

DON'T I HAVE A RIGHT TO BAIL? A STUDY OF BAIL DECISIONS/OUTCOMES
AND THEIR EFFECTS ON PLEA BARGAINING AND SENTENCING

by

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ABSTRACT

DON'T I HAVE A RIGHT TO BAIL? A STUDY OF BAIL DECISIONS/OUTCOMES AND THEIR EFFECTS ON PLEA BARGAINING AND SENTENCING

by

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Previous research on bail practices has shown that legal factors such as offense severity and prior criminal record impact bail decisions and outcomes, as well as demographic factors such as race and gender. While sentencing practices have been studied extensively, bail is at the forefront of the criminal process and has the potential to affect the trajectory of a case. This study examines the factors that impact bail decision making and the subsequent influence of bail on the entire criminal case process that includes plea bargaining and ultimately sentencing. The analyses consist primarily of quantitative methods. Specifically, this research employs a sample of 634 New Jersey superior court cases tracked from arrest through disposition. These data are supplemented with findings from interviews with the courtroom work group and observations of bail hearings.

Regarding bail, this study finds that both legal and extralegal factors impact bail decisions and that financial resources play an important role in bail outcomes. More specifically, the seriousness of the offense and the number of charges brought against the defendant strongly impact bail decisions by the court. This study examines bail decisions made by judges and subsequent bail outcomes, i.e., whether defendant posted financial

bail and were released or not. Individuals represented by public defenders are less likely to post bail when compared with individuals who have private counsel. Bail amount set by the court is higher for defendants in urban jurisdictions and defendants in urban jurisdictions are less likely to be able to post bail. Looking at demographic factors, minorities receive less advantageous bail decisions and black defendants are less likely to post bail. Conversely, bail amount plays a strong role in bail outcomes in that defendants with higher monetary bail requirements are less likely to post bail, highlighting the importance of the defendant's economic resources. Additionally, this study's qualitative findings demonstrate that criminal history is a strong consideration in bail decisions and that the courtroom work group dynamic also influences bail proceedings.

Turning to subsequent decision points, this study found that an increase in the number of charges is related to an increase in the case's disposition time. While cases involving black and hispanic defendants take longer to reach a disposition, cases involving public defenders have a shorter disposition time. These results support the hypothesis that defendants who are detained before trial plead guilty earlier than defendants who are able to post bail, which can significantly affect later dispositions. Although pretrial detention does not impact the decision to incarcerate, pretrial detention does significantly impact the length of the sentence in cases that involve incarceration. Several other factors influence sentence length, including gender, race, the number of charges and offense type, and prior criminal history.

In sum, the quantitative analyses indicate that both legal and extralegal factors impact bail decisions. The qualitative data demonstrate that factors internal to the court,

i.e., agreement on the going rate, also play a role in bail proceedings. Moreover, these results show that pretrial detention impacts subsequent decision points in that defendants who are detained prior to trial, in most instances, plead guilty faster and receive lengthier sentences. The impact of bail proceedings on the trajectory of a case highlights the ongoing need to carefully scrutinize pretrial practices.

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TABLE OF CONTENTS

Abstract	iv
Acknowledgements	vii
Chapter 1. Introduction	1
Chapter 2. Factors of Bail and the Subsequent Impact of Bail on Plea Bargaining and Sentencing	8
2.1. History of Bail	9
2.2. Criminological Research About Bail	17
a. Selective Incapacitation Policies	17
b. Risk Management and New Penology	21
c. Race and Dangerousness	23
d. Who Gets Bail?	27
2.3. Impact of Bail Decisions on Subsequent Court Decisions	32
a. Plea Bargaining versus Trial	32
b. Factors Contributing to Guilty Pleas	33
c. Sentencing	35
2.4. What This Study Adds to the Literature	39
a. Replication in New Jersey	39
b. Impact of Timing on Case Disposition	42
Chapter 3: Methodology	46
3.1. Hypotheses	47
3.2. Data	48
3.3. Variables	54
a. Dependent Variables	54
b. Independent Variables	56
3.4. Data Analysis Strategy	58
3.5. Description of the Sample	62
3.6. Qualitative Portion of the Analysis	65

Chapter 4: Results	67
4.1. Bail	68
a. Logistic Regression for Bail Type	68
b. Tobit Regression for Bail Amount	71
c. Logistic Regression Predicting Ability to Post Bail	73
d. Comparison of Screened/Unscreened Cases	76
4.2. Plea Bargaining	81
a. Logistic Regression for Disposition Timing	82
b. OLS Regression Predicting Days to Disposition	84
c. Description of Trial Cases	87
4.3. Sentencing	88
a. Logistic Regression Predicting Incarceration	89
b. Tobit Regression Predicting Length of Incarceration	92
4.4. Summary of Quantitative Results	94
4.5. Summary of Qualitative Results	96
Chapter 5: Discussion and Conclusion	101
5.1. Key Findings	102
a. Bail	102
b. Plea Bargaining	106
c. Sentencing	110
5.2. Policy Implications	113
5.3. Limitations	116
5.4. Future Research	117
Appendix	120
References	122

TABLE OF TABLES

Chapter 3. Methodology

Table 3.1. Sample Attrition	53
Table 3.2. List of Analyses	59
Table 3.3. Variable Descriptions	64

Chapter 4. Results

Table 4.1. Logistic Regression Analysis Predicting Bail Type	69
Table 4.2. Tobit Analysis Predicting Bail Amount	73
Table 4.3. Logistic Regression Analysis Predicting Bail Posting	75
Table 4.4. Crosstabulation of Expanded Degree/Offense Type and Case Screened	80
Table 4.5. Logistic Regression Analysis Predicting Disposition Timing	83
Table 4.6. OLS Regression Predicting Days to Disposition	85
Table 4.7. Logistic Regression Predicting Custodial Sentence	90
Table 4.8. Tobit Analysis Predicting Sentence Length	93

APPENDICES

Appendix A. Interview Questions for Prosecutors/Public Defenders	120
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CHAPTER 1: INTRODUCTION

Scholars have devoted a great deal of attention to research on structural flaws in the American legal system. In particular, a great deal of important research has focused on inequities in sentencing practices and the possible racial disparities that occur at this phase of the legal process (Demuth & Steffensmeier, 2004; Spohn & Holleran, 2000; Western, 2006). An equally important but commonly overlooked facet of the criminal justice system is bail decisions.

Why is there a limited body of research on bail as compared to the vast literature on sentencing outcomes? In his study on racial and ethnic differences in the pretrial phases, Demuth (2003) provides a few possible explanations: First, bail marks the beginning of the legal process, whereas sentencing signals the culmination of the process and the pronouncement of punishment. Sentencing is strictly regulated and typically receives more attention from the legislature and the media. As Demuth (2003) also notes, sentencing data is collected and monitored and is readily available to researchers. In addition to these reasons, the study of bail may have lost its luster with the passage of the federal Bail Reform Act of 1984.

Although the original purpose of bail was to ensure the appearance of accused individuals in court, the Bail Reform Act of 1984 resulted in an expansion of the use of bail, explicitly allowing the use of preventive detention in cases involving defendants who judges presumed were dangerous (18 U.S.C. 3142). Section 3142(b) states that a defendant should not be released in the community if “such release will not reasonably

assure the appearance of the person as required or will endanger the safety of any other person or the community.” This position was solidified with the Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987). In *Salerno*, the portion of the Bail Reform Act of 1984 that authorized the use of preventive detention was held constitutional, making dangerousness a formal criterion for bail determinations.

This significant change in the purpose of bail inspired the current research. Bail occurs at the beginning of the legal process and has the ability to affect various other decision points in the case. Research by Beeley (1927) and Foote (1954) that exposed various inequities in the cash bail system was followed by a bail reform movement in the 1960s which focused on release on own recognizance and returning individuals to future court appearances. In contrast to the bail reform movement, the Bail Reform Act in 1984 changed the scope of bail to include the protection of the community from potentially dangerous persons. While this development may have hampered research on bail, some notable studies (Demuth & Steffensmeier, 2004; Katz & Spohn, 1995; Schlesinger, 2005) have since have examined the factors most pertinent to bail decisions and outcomes, examining the progression of bail practices after 1984.

Despite this work, bail studies are still scarce and much more research on the subject is needed to determine the effect of bail operations on criminal case processing. This research takes account of both the significant changes to the criminal justice system and in the landscape of bail since the passage of the Bail Reform Act of 1984. To that end, this study utilizes a sample of cases from the state of New Jersey, a state that has

retained its original laws governing bail, in which the primary goal of bail is to ensure that offenders return to future court proceedings. This sample, which contains both legal and extralegal variables, is well-suited for analyzing bail practices. Earlier bail reform efforts were spurred by evidence-based research on the inequities in bail administration. As the objectives of bail have drastically changed, policymakers need research again in order to evaluate the effectiveness of current bail practices.

The current research, while focused on the factors that determine bail decisions and outcomes, also presents an examination of the decision points that follow: plea bargaining and sentencing. Albonetti (1990) directs attention to the decision points in between bail at the beginning of the process and sentencing at the end; especially the guilty plea process. Some research (Frenzel & Ball, 2007) shows that offense severity and prior record impact plea bargaining while other research (Albonetti, 1990) demonstrates that race is a significant predictor of plea bargaining decisions.

Such studies seldom include bail decisions and outcomes as factors that may significantly affect guilty pleas or subsequent sentence. Although Kellough & Wortley (2002) examined plea bargaining decisions in Canada using pretrial detention as an independent variable in their analysis, there is currently very little empirical research that examines the effect of bail on plea bargaining in the United States. This study is intended to fill the gap by examining the impact of pretrial detention on guilty pleas and to go a step further by analyzing the timing of such guilty pleas. In order to understand defendants' timing of their pleas, this research focused on the time that elapsed between

when bail was set and the disposition of a case. This analysis analyzes the extralegal factors that influence a defendant's decision to plead guilty, surmising that defendants often plead guilty early in order to get out of jail when they have been held without posting bail. This research offers a foundation for future studies on the administration of justice since a guilty plea is the most common form of case disposition.

Sentencing remains an important topic, especially because it is the final outcome of a case. Sentencing has been studied by many scholars (Spohn & Holleran, 2000; Tonry, 1996; Western, 2006), who have found that various legal and extralegal factors impact sentencing decisions. Criminal history and the seriousness of the offense have been consistent predictors of sentencing decisions (Gottfredson & Gottfredson, 1988; Neubauer, 2002) as have the extralegal variables race and gender (Albonetti, 1997; Spohn & Holleran, 2000). However, partly because factors internal to the court itself are understudied, this research examines the potential effects of bail operations on sentencing. Some researchers (Free 2003; Phillips, 2008; Williams, 2003) have also examined the potential impact of pretrial decisions on conviction and sentencing. This body of research is not extensive and more is needed to gauge the full extent of pretrial operations on sentencing, especially given some of the well-known adverse effects of incarceration on offenders, their family members and the community. These concerns are crucial because some research has posited that the court's pretrial detention of a defendant may be, in effect, a decision to convict.

This brings us back to the beginning of the case as demarcated by bail. Decisions

at the pretrial stage affect the entire course of the case. This research considers the importance of bail decisions on the subsequent decision points during criminal processing. More specifically, this study explores the criminal judicial process beginning with bail and concluding with sentencing. This research makes an unique contribution to the literature by examining the entire process including the plea bargaining stage. Hopefully, this research will help to renew interest in bail research, just as Foote's (1954) work did over fifty years ago. This study should also serve as a foundation for studies on plea bargaining. Although the trial is often thought of as the hallmark of justice in the United States, almost all cases are settled through plea bargaining and while there is extensive research on the practice (Alshuler, 1979; McCoy, 1993 Schulhofer, 1983), current research on factors that affect the process is limited.

This research also makes several empirical contributions: First, it is a replication of previous studies using new data in a different jurisdiction, but analyzing the same factors affecting bail decisions and outcomes. Replication is crucial in explaining bail decision making, particularly when laws have undergone substantial change as is the case with bail laws. Replication of previous research in a different location is useful in strengthening the reliability of existing theories and/or by providing evidence that can inform new theories of bail decision making. Replication provides policymakers with research that is useful in evaluating the effectiveness of laws in a particular jurisdiction. Finally, replication with different data may contain different indicators of bail operations that allow more effective testing of researchers' explanations.

The current study uses data from the state of New Jersey describing all criminal court outcomes from arrest through sentencing from all arrests in one randomly selected week. This database provides rich detail for both legal and extralegal variables at various decision points in the criminal case while allowing researchers to make links between these decision points. These data have not been analyzed for academic research before, so the current study provides an important opportunity to examine criminal case processing in New Jersey. In addition, members of the judiciary were interviewed to help place the statistical findings in the appropriate context. The combination of a quantitative analysis with qualitative interviews offers a deeper insight into bail operations and subsequent decision points. The current study provides evidence of the powerful role that bail practices play at each step of criminal case processing.

**CHAPTER 2: BAIL AND ITS EFFECT ON PLEA BARGAINING AND
SENTENCING: THEORETICAL FOUNDATIONS**

2.1. History of Bail

The Eighth Amendment to the Constitution proscribes excessive bail. Foote (1954) interpreted this proscription as a Constitutional guarantee to bail, a right more clearly provided by the Federal Rules of Criminal Procedure. According to Fed. R. Crim P. 46, “[a] person arrested for an offense not punished by death shall be admitted to bail.” The right to bail was further clarified by the United States Supreme Court's decision in *Stack v. Boyle*, 342 U.S. 1, 4 (1951), which stated: “this traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.” The Court noted that the purpose of bail was to ensure a defendant's appearance in court. This standard was subsequently questioned by research that exposed the inequitable practices of a system that was dominated by monetary bail (Beeley, 1927; Foote, 1954; Goldkamp, 1979). Foote's (1954) findings included the following: release decisions were primarily based on the offense and little consideration was given to factors that were related to future appearance in court; cash bail was used to detain and punish the poor; and defendants who were incarcerated before trial were found to receive harsher sentences.

Monetary bail, a central feature of bail operations in the United States, brings with it the problems that Foote (1954) described. Types of financial bail typically include the following: surety bond, property bond and full cash bond. A property bond involves the pledge of a defendant's property deed(s) to the court. Full cash bail requires that a defendant pay the full amount of bail in cash to the court. A surety bond involves a third

party who pays the bail requirement on behalf of the defendant in exchange for a non-refundable ten-percent premium from the defendant. This third party is typically referred to as a bail bondsman. The bail bonds industry depends on judges' decisions to demand financial bail from defendants. While the court is concerned with the potential flight risk and danger that a defendant may pose, the bail bondsman's main concern is money (Skolnick, Feeley & McCoy, 2004). The bail bonds industry is profit-driven and privileges defendants who can pay higher premiums and are therefore more profitable, leading to disparities in bail release outcomes.

Bail reform efforts blossomed in the 1960s in response to the criticisms of the cash bail system (Skolnick et al., 2004). Most notably, the Vera Foundation formed the Manhattan Bail Project in 1961, which led to a significant increase in the use of release on recognizance (ROR). ROR is a non-financial release that is contingent on the defendant's assurance to appear at future court proceedings (Eskridge, 1983). The federal Bail Reform Act of 1966 reinforced the use of ROR whenever possible and offered an alternative to the monetary system of bail that dominated the prior decades (Skolnick et al., 2004). The 1966 Act mandated the release on personal recognizance or an unsecured personal bond for individuals charged with non-capital crimes unless the release did not adequately ensure the return of a defendant to future court proceedings. The Act allowed for additional conditions to be imposed by the court, if needed, to safeguard the appearance of the accused at court proceedings (Bogomolny & Sonnenreich, 1969). These conditions *were limited* to those that sought to assure the defendant's appearance in

court and *did not extend* to those that might protect the community from potentially dangerous individuals. The 1966 Act authorized preventive detention only for individuals charged with capital offenses.

The increased use of ROR and the provisions for conditional release fueled the development of pretrial service agencies in the 1960s. Since the bail reform movement of the 1960s, hundreds of pretrial agencies have been established nationwide (Skolnick et al. 2004). These agencies have similar goals but range in their services, including: collecting criminal history information; providing information about community ties; making release recommendations to the court; and supervising offenders who receive conditional release (Skolnick et al. 2004).

However, as the use of ROR increased, a change in the purpose of bail became apparent. The traditional goal of ensuring a defendant's appearance in court was replaced by the goal of preventive detention (Fagan & Guggenheim, 1996). This change in bail was not necessarily surprising given the concurrent system-wide changes in criminal justice. Whereas rehabilitation had been the prevailing rationale of the criminal justice system for several decades (Tonry, 1996; Travis, 2005), this model of justice came under attack in the mid-1970s when studies in the field of criminal justice posited that rehabilitation was not effective (Bertrall, 2006; Martinson, 1975).

In addition to the criticism of rehabilitation, signs of sentencing disparities surfaced in the 1970s and 1980s (Ruback & Wroblewski, 2001; Tonry, 1996). Civil rights activists voiced concerns that sentencing disparities in the criminal justice system were

the result of racial and class biases (Tonry, 1996). Concerns over the failure of rehabilitation and growing sentencing disparities compounded with evidence of rising crime rates lead to a public campaign for harsher sentencing legislation (Travis & Lawrence, 2002).

As Skolnick et al. (2004) note, the demand for tougher crime policies conflicted with the reality of the nation's overcrowded jails. The conflict became moot with the passage of the Bail Reform Act of 1984, which reads: "the judicial officer must order the defendant detained if no condition will reasonably assure the appearance of the defendant and the *safety of the community*." (18 U.S.C. 3142 (e) (italics added.) It became apparent that protecting the public from "dangerous" individuals outweighed other concerns (Fagan & Guggenheim, 1996). Legislators endorsed preventive detention by prioritizing the identification of potentially dangerous offenders. Ironically, death penalty researchers pointed out that the most dangerous offenders, murderers, recidivate less often than other serious offenders (Stolzenberg & D'Alessio, 2004; Vito & Wilson, 1988). Cohen and Reaves (2007) also found that pretrial misconduct rates were the lowest for offenders who were arrested for murder or rape. In the same study, defendants arrested for drug crimes and motor vehicle theft had misconduct rates that were double those of defendants charged with murder and rape.

However, it was clear from passage of the Bail Reform Act of 1984 that identifying dangerous individuals would become a central priority of bail proceedings. The 1984 Act also addressed the importance of conditional release, effectively overruling

the 1964 Act. Although the Bail Reform Act of 1984 codifies the practice of preventive detention, it also mandates ROR or unsecured personal bond when the release of an offender does not jeopardize the safety of the community. Section 3142 (c) of the Bail Reform Act of 1984 gives courts the power to impose additional conditions on the terms of the defendant's release if the safety of the community could be endangered. Again, as explained in the 1966 Act, the court must choose the least restrictive conditions; however, with the passage of the 1984 Act, the purpose of imposing conditions was expanded to include both the appearance of an accused individual at court and the protection of the community. The 1984 Act also addressed the issue of using cash bail to detain defendants in Section 3142 (c) which prohibits the court from “imposing a financial condition that results in the pretrial detention of a person.” However, this directive does not prohibit the court from setting cash bail at an amount that reasonably assures the defendant’s appearance at court proceedings.

Cash bail remains a central feature of bail proceedings even as ROR and conditional release have developed into equally important facets of bail determinations. Looking back at these successive reforms, the first bail reform movement of the 1960s resulted in an increase in the use of ROR and the development of several pretrial agencies nationwide. In the 1980s, a second bail reform movement focused primarily on potentially dangerous offenders and expanded the purpose of bail to include the protection of the community from dangerous individuals.

Bail’s more expansive purpose was quickly challenged in the courts. The 1984

Bail Reform Act represented a significant shift in bail policy and its application - a shift that potentially violated the Eighth Amendment to the Constitution which, after all, states that “excessive bail shall not be required.” The Bail Reform Act of 1984 was challenged in court after its passage in 1984. But the United States Supreme Court had already considered questions about whether “dangerousness” was a proper consideration in sentencing (although not in bail proceedings). In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the petitioner was found guilty of capital murder of a police officer and was sentenced to the death penalty. Barefoot challenged the decision of the appellate court by arguing that the appellate court had improperly denied the petitioner's request for a stay of execution. Barefoot contended that testimony provided at the sentencing hearing by a psychiatrist was improper because the psychiatrist had made predictions about his future dangerousness.

The Supreme Court in *Barefoot* upheld the decision of the appellate court, concluding that it was permissible to have a psychiatrist testify about the future danger posed by a defendant. The majority, in a 6-3 decision, found that the testimony of psychiatrists was not unconstitutional, “since there was no showing that such testimony regarding the defendant's future dangerousness is almost entirely unreliable and that the fact finder and adversary system are not competent to uncover, recognize and take due account of the testimony's shortcomings” (See 463 U.S. 880, 899). While the Court acknowledged that predictions of future behavior are often wrong and prejudicial (463 U.S. 880, 899), it also made clear that this was an issue for the fact finder (the jury) to

decide. The Court's decision in *Barefoot* opened the door for the use of predictions of future behavior in other facets of the legal system, such as bail.

Shortly after the decision in *Barefoot*, the Supreme Court again tackled the issue of predictions of future dangerousness in the case of *Schall v. Martin*, 467 U.S. 253 (1984). This time, the Court squarely tackled the issue of preventive detention based on predictions of dangerousness. In *Schall*, the Juvenile Justice Department of New York City challenged a statute authorizing the preventive detention of juveniles, stating that the prediction of dangerousness was used as punishment and was therefore unconstitutional. The statute, also known as the New York Family Court Act, contains a provision authorizing the pretrial detention of juveniles found to pose a risk of criminal activity during the pretrial phase. Both the lower and appellate courts found this provision unconstitutional because they considered the detention to be punishment without evidence of guilt.

The Supreme Court in *Schall* reversed the decision of the lower appellate court, concluding that sufficient procedural safeguards existed and that preventive detention serves a regulatory rather than punitive function and therefore does not violate the due process rights of juveniles (467 U.S. 253, 281). Moreover, the Court rejected *Schall's* arguments, which the lower court had accepted, that it is difficult to accurately predict future criminal behavior. The Supreme Court responded to this argument by declaring that "from a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct" (See 467 U.S. 253, 278).

It was the Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987) that took preventive detention and predictions of future criminal behavior from the juvenile to the adult legal system and specifically applied them to bail proceedings. Anthony Salerno, “boss” of the Genovese crime family, and Vincent Cafaro, “captain” of the Genovese crime family, were arrested on March 21, 1986, in connection with several RICO (Racketeering Influenced and Corrupt Organizations Act) charges. The indictment alleged activities ranging from fraud and gambling to conspiracy to commit murder. The Government moved to have the defendants detained pretrial; despite evidence of Salerno's medical condition and solid community ties, the district court granted the Government's motion, stating that the safety of the community could not be assured if the defendants were released. On appeal, the lower appellate court sided with Salerno by finding that it was unconstitutional to deny the defendants bail after their arrest in connection with numerous racketeering charges. However, the Supreme Court disagreed with the decision of the appellate court, holding that the provision of the Bail Reform Act authorizing preventive detention was constitutional. The Court concluded that this provision did not violate the due process clause of the Fifth Amendment or the excessive bail clause in the Eighth Amendment.

With its decision, The *Salerno* Court upheld the Bail Reform Act of 1984 and confirmed that preventive detention was a legitimate purpose of bail. The Court, relying on its earlier decision in *Schall v. Martin*, 467 U.S. 253 (1984), found that preventive detention served a regulatory rather than punitive purpose. In accordance with this view,

the Court affirmed the decision of the lower court, stating that “[t]he Court of Appeals assumed that pretrial detention under the Bail Reform Act is regulatory, not penal, and we agree that it is” (See 481 U.S. 739, 746). The Court articulated the following conditions, under the Bail Reform Act, for which preventive detention is sanctioned: “cases involving violence; crimes for which the penalty is either a life sentence or death; significant drug offenses; and specific repeat offenders” (481 U.S. 739, 747).

The recent history of bail at the federal level has been marked by a reduction in the rights enjoyed by criminal defendants. States obviously have the discretion to lower standards in state law when the Supreme Court determines that the federal Constitution provides fewer rights. Most states proposed their own version of the 1984 Bail Reform Act after the United States Supreme Court upheld its “dangerousness” standard under the Eighth Amendment. Currently, forty-four states and the District of Columbia have passed bail legislation modeled after the federal system (Pretrial Resources Service Center, 1999) that allow predictions of dangerousness to be taken into account in bail decisions. New Jersey, however; is not one of them.

2.2. Criminological Research About Bail

a. Selective Incapacitation Policies

Predictions of danger became an inherent feature of the criminal justice system with the socio-legal shift from rehabilitation to incapacitation that occurred in the 1980s. Selective incapacitation policies aim to identify and incapacitate high rate offenders

during periods of high-rate offending in order to reduce crime (Von Hirsch, 1998). The selective incapacitation rationale can be linked to a Philadelphia cohort study conducted by Wolfgang, Figlio, and Sellin (1972). In their study, Wolfgang et al. (1972) followed a birth cohort of boys in Philadelphia and found that 6.3% of the cohort was responsible for committing 51.9% of all offenses. The findings gave birth to the so-called “career criminal” literature and brought attention to selective incapacitation as a basis of punishment in criminal justice policy.

While Wolfgang et al. (1972) identified the career criminal, it was not until approximately ten years later that the strategy of selective incapacitation was introduced into the criminal justice system. Many changes occurred between 1972 and 1982 that resulted in the eventual move away from rehabilitation as a sentencing philosophy. In addition, as noted by Von Hirsch (1998), a number of self-report surveys administered in the 1980s revealed that a majority of offenses were committed by a small number of offenders. One of the most notable studies of selective incapacitation was conducted by Peter W. Greenwood and Allan Abrahamse of the Rand Corporation. Their 1982 report, titled “Selective Incapacitation,” detailed the findings from a survey of incarcerated robbers and burglars, who self-reported that they had committed very high numbers of crimes before getting caught. Greenwood and Abrahamse (1982) argued that the identification and prolonged incapacitation of high-rate offenders would reduce the overall crime rate. This report brought selective incapacitation to the forefront of criminal justice policy and led to an ongoing debate over the merits of selective

incapacitation strategies (Auerhahn, 1999, Chaiken & Chaiken, 1984; 2006; Tonry, 1998; Von Hirsch, 1984, 1998).

On the surface, the RAND study (1982) appeared to provide strong support for selective incapacitation policies. However, a closer look at the findings revealed several potential problems with the conclusions drawn from the study: the absence of detailed information described by Greenwood and Abrahamse in official records (see Chaiken & Chaiken, 1984); the limitations associated with the use of self-reports (Von Hirsch, 1998); and a lack of generalizability (which led to an overestimation of crime reduction effects, see Von Hirsch, 1998). Von Hirsch argued that the reliance on self-report data, which could not be confirmed by court records, could lead to serious inflation of estimates of crimes committed. Offenders might “brag” and overstate their crimes, or forget periods of desistance. Under any circumstance, there was no way to confirm the numbers objectively. As a result, selective incapacitation of these offenders, he argued, might not achieve the crime reduction benefits the RAND report predicted.

While subsequent evaluations of the RAND study revealed areas of concern (Auerhahn, 1999; Chaiken & Chaiken, 1984), the problems associated with selective incapacitation policies extend far beyond Von Hirsch’s objections. First, risk assessments by mental health specialists as predictions of future criminal behavior are not always accurate; as explained by Auerhahn (1999), predictions of criminality may suffer from methodological errors. “Underpredictions”, also known as false negatives, occur when high-rate offenders are incorrectly labeled as low-rate offenders. These offenders may

pose a threat to public safety when incorrectly identified. Equally as worrisome, “overpredictions”, or false positives, occur when low-rate offenders are incorrectly labeled as high-rate offenders. Overpredictions create the potential for improper incarceration or the imposition of an unnecessarily punitive sentence. Alarming high rates of false positives in excess of 50% have been found in several studies (Cohen, 1983; Kozol, Boucher, & Garofalo, 1972; Monahan, 1981).

In addition to the possibility of inaccurate predictions, selective incapacitation policies suffer from problems with replacement effects (Chaiken & Chaiken, 1984; Von Hirsch and Gottfredson, 1983; Zimring and Hawkins, 1995) and conflict with the principle of proportionality (Von Hirsch, 1998). Furthermore, critics of selective incapacitation point out that the policy widens the gap in imprisonment rates between black and white offenders. These critics argue that judges tend to see young black men as dangerous while regarding young white offenders as candidates for in-community sanctions. They blame the policy of selective incapacitation, in part, for rising rates of imprisonment that also exacerbates sentencing inequalities (Tonry 1994; Western 2004). Even while sustaining heavy criticism, in the late 1970s selective incapacitation policies replaced rehabilitative policies as the preferred mode of criminal justice. These policies have remained crucial to the operation and our understanding of the criminal justice system.

b. Risk Management and New Penology

In light of this development, Feeley and Simon (1992) offered a widely debated theory about the shift in penology to selective incapacitation. According to Feeley and Simon (1992), management of the dangerous classes is a part of the move from the old penology to a new penology. Backlash against the failing penal practices of the 1960s and 1970s and the methods of classification and prediction shifted the focus to surveillance and control, rather than the traditional focus on the individual. A consequence of this shift is the reliance on statistical averages and aggregations to determine fixed sentences. Many sentencing schemes are currently based on guidelines that use offense seriousness and prior criminal history to derive sentencing ranges (Feeley & Simon, 1992).

Feeley and Simon (1992) describe three major developments that occurred in the shift to the new penology, from the language of clinical diagnosis to probability and risk; from a focus on reducing recidivism to an increasingly efficient control system; and from the technique of targeting individuals to targeting aggregate populations of offenders . Accompanying these new objectives is a new set of techniques used by practitioners. One of the new techniques includes a focus on incapacitation as a more cost-effective form of custody and control. Following Auerhahn (1999), Feeley and Simon (1992) discuss the compatibility of incapacitation and risk management, as both of these objectives can be accomplished by utilizing the other. Selective incapacitation policies, with their focus on distinguishing between high and low-risk offenders, are particularly

demonstrative of the move towards a new penology.

Feeley and Simon (1992) argue that penal practices found under the new penology are evident in many areas of criminal justice, especially in the court system. They reference the *Salerno* decision in their discussion of the new penology, pointing out that the decision to use preventive detention, as decided by the *Salerno* Court, is further evidence that the courts are more concerned with managing risk than dealing with the individual. Feeley and Simon (1992) also discuss the widening of the “carceral net” created by the use of incapacitation and other sanctions including probation and parole to support their argument that there has been a noticeable shift to the objective of risk management.

Along these lines, Kellough and Wortley (2002) sought to test the influence of the new penology in bail decisions. According to Kellough and Wortley (2002), bail decisions provide a good forum for examining theories of risk and decision making in the criminal justice system. At the pretrial stage, defendants are considered innocent until proven guilty. Therefore, the usual justifications found in the sentencing phase are absent. There is no legal requirement to base bail decisions on deterrence or rehabilitation or, for that matter, any other punishment philosophy. As pointed out by the Court in *Schall v. Martin*, preventive detention in the pretrial phase is used for regulatory and not punitive purposes (See 467 U.S. 253, 281). The primary considerations for bail decisions are actually based on risk; the risk of flight and the risk of danger to the community. That bail decisions primarily concern risk management lends credence to

Feeley and Simon's (1992) assertion that the new penology has made its way into bail decisions.

Feeley and Simon (1992) relate the new goal of managing risk to the notion of the “dangerous underclass”. As the authors explain, the dangerous classes are a high-risk group that must be managed efficiently to minimize the risk to society. By “underclass,” the authors envision a “largely Black and Hispanic population living in concentrated zones of poverty in central cities, separated physically from and institutionally from the suburban locus of mainstream social and economic life in America” (Feeley and Simon, 1992, p. 467). Because they have few job skills, are under- educated and are consequently perceived as contributing little to society, the goal of the penal system becomes managing the risk posed by this marginalized population (Feeley & Simon, 1992). Although the characteristics of an underclass are not necessarily linked to particular race or ethnicity, in the United States the poorest and least educated are more likely to be people of color than whites. The new penology, in its account of the “underclass,” suggests that race may be a proxy for dangerousness in judicial decision making. However, the idea that race can stand for dangerousness is certainly not a new one.

c. Race and Dangerousness

Sentencing scholars have extensively examined the connection between race and dangerousness to address concerns over the impact of race on judicial decisions.

Albonetti (1991) suggested the “uncertainly avoidance/causal attribution” wherein judges, with excessive caseloads and incomplete information, rely on stereotypes and prior experience when making sentencing decisions. Racialized decision making has also been examined in the context of bail decisions since bail proceedings require judges to make quick assessments of defendants based on little information (Fagan & Guggenheim, 1996). Demuth (2003) asserts that faced with an overwhelming case processing system, judges make decisions based on both legal factors and stereotypes associated with the defendant's race, ethnicity and socio-economic class. According to Demuth (2003), judges may form behavioral expectations about defendants based on certain stereotypes that strengthen over time. In particular, judges may come to hold certain beliefs about a defendant's potential danger to the community based on the defendant's race or social class. In turn, these biases can affect pretrial decisions. According to Demuth (2003), these negative stereotypes have developed in the wake of the demand for tougher crime control policies and persistent perceptions of minorities as a part of the “underclass”. Other theorists suggest that the perspective of racial threat has led to the idea of the “urban, underclass blacks and drugs” and is based on a “moral panic” surrounding the war on drugs. Jenkins (1994) claims that intolerance for drug-related crimes links racial minorities to these crimes and has led to more severe sentences for minority offenders.

Demuth (2003) interprets the notion of stereotyping in pretrial decisions using the “focal concerns” theory of judicial decision making, first suggested by Steffensmeier (1980) and later extended by Steffensmeier et al. (1993, 1998) and Steffensmeier and

Demuth (2001). According to this theory, judicial agents are guided by concerns of blameworthiness, the safety of the community, and practical constraints such as organizational costs and social consequences, when making sentencing decisions. This theory suggests that internal and external factors impact the courts' sentencing decisions.

However, it has also been suggested that attributions linked to extralegal factors such as race and ethnicity impact these focal concerns (Steffensmeier et al., 1998). More specifically, some studies have found that Black men are seen as aggressive and dangerous (Title & Curran, 1988, Gibbs, 1998). Spohn and Holleran (2000) found that young men of racial minority groups are perceived as dangerous and receive harsher punishments as a means of social control. Demuth (2003) notes that decision making at the pretrial phase may be particularly susceptible to the influence of attributions, as these decisions are often made without all of the pertinent legal information.

Schlesinger (2005) draws on focal concerns theory as well as the "racial formation perspective" and "attribution theory" to explain the effects of race/ethnicity on pretrial decisions. According to the racial formation perspective, each racial and ethnic group has its own set of perceived attributions (Chiricos, 1996). For example, Black men are often seen as dangerous (Title & Curran, 1988, Gibbs, 1998) and Hispanics are often perceived as criminal (Brown & Warner, 1992). Although the stereotypes may overlap, they are separate. According to Schlesinger (2005), attribution theorists believe that certain legal factors will increase the likelihood of negative attributions perceived by judicial decision makers. For example, attributions of Black men as dangerous become

more likely when Black males are charged with violent crimes.

Schlesinger (2005) explains that attributions of dangerousness are especially relevant when judges make bail decisions because many states recognize the protection of the community from potentially dangerous individuals as the goal of bail. Further, Schlesinger (2005) integrates the three perspectives to explain racial and ethnic disparity in pretrial case processing. According to the author, judges have insufficient time and information and will therefore rely on legal factors as well as distinct attributions related to a defendant's social characteristics during pretrial processing. Certain attributions will be more important depending on the legal circumstances and will result in adverse pretrial decisions (Schlesinger, 2005). These theories raise the possibility that judges may perceive defendants from racial minorities as dangerous when making bail determinations.

Both sentencing and bail scholars have contributed to this ongoing discussion in an attempt to understand the factors that impact judicial decisions. A host of theories have been developed to explain legal decision making: Perceptions of dangerousness, attributions of blame, and risk management are some of the more prominent theories offered by scholars. The common thread is that bail decisions are made without sufficient time and information, leaving room for spurious factors to influence who gets bail.

d. Who Gets Bail?

The preceding considered the factors that impact bail decisions and how those components of the decision may be either internal or external to the court. Internal factors can include: the norms of the courtroom work group, the attitudes of these individuals, and the resources available to the court. While research on sentencing has included these factors, studies of bail have typically focused on factors external to the court, both legal and extralegal. Legal factors include the type and severity of the offense, the defendant's prior criminal record, and the number of charges involved. Extralegal factors usually include the defendant's age, gender and race.

Some notable studies have examined the relationship between pretrial release and race/ethnicity. Some of this research has focused on the relationship between race and bail amount set by the court (Demuth, 2003; Demuth & Steffensmeier, 2004; Katz & Spohn, 1995; Nagel, 1983) Using a sample of violent offenders in Detroit, Katz and Spohn (1995) found that race did not play a role in the bail amount set by the court. Looking at pretrial release decisions in New York, Nagel (1983) found that white defendants received lower bail amounts and were offered cash alternatives more frequently than black and Hispanic defendants. The author also found that English speaking defendants enjoyed more favorable bail amount decisions than defendants whose primary language was Spanish.

In their study of bail bond determinations in New Haven, Connecticut, Ayres & Waldfoegel (1994) found that the court set bail at “unjustifiably” high amounts for black

and Hispanic males when compared with white males. Further, Turner & Jackson (2005) found that the court set higher bail amounts for Hispanic defendants than their black and white counterparts. More recently, Demuth (2003) examined the effect of legal and extralegal variables on pretrial decisions and found that bail amounts set by the court are higher for Hispanics than black or white defendants and that Hispanics are the least likely to be granted non-financial conditions of bail.

The research on bail also examines the relationship between race/ethnicity and pretrial detention of defendants. Katz & Spohn (1995) found that blacks were more likely than white defendants to be detained during the pretrial phase. Demuth (2003) found that black and Hispanic defendants were denied bail more often than white defendants. More recently, Cohen and Reaves (2007) found that Hispanics were less likely than other races to be released and that males were less likely than females to be released pretrial. Pretrial detention can result from adverse judicial decisions, although it may also occur when a defendant is unable to meet even a minimal bail requirement and is therefore detained.

Demuth (2003) notes the importance of including both pretrial decisions and pretrial outcomes, as disparities may occur due to both bail decisions and the defendant's ability to meet bail conditions. Demuth & Steffensmeier (2004) found that females and white males are in an advantageous position in that they are more likely to post bail when compared to Hispanic defendants. Schlesinger (2005) concluded that legal variables are the strongest predictors of pretrial *decisions*; however, the author found that race and ethnicity best predict pretrial *outcomes*. More specifically, black and Latino defendants

are less likely than white defendants to post bail and therefore remain detained during the pretrial period.

The overall findings are somewhat mixed regarding the relationship between pretrial release and race/ethnicity. Lafree (1985) found mixed results with regard to the treatment of Hispanic defendants in the Southwest. He observed that Hispanic defendants in Tucson, Arizona had higher odds of pretrial release than white defendants during the pretrial process. However, the results in El Paso, Texas indicated just the opposite: Hispanic defendants were treated less favorably than white defendants in that they were detained pretrial more often. In addition, black and Latino defendants received less advantageous pretrial release outcomes when compared with white defendants. Schlesinger (2005) notes that when black and Latino defendants have similar legal circumstances, black defendants receive more advantageous pretrial decisions than Latino defendants. This review of the literature on the pretrial process suggests that white defendants typically receive more advantageous pretrial decisions and outcomes than black and Hispanic defendants.

Past research on pretrial release decisions also suggests that both the offense severity and the criminal record are the best predictors of judicial decisions (Goldkamp, 1979; Gottfredson and Gottfredson, 1990; Holmes et al., 1996). Demuth & Steffensmeier (2004) found that in addition to distinctions according to race, prior criminal record and offense severity exert a strong effect on both pretrial decisions and pretrial outcomes. Schlesinger (2005) found that race and ethnicity both affect pretrial processing; however,

legal variables are the strongest predictors of pretrial decisions by the court.

In her study of factors affecting release and bail decisions in New York City, Phillips (2004) found that charge severity and criminal history were strong predictors of ROR decisions. However, the strongest predictor of ROR, consistent with some prior research on bail decisions (Dhami, 2002; Varma, 2002) was the bail request made by the prosecutor. According to Phillips (2004), this factor accounted in large part for charge severity, as well as criminal history and strength of the case. Requests by the prosecutor also exerted the strongest impact on bail amount set by the court when financial release was imposed.

In their observational study of bail decisions in Perth, Australia, Allan et al. (2005) also found that legal factors affected bail decisions, while extralegal characteristics did not. They found that the number of charges had a strong inverse effect on bail decisions. The odds of a defendant being granted bail decreased as the number of charges increased. Allan et al. (2005) also found that legal representation and formal bail applications played a significant role in bail determinations. Specifically, bail was more likely to be granted if a defendant had legal representation and if a formal bail application was requested.

Cohen and Reaves (2007) conducted a comprehensive study of pretrial decisions and outcomes of felony defendants in state courts between 1990 and 2004, and found that approximately 62% of felony defendants were released prior to their case disposition. In addition, their results show that one out of six defendants were denied bail; however, five out of six defendants could not meet the financial requirements the court set. Cohen and

Reaves (2007) also found that defendants who were charged with violent offenses or who had criminal records were more likely to have bail denied or have a high amount of bail set. These results indicate that both legal and extralegal factors predict bail outcomes and decisions.

The research on bail shows that both legal factors, such as prior criminal history and offense severity, and extralegal factors, such as race, ethnicity and gender, impact pretrial decisions and outcomes. The current research examines the factors most salient to bail decisions in a jurisdiction that runs counter to the prevailing model of bail found in the federal system and the many states emulating it. Previous researchers have examined bail decisions in some of the following jurisdictions: Katz and Spohn (1995) in Detroit; Nagel (1983) and Phillips (2004) in New York City; Turner and Jackson (2005) in Lincoln, Nebraska. Very often studies of bail have been conducted in one jurisdiction; however, this study examines data collected from all twenty-one counties in New Jersey. This research also analyzes bail outcomes as the outcomes affect the following decision points in a case. Defendants who are held in pretrial detention may be more eager to plead guilty and may suffer adverse consequences at sentencing. This study examines the impact of bail decisions/outcomes on plea bargaining and sentencing to illustrate the connection between these decision points in case processing.

2.3. Impact of Bail Decisions on Subsequent Court Decisions

a. Plea Bargaining versus Trial

Plea bargaining is the “middle point” of case processing, between pretrial status and adjudication of guilt and (in 97% of cases) sentencing. But, as Albonetti (1990) puts it, “by focusing largely on outcome decisions (bail and sentencing), research has failed to examine race differences in actual *processing*, namely, whether the case went to trial or was pled guilty.” Albonetti and other researchers remind us that bail is at the beginning of process but that other decision points, especially plea bargaining, are on the path that leads to sentencing.

Plea bargaining, as Feeley (1982) describes it, refers to a defendant's decision to waive a trial and plead guilty in exchange for a more lenient punishment than would be expected after being found guilty at trial. McCoy (1993, p. 50) defines plea bargaining as “the process by which the defendant in a criminal case relinquishes the right to go to trial in exchange for a reduction in charge and/or sentence.” Although the definitions of plea bargaining may vary, McCoy (2005) notes that one critical feature remains the same: plea bargains always involve a confession and a waiver of the defendant's right to trial.

Part of the opposition to the practice of plea bargaining stems from the coercion of defendants' to give up their rights through promises of leniency or threats of harsher punishment at trial. McCoy (2005) describes the escalating problem of the “trial penalty” suffered by defendants who choose trial over plea bargaining. According to McCoy (2005), prosecutors gained substantial power with the passage of several mandatory

sentencing laws and sentencing guidelines in the 1980s. The threat of a trial penalty, in addition to the existing severe sentences prescribed by current laws, grants prosecutors the leverage needed to impose plea bargains on defendants. McCoy (2005) explains that although the trial penalty may not be a new phenomenon, it has become much more serious due to the inflation of the “going rate”.

The going rate is the punishment expected for an offense type and it has increased due to harsher sentencing legislation and more punitive public attitudes toward crime in the last thirty years. In an analysis of court statistics from felony cases, McCoy and Cohen (2003) set out to examine whether cases involving a jury trial received longer sentences than those involving a bench trial or guilty plea. Controlling for various factors and comparing only similar felony cases, results indicated that sentences subsequent to jury trial convictions were 44.5 months longer than those accepted in plea bargains. McCoy (2005) suggests that the severity of the trial penalty for similarly situated cases should cause professionals to question whether the trial penalty is tantamount to institutionalized coercion.

b. Factors Contributing to Guilty Pleas

Previous research that has examined the coercive nature of the guilty plea indicates those defendants who pled guilty received less severe sentences than those who took their cases to trial (Brereton & Casper, 1981-1982; Uhlman & Walker, 1980). Albonetti (1990) suggests that the finality of the conviction underscores the importance of

studying factors that contribute to a defendant's decision to plead guilty. In her study, Albonetti (1990) found that the number of charges, a confession and physical evidence increase the probability of a guilty plea whereas the severity of the penalty, use of a weapon and the number of witnesses decrease the probability that a defendant will plead guilty. Meyer and Gray (1997) also found that offense severity was the strongest determinant of guilty pleas.

However, legal predictors are not the only factors that influence plea bargaining. Meyer and Gray (1997) found that white defendants were more likely to plead guilty. But most studies have found that black defendants are less likely than white defendants to plead guilty (Albonetti, 1990; Frenzel & Ball, 2007; Kellough & Wortley, 2002). Kellough & Wortley (2002) found that younger defendants are more likely than older defendants to plead guilty. While the research shows that both legal and extralegal factors impact the decision to engage in plea negotiations, Feeley (1979) suggested pretrial detention would increase the likelihood of a defendant pleading guilty. After all, those who cannot afford bail will have to wait in jail until their cases are concluded. According to the Bureau of Justice Statistics (2008), approximately 43% of defendants are held until case disposition. This may provide an incentive to plead guilty since it is reasonable to expect that the longer the defendant is held in custody, the greater the incentive he or she has to plead guilty in order simply to be released – especially when the sentence is unlikely to exceed the time spent incarcerated waiting for trial and the judge will set the sentence upon conviction as “time served”.

Only a few studies have examined this hypothesis and two of these studies found that being held in custody did not significantly predict a defendant's decision to plead guilty (Albonetti, 1990; Meyer & Gray, 1997). However, in their Canadian study of bail decisions and plea bargaining, Kellough & Wortley (2002) found that *individuals detained pretrial are more likely to enter into guilty pleas*. Kellough & Wortley (2002) note that individuals held pretrial may plead guilty for various reasons, including the following: the crime to which an individual pled guilty may not involve any prison time; a plea may result in a sentence of time served and ultimately a release from jail; and pleading guilty might mean moving to a more stable and less crowded correctional facility. For various reasons, pleading guilty while in pretrial detention might be the more appealing option than opting for trial. McCoy (2008) echoes this sentiment by suggesting that low-level offenders who face only short jail terms or non-incarcerative sanctions will plead guilty simply to get out of jail. The current research follows the same line of reasoning considering that decisions at the pretrial stage will influence later decisions, including those involved with plea bargaining and ultimately sentencing.

c. Sentencing

Scholars have found that legal factors such as seriousness of the offense and prior criminal history play a significant role in incarceration decisions (Gottfredson & Gottfredson, 1988; Neubauer, 2002) while others have also documented the impact of extralegal factors such as race and gender in sentencing decisions (Spohn, Gruhl &

Welch, 1981; Steffensmeier, Ulmer & Kramer, 1998). But the legal factor of pretrial status also may significantly affect sentencing yet this variable is seldom included in sentencing studies. It appears from current research that offense severity and criminal history are the strongest predictors at all stages of criminal adjudication including bail decisions, guilty pleas, and sentencing. However, the interaction of these factors with pretrial status and their effect on guilty pleas and sentencing is seldom studied. The current study looks at the factors that impact all three of these components. It is possible that the factors that affect judicial decisions about bail and sentencing will have little to do with why defendants plea bargain.

As Foote (1954) posited over fifty years ago, defendants who are incarcerated before trial are not in a position to fully contribute to their own defense. Recent research regarding the link between pretrial incarceration and case disposition shows more conclusive evidence. Defendants who are detained pretrial are usually unable to afford representation, a situation that is worsened by the increased costs imposed by pretrial detention. To make matters worse, lawyers usually spend less time with detained defendants than with those released on bail (Allan, Allan, Giles, Drake & Froyland, 2005).

Pretrial detention and the defendant's lack of involvement in his/her own defense have important implications for the outcome of the case. According to results from an ongoing study conducted by the New York City Criminal Justice Agency (CJA), pretrial detention has a negative impact on case disposition from the defendant's point of view.

The study suggests that pretrial detention increases the likelihood of conviction, the likelihood of imprisonment and the length of incarceration (Phillips, 2008). Previous research on this topic has also acknowledged that pretrial detention can have an adverse effect on conviction. Findings from the first study on the subject, conducted by Ares, Rankin and Sturz (1963) as part of the Manhattan Bail Project, concluded that defendants held in pretrial detention were more likely to be convicted and incarcerated. Another Manhattan Bail Project study conducted by Rankin in 1964 reached the same conclusion.

More recent research provides evidence of the link between pretrial detention, conviction and incarceration. In a study of the effect of pretrial decisions on incarceration, Williams (2003) found that defendants held in pretrial custody were more likely to receive a sentence of incarceration and longer sentences when incarceration was imposed. Other research that did not focus on pretrial detention found that defendants held in custody were more likely to be convicted (Cohen & Reaves, 2007) and were more likely to be sentenced to a term of incarceration (Chiricos & Bale, 1991; Goldkamp, 1980; Holmes & Daudistel, 1984).

Beyond the legal consequences, incarceration has a range of other damaging effects on offenders and their family members (Travis, 2005; Western, 2002; Western, 2006). When defendants are denied bail, they are typically held in local jails during the pretrial period. According to the Bureau of Justice Statistics (BJS, 2010), by midyear of 2009, there were approximately 767,000 inmates being held in local jails. Although local jails also house offenders who have been convicted and sentenced to serve a term of

incarceration (usually one year or less), approximately 62% of the 767,000 inmates detained in jails are being held before trial (BJS). Research shows that incarceration is associated with a range of detrimental effects, including: lower employment rates, decreased wages, physical and psychological conditions, weakened familial bonds and higher rates of recidivism (Allan et al., 2005; Travis, 2005; Western, 2002; Western, 2005). With the potential for such consequences, the study of pretrial structuring and administration is central to the legal system.

Twenty-three years have passed since the decision in *Salerno*. While the pronouncement of punishment at sentencing will result in a term of imprisonment for many defendants, decisions relating to pretrial detention are also tantamount to a term of incarceration, bringing with it the same host of post-incarceration effects associated with a term of incarceration -- e.g. decreased employment rates and wages, etc. In addition, as mentioned previously, bail decisions stand at the forefront of the criminal justice process and hold great potential to adversely affect plea bargaining and the outcome of a defendant's case. A term of incarceration, then, whether brief or long-term, can be traced to the pretrial decision. The fact that the decision points throughout a case are linked, beginning with pretrial proceedings, makes it a even more important to study bail operations more thoroughly.

2.4. What This Study Adds to the Literature

a. Replication in New Jersey

Using data that has not been analyzed for academic research before, this study replicates existing research of bail operations. Some prominent theories of judicial decision making have been offered by sentencing researchers and have been extended to bail decision making. Focal concerns theory, attribution theory, and new penology are all among these well-known perspectives. The quantitative data in this study contains several indicators of case and defendant characteristics and the qualitative data contains indicators of internal court considerations. These data were used to assess the merits of the aforementioned theories and to determine if a combination of these perspectives offers a more comprehensive explanation of bail decision making.

The data for this study was collected from the State of New Jersey.¹ The New Jersey Court Rules, which govern the state's criminal practices, illustrate both the goals of bail and the factors most relevant to bail decisions. New Jersey employs a very different system of bail than the one used in the federal system. In this jurisdiction, potential dangerousness cannot serve as a criterion for preventive detention. The Court Rules state that preventive detention is only authorized when a defendant has been charged with a capital crime.

According to Rule 3:26-1, all defendants who are charged with a crime not punishable by the death penalty shall be eligible for bail in New Jersey; moreover, bail

¹ A full description of the data for this research will be provided in a subsequent chapter.

must be set within twelve hours of arrest. The Court Rules clearly articulate that the purpose of bail in New Jersey is to ensure the future appearance of a defendant at court proceedings. Although the federal courts opened the door to using dangerousness as a criterion for bail proceedings, New Jersey chose not to reform its system, thereby retaining the original purpose of bail, where preventive detention based on dangerousness is prohibited under the state Constitution. As for the type of release to be granted, according to N.J. Rule 3:26-1 the judge is directed to consider these factors:

1) the seriousness of the crime charged against defendant, the apparent likelihood of conviction, and the extent of the punishment prescribed by the Legislature; (2) defendant's criminal record, if any, and previous record on bail, if any; (3) defendant's reputation, and mental condition; (4) the length of defendant's residence in the community; (5) defendant's family ties and relationships; (6) defendant's employment status, record of employment, and financial condition; (7) the identity of responsible members of the community who would vouch for defendant's reliability; (8) any other factors indicating defendant's mode of life, or ties to the community or bearing on the risk of failure to appear, and, particularly, the general policy against unnecessary sureties and detention (NJ Court Rules 3:26-1(a)).

First and foremost the court considers the seriousness of the crime, followed by the defendant's criminal history and a comprehensive list of factors relating to a defendant's community ties. These factors (the *Johnson*² factors) are each supposed to carry equal weight. While bail cannot be denied to individuals based on their potential dangerousness in New Jersey, the court can consider the protection of the community when imposing certain conditions. According to Rule 3:26-1(a), the court may release an individual on the individual's own recognizance and the court may impose conditions upon release necessary for the protection of the community.

² These factors were originally introduced by the court in *New Jersey v. Johnson*, 61 N.J. 351 (1972).

New Jersey Court Rules do not address the issue of dangerousness; however, according to New Jersey Criminal Procedure, certain crimes have bail restrictions. Under this statute, bail restrictions apply to crimes in the first and second degree in the following categories:

1) Murder, 2) Manslaughter, 3) kidnapping, 4) sexual assault, 5) robbery, 6) carjacking, 7) arson/related offenses, 8) causing/risking widespread injury/damages, 9) burglary, 10) theft by extortion, 11) endangering welfare of children, 12) resisting arrest/eluding officer, 13) escape, 14) corrupting/influencing a jury, 15) possession of weapons for unlawful purpose, 16) weapons training for illegal activities. Crime with bail restrictions also includes any first or second degree drug-related crimes under chapter 35 of Title 2C of the New Jersey Statutes and any first or second degree racketeering crimes under chapter 41 of Title 2C of the New Jersey Statutes. (NJ Stat. § 2A:162-12).

In cases involving these specified crimes, the bail posted is restricted to full cash, surety bond executed by a corporation, or a bail bond secured by property equal to the bail amount plus an additional \$20,000. Release on recognizance is not an option. In all other cases, bail can be posted in the form of full cash, surety bond, property bond or ten percent cash bail and the court can choose to release a defendant on personal recognizance or on conditional release (NJ Court Rules 3:26-1(a)) and such a release is presumed for defendants not charged with the serious crimes listed. Other federal and state laws, by contrast, allow judges to detain persons accused of crimes of lower seriousness if the detention is necessary for protection of the community.

In addition to the New Jersey Court Rules, the case law, or the lack thereof, indicates that dangerousness is not a feature of New Jersey's bail scheme. While the federal courts have decided many cases that approve the use of preventive detention, New Jersey's constitutional prohibition of the practice has held firm. In the only major case

addressing the matter, *New Jersey v. Johnson*, 61 N.J. 351 (1972), the state Supreme Court held that lower courts cannot constitutionally deny bail in non-capital cases. The outcome of this 1972 case was decided before the 1984 Bail Reform Act encouraged states to move to a much more restrictive model, but there is no subsequent case indicating that New Jersey has made such a move (Kazemian, McCoy & Sacks, unpublished manuscript). Aside from this case, the majority of New Jersey bail cases address the issue of bail forfeiture. In one of the more noteworthy cases, *New Jersey v. Korecky*, 169 N.J. 364, the state Supreme Court as recently as 2001 held that assuring a defendant's presence in court is the main objective of bail. New Jersey has retained its original bail laws in an era when preventive detention has taken a firm hold. Therefore, New Jersey offers a proper forum for replicating existing bail studies in a new time and location under different legal conditions. Moreover, this study extends the research on bail operations by going a step further to analyze the impact of bail decisions on guilty pleas and sentencing.

b. Impact of Timing on Case Disposition

Research on pretrial operations requires the acknowledgement that bail is one decision point among many in criminal case processing. This study posits that bail outcomes can be linked to subsequent decision points. Therefore, this research analyzes the importance of bail decisions throughout the entire course of the case. The studies reviewed in the above have examined bail decisions, plea bargaining and sentencing;

these studies usually have examined just one of these stages (Demuth, 2003; Frenzel & Ball, 2007) while others have combined two of the decision points for analysis (Kellough & Wortley, 2002). However, few studies to date have focused on the entire process (Phillips, 2008).

The research on factors affecting both bail and sentencing is substantial; however, the research on factors affecting guilty pleas is not as extensive. The studies that have examined this decision point have typically measured a dependent variable for case disposition as a binary variable that limited the options for analysis to *guilty plea* or *trial*. However, since the majority of cases are resolved through guilty pleas, there is little variation in this variable and analysis is inconclusive unless many independent variables are utilized. One approach would be to find other factors that may affect guilty pleas, such as the length of time to the disposition of a case. The right to a “speedy and public trial” is afforded to criminal defendants by the Sixth Amendment to the United States Constitution; charging the courts with the task of providing justice in an expeditious manner. According to the BJS (2006), the average case processing time for felony defendants is approximately 10.1 months, while cases involving misdemeanors take approximately 4.6 months to resolve. Prompted by an interest in how the courts balance these goals, some researchers have examined factors that contribute to case processing time (Church 1982, Flemming, Nardulli, & Eisenstein, 1987; Ostrom & Hanson, 1999).

In their analysis of nine state criminal trial courts, Ostrom & Hanson (1999) examined the impact of case characteristics, management strategies and resources on the

pace of felony litigation. In examining these factors, the authors framed their analysis as a comparison of the impact of organizational characteristics on case characteristics. Regarding culture of the court, Ostrom & Hanson (1999) found that prosecutors and public defenders in faster courts generally feel pleased about their level of communication, view their opposing counsel as competent adversaries, share expectations about the timing of case dispositions and do not feel that they need more resources, in contrast to their counterparts from slower courts. These findings indicate that prosecutors and public defenders in courts with a faster pace of litigation hold similar views on management strategies and resources.

Ostrom & Hanson (1999) also found that certain case characteristics had a significant impact on the pace of litigation. According to the authors, cases that involve the most serious offenses require the longest time from their beginning to their disposition. Unsurprisingly, they found that trial cases take longer to resolve than cases settled via guilty pleas as do cases in which bench warrants are issued; finally, cases in which defendants are released on bond also take longer to resolve. Ostrom & Hanson (1999) concluded that cases involving detained defendants are settled faster because courts try to decrease the cost of incarceration while maximizing the liberty afforded to defendants.

Ostrom & Hanson's (1999) explanation of their findings proposes that earlier case dispositions for defendants who are detained before trial are a function of court efficiency. While the researchers operationalize bond status at the level of the defendant, they

attribute its impact to *intra-* court considerations of management. Additionally, the potential impact of bail practices on case dispositions was not the focus of Ostrom & Hanson's (1999) study. In light of these considerations, the current research posits that defendants held before trial will plead guilty earlier to get out of jail quickly, a reason that may coincide with court efficiency explanations. Looking at the body of past research, this dissertation adds to the theoretical understanding of plea bargaining and sentencing by framing bail outcome as an independent variable to test the timing of disposition and sentencing outcomes as dependent variables.

CHAPTER 3: METHODOLOGY

3.1. Hypotheses

This study investigates the factors that significantly affect bail decisions and the outcomes those decisions in New Jersey where state law presumes release. This research looks at the circumstances under which judges decide whether to grant release on one's own recognizance or to require defendants to post bail. The amount of bail is also examined, as bail in certain cases will be tantamount to preventive detention. Judges can set bail at an amount that is beyond a defendant's means, even if that amount would not generally be considered high. The effect of the amount of bail is relative to a defendant's economic resources. The current study is mindful of this reality and consequently examines the outcomes that are the result of decisions about bail. In order to understand bail in criminal procedure, it is crucial to examine not only decisions about bail but also the outcomes of those decisions. Even if a judge acts in accordance with the law by not preventively detaining a felon, a defendant may still be detained due to an inability to post bail.

This research begins with the pretrial process and an examination of the factors that impact bail decisions and their consequent outcomes. Further, because pretrial decisions may also play an important role in plea bargaining and ultimately sentencing, this study will also examine the influence, if any, of pretrial detention on plea bargaining in New Jersey. Finally, this research will investigate the factors that impact the final phase of the criminal justice process in sentencing. The following hypotheses will be tested:

H₁: Under a presumptive release law, only the seriousness of the offense will be significantly related to the decision to release arrestees on own-recognizance and, when bail is required, only offense seriousness will account for the amount of monetary bail set by the court.

H₂: Under a presumptive release law, non-violent arrestees will be granted own-recognizance release or low monetary bail.

H₃: Race and/or gender will not play a significant role in bail decisions or outcomes.

H₄: Cases in which defendants are held in pretrial detention will be more likely to result in earlier case dispositions.

H₅: Arrestees held in pretrial detention will be more likely to plead guilty than individuals released pretrial.

H₆: Pretrial detention will be significantly related to whether a defendant receives a custodial versus non-custodial sentence.

H₇: In cases where a defendant receives a term of incarceration, pretrial detention will be significantly related to the length of incarceration to which a defendant is sentenced.

3.2. Data

This study utilizes individual-level data from the State of New Jersey's Criminal

Disposition Commission (CDC). The CDC is a statutorily-mandated agency mainly comprised of the chiefs of all principal state criminal justice agencies: the Attorney General, the Chief Justice, the chiefs of the Department of Corrections and the state Parole Board, the state prosecutors' association and the state's Public Defender; it also includes one state senator, an assemblyman, and a member of the public (N.J. Stat. § 2C:48-1 (2008)). The CDC's mission is to evaluate state criminal justice practices and policies and to detect the presence of systematic inequities.

In order to describe New Jersey's courts' decisions and to provide an accurate portrait of current practices, the CDC compiled a unique database in which it recorded every summons and complaint issued in New Jersey from October 18, 2004, to October 24, 2004. The week was randomly selected and did not include any unusual or major event(s) that would have affected criminal justice operations during that time. The movement of these cases was followed through the system from arrest through sentencing and was recorded culminating in the creation of a database containing 2,093 initial cases that describes, in detail, the typical operation of New Jersey's criminal justice system; of these, nearly half of the sample, 1,118 cases were "screened out". The screening process in New Jersey denotes the County Prosecutor's review of the charges and his or her decision about whether they should be filed as indictable offenses in Superior Court. Cases that are charged as indictable offenses in Superior Court are considered cases that are "screened in."

Cases that are screened out are those that are not charged as indictable offenses in

Superior Court. There are several circumstances under which cases are screened out. In some instances the judge dismisses the cases at arraignment or defendants plead guilty immediately, pay fines and are released. In many cases, after a case has been screened out the charges are downgraded and remanded to municipal court for prosecution as “disorderly persons” offenses (misdemeanors). These are cases in which the prosecutor has determined that the evidence does not support charging a defendant with an indictable offense. Cases that are screened out can also be transferred to Family Court. These are cases that involve juveniles under the age of eighteen; there are very few of these cases in this sample. Of the 2,093 cases in this sample, 975 remained (were screened in). The CDC only tracked the bail and disposition information for the cases that were screened in. Table 4.4, located in the next chapter, provides a summary of the offense types for cases “screened in” versus those “screened out.”

The process of screening illustrates the reality of case attrition in criminal court case processing. The Vera Institute of Justice published a study (1977) describing the phenomenon of “the funnel of justice,” explaining that there is a high attrition rate of felony cases from arrest to sentencing. Although the study examined felony cases in New York City, the authors explained that a similar pattern of high attrition rates can be found in most other cities as cases progress through the criminal process. In the Vera study, the sample began with 100,739 felony arrests, but the number quickly diminished the further the cases progressed through the court system. More specifically, of these 100,739 cases, only 56% resulted in any type of conviction – the remaining 44% of cases

were dismissed or acquitted. Of the 42,119 cases that had a conviction, 27% resulted in a sentence of incarceration in either a jail or prison.

Similarly, the sample in the current study was also significantly reduced due to case attrition. As explained in the preceding paragraphs, the CDC began with sample of 2,093 cases – these were all criminal complaints that were issued in one week as a result of arrests. Of the 2,093 total cases in this sample, 1,118 (53%) were screened out of Superior Court, illustrating one significant step in the process of felony case attrition. The 975 cases remaining for felony prosecution had various outcomes, the most common of which was a plea bargain. Of these cases, 646 (66%) were resolved through a guilty plea or verdict (just 11 of those cases went to trial). Of the remaining cases, 299 (31%) were dismissed, while 10 were downgraded for prosecution as “disorderly persons” in municipal court (1%). Approximately 20 (2.7%) cases were not yet disposed when the data was collected. In sum, the felony conviction rate for this sample was approximately 31%, which is consistent with typical attrition patterns in felony processing. Finally, of the 646 cases that resulted in a conviction in this sample, 372 received either a term of incarceration or another type of custodial sentence – approximately 18% of defendants in the total sample of 2,093 and 38% of the sample of 975 felony cases “screened in” to Superior Court and utilized for this study on bail, in which one hypothesis is that bail status may eventually affect sentencing outcomes.

The sample utilized in this research was reduced as a result of case attrition but more importantly, to address methodological problems associated with sample selection

bias. As previously described, 975 felony cases were screened in and were subject to the bail process. However, this research investigates the subsequent decision points of conviction and sentencing as well and as case attrition occurs at each decision point it is not possible to compare the same sample of subjects in all of the analyses. To prevent selection bias, the analysis examined only cases of those defendants whose legal cases had bail decisions and subsequently proceeded all the way through the system to conviction and sentencing. This resulted in a final sample of 634 cases for analysis. Even though the sample is reduced as the study progresses, the numbers are still robust for statistical analyses. See Table 3.1 for the process of case attrition in this sample.

TABLE 3.1. SAMPLE ATTRITION

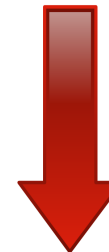
Entire Sample (n=2,093)



Cases Screened into Superior Court (n=975)



Cases with bail decisions that resulted in guilty plea/verdict (n=634)



Cases in which incarceration imposed (n=372)

New Jersey is comprised of rural, suburban, and metropolitan counties that contain many judicial districts. The cases in this database originate from all twenty-one counties in New Jersey. The database includes some demographic variables that describe the defendants and a comprehensive list of legal variables about the decisions made in each case as it progressed through the system. The list comprises: bail decisions and outcomes, criminal history information, several measures of offense severity, and decisions made choosing from a variety of possible outcomes. The information collected by the CDC is a very “deep” database, compiling hundreds of data points on each case decided in the representative week (October 18, 2004, to October 24, 2004); its composition sacrifices the “broad” or longitudinal overview of all cases decided over time. The sample of cases decided in one week is representative of the typical decisions made in New Jersey’s courts as well as those decisions made in other states’ trial courts, so the findings in this study have general relevance to state trial courts.

3.3. Variables

a. *Dependent Variables*

The hypotheses listed in the previous section were tested using several dependent variables found in three decision-making points in the legal process. The first three dependent variables roughly correspond to a “continuum of control” in bail release. Bail type is a binary variable indicating whether the judge granted release on own recognizance or imposed a financial bail condition. Bail amount is the amount of

monetary value a judge requires in cases where a cash bail is assigned. The bail outcome is a binary variable that designates whether the defendant was able to post bail for release or was detained because he could not meet the judge's imposed cash condition. It is important to view bail as a process wherein bail outcomes follow particular decisions that judges make about bail.

The second set of dependent variables was included to examine the hypotheses about the timing for defendants' plea bargains. Two variables were used to examine these hypotheses. The first, a binary variable, assesses whether the case disposition occurs before or after indictment and tested the hypothesis that individuals held before trial would plead earlier. A second continuous variable measured the number of days that elapsed between the time when bail was set and the date of the final disposition, a measurement made to discern if defendants held before trial have earlier case dispositions. A third binary variable measuring whether a defendant has pled guilty to any charges was originally intended to be included as a dependent variable in this analysis. However, and consistent with the literature, very few cases went to trial in this sample; sixteen to be exact. As this number is too small for statistical analysis, descriptive information is examined to provide characteristics of the cases that were settled through a jury trial.

Finally, as studies noted above have also shown, pretrial detention can lengthen the sentence of the guilty. Sentencing follows the outcome of the case, which should be understood by accounting for the impact of the bail process on plea bargaining. Two variables are used to this end: a binary variable represents sentencing outcome to indicate

whether a defendant received a custodial or non-custodial sentence; secondly, the length of the sentence for individuals who received a custodial term was examined.

b. *Independent Variables*

The CDC database includes both demographic and legal information that was used to construct independent variables in the context of the current study. The demographic variables in the study were: age (in years), gender (male/female), race (white/black/hispanic), jurisdiction type (urban/non-urban), and defense attorney type (public defender/private counsel/none). Jurisdictions were designated as urban/non-urban depending on the population per square mile of each county. (New Jersey is the most densely populated state in the nation, containing no counties that could be categorized as “rural” as compared to less populated states.) While the data do not include specific information about the arrestees’ socio-economic status (because judges do not have access to reliable information about this measure), the attorney type was used as a proxy for the defendant’s financial situation. These are attributes that judges can observe during defendants’ court appearances, even though in New Jersey there is no pre-trial agency to present personal information about arrestees at a bail hearing.

The database also includes several other legal indicators that may be relevant to bail decisions, plea bargaining and sentencing. Offense type is a four-category variable consisting of “person and weapons offenses” (otherwise known as violent offenses), property offenses, drug offenses, and other offenses. The “other” category includes a

range of non-violent, public -order offenses such as solicitation for prostitution or disorderly conduct, but also “crimes of dishonesty” such as forgery and perjury. Prior research on bail suggests that the seriousness of the crime plays a strong role in bail decisions. Based on this knowledge, dummy variables were created for the latter three offense types, making violent offenses the reference category.

The number of charges in a case, as a continuous measure of offense severity, is also included in the analyses. Although New Jersey’s statute does not include the number of charges in its list of items that judges may consider, the number of charges is included because it may play a critical role in plea bargaining and sentencing. Along with the seriousness of the offense, the defendant’s criminal history has been found to be the strongest predictor of judicial decisions at all stages of criminal procedure (Gottfredson and Gottfredson, 1990). Therefore, the study included the number of prior convictions as a continuous variable to measure a defendant’s criminal history.

While various legal factors such as prior record, offense severity, and the number of charges have been examined for their effect on bail outcomes, this research adds to the standard list of variables by testing whether the legal factor “pretrial status” affects subsequent procedure. This research focuses on the coercive element of plea bargaining that influences cases in which defendants, who are detained before trial to plead guilty to get out of jail. Keeping this focus in mind, bail outcomes were used in the analyses of the factors that affect plea bargaining. Sentencing, the final stage of a criminal trial, was also analyzed using a binary variable reflecting whether a defendant was released prior to trial;

the rationale for this analysis was based on the premise that defendants who are jailed while awaiting trial will receive less favorable sentences. Taken together, the analyses selected in this research are representative of decisionmaking over the entire course of a case.

3.4. Data Analysis Strategy

Several analyses were employed in this study to measure the factors affecting bail decisions/outcomes and the potential impact of pretrial practices on both plea bargaining and sentencing. Logistic regression was utilized for many of the analyses. Logistic regression was selected for a number of reasons: First, several of the dependent variables examined in this study are dichotomous and categorical, while the independent variables used in the analysis are both categorical and continuous, permitting the use of logistic regression (Mertler & Vannatta, 2005). Since the main objectives of this study are to predict the probability of a particular bail outcome and to predict the corresponding case disposition, logistic regression is the preferred statistical procedure for this and other studies of this topic (Cohen & Reaves, 2007; Demuth & Steffensmeier, 2004; Schlesinger, 2005; Williams, 2003). A full list of logistic regressions can be found in Table 3.2.

It was intended that several analyses in this study would employ multivariate regression. While multiple regression involves more assumptions than logistic regression (Mertler & Vannatta, 2005), it was selected for this research because predictions were sought for several dependent and continuous variables. Several other studies have used

multiple regression for similar purposes (Demuth, 2003; Kellough, & Wortley, 2002; Williams, 2003). This method is advantageous because it allows multiple predictor variables to inform the researcher about how much of the variance in the dependent variable is explained by the predictor variables (Mertler & Vannatta, 2005). OLS regression will be used to examine the dependent variable “time to disposition.”

However, two of the dependent variables in this analysis (bail amount set by the court and length of incarceration) have values that register zero, which violate the assumptions of multivariate linear regression. Since the study surmises that the same factors that may influence whether a sentence involves incarceration may also affect the length of sentence, a Tobit analysis was employed to control for bias due to left censoring (Albonetti, 1997; Breen, 1996). A full list of these models can be found in Table 3.2.

TABLE 3.2: List of Analyses

	Analysis	Dependent Variable
Model 1	Logistic Regression	Bail Type (Financial/Non-financial)
Model 2	Tobit Regression	Bail Amount Set
Model 3	Logistic Regression	Ability to Post Bail (Yes/No)
Model 4	Logistic Regression	Disposition Timing (Pre/Post-Indictment)
Model 5	OLS Regression	Time to Disposition
Model 6	Logistic Regression	Custodial Sentence (Yes/No)
Model 7	Tobit Regression	Sentence Length
Model 8	Descriptive Statistics	Trial Cases (n=16)

Regression analyses assessed the factors that played a significant role in decision-making at each stage of the criminal process and provided insight into the entire course of the criminal process beginning with bail and ending with sentencing. Regression allows the researcher to control for several factors while still discerning significant factors. The models used in this study examined the bail stage, followed by plea bargaining and finally sentencing. This is viewed as a multi-stage process. Having detailed the strength of each model's explanatory capability, it should also be noted that the use of regression analysis with a multi-stage approach may invite sample selection bias. For example, it is possible that a defendant will not be eligible to post bail because bail was never granted by the court. As Demuth (2003) notes, it may be problematic to treat these stages as independent of one another when some of the outcomes are predicated on earlier decisions. Demuth (2003) handles the issue of cross-stage dependence of pretrial decisions/outcomes by including correction terms. Another popular model, known as the Heckman two-step correction, is one of the most commonly used procedures to deal with sample selection bias in criminal justice research (Bushway, Johnson & Slocum, 2007). Regression analysis also provides evidence of the strongest determinants of criminal processing over the course of a case, even if the results are compared independently; this method has been utilized by other researchers conducting similar research (Kellough & Wortley, 2002; Williams, 2003). However, the Tobit analysis treats zeros as meaningful numbers in contrast to the Heckman correction, which treats zeros as unobserved values. Therefore, Tobit analysis was used as the appropriate strategy to address the issue of bias due to

censored data (Albonetti, 1997; Bushway, Johnson, & Slocum, 2007).

While a full account of the analyses will be presented in the next chapter, it is clear that logistic, OLS and Tobit regressions worked well testing the main hypotheses of this study that sought to predict the factors that have the strongest effect at each stage of the legal system. Regression analysis can also provide evidence of causal relationships between variables (Mertler & Vannatta, 2005). The discussion and conclusion will address the results and the findings of the regressions; each section is subdivided according to dependent variables.

Some recent research on judicial decision making has also included the use of interaction terms in analyses. Interactions among predictor variables can be useful in certain analyses in enhancing predictions about the dependent variable (Tabachnick & Fidell, 1996). For example, Turner, Secret & Johnson (2003) examined interaction effects of race and criminal history and race and offense seriousness in their study of factors affecting bail amount set by the court. Nobling, Spohn, & DeLone (1998) examined interaction variables of race and employment status and gender and employment status when investigating factors affecting incarceration and sentence severity. Steffensmeier et al. (1998) included race-age and age-gender interaction effects in their study on the effect of being young, black and male in criminal sentencing, positing that the combination of these factors could better explain sentencing decisions. Spohn (2000) found that interaction effects between race and legal factors enhanced sentence severity and additionally that the interaction between race and pretrial detention enhanced sentence

severity. In the current study, interaction terms were created between the number of prior convictions and demographic variables (age, race and gender) and between offense seriousness and demographic variables to determine if the combination of these variables would produce a more pronounced effect on the dependent variables measuring bail and sentencing decisions. Interaction terms were also created between race and urbanity and were used in the analyses examining bail decisions and outcomes. Finally, interaction terms were created between race and pretrial release status to use in the analyses of factors affecting sentencing.

3.5 Description of the Sample

Approximately 87% (n= 553) of the sample is comprised of males, and about 66% (n= 419) of defendants are ethnic minorities. The average number of charges in this sample is 3.8 and the average number of prior convictions is 2.1. Offense types are distributed throughout the sample as follows: 30% (n= 187) of the charges involved violent offenses (these offenses include the use or sale of firearms), 22% (n= 141) involved property offenses, 41% (n= 262) involved drug offenses and 7% (n= 44) involved other types of offenses. Approximately 24% (n= 151) of the arrestees were released on their own recognizance, while 76% (n= 483) were granted bail contingent on payment of money. The average bail amount in this sample was \$48,725 but the most commonly occurring bail amount set by the court was \$10,000. Roughly 64% (n= 308) of the defendants in the sample were able to post bail, whereas about 36% (n= 175) could

not meet bail requirements and were jailed while awaiting trial. Approximately 84% (n= 510) of defendants were assigned a public defender while only about 16% (n= 98) retained private counsel. Less than one-fifth of the case dispositions (n=91) or 14% occurred before an indictment, with 210 days as the average time from the day when bail was set to the disposition of the case. More than half of those convicted (n=372) or 59% received a custodial sentence and the average length of custodial sentences in this sample is 3 years. (These descriptive data can be found in Table 3.3).

As the joint frequencies for bail posting status and race show, more than triple the number of white defendants were able to post (24%) than not post bail (6.6%). While there was a similar trend for black defendants, the numbers were not as high, indicating that 22% were unable to post bail and approximately 31% were able to post bail. The numbers were nearly equal for Hispanic defendants of whom 8.1% were unable to post bail as compared to the 8.9% who were able to make bail. Turning to the type of offense and bail method, no matter what the type of offense, financial bail is used much more often than the non-financial alternative. From a review of the frequencies, defendants who posted bail were given custodial sentences in 35.7% of the cases: a more thorough analysis examined this aspect of the data. Finally, when comparing the types of offense in screened cases, the frequencies show that that third degree CDS cases (i.e., “controlled dangerous substance” or “drug cases”) were the type of charges most commonly screened out of this sample (9.4%).

Table 3.3 Variable descriptions (N=634)

Name	Coding	n	%	M	SD
Age	In years			30	9.9
Gender	1 = female	80	12.6		
	0 = male	553	87.4		
Race	1 = white	213	33.7		
	2 = Hispanic	104	16.5		
	3 = black	315	49.8		
County type	1=urban	451	71.1		
	2-non-urban	183	28.9		
Offense type	1 = person & weapons	187	29.5		
	2 = property	141	22.2		
	3 = cds (controlled dangerous substance)	262	41.3		
	4 = other	44	6.9		
Prior convictions	Number of prior convictions			3.1	4.1
Number of counts	Number of current charges			3.8	3.4
Bail type	1=financial	483	76.2		
	0-non-financial	151	23.8		
Bail posted	1 = yes	308	63.8		
	0 = no	175	36.2		
Release	1=Release	459	72.4		
	0=In Jail	175	27.6		
Bail amount	Bail amount set by the court in dollars			\$48,725	\$199,000

Table 3.3 Continued

Defense attorney type	1=private counsel 0=assigned counsel	98 510	16.1 83.9		
Disposition time	1=pre-indictment 2=post-indictment	91 543	14.4 85.6		
Days to Disposition				210	168
Custodial disposition	1=yes 2=no	372 261	58.8 41.2		
Incarceration (days)				1095	1144

3.6. Qualitative Portion of Analysis

The quantitative analysis will also be supplemented with qualitative data.

Interviews and observations of bail hearings in New Jersey promoted a better understanding of the bail process in New Jersey. Prosecutors, public defenders and judges were interviewed regarding: the bail process in general, the screening process, the criteria used in bail decisions, information available at time of bail hearings, the application of bail restrictions, the recourse to ROR, plea negotiations, specific factors impacting plea negotiations and other related issues. These qualitative data were instrumental to the task

of describing the reality of the bail process in New Jersey and in clarifying some of the findings from the quantitative analyses. Interviews are often used to supplement research relying primarily on quantitative methods of data collection. As noted by Yedigis and Weinbach (2009, p. 150), the “interview may be a follow-up to attempt to verify or explain information provided by the primary data collection method”. Qualitative interviews are less structured than survey research. According to Babbie (2001, p. 291), this type of interview is one in which “the interviewer has a general plan of inquiry but not a specific set of questions that must be asked with particular words and in a particular order”. A list of questions asked in the interviews can be found in Appendix A. However, some of these foundational questions lead to further and more detailed probing of the subject. The observations and interviews were conducted after an initial analysis of the statistics and were designed to help place the statistical findings in the proper context.

CHAPTER 4: RESULTS

4.1. Bail

H₁: Under a presumptive release law, only the seriousness of the offense will be significantly related to the decision to release arrestees on own-recognizance and, when bail is required, only offense seriousness will account for the amount of monetary bail set by the court.

H₂: Under a presumptive release law, non-violent arrestees will be granted own-recognizance release or low monetary bail.

H₃: Race and/or gender will not play a significant role in bail decisions or outcomes.

The first series of analyses tested these hypotheses that are related to bail operations. Three analyses were used to determine the factors that are most relevant to bail decisions and outcomes: bail type, amount of bail set by court and the defendant's ability to post bail. These analyses tested the effect of legal factors, such as seriousness of offense, and extralegal factors, such as race and gender, on pretrial operations in a jurisdiction that presumes release. Although the law presumes release, these analyses revealed whether certain factors, such as monetary requirements, were tantamount to preventive detention. The quantitative results were supplemented with qualitative information that was collected in interviews and observation of bail hearings.

4.1.a. Logistic Regression for Bail Type

Table 4.1 documents the demographic and legal variables associated with the type of bail imposed (judge releases defendant on own recognizance versus requiring financial bail). Cross tabulations revealed that the data were adequate for logistic regression.

Further, an examination of the standardized residuals demonstrated that there were no outliers; while tolerance and VIF statistics indicated that there were no problems with collinearity. The inclusion of interaction terms for continuous variables in the model demonstrated the linearity of the logits. Finally, a scatter-plot shows that the assumption of independence of the error term was not violated.

Table 4.1. Logistic Regression Analysis: Dependent Variable = Bail Type (0=ROR; 1=Financial bail) (n=593)

	B	SE	Wald	Exp(B)
Gender (Female)	0.05	0.29	0.03	1.05
Age	-0.01	0.01	0.61	0.99
Race (White)				
Hispanic	0.47	0.31	2.25	1.59
Black	0.50	0.24	4.42	1.65 *
Attorney Type (Private)	-0.27	0.29	0.83	0.77
County Type (Non-Urban)	0.17	0.22	0.57	1.18
Prior Convictions	0.03	0.03	1.24	1.03
Number of Charges	0.12	0.04	9.69	1.13 **
Offense Type (Violent)				
Property	-0.71	0.29	5.85	0.49 *
Drugs	-0.56	0.26	4.61	0.57 *
Other	-0.98	0.39	6.21	0.37 *
Model χ^2	39.45***			
-2LL	613.39			
Nagelkerke R ²	0.10			

* p < .05 ** p < .01 *** p < .001
Note: Reference categories are in parentheses.

Turning back to the variables in Table 4.1, several significant predictors of bail type emerged ($\chi^2(11, n=593) = 39.45, p < .001$). Of these predictors, most were legal factors. Race was the only demographic variable that was significantly associated with bail type, indicating that the odds of having a financial bail requirement (versus ROR) are higher for Black defendants (Wald=4.42, odds=1.65, $p < .05$) when compared to white defendants. This finding contradicts the hypothesis that race would not play a role in bail decisions. Table 4.1 shows that the number of charges (Wald=9.69, odds=1.13, $p < .01$) significantly predicts the odds of a financial bail requirement. Particularly, an increase in the number of charges pending against a defendant reduced the odds that a defendant would be released on their own recognizance. This finding is consistent with previous literature on criminal justice decision-making and is consistent with the account provided by one prosecutor in New Jersey, who indicated that the type of bail is dictated by the charges in a case (Interview, 03/10/10). It is also consistent with the Court Rule 3:26-1, in which judges may take account of the “seriousness of the crime” charged; multiple charges indicate higher seriousness.

Of primary interest in this regard is the impact of offense type on the type of bail imposed by the court. When compared to violent offenses, the odds of having financial bail required are 51% lower for property offenses, 43% lower for drug offenses, and 63% lower for other offenses. Put more simply: the odds are significantly lower that an arrestee charged with a violent offense will be released on recognizance. These results partially support the first hypothesis in that the seriousness of the offense played a significant role

in whether a defendant received financial bail or was released on their own recognizance. However, offense seriousness was not the only factor to impact this decision. The number of charges and race also influenced the bail type that was chosen by the court. These results also show partial support for the second hypothesis in that the odds of being released on one's own recognizance are much greater for non-violent arrestees.

4.1.b. Tobit Regression for Bail Amount Set

The following analysis determined whether the type of alleged offense impacted the amount of bail set by a judge when a financial bail requirement was imposed. Table 4.2 presents indicators that are related to the amount of bail set by the court in the subset of cases in which judges required financial bail to be posted. The variable for bail amount was transformed using a logarithmic transformation because it was very positively skewed. Tolerance and VIF statistics indicate that multi-collinearity was not a problem. A normality plot indicated a normal level of residuals. The Durbin Watson statistic confirmed independence of the observations and the analyses required assumptions of homoscedasticity and linearity were met.

Table 4.2 presents the results of a Tobit analysis that examined the dependent variable for the amount of bail set. Unsurprisingly, judges required significantly higher-dollar amounts of bail for violent offenders when these offenders' bail was compared to the bail for defendants charged with property, drug and other offenses. These findings support the second hypothesis in part, as non-violent arrestees were granted lower bail

amounts than violent ones; however, a “lower” bail does not translate into an *affordable amount* for all defendants to post bail.

As to which defendants were more likely to post bail, the analyses included several factors for examination. Race was significantly associated with bail amount, so that Hispanic and black defendants were subject to higher bail amounts than white defendants. Generally, minorities were required to pay more bail for release than to white defendants; this finding held even when the analysis controlled for the severity of the offense. County type is also a significant predictor of the bail amount set by the court. When judges imposed a financial bail requirement, defendants in non-urban jurisdictions received lower bail amounts than defendants in urban jurisdictions. Among legal variables, the number of charges was significantly and positively related to the bail amount: as the number of charges pending increased so did the bail amount set by the court. Surprisingly, the number of prior convictions did not have a significant impact on bail amount set by the court. Contrary to the findings of this analysis, one New Jersey judge conveyed that an extensive criminal history would normally result in a relatively higher amount of bail (Interview, 3/16/10).

**Table 4.2. Tobit Analysis: Dependent Variable = Bail Amount (Logged)
(n=598)**

	Coefficient	SE	t
Gender (Female)	0.15	0.11	1.33
Age	-0.01	0.00	-1.33
Race (White)			
Hispanic	0.30	0.11	2.64**
Black	0.32	0.89	3.58***
Attorney Type (Private)	-0.16	0.10	-1.54
County Type (Non-Urban)	0.21	0.08	2.51*
Prior Convictions	-0.00	0.00	-1.19
Number of Charges	0.05	0.01	4.43 ***
Offense Type (Violent)			
Property	-0.36	0.10	-3.46 ***
Drugs	-0.32	0.09	-3.62 ***
Other	-0.46	0.16	-2.96 **
Model χ^2	86.48 ***		
Log likelihood	-717.57		
Pseudo R ²	0.06		

* p < .05 ** p < .01 *** p < .001
Note: Reference categories are in parentheses.

4.1.c. Logistic Regression Predicting the Ability to Post Bail

The previous analyses examined the indicators associated with the court's decision to impose financial bail and, in those cases, the bail amount required. Table 4.3 relates the demographic and legal variables associated with the outcomes of bail decisions: the defendant's bail posting status or whether the defendant was able to pay the sum required

in order to be released on bail. An examination of cross-tabulations indicates that the data is adequate for logistic regression. To this end, an examination of standardized residuals demonstrates that there are no outliers; tolerance and VIF statistics indicate that there are no problems with collinearity. Inclusion of the interaction terms for continuous variables in the model demonstrated the linearity of the logits. Finally, a scatter-plot shows that the assumption of independence of the error term was not violated.

Table 4.3 shows the results for the logistic regression predicting bail posting status. The strongest predictor of posting bail was the amount of bail set (Wald=47.67, odds=0.15, $p<.001$). Asked about the bail set in a case involving an alleged assault, one New Jersey judge explained: “I set the bail amount at \$150,000 because I knew he couldn't pay it but if I thought he could have I would have jacked it up” (Interview, 3/16/10). Race significantly predicts a defendant's ability to post bail, with the odds of posting bail being significantly lower for black defendants when compared to white defendants (Wald=4.91, odds=0.31, $p<.005$). Additionally, defendants in urban jurisdictions have lower odds of posting bail than those in non-urban counties. Further analysis of the interaction effect for race and county type was significant, indicating that the positive association between Black defendants and bail posting status is more pronounced for defendants who live in urban jurisdictions. This finding contradicts the hypothesis that race does not impact bail outcomes. While looking at the defendant's counsel, the odds of posting bail are 93% lower for defendants with public defenders when compared to the odds for defendants with private counsel.

Table 4.3. Logistic Regression Analysis: Dependent Variable = Bail Posting (0= Bail not posted; 1= Bail posted) (n=442)

	Model 1				Model 2			
	B	SE	Wald	Exp(B)	B	SE	Wald	Exp(B)
Gender (Female)	-0.20	0.39	0.26	0.82	-0.23	0.39	0.37	0.79
Age	-0.02	0.01	2.91	0.98	-0.02	0.01	2.26	0.98
Race (White)								
Hispanic	-0.30	0.33	1.24	0.65	-0.23	0.41	0.32	0.79
Black	-0.32	0.32	0.99	0.73	-1.12	0.53	4.91	0.31*
Attorney Type (Private)	-2.53	.54	21.8	0.08 ***	-2.66	0.55	23.36	0.07 ***
County Type (Non-Urban)	-0.49	0.23	2.78	0.61	-1.27	0.47	6.67	0.29**
Prior Convictions	-0.07	0.03	4.07	0.94 *	-0.07	0.03	4.70	0.93*
Number of Charges	-0.02	0.03	0.33	0.98	-0.03	0.03	0.57	0.98
Offense Type (Violent)								
Property	-0.79	0.35	5.07	0.46 *	-0.79	0.35	5.00	0.46 *
Drugs	0.06	0.29	0.04	1.06	0.01	0.29	0.00	1.01
Other	-0.64	0.55	1.35	0.53	-0.64	0.56	1.30	0.53
Bail Amount (log)	-1.92	0.28	48.76	0.15 ***	-1.91	0.28	47.67	0.15 ***
Black x Urban Jurisdiction					1.28	0.62	4.31	3.59 *
Model χ^2			142.38 ***				146.82 ***	
-2LL			432.76				428.32	
Nagelkerke R ²			0.39				0.39	

* p < .05 ** p < .01 *** p < .001
Note: Reference categories are in parentheses.

It is interesting that the number of charges is not significantly associated with the ability to post bail. The number of charges was a significant predictor in both analyses of bail decisions by the court but had seemingly little impact on the outcome. Criminal history was not significant in the analyses of bail decisions made by the court which runs counter to the previous literature on this topic. However, criminal history was significant in the final analysis of bail outcomes: the higher the number of prior convictions, the less likely it was for a defendant to post bail (Wald=4.70, odds=0.93, $p<.05$). With regard to offense type, the odds of posting bail are significantly lower for defendants charged with property offenses (Wald= 5.00, odds= 0.46, $p<.005$) when compared to defendants charged with violent offenses. Interestingly, no significant differences were observed between violent offenses and drug offenses; defendants in each offense category were more likely to post bail when compared to property defendants. Violent offenders' ability to post bail suggests that New Jersey is not practicing *de facto* preventive detention. However, according to one public defender, the high bail amounts set by the court are tantamount to preventive detention for many defendants (Interview, 11/22/10), a concern that is compounded by the fact that non-violent arrestees are less likely to post bail, particularly because the bail amount set for non-violent arrestees was lower than that of violent arrestees. This finding will be covered further in the discussion.

4.1.d. Comparison of Screened/Unscreened Cases

The sample used in the regression analyses is comprised of a subset of those cases

not screened out (n=975) or those defendants that were charged and adjudicated in superior court. However, the entire sample was comprised of 2,093 cases. While the cases screened out of the analysis did not have dispositions or sentencing outcomes because they went to municipal court or were concluded before further superior court proceedings (for example, the defendant pleaded guilty immediately at bail hearing) the CDC did track and record the bail decisions/outcomes for the cases that were screened out of the analysis. First, a chi-square analysis was conducted to compare the types of cases screened in with those screened out to determine if there were any significant differences. The results show that there are significant differences ($\chi^2(18) = 385.034, p < .001$). The cross-tabulation, presented in Table 4.4, reveals where some of these differences lie. The table shows that first and second degree persons charges and both third degree drug and property offenses were more likely to remain in superior court. By contrast, less serious, third- degree persons charges and both fourth- degree property and public order offenses were more likely to be screened out of superior court and sent to municipal court for further proceedings.

The dependent variables used in the regression analyses of bail were included in the next set of bivariate analyses to examine the potential differences in bail decisions and outcomes between cases that are screened in and out of superior court. Cases that are screened out include those that have been remanded or downgraded to municipal court. These cases involved lower level crimes than those that remained in superior court. Therefore, one might suppose that ROR would be granted in more of the cases that were

screened out, since they were less serious. However, the results of a chi-square indicate that there was not a significant difference in bail type set by the court between these cases ($\chi^2 (1) = 1.707, p=.191$).

A second set of analyses tested whether there were differences in bail amounts. A t-test, used to investigate the difference in bail amount set between cases screened in and screened out, showed that there was a significant difference between these cases' bail amounts ($t (699) = 4.899, p<.001$). The average bail amount for cases screened out of superior court was \$9,596 while the average amount for cases remaining in superior court was \$44,232. This strikingly large difference may be attributed to the fact that the cases that remained in superior court appear were comprised of more serious offenses than those that were screened out and New Jersey Court Rules direct judges to take case seriousness into account when setting bail. Interestingly, and regardless of the monetary difference, financial bail was the norm.

A chi-square tested the relationship between bail posting status and case screening. It is important to remember that although bail decisions are important, bail posting status reveals whether defendants were actually detained pretrial. The results for the chi-square analysis reveal that there was a significant relationship between bail posting status and screening status ($\chi^2 (1) = 5.231, p<.005$). Defendants in cases that were screened out ($n=216, 20\%$) were significantly less likely to post bail than defendants whose case remained in superior court ($n=448, 42\%$); despite the fact that bail amount set in cases screened out was typically about \$34,000 less. This finding will be discussed in further

detail below. However, it should be noted here that financial bail was given in approximately 70% of the cases whether or not the cases were screened out or remained in superior court. The pretrial detention of defendants, who must pay significantly lower bail amounts in downgraded cases but who still cannot produce enough money to gain their release, may indicate one of the flaws of a system that is dominated by cash bail.

Table 4.4. Expanded Degree/Offense Type and Case Screened (N=2,093)

Expanded Degree/Offense Type	Case Screened/NO (Superior Court)	Case Screened/YES (Out of Superior Court)
1 st Degree Persons	33 1.6%	3 0.10%
1 st Degree CDS	9 0.4%	0 0%
2 nd Degree Persons	105 5%	51 2.4%
2 nd Degree Property	20 1%	18 0.9%
2 nd Degree CDS	65 3.1%	18 0.9%
2 nd Degree Public Order	7 0.3%	2 0.1%
2 nd Degree Firearms/Weapons	11 0.5%	4 0.2%
3 rd Degree Persons	83 4%	128 6.1%
3 rd Degree Property	236 11.3%	100 4.8%
3 rd Degree CDS	313 15%	196 9.4%
3 rd Degree Public Order	22 1.1%	14 0.7%
3 rd Degree Firearms/Weapons	30 1.4%	7 0.3%
4 th Degree Persons	22 1.1%	38 1.8%
4 th Degree Property	32 1.5%	120 5.7%
4 th Degree CDS	9 0.4%	1 0%
4 th Degree Public Order	36 1.7%	153 7.3%
4 th Degree Firearms/Weapons	17 0.8%	12 0.6%
All Regulatory Violations	59 2.8%	0 0%
Unspecified or Undetermined	39 1.9%	80 3.8%

4.2. Plea Bargaining

H₄: Cases in which defendants are held in pretrial detention will be more likely to result in earlier case dispositions.

H₅: Arrestees held in pretrial detention will be more likely to plead guilty than individuals released pretrial.

The first set of analyses sought to examine which factors were most salient to bail decisions and outcomes. The second set analyzed plea bargaining, which is an area that has not received as much attention. These analyses attempted to identify the factors that exerted the strongest influence on plea bargaining decisions. Research has shown that offense severity and criminal history are the most influential factors in bail decisions and in plea bargaining. Previous studies have also shown that race and age can play an important role in a defendant's decision to plead guilty. However, this research tests a different hypothesis that only a few researchers have suggested: that people will plead guilty simply to get out of jail and to get out quickly. To test whether pretrial operations have an impact on plea bargaining, these analyses included the following two dependent variables: disposition timing (pre or post-indictment); days to disposition (days from bail to disposition). These analyses included a defendant's pretrial release status following the reasoning that defendants who are held prior to trial will plead guilty to get out. It was hypothesized that defendants who plead guilty will do so to get out of jail early- on in the criminal process.

4.2.a. Logistic Regression for Disposition Timing (Pre/Post-Indictment)

Table 4.5 inventories the demographic and legal variables that might affect the timing of a defendant's disposition (pre or post-indictment). The cross-tabulations reveal that the data is adequate for logistic regression. An examination of standardized residuals demonstrated that there were no outliers. Tolerance and VIF statistics indicated that there were no problems with collinearity. Including interaction terms for continuous variables in the model demonstrated the linearity of the logits. Finally, a scatter-plot showed that the assumption of independence of the error term was not violated.

Table 4.5. Logistic Regression Analysis: Dependent Variable = Disposition Timing (0= Pre-Indictment; 1=Post-Indictment) (n=593)

	Model 1				Model 2			
	B	SE	Wald	Exp(B)	B	SE	Wald	Exp(B)
Gender (Female)	-0.19	0.40	0.22	0.83	-0.91	0.54	2.85	0.40
Age	0.01	0.01	0.78	1.01	0.01	0.01	0.67	1.01
Race (White)								
Hispanic	0.85	0.44	3.71	2.34	0.83	0.44	3.51	2.29
Black	0.38	0.31	1.49	1.47	0.38	0.32	1.45	1.46
Attorney Type (Private)	-0.76	0.45	2.84	0.47	-0.80	0.45	3.13	0.45
County Type (Non-Urban)	-0.48	0.32	2.35	0.62	-0.50	0.32	2.48	0.61
Prior Convictions	0.06	0.04	1.85	1.06	-0.12	0.08	2.39	0.89
Number of Charges	0.09	0.05	3.40	1.10	0.09	0.05	3.02	1.09
Offense Type (Violent)								
Property	0.15	0.38	0.15	1.16	0.13	0.39	0.12	1.14
Drugs	0.10	0.33	0.09	1.10	0.12	0.33	0.13	1.13
Other	-0.86	0.46	3.44	0.42	-0.91	0.47	3.75	0.41
Release (In Jail)	0.72	0.29	6.12	2.06*	0.72	0.30	5.92	2.05*
Gender x Prior Convictions					0.23	0.09	6.34	1.26*
Model χ^2			23.10 *				29.96 **	
-2LL			406.53				400.56	
Nagelkerke R ²			0.08				0.10	

* p < .05 ** p < .01 *** p < .001
Note: Reference categories are in parentheses.

Table 4.5 shows the results of a logistic regression predicting disposition timing. Surprisingly, only a few factors appear to impact the timing of case disposition (χ^2 (13,

$n=593 = 29.96, p=0.05$); however, the findings are of particular interest to this study. Specifically, the odds of a case disposition occurring at or after indictment are significantly higher for defendants who are on release (Wald= 5.92, odds=2.05, $p<.05$). This finding lends support to the hypothesis that cases in which defendants are held in pretrial detention are more likely to reach early case dispositions. One prosecutor discussed this issue as well, indicating that most guilty pleas occur pre-indictment. According to the prosecutor, defendants plead guilty to get out of jail, to get time served or to “get it over with” (Interview, 3/10/10). These findings will be examined in further detail in the discussion section. In addition to the main effects, this model yielded a significant interaction effect. The interaction between gender and prior convictions is significant (Wald=4.83, odds=1.26, $p<.05$), indicating that a more extensive criminal history affects the odds of disposition timing more substantially if the defendant is male.

4.2.b. OLS Regression Predicting Days to Disposition

Table 4.6 investigates the predictors of the disposition’s timing or days from bail set to the case’s disposition. The variable for days to disposition was positively skewed and was therefore transformed using a logarithmic transformation. Tolerance and VIF statistics indicate that multicollinearity was not a problem. A normality plot indicated the normality of residuals. The Durbin Watson statistic confirmed independence of the observations and assumptions of homoscedasticity and linearity were met.

Table 4.6. OLS Regression: Dependent Variable = Days to Disposition (Logged) (n=499)

	b	SE	β	t
Gender (Female)	0.01	0.11	0.00	0.09
Age	0.00	0.00	0.03	0.74
Race (White)				
Hispanic	0.27	0.12	0.12	2.30*
Black	0.29	0.09	0.16	3.13**
Attorney Type (Private)	-0.31	0.11	-0.13	-2.82**
County Type (Non-Urban)	-0.12	0.09	-0.62	-1.42
Prior Convictions	0.01	0.01	0.06	1.30
Number of Charges	0.05	0.01	0.18	4.24***
Offense Type (Violent)				
Property	-0.25	0.11	-0.11	-2.31*
Drugs	-0.24	0.09	-0.14	-2.71*
Other	-0.26	0.16	-0.07	-1.61
Release (In Jail)	0.61	0.08	0.32	7.22***
R ²	0.41			

* p< .05 ** p< .01 *** p< .001

Note: Reference categories are in parentheses.

Table 4.6 presents the results of a multiple regression predicting time to disposition. Both legal and demographic factors are significant ($F(12, n=499) = 8.218, p < .001$). Race emerged as a significant predictor of disposition timing when this variable

was examined in units of days rather than in categories of pre and post-indictment. This result indicates that case dispositions for black ($t=3.13$, $b=0.29$, $p=.002$) and Hispanic ($t=2.30$, $b=0.27$, $p<.05$) defendants took longer than those for white defendants. Secondly, attorney type was a significant predictor in this analysis ($t=-2.82$, $b=-0.31$, $p=.005$). Specifically, defendants with public defenders had a significantly shorter number of days to disposition than defendants with private attorneys. This result is not surprising since resources may often influence public defenders to settle cases relatively faster than private attorneys. Put another way, private attorneys paid by the hour may have incentives to spread out the timing.

Turning to the legal predictors, the number of charges was a significant predictor of disposition timing ($t=4.24$, $b=.05$, $p<.001$). As the number of charges pending increased, so did the days from the granting of bail to the disposition of a case. Regarding the offense type, property ($t=-2.31$, $b=-0.25$, $p<.001$) and drug felony offenses ($t=-2.71$, $b=-0.24$, $p=.007$) had significantly shorter disposition times when compared to violent offenses. Finally, a defendant's pretrial release status was a significant predictor of disposition timing ($t=7.22$, $b=0.61$, $p<.001$) in that defendants who were held in pretrial detention had a shorter time to their case's disposition than defendants who were on release. This finding supports the hypothesis that defendants who are held before trial will have earlier case dispositions because they plead earlier to get out of jail. The findings in this analysis are consistent with the previous logistic regression that predicted case disposition as before or after the indictment. However, examination of disposition

timing as a continuous variable revealed many more significant legal and demographic predictors.

4.2.c. Description of Trial Cases

Some previous studies have examined the demographic and legal variables associated with the dichotomous variable for case disposition (guilty plea or no plea). However, as previously discussed, only about 3% of all cases reach trial. The sample in this analysis is consistent with the literature in that only seventeen cases (1.5% of entire sample) were concluded following a trial. While this number is too small for statistical analysis, descriptive information is utilized to provide information about these cases.

All of the cases that were resolved through trial involved male defendants. Race was distributed as follows: black (n=12); hispanic (n=2); and white (n=3). These numbers may provide support for earlier research positing that black defendants are more likely not to plead guilty. The offense types consist of the following: first degree persons (n=1); second degree persons (n=4); second degree CDS (n=3); third degree CDS (n=6); third degree firearms (n=1); fourth degree persons (n=1); and fourth degree property (n=1). Defendants who went to trial had an average of 4.5 charges pending and 3 prior convictions. Thirteen of these defendants were represented by public defenders.

Regarding bail, financial bail was required in fifteen of the cases that were resolved through trial, with the average bail amount being approximately \$80,000. Of these fifteen defendants, twelve were able to post bail and were released prior to trial.

The sample of trial cases is too small to provide conclusive support for the hypothesis that arrestees held in pretrial detention will be more likely to plead guilty than individuals released pretrial. However, 80% of the trial defendants were released prior to trial, which may suggest support for this hypothesis. Additionally, ten of the eleven defendants convicted at trial were sentenced to a term of incarceration, with an average sentence length of eight years' incarceration. A larger sample with more variation in disposition type, i.e., case resolved through guilty plea, bench trial, jury trial, would allow for an analysis of the potential trial penalty faced by defendants who opt not to plead guilty.

4.3. Sentencing

H₆: Pretrial detention will be significantly related to whether a defendant receives a custodial versus non-custodial sentence.

H₇: In cases where a defendant receives a term of incarceration, pretrial detention will be significantly related to the length of incarceration to which a defendant is sentenced.

The final set of analyses examines the impact of bail decisions and their outcomes on sentencing. Other research has shown that negative bail outcomes will result in lengthier sentences of incarceration. While not a revelation, it is imperative to continue testing this facet of criminal justice processing to help policymakers properly evaluate sentencing practices. This research explored the criminal justice process from its inception (bail) to its subsequent decision points on to its conclusion (plea bargaining, case disposition and sentencing). Sentencing receives a great deal of attention in the

research conducted in this field; significantly, this study frames bail as the driving force behind the outcomes of criminal cases. To this end, this portion of the analyses uses two dependent variables: incarceration (yes/no) and sentence length.

4.3.a. Logistic Regression Predicting Incarceration

Table 4.7 shows the demographic and legal variables associated with the dichotomous variable sentence of incarceration (yes or no). Cross-tabulations reveal that the data is adequate for logistic regression. An examination of standardized residuals demonstrated that there are no outliers. A scatter-plot showed that the assumption of independence of the error term was not violated. Tolerance and VIF statistics indicated that there were no problems with collinearity. However, including interaction terms for continuous variables in the model demonstrated a violation of the linearity of both continuous logits-number of counts and number of prior convictions. Initially, the variables were transformed; however, even after transformation these variables still violated this assumption. Therefore, using a method that researchers have used to continue analysis despite a violation of this assumption (Alderden & Lavery, 2007), both number of counts and prior convictions were re-coded into categorical variables. The mode for prior convictions was zero, while the median was one and the 75th percentile fell at four prior convictions. Following a similar categorization used by Greenwood and Abrahamse (1982), these categories were re-coded so that zero prior convictions represent a low-rate offender, while one to four prior convictions represent a medium-rate offenders and five or more prior convictions represent a high-rate offenders. Similarly, for the

number of charges pending, the mode was one, while the median was two and the 75th percentile fell at four charges pending in a case. Therefore, this variable was also recoded into three categories in hopes that this categorization would allow for a more meaningful comparison. This procedure seemed superior to a comparison that used a dichotomous variable which divided along the lines of cases with one charge and cases involving two or more charges.

Table 4.7. Logistic Regression: Dependent Variable = Custodial Sentence or No Custodial Sentence (n=592)

	b	SE	Wald	Exp(B)
Gender (Female)	0.49	0.27	3.16	1.63
Age	-0.01	0.01	0.43	1.00
Race (White)				
Hispanic	0.29	0.28	1.02	1.33
Black	0.17	0.22	0.56	1.18
Attorney Type (Private)	0.17	0.26	0.40	1.18
County Type (Non-Urban)	-0.48	0.21	5.30	0.62***
Number of Counts (1)				
Number of Counts 2 to 5	0.60	0.22	7.75	1.83**
Number of Counts 5 and more	0.90	0.26	11.57	2.45***
Number of Priors (0)				
Number of Priors 1 to 4	0.74	0.22	11.62	2.09***
Number of Priors 5 and more	1.45	0.28	26.10	4.26***
Offense Type (Violent)				
Property	-0.55	0.26	4.36	0.58*
Drugs	-0.45	0.22	4.11	0.64*
Other	-0.16	0.39	0.17	0.85
Release (In Jail)	-0.21	0.22	0.89	0.81
Model χ^2		73.48***		
-2LL		721.881		
Nagelkerke R ²		0.16		

* p< .05 ** p< .01 *** p< .001

Note: Reference categories are in parentheses.

Table 4.7 presents the results of a logistic regression to predict a sentence of incarceration. The analyses yielded some expected results that conform to the findings of previous research on the topic. For example, the number of prior convictions and number of charges were both significant predictors of a sentence of incarceration (Gottfredson & Gottfredson, 1988; Neubauer, 2002). As noted in the above, both of these variables were re-coded as categorical variables. Defendants with one to four prior convictions and those with five or more prior convictions were both more likely to receive a sentence of incarceration when compared to defendants with no prior convictions (Wald=11.62, odds=2.09, p=0.001; Wald=26.10, odds=4.26, p<.001). Cases where there were two to five counts and five or more counts were more likely to receive a sentence of imprisonment when compared to those cases where only one charge was pending (Wald=7.75, odds=1.83, p=.005; Wald=11.57, odds=2.45, p=.001).

There were other predictors of incarceration that emerged. Offense type influenced the fate of defendants charged with property offenses and drug offenses since they were less likely to receive a term of incarceration when compared to violent offenders (Wald=4.36, odds=0.58, p=.037; Wald=4.11, odds=-0.64, p=.043). Jurisdiction, which had not played a major role in the previous analyses, emerged as a significant predictor of incarceration. Surprisingly, the odds of incarceration are 38% lower for defendants in urban jurisdictions as compared to those in non-urban jurisdictions (Wald=5.30, odds=0.62, p<.021). Finally, the variable of most interest-bail posted-did not

have a significant impact on incarceration. This finding does not support the hypothesis that defendants detained pretrial are more likely to receive custodial sentences than those who post bail.

4.3.b. Tobit Regression for Length of Incarceration

Table 4.8 investigates predictors of sentence length in days for those offenders who were sentenced to incarceration terms. The variable for sentence length was positively skewed and was therefore transformed using a square root transformation. Additionally, case number 31 was an extreme outlier. To correct for its potential heavy influence, the sentence length for this case was re-coded to the next highest value. Tolerance and VIF statistics indicated that multicollinearity was not a problem. A normality plot indicated normal residuals. The Durbin Watson statistic confirmed the independence of the observations. In addition, assumptions of homoscedasticity and linearity were met.

**Table 4.8. Tobit Analysis: Dependent Variable = Sentence Length (Logged)
(n=589)**

	Model 1			Model 2		
	Coefficient	SE	t	Coefficient	SE	t
Gender (Female)	13.10	3.83	3.41***	10.90	3.72	2.93**
Age	0.01	0.02	0.53	-0.11	0.12	-0.87
Race (White)						
Hispanic	6.63	3.69	1.80	4.73	3.56	1.33
Black	7.24	2.93	2.47*	6.12	2.84	2.16*
Attorney Type (Private)	5.02	3.49	1.44	0.55	3.42	0.16
County Type (Non-Urban)	-3.71	2.68	-1.39	-4.05	2.58	-1.57
Prior Convictions	-0.01	0.01	-1.08	2.11	0.33	6.46***
Number of Charges	1.16	0.35	3.32***	1.34	0.34	3.97***
Offense Type (Violent)						
Property	-8.21	3.39	-2.42*	-9.34	3.28	-2.85**
Drugs	-5.14	2.83	-1.82	-6.55	2.72	-2.40*
Other	-6.60	5.05	-1.31	-12.60	5.01	-2.51*
Release (In Jail)	-8.24	2.73	-3.02***	-6.35	2.65	-2.39*
Age x Prior Convictions				-5.16	1.51	-3.41***
Model χ^2	73.06 ***			114.55***		
Log likelihood	-1879.55			-1826.41		
Pseudo R ²	0.0191			0.0304		

* p< .05 ** p< .01 *** p< .001
Note: Reference categories are in parentheses.

Table 4.8 presents the results from a Tobit regression to predict the length of a defendant's incarceration in days. Gender is a significant predictor of sentence length. Unsurprisingly, men receive longer sentences than women ($t=2.93$, $p<.004$). Also of no surprise is the finding that black defendants received lengthier sentences when compared to white defendants. Consistent with the previous analysis, the number of charges was a significant predictor. As the number of charges pending increases, so does a defendant's sentence length. Consistent with previous research, an increasing number of prior convictions also increases a defendant's sentence length. Offense type is significant in that property, drug and other felony offenses all received shorter sentences than offenses involving violence. The interaction between age and prior convictions is significant, indicating that the relationship between number of prior convictions and sentence length is more pronounced for younger defendants. The variable most central to the concerns of this study, a defendant's bail posting status, played a significant role in the length of the sentence that he or she received. Defendants who were held in pretrial detention received lengthier sentences than those who were able to post bail; confirming one of the main hypotheses of this research.

4.4 Summary of Quantitative Findings

The general finding of the quantitative analyses shows that as the number of charges increase, so do the odds of a financial bail requirement and the dollar amount of bail set by the court. Bail amount set by the court is higher for defendants in urban

jurisdictions and defendants in urban jurisdictions are less likely to be able to post bail. Minorities often face a disadvantage with regard to pretrial decisions made by the court and black defendants in particular, have lower odds of posting bail. The combination of urbanity and race has an even stronger impact on a defendant's ability to post bail and defendants with public defenders are also less likely to post bail. The bail amount set by the court is the strongest factor influencing a defendant's ability to post bail. Surprisingly, while violent arrestees are more likely to receive financial bail and higher bail amounts when compared to non-violent offenders, they are also more likely to post bail. A similar finding emerged when comparing cases screened out of superior court with those that remained in superior court. Although the cases that were screened out were just as likely as those that remained to have financial bail imposed, the dollar amount was significantly higher for the cases that remained in superior court. Nevertheless, defendants whose cases were screened out were still significantly less likely to post bail than those defendants whose cases remained in superior court.

Several factors, both legal and extralegal, impact the timing of a defendant's guilty plea, particularly when disposition timing is measured as a continuous variable. Cases involving property and drug offenses have a shorter disposition time when compared to cases involving violent felonies. As the number of charges increase, so do the days until a case disposition. Turning to race, case dispositions for hispanic and black defendants took longer than those involving white defendants. Cases involving public defenders reached a disposition quicker than those that involved a private counsel. Prior

convictions, while not significant by itself, exerted a stronger impact in cases involving male defendants. Finally, defendants who were held in pretrial detention reached a disposition more quickly than those who were able to post bail.

Results regarding sentencing revealed that a number of factors influenced the odds of incarceration. Many of the same factors affected both when a custodial sentence was imposed and the length of the sentence. Defendants who were charged with violent offenses were more likely to be sentenced to a term of incarceration and a lengthier sentence than those who were charged with property offenses. They were also more likely than drug offenses to receive a term of incarceration. As the number of charges and prior convictions increased, so did the probability of receiving a term of incarceration and the sentence length. Looking at the sample of defendants along gender lines revealed that males received lengthier sentences than females. Looking at the sample in terms of race, black defendants receive lengthier sentences than their white and hispanic counterparts. Interestingly, defendants in urban jurisdictions were less likely than those in non-urban jurisdictions to receive a term of incarceration. The interaction between age and prior convictions suggests an extensive criminal history impacts sentence length more for younger defendants. Finally, bail status did not influence the odds of incarceration but did impact the length of sentence; defendants who were held before trial received longer sentences than those who were able to post bail.

4.5. Summary of Qualitative Findings

The data collected from observations of bail hearings and interviews helped to

make sense of the bail process in New Jersey. For example, the bail rules of New Jersey mandate that bail must be set within the first twelve hours of arrest. An interview with one New Jersey prosecutor confirmed this fact but also provided more detail about the process. The prosecutor explained that going into the initial bail hearing, within twelve hours of arrest, the parties involved typically possess only a few pieces of information such as a police report and possibly the defendant's prior criminal record. However, the prosecutor explained that the first appearance, also known as the arraignment, must take place within seventy-two hours after an arrest, and the judge at the arraignment can decide to continue the defendant's original bail or to amend it at that point. By this time, both the lawyers and the judge have more information about the defendant, including the prior criminal record, the complaint and any information about the defendant's community ties (Interview, 03/11/10).

Observations taken during about twenty-five bail hearings supports the finding that judges require more bail money from defendants accused of violent offenses than those accused of other offenses. All cases that involved alleged robbery or aggravated assault resulted in higher sums for bail than those for any of the cases that involved controlled substances. Analysis of bail hearings also confirmed the finding that the bail amount set by the court increases with the number of charges. The judge consistently increased the money bail amount for each additional charge when a case involved multiple charges (Field notes, 3/11/10; 3/16/10). The following quotes illustrate the finding that offense severity impacts bail decisions as well:

ROR is usually used in disorderly persons cases. Whether a defendant gets ROR or financial bail is based on the level of charges (Interview with prosecutor, 3/11/10).

The first consideration is the severity of charges and then the dynamic (referring to the courtroom work group). The severity of the crime rules the day (Interview with public defender, 11/22/10).

One important conclusion from these observations does not coincide with the results of the statistical analyses: the qualitative data suggests that criminal history plays a strong role in bail decisions. This finding emerged from both observations and interviews of the courtroom work group. The following cases illustrate this point:

The defendant, a young black male, was charged with one count of aggravated assault and one count of possession of a handgun. The judge set a financial bail amount of \$150,000. The defendant's attorney requested that the bail be lowered in light of his client's familial ties, employment, and lack of economic resources. The judge stated that his concern over the defendant's extensive criminal history prevented him from lowering the defendant's bail (Field notes, 3/16/10).

The accused, a young black female, was charged with one count of aggravated assault by use of automobile. The two victims, present at the hearing, requested that the defendant not have further contact with them but also requested that the charges against the defendant be dropped. The public defender argued for ROR, stating that his client had a baby at home and that she needed to be with the child to continue breastfeeding. The judge set financial bail at \$20,000, expressing his concern over the defendant's extensive prior record. The judge told the defendant that she could pump her milk in jail so that breast feeding would not be disrupted (3/16/10).

In findings detailed above, community ties factors should play a significant role in bail determinations but the qualitative data seems to indicate otherwise. The following quotes indicate the importance of criminal history:

Some of the *Johnson* factors determine bail, but the severity of the crime and prior record are more important (Interview with public defender, 11/22/10).

ROR is used for lower-level cases and when there is no prior criminal history. ROR should be the goal but the histories are so much by the time they get here that they can't get ROR (Interview with judge, 3/16/10).

Analysis of the data also confirms some of the main findings regarding guilty pleas. Specifically, the data collected from interviews indicates that most defendants plead guilty and many of them do so to get out of jail. The following quotes, taken from interviews, support this conclusion:

Most cases are disposed of through guilty pleas. They plead earlier to get out earlier if they are detained. Yes, yes, they definitely plead guilty to get out of jail. You would want to get out too. They plead guilty to get out, get time served or to get it over with (Interview with prosecutor, 3/11/10).

They plead guilty to get out; that happens a lot. The thought of collateral consequences is the furthest thing from their minds - they just want to get out (Interview with public defender, 3/16/10).

Ten percent of people in jail are innocent but people plead guilty because they save themselves time in jail (Interview with judge, 3/16/10).

Data from the qualitative analyses also provide support for the shared dynamics of the courtroom work group. While not a variable in the analysis, the norms of this work group have been offered as an explanation for manner and frequency of plea bargains. The dynamic of the courtroom work group appears to play a role in the bail process as well. Observations indicate that public defenders and prosecutors are friendly with each other as well as with the judge presiding over bail hearings. They joke, laugh and share in casual conversation prior to bail proceedings. One public defender explained that the players are usually the same (Interview, 3/11/10). The following quote, taken from an

interview with a public defender, helps illustrate the dynamic:

Bail decisions made in advance happens a lot. Usually there is the same judge, prosecutor and sometimes public defenders. We get to know each other and what the judge wants and expects. There is definitely a dynamic among the players (Interview, 3/16/10).

Some of the statistical findings could be neither confirmed nor refuted by analysis of the qualitative data. For example, results from the statistical analyses indicate that minority defendants receive less favorable bail decisions when compared with white defendants. However, only one of the defendants observed in the bail hearings was white, making it impossible to form any conclusions about the role of a defendant's race. Results from the quantitative analyses also indicated that attorney type had a significant impact on both bail decisions and outcomes; however, all of the defendants in observed during their bail hearings were represented by a public defender. A more extensive qualitative study would be useful in addressing some of these questions.

CHAPTER 5: DISCUSSION AND CONCLUSION

5.1. Key Findings

This study examined the importance of bail decisions throughout the entire course of a case. Bail is one of the first legal proceedings to occur in the criminal justice process and it has the potential to affect the subsequent decision points in a case. Bail research was popular prior to the Bail Reform Act of 1984 and some recent research has demonstrated a renewed interest in the bail process (Demuth & Steffensmeier, 2004; Katz & Spohn, 1995; Schlesinger, 2005). Several studies have examined the potential impact of the bail process on conviction and sentencing (Free 2003; Phillips, 2008; Williams, 2003). However, as Albonetti (1990) points out, the research on decision points between bail and sentencing (usually in the form of plea bargaining) is scarce, even though plea bargaining is the most common form of case disposition. This study addressed this apparent gap in the research on decision points in criminal case processing by analyzing the factors most salient to bail and in turn, how bail decisions and outcomes affect both plea bargaining and sentencing. Some interesting findings emerged.

5.1.a. Bail

As previous sections detailed, bail's one legitimate purpose under New Jersey law is to ensure that a defendant returns to court for future appearance; indicating New Jersey's resistance to the trend in federal and other state courts where the protection of the community from potentially dangerous individuals is a legitimate goal of bail as well. It

was hypothesized that only the seriousness of an offense would be related to the type of bail granted by the judge and that individuals charged with non-violent crimes would be given low monetary bail or ROR. The results supported these hypotheses, indicating that judges consistently granted ROR or lower monetary bail amounts to defendants charged with less serious crimes. Further, as the number of charges increased, so did the less favorable bail decisions received by defendants; these decisions may not relate to offense type but have been consistently used as a measure of offense severity (Kellough & Wortley, 2002; Schlesinger, 2005). The influence of these factors accords with New Jersey's law and with previous research on bail decisions. Finally, while past offending was a salient factor in sentencing decisions, it is noteworthy that prior convictions did not emerge from the results of the quantitative analyses as a significant predictor of bail decisions in New Jersey. This result is particularly interesting since prior offending is often regarded as one of the most influential factors in criminal justice decisions (Gottfredson and Gottfredson 1988; 1990). While this finding may suggest that criminal history does not play a significant role in bail decisions, interviews and observations of bail hearing suggested otherwise.

This study also found that race played an important role in bail decisions by the court in its determination of bail type and in the amount of bail set. The odds of a minority receiving ROR were less than those for a white defendant and when financial bail was set, minorities had to pay higher bail amounts than white defendants. Although this finding is consistent with previous research on this topic (Demuth, 2003; Nagel, 1983), the

explanation for these results may not be as easy as equating minority status with unfavorable bail decisions. Bail proceedings require judges to make quick assessments of defendants based on little information (Fagan & Guggenheim, 1996). As reviewed in previous sections, several theoretical perspectives offer explanations of these quick decisions and how they influence the pretrial decisions made about minority defendants.

Demuth (2003) posits the focal concerns theory as a possible explanation for judicial stereotyping in sentencing decisions. Schlesinger (2005) integrates Demuth's theory with the racial formation perspective and attribution theory to explain how certain attributions to minority defendants become more salient when judges must make quick decisions. Feeley and Simon (1992) explain that with the shift to the new penology, risk management has become one of the central concerns of courts. Risk management is predicated on predictions of future dangerousness, which became a feature of bail operations when the Court authorized the use of preventive detention for potentially dangerous individuals (Feeley and Simon, 1992). Feeley and Simon's (1992) assertion of risk management of the urban "underclass" may seem supported by the findings that black urban defendants had higher financial bail requirements and were less likely to be able to post bail.

However, the results of this research may require an amalgam of these theories to explain bail decision making, particularly given the information yielded by the qualitative analysis. Race plays some part in bail decisions in the ways that are explained by these perspectives but race alone does not decisions about bail, in the same way that it is clear

that legal indicators are not solely responsible for bail decisions. These legal predictors of bail- the offense type, the number of charges, a defendant's criminal history -have also been interpreted by these various theoretical frameworks. Attribution theory, focal concerns theory, and the new penological discourse attempt to account for these factors. While analyses of these indicators provide partial support for each of these theories, none can definitively explain why particular decisions are made.

The qualitative data, which provided some crucial information that was not captured in the quantitative analyses require an expanded view of bail decision making. The result that departed the furthest from the quantitative findings was that criminal history did have a strong impact on bail decisions. Factors internal to the court (gleaned from the qualitative data) indicate that the members of the courtroom work group value speedy and efficient bail proceedings while they share expectations about the going rate so that many decisions are based on agreements made before the bail proceedings. These qualitative findings indicate that it is more than case-related, defendant-level characteristics that affect bail decisions. In fact, it may be a combination of factors that are both external and internal to the court that influences bail decision making. Typically, previous studies focused on external factors; this study highlights the need to study factors internal to the court. That both external and internal factors impacted the bail process suggests that focal concerns theory may be the most appropriate explanation of bail decision making.

Turning back to bail outcomes, it was no surprise that the bail amount set by the

court was strongly associated with a defendant's ability to post bail. The higher the bail amount that was set by the court, the less likely a defendant was to post bail and defendants with public defenders were less likely to post bail than offenders with private counsel. It was interesting; however, that offenders who were charged with violent offenses were more likely to post bail than those charged with property offenses. This finding reaffirms the fact that New Jersey does not recognize protection of the community from potentially dangerous individuals as a goal of bail. However, this raises another concern: even though poor defendants and defendants who face less serious charges receive more favorable decisions, they are still less likely to post bail. This finding became clearer when cases that were screened in and those that were screened out of superior court were compared. Defendants in cases that were screened out, despite having a bail that was on average \$34,000 less, were still less likely to post bail than those defendants that remained in superior court. These defendants are therefore more likely to be held before trial; this highlights the problems associated with a cash bail system and affects the policy implications discussed in 5.2.

5.1.b. Plea Bargaining

As previously mentioned, plea bargaining has become the most common form of case disposition in the United States. Approximately 97 percent of felony cases reach their disposition through plea bargaining (BJS, 2009). Of the 722 cases in the entire sample that resulted in a guilty finding, only 11 were the result of a trial while the

remainder were the result of a plea bargain. Ideally, one analysis would have focused on the dependent variable indicating disposition type (guilty plea or trial) - the idea being that defendants unable to post bail will plead guilty rather than opt for trial. However, this analysis was not possible due to the small number of cases (n=17) in the sample that were resolved through trial. Although plea bargaining has become the norm, certain factors have been found to increase the odds of a defendant engaging in the plea bargaining process.

The offense types are divided for the most part, with about half of the cases including high-level offenses against persons and the other half comprising second and third degree controlled substances offenses. While the average number of prior convictions in the trial cases is approximately the same as that in the overall sample, the average number of charges pending in the trial cases is 4.5, which is notably higher than the average of 3.1 charges pending in the overall sample. Previous literature indicates that the number of charges will increase the probability of a guilty plea (Albonetti, 1990), which is consistent with notion of the “trial penalty” faced by defendants who opt for trial over plea bargaining. Although the frequencies indicate otherwise in this research, the sample is too small to draw conclusions regarding the impact of the number of charges on guilty pleas. Although limited, the data clearly shows that most of the defendants who opted for trial had a monetary bail requirement. However, unlike the overall sample where approximately 65% of defendants were able to post bail, approximately 80% of the defendants whose cases went to trial were able to post bail and were therefore released

before trial. These preliminary numbers suggest the relevance of statistical analyses that examine the impact of pretrial detention on a defendant's decision to plead guilty.

Even more importantly, this research looks at factors that affect the timing of a plea bargain. Most cases will result in a plea bargain but the court is still charged with providing speedy justice, making the issue of timing an important one. The number of charges, while increasing a defendant's likelihood of pleading guilty, also increased the number of days until disposition. Defendants with more charges pending against them took longer to plea bargain; a reality which makes sense considering that cases involving more charges are usually more complex requiring more due diligence. Similarly, cases involving property and drug offenses were resolved quicker than those involving violent offenses, which may also indicate that more serious and more complex cases take longer to resolve. Cases involving public defenders will have a shorter disposition time than those with private attorneys. This finding may highlight the lack of resources and the burden of the caseload pressures faced by public defenders who undoubtedly need to dispose of cases expeditiously. However, it may also be another indicator of the efficiency of the courtroom work group. This study joins several others in efforts to understand these courtroom relationships (Clynch & Neubauer, 1981; McCoy, 1993; Schulhofer, 1983; Spohn, 1991). Another finding, consistent with previous research (Albonetti, 1990; Frenzel & Ball, 2007; Kellough & Wortley) is the role of race. The results indicate that cases involving black and Hispanic defendants will take longer to dispose. One explanation for this finding, offered by Albonetti (1990), explained that

black defendants may be less likely to plea bargain as they are more distrustful of the legal system. This argument can be applied to the finding that minority defendants may express their distrust of the legal system by a comparatively long resistance to plea bargaining.

The hypothesis that defendants, held before trial, will be more likely to plea bargain early to get out of jail quickly is essential to the approach of the present research. And this study's results appear to support this hypothesis as pretrial detention had the strongest impact on when defendants plead guilty. Defendants who were held pretrial in this sample had their cases disposed of earlier than defendants who were released. According to the Bureau of Justice Statistics (2008), approximately 43 percent of defendants are held until case disposition, thus providing defendants with an incentive to plead guilty quicker than those released in the community.

The results in this analysis are also consistent with the findings from Kellough and Wortley's (2002) study of bail decisions and plea bargaining. Although Kellough and Wortley (2002) did not look at the time elapsed before a case's disposition, they found that individuals held in pretrial detention were more likely to engage in plea negotiations. Kellough and Wortley (2002) offered new explanations of the factors that affect plea bargaining. They reasoned that defendants may plead guilty to a crime when prison time might not follow or when a guilty plea would result in a release from jail. McCoy (2008) also echoed this sentiment when she suggested that lower-level offenders would plead guilty to get out of jail. It is possible that defendants also plead early for other reasons

such as better correctional accommodations. Ostrom & Hanson (1999) explain that guilty pleas occur faster because of the court's concerns over incarceration's costs and the defendant's loss of freedom, suggesting that it is the courtroom's organization that is responsible for timing of guilty pleas. While this is a viable explanation and one that warrants future research, the combined quantitative and qualitative results in this study suggest that that defendants will plead earlier to get out of jail faster. Similar to the conclusions regarding bail, it may be that a more comprehensive perspective that includes case, defendant and court-level characteristics, would better explain the timing of guilty pleas.

5.1.c. Sentencing

The final decision point, sentencing, marks the conclusion of the legal process. This is usually the phase of the system that receives the most attention. This attention includes the media's attention (Demuth, 2003) since sentencing may provide an opportunity to "see justice served". While the interest in sentencing is understandable, there are several steps that precede sentencing and many factors that can affect the end result. Several studies have examined variables that affect conviction and sentencing (Neubauer, 2002; Spohn, Gruel & Welch, 1981; Steffensmeier, Ulmer & Kramer, 1998) and a few of these have included pretrial detention as a possible influence (Phillips, 2008; Williams, 2003). This study examined the determinants of incarceration and sentence length.

As expected, a defendant's number of prior convictions significantly predicted the odds that a defendant would receive a custodial sentence and sentence length, a finding that is consistent with previous literature (Gottfredson & Gottfredson, 1988; Neubauer, 2002). The number of charges pending against a defendant significantly predicted the odds of incarceration and sentence length, in that an increasing number of charges increased sentence length. This finding, also consistent with previous research (Williams, 2003), is reasonable considering that as the charges brought increase, so do the accompanying penalties. Additionally, the findings that cases involving violent felonies are more likely to receive a custodial sentence and lengthier sentences comport to previous findings that offense severity impacts sentencing decisions.

The effects of demographic variables on sentencing were consistent with previous research: males received longer custodial sentences than females (Albonetti, 1997). Race did not impact the odds of incarceration but did impact sentence length, in that black defendants received longer custodial sentences than their Caucasian counterparts. This finding is consistent with a solid body of research concluding that race plays a strong role in these decisions (Kramer & Steffensmeier, 1993; Spohn & Cederblom, 1991), even though some research refutes these conclusions (Engen & Gainey, 2000). The findings also indicate that younger defendants receive longer sentences when they have a more extensive criminal history. The finding that young, black, male defendants with extensive criminal histories are sentenced more harshly is consistent with previous research linking defendant characteristics such as race and gender with legal factors such as prior criminal

record under a framework of attributions of dangerousness (Spohn, 2000; Steffensmeier and Demuth, 2001; Steffensmeier et al., 1998).

Interestingly, in this sample, defendants in urban jurisdiction were less likely than those in non-urban counties to receive a sentence of incarceration. This finding implies that non-urban defendants are not treated more leniently than urban defendants. This finding may be related to the political views held by non-urban judges and may reflect a tendency for non-urban judges to be more punitive. Although it is beyond the scope of the current study, this result could be examined more carefully in future research utilizing data that measures court-related characteristics.

Most importantly for this study's purposes, a defendant's bail posting status was hypothesized to significantly predict the decision to incarcerate and the length of sentence. While the ability to post bail did not impact whether a defendant received a custodial sentence, once the court imposed this type of sentence, bail posting had an influential role in dictating the length of the sentence. Those who were detained before trial received longer terms of incarceration than defendants who were out on bail. Several explanations of this trend are possible. More than fifty years ago (Foote, 1954) posited that defendants who are detained before trial cannot participate fully in their defense, particularly because they do not spend much time with their attorneys.

Williams (2003) contends that judges treat defendants who were released pretrial more leniently than those who could not make bail. He reasoned that judges may see detained defendants as being more dangerous and posing more of a threat to the

community. Judges may perceive pretrial incarceration as an appropriate measure taken for protection for the community rather than detention before trial as the unfortunate result of a lack of resources. Of course, defendants who are out on bail have ample opportunity to demonstrate for the court that they do not pose a danger to the community in which they reside.

Similarly, as Williams (2003) describes, the effects stems from more than a defendant abiding by the legal terms of his/her release. Good behavior (in free society) before trial suggests to a judge that a defendant does not pose a threat and will make his/her scheduled court appearances. These defendants often manage to keep their job or to find new employment; these defendants are able to continue attending school and to demonstrate ties to the community. All of these factors may contribute to a judge's perception that defendants who are released before trial are worthy of more lenient sentences, such as community supervision and other diversion programs. A defendant who is detained pretrial will not have the same opportunity to demonstrate a network of solid community ties and any pattern of good conduct. Therefore, defendants who are released on bail enjoy an advantage at sentencing.

5.2 Policy Implications

Currently, approximately 767,000 individuals are being held in jails; 62% of the persons in jail are being held pretrial (BJS, 2010). As previously discussed, incarceration is associated with a host of negative consequences, including decreased rates of

employment and decreased wages, broken familial ties and increased rates of recidivism (Allan et al., 2005; Travis, 2005; Western, 2002; Western, 2005). In addition to these detrimental effects on individuals, the cost of corrections in the United States has skyrocketed and is increasingly becoming a burden on taxpayers. According to the Bureau of Justice Statistics, over 7.3 million people are under some kind of correctional supervision at a cost of approximately \$68 billion dollars per year to Americans (BJS, 2010). It is estimated that \$9 billion of this total is spent on detaining defendants who cannot afford bail (Sullivan, 2010). The cost to society is overwhelming and unnecessary.

As this study found, many of the defendants held in pretrial detention were accused of non-violent crimes. A significant part of the problem of overcrowded jails can be traced to the housing of defendants who cannot afford to post bail. Unfortunately, the implication that money buys justice is not a new one. Those with financial resources are able to purchase their freedom. Even though this is nothing new, it becomes an even bigger concern given the current economic crisis and the demand to allocate scarce budget current resources. The movement towards “mass incarceration” since the 1990s has meant a corrections budget that has reached astronomic proportions. The most prudent solution was proposed after the first bail reform movement: a significant increase in the use of ROR (Release on Recognizance).

As earlier sections explained, ROR is the release of a defendant on his/her promise to return for future court proceedings. However, cash bail is used much more frequently, likely due to the renewed focus on “crime control” and the more punitive trend in

punishment of the last 30 years. Because the federal and many state systems acknowledge potential dangerousness as a legitimate reason to deny bail it will be difficult to increase the use of ROR in those jurisdictions. This notwithstanding, it is certainly a realistic goal for those jurisdictions, like New Jersey, that focus on risk of flight to increase the use of ROR or conditional release, which would allow defendants to be released into the community but with supervision prior to trial. As previously mentioned, most pretrial detainees are non-violent offenders for whom the use of ROR should be substantially increased. However, this research has shown that, the offense type, the number of charges and a criminal history are very important to judges when making bail decisions. This view suggests that judges, despite their mandate, may be focused on the wrong criteria for bail decisions; and that the goal of bail may not be stressed enough in certain jurisdictions. However, it is not possible to reach definitive conclusions on this matter without an examination of data that describe the communities of defendants.

Another option that is not as aggressive as reducing the use of cash bail is to simply reduce the amount of bail set by the court. The results and discussion sections explained that the defendants who were most likely not to post bail were non-violent. The bail amount set by the court is simply too high for even low-level offenders. In many jurisdictions, including New Jersey, bail guidelines exist to assist judges with their decisions. These guidelines, which judges in New Jersey are not bound by, are usually guided by the offense type which does not indicate a defendant's risk of flight. Again, this

state of affairs suggests that the judiciary may not be properly focused on the legitimate criteria for bail decisions in a jurisdiction that recognizes flight risk as its primary determinate for the decision of whether to grant bail.

It may be that one of these options is more viable than the other or that a combination of the alternatives could work. The bottom line is any correction of flaws in pretrial administration could greatly improve criminal case processing as a whole. The findings in this study show that many low-level offenders cannot afford bail and that our system is one characterized by financial bail. The findings also very clearly demonstrate that the decision points in the criminal justice system are connected and that defendants held in pretrial detention plead guilty quickly and likely face adverse consequences at sentencing. The consequences to individuals, families, and the cost to society, are too substantial to ignore. Incarceration, even in the short-term, poses long-term harm. The main policy implication of this work is that the flaws in pretrial administration must be addressed to ensure justice at each step of the process.

5.3. Limitations

Data about the defendants' "community ties" was not available for this analysis. Information about community ties typically includes a defendant's employment and educational status, marital and family situation, residential arrangements, and financial standing. The absence of this individual-level data is a limitation to this study in that this information is also considered by the court when making bail determinations. However,

as previously mentioned and as noted by Demuth (2003), these factors are not given as much weight as the offense severity and criminal history information. In New Jersey, judges do not have access to reliable information about community ties. The defense attorney, with the assistance of an investigator working for the public defender's office, gathers information about employment status, education, family ties, and other pertinent information about community ties information for the court. However, this information is obtained quickly and is not verified by the court.

One important variable that is missing from the analysis is citizenship of the defendant. Similarly, other measures of flight risk are missing from the analysis. Variables measuring community ties are relevant to the assessment of flight risk. In addition, more specific indicators can provide a judge with insight into the defendant's potential to appear in the future. Specifically, it would have been helpful to have had information about a defendant's history of court appearances and a measure of a defendant's compliance with past court orders. New Jersey stipulates that bail decisions should be based on flight risk and these variables would have offered valuable information.

5.4. Future Research

When possible, future analyses of bail decisions and subsequent decision points should include measures of community ties. It would be particularly helpful to include information about a defendant's citizenship, employment status and financial standing.

Data constraints prevented the use of a specific measure of socioeconomic status (private and assigned counsel served as a proxy); however, more precise measures should be used in future research. Although the majority of the research has focused on race, the role of class deserves the same attention. Measures of flight risk are especially relevant when studying bail decisions and should be included whenever possible.

This study focused on the analysis of felony cases. The New Jersey Criminal Disposition Commission collected bail data for misdemeanor cases but did not track the cases through the entire criminal process. Therefore, it was not possible to analyze these cases from inception to finish. Future research should examine misdemeanor cases. These are cases in which we would expect defendants to be more likely to receive ROR or very low cash bail. If defendants with low cash bail requirements are detained at length, it may provide evidence of *de facto* preventive detention, which can adversely affect individual cases and pose a substantial financial burden to society.

This study consisted primarily of quantitative analyses supplemented with observations of bail hearings and by interviews with members of the courtroom work group. Future research on this topic would also benefit from more qualitative research. Kellough and Wortley (2002) also combined research methods and in doing so interviewed pretrial detainees. Observations and interviews certainly help to highlight the findings of these studies and also provide invaluable information that cannot be expressed solely by examining the numbers. To this end, Ostrom and Hanson (1999) included a comprehensive analysis of factors internal to the court. Future research should also

incorporate measures of the courtroom culture and organization.

Finally, this study sought to examine several decision points in criminal justice processing. Future research should also seek to do the same. A substantial body of literature has amassed on sentencing and several important studies have examined bail decisions and outcomes; however, very little research has addressed the factors that affect the plea bargaining process. This study was conducted to fill the gap in knowledge on this topic and to highlight the impact of bail on subsequent stages of the process. The findings here suggest that early decisions may just be the most important ones.

Appendix A: Interview Questions for Prosecutors/Public Defenders

What is screening?

What types of cases are screened out?

What is the usual time between arrest and bail proceedings?

What is the criteria for bail decisions?

What information do you have when determining bail?

Where do you get the defendant's information from?

How do you determine who gets ROR?

What are the most common cases for which ROR is an option?

How does dangerousness factor into bail decisions?

Which cases warrant a request for financial bail?

What are bail restrictions?

Which cases have bail restrictions?

How often and under what circumstances are additional conditions of release imposed?

When do plea negotiations take place?

Do most defendants plead before or after the indictment?

Do guilty pleas help reduce jail time for defendants?

Are people who are free on bail less likely to plead guilty?

My analysis of statistics from New Jersey's CDC show that: legal factors such as offense severity and the number of charges pending affect bail decisions by the court; minority defendants receive less advantageous decisions than their Caucasian counterparts; defendants with public defenders are less likely to be able to post bail; financial resources exert a strong influence on a defendant's ability to post bail; defendants detained pretrial plead guilty quicker than those released on bail; and defendants detained pretrial receive lengthier custodial sentences than those released on bail.

Do you have any comments about these findings? Do you have ideas about why the bail system operates this way?

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