

# THE ROLE OF THE PUBLIC SAFETY ASSESSMENT IN PRETRIAL DETENTION

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**T**he public safety assessment (PSA) is a pretrial risk assessment that was introduced through the Criminal Justice Reform Act (CJRA).<sup>1</sup> “The CJRA is to be ‘liberally construed’ in favor of ‘primarily relying upon pretrial release by non-monetary means.’”<sup>2</sup> The PSA is designed to be considered by trial court judges in making pretrial detention determinations. As a part of the CJRA, the PSA depends on neutral and reliable data, based on nine factors, to determine two risk ‘scores’: 1) new criminal activity (NCA) and 2) failure to appear (FTA).<sup>3</sup> This score, along with the PSA recommendation on pretrial detention, is then used by the judge to make a determination on detention.

Under the CJRA, a prosecutor may seek pretrial detention if: 1) the defendant is charged with certain serious crimes;<sup>4</sup> 2) the defendant is charged with a crime carrying a life sentence;<sup>5</sup> 3) the defendant has committed multiple serious crimes in the past;<sup>6</sup> or 4) the state believes there is a serious risk a defendant will not appear in court, will pose a danger to the community, or will obstruct (or attempt to obstruct) justice.<sup>7</sup> The court must hold a hearing on a motion for pretrial detention no later than the defendant's first appearance, or three days from the date of the motion.<sup>8</sup> Unless a statutory exemption is present,<sup>9</sup> there is a presumption of release.<sup>10</sup> To rebut this presumption, the state must present clear and convincing evidence that no set of conditions "reasonably assure the defendant's appearance in court, the safety of the community, or the integrity of the criminal justice process."<sup>11</sup> The New Jersey Supreme Court has held that this presumption of release is present without regard to whether the PSA recommends pretrial detention.<sup>12</sup>

### Determining the Score and Recommendation

The PSA was created to advance the notion that "[t]he pretrial phase of the criminal justice process should aim to protect public safety and assure defendants' appearance in court, while honoring individuals' constitutional rights, including the presumption of innocence and the right to bail that is not excessive."<sup>13</sup> It provides the reviewing judge with "an approved instrument that is 'objective, standardized, and [has been] developed based on [an] analysis of empirical data and risk factors.'"<sup>14</sup>

Following an individual's arrest, a pretrial services officer prepares the PSA. It is an automated process that gathers information about defendants from various law enforcement and Judiciary databases to answer the nine

PSA questions and ultimately provide risk scores.<sup>15</sup> The PSA scores are determined by nine inquiries: 1) age at current arrest; 2) whether the current offense is categorized as violent; 3) whether the defendant has a pending charge at the time of the offense; 4) prior disorderly persons convictions; 5) prior indictable convictions; 6) prior violent convictions; 7) prior failure to appear pretrial in the past two years; 8) prior failure to appear pretrial older than two years; and 9) prior sentence to incarceration.<sup>16</sup> The PSA's algorithm uses the responses to these inquiries to calculate scores for FTA and NCA. If there is a statistical likelihood the defendant will engage in new violent criminal activity, a 'flag' will be generated.<sup>17</sup> These scores are then factored into the decision-making framework (DMF).<sup>18</sup> The DMF utilizes the NCA and FTA scores, along with other factors, to generate a recommendation as to detention or release, as well as identifies the recommended level and type of conditions and intervention or monitoring services necessary should the defendant be released.<sup>19</sup>

In addition to the PSA's release recommendation, the judge may consider "the nature and circumstances of the offense, the weight of the evidence, the defendant's history and characteristics, [and] the risk of danger and obstruction...."<sup>20</sup> While the state may meet its burden through a variety of ways (*e.g.*, witness testimony, documentary evidence), the "court may consider a recommendation against release in a PSA 'as prima facie evidence sufficient to overcome the presumption of release.'"<sup>21</sup> The recommendation of the PSA, of course, does not replace judicial discretion; if a judge seeks to depart from the recommendation, he or she may do so, but must provide a written explanation.<sup>22</sup> Anytime detention is ordered, the court must provide a written statement of reasons.<sup>23</sup>

### Going Beyond the PSA

In practice, the PSA is not as black and white as the statute and court rule imply. In the short time the PSA has existed, New Jersey courts have already weighed in on several issues. In *State v. C.W.*, the trial court relied on the relatively low PSA score in deciding that detention was not warranted, despite the PSA recommendation for detention. The Appellate Division reversed, reasoning that the PSA scores do not take into account all relevant information, specifically that the defendant in this matter had been confined to a juvenile facility for several years and his status as a tier-three sex offender. It held that "[t]he numbers in this case are not particularly informative" since they do not reflect those important factors. Accordingly, the judge's reliance on the numbers, and departure from the recommendation without written explanation, was improper.<sup>24</sup> This case ruled for the first time that juvenile offenses may be considered and that a trial court may require the prosecutor to submit more than the PSA and pretrial recommendation to sustain its burden.<sup>25</sup>

Critically, in terms of assessing whether detention is appropriate pending case disposition, "a recommendation against release, based on the type of charge alone, cannot justify detention unless it is based on a statutory presumption of detention."<sup>26</sup>

In *State v. Mercedes*, a consolidated New Jersey Supreme Court opinion, the Court analyzed the *Travis* matter, where the PSA rated the defendant a one out of six, the lowest risk score, for both risk of FTA and of NCA. Yet, based on the robbery charge alone, release was not recommended according to pretrial services. The state moved for pretrial detention and the trial court agreed, relying on the "extraordinarily serious charges" and other non-PSA factors. The Appellate Division affirmed, reasoning that the court followed the PSA's recommenda-

tion, overcoming the presumption of release, and considered relevant information and provided sufficient reasons.<sup>27</sup>

Since its inception, the New Jersey Supreme Court has even acted to re-write some of the rules, determining that the rule concerning overcoming the presumption needed to be revised. Rule 3:4A(b)(5) originally read, in pertinent part: “The court may consider as prima facie evidence sufficient to overcome the presumption of release a recommendation by the Pretrial Services Program... that the defendant’s release is not recommended....” The Supreme Court, in analyzing the *Travis* matter, concluded that the phrasing accomplished little in practice and could be misunderstood.<sup>28</sup> It rewrote the rule as follows:

The standard of proof for the rebuttal of the presumption of pretrial release shall be by clear and convincing evidence. To determine whether a motion for pretrial detention should be granted, the court may take into account information about the factors listed in N.J.S.A. 2A:162-20.<sup>29</sup>

The Court emphasized, however, that the trial court must consider a presumption against release in making its determination and, in fact, must provide reasons on the record should it go against any recommendation. Further, the underlying crime, including its seriousness, as well as the strength of the proofs, are also valid considerations. The Court concluded that the *Travis* matter was a close call, but declined to rule on the trial court’s determination as to the appropriateness of pretrial detention, as the defendant had already pled guilty by the time the Supreme Court issued its ruling.<sup>30</sup>

### Judicial Interpretation of the PSA

In practice, however, going ‘beyond’ the PSA has proven more difficult than the focus on judicial discretion suggests. In *State v. Williams*, the judge discount-

ed the PSA, which provided a score of six for NCA, a score of five for FTA, a flag for new violent criminal activity (NVCA), and a recommendation of detention, and ordered release.<sup>31</sup> The judge concluded that the state fell just below the clear and convincing burden because the PSA did not take into account that the defendant was eight weeks pregnant. The Appellate Division reversed and ordered the defendant’s detention, finding that the judge failed to connect the defendant’s pregnancy to her risk of posing a danger to the community, obstructing justice, or failing to appear in court.<sup>32</sup> The Appellate Division further stated that the judge failed to issue a written statement of reasons, which would usually compel remand, but as he stated his reason on the record, and such reason was improper, there was no reason immediate detention could not be ordered.<sup>33</sup>

In *State v. Mercedes*, the defendant was implicated by ‘reliable’ information and charged with aggravated assault and firearm possession. Later that day, prior to being arrested on the assault and firearm charges, the defendant was arrested on drug charges. He was charged on a second complaint for the drug charges. Pretrial services prepared two PSAs. On the earlier assault charges, the defendant scored fives for both risk of NCA and FTA. On the later drug charges, the defendant scored a five for FTA and a six for NCA.<sup>34</sup> Release was not recommended, in part because of the pending charges from earlier in the day. The trial court “looked beyond the numbers” of the PSA and reasoned the pending criminal activity differed from a typical case in which the defendant was arraigned, released, and picked up on new charges; instead, here, the defendant was unaware of the earlier assault charges when he was picked up on the drug charges that same day.<sup>35</sup>

In rejecting this analysis, the state Supreme Court found this factor does

not consider, let alone turn on, the defendant’s knowledge of pending charges.<sup>36</sup> Notably, if the defendant were aware he was wanted on other charges for which no court date had been set, this could be appropriately considered by the trial court.<sup>37</sup> Yet, the Court stated that the trial court correctly questioned whether the charges arising from earlier that day were appropriately ‘pending.’ The Court continued, there was no future pre-disposition-related court date arising from the aggravated assault charges earlier in the day, the defendant had not been arrested and released, accordingly, the assault charges from earlier in the day were not ‘pending’ for purposes of this factor.<sup>38</sup>

### Conclusion: A Developing Area

Effective representation now requires an understanding of the functioning of the PSA and its role in the detention analysis. In order to best advocate on behalf of a defendant and to secure pre-disposition release, staying current on the evolving body of case law in this area is critical. Knowledge of which factors to technically emphasize in argument, as well as an understanding of the underlying purposes of the CJRA and the PSA, will result in the most compelling argument and may be the difference between a client’s release or detention awaiting trial. ☪

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### Endnotes

1. N.J.S.A. 2A:162-15 *et al.*
2. *State v. Mercedes*, 233 N.J. 152, 162–63 (2018) (*citing* N.J.S.A. 2A:162-15).
3. Public Safety Assessment, New Jersey Risk Factor Definitions (Dec. 2018), <https://www.njcourts.gov/courts/assets/criminal/psariskfactor.pdf>.
4. N.J.S.A. 2A:162-19(a)(1), (4), (5), (6).
5. N.J.S.A. 2A:162-19(a)(2).

6. N.J.S.A. 2A:162-19(a)(3).
7. N.J.S.A. 2A:162-19(a)(7).
8. N.J.S.A. 2A:162-19(d)(1) and R. 3:4A(b)(1).
9. The statutory exemption applies if the court finds probable cause that the defendant committed murder or a crime that carries a life sentence; in those cases, there is a rebuttable presumption of detention that the defendant can rebut by a preponderance of the evidence. N.J.S.A. 2A:162-19(b), R. 3:4A(b)(4) and *Ingram*, 230 N.J. 190, 201 (2017).
10. See R. 3:4A(b)(5).
11. See *id* and *State v. Ingram*, 230 N.J. at 200–01 (citing N.J.S.A. 2A:162–18(a)).
12. *State v. C.W.*, 449 N.J. Super. 231 (2017).
13. Pretrial Criminal Justice Research (LJAF 2013), <https://www.arnold-foundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf>.
14. See *Mercedes*, 233 N.J. at 164, (quoting N.J.S.A. 2A:162-25).
15. *State v. C.W.*, 449 N.J. Super. 231, 238-39 (App. Div. 2017).
16. New Jersey Risk Factor Definitions.
17. *State v. C.W.* at 239-40.
18. *Id.*
19. *Id.* at 240.
20. *Mercedes*, 233 N.J. at 170 (citing N.J.S.A. 2A:162-20(a) to (f)).
21. *Ingram*, 230 N.J. at 201.
22. *Id.* at 165 (citing N.J.S.A. 2A:162-23(a)(2)).
23. N.J.S.A. 2A:162-21(a)(1). Further, “a trial court’s decision is not entitled to deference and may constitute an abuse of discretion.” *State v. S.N.*, 231 N.J. 497, 515 (2018).
24. *C.W.* at 265.
25. *Id.* at 264.
26. See *Mercedes*, 233 N.J. 152, 171 (2018) (citing N.J.S.A. 2A:162-19(b)).
27. *Id.* at 157.
28. *Id.* at 171.
29. *Id.* at 172.
30. *Id.* at 174.
31. *State v. Williams*, 452 N.J. Super. 16, 19 (App. Div. 2017).
32. *Id.* at 22.
33. *Id.*
34. *Mercedes*, 233 N.J. 159.
35. *Id.*
36. *Id.* at 175.
37. *Id.*
38. *Id.*



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