

Executive Director,
Jerome E. McElroy

Director, Research Dept.,
Richard R. Peterson, Ph.D.

Research Brief Editor,
Mary T. Phillips, Ph.D.

Graphics & Production,
Raymond P. Caligiure

Administrative Associate,
Nyota A. Muhammad

CJA is a not-for-profit corporation that provides a variety of criminal justice services under a contract with the City of New York. CJA staff interview defendants arrested in New York City, make recommendations for pretrial release, and notify released defendants of upcoming court dates. Within the Agency, the Research Department conducts studies covering a broad array of criminal justice policy concerns. The Research Brief series summarizes the results of some of these studies.

New York City
Criminal Justice Agency, Inc.
52 Duane Street
New York, NY 10007
PHONE: 646 213-2500
FAX: 646 213-2650
WEB: www.nycja.org

Prosecutors' Bail Requests and the CJA Release Recommendation: What Do They Tell the Judge?

By Mary T. Phillips, Ph.D.

Recent research has shown that prosecutors' bail requests have a considerable impact on judges' release and bail decisions at arraignment in New York City.

Because a defendant's likelihood of failure to appear (FTA) is the only statutory criterion for release in New York, the question arises: To what extent are prosecutors' bail requests based on risk of FTA?

CJA also makes a recommendation for or against release, which is based explicitly on risk of FTA. Our previous research showed that judges are somewhat influenced by the CJA recommendation, but their decisions for cases in the study sample were more strongly influenced by prosecutors' bail requests.

Prosecutors' bail requests play a major role in judges' release decisions at arraignment.

Are bail requests based on defendants' flight risk?

If not, what are they based on?

Prosecutors have information, unavailable to CJA, pertaining to the strength of the case and other circumstances that could affect a defendant's motivation to flee. Perhaps bail requests reflect such knowledge, enhancing their power of prediction.

In order to help judges assess the merits of the two recommendations, this research examines their relative strengths in predicting FTA. Our hypothesis was that the prosecutor's request is more closely linked to likelihood of conviction and sentence severity than to risk of flight.

Following a summary of the findings is a brief discussion of their implications for judicial release and bail decisions.

This *Research Brief* is adapted from:

Prosecutors' Bail Requests at Criminal Court Arraignment: Comparisons With the CJA Recommendation in Predicting FTA and Case Outcomes in Two New York City Boroughs (July 2005)
by Senior Research Analyst Mary T. Phillips, Ph.D. (unpublished)

Address comments to the author at mphillips@nycja.org
Systems programming: Anne Gravitch, Wayne Nehwadowich.

INTRODUCTION

Several years ago CJA initiated a study of judicial release and bail decisions. The results were reported in 2004 and summarized in an earlier issue of this series (#6). The major finding was that the prosecutor's bail request was the strongest predictor of both release on recognizance (ROR) and bail amount; in fact, it was the *only* important factor in the amount of bail set at arraignment. The ROR decision was also influenced by the CJA recommendation, as well as the defendant's criminal history and the offense type. However, the effects of all these other variables paled next to the power of the prosecutor's bail request.

Recommendations made by CJA and the prosecutor disagreed about half the time, usually when CJA recommended ROR and the prosecutor requested bail. When there was disagreement, judges more often went along with the prosecutor.

This has been a source of some frustration to the Agency because numerous studies have shown that the CJA recommendation consistently identifies defendants who can be released to the community with little risk that they will fail to return to court. This

suggests that arraignment judges would have a better chance of making an accurate assessment of risk of flight if they gave more weight to the CJA recommendation than to prosecutors' requests.

A major change in the CJA recommendation system took place shortly after data collection was completed for the judicial decision project. Had the new system been in effect for the cases in this sample, slightly more agreement would have been found between the prosecutor and the CJA recommendation. The new recommendation system—unlike the old one—penalizes defendants for a prior FTA, and this was something that was also found to affect whether prosecutors consented to ROR.

Under the new system, CJA still recommends many defendants for whom prosecutors request bail, so the issue for the court of how to weigh conflicting recommendations is ongoing. We know that the CJA recommendation provides information about the defendant's likelihood of flight — but what information does the prosecutor's bail request convey? The current research was undertaken to find out.

Research Questions

The primary research question was:

- How does the prosecutor's bail request compare with the CJA recommendation in predicting FTA?

If the prosecutor's bail request does not predict FTA, further questions addressed what it *does* predict.

Does the prosecutor's bail request predict:

- likelihood of conviction?
- likelihood of incarceration, for convicted defendants?
- sentence length, for defendants convicted and sentenced to incarceration?

The Sample Cases

The sample for the judicial release and bail decision project, which was also used in the current research, included 1,997 cases of defendants arraigned in Criminal Court in Manhattan and Brooklyn between September 2002 and March 2003. Data on prosecutors' bail requests were collected manually by CJA researchers who observed arraignments in all weekday and evening arraignment parts on various days of the week and at various times of day during this period. Much of the time, they were allowed to sit at the bench beside the judge in order to hear the proceedings more clearly. Because of the time-consuming nature of the observations, the research was limited to two boroughs.

All cases that were arraigned during observation sessions and were not disposed were included in the research sample (with the exception of cases of defendants who had been issued a Desk Appearance Ticket). Cases were tracked until April 2005, by which time 97% had reached final disposition.

The CJA database was the source for information on the CJA recommendation, the defendant's criminal history, case outcomes, and other case-processing data. This database contains information on nearly every New York City arrest through sentencing in Criminal Court or Supreme Court.

THE PROSECUTOR'S BAIL REQUEST & THE CJA RECOMMENDATION

The CJA recommendation, provided for nearly every defendant, is included with court papers handed to the judge at the beginning of the arraignment proceeding; copies are also provided to the prosecutor and the defense attorney. The prosecutor delivers his or her request verbally, usually at the close of the oral presentation of the facts of the case (except when the prosecutor expects a guilty plea at arraignment in a misdemeanor case). Typically, the defense attorney is then given a chance to respond to the prosecutor's bail request.

Defense attorney requests are not included in the current analyses. Many cases were missing this item because defense attorneys often do not make a request when the judge has already decided on ROR. More importantly, there is little variation in their requests: defense attorneys nearly always ask for ROR. Their advocacy role requires defense attorneys to focus on release or low bail for their clients regardless of risk of FTA. For these reasons the defense request was not found to be a significant factor in release or bail decisions, and is not considered here as a potential tool for predicting risk of FTA.

The prosecutor's request and the CJA recommendation are described in accompanying boxes.

Prosecutor's Bail Request

Prosecutors generally request that bail be set in a specific amount, or, less often, they consent to ROR. In rare circumstances they request that a defendant be remanded without bail. In our research, prosecutors occasionally changed their requests after a judge denied the first request; when this happened, only the first request was used in the analysis.

The basis for prosecutors' bail requests is not public information, as is the basis for the CJA recommendation.

Bail request categories were:

- Consent to ROR
- Dollar amount of bail requested
- Remand

Requests for bail in the amount of \$1 were excluded from the statistical analyses because this is an indication that the defendant was remanded or held on higher bail in another case.

CJA Recommendation

CJA staff members interview defendants prior to arraignment, to collect information about their residence, employment, and other community ties. This information is used (with, since 2003, criminal history) to make an objective ROR recommendation. The system was developed using empirical research to identify factors that predict FTA. No recommendation is made as to bail amount.

The recommendation system currently in use for adults was adopted in June 2003, a few months after the end of the research period. Whereas the old system relied wholly on community-ties information in assigning recommendation categories, the new system also takes into account some criminal history factors.

For both the old and the new systems, CJA staff attempt to verify key items of information by calling a contact person named by the defendant. Points are awarded based on the information and whether it was verified, and the points are added to produce a total score, which is the basis for assigning a recommendation category.

Recommendation categories under the old system, in use during the research period, were:

1. Recommended: Verified community ties.
2. Qualified: Unverified community ties.
3. No recommendation due to:
 - A. Insufficient community ties
 - B. Residence outside the NYC area
 - C. Conflicting residence information
 - D. Incomplete interview
4. No recommendation due to:
 - A. Open bench warrant
 - B. Criminal history not available
 - C. Bail-jumping charge
 - D. For information only: murder charge

The first two categories are favorable recommendations, and the third is unfavorable. Defendants in the fourth category (also unfavorable) are excluded from receiving a recommendation for policy reasons. In Figure 1 on the following page, 3-A (insufficient community ties) and 4-A (open bench warrant) are presented separately, and all other subcategories of 3 and 4 are grouped together as "other unfavorable."

WHICH IS THE BETTER PREDICTOR OF FTA . . .

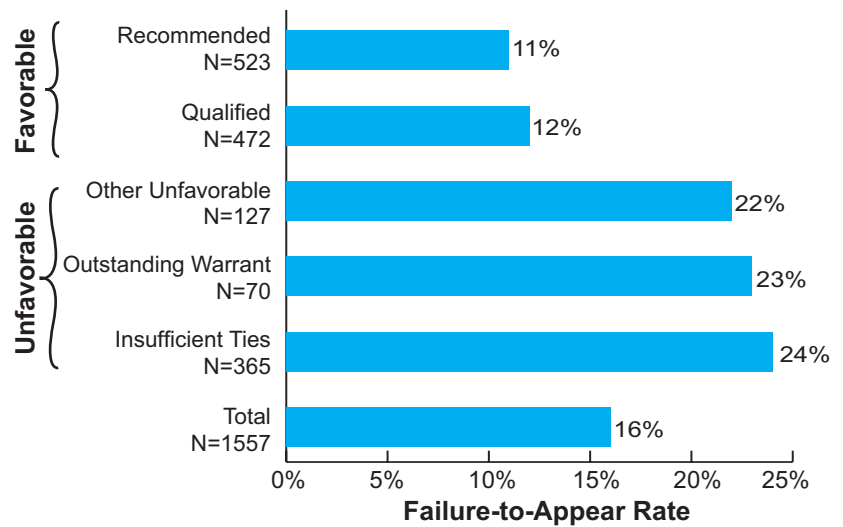
Failure-to-appear (FTA) rates were calculated by dividing the number of cases with a pre-disposition FTA by the number of cases in which the defendant was released on recognizance or on bail at any time prior to disposition, placing him or her at risk for FTA. The overall FTA rate for at-risk cases was 16%.

. . . the CJA recommendation?

Figure 1 shows that in cases with a defendant who received a favorable recommendation from CJA, the FTA rate was lower than average: 11% for cases in which the defendant received the top recommendation, and 12% for cases in which the defendant received a qualified recommendation.

Unfavorable recommendations were associated with FTA rates that were double the rates for cases with a favorable recommendation. Defendants with insufficient community ties had the highest FTA rate: 24%. The difference in likelihood of FTA between those with a favorable versus an unfavorable recommendation was statistically significant.

FIGURE 1
FTA RATE BY CJA RECOMMENDATION
(At-Risk Cases)

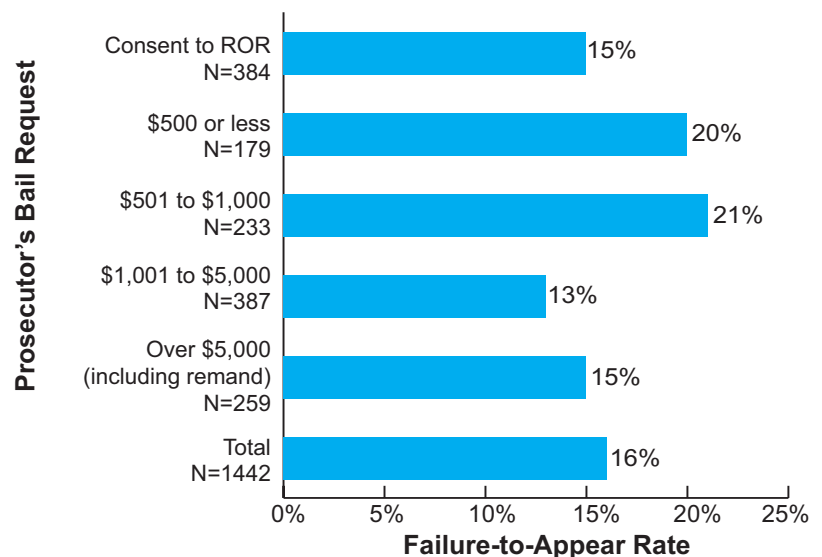


. . . or the prosecutor's bail request?

Figure 2 presents a very different picture. Cases in which the prosecutor consented to ROR had an FTA rate of 15%, which is near the average for all cases. The FTA rate was no different for cases in which the prosecutor asked for the highest bail amounts or remand without bail (also 15%). For cases in the low to middle ranges of bail requests, FTA rates were highest (around 20%).

There is no indication that prosecutors requested higher bail for defendants most likely to FTA, or that they consented to ROR only for defendants with a low risk of FTA. In fact, there is no consistent pattern to the relationship between the prosecutor's bail request and likelihood of FTA.

FIGURE 2
FTA RATE BY PROSECUTOR'S REQUEST
(At-Risk Cases)



And the answer is . . .

The bivariate relationships shown in Figures 1 and 2 strongly suggest that the CJA recommendation is not only the better predictor of FTA, but also that the prosecutor’s bail request does not predict FTA at all. However, this could not be established definitively until a multivariate analysis was done, to account for the possible confounding effects of other factors.

As a final step in answering each research question, a multivariate regression analysis was done to control for the effects of the severity of the arraignment charge and the defendant’s criminal history. Specific criminal history items included in the analysis were whether the defendant had an open case, a prior misdemeanor conviction, or a prior felony conviction.

Controlling for all of these factors did not change the results of the bivariate analyses of FTA. The hypothesis—that the CJA recommendation is a strong and statistically significant predictor of FTA, while the prosecutor’s bail request is not—was confirmed. The prosecutor’s bail request had no statistically significant relationship with FTA in the multivariate analysis.

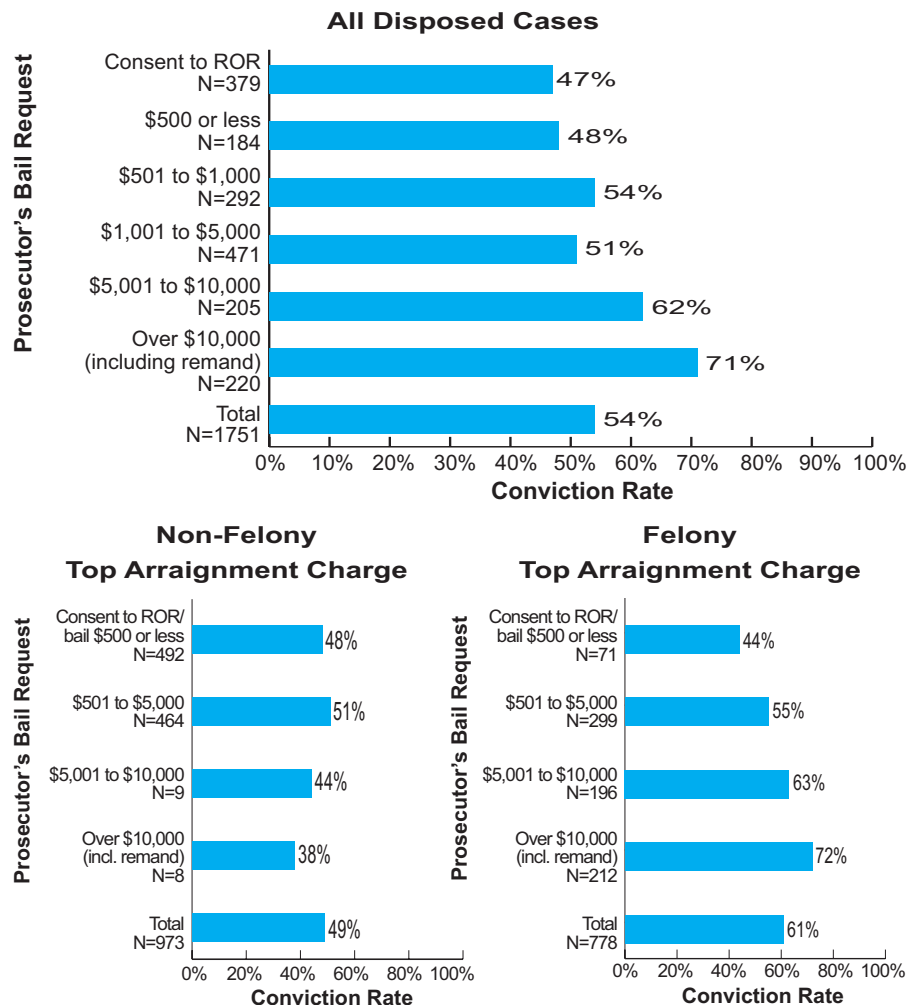
DOES THE PROSECUTOR’S REQUEST PREDICT CONVICTION?

An examination of all cases combined indicates that higher bail was requested for defendants who were most likely to be convicted. Figure 3, top half, shows that the conviction rate was 47% for cases in which the prosecutor consented to ROR, compared to 71% for cases with the highest bail requests.

However, the lower half of Figure 3 shows that the level of the prosecutor’s request predicted conviction only for felony cases, and not for cases of lesser severity. For non-felony cases, the conviction rate was about the same for cases with a bail request under \$500 (48%) as for those with a bail request between \$501 and \$5,000 (51%). There were only a handful of non-felony cases for which bail over \$5,000 was requested.

Felony cases had a higher conviction rate overall (61%, compared to 49% for non-felonies), and for these cases the level of the prosecutor’s bail request was significantly related to conviction rates. Felony cases with the lowest bail requests had a conviction rate of 44%, compared to 72% for cases with the highest bail requests.

**FIGURE 3
CONVICTION RATE BY PROSECUTOR’S REQUEST**



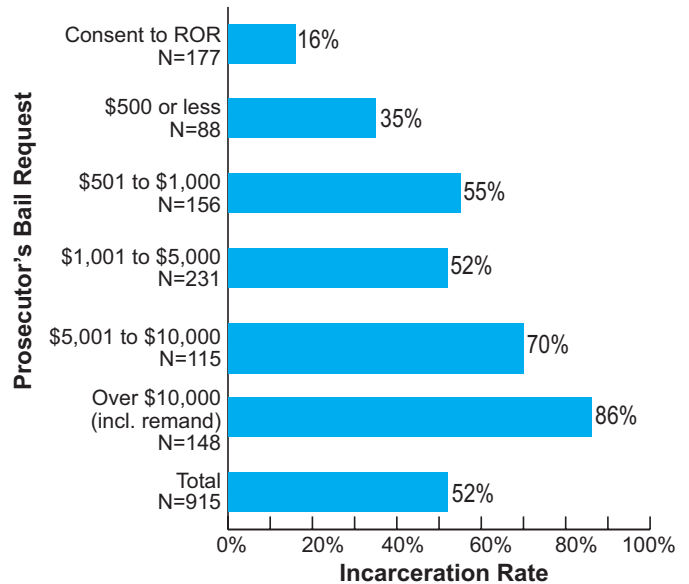
The multivariate (regression) analyses confirmed that high bail requests were significantly related to greater likelihood of conviction for felony cases, and were not related to conviction for non-felony cases, controlling for criminal history and the specific severity class of the charge.

DOES THE PROSECUTOR’S REQUEST PREDICT INCARCERATION?

Figure 4 shows that, for cases in which the defendant was convicted, the proportion that received a sentence of jail or prison time increased along with the bail request. Among cases in which the defendant was convicted and the prosecutor had consented to ROR, the proportion receiving a sentence of jail or prison was very small (16%). That proportion more than doubled for cases in which the prosecutor had requested even a small amount of bail (35% incarcerated in cases with a bail request under \$500). The incarceration rate rose to 86% for cases in which the prosecutor had requested over \$10,000 or remand.

The same pattern was found for non-felony and felony cases separately. The multivariate regression analyses revealed that — for non-felony cases only — criminal history accounted for the apparent relationship between the prosecutor’s request and conviction. For felony cases, however, the prosecutor’s bail request was a strong, statistically significant predictor of incarceration even controlling for criminal history.

FIGURE 4
INCARCERATION RATE
BY PROSECUTOR’S REQUEST
(Convicted Cases)



DOES THE PROSECUTOR’S REQUEST PREDICT SENTENCE LENGTH?

FIGURE 5
MEDIAN SENTENCE LENGTH
BY PROSECUTOR’S REQUEST
(Cases Sentenced to Incarceration)

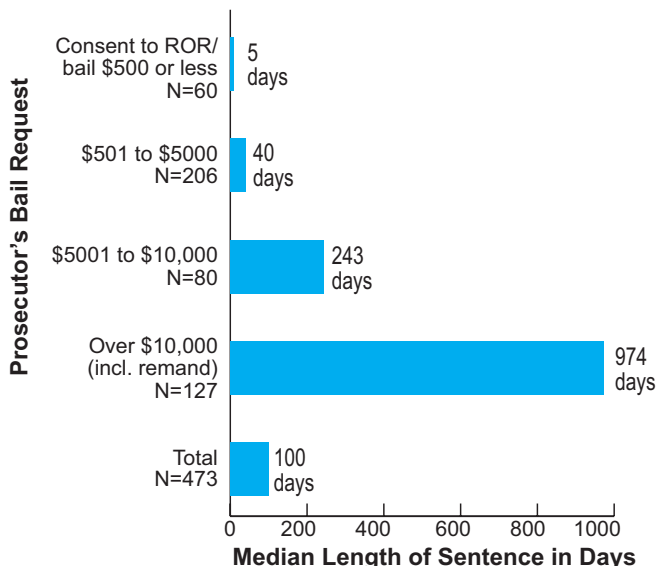


Figure 5 presents evidence of the strongest relationship yet found between the prosecutor’s bail request and any outcome. It applies only to the small proportion of cases in which the defendant was sentenced to incarceration, but for those cases, the prosecutor’s bail request was a powerful predictor of the length of the sentence.

In cases in which the prosecutor had consented to ROR or asked for no more than \$500 in bail, the median sentence was 5 days. The median was 40 days for cases in which the prosecutor had asked for a bail amount between \$501 and \$5,000; 243 days for cases in which the prosecutor had requested from \$5,001 to \$10,000; and nearly 3 years (974 days) for cases in which the prosecutor had requested over \$10,000 or remand. Some of this was accounted for by charge severity, but the relationship was found within both non-felony and felony cases.

Multivariate regression analyses confirmed that the prosecutor’s bail request was a strong and significant predictor of sentence length for non-felony and felony cases, controlling for criminal history and the severity class of the arraignment charge.

CONCLUSIONS

The purpose of the study was to ascertain which recommendation—the prosecutor’s or the one provided by CJA—provides judges with the more accurate assessment of whether a defendant, if released, is likely to fail to appear for future court dates. The research results leave no doubt that the CJA recommendation is far better at this task. It is never possible to predict with total accuracy whether a person will flee, but defendants in this study who were not recommended by CJA, and who were released anyway, were much more likely to miss a scheduled court date than defendants whom CJA had recommended. By contrast, among released defendants, those for whom prosecutors had consented to ROR failed to appear at the same rate as those for whom the prosecutor had requested over \$5,000 in bail. In general, prosecutors’ bail requests provided judges with no useful guidance as to the risk of FTA.

We replicated the analyses using the categories that defendants would have been assigned under the new CJA recommendation system. Our conclusions were unchanged regarding the relative effectiveness of the two recommendations in predicting FTA. However, the new system differentiates better between defendants who are at high and medium risk of FTA, and is thereby potentially more useful.

We had guessed that prosecutors link their bail requests to probability of conviction (justifiable assuming that a likely conviction provides motivation to flee), or that they attempt to encourage guilty pleas through detention resulting from high bail (not so justifiable).

Both interpretations are consistent with the finding that prosecutors’ bail requests were significantly associated with conviction among felony-level cases. For cases of lesser severity, however—the majority of cases—there was no significant relationship between the level of the prosecutor’s request and likelihood of conviction.

For convicted defendants, the prosecutor’s bail request also differentiated between those who were likely to receive an incarcerative sentence and those who were not—again, however, this was found only for cases with a felony charge at arraignment.

Finally, the prosecutor’s request provided a powerful clue as to the length of the sentence that would be imposed in cases in which the defendant was sentenced to incarceration. This finding applied to non-felony cases as well as to felony cases (but felony cases constituted the majority of cases with an incarcerative sentence).

The research results suggest that the level of the prosecutor’s bail request does convey information beyond the severity of the charge and the defendant’s criminal history. As hypothesized, prosecutors’ bail requests are linked to likelihood of conviction and the severity of the sentence for convicted defendants, and not to likelihood of FTA. What we did not anticipate was that the relationship of the prosecutor’s request to conviction and sentencing applies primarily to felony defendants. For defendants charged with lesser severity crimes, the bail request made a distinction only for those sentenced to incarceration (11% of the sample).

IMPLICATIONS FOR JUDICIAL DECISION MAKING

In making release and bail decisions, judges in New York are bound by law to consider only whether the defendant will return to court when required. Thus judges need an accurate method of gauging each defendant’s risk of flight.

The New York bail statute states that likelihood of conviction and probable sentence should be considered in assuring the defendant’s court attendance. Although the prosecutor’s request does predict these outcomes, at least for felony cases, we did not find the prosecutor’s request to be related to FTA, even for felony cases.

Whether risk of FTA should be the only criterion for release and bail decisions is another matter. Efforts to add public safety concerns to

the New York bail statute are supported by many people, including judges, and may already be a consideration in some release decisions. The fact that prosecutors’ bail requests distinguish between defendants on the basis of conviction probability and sentence severity suggests that public safety concerns may also underlie bail requests (especially as these distinctions apply primarily to the most serious cases).

Insofar as failure to appear is the court’s concern in making release and bail decisions, this research has demonstrated that the prosecutor’s bail request tells the judge nothing of relevance. The CJA recommendation remains judges’ best guide for making decisions based on likelihood of FTA.

CJA

Research Brief from

No. 9 (August 2005): Prosecutors' Bail Requests and the CJA Release Recommendation: What Do They Tell the Judge?

Forthcoming:

No. 10 *Recidivism Among Juvenile Offenders*, by Marian J. Gewirtz

Previously published in this series:

No. 8 (April 2005): *Pretrial Re-Arrest Among New York City Defendants* (Siddiqi)

No. 7 (December 2004): *Manhattan's Specialized Domestic Violence Court* (Peterson)

No. 6 (August 2004): *Release and Bail Decisions in New York City* (Phillips)

No. 5 (April 2004): *CJA's New Release-Recommendation System* (Siddiqi)

No. 4 (December 2003): *Combating Domestic Violence in New York City, 2001* (Peterson)

No. 3 (August 2003): *The Impact of Quality-Of-Life Policing* (Solomon)

No. 2 (April 2003): *The Impact of Felony ATI Programs On Recidivism* (Savolainen)

No. 1 (December 2002): *Jail Displacement for ATI Programs* (Phillips)

www.nycja.org/research/research.htm

CJA

Research Brief from

No. 9 (August 2005): Prosecutors' Bail Requests and the CJA Release Recommendation: What Do They Tell the Judge?

The New York City Criminal Justice Agency, Inc.
52 Duane Street
New York, NY 10007

TO: