



# Criminal Justice Reform Is About Fairness

## THE NEW JERSEY APPROACH

By Justice Stuart Rabner

Craig Mallon's<sup>1</sup> decision to plead guilty to fourth-degree joyriding in 2016 made sense from a practical standpoint. The New Jersey resident originally denied that he had taken his fiancée's car without permission. Unable to post 10 percent of a \$2,500 bail, Mallon served 124 days in a county jail—maintaining his innocence and waiting for his case to be heard.

Then, on day 125, Mallon was offered a plea agreement that allowed him to become a free man right away. He recanted his denial and pleaded guilty in exchange for a sentence that amounted to time served and no probation. In the end, Mallon's inability to post a modest amount of bail likely affected the outcome of his case as much as the weight of the evidence against him did. Had he had access to money, the criminal justice system would have treated him differently.

This system is changing. Across the nation, legislators and court officials recognize that the criminal justice system cannot be truly just if individuals who have access to money are treated more favorably than people who do not. The State of New Jersey has been at the forefront of this reform movement for several years now. In 2017, New Jersey implemented broad changes statewide. Rather than require criminal defendants to post bail, New Jersey overhauled its criminal justice system and began to employ a risk assessment tool to help judges make objective and informed decisions about pretrial release.

The tool measures the risk defendants pose on two levels: Will they show up for trial? Will they commit a crime while on release? A recommendation about pretrial release then is made to the judge based on commonsense, objective factors tied to the current charge and the defendant's history. If a defendant poses a significant risk to public safety or flight, prosecutors can seek to have the defendant detained until trial. All other defendants are released pretrial on a range of conditions and are monitored by a newly created pretrial services unit.

Throughout 2017, more than 8,000 defendants—those found to pose the greatest risk to public safety—were ordered detained pretrial. Their cases are subject to

a new speedy trial law. At the same time, New Jersey's pretrial jail population dropped 20 percent. More than 31,000 defendants—who posed less of a risk of danger or flight—were released under various levels of monitoring. Another 3,000 low-risk defendants were released with no conditions. Out of 44,000 cases overall, only 44 defendants were ordered to post bail as a condition of release. And crime, including violent crime, decreased in 2017, as State Police Uniform Crime Report statistics show. Beyond the numbers, there are elements to criminal justice reform that cannot be so easily measured. They help show why the issue of pretrial release is so critical.

Under the old system, poor defendants—often members of minority groups—sat in jail for weeks or months while presumed innocent, despite posing little risk to the public. During that time, they could lose their jobs, contact with family members, and even custody of their children. Meanwhile, the cost to taxpayers to house a low-risk defendant can amount to \$100 or more per day. Time spent in jail also can become an incentive for a defendant to plead guilty and receive a sentence for time served. Studies show that defendants held pretrial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released pretrial. At the other end of the spectrum, dangerous defendants had the opportunity to post bail, despite the risk they might commit new crimes or try to intimidate witnesses. Their release before trial raised a genuine public safety concern.

These concepts aren't new or surprising, yet change is hard to achieve. Several catalysts pushed New Jersey toward reform. A 2013 study of the state's county jail population revealed that 12 percent of the state's inmates were in jail not because they posed a risk of danger or flight, but because they couldn't make bail of \$2,500 or less. Around the same time, the governor called for an amendment to the state constitution to allow for pretrial detention. In response, the state judiciary formed the Joint Committee on Criminal Justice, with representatives from all three branches of



**\$100**  
OR MORE PER DAY

### THE COST TO TAXPAYERS TO HOUSE A LOW-RISK DEFENDANT

government. Its 33 members included the attorney general and county prosecutors, the public defender and private defense attorneys, counsel for the ACLU, judges, and staff. A year later, many of the committee's recommendations on pretrial reform and the need for a speedy trial act were adopted by the legislature and signed into law by the governor.

The public took the next step. In November 2014, more than 60 percent of New Jersey voters approved a constitutional amendment that gave judges, for the first time, the ability to detain defendants without bail to ensure their appearance in court and protect the safety of the community. In 2016, the judiciary began to review cases of low-risk defendants held in jail on low amounts of bail. The pretrial jail population dropped by more than a third over the following two years as low-risk defendants were no longer held solely because they could not afford bail.

Around this time, the judiciary, in partnership with the Laura and John Arnold Foundation, planned to implement a risk assessment tool, validated with data from thousands of actual New Jersey cases. The New Jersey Supreme Court adopted court

rules to implement the new law, and the attorney general issued guidelines to law enforcement statewide. The judiciary also worked closely with the public defender and county officials to roll out this initiative. In addition, the judiciary created pretrial services units in courthouses throughout the state to prepare recommendations for judges based on the risk assessment and to monitor defendants on pretrial release. Low-risk defendants simply may receive a text message or phone call to remind them of future court appearances. Defendants who pose greater risks meet regularly with pretrial services officers and can be placed on electronic monitoring.

Criminal justice reform in New Jersey is still a work in progress. And it is not infallible. No system that tries to assess future behavior can make that claim. As in the past, when defendants were routinely released on bail, some will commit serious crimes or flee before trial. That is one reason why stakeholders meet regularly and continue to refine our approach based on empirical data and practical developments. Still, a year into this monumental reform, the improvements are evident. Mr. Mallon would face a very different criminal justice system today.

As many other jurisdictions consider these issues, they will develop different approaches that best fit their states and court systems. New Jersey's experience reveals that with the right cooperation and coordination, we can help create a better and fairer system of criminal justice. ■

*A version of this article first appeared in Gannett newspapers.*

#### Endnote

1. Craig Mallon is a pseudonym to protect the privacy of an actual defendant.



**Justice Stuart Rabner** is chief justice of the New Jersey Supreme Court and chaired the Joint Committee on Criminal Justice.