

# Legal experts: Data shows that New Jersey's bail reform works | Opinion

By Star-Ledger Guest Columnist

By Charles McKenna and John Koufos

Sept. 18, 2022

At its core is the basic idea that people should only be held in jail before trial if they pose a risk of flight or to public safety. This concept stands in contrast to cash bail, which literally ties peoples' freedom to their bank accounts. Under that wealth-based detention system, hard-working Americans suffer behind bars long before they're ever found guilty simply because they don't have enough money.

We come from different sides of the criminal law spectrum but agree that New Jersey's risk-based bail system is the best model for other states to follow. One of us was the chief of the criminal division at the U.S. Attorney's Office, and chief counsel to a governor. The other was a criminal defense and civil rights lawyer who won a case before the New Jersey Supreme Court while out on \$150,000 bail. Both of us know that cash bail doesn't help anyone.

Imagine this all-too-common example of life under cash bail: You are a single parent raising children, living paycheck-to-paycheck in an apartment, and are arrested for a relatively minor crime with a \$1,000 bail that you cannot post. You are no threat but remain stuck in county jail. Your kids are left alone so the child services agency takes them. You miss work and are fired. You miss rent and your landlord starts eviction proceedings. Regardless of your guilt or innocence, your life is ruined – and nobody is made any safer.

Since 2017, the Garden State has enacted a risk-based system that protects the public and guards our constitutional rights by combining data, risk measurement, and risk assessment. When someone is arrested, court staff conducts a public safety assessment (PSA) that considers the type of offense, prior convictions (including violent convictions), whether the person missed court before, and more. Judges are empowered to tailor their decisions to release, detain, or impose conditions on a specific case.

These data-driven decisions are the best practice for nearly every other industry in the world. Our criminal justice system should be no different – and it should be little surprise that such a system was crafted by a mix of Republicans and Democrats with direct experience in the courts.

One of the architects was former Gov. Chris Christie, who previously served eight years as a U.S. Attorney. Chief Justice Stuart Rabner, who served as state Attorney General and federal prosecutor, has ensured fairness and balance are part of the process. The New Jersey legislature carefully tailored the statutory framework. Most importantly, 62% of New Jersey voters approved a constitutional amendment that led to the creation of this model bail system. With years of experience, we now have the data to prove the New Jersey model is working.

A 2022 report from the Administrative Office of the Courts reported that “[d]efendants charged with [firearms] offenses have been detained at more than twice the rate of other defendants.” By January 2022, just 5.7% - 7.1% of people released for crimes that did not involve firearms were rearrested for more serious offenses. That leaves 93% that were not rearrested for more serious crimes – roughly 9 out of 10 people. Other jurisdictions, including New Mexico and Kentucky, saw crime rates decline or remain stable when they implemented similar bail reforms.

Proponents of cash bail and increased pretrial detention typically point to New York as an example where public safety needs are not being met. However, New York’s system did not employ a risk-based bail system. Instead, New York initially abolished bail for many crimes without giving judges discretion to consider whether a person is a threat to public safety. The bottom line – whether it is criminal justice, hospitals and healthcare, or traffic patterns – better data leads to targeted intervention.

The smart on crime approach is to build on the success of risk-based bail, instead of rolling back the progress we have made or relying on cash bail that only locks up the working class while letting criminals with cash go free. And there should be nothing controversial about that.

***Charles McKenna** is a partner at Riker Danzig, LLP and specializes in White Collar Criminal Defense and Investigations. He served as a federal prosecutor for 18 years and rose to chief of the criminal division at the U.S. Attorney’s Office for the District of New Jersey, before becoming chief counsel to Gov. Chris Christie. He previously served as director of the New Jersey Office of Homeland Security and Preparedness.*

***John Koufos** was a New Jersey Supreme Court certified criminal trial attorney before serving a state prison sentence. He is a nationally recognized criminal justice reform advocate.*