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## A NEW CALCULUS FOR THE MEASURE OF MERCY:<sup>1</sup> DOES THE NEW JERSEY BAIL REFORM AFFECT THE IMMIGRATION COURT BOND HEARINGS?

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The short answer is no, the New Jersey Bail Reform will not directly affect how the immigration courts determine immigration bonds. However, while the state criminal system is wholly distinct from the federal immigration system, there are increasing intersections of state law having unintended consequences in immigration proceedings<sup>3</sup>. Under the Supremacy Clause of the US Constitution, federal law is the “Supreme Law of the Land,” and states have no authority to regulate immigration

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<sup>1</sup> WILLIAM SHAKESPEARE, *MERCHANT OF VENICE* (4.178-4.182) Portia to the Venetian Court of Justice. “Though justice be thy plea, consider this/That, in the course of justice, none of us/Should see salvation: we do pray for mercy; / and that same prayer doth teach us all to render/The deeds of mercy.”

<sup>2</sup> The author is the Eastern Regional Vice President of the National Association of Immigration Judges. The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author’s personal opinions, which were formed after extensive consultation with the membership of the NAIJ. This presentation is intended for instructional purposes and is not a substitute for legal advice. Judge Harbeck is also an adjunct professor of law at both Rutgers University School of Law (Immigration & Nationality) and Seton Hall Law School (Trial Skills) and is the author of a textbook chapter entitled *Bond Hearings in a Nutshell*, which is contained in *Prison Law 2015* (Practicing Law Institute 2015). [http://www.pli.edu/Content/CourseHandbook/Prison\\_Law\\_2015/\\_/N-4mZ1z11yzv?pareauser=1&ID=269709](http://www.pli.edu/Content/CourseHandbook/Prison_Law_2015/_/N-4mZ1z11yzv?pareauser=1&ID=269709). Judge Harbeck thanks Judge Dana L. Marks, NAIJ President, Judge Denise N. Slavin, NAIJ Executive Vice President, and Dr. Alicia Triche of Memphis, TN for their guidance and editing skills.

<sup>3</sup> Hon. Dana L. Marks & Hon. Denise N. Slavin, *A View Through the Looking Glass: How Crimes Appear from the Immigration Court Perspective*, 39 *FORDHAM URB. L.J.* 91 (Fall 2011).

enforcement.<sup>4</sup> That said, there are a number of similar rationales between the new state bail reform and the existing bond determination criteria in the immigration court. This article outlines those similarities as well as the differences between the two. It is also important to note from a practical point of view that New Jersey bail reform has no impact on immigration detainers. An immigration detainer is the process by which Immigration and Customs Enforcement (ICE), a component of the Department of Homeland Security (DHS) may detain a non-citizen without a warrant, but only if ICE has “reason to believe” that the non-citizen “is likely to escape before a warrant can be obtained for his arrest.”<sup>5</sup>

### **What Is the New Jersey Bail Reform?**

“Bail has only one purpose,” explained Attorney General Robert F. Kennedy to the Senate Judiciary Committee in 1964, and that purpose is “to insure that the person who is accused of a crime will appear in court for his trial.”<sup>6</sup> It is not punishment; it is simply a guarantee.<sup>7</sup> Most states have a resource-based bail system: a judge sets an amount of bail depending on the circumstances of the criminal matter at hand. If defendants can post the amount ordered, they are released pending their next court date. If not, they languish in jail. The majority of people currently in local jails haven't been convicted of any crime; they are merely waiting for the disposition of their cases. New Jersey is one

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<sup>4</sup> U.S. CONST. art. VI, cl. 2; *See also* *De Canas v. Bica*, 424 U.S. 351 (1976) (When Congress has occupied the field of a federal immigration issue, states cannot regulate it).

<sup>5</sup> 8 U.S.C. § 1357(a)(2) (2006); *see generally* *Moreno v. Napolitano*, No. 11 C 5452, 2014 U.S. Dist. LEXIS 136449 (N.D. Ill. Sep. 30, 2016) (challenging the validity of detainers); *see* DEP'T OF HOMELAND SECURITY, I-247 FORM, <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>.

<sup>6</sup> *Testimony by Attorney General Robert F. Kennedy on Bail Legislation Before the Subcommittees on Constitutional Rights and Improvements in Judicial Machinery of the S. Judiciary Comm.: Hearing on S. 2838, S. 2839, and S. 2840*, 88th Cong. 1 (1964) <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf>.

<sup>7</sup> *Id.* Testimony by Attorney General Robert F. Kennedy on Bail Legislation before the Subcommittee on Constitutional Rights and Improvements in Judicial Machinery of the Senate Judiciary Committee 8/4/1964. Attorney General Kennedy explained: “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.”

of a handful of states (Kentucky and Arizona being the other two states, to date<sup>8</sup>) that have elected to shift from a commercial or resource-based system to a risk-based system. This change is expected to have a number of advantages. First and foremost, eligible defendants will be granted release, or not, depending on an objective, standardized risk assessment. “The risk assessment tool evaluates the likelihood of a defendant being arrested for a new crime or for a new violent crime, or failing to appear in court.”<sup>9</sup>

On August 11, 2014, Governor Chris Christie signed comprehensive bail reform legislation (Senate Bill 946/Assembly Bill 1910).<sup>10</sup> Then, on November 4, 2014, New Jersey voters passed Ballot Question #1, enacting this reform, which went into effect in January 2017.<sup>11</sup> The law was passed with two major purposes in mind: “To ensure that the most dangerous criminals are detained before trial, and to ensure that those accused of less serious offenses aren't held in jail simply because they can't afford to pay bail.”<sup>12</sup> According to Morris/Sussex Assignment Judge Stuart Minkowitz, whose vicinage conducted one of the N.J. bail reform pilot programs, “In the past, those who could afford to pay were released and those who could not stayed incarcerated.”<sup>13</sup> Meanwhile, the pre-2017 bail guidelines “did not allow judges to consider whether a defendant was a danger to the community, only if they were a flight risk.”<sup>14</sup> Following incidents where violent offenders committed crimes while out on bail after posting only a portion of their bail, “the system drew severe criticism after some violent offenders committed crimes while out on bail after posting only a portion of their bail through bail bondsmen.”<sup>15</sup>

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<sup>8</sup> See Hon. Glenn A. Grant, J.A.D., *Acting Administrative Director of the Courts Criminal Justice Reform Report to N.J. Legislature* (December 2015), [https://www.judiciary.state.nj.us/criminal/cjr/Criminal\\_Justice\\_Reform\\_Report\\_to\\_the\\_Legislature\\_12\\_01\\_15.pdf](https://www.judiciary.state.nj.us/criminal/cjr/Criminal_Justice_Reform_Report_to_the_Legislature_12_01_15.pdf) [hereinafter Reform Report].

<sup>9</sup> Brian J. Neary, *Why is Bail Reform Needed?*, LAW OFFICES OF BRIAN J. NEARY, (Sept. 7, 2016), <http://www.nearylalaw.com/new-jersey-bail-law/2016/09/07/new-jersey-bail-reform-coming-2017/>.

<sup>10</sup> S.B. 946, 215th Gen. Assemb., Reg. Sess. (N.J. 2014).

<sup>11</sup> *Winning Bail Reform in New Jersey*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/about-us/departments-and-state-offices/new-jersey/new-solutions-campaign/bail-reform/winning-bail-re> (last visited Jan. 30, 2017).

<sup>12</sup> Ben Horowitz, *Bail Reform to Require 'Extraordinary Amount of Resources,' Judge Says*, NJ.COM (Sept. 10, 2015), [http://www.nj.com/morris/index.ssf/2015/09/judge\\_bail\\_reform\\_to\\_require\\_extraordinary\\_amount.html](http://www.nj.com/morris/index.ssf/2015/09/judge_bail_reform_to_require_extraordinary_amount.html).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

The move to reform the state's criminal justice system grew from the work of the Joint Committee on Criminal Justice, a special committee of the Supreme Court established by Chief Justice Stuart Rabner to examine the issues of bail and speedy trial reform. According to Chief Justice Rabner, “The existing bail system is not fair to poor defendants who, because they cannot post bail, are cut off from families, may lose their jobs, and may go without access to medication for a period of time. In terms of the charges against them, studies have shown that they face tougher plea offers and pressure to plead guilty because of the amount of time they have already spent in jail, and they receive longer sentences as compared to similarly situated defendants who were able to make bail.”<sup>16</sup> As part of this examination, Hon. Glenn A. Grant, JAD, Acting Administrator of the Courts in New Jersey, travelled to Phoenix, AZ and Louisville, KY to observe and learn from the new risk based pretrial structures that those states had enacted, using the rationale of a pilot program in Washington, D.C.<sup>17</sup>

On Jan. 1, 2017, New Jersey shifted from a system that relied principally on setting monetary bail as a condition of release to a risk-based system that is more objective and fairer to defendants because it is unrelated to their ability to pay monetary bail. Under the pre-2017 system in which judges set a dollar amount of bail, poor defendants who posed little risk of danger or flight were sometimes held in county jail because they could not make even modest amounts of bail. Under the new system, Judge Minkowitz said, there will be no more “paying of bail at the police station”, and many of those charged with an indictable crime will go to jail for 48 hours pending their hearing.<sup>18</sup>

Under guidelines still being worked out, police may have discretion to release low-risk offenders. Suspects will be fingerprinted at the police station and police will have access to numerous criminal databases that will tell them of the defendant's prior record. A computerized “risk assessment tool”

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<sup>16</sup> *Pretrial Services Program*, NEW JERSEY JUDICIARY (2017), [http://www.judiciary.state.nj.us/forms/12088\\_cjr\\_pre-trial\\_svcs\\_brochure.pdf](http://www.judiciary.state.nj.us/forms/12088_cjr_pre-trial_svcs_brochure.pdf) (last visited Jan. 16, 2017) (quoting Chief Justice Stuart Rabner).

<sup>17</sup> See Reform Report, *supra* note 8.

<sup>18</sup> See Neary, *supra* note 9.

will determine whether the defendant is a low, moderate or high risk, and will assign a numerical score. “That key bit of information will guide police, attorneys and judges,” Minkowitz said.<sup>19</sup> For many defendants, the judge will make a “determination of conditions of pretrial release,” which could be as serious as wearing an ankle bracelet and might still include bail in certain situations, Minkowitz said.<sup>20</sup> If the prosecutor wants to detain a suspect accused of a violent crime, he or she will have three days beyond the 48 hours to hold a “plenary hearing” where “the state must provide clear and convincing evidence that the person should be detained,” Minkowitz said.<sup>21</sup>

One study revealed that about 12 percent of New Jersey's county jail population remained in custody because they couldn't post bail of \$2,500 or less.<sup>22</sup> More than two-thirds of these indigent defendants were members of racial and cultural minority groups.<sup>23</sup> Under the pre-2017 law, defendants with assets could post bail and be released even if they posed a serious risk of flight or danger to the public. Under the new Bail Reform, judges assess the level of risk each defendant presents and impose conditions of release. Judges use an objective risk-assessment tool that has been tested and validated with data from thousands of actual cases in New Jersey. Judges consider factors such as the defendant's age at the time of arrest, pending charges, and prior convictions and whether any of those involved violence, prior failures to appear, and prior jail sentences.

With that information, each defendant is now classified as low, moderate, or high risk and may be released on conditions without having to post monetary bail. Following the risk assessment, an eligible defendant may be released on his or her own recognizance; granted a non-monetary release with certain conditions; released with monetary bail only to ensure a future appearance; or released

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Yolande P., Marlow, *2016 Report to the National Consortium on Racial and Ethnic Fairness in the Courts* (May 10, 2016) [http://www.national-consortium.org/~media/Microsites/Files/National Consortium/Conferences/2016/State Reports/New-Jersey-State-Report-2016.ashx](http://www.national-consortium.org/~media/Microsites/Files/National%20Consortium/Conferences/2016/State%20Reports/New-Jersey-State-Report-2016.ashx).

with some combination of monetary bail and conditions. There is also the possibility that a defendant will not be released, but remain in detention. This would happen only following a motion by the State and a hearing on the motion, not simply at the court's request. The new law puts legal protections in place for defendants in the event of such a motion and the detention hearing that would follow.<sup>24</sup> Defendants who are released pretrial are monitored by pretrial services staff, similar to those in the federal criminal system and a number of states. The pretrial services staff, who are part of the Judiciary, completes risk assessments so that a judge can set conditions of release within 48 hours of each arrest. The staff monitors defendants on release based on the level of supervision that each defendant requires. For low-risk defendants, that could amount to nothing more than a phone call or text to remind them to show up in court. As the risk level increases, the nature of the monitoring will be enhanced. Judges are able to order those defendants who pose a serious risk of flight or a serious risk of danger to the community or to witnesses to be held without bail.

### **What is the Immigration Court?**

The Immigration Court is a quasi-administrative court created by the federal Immigration and Nationality Act (INA).<sup>25</sup> Until 2003, the Immigration and Naturalization Service (INS), located within the Department of Justice (DOJ), played the central role; however, the INS no longer exists.<sup>26</sup> With the creation of the Department of Homeland Security (DHS) in the aftermath of September 11, 2001,

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<sup>24</sup> N.J.S.A. § 2A:162-15.

<sup>25</sup> *Overview of INS History: USCIS History Office and Library*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (2012), <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>.

<sup>26</sup> *Our History*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/about-us/our-history> (last visited Jan. 25, 2017).

the immigration bureaucracy was radically restructured.<sup>27</sup> The adjudicatory function in removal/deportation cases remained at the Department of Justice (DOJ) under the supervision of the Attorney General.<sup>28</sup> Specifically, the agency that oversees the adjudications is the Executive Office for Immigration Review (EOIR), within DOJ.<sup>29</sup> EOIR is actually three units within the DOJ.<sup>30</sup> The Office of the Chief Immigration Judge within EOIR (OCIJ) oversees the immigration courts where the immigration judges (IJs) conduct formal removal hearings, adjudicating whether to deny entry, remove/deport, or grant relief to aliens facing removal.<sup>31</sup> This branch also handles immigration bond hearings.<sup>32</sup>

There are over 270 IJs in the immigration courts nationwide.<sup>33</sup> The IJs determine removability, rule on applications for relief from removal (asylum, adjustment of status, cancellation of removal, waivers, etc.) and conduct the immigration bond hearings.<sup>34</sup> There are two immigration courts located in New Jersey. One is at the detention center at 625 Evans Street in Elizabeth, and the other is at 970 Broad Street in Newark.

### **What is the Basis for Immigration Custody?**

An immigration bond hearing is separate from a removal/deportation hearing.<sup>35</sup> The purpose of an immigration bond is to ensure that the alien<sup>36</sup> will return to court if released from detention. If

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<sup>27</sup> *Implementing 9/11 Commission Recommendations*, U.S. DEP'T. OF HOMELAND SECURITY (Oct. 3, 2016), <https://www.dhs.gov/implementing-911-commission-recommendations>.

<sup>28</sup> *The Immigration Court Practice Manual*, U.S. DEP'T. OF JUST. (2009), [https://www.justice.gov/eoir/pages/attachments/2015/02/02/practice\\_manual\\_review.pdf](https://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf).

<sup>29</sup> *EOIR at a Glance*, U.S. DEP'T. OF JUST. (Sept. 9, 2010), <https://www.justice.gov/eoir/eoir-at-a-glance>.

<sup>30</sup> *Id.*

<sup>31</sup> Michael A. Scaperlanda, *Immigration Law: A Primer*, 2009 FED. JUD. CENTER.

<sup>32</sup> *See Id.*

<sup>33</sup> *Office of The Chief Immigration Judge*, U.S. DEP'T. OF JUST., <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>. (last visited Feb 1, 2017) The official website of EOIR states that there are “approximately 250 Immigration judges;” however, recent hiring during 2017 places this actual number at around 300 or so IJs. *See also, Immigration Courts*, LAW OFFICES OF CARL SHUSTERMAN, <http://www.shusterman.com/immigrationcourts/> (last visited Jan. 25, 2017).

<sup>34</sup> *EOIR*, U.S. DEP'T. OF JUST., <http://www.justice.gov/eoir> (last visited Jan. 25, 2017).

<sup>35</sup> 8 C.F.R. § 1003.19(d).

<sup>36</sup> The word “alien” is used to denote non-U.S. citizens because that is how such persons are described in the INA.

s/he obeys all the orders of the court and returns to court when s/he is supposed to, the bond amount will be returned to whoever posted it for him or her. If s/he does not obey the orders of the court, the bond is forfeited and the IJ may enter an Order of Removal *in absentia*.<sup>37</sup>

Under the INA, the Attorney General “shall take into custody” any aliens who meet certain criteria.<sup>38</sup> In general, an alien is subject to mandatory custody if s/he: is inadmissible by reason of having committed any offense covered in INA § 212(a)(2); removable by reason of committing certain offenses under INA § 237; has a conviction of or sufficient admission of the elements of a Crime Involving Moral Turpitude (CIMT) (2 or more if LPR); has a conviction for a controlled substance violation; has multiple criminal convictions with an aggregate of 5 years in sentence time; has been convicted of prostitution and commercialized vice; has been convicted of an aggravated felony or a firearms offenses.<sup>39</sup>

While the Fifth Amendment entitles aliens to due process of law in removal and custody proceedings, the IJ has no jurisdiction/authority to set a bond for arriving aliens<sup>40</sup> or for Visa Waiver Program (VWP) aliens.<sup>41</sup> Instead, only DHS can set bond or issue parole for those populations. There are other instances in which the IJ cannot set a bond because an alien is statutorily subject to mandatory immigration custody, as referenced above. However, even in circumstances where mandatory detention in removal proceedings is constitutionally permissible, due process still requires adequate procedural protections to ensure that Government's stated justification for detaining an alien without

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<sup>37</sup> 8 U.S.C. § 1229a(b)(5)(a); *See also Bond and Custody Hearings*, U.S. DEP'T. OF JUST, (2014), [http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond\\_Guide.pdf](http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond_Guide.pdf).

<sup>38</sup> Immigration and Nationality (Hart-Celler) Act, § 236(c)(1) (1965) (codified as amended at 8 U.S.C. § 1226).

<sup>39</sup> *Id.* at § 237.

<sup>40</sup> *In Re Oseinnusu*, 22 I&N Dec. 19 (BIA 1998).

<sup>41</sup> *Matter of A-W-*, 25 I&N Dec. 45 (BIA 2009).



a bond hearing outweighs the individual's constitutionally protected interest in avoiding physical restraint. Thus, IJs do have jurisdiction/authority to conduct a hearing to determine if an alien is subject to mandatory custody.<sup>42</sup>

Board of Immigration Appeals (BIA) case law supports that a non-citizen should not be detained unless s/he presents a danger to the community (including a threat to national security and a “danger to persons or property”) or is a flight risk.<sup>43</sup> Since bond hearings are separate from removal/deportation hearings, the IJ does not have to have the Notice to Appear (NTA, the charging document filed by DHS to commence removal proceedings) to conduct a bond hearing AND the IJ, in assessing bond amount and eligibility, may consider criminal convictions even if they are not listed on the NTA as a predicate for potential removal.<sup>44</sup>

The time for a bond hearing is set upon the DHS filing of the Notice of Custody Determination (Form I-286) with the immigration court or upon the non-citizen’s motion prior to any final administrative order of removal/deportation.<sup>45</sup> There is no “statute of limitations” for DHS/ICE to take an alien into immigration custody following the alien’s release from criminal detention.<sup>46</sup>

There is a distinction for detention of aliens in pre-removal (*i.e.*, before IJ order of removal) and post-removal detention. This is significant in viewing circuit court decisions on the right to bond review. The Attorney General has the authority to detain aliens during the “pre-removal” period.<sup>47</sup> That is, while removal proceedings are on-going but before the issuance of a final order of removal.<sup>48</sup>

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<sup>42</sup> 8 U.S.C. § 1229a (2012).

<sup>43</sup> *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976).

<sup>44</sup> *In Re Kotliar*, 24 I&N Dec. 124 (BIA 2007).

<sup>45</sup> 8 C.F.R. §§ 1003.19, 1236.1. In some jurisdictions when the DHS fails to make a custody determination, the Court will take this as a DHS finding that it will not grant a bond and will entertain a motion to re-determine bond.

<sup>46</sup> *Sylvain v. Att’y Gen.*, 714 F.3d 150 (3d Cir. 2013).

<sup>47</sup> 8 U.S.C. § 1226 (c) (2015).

<sup>48</sup> *Id.*

In mandatory custody pre-removal situations, the Constitution mandates that DHS must establish whether continued detention is necessary.<sup>49</sup> In these instances, DHS bears the burden of proof.<sup>50</sup> This does not obligate the immigration court to grant bonds in all instances; it requires the court to have a bond hearing. The *Diop* decision does not state a specific length of pre-removal order detention beyond which a petitioner may be entitled to a hearing. Instead, the *Diop* court noted that “reasonableness, by its very nature, is a fact-dependent inquiry requiring an assessment of all the circumstances of a particular case.”<sup>51</sup> For non-mandatory custody aliens, the IJ can either: (1) continue to detain, or (2) release on bond of not less than \$1,500.00.<sup>52</sup> While there is no published caselaw on this matter, in many jurisdictions, IJs exercise the option to release a respondent on his/her own recognizance or impose conditions on the bond<sup>53</sup>. Some offenses may be exceptions to mandatory custody if they are extremely *de minimis*.

The IJ considers flight risk factors such as: a history of failures to appear in any court; the ability and understanding of the alien of the need to return to court; family ties; incentives to return to court depending on the strength of relief available. Further, a criminal alien must demonstrate s/he are not a danger to persons or property and that s/he is likely to appear for future proceedings.<sup>54</sup> This is actually quite similar to the criteria the New Jersey criminal courts now employ under Bail Reform.

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<sup>49</sup> *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 234 (3d Cir. 2011). For an in-depth analysis of mandatory detention issues in immigration, see Margot Kniffin & Sarah Martin, *Developments in Civil Detention: Circuit Approaches to the Reasonableness of Prolonged Detention and Interpretations of the “When Released” Clause*, Vol. 10 no. 4 Immigration Law Advisor 1, (May 2016). The Second Circuit approach is distinguishable, adopting a bright-line approach to pre-removal detention whereby an alien held pursuant to 8 U.S.C. §1226 (c), must be afforded a bond hearing within six months of detention. See *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015).

<sup>50</sup> *Diop*, 656 F.3d at 234.

<sup>51</sup> See *id.*

<sup>52</sup> 8 U.S.C. § 1226 (a)(1)–(2).

<sup>53</sup> *Bond/Custody*, US DEPT. OF JUST. 1, 2-3, [https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond\\_Guide.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond_Guide.pdf).

<sup>54</sup> *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006).

The evidence submitted to an IJ for a bond hearing is separate from the evidence submitted on the alien's potential application for relief. In general, material supporting the following can assist in assessing the bond: strong family and community ties; good moral character; not a danger to the community; employment and financial ties; strength of relief (*i.e.*, Asylum case/Country Conditions); rehabilitation following any criminal activity; appearances at prior hearings; stable place to live; skills and talents; job to return to or offer of future employment; and letters of support from friends and family. (These persons can also testify at bond hearing at the IJ's discretion).<sup>55</sup>

IJs employ discretion in setting bond amounts. Some factors to consider include: a fixed address in the U.S.; length of residence in the U.S.; family ties in the U.S., especially to relatives who can convey immigration status; employment history in the U.S.; immigration history in the U.S.; whether the alien attempted to avoid prosecution; prior failures to appear for court; and whether the alien has a criminal record.<sup>56</sup> Less significant factors that the IJ may consider include: the amount of the bond in the criminal proceeding and DHS' difficulty in executing final order.<sup>57</sup>

After an IJ makes a bond determination, s/he may conduct a hearing to reconsider the determination so long as: (1) the request is made in writing; and (2) the alien has shown a materially changed circumstance since the initial hearing.<sup>58</sup> A bond reconsideration hearing may be made while an appeal of the IJ's decision on the initial Bond Hearing is pending at the BIA.<sup>59</sup> This does NOT toll appeal time. Bond determinations made by the IJ may be appealed to the Board of Immigration Appeals (BIA) either by the alien or the DHS within 30 days of the IJ's order.<sup>60</sup>

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<sup>55</sup> See *supra* note 53.

<sup>56</sup> *Guerra*, 24 I&N Dec. at 40.

<sup>57</sup> *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987); *Matter of Shaw*, 17 I&N Dec. 177, 178-79 (BIA 1979); *Matter of P-C-M-*, 20 I&N Dec. 432, 434 (BIA 1991).

<sup>58</sup> 8 C.F.R. § 1003.19(e) (2016).

<sup>59</sup> *In Re Valles*, 21 I&N Dec. 769 (BIA 1997).

<sup>60</sup> 8 C.F.R. § 1003.38(b) (2016).

In sum, the New Jersey Bail Reform does not alter the methodology used by IJs to determine the eligibility and amounts of immigration bonds. As noted, the Bail Reform criteria of risk assessment is actually quite similar to how IJs assess immigration bond eligibility and amounts. The Bail Reform has no substantive legal effect on the bond proceedings conducted in federal immigration courts. However, from a practical perspective, the volume of immigration court docket could be affected drastically. Non-citizens, who are eligible for low bonds and are released from New Jersey state criminal custody, may be subject to immigration detainers. These non-citizens could be placed immediately into ICE custody and thus would have the right to request bond hearings in immigration court.