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Dirty Money: An Analysis of New Jersey's Bail Source Statute and *State v. Wright*

BY RUSSELL J. CURLEY

* All views expressed in this article are the author's alone, not necessarily those of the New Jersey Attorney General, nor the New Jersey Division of Criminal Justice.

I. INTRODUCTION

Under the New Jersey Constitution, all criminal defendants are entitled to pre-trial release if secured by sufficient bail to ensure their presence at all subsequent court appearances.¹ Traditionally, a defendant or a close family member pledges the family nest egg or offers the family home as collateral for their loved one's pre-trial release.² If the defendant fails to appear for court, that collateral, i.e., money or house, will be forfeited. Such a bail arrangement is often effective in guaranteeing a defendant's appearance in court.³

Yet too often criminal defendants, especially alleged drug traffickers and gang members who lack lawful means of support, pledge thousands of dollars for bail money that is derived from criminal activity.⁴ In other cases, some shadowy figure with little or no meaningful connection to the defendant will come forward with the requisite bail money, usually in exchange for a cut of the criminal proceeds.⁵ The use of proceeds stemming from illegal activities, pledged by either the defendant or one of his cohorts, defeats the purpose of bail.⁶ When a criminal defendant's liberty is secured by illegal proceeds, he has far less of an incentive to appear for trial because the loss of this money can be seen as the cost of doing business.⁷

To combat this problem, the New Jersey Legislature revised three bail statutes in 2007. These revisions provided for the increased scrutiny of bail arrangements by trial courts and prosecutors to determine the sufficiency and reliability of both the bail pledged and those who pledged it.⁸ Accordingly, the law now allows for court-ordered hearings to examine the source of

bail money,⁹ which can provide valuable information about the motivations for a defendant to appear.¹⁰ The Legislature thus recognized that the fundamental purpose of bail could not be achieved if a defendant were free to post with ill-gotten gains or if the defendant has no legitimate relationship with, or responsibility to, the person posting. Simply stated, the "bail set by a court is not a ransom which will allow a defendant to flee if he or she is able to afford it."¹¹

While these revised bail source inquiry statutes enhanced the capacity of the New Jersey legal system to combat the use of criminal proceeds as bail, the statute failed to articulate the procedural features of these bail source hearings.¹² Instead, the New Jersey Supreme Court was tasked with adopting a set of

"procedure[s] to determine the sufficiency of bail."¹³ This lack of direction, coupled with the Court's incomplete response,¹⁴ has resulted in confusion, a lack of uniformity, and disparate rules for conducting bail source hearings throughout the New Jersey trial courts. To date, there is only one available court decision interpreting the bail source statute.¹⁵ This decision attempts to establish the burdens of parties to bail source hearings.¹⁶ Yet in doing so the *Wright* court made some fundamental missteps that have resulted in a flawed interpretation of the statute.¹⁷

Part II of this article examines New Jersey's bail source statute,¹⁸ as well as the New Jersey court rule governing bail source hearings.¹⁹ Part III summarizes the facts and holding of *Wright*,²⁰ and Part IV analyzes the case's outcome.²¹ Part V suggests a different framework for conducting bail source hearings in New Jersey. This article concludes in Part VI that the Legislature should revise the bail source statute to formally assign the burdens of production and proof to the defendant in a bail source hearing and thus, in effect, legislatively overrule a significant aspect of the *Wright* holding.



II. NEW JERSEY'S BAIL SOURCE STATUTE

The original version of N.J. STAT. ANN. §§ 2A:162-13 was enacted on January 9, 2004 and permitted trial courts to inquire about the source of funds used for bail.²² These bail source hearings were deemed discretionary and enabled the courts to determine the relationship of the defendant to the person posting bail, the defendant's interest in ensuring that the bail is not forfeited, and whether the funds used to post bail were acquired through criminal conduct.²³ The statute permitted courts to thus "examine, under oath or otherwise, any person who may possess relevant information" and allowed the courts to inquire into several factors of persons posting cash and to question the source of money or property pledged to secure bail.²⁴ The Legislature simultaneously passed a related statute that directed the New Jersey Supreme Court to adopt procedural rules for conducting bail source hearings.²⁵

On June 1, 2007, the Legislature adopted an updated version of §§ 2A:162-13 as part of a sweeping legislative initiative designed to provide law enforcement with tools to "combat the growing menace of street gangs in New Jersey."²⁶ Under the new law, a person charged with bail restrictions²⁷ who posts cash bail or secures a bail bond must provide the prosecutor with relevant information about (1) the obligor; (2) the indemnifier or person posting cash bail; (3) the security offered; and (4) the source of the money or property used to post cash bail or secure the surety or bail bond.²⁸ The law requires a criminal defendant first to complete and submit a form detailing the source of their bail to the prosecutor.²⁹ After reviewing the bail source form, the prosecutor may request a formal bail source hearing.³⁰ If the offense is a bail-restricted crime, the court shall conduct a bail source hearing; at the request of the prosecutor, the court will then issue an order either approving or rejecting the bail.³¹ In cases where the defendant is charged with an offense that is not a bail-restricted crime, the trial court still has the discretion to conduct a bail source hearing if requested by the prosecutor.³² The court may further conduct such a hearing at the request of the prosecutor if the individual is charged with an offense other than a bail-restricted crime and later posts cash bail or secures a bail bond.³³

Under the statute, the court cannot issue an order approving the bail unless it is first satisfied with several issues.³⁴ First, the court must find that the evidence adduced in the inquiry establishes the reliability of the source of funds used to post bail or security offered.³⁵ Second, the relationship of the obligor or person posting cash bail must be sufficient to ensure the defendant's presence in court when required.³⁶ Third, the court must believe that the funds used to post cash bail or secure a bail bond were not acquired through criminal or unlawful conduct.³⁷

The most significant change from the 2004 statute to the current version is the transfer of discretion from the courts to the prosecutor in determining whether a bail source hearing should be held when a defendant has been charged with a crime with bail restrictions.³⁸ By removing judicial discretion to deny a request for these hearings, the statute relieves prosecutors of the need to make an initial showing that the source of bail funds are suspect.³⁹

Like the 2004 version, the revised bail source statute directed the New Jersey Supreme Court to devise the procedural rules for bail source hearings.⁴⁰ In assigning the court the task of determining hearing procedures, the revised statute failed to include any specific procedural rules of its own.⁴¹ On September 1, 2008, over one year after the revised statute became law, the Supreme Court issued a number of procedural rules for bail source hearings. However, those rules predominantly concerned time and notice requirements.⁴² The court rules provided that the state could request a bail source hearing either orally or in writing at any time prior to trial.⁴³ If the defendant is still in custody at the time the hearing is requested, the rule requires that the defendant remain in custody until further order of the court.⁴⁴ If the defendant has been released prior to the state's request for a bail source hearing, the rule holds the defendant's bail until completion of the hearing.⁴⁵ The rule summarizes the requirements of the bail source statute by instructing the court to make findings of fact regarding all aspects of the bail arrangement and to issue an order declaring the bail arrangement satisfactory or unsatisfactory.⁴⁶ In the event of an unsatisfactory bail arrangement where the defendant has already been released, the defendant must be returned to custody and held until a sufficient arrangement is produced.⁴⁷ The rule neither addresses which party bears the burdens of proof or production nor holds which standard of proof is necessary to satisfy a bail source inquiry.⁴⁸

III. NEW JERSEY V. WRIGHT

The absence of direction from both the Legislature and the state Supreme Court regarding the burdens of proof and persuasion in bail source hearings has caused confusion in New Jersey trial courts, as evidenced by the only published opinion on the issue, *Wright*.⁴⁹ On June 16, 2008, defendant Jermaine Wright was arrested with a codefendant on first-degree drug possession charges, after they were allegedly caught in possession of almost one pound of cocaine.⁵⁰ Making matters worse, Wright allegedly possessed the cocaine within a school zone and within 500 feet of a public park.⁵¹ Bail was set in municipal court at \$150,000, cash or bond.⁵² At the time of his arrest Wright was already free on \$135,000 bail on an earlier, unrelated first-degree drug distribution charge.⁵³

On June 25, 2008, a bail hearing was conducted in the Superior Court, Law Division, at which time the State requested that bail be increased, arguing that Wright was a considerable flight risk in light of the fact that he was facing two first degree drug possession charges and, if convicted on either, he faced a possible life sentence under the repeat drug offender sentencing statute.⁵⁴ Bail was then increased to \$200,000 cash or bond, and at that time the State requested a bail source hearing.⁵⁵

Wright and his codefendant were subsequently indicted on first, second and third degree drug possession counts and conspiracy.⁵⁶

In anticipation of the source hearing, the trial court issued a written opinion in the case, wherein the court identified that the applicable statute was silent on several important procedural aspects of the bail source hearing.⁵⁷ In particular, the *Wright* decision noted that neither the statute, nor New Jersey Court Rule 3:26-8, “allocate the burden of proof or define the standard of proof.”⁵⁸

A. BURDEN OF PROOF AT A BAIL SOURCE HEARING

The court began its analysis by examining general principles of allocation of burdens of proof, surveying case law and determining that while neither the Legislature, nor the Supreme Court, articulated a burden of proof for bail source hearings, it is common for both the bodies to allow burden of proof standards to develop through case law.⁵⁹ The *Wright* court then, after employing a multi-faceted analysis, determined that the State should have the burden of persuasion.⁶⁰ In so concluding the Court in *Wright* reasoned that since the State was seeking to “overturn” defendant’s bail by claiming its source renders it insufficient, it was the party relying on a fact and thus has the burden of establishing it.⁶¹ In addition, the Court in *Wright*⁶² relying on *State v. Zorillo*⁶³, reasoned that placing a burden of persuasion on criminal defendants would infringe on their state constitutional right to bail.⁶⁴

B. BURDEN OF PRODUCTION

Although expressly rejecting the argument that because defendant has better access to information about his bail arrangement and therefore should bear the burden of persuasion, the *Wright* court determined this was an appropriate basis to shift the burden of production to defendant.⁶⁵

In assigning the burden of production on the defendant the *Wright* court created a requirement that the State was first required to make a *prima facie* showing that the bail arrangement was insufficient or the proceeds tainted before the burden of production shifts to a defendant.⁶⁶ Although articulating that the showing by the State “should not be extremely difficult,” the *Wright* court did not specify what the State was required to show in order to obtain a bail source hearing.⁶⁷ The court also made no distinction between bail-restricted cases and cases not charging crimes with bail restrictions.⁶⁸

C. STANDARD OF PROOF

The *Wright*⁶⁹ decision concluded by determining that the State has the ultimate burden of proving that a bail arrangement is insufficient to ensure a defendant’s appearance in court, and must do so by a preponderance of the evidence.⁷⁰ In doing so, the *Wright* court

relied on *State v. Casavina*,⁷¹ finding that since the State was seeking to deny bail, it must do so by a preponderance.⁷² The *Wright* court reasoned that since *Casavina* required the State to establish by a preponderance of the evidence that a defendant should not be eligible to participate in the ten percent option for bail, the State must also establish by a preponderance of the evidence that a bail arrangement is insufficient to ensure a defendant’s presence at future court appearances.⁷³

The Wright court is overly cautious in its concern that placing the burden of persuasion on criminal defendants violates their state constitutional rights.

IV. ANALYSIS OF THE *WRIGHT* DECISION

The *Wright* decision begins on a faulty premise: in requesting a bail source hearing the State is not seeking to “overturn” the court’s order setting the amount of bail, nor attempting to “set aside an order already in place”⁷⁴ The *Wright* court twice incorrectly reasoned that the State should have the burden of persuasion because it is seeking to overturn the bail already in place.⁷⁵ The State in the *Wright* case did not challenge the \$200,000 bail; rather the State sought a hearing to determine who was pledging defendant’s bail and whether the source of the bail proceeds was from illegal activity.⁷⁶ These are two separate proceedings and the request for a source hearing should not be viewed as a second bite at the apple to overturn the amount of bail. A defendant’s right to bail does not sweep so broadly as to allow a defendant to pledge money that is tainted.

The *Wright* court is overly cautious in its concern that placing the burden of persuasion on criminal defendants violates their state constitutional rights.⁷⁷ The right to bail in New Jersey is not absolute and has several conditions.⁷⁸ This right is “clearly qualified by, among other limitations, compliance with the conditions of bail”⁷⁹ The bail source hearing is not an encumbrance on the right to bail, but rather a condition of it. Similarly, defendants subject to source hearing requirements must demonstrate, by a modest level of proof, that their bail money is not derived from criminal activity.⁸⁰ This demonstration is no more stringent a bail condition than others placed on defendants seeking pre-trial release.

Moreover, *Wright*’s reliance on the *Rhode Island v. Zorillo* court’s proposition that placing the burden of proof and production on a criminal defendant violates that defendant’s constitutional right to bail is unpersuasive.⁸¹ The terms of N.J.S.A. 2A:162-13 are different from those of the Rhode Island statute that were declared unconstitutional in *Zorillo*.⁸² In addition, the New Jersey Constitution’s right to bail is quite different from Rhode Island’s. Unlike the New Jersey Constitution,⁸³ the Rhode Island Constitution⁸⁴ does not grant the right to bail to all criminal defendants.⁸⁵ Rather, there are large classes of criminals not entitled to bail.⁸⁶ There bail is a two-step process, where first, the state attempts to deny bail outright, and if unsuccessful, then requests a source hearing.⁸⁷ The *Zorillo* court specifically found the state’s attempt to use the source hearing as a means of thwarting bail to be unconstitutional, due to the state’s attempt to deny bail outright.⁸⁸ This endeavor was exacerbated by the high standard of proof that Rhode Island defendants had to meet to prove the legitimacy of their bail money.⁸⁹

Zorillo illustrated that although the state shouldered the initial burden of proving a defendant ineligible for bail in phase one, it could effectively shirk this burden altogether by requesting a bail source hearing, thus transferring the burden to the defendant. As a result, the state’s actions were found unconstitutional.⁹⁰ In fact, *Zorillo* indicated that to avoid constitutional challenges, trial courts could inquire about the source of bail during the first phase of the bail proceeding, thereby eliminating the chance that the state would seek to evade its burden of proving the defendant ineligible for bail.⁹¹ The combination of bail availability to virtually all criminal defendants in New Jersey, and the low standard of establishing untainted bail money, result in the proposed and constitutional framework set out *infra* Part V. Thus given the marked differences in the state constitutional rights to bail in New Jersey and Rhode Island, the *Wright* court’s reliance on *Zorillo* is misplaced.

The *Wright* court’s analysis further unravels when it relies on *Casavina*⁹² and cites federal bail law.⁹³ Both *Casavina* and federal bail law contain presumptions regarding a defendant’s right to bail or to the ten percent option for posting bail.⁹⁴ Accordingly, the state or government must overcome

these presumptions by a preponderance of the evidence. There is no presumption that all bail arrangements are sufficient or untainted. Therefore, the *Wright* court is incorrect in asserting that the state must provide, via a preponderance of the evidence, proof that the bail is tainted because no contrary presumption exists.⁹⁵ Moreover, the fact that defendants have a state constitutional right to bail does not change the calculus. Mr. Wright’s bail was set at \$200,000; the state’s request for a source hearing did not unduly infringe on this right to bail, but instead simply ensures that the bail is untainted.⁹⁶ Consequentially, the state should not bear the burden of proof.

The *Wright* decision correctly placed the burden of production on defendant, because he is in a better position to more quickly produce records rather than waiting for bank and tax record subpoenas to be issued and returned. However, the *Wright* court made another fundamental misstep by grafting a separate condition onto the rule, requiring the state to make a *prima facie* showing,⁹⁷ even in crimes with bail restrictions, before it can obtain a bail source hearing. While the court rule explicitly states that in crimes without bail restrictions the state “must demonstrate a reasonable and well grounded basis to warrant an inquiry by the court,” there is no similar provision for bail source hearings in crimes with bail restrictions.⁹⁸ Rather, under both the statute and the court rule regarding crimes with bail restrictions, the state need only request a hearing and the court is required to conduct one.⁹⁹ In *Wright*, the defendant was charged with a crime with bail restrictions, and although the state made a timely request for a bail source hearing, the court superimposed this requirement onto the court rule as a condition precedent to the granting of a hearing.¹⁰⁰ Since neither the bail source statute nor the court rule governing bail source hearings requires such a showing by the state to be granted a hearing, the *Wright* court thus exceeded its authority and directly contradicted the statute.

V. A PROPOSED FRAMEWORK FOR CONDUCTING BAIL SOURCE HEARINGS IN NEW JERSEY COURTS

A criminal defendant is in a better position to shoulder the burdens of proof and persuasion at a bail source hearing, and should do so by a preponderance of the evidence.

The bail source statute appears to place the burden on a defendant to demonstrate that his bail money was lawfully acquired.¹⁰¹ As written, the statute prohibits the court at the conclusion of the bail source inquiry from issuing an order approving the bail unless it is satisfied that the evidence adduced in the inquiry establishes the reliability of the source of the funds used to post bail or security offered, that the relationship of the obligor or person posting cash bail is sufficient to ensure the

defendant's presence in court when required, and that the funds used to post cash bail or secure a bail bond were not acquired as a result of criminal or unlawful conduct.¹⁰²

This language implies that the defendant bears the burden of proof. The defendant would introduce evidence establishing (1) the sufficiency of his relationship with the obligor, and (2) that his bail funds were not the fruits of criminal conduct.

It seems appropriate that the burdens of proof and persuasion are placed on defendants to demonstrate why their posted bail should be approved.¹⁰³ The New Jersey Constitution does not outlaw the imposition of all burdens on defendants.¹⁰⁴ Criminal defendants are better able to shoulder these burdens because they know the source of their bail funds.¹⁰⁵ In the interest of obtaining an expeditious yet informed determination by the court, the ultimate burden of persuasion should be borne by the defendant.¹⁰⁶

In cases where the defendant is not charged with a crime with bail restrictions, and where the state must demonstrate a reasonable and well-grounded basis to warrant a hearing, it would be appropriate to impose a concomitant burden of both production and persuasion on the defendant once the state's initial burden is met. Courts in both New York¹⁰⁷ and Rhode Island¹⁰⁸ impose this requirement. By placing the burden of production on the defendant, the court avoids the potential delay of defendant's release, which could occur upon adjournment for the state to conduct its own investigation.¹⁰⁹ Far from being an unconstitutional burden, requiring a defendant to provide sufficient information to the trial court to justify release gives the defendant an incentive to do so completely and accurately.¹¹⁰ Trial courts are entitled to the most complete and accurate information available to make a proper determination regarding whether bail should be allowed.¹¹¹

The New Jersey Legislature should amend the bail source statute and require criminal defendants to bear the burden of persuading trial courts, by a preponderance of the evidence, that the money or property posted as collateral is not the fruit of unlawful conduct. The preponderance of the evidence standard is reasonable and fair to both defendant and the state.¹¹² Implementation of this standard will allow for an appropriate inquiry by the court, will satisfy prosecutors' need to know the lawfulness of a bail's source, and will be met by defendants with little difficulty

VI. CONCLUSION

New Jersey's revised bail source statute is a promising step in ensuring that criminal defendants are not allowed to post the proceeds of criminal activity to secure their pre-trial release and

that they have a real and meaningful relationships with the people posting bail. However, the statute is incomplete. The current statute should be amended to assign the burdens of proof and production at bail source hearings to criminal defendants, and to require a showing by a preponderance of the evidence. Alternatively, the New Jersey Supreme Court should revise its applicable rules governing bail source hearings to assign these burdens to criminal defendants, who are best equipped to shoulder them. Without such affirmative statements by either the Legislature or the Supreme Court, trial courts may misinterpret the bail source statute, as demonstrated by the *Wright* decision.¹¹³ **CLB**

¹ N.J. CONST. ART. I, § 11 (granting defendants the right to bail in non-capital cases).

² See *id.* (providing for pre-trial release based on "sufficient sureties").

³ See *New Jersey v. Simpson*, 839 A.2d 896, 901 (N.J. Super. Ct. App. Div. 2003). "It is difficult to conceive of a matter more central to the administration of the criminal justice system than the appearance of defendants before the court as the court requires." *Id.*

⁴ See *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463, 475 (E.D. Va. 1994) (explaining that "[c]ourts have frequently remarked on the fact the large sums of cash and drugs frequently go together"); see also *United States v. Thomas*, 913 F.2d 1111, 1115 (4th Cir. 1990) (citations omitted) (illustrating that "[t]he possession of unusually large amounts of cash . . . or the making of uncommonly large cash purchases . . . may be circumstantial evidence of drug trafficking").

⁵ See *United States v. DeMarchena*, 330 F. Supp. 1223, 1225, 1227 (S.D. Cal. 1971) (stating that after defendant was indicted for transporting over 2,000 pounds of marijuana into the United States, two unknown persons approached a bail bondsman, tendered a greeting card box containing \$55,000 in cash, and attempted to secure the defendant's release from custody. After a bail source hearing, the court stated, "[a]t this time the court knows nothing of the \$55,000 in the Hallmark card box, except that it came from someone who cared enough to send the very best. Whether this person cares about future court appearances of defendant is doubtful").

⁶ See *New York v. Esquivel*, 601 N.Y.S.2d 541, 545 (N.Y. Sup. Ct. 1993) (reiterating that "[i]f the funds posted are the fruits of criminal or unlawful conduct, then a defendant may choose simply to forfeit the collateral and flee. This is a small price to pay for the 'privilege' of reaping hundreds of thousands of dollars in illegal profits prior to apprehension").

⁷ See *New York v. McIntyre*, 640 N.Y.S.2d 386, 390-91 (N.Y. Sup. Ct. 1996) (noting that bail arrangement violates public policy when "[n] either defendant nor a close relative has put his own assets at risk" as the "prospect of loss to the third-party indemnitors in this case is not likely to provide incentive for defendant to return").

⁸ See N.J. STAT. ANN. §§ 2A:162-12-14 (WEST 2007) (determining "[c] rime with bail restrictions, that the court may "conduct an inquiry to determine the reliability of the obligor or person posting cash bail . . . [and] the relationship of the obligor or person posting cash bail to the defendant. . . and that [t]he procedure to determine the sufficiency of bail shall be governed by rules adopted by the Supreme Court").

⁹ See § 2A:162-13 (stating that when a person posts cash bail, the court may upon the request of the prosecutor conduct inquiries about the reliability of the person offering bail).

¹⁰ See *id.*, enabling trial courts to obtain all relevant information relating to the bail determination, which ensures the integrity of the judicial process.

¹¹ *Esquivel*, 601 N.Y.S.2d at 545.

¹² See N.J. STAT. ANN. §§ 2A:162-12-14 (2010). These sections discuss the crimes that qualify for bail, the applicability of a court inquiry, and even the sufficiency of bail, but fail to fully address the burdens of parties. Procedurally-wise, the statute primarily addresses what a prosecutor must do for a hearing. *Id.*

¹³ N.J. STAT. ANN. § 2A:162-14 (2010)

¹⁴ See N.J. CT. R. 3:26-8 (2010) (expressing that unless a defendant is charged with a crime listed *infra* note 20, the “the State must demonstrate a reasonable and well grounded basis to warrant an inquiry by the court”).

¹⁵ *New Jersey v. Wright*, 980 A.2d 17 (N.J. Super. Ct. Law Div. 2009).

¹⁶ *Id.*

¹⁷ See *id.* at 19 (stating that the defendant must disclose information regarding the source of their bail).

¹⁸ N.J. STAT. ANN. §§ 2A:162-12-14 (2010).

¹⁹ N.J. CT. R. 3:26-8.

²⁰ See *Wright*, 980 A.2d at 26 (holding that the “State bears the burden of persuasion that the bail does not satisfy the requirements”).

²¹ See *infra* part IV.

²² An earlier version of the 2004 statute, S-1322 introduced in the New Jersey Senate on March 14, 2002 by Senator Wayne R. Bryant, limited bail source hearings to defendants charged with drug offenses under Chapter 35 of the New Jersey Criminal Code.

²³ N.J. STAT. ANN. §§ 2A:162-13 (2010).

²⁴ These factors include the character, background, and reputation of the person posting bail. See *id.*

²⁵ N.J. STAT. ANN. § 2A:162-14 (2010).

²⁶ From the legislative history, it is apparent that that the Legislature wanted to give prosecutors this power to thwart gang members pledging bail with criminal proceeds and makes clear that courts would be required to conduct bail source hearings without any initial showing by prosecutors. See Assembly Approves Watson Coleman Anti-Street Gang Package, (May 22, 2006) available at <http://vip.politickernj.com/assembly-majority-leader-bonnie-watson-coleman-6> (“One such piece of legislation (A2987) would require an investigation into the source of bail money used in gang-related cases to determine if the funds came from a legitimate source or an illegitimate one, such as drug sales. The measure clarifies under which an investigation into the source of bail money would be required, including all first and second degree crimes, any crime involving a weapons offense and any crime involving alleged gang activity.”).

²⁷ See N.J. STAT. ANN. § 2A:162-12 (2010) (enumerating the following crimes as being bail restricted: murder, manslaughter, kidnapping, sexual assault, robbery, carjacking, arson and related offenses, causing or risking widespread injury or damage, burglary, theft by extortion, endangering the welfare of a child, arrest, escape, corrupting or influencing a jury, possession of weapons for unlawful purposes, weapons training for illegal activities, and soliciting or recruiting gang members).

²⁸ See N.J. STAT. ANN. § 2A:162-13 (2010) (providing that when a defendant “posts cash bail or secures a bail bond, the court shall, upon the request of the prosecutor, conduct an inquiry to determine the reliability of the obligor or person posting cash bail, the value and sufficiency of any security offered, the relationship of the obligor or person posting cash bail to the defendant and the defendant’s interest in ensuring that the bail is not forfeited, and whether the funds used to post the cash bail or secure the bail bond were acquired as a result of criminal or unlawful conduct”).

²⁹ See *id.* (noting pursuant to this inquiry, the court “may examine, under oath or otherwise, any person who may possess relevant information,” and may inquire into any other relevant matters, including, *inter alia*, the “source of any money or property deposited by any obligor as security and whether such money or property constitutes the fruits of

criminal or unlawful conduct”); see also N.J. CT. R. 3:26-8 (questioning “whether the funds used to post bail or secure the bail bond were acquired as a result of criminal or unlawful conduct”).

³⁰ Prosecutors are required to make a prompt review of bail source questionnaire forms.

³¹ § 2A:162-13.

³² *Id.*

³³ *Id.*

³⁴ See N.J. STAT. ANN. §§ 2A:162-12-14 (2010) (stating that the court can examine a person with relevant information under oath; once the inquiry has been completed, the court must then issue an order approving or disapproving the bail).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Compare §1c (stating “a defendant may post bail in any combination of forms authorized in subsection b. of this section provided the court does not direct otherwise”) with § 2A:162-13 (specifying that “the court may, upon the request of the prosecutor, conduct an inquiry to determine the reliability of the obligor or person posting cash bail”); but see *infra* Parts III and IV (discussing *Wright*, which holds that the state must make a *prima facie* showing that the bail arrangement is tainted or otherwise unsatisfactory before a hearing will be granted, even for bail restricted crimes).

³⁹ The legislative history makes it clear that the Legislature granted these powers to prosecutors to thwart gang members from pledging bail with criminal proceeds, and that courts would be required to conduct bail source hearings without any initial showing by prosecutors.

⁴⁰ N.J. STAT. ANN. § 2A:162-14 (2010).

⁴¹ See *Bail Source/Sufficiency Hearings – Rule Recommendations – Publication for Comment at 1-2 Before the Criminal Practice Committee* (2008) (statement of Honorable Edwin H. Stern) (waiting to amend the rules until Assembly Bill No. 2987 and Senate Bill No. 2012 were signed into law).

⁴² N.J. CT. R. 3:26-8.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See N.J. CT. R. 3:26-8 (noting that if a defendant fails to appear for his bail source hearing, bail will be revoked, forfeited, and the trial court is required to issue a bench warrant for the defendant’s arrest).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *Bail Source/Sufficiency Hearings*, *supra* note 45 (debating these critical issues vigorously, the Criminal Practice Committee could not reach a consensus and thus remained silent on the issues); see also *WRIGHT*, 980 A.2D at 20-21 (noting that the state Supreme Court declined to assign or explain the standard of proof).

⁴⁹ *WRIGHT*, 980 A.2D at 17.

⁵⁰ *Id.* at 19.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ N.J. STAT. ANN. § 2C:43-6(F) (WEST 2008); *Wright*, 980 A.2d at 19.

⁵⁵ *WRIGHT*, 980 A.2D AT 19.

⁵⁶ *Id.*

⁵⁷ *Id.* at 19-21.

⁵⁸ *Id.* at 20.

⁵⁹ *Id.* at 21.

⁶⁰ See *id.* at 20-22 (commenting on the analysis which included examining a party’s access to the proofs, considering the tradition that burden of establishing a fact is generally placed on the person relying thereon, and the comparative interests of the of the parties).

⁶¹ *WRIGHT*, 980 A.2d at 23-25.
⁶² *Id.*
⁶³ *State v. Zorillo*, 565 A.2d 1259 (R.I. 1989).
⁶⁴ *WRIGHT*, 980 A.2d at 23-24.
⁶⁵ *Id.* at 24-26.
⁶⁶ *Id.* at 24-25.
⁶⁷ *Id.* at 25.
⁶⁸ *Id.*
⁶⁹ *Id.* at 17.
⁷⁰ *WRIGHT*, 980 A.2d at 26.
⁷¹ *State v. Casavina*, 394 A.2d 142 (N.J. Super. Ct. App. Div. 1978).
⁷² *See* N.J. CT R. 3:26-4 (2010) (“bail may be satisfied by the deposit in court of cash in the amount of ten-percent of the amount of bail fixed and defendant’s execution of a recognizance for the remaining ninety percent”).
⁷³ *See Wright*, 980 A.2d at 26 (citing *New Jersey v. Casavina*, 394 A.2d 142 (N.J. Super. Ct. App. Div. 1978)) (asserting that application can be disallowed only for “sound reasons” or with “sufficient findings specifically articulated by the judge”).
⁷⁴ *Id.* at 22.
⁷⁵ *Id.* at 22, 24.
⁷⁶ *Id.* at 18. The statute mandates a hearing upon the prosecutor’s request for certain issues; once that request has been granted, the prosecution bears the burden of persuasion. *Id.* Therefore the State requested a hearing after the bail was increased from \$150,000 to \$200,000 based on their allegations that the defendant’s charges fell under the proscribed list of illegal activities. *Id.*
⁷⁷ *Id.* at 22; *see* *New Jersey v. Ramirez*, 875 A.2d 1025, 1031 (N.J. Super. Ct. App. Div. 2005) (noting that the limitations on this constitutional right to bail arise out of a concern for the public interest, which suffers a grave injury when a defendant fails to appear for trial).
⁷⁸ N.J. CT. R. 3:26-1(a) sets forth the standard for fixing bail, and provides that “the court may also impose terms or conditions appropriate to the defendant’s release including conditions . . . necessary to protect persons in the community.” N.J. CT. R. 3:26-6. A court is also authorized to order forfeiture of a defendant’s bail “[u]pon breach of a condition of a recognizance, the court on its own motion shall order forfeiture of the bail . . . the court may direct that a forfeiture be set aside if its enforcement is not required in the interest of justice upon such conditions as it imposes.” *Id.*
⁷⁹ *New Jersey v. Simpson*, 839 A.2d 896, 901 (N.J. Super. Ct. App. Div. 2003).
⁸⁰ *See* *New Jersey v. Johnson*, 294 A.2d 245, 252 (N.J. 1972) (noting that the imposition of a bail condition is a matter of judicial discretion, and that “discretion must be exercised reasonably, having in mind that the primary purpose of bail in this State is to insure presence of the accused at trial, and that the constitutional right to bail should not be unduly burdened”).
⁸¹ Other than *Wright*, there are no other published opinions that rely on *Zorillo* for guidance on bail source standards. *See Wright*, 980 A.2d 17; *see also* *Rhode Island v. Zorillo*, 565 A.2d 1259 (R.I. 1989).
⁸² The statute at issue in *Zorillo* specifically states: “If, after hearing, the party who has posted or is about to post bail or has furnished a fee, money or other consideration to another person who has posted or is about to post bail cannot establish to the satisfaction of the court by clear and convincing evidence that the source of money is from a legal enterprise the court need not accept the bail.” R.I. GEN. LAWS § 12-13-23 (1988).
⁸³ The New Jersey Constitution only prohibits bail for those charged with capital crimes. But since the death penalty has since been abolished in New Jersey as of December 2007, all defendants in New Jersey are entitled to bail. N.J. STAT. ANN. 2C:43-6(F) (WEST 2008).

⁸⁴ R.I. CONST. ART. I, § 9. “All persons imprisoned ought to be bailed by sufficient surety, unless for offenses punishable by imprisonment for life or for offenses involving the use or threat of use of a dangerous weapon by one already convicted of such an offense or already convicted of an offense punishable by imprisonment for life or for an offense involving the unlawful sale, distribution, or delivery of any controlled substance punishable by imprisonment for ten years or more, when the proof of guilt is evident or the presumption great. Nothing in this section shall be construed to confer a right to bail, pending appeal of a conviction. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety shall require it; nor ever without the authority of the general assembly.” *Id.*
⁸⁵ *See* *Fontaine v. Mullen*, 366 A.2d 1138, 1142-43 (1976) (noting that trial courts in Rhode Island retain discretion as to whether a defendant should be granted bail).
⁸⁶ *See* R.I. CONST. art. I, § 9 (bail is not available for offenses “punishable by imprisonment for life, or for offenses involving the use or threat of use of a dangerous weapon by one already convicted of such an offense or already convicted of an offense punishable by imprisonment for life, or for an offense involving the unlawful sale, distribution, manufacturer, delivery, or possession with intent to manufacture, sell, distribute or deliver any controlled substance or by possession or by a controlled substance punishable by imprisonment for ten (10) years or more, when the proof of guilt is evident or the presumption great”).
⁸⁷ *Zorillo*, 565 A.2d at 1261.
⁸⁸ *Id.*
⁸⁹ *See* R.I. GEN. LAWS § 12-13-23 (1988) (requiring defendants to prove “by clear and convincing evidence that the source of money is from a legal enterprise”).
⁹⁰ *Zorillo*, 565 A.2d at 1261.
⁹¹ *Id.*
⁹² In *Casavina*, 394 A.2d 142 (N.J. Super. Ct. App. Div. 1978), the Appellate Division found that a trial court has discretion to deny a defendant a ten percent cash option for bail when it deemed the defendant a flight risk. 394 A.2d at 143-44. The opinion states that while all defendants are presumed eligible for a ten percent cash option, the state bears the burden of proving a defendant’s ineligibility by a preponderance of the evidence. *Id.* at 144.
⁹³ *Wright*, 980 A.2d at 23.
⁹⁴ *See generally Wright*, 980 A.2d at 23 (referencing how the “State bears the burden to prove by a preponderance of the evidence why a defendant should be denied a ten percent option on bail”).
⁹⁵ *Id.*
⁹⁶ *Id.* at 19.
⁹⁷ This standard is murky. The *Wright* court set a seemingly low standard but left it undefined, stating only that the standard “should not be extremely difficult” for the State to meet it. *Id.* at 25-26.
⁹⁸ N.J. CT. R. 3:26-8(b).
⁹⁹ N.J. STAT. ANN. § 2A:162-12 (WEST 2007); N.J. CT. R. 3:26-8(b).
¹⁰⁰ *Wright*, 980 A.2d at 25.
¹⁰¹ § 2A:162-13.
¹⁰² *Id.*
¹⁰³ Burdens in collateral matters are often placed on a criminal defendant; for example, the burden of proving affirmative defenses, such as duress or entrapment, fall upon criminal defendants in New Jersey. § 2C:1-13(c).
¹⁰⁴ For example, both the Appellate Division and the Supreme Court of New Jersey have ruled that a defendant who violates the conditions of his bail must bear the burden of demonstrating why that bail should not be forfeited. *New Jersey v. Korecky*, 777 A.2d 927, 933 (N.J. 2001); *Ramirez*, 875 A.2d at 1031-32.

¹⁰⁵ See *Esquivel*, 601 N.Y.S.2d at 545 (suggesting that “the defendant is uniquely suited to know the source of the bail funds [and] [i]f the prosecution were required to investigate the source of any and all funds and/ or property posted, the court would be required to grant the people an adjournment to conduct the investigation, thereby delaying defendant’s release and frustrating the purpose of bail”).

¹⁰⁶ See *J.E. ex rel G.E. v. New Jersey*, 622 A.2d 227, 235-36 (N.J. 1993) (noting that the Court “generally [has] imposed the burdens of persuasion and production on the party best able to satisfy those burdens.”); see also *Romano v. Kimmelman*, 474 A.2d 1, 14 (N.J. 1984) (holding “clear and convincing proof” is required to admit a breathalyzer test).

¹⁰⁷ *McIntyre*, 640 N.Y.S.2d at 387-88; see *Esquivel*, 601 N.Y.S.2d at 545-46 (explaining the burden of production for records relating to bail).

¹⁰⁸ R.I. GEN. LAWS § 12-13-23 (1988).

¹⁰⁹ *Id.*

¹¹⁰ A court has “the right and the duty to satisfy itself that there is more than just a financial assurance that a bailed defendant will appear in court when required.” *DeMarchena*, 330 F. Supp. at 1226.

¹¹¹ *Esquivel*, 601 N.Y.S.2d at 545.

¹¹² See *id.* (noting that the preponderance of the evidence standard has been employed in New York state courts for over fifteen years, thus demonstrating its reasonableness and fairness to both the defendant and the state).

¹¹³ See *Wright*, 980 A.2d at 17.

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