

NEW JERSEY'S NEW MATERIAL WITNESS STATUTE: BALANCING THE RIGHTS OF PROSECUTORS, DEFENDANTS, AND MATERIAL WITNESSES IN CRIMINAL CASES

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I. Introduction

"I'm locking you up as a material witness."

The threat of detention as a material witness to a crime is commonplace to movie and television drama, in which the hard-boiled officer pressures the hesitant potential witness to pursue the investigation of a crime. The problem of assuring the availability of witnesses in criminal cases presents very real issues concerning the balance among the rights of the prosecution, the defendant, and witnesses to a crime.

In general, a material witness is "[a] person who can give testimony relating to a particular matter no one else, or at least very few, can give."¹ Under the statutes of many states, a material witness may be required to post an appearance bond. If he or she is unable to do so, he or she may be detained until he or she testifies.² A material witness is often an innocent observer of a crime

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¹ BLACK'S LAW DICTIONARY 826 (6th ed. abridged 1990).

² See Ronald L. Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1 (1969). The federal government and most states have enacted conditions relating to pretrial confinement of material witnesses. See Ronald L. Carlson & Mark S. Voelpel, *Material Witness and Material Injustice*, 58 WASH. U. L.Q. 1, 21 (1980). The detention of witnesses is justified under the concept that every citizen has a public duty to testify, for which the witness is not entitled to further compensation than that which the statute provides. *Hurtado v. United States*, 410 U.S. 578, 589 (1973) (citing *Blair v. United States*, 250 U.S. 273, 281 (1919)). Most of the material witness statutes in the United States are outdated. For example, the New Jersey material witness statutes derive from 1898. See, e.g., Law of 1898, ch. 237, 1898 N.J. Laws 871. Further, when these statutes are "dusted off and put into operation, these archaic

who happens to be in the wrong place at the wrong time. For example, a tourist from California who witnesses a crime in Newark and gives a report to the police is a potential material witness in New Jersey.³

On October 26, 1994, Governor Christine Todd Whitman signed into law a revision of New Jersey's existing statutes on material witnesses.⁴ The bill that reached the Governor's desk was sponsored by Assemblyman Gary Stultrager (R-Gloucester), and was based upon the recommendations of the New Jersey Law Revision Commission. In 1991, the Law Revision Commission began examining and revising the statutes in response to the New Jersey Superior Court in *State v. Misik*.⁵ In *Misik*, the court held the then existing material witness statutes unconstitutional and recommended procedures that should be followed in accordance with New Jersey's material witness statute before a witness could be legally detained, due to the fact that the existing statute was silent on the matter.⁶

Under the statutes in force when *Misik* was decided, a judge or magistrate had the power to detain any person who could testify against someone accused of a crime punishable by death or imprisonment.⁷ A judge had the power to set bail or detain a material

statutes result in innocent citizens spending weeks — even months — in custody." Carlson & Voelpel, *supra*, at 1.

³ See Application of Cochran, 434 F. Supp. 1207 (D. Neb. 1977). The *Cochran* court observed that a material witness is "an innocent citizen whose right to the full enjoyment of liberty is threatened solely because of his potential usefulness as a witness for the government . . . [and] the deprivation of liberty, although temporary by definition, can be measured in weeks or even months." *Id.* at 1213. The court concluded that the procedural safeguards applied to parolees under a due process analysis in *Morrissey v. Brewer*, 408 U.S. 471 (1972), also apply to material witnesses. *Id.* at 1213. The court referred to three factors in evaluating the necessity of a witness: the private interests that will be affected; the "risk of an erroneous deprivation" of interests via the procedure; and the government's interest. *Id.* at 1213-14 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). The *Cochran* court concluded that a material witness has an interest of unconditional liberty which deserves the same level of protection as the interest of a parolee. *Id.* at 1213.

⁴ Act of Oct. 26, 1994, ch. 126, 1994 N.J. Laws 104 (codified as N.J. STAT. ANN. § 2C:104-1 (West 1994)).

⁵ 569 A.2d 894 (N.J. Super. Ct. Law Div. 1989).

⁶ *Id.*

⁷ N.J. STAT. ANN. § 2A:162-2 (West 1994) and N.J. STAT. ANN. § 2A:162-3 (West 1994). Under N.J. STAT. ANN. § 2A:162-2, a judge could order such a material witness to post a bond to secure his appearance as a witness. Under subsection 3, a material witness could be "committed to or detained in jail" to secure his appearance as a

witness even if the "accused" had not yet been arrested, imprisoned or bailed.⁸

II. State v. Misik

The situation presented in *State v. Misik*⁹ illustrated the insufficiency of New Jersey's statutory scheme under modern constitutional standards.¹⁰ In *Misik*, a Superior Court judge issued a warrant for the arrest of Janos Misik as a material witness pursuant to New Jersey law based on the *ex parte* application of a detective of the New Jersey State Police.¹¹ The application alleged that Misik had "essential and material knowledge" regarding the commission of environmental crimes committed by his employer, and that his arrest was necessary because he would not be available for service by subpoena.¹²

The affidavit in support of the application contained the following allegations: (1) Misik had information connecting his employer, Petro King Terminal Corporation, to the release of petroleum product into the Hackensack River; (2) Misik missed an appointment with a prosecutor despite his initial cooperation with the police; (3) Misik was a suspected illegal alien because he once failed to produce his "green card" to the police; (4) Misik lived on a boat displaying a "For Sale" sign; (5) Misik gave police false information regarding the exact location of his boat; and (6) Misik had a criminal record for drug offenses.¹³ The application for the arrest of Misik was filed despite the fact that no criminal action or proceeding against Petro King Terminal Corporation was

witness against any person charged with a crime that is "punishable by death or imprisonment in the state prison . . ." N.J. STAT. ANN. § 2A:162-3.

⁸ See N.J. STAT. ANN. § 2A:162-2 and § 2A:162-3 (West 1994). The only standard set in the statute for the treatment of detained witnesses was that the witnesses "shall not be kept in the same apartment with or be provided with the same fare as persons charged with or convicted of a crime." N.J. STAT. ANN. § 2A:162-3. To achieve this standard, the county was required to "take care that" detained witnesses "shall be comfortably lodged and provided for, and not further restricted of their liberty than is necessary for their detention." *Id.* The statute established a payment of \$3.00 per day for detained witnesses to be paid from the county treasury for each day of detention. N.J. STAT. ANN. § 2A:162-4 (West 1994).

⁹ 569 A.2d 894 (N.J. Super. Ct. Law Div. 1989).

¹⁰ *Misik*, 569 A.2d at 894.

¹¹ *Id.* at 896.

¹² *Id.*

¹³ *Id.*

pending.¹⁴

The court held an *in camera* discussion with an assistant prosecutor concerning the State's authority to obtain an *ex parte* arrest warrant of Misik.¹⁵ The assistant prosecutor maintained that the State had authority to arrest Misik without a warrant. The prosecutor argued that, under *State v. Hand*,¹⁶ a peace officer may arrest without a warrant when he has a reasonable basis or probable cause to believe a person is a material witness.¹⁷ The *Misik* court then issued the warrant which authorized the police to arrest Misik. The warrant required the police to bring Misik before the court immediately after his arrest so that the court could inform Misik of his rights and the nature of the proceedings.¹⁸

The police arrested Misik the same day the arrest warrant was issued. Contrary to the court's order, however, Misik was brought to the prosecutor's office instead of to court.¹⁹ At the prosecutor's office, Misik was subjected to a lengthy custodial interrogation and later detained overnight in jail where he was treated like an ordinary prisoner, contrary to New Jersey's detention of witnesses statute which requires that detained material witnesses be separated from other prisoners and be "comfortably lodged."²⁰ The following morning Misik was brought to court in handcuffs and dressed in prison garb.²¹

Misik's attorney objected to the procedures adopted by the court to issue the arrest warrant and requested leave to file a brief challenging the constitutionality of the material witness statutes.²² The court released Misik from custody on his own recognizance, subject to the condition that he report weekly to the prosecutor's office for one month.²³ The court also informed the prosecutor that if the State did not convene a grand jury investigation of Petro King Terminal Corporation within one month, it would vacate the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 242 A.2d 888 (N.J. Super. Ct. Law Div. 1968).

¹⁷ *Misik*, 569 A.2d at 896-97.

¹⁸ *Id.* at 897.

¹⁹ *Id.*

²⁰ N.J. STAT. ANN. § 2A:162-3 (West 1994).

²¹ *Misik*, 569 A.2d at 897.

²² *Id.*

²³ *Id.*

reporting requirement.²⁴ Additionally, the court granted Misik leave to file a brief challenging the constitutionality of the material witness statute.²⁵

At a hearing on the matter, the court held that under both the federal and New Jersey constitutions, an alleged material witness must be provided with notice and an opportunity to be heard before being detained.²⁶ The court also held that a criminal action must be pending against an accused before a person may be apprehended or detained as an alleged material witness.²⁷ Consequently, Misik was free to refuse to cooperate with the police. Misik did not have to cooperate because, absent a grand jury investigation, the prosecutor could not compel Misik's appearance by subpoena. The court found that the prosecutor had misused the material witness statute to detain and arrest Misik.²⁸

Further, the court found that Misik had been deprived of his constitutional rights under both the federal and New Jersey constitutions. The judge stated that Misik was arrested without notice or an opportunity to be heard and thus found that the arrest and detention violated the due process requirements of the Fourteenth Amendment of the United States Constitution.²⁹ The court also stated that it was "patently unreasonable" under the Fourth Amendment to have arrested and detained Misik on the basis of his refusal to cooperate with the police.³⁰ Yet, while the court found that the procedures used to arrest Misik violated the federal and New Jersey constitutions, the court did not hold that the New Jersey material witness statute was unconstitutional.

New Jersey's material witness statute was silent regarding constitutional safeguards; therefore, the court looked to federal and

²⁴ *Id.*

²⁵ *Id.* at 897.

²⁶ *Misik*, 569 A.2d at 905. The court noted that, under extreme circumstances, an alleged material witness may be detained without prior notice after first being provided with a hearing. *Id.*

²⁷ *Id.* In support of its holding, the court found that the "express language of the statute compels the conclusion that a criminal action must be pending against an accused before a court may sanction the detention of a person believed to be a material witness." *Id.* at 898. The court also noted that "it is well-established that our Rules do not give a prosecutor any pre-trial subpoena power independent of the grand jury." *Id.* at 898-99.

²⁸ *Misik*, 569 A.2d at 899.

²⁹ *Id.*

³⁰ *Id.*

other state legislation for guidance.³¹ The *Misik* court concluded that the New Jersey statute could be rehabilitated if procedural safeguards were established, and it set forth a list of guidelines to fill the gap.³²

Most importantly, the court held that a person could not be arrested or detained as a material witness unless the justification for the arrest or detention was based on probable cause.³³ The judge stated that a weighty burden of proof should be imposed upon the State when it finds it is necessary to seek detention of a person who is innocent and who has not yet been accused of a crime.³⁴ In support of its position, the *Misik* court cited a United States Supreme Court decision, *Addington v. Texas*^{35, 36} In *Addington*, the United States Supreme Court established the "clear and convincing" standard of proof to commit a person for mental care on an involuntary basis.³⁷

The *Misik* court found that the interests at stake in material witness proceedings are the liberty interests of an innocent citizen and the State's need to gather evidence of crimes.³⁸ The clear and convincing standard allocates the risk of error to the state and thus minimizes the risk of erroneous decisions.³⁹ This standard also mirrors the value our society sets on individual liberty.⁴⁰ Thus, the *Misik* court held that the "clear and convincing" standard is constitutionally compelled for the arrest and detention of material witnesses.⁴¹

³¹ See, e.g., 18 U.S.C. § 3142(e), (f) (Supp. III 1988) and 18 U.S.C. § 3144 (Supp. II 1988) (detention subject to evidence that it may be impracticable to secure the presence of a witness by subpoena); N.Y. CRIM. PROC. § 620.30 (McKinney 1986) (order directs alleged material witness to appear at pre-deprivation hearing); NEB. REV. STAT. § 29-507 (1989) (specifies the conditions of release for material witnesses).

³² *Misik*, 569 A.2d at 903-04.

³³ *Id.* at 902-03.

³⁴ *Id.* at 902.

³⁵ 441 U.S. 418 (1979).

³⁶ *Misik*, 569 A.2d at 902.

³⁷ *Addington*, 441 U.S. at 433. The Court described the function of the standard of proof, which is rooted in the Due Process Clause, as a reflection of society's confidence in the factfinder's ability to judge a given adjudication. *Id.*

³⁸ *Misik*, 569 A.2d at 902-03.

³⁹ *Addington*, 441 U.S. at 425. Further, the clear and convincing standard "reflects the value society places on individual liberty." *Id.* at 425 (citing *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971)).

⁴⁰ *Id.* at 426 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971)).

⁴¹ *Misik*, 569 A.2d at 907.

Prior to *Misik*, the two principal decisions on New Jersey material witness law were two Law Division opinions, *State v. Price*⁴² and *State v. Hand*.⁴³ When read together, *Price*, *Hand*, and *Misik* did not constitute a coherent statement of law on material witnesses. Clear guidelines, therefore, did not exist for courts, prosecutors, or defendants. The primary inconsistencies concerned the right of the police to arrest a material witness without a warrant, and the necessity of a pending criminal action to detain a material witness.

For example, the *Price* court held that police may not hold a potential witness unless there is a pending criminal action against an accused.⁴⁴ To the contrary, the *Hand* court sanctioned the detention of a person believed to be a material witness despite the absence of any formal charges against an accused.⁴⁵ Similar to *Price*, *Misik* held that a pending criminal action is necessary to obtain a material witness order.⁴⁶ Additionally, *Hand* authorizes the warrantless arrest of potential material witnesses,⁴⁷ while *Misik* prohibits such arrests.⁴⁸ Thus, two decisions, *Misik* and *Hand*, directly contradict one another on this issue. *Price*, *Hand* and *Misik* are Law Division opinions. Each decision has equivalent legal weight and thus the state of the law pertaining to material witnesses remained unsettled.

In light of *Misik*, *Price*, and *Hand*, the New Jersey Law Revision Commission identified several procedural and substantive problems in the New Jersey material witness statute. First, the statute did not specify whether a criminal action must be pending before the state may apply for a warrant to arrest a person alleged to be a material witness. The failure of the statute to specify the preconditions for a warrant engendered uncertainty as to when the statute is applicable.

Second, the statute did not contain procedural safeguards to

⁴² 260 A.2d 877 (N.J. Super. Ct. Law Div. 1970) (holding that illegal arrest and detention of material witness nullified consent to search and seizure).

⁴³ 242 A.2d 888 (N.J. Super. Ct. Law Div. 1968) (holding warrantless arrest of defendant as material witness invalid as police did not intend to hold defendant as material witness).

⁴⁴ *Price*, 260 A.2d at 881.

⁴⁵ *Hand*, 242 A.2d at 895.

⁴⁶ *Misik*, 569 A.2d at 903.

⁴⁷ *Hand*, 242 A.2d at 894-95.

⁴⁸ *Misik*, 569 A.2d at 905. The court in *Misik* stated that "under no circumstances may a person be arrested or detained without court process" *Id.*

make certain that arrest and detention of a witness comply with both federal and state constitutional due process requirements. Third, while it prohibited lodging a material witness in an ordinary jail, the statute did not require the court to impose the least restrictive constraint to detain a witness. Fourth, the statute set the payment of an unreasonably low fee of three dollars per day for detained witnesses. Finally, the material witness statutes left open the issues of warrantless arrests, finality of the order for purposes of appeal, and the effects of deposing a witness.

III. *The New Jersey Law Revision Commission Response to State v. Misik*

The New Jersey Law Revision Commission (the Commission) is charged with the responsibility of reviewing laws and making recommendations. The Superior Court's decision in *State v. Misik* brought the need to re-examine New Jersey's material witness statute to the attention of the Commission. The commission needed to conform the statutes to constitutional requirements and to clarify the uncertainty created by the opinion in *Misik*.

The Commission examined prior New Jersey court opinions, and evaluated them against the approach taken by the opinion in *Misik*. The Commission also sought guidance from other states' statutes, as well as federal statutes. No suitable statutory model was found in either state⁴⁹ or federal law;⁵⁰ therefore, the Commission proceeded to draft its own comprehensive statute. The Legislature

⁴⁹ Several states have developed modern legislation in the area of material witness detention. See, e.g., ARIZ. REV. STAT. ANN. § 13-4083(b) (1989) (deposition of detained witness requires discharge); HAW. REV. STAT. § 835-2 (1988) (detention system based on material witness order); and N.Y. CRIM. PROC. LAW § 620.20 (McKinney 1984) (detention system based on material witness order. However, notwithstanding this legislative activity, most state statutes do not provide substantive or procedural protections for detained witnesses. See Carlson & Voelpel, *supra* note 2, at 27.

⁵⁰ The federal material witness law also does not constitute a model law. The federal law is not a single comprehensive statute. Rather, the federal material witness law consists of a matrix of statutes and rules. See e.g., 18 U.S.C. § 3144 (1985) (release or detention of a material witness); 18 U.S.C. § 3142 (1989) (release or detention of a defendant pending trial); 28 U.S.C. § 1821 (1989) (witness fees); 18 U.S.C. § 3006(a) (1989) (assignment of counsel rule); FED. R. CRIM. P. 46 (1994) (release from custody); and FED. R. CRIM. P. 15 (1994) (deposition of detained witness). In addition to being unduly complicated, the federal statutes and rules fail to authorize the arrest of material witnesses. The judiciary inferred the power to arrest from the federal material witness statute. See *Bacon v. United States*, 449 F.2d 933, 937 (9th Cir. 1971).

enacted that statute in its entirety and the statute regulates judicial orders directing the appearance or detention of material witnesses.

The statute has three objectives: (1) to strike a balance between the need of the law enforcement community to prosecute crime and the right of the citizen not charged with a crime to remain free from arrest; (2) to resolve inconsistencies in the common law; and (3) to establish the payment of a reasonable fee for confined witnesses and to create other procedural rules to effectuate the interests of the law enforcement community and material witnesses.

The new material witness statute affords both the state and the defendant the right to apply for material witness orders if certain threshold requirements are met. These requirements include: (1) an indictment, accusation, or complaint of a crime, or a pending criminal investigation before a grand jury; (2) the alleged witness has information material to the pending criminal action; and (3) the alleged witness is unlikely to respond to a subpoena. The proposed statute specifies the content of the application for a material witness order, and lists the rights that must be afforded to a witness during a material witness hearing.

In addition, the statute establishes standards of review for the issuance of material witness orders, and sets the conditions of release and of confinement. The statute also permits police officers to arrest an alleged material witness without a warrant in emergencies, but requires them to bring the witness before a judge immediately after arrest. Finally, the proposed statute increases the fee paid to detained witnesses and gives material witnesses additional rights, such as the right to appeal and the right to modify the material witness order.

IV. New Jersey's New Statute on Material Witnesses

Set forth below is the text of New Jersey's new statute on material witnesses, which was enacted into law by the Legislature without change from the text proposed by the Law Revision Commission. Following the text of each provision is the Comment prepared by the Commission in its report to the Legislature recommending the adoption of the new statute.

I. 2C:104-1. Definitions

A. Statutory Provisions

a. A material witness is a person who has information material to the prosecution or defense of a crime.

b. A material witness order is a court order fixing conditions necessary to secure the appearance of a person who is unlikely to respond to a subpoena and who has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury.

B. New Jersey Law Revision Commission Comment

This section defines a material witness and a material witness order. A material witness is a person who has information crucial to the prosecution or defense. A material witness order is a court order finding that a person is a material witness, and commanding the person to appear before the court. A material witness order may not issue unless the court finds that: (1) a person is a material witness, (2) the person is unlikely to respond to a subpoena, and (3) there is a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury. The material witness statute therefore does not apply to offenses that are not crimes.⁵¹ The inclusion of definitions cures the defect noted by *State v. Misik* that the former statute did not define a material witness or material witness order.⁵²

II. 2C:104-2. Application for Material Witness Order

A. Statutory Provisions

a. The Attorney General, county prosecutor or defendant in a criminal action may apply to a judge of the Superior Court for an order compelling a person to appear at a material witness hearing, if there is probable cause to believe that (1) the person has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, and (2) the person is unlikely to respond to a subpoena. The application may be accompanied by

⁵¹ See N.J. STAT. ANN. §§ 2C:1-4(a) and 1-14(k) (West 1994).

⁵² *Misik*, 569 A.2d at 898.

an application for an arrest warrant when there is probable cause to believe that the person will not appear at the material witness hearing unless arrested.

b. The application shall include a copy of any pending indictment, complaint or accusation and an affidavit containing: (1) the name and address of the person alleged to be a material witness, (2) a summary of the facts believed to be known by the alleged material witness and their relevance to the pending criminal action or investigation, (3) a summary of the facts supporting the belief that the person possesses information material to the pending criminal action or investigation, and (4) a summary of the facts supporting the claim that the alleged material witness is unlikely to respond to a subpoena.

c. If the application requests an arrest warrant, the affidavit shall set forth why immediate arrest is necessary.

B. New Jersey Law Revision Commission Comment

Subsection (a) substantially changes the source section, which merely established the power to bind material witnesses. Subsection (a) allows the Attorney General, county prosecutor or defendant to apply to the Superior Court for a material witness order. The present statute does not give defendants the right to apply for material witness orders. Subsection (a) gives defendants the right to secure the testimony of witnesses to balance the powers of the State and defendants in criminal proceedings. The federal statute and the laws of several foreign jurisdictions provide defendants the right to obtain material witness orders.⁵³

The Superior Court may issue a material witness order when there is probable cause to believe that: (1) there is a pending indictment, accusation, or complaint for a crime, or a criminal investigation before a grand jury, (2) a person possesses information material to the pending criminal action, and (3) the person is unlikely to respond to a subpoena. These requirements derive from the guidelines prescribed by *Misik*.⁵⁴

However, the requirements of this subsection differ in one important respect from the *Misik* guidelines. *Misik* limits applications

⁵³ See 18 U.S.C. § 3144 (1989); HAW. REV. STAT. § 835-2(a) (1988); N.Y. CRIM. PROC. LAW 620.20 (1) (McKinney 1984); and N.C. GEN. STAT. § 15A-803(a) (1990).

⁵⁴ See *Misik*, 569 A.2d at 903-04.

for material witness orders to situations where a complaint, indictment or accusation is pending. Subsection (a), in addition, allows applications where a grand jury is conducting an investigation. The addition recognizes that a witness's testimony may be necessary to determine the identity of the person to be indicted. To the extent that the present statute may not allow the use of material witness orders in aid of grand jury investigations this section represents a change in the law.⁵⁵

Subsection (b) requires the party making an application for a material witness order to provide facts to the court establishing the need for the material witness order. The affidavit must contain a summary of the facts believed to be known by the alleged material witness and their relevance to the pending investigation. The affidavit also must contain a summary of facts showing that the person is unlikely to respond to a subpoena, and a summary of facts supporting the affiant's belief that the person is a material witness. The requirements of subsection (b) are intended to provide a court with information needed to make an independent judgment on the application. Mere conclusory allegations do not satisfy these requirements. When applicable, subsection (b) requires the application to include a copy of the pending indictment, accusation or complaint.

Subsection (c) governs the special situation where the applicant seeks the arrest of the alleged material witness. In this event, the application must establish that, without the arrest, the material witness will not be available as a witness.

III. 2C:104-3. *Order to Appear*

A. Statutory Provisions

a. If there is probable cause to believe that a material witness order may issue against the person named in the application, the judge may order the person to appear at a hearing to determine whether the person should be adjudged a material witness.

b. The order and a copy of the application shall be served personally upon the alleged material witness at least 48 hours before the hearing, unless the judge adjusts the time period for good cause, and shall advise the person of: (1) the time and place

⁵⁵ See *State v. Price*, 260 A.2d 877, 881-82 (N.J. Super. Ct. Law Div. 1970).

of the hearing, and (2) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one.

B. New Jersey Law Revision Commission Comment

Subsection (a) identifies the standard of review governing an application for a material witness order. The standard of review is the probable cause standard. To issue a material witness order, the judge must find that it is more probable than not that the facts set forth in the application are true.

Subsection (b) requires the party who obtains a material witness order to serve a copy of the order and application upon the person named in the application. Service must take place at least 48 hours before the hearing unless the judge enlarges or contracts the prescribed time period. The judge may alter the prescribed time period if the party making the application for a material witness order demonstrates that exigent circumstances justify a deviation from the prescribed time period. The order to appear informs the alleged material witness of the time and place of the hearing and of the right to counsel.

IV. *2C:104-4. Arrest With Warrant*

A. Statutory Provisions

a. If there is clear and convincing evidence that the person named in the application will not be available as a witness unless immediately arrested, the judge may issue an arrest warrant. The arrest warrant shall require that the person be brought before the court immediately after arrest. If the arrest does not take place during regular court hours, the person shall be brought to the emergency-duty Superior Court judge.

b. The judge shall inform the person of: (1) the reason for arrest, (2) the time and place of the hearing to determine whether the person is a material witness, and (3) the right to an attorney and to have an attorney appointed if the person cannot afford one.

c. The judge shall set conditions for release, or if there is clear and convincing evidence that the person will not be available as a witness unless confined, the judge may order the person confined until the material witness hearing which shall take place within 48 hours of the arrest.

B. New Jersey Law Revision Commission Comment

Subsection (a) establishes the standard of review that the judge applies to an application for an arrest warrant. The standard of review is the “clear and convincing” evidence standard.⁵⁶ The “clear and convincing” standard is the intermediate standard of proof located between the preponderance of the evidence and reasonable doubt standards.⁵⁷ While it is difficult to define the term “clear and convincing” evidence precisely, it denotes a rigorous level of proof. The “clear and convincing” standard of proof minimizes the risk of erroneous decisions and reflects the value society places on individual liberty.⁵⁸

Subsection (a) also directs that the person be brought before the court immediately after arrest. If the arrest takes place outside of regular court hours, the person must be brought before the emergency-duty Superior Court judge. The purpose of this requirement is to make certain that the arrested person has an immediate judicial review of the arrest. The statute does not specify a penalty for noncompliance with the requirement to bring the arrested person before the court immediately after arrest, since a violation of a court order is a contempt of court.

Subsection (b) requires the judge at this first appearance to inform the arrested person of the time and place of the material witness hearing and the right to counsel.

Subsection (c) requires the judge to release the arrested person with appropriate conditions unless confinement is the only method to secure the appearance of the witness. When the judge orders the person confined, the judge must hold the material witness hearing within 48 hours of the person’s arrest.

V. 2C:104-5. Arrest Without Warrant

A. Statutory Provisions

a. A law enforcement officer may arrest an alleged material witness without a warrant only if the arrest occurs prior to the filing of an indictment, accusation or complaint for a crime, or the initia-

⁵⁶ *Misik*, 569 A.2d at 904.

⁵⁷ See *Addington v. Texas*, 441 U.S. 418, 423 (1979).

⁵⁸ *Id.* at 425 (quoting *Tippett v. Maryland*, 436 F. 2d 1153, 1166 (4th Cir. 1971)).

tion of a criminal investigation before a grand jury, and if the officer has probable cause to believe that:

- (1) a crime has been committed,
- (2) the alleged material witness has information material to the prosecution of that crime,
- (3) the alleged material witness will refuse to cooperate with the officer in the investigation of that crime, and
- (4) the delay necessary to obtain an arrest warrant or order to appear would result in the unavailability of the alleged material witness.

b. Following the warrantless arrest of an alleged material witness, the law enforcement officer shall bring the person immediately before a judge. If court is not in session, the officer shall immediately bring the person before the emergency-duty Superior Court judge. The judge shall determine whether there is probable cause to believe that the person is a material witness of a crime and, if an indictment, accusation or complaint for that crime has not issued or if a grand jury has not commenced a criminal investigation of that crime, the judge shall determine whether there is probable cause to believe that, within 48 hours of the arrest, an indictment, accusation or complaint will issue or a grand jury investigation will commence. The judge then shall proceed as if an application for a warrant has been made.

B. New Jersey Law Revision Commission Comment

This subsection settles the law regarding the right to arrest material witnesses without a warrant.⁵⁹ Subsection (a) allows the warrantless arrest of alleged material witnesses under precisely defined circumstances. The warrantless arrest power applies in exigent circumstances such as the encounter between a law enforcement officer and a witness at the scene of a crime. As a result, the power to arrest without a warrant ceases to exist subsequent to the filing of an indictment, accusation or complaint for a crime or the initiation of a criminal investigation before a grand jury.

Subsection (b) follows the procedure set forth in 2C:104-4 regarding arrests upon warrant. The law enforcement officer must

⁵⁹ Compare *State v. Hand*, 242 A.2d 888, 895 (N.J. Super. Ct. Law Div. 1968) (allowing warrantless arrests) with *State v. Misik*, 569 A.2d 894, 905 (N.J. Super. Ct. Law Div. 1989) (forbidding warrantless arrests).

bring the arrested person before a judge immediately after arrest so that the judge may review the propriety of the arrest and set appropriate conditions of release. The failure of the law enforcement officer to comply with the requirement to bring the arrested person before a judge immediately after arrest makes the arrest unlawful thereby providing the wrongfully arrested person remedies for such an unlawful arrest.

VI. 2C:104-6. *Material Witness Hearing*

A. Statutory Provisions

a. At the material witness hearing, the following rights shall be afforded to the person: (1) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one, (2) the right to be heard and to present witnesses and evidence, (3) the right to have all of the evidence considered by the court in support of the application, and (4) the right to confront and cross-examine witnesses.

b. If the judge finds that there is probable cause to believe that the person is unlikely to respond to a subpoena and has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, the judge shall determine that the person is a material witness and may set the conditions of release of the material witness.

c. If the judge finds by clear and convincing evidence that confinement is the only method that will secure the appearance of the material witness, the judge may order the confinement of the material witness.

d. The judge shall set forth the facts and reasons in support of the material witness order on the record.

B. New Jersey Law Revision Commission Comment

Subsection (a) establishes the rights afforded to the alleged material witness at the hearing. The alleged material witness has the full panoply of rights afforded to a person at an adversarial hearing. Among the rights granted is the right to know the evidence used by the court as the basis for grant of the application. If disclosure of particular evidence would obstruct the ongoing criminal investigation, the court may exclude that evidence from consid-

eration in deciding whether to grant the application.⁶⁰

Subsections (b) and (c) distinguish conceptually between the finding that a person is a material witness and the decision to impose restraints to assure the appearance of the witness. Subsection (b) identifies the standard of review for determining that a person is a material witness and to impose non-custodial restraints on the witness. The standard of review is the probable cause standard.

Subsection (c) identifies the standard of review for ordering the confinement of the witness. The judge may order the confinement of the material witness only when the judge finds by clear and convincing evidence that no other form of restraint will assure the appearance of the material witness. The clear and convincing standard is used to indicate that confinement is a last resort. The clear and convincing standard protects the constitutional right of the person to be free from arbitrary seizure.⁶¹

Subsection (d) requires that the judge set forth facts and reasons in support of the order. The requirement to set forth facts and reasons furnishes a record for appeal.

VII. 2C:104-7. *Conditions of Release; Confinement*

A. Statutory Provisions

a. A confined person shall not be held in jail or prison, but shall be lodged in comfortable quarters and served ordinary food.

b. The conditions of release for a material witness or for a person held on an application for a material witness order shall be the least restrictive to effectuate the appearance of the material witness. A judge may: (1) place the witness in the custody of a designated person or organization agreeing to supervise the person, (2) restrict the travel of the person, (3) require the person to report, (4) set bail, or (5) impose other reasonable restrictions on the material witness.

c. A person confined shall be paid \$40 per day, and when the interests of justice require it, the judge may order additional payment not exceeding the actual financial loss resulting from the confinement. The party obtaining the material witness order bears the cost of confinement and payment unless the party is indigent.

⁶⁰ Cf. *State v. Kunz*, 55 N.J. 128 (1969) and N.J. Ct. R. 3:21-2(a).

⁶¹ *Misik*, 569 A.2d at 904.

B. New Jersey Law Revision Commission Comment

Subsection (a) identifies the conditions of detention, and is substantially identical to the requirements of New Jersey Stat. Ann. 2A:162-3. A material witness, if confined, cannot be treated like a prisoner because the material witness has not committed a crime. Rather, the state or defendant must provide comfortable lodging and ordinary food to a confined material witness.

Subsection (b) requires the judge to impose the least restrictive restraint upon a non-confined material witness to secure the appearance of the material witness. The list of alternatives is designed to guide the judge in the decision making process, but is not meant to exhaust the range of possible and appropriate alternatives. Subsection (b) permits the judge to exercise discretion in setting the appropriate restraints.

Subsection (c) substantially departs from the previous law which provided for payment of \$3 for each day the person is "committed or detained in jail."⁶² Subsection (c) requires the payment of \$40 for each day the material witness is confined. The amount of payment is the same as that provided by federal law.⁶³ In addition, this subsection allows a court to order additional payment not to exceed actual financial losses, if the additional payment would serve the interests of justice.

New Jersey Statute 2A:164-2 required the board of chosen freeholders of the county where the confinement occurs to pay the costs of confinement regardless of the entity seeking the confinement. Subsection (c) reflects the fact that the county is not always responsible for the costs of prosecution when the prosecution is brought by the State.⁶⁴ The effect of subsection (c) is that the prosecution, whether county or State, bears the cost of a material witness confined on its behalf. Likewise, a defendant obtaining the material witness order requiring confinement is obligated to pay the cost of confinement, plus additional payment if ordered, unless the party is indigent.

⁶² See N.J. STAT. ANN. § 2A:162-4 (West 1994).

⁶³ 28 U.S.C.A. 1821(b).

⁶⁴ Cf. N.J. STAT. ANN. § 2A:73A-9 (West 1994).

VIII. 2C:104-8. *Deposition*

A. Statutory Provisions

A material witness may apply to the Superior Court for an order directing that a deposition be taken to preserve the witness's testimony. After the deposition is taken, the judge shall vacate the terms of confinement contained in the material witness order and impose the least restrictive conditions to secure the appearance of the material witness.

B. New Jersey Law Revision Commission Comment

This section gives a material witness a statutory right to apply to the Superior Court for an order requiring the taking of a deposition pursuant to court rules to preserve the testimony of the witness. Deposition as an alternative to continued confinement is now allowed by court rule.⁶⁵ The federal rules and other state laws take a similar approach.⁶⁶ The taking of a deposition to preserve testimony vacates the confinement terms of the material witness order and requires the judge to modify the material witness order to assure that the least restrictive conditions of release remain imposed on the material witness.

IX. 2C:104-9. *Orders Appealable*

A. Statutory Provisions

A material witness order shall constitute a final order for purposes of appeal but, on motion of the material witness, may be reconsidered at any time by the court which entered the order.

B. New Jersey Law Revision Commission Comment

This section makes a material witness order a final order for purposes of appeal entitling the material witness to file an appeal without leave of the Appellate Division. In the absence of the statute it would be unclear whether a material witness order is interlocutory or final. The Superior Court which entered the order retains jurisdiction when an appeal is taken to enable the witness to apply to the court for a modification of the original order.

⁶⁵ N.J. CT. R. 3:13-2.

⁶⁶ See, e.g., FED. R. CRIM. P. 15; ARIZ. REV. STAT. ANN. § 13-4083(b) (1989).

V. Conclusion

By amending its material witness statute, New Jersey addressed the real issues concerning the balance among the rights of the prosecution, the defendant, and witnesses to a crime. The amendments were enacted pursuant to recommendations by the New Jersey Law Revision Commission and its reading of *State v. Misik*. The statute has been updated to restrict a judge's power to detain a person who can testify against someone accused of a crime punishable by death or imprisonment. The main thrust of the statute sets the standard of review by which a judge applies to an application for an arrest warrant for the alleged material witness. This standard is the clear and convincing standard. This standard commands a high level of proof and will minimize the risk of unnecessary material witness detentions. Finally, the new statute goes beyond *Misik* and details the rights of material witnesses who find themselves in the situation of being one of only a few who can provide information pertaining to a crime.