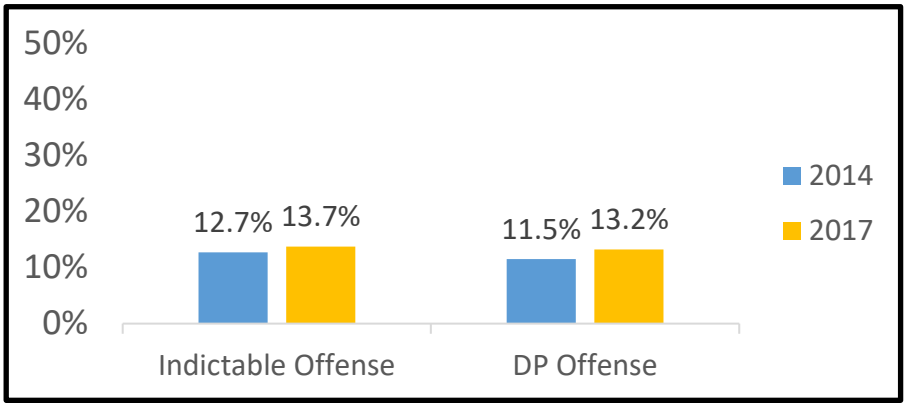
[42] State v. Robinson, 229 N.J. 44, 69–71 (2017).

important questions until recently: (1) are individuals who have been released appearing in court without having to post bail; and (2) are they committing new crimes while on release? Equally important, how do those results compare with what occurred under the prior system?

Critics of the reform effort predicted a spike in crime if large numbers of defendants were released without posting bail. That did not happen. According to the New Jersey State Police Uniform Crime Report, crime rates have decreased since the CJRA was implemented, particularly violent crimes.[43] That is not a perfect measure to evaluate criminal justice reform, and the results cannot be attributed to the CJRA. We should instead consider the results of the study that compared defendants released in 2014, when monetary bail was routinely ordered, and 2017, when it was not.

The study shows that recidivism rates have remained low:

New Criminal Activity: Indictable and Disorderly Persons Offenses, 2014 and 2017



[Source: 2018 REPORT, *supra* note 28, at 14.]

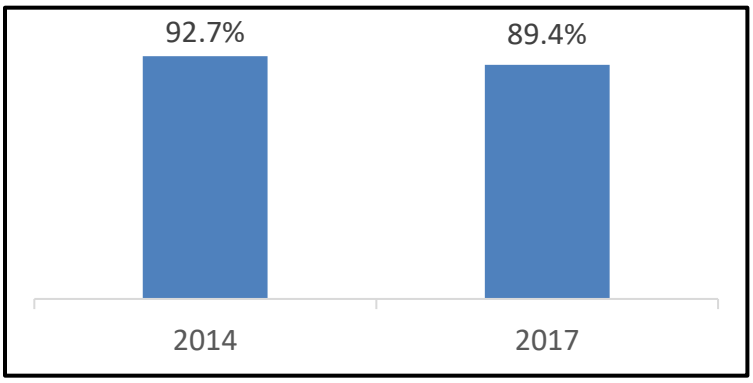
The rate of new criminal activity for indictable offenses increased 1%; the rate for disorderly persons offenses increased under 2%. Because of challenges in compiling data for 2014 several years after the fact, as well as other reasons, experts advise that "small changes in outcome measures should be interpreted with caution and likely do not represent meaningful differences."[44]

[43] *See* N.J. ST. DIV. POLICE UNIF. CRIME REPORTING UNIT, UNIFORM CRIME REPORTING 2018 CURRENT CRIME DATA (Dec. 14, 2018), https://www.njsp.org/ucr/pdf/current/20181214_crimetrend_2018.pdf; N.J. ST. DIV. POLICE UNIF. CRIME REPORTING UNIT, UNIFORM CRIME REPORTING 2017 CURRENT CRIME DATA (May 4, 2018), https://www.njsp.org/ucr/pdf/current/20180504_crimetrend_2017.pdf.

[44] 2018 REPORT, *supra* note 28, at 13.

The study also reveals that defendants continued to appear in court at high rates under the new system:

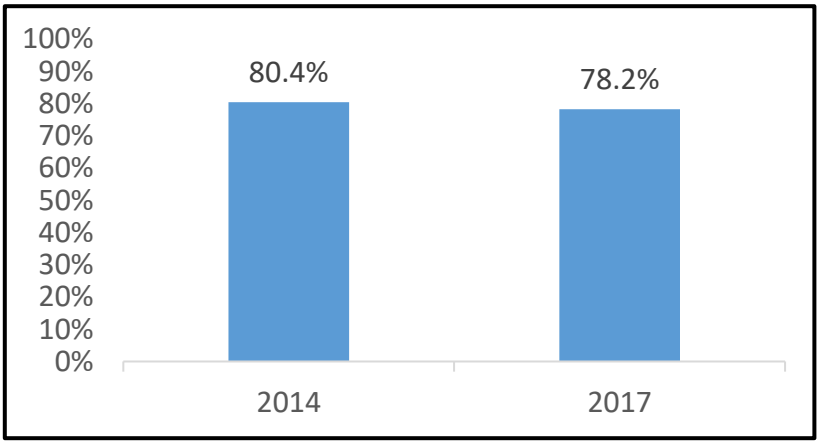
Court Appearance Rates, 2014 and 2017



[Source: 2018 REPORT, *supra* note 28, at 15.]

The rate of court appearances went down several percentage points, from 92.7% to 89.4%. But the data shows that even though defendants may have missed one or more court appearances, they generally did not flee—because cases have been disposed of at roughly the same rate before and since the start of the CJRA:

Percentage of Cases Disposed, 2014 and 2017



[Source: 2018 REPORT, *supra* note 28, at 16.]

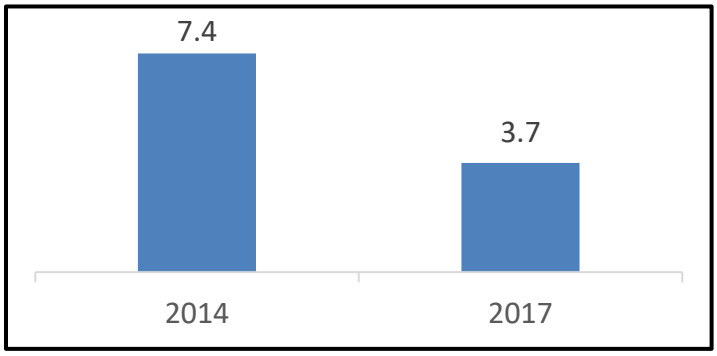
For cases that began in 2014, about 80% were completed within 22 months. For the same period in 2017, 78% of cases were completed.[45]

[45] 2018 REPORT, *supra* note 28, at 15.

C. Length of Time Defendants are Held in Jail Pretrial

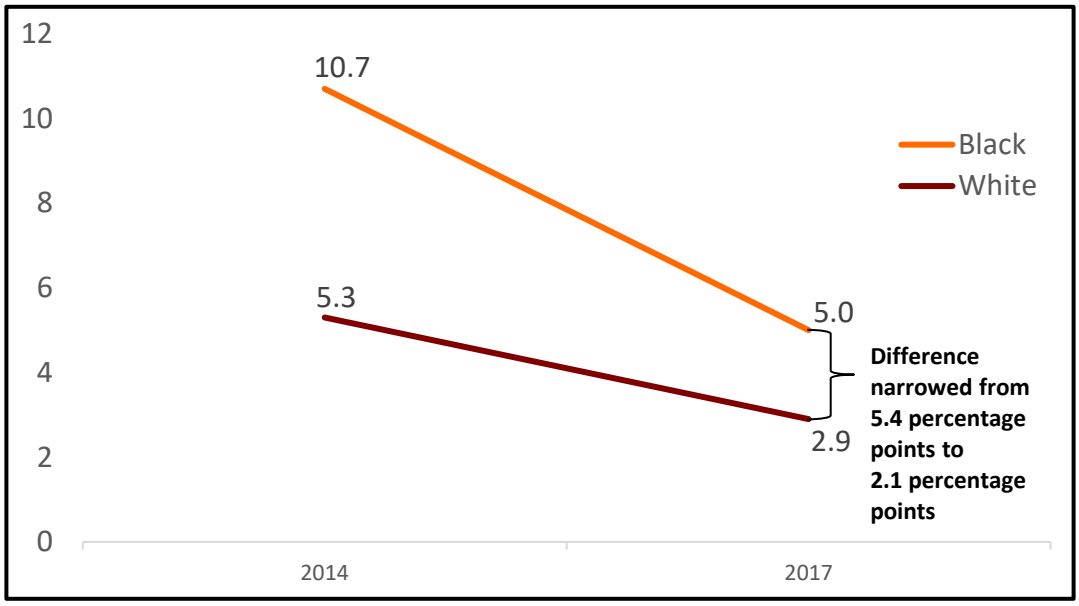
Results from the recent study also relate directly to issues of fairness and equity in our justice system—specifically, how long defendants are held in jail before trial. Defendants who are not detained now spend half as much time in jail from when they are first committed to when they are initially released:

Days from Complaint Issuance or Arrest to Initial Pretrial Release, 2014 and 2017



[Source: 2018 REPORT, *supra* note 28, at 20.]

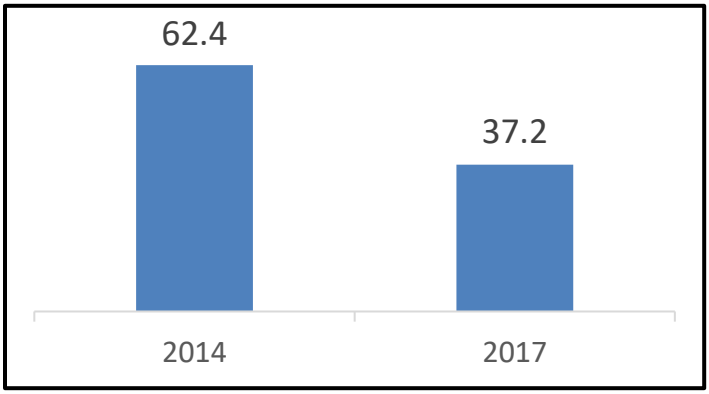
Looked at by race, black defendants spent an average of five days in jail before their initial release in 2017, as compared to 10.7 days several years ago; for white defendants, the period of time dropped from 5.3 to 2.9 days:



[Source: 2018 REPORT, *supra* note 28, at 21.]

Next, let's consider the total amount of time spent in jail pretrial for all defendants—those released as well as those detained:

Total Number of Days in Jail Pretrial, All Defendants, 2014 and 2017

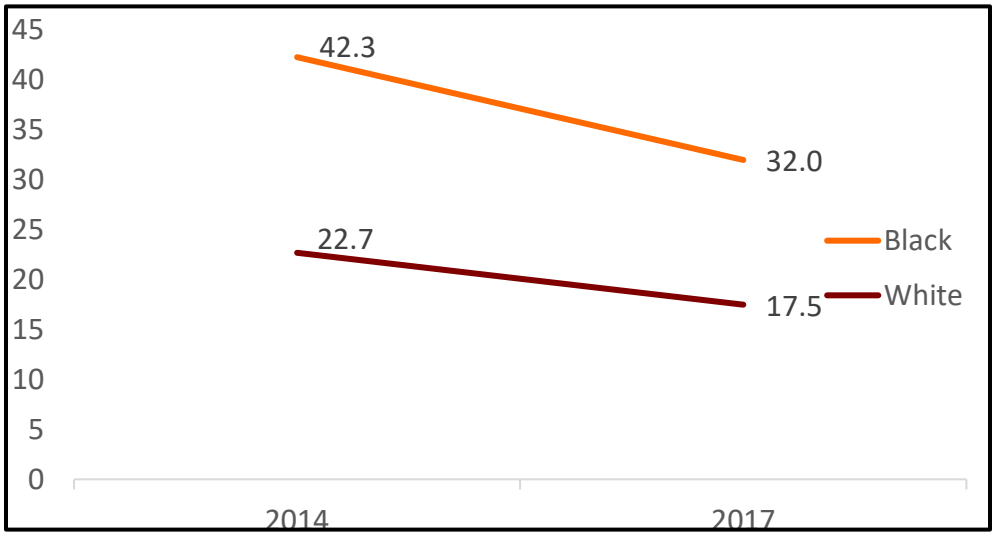


[Source: 2018 REPORT, *supra* note 28, at 22.]

The average amount of time spent in jail pretrial dropped from about two months to roughly five weeks, a 40% reduction.

Measured by race, the study showed a decrease of ten days in custody for black defendants and five days for white defendants:

Total Number of Days in Jail Pretrial by Race, 2014 and 2017

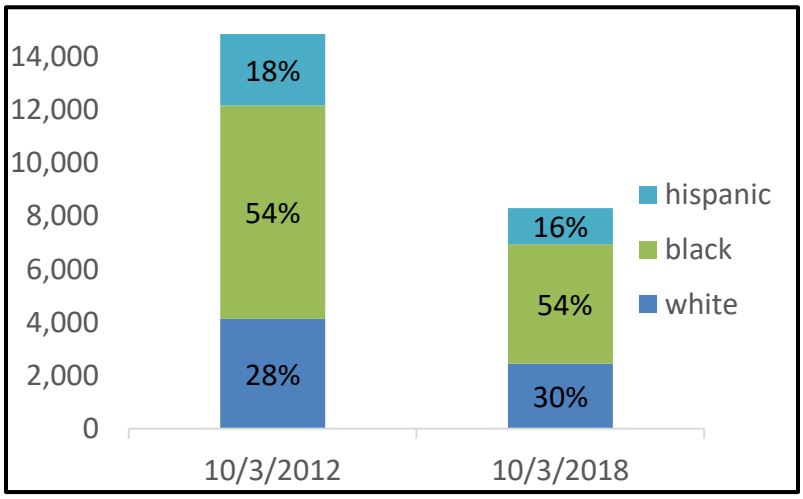


[Source: 2018 REPORT, *supra* note 28, at 23.]

D. Reduction in Jail Population

Those results have had a notable effect on the State's jail population. A comparison of the county jail population on October 3, 2012 and October 3, 2018 shows the number of inmates dropped by more than 6000.

Total Jail Population Demographics, 10/3/2012 and 10/3/2018



[Source: 2018 REPORT, *supra* note 28, at 27.]

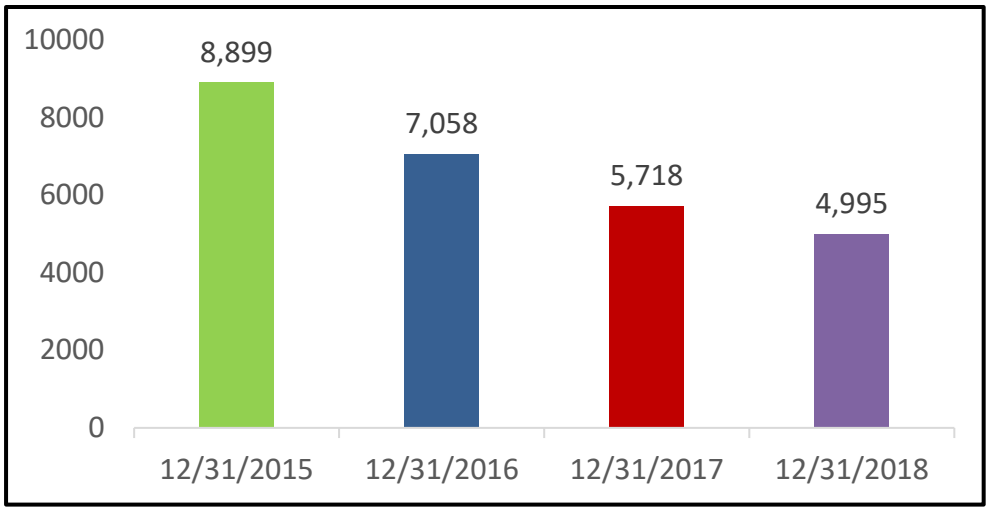
The reduction took place across race, ethnicity, and gender lines. There were 5600 fewer men and 600 fewer women in custody compared to six years before.[46] About 3000 fewer black defendants, 1500 fewer white defendants, and 1300 fewer Hispanic defendants were held in jail.[47]

Although the population overall has been reduced, the ratio among white, black, and Hispanic defendants has remained the same. That critical issue extends beyond the court system, which responds to and addresses defendants who are brought into the system. The entire criminal justice system must continue to grapple with this disparity.

Finally, let's look at the pretrial jail population from the start of 2016 through the end of 2018. During that period, the population dropped 43.9%:

[46] 2018 REPORT, *supra* note 28, at 26.
[47] 2018 REPORT, *supra* note 28, at 27.

Pretrial Jail Population



[Source: 2018 REPORT, *supra* note 28, at 39.]

2016 is an appropriate starting point because, as the Judiciary geared up for the actual implementation of the CJRA on January 1, 2017, we asked all Municipal and Superior Court judges to review all bail cases in which individuals had not been released—especially cases in which modest amounts of bail had been set. The chart depicts a steady reduction of defendants held pretrial, from about 8900 to 5000 individuals. Although reducing the jail population was not one of the goals of criminal justice reform, it is a significant result.

More details about the results of the first two years under the CJRA can be found in the 2018 Report to the Governor and the Legislature, which is available on the Judiciary's website.[48]

VI. MORE WORK LIES AHEAD

Criminal justice reform remains a work in progress with much still to be done. The court system faces increasing pressures from speedy trial deadlines, which apply to defendants who have been detained.[49] Their cases must be indicted within ninety days and brought to trial within the next six months,[50] subject to extensions of time set forth in the CJRA.[51] For example,

[48] *See generally* 2018 REPORT, *supra* note 28.

[49] *See* N.J. STAT. ANN. § 2A:162-22(a) (West Supp. 2019). The speedy trial requirements also apply to the relatively small number of defendants held in custody because they are unable to post monetary bail. *Id.*

[50] N.J. STAT. ANN. § 2A:162-22(a)(1)(a), (2)(a).

[51] *Id.* § 2A:162-22(b).

the time to resolve pretrial motions, examine a defendant's competency, and consider an application for drug court, along with other periods, are excluded from computing time.[52] The CJRA, however, imposes a two-year outer limit—excluding delays attributable to a defendant—after which a defendant is entitled to be released pending trial, subject to conditions, if the prosecutor is not ready to proceed.[53] To date, no defendant has been released under that provision.

The Court has also made refinements to the Decision Making Framework (DMF),[54] which sets forth policies to ensure consistent release recommendations. Pretrial Services follows the DMF, which works in tandem with the public safety assessment. Based on suggestions from judges and staff, public officials, and critics, the DMF has been adjusted for repeat offenders who were arrested twice before, if those charges were pending at the time of the latest offense, and for various firearms offenses.[55] In both areas, Pretrial Services now recommends either a higher level of supervision or that the defendant not be released. The Court made those adjustments after it consulted with experts.

To be sure, more work lies ahead in other areas. The Judiciary is working to improve appearance rates and will take additional steps to notify defendants charged with disorderly persons offenses of their upcoming court appearances. We need to continue to examine and refine the risk-assessment process—in particular, by quantifying and incorporating risks posed by defendants charged with domestic violence.

Additional resources are needed for substance abuse and mental health treatment, as well as housing assistance, for certain defendants released pretrial. We also need a stable funding source for the CJRA and will work with Governor Phil Murphy and the Legislative Branch—who continue to be very supportive—to resolve the program's structural deficit.

We must continue to work together with stakeholders across the criminal justice system and critics alike to try to address legitimate concerns in a responsible way. And, as I mentioned earlier, all parties need to examine and address racial disparities in the criminal justice system.

We can also expect to see further developments in the case law. Much of the focus for the last two years has been on detention hearings, a critical area that directly affects a person's liberty. What discovery must the State

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[52] *Id.*

[53] *Id.* § 2A:162-22(a)(2)(a).

[54] *See* N.J. JUDICIARY, PRETRIAL RELEASE RECOMMENDATION DECISION MAKING FRAMEWORK (DMF) (Mar. 2018), https://njcourts.gov/courts/assets/criminal/decmakframwork.pdf.

[55] *Id.* at 2 (steps 6 and 9).

disclose to a defendant before the hearing? *State v. Robinson*[56] requires more expansive discovery than federal law does. Can the State proceed by proffer or must it call live witnesses? *State v. Ingram*[57] held that, under the plain language of the CJRA and consistent with principles of due process, prosecutors are not required to call live witnesses at detention hearings.

Under what circumstances can a defendant call an adverse witness—a State investigator, a detective, or the victim of an offense, for example—at a detention hearing? *State v. Pinkston*[58] outlines the qualified right defendants have in this area; they must first proffer how the witness's testimony would tend to negate probable cause or undermine the State's evidence in support of detention in a material way.

What is the proper standard of review of a trial court's order of pretrial detention? *State v. S.N.*[59] sets forth an abuse of discretion standard. What is the proper remedy if the State fails to disclose exculpatory evidence before a detention hearing?[60] *State v. Hyppolite*[61] outlines a modified materiality standard for judges to determine whether to reopen the hearing.

Future legal challenges are certain to result in additional decisions.

VII. FURTHER REFLECTIONS AND CONCLUSION

Someone recently asked what accounts for the broad-based progress New Jersey has made on pretrial justice issues. There are a number of parts to the answer.

First, all three branches were willing to work together and consult on this thorny problem. That began with the participation of all three branches in the work of the Joint Committee on Criminal Justice in 2013 and continued through the drafting of the CJRA. The Governor, Senate President, and Speaker of the Assembly then pressed for the new law's passage.

Second, New Jersey has a centralized Judiciary, Office of the Attorney General, and Office of the Public Defender. They have statewide authority to issue directives that apply in their respective areas: to judges and court staff, County Prosecutors, and Public Defender's offices throughout the State. That authority is critically important to be able to implement new policies.

Third, the two-year lead-up period from the passage of the CJRA to its effective date afforded each group time to implement complex changes.

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56 State v. Robinson, 229 N.J. 44, 61 (2017).
57 State v. Ingram, 230 N.J. 190, 195 (2017).
58 State v. Pinkston, 233 N.J. 495, 510 (2018).
59 State v. S.N., 231 N.J. 497, 500 (2018).
60 *See* N.J. CT. R. 3:4-2(c)(2)(E) (imposing requirement).
61 State v. Hyppolite, 236 N.J. 154, 169 (2018).

During that time, the Judiciary, Attorney General, and Public Defender ably worked through countless issues. We had invaluable support from the Arnold Foundation throughout. In the Judiciary, the Director of the Administrative Office of the Courts, Judge Glenn A. Grant, masterfully guided the project at every stage. And as I noted before, we cannot overlook the State's judges, who were willing to embrace a new approach to pretrial release.

Finally, credit also goes to the media, which covered this story in a responsible way. Any system that tries to predict future behavior—and answer questions like, "Will this person show up for court or commit a serious crime while on release?"—will not get it right every time. There have been times under the new system when individuals released on conditions committed serious offenses. That was also true under the prior system, when people who posted bail and were released committed serious offenses as well. Regrettably, no responsible system of pretrial release can entirely eliminate that risk.

The media reported on those events, as it should have, but did not sensationalize recent, isolated incidents. Instead, it took a responsible, broader view and based its judgment not on terribly unfortunate episodes but on systemwide results like the ones discussed above.

To be sure, there has been criticism from some quarters, and that will likely continue. When an entire industry is threatened by change, that type of criticism is understandable. And make no mistake. We have witnessed a sea change in the system of pretrial release—the most significant change to New Jersey's criminal justice system in decades.

Today, monetary bail is hardly used, which means that many low-risk defendants are no longer being held in custody pretrial simply because they are too poor to make bail. More defendants are instead being released on conditions. They are showing up in court at rates comparable to years before and are not committing new offenses at a notably higher rate. And although some defendants are still being held in custody pretrial, those individuals pose significant risks of danger, flight, or obstruction.

In short, the current system is working as intended and has begun to remove a number of inequities from the previous approach—thanks to the dedicated work of many individuals.

The path taken for the past six years has been a long one, but I believe the journey has been worthwhile. To the students here today, I leave you with this thought. Wherever you are headed in your legal careers—private practice, a public defender's office, a prosecutor's office, or another position—at the right moment for you, try to participate in projects that strive to create a better and fairer system of justice in New Jersey. You will not regret it.