

# New Jersey's former top prosecutors: Bail reform isn't easy, but it works

By Christopher Porrino, Esq., and Elie Honig, Esq., *Lowenstein Sandler LLP*

NOVEMBER 21, 2018

Too many people across the United States spend too long in jail before they've ever been convicted of a crime, simply because they are too poor to post cash bail. At the same time, some dangerous offenders are able to buy their way out of jail by posting cash bail, regardless of the risk they pose to the community.

For far too long, the criminal justice system in New Jersey — and many other states — suffered from these dual fundamental failures. Recently, however, New Jersey instituted sweeping reforms to its bail system. The lesson we offer from the front lines of the New Jersey bail reform effort is this: It is not easy, but it works.

Despite heated opposition from the bail bonds industry, New Jersey has successfully enacted and implemented a reformed system that is more just because it does not discriminate against arrestees based on wealth.

At the same time, the new system better protects the public by enabling judges to consider an arrestee's potential dangerousness and to detain without bail the highest-risk defendants. The objective data, and our own experiences working in the criminal justice system, support this conclusion.

The bail reform effort in New Jersey happened only because diverse stakeholders put aside narrow self-interests and focused on the greater public good. In 2013, the Drug Policy Alliance shined a spotlight on the urgent need for bail reform when it issued a groundbreaking study finding that over 73 percent of New Jersey's incarcerated population were awaiting trial. Stunningly, the study also found that 12 percent of the state's incarcerated population were pretrial detainees who could not afford to post bail of \$2,500 or less. That report underscored the urgent need to fix our broken cash bail system.

Shortly after the report was issued, the chief justice of the New Jersey Supreme Court, Stuart Rabner, convened a Joint Committee on Criminal Justice to study bail reform and make recommendations. The committee was comprised of judges, prosecutors, public defenders, private criminal defense practitioners, the American Civil Liberties Union, and representatives of the governor's office and the state legislature.

Working together over several months, committee members put aside their conventional talking points, formed novel partnerships, and arrived at broad consensus on two very important issues.

First, they agreed that our cash bail system discriminated based on wealth because some offenders could afford to pay their way out of jail while indigent offenders could not, even if they posed little or no risk.

---

The bail reform effort in New Jersey happened only because diverse stakeholders put aside narrow self-interests and focused on the greater public good.

---

Even the prosecutors on the committee agreed that too many low-risk, poor arrestees were behind bars simply because they could not pay for their freedom pending trial.

On the flip side, a broad consensus emerged on the committee — joined even by the state's top public defender — that at least some of the highest-risk offenders should be detained pending trial without any bail.

Incredibly, before bail reform, New Jersey law prohibited prosecutors from arguing, and judges from considering, the danger posed by an arrestee in setting bail conditions. The committee members agreed that risk must be not only a relevant factor but a primary focus in an effective bail system.

The committee ultimately submitted a report that became the framework for bail reform legislation. The proposed legislation abolished cash bail in all but a very narrow set of circumstances. It generally required courts either to release offenders on nonmonetary conditions or to detain high-risk offenders without bail.

The bill also required implementation of a data-driven risk assessment tool to provide an objective measure of the risk posed by each individual arrestee.

The bill further called for an amendment to the New Jersey Constitution, because the constitution as written entitled all defendants to cash bail.

The proposed constitutional amendment permitted judges to detain without bail some arrestees deemed high-risk by the court if necessary to ensure the arrestee's future appearance in court or to protect the public.

At first, the legislation and accompanying constitutional amendment appeared to be headed toward quick and decisive enactment. The measures enjoyed broad bipartisan support from then-Gov. Chris Christie, a Republican, and from the Democratic-controlled state Senate and Assembly.

Liberal-leaning interest groups like the ACLU supported the reform measures, as did many criminal law practitioners, including the attorney general's office and the public defender. A broad alliance coalesced in favor of bail reform, transcending traditional fault lines of politics and ideology.

Passage of the new law seemed all but assured — until the bail bonds industry intervened. Sensing an existential threat, the multibillion-dollar industry took the clever tack of enlisting the Southern Christian Leadership Conference — the legendary civil rights organization co-founded by Dr. Martin Luther King Jr. — to advocate on its behalf.

The SCLC dispatched representatives to New Jersey to argue that bail reform would discriminate against minorities. That argument so plainly lacked merit — the vast majority of the pretrial incarcerated population who stood to benefit from abolition of cash bail were minorities — that the bail bonds industry's strategic lobbying effort failed.

The bill passed with overwhelming majorities of the Assembly and the Senate. Christie signed the bill into law, and voters overwhelmingly approved a ballot referendum to amend the state constitution by a 62 percent to 38 percent margin.

New Jersey's new system went into effect Jan. 1, 2017. Under the new law, arrestees charged by warrant are held in county jail for a maximum of 48 hours before their first court appearance (though the average stay in county jail before first appearance is closer to 24 hours).

The arrestee is fingerprinted through the automated Livescan system. The risk assessment tool then automatically evaluates various factors, including the nature and seriousness of the new charges, the arrestee's criminal history, and the arrestee's history of appearance or non-appearance in court.

The risk assessment tool automatically scores each arrestee on risk of new criminal activity and risk of non-appearance in court (each on a 1 to 6 scale, with 6 being highest) and risk of new violent criminal activity (a yes/no determination).

Importantly, these risk assessment scores are not binding on the judge or the parties. Rather, they provide an objective and standardized measure of the risk posed by each individual alleged offender.

It remains up to the prosecutor and defense attorney to make appropriate arguments, and for the judge to apply discretion in deciding whether to detain the arrestee without bail or to release the arrestee on appropriate nonmonetary conditions (such as home confinement, electronic monitoring, curfew and stay-away orders).

Since implementation of the new system, approximately 18 percent of arrestees charged by warrant have been detained without bail, while the remaining 82 percent either have been released on their own recognizance or on nonmonetary conditions. Fewer than 0.1 percent of all arrestees have been released on cash bail.

The new legislation also contains speedy-trial rules requiring prosecutors to indict any detained defendant within 90 days after arrest and then to try the case within 180 days after indictment. Violation of the deadlines results in release of the defendant from prison, but not dismissal of charges.

Under the old system, arrestees spent an average of 314 days in jail awaiting trial, and delays sometimes lasted as long as two years or more. Under the new system, all defendants held without bail are assured of a trial within 270 days after arrest.

To be sure, bail reform in New Jersey required hard work, innovation and creativity by prosecutors, defense lawyers and the courts alike. All the relevant players in the criminal justice system had to learn to prioritize potential jail cases; to understand and make proper use of the new risk assessment tool; to conduct detention hearings promptly and fairly; to meet earlier discovery requirements necessary for detention hearings; and to comply with speedy trial deadlines.

While prosecutors, defense attorneys and judges faced challenges during the first months under the new bail reform, the new procedures now are well ingrained in the everyday course of work. What once felt cataclysmic now seems routine.

Now that the new system has been in place for nearly two years, the objective data proves decisively that bail reform in New Jersey has been a sweeping success.

In 2017 — the first year when judges could consider danger in denying cash bail to arrestees — over 8,000 of the state's highest-risk arrestees were detained pending trial, with no opportunity to buy their freedom by posting a bail bond.

During that time, New Jersey's violent crime index fell by 5.7 percent, including a 14.3 percent drop in murders and significant decreases in robbery, assault and burglary rates. Preliminary data indicates that violent crime rates have fallen again in 2018. At the same time — with indigent,

low-risk arrestees eligible for release without having to post cash bail — New Jersey’s pretrial county jail population fell by a staggering 20.3 percent in 2017 alone. As of Aug. 31, 2018, that reduction stands at 26.3 percent compared to the jail population on Jan. 1, 2017.

Even using a conservative estimate that incarceration of pretrial inmates costs \$100 per person, per day, that reduction equates to over \$68 million per year in taxpayer savings. Further, low-risk defendants who stay out of jail avoid socially costly collateral consequences such as loss of a job or driving privileges.

Also, statistics show those low-risk defendants who spend less time in jail are less likely to commit future crimes.

Notwithstanding the undeniable success of the new system, the bail bonds industry has challenged reform efforts at every turn.

In addition to launching sensationalistic internet campaigns depicting the Grim Reaper and predicting that New Jersey would devolve into lawless chaos, the bail bonds industry took their fight to the courts. To date, the courts have rejected every lawsuit filed by the bail bonds industry.

Most recently, in July the 3rd U.S. Circuit Court of Appeals, in *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018), firmly denied the bail bonds industry’s challenge to the constitutionality of the new system, finding that “New Jersey’s interests in ensuring defendants appear in court, do not endanger the safety of any person or the community, or obstruct their criminal process, are no doubt legitimate.”

Now that the battle largely has been fought in New Jersey, the question becomes: Which states will follow? In August California passed sweeping legislation that closely mirrors New Jersey’s system. The California legislation eliminates cash bail and requires adoption of a data-driven risk assessment tool.

Upon passage of the legislation, the chief justice of California’s courts stated that “[o]ur old system of money bail was outdated, unsafe and unfair.” The New York Times noted that “[t]he California law is part of a wave of criminal justice reforms taking place across the country.”<sup>1</sup>

Other states should follow California in enacting bail reform legislation built on the New Jersey model. New York should step up next.

In his 2018 State of the State address, Gov. Andrew Cuomo declared that “[t]he blunt ugly reality is that too often, if you can make bail you are set free and if you are too poor to make bail you are punished. We must reform our bail system so a person is only held if a judge finds either a significant flight risk or a real threat to public safety.”

Many other states seem poised to follow suit. In fact, at least 20 have formed task forces to study bail reform, and many others are considering the issue. To all of those states, we say this: If you want to see what meaningful and successful bail reform looks like, not only in theory but also in practice, then look no further than New Jersey.

In 1964 Attorney General Robert Kennedy testified before Congress that the “problem, simply stated, is: The rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail. ... Bail has become a vehicle for systematic injustice.”<sup>2</sup>

We as a country have known this truth for over five decades. Now, New Jersey has shown that bail reform truly does work. The road map is available for everyone else to follow. We call on all other states to join us in creating the fairer and more just bail system that Kennedy envisioned so many years ago.

## NOTES

<sup>1</sup> Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES (Aug. 28, 2018), <https://nyti.ms/2T6WN2v>.

<sup>2</sup> *Hearing Before the Subcomms. on Constitutional Rights and Improvements in Judicial Machinery of the S. Jud. Comm.* (Aug. 4, 1964) (testimony by U.S. Attorney General Robert F. Kennedy on bail legislation), <https://bit.ly/2FiAXpl>.

*This article appeared in the November 21, 2018, issue of Westlaw Journal White-Collar Crime.*

## ABOUT THE AUTHORS



**Christopher Porrino** (L) is a partner at **Lowenstein Sandler LLP** in New York and is the chair of its litigation department. He is a former attorney general of New Jersey, former director of the attorney general’s office’s law division and former chief counsel to Gov. Chris Christie. As chief counsel, he oversaw the New Jersey bail reform legislative effort. **Elie Honig** (R) is special counsel at the firm. He is also a former director of the New Jersey Division of Criminal Justice and a former assistant U.S. attorney for the Southern District of New York.

**Thomson Reuters** develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world’s most trusted news organization.