

**SB**

**206**

**SENATE COMMITTEE REPORT**  
**First Committee of Referral**

DATE: 1/9/06

FURTHER: Finance

Date of 5-Day Notice: \_\_\_\_\_  
 (in accordance with Uniform Rule 23)

DATE TURNED  
 IN TO OFFICE: \_\_\_\_\_

Judiciary Committee considered SENATE BILL NO. 206

**SB 206 DETENTION OF MATERIAL WITNESSES**

"An Act relating to material witnesses; and amending Rule 58.1, Alaska Rules of Civil Procedure, and Rule 204, Alaska Rules of Appellate Procedure."

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

|  |
|--|
| <b>CS Senate Bill:</b>                               |
| <input type="checkbox"/> Same Title                  |
| <input type="checkbox"/> New Title                   |
| <b>SCS House Bill:</b>                               |
| <input type="checkbox"/> Same Title                  |
| <input type="checkbox"/> Technical Title Change      |
| <input type="checkbox"/> New Title w/<br>SCR # _____ |

**NEW FISCAL NOTE(S):**

| Department | Date | Fiscal | Indet. | Zero | FN# |
|------------|------|--------|--------|------|-----|
|            |      |        |        |      |     |
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**PREVIOUS FISCAL NOTE(S):**

| Department | Date | Fiscal | Indet. | Zero | FN# |
|------------|------|--------|--------|------|-----|
|            |      |        |        |      |     |
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|            |      |        |        |      |     |
|            |      |        |        |      |     |

APPROPRIATION - no fiscal note

| SIGNATURES AND RECOMMENDATIONS: | Do PASS | Do NOT PASS | No REC | AMEND |
|---------------------------------|---------|-------------|--------|-------|
| <i>[Signature]</i>              |         |             |        | X     |
| <i>[Signature]</i>              | ✓       |             |        |       |
| <i>[Signature]</i>              |         |             |        | X     |
| <i>[Signature]</i>              |         |             |        |       |
| CHAIR: <i>[Signature]</i>       | ✓       |             |        |       |

24-LS1197U  
Luckhaupt  
3/14/06

CS FOR SENATE BILL NO. 206( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:  
Referred:

Sponsor(s): SENATOR BUNDE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to contempt of court and to temporary detention and identification of  
2 persons."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 \* Section 1. AS 09.50.020(a) is amended to read:

5 (a) A person who is guilty of contempt is punishable by a fine of not more  
6 than \$300 or by imprisonment for not more than six months. However, when the  
7 contempt is one mentioned in AS 09.50.010(3) - (12), or in an action before a  
8 magistrate, the person is punishable by a fine of not more than \$100 unless it appears  
9 that a right or remedy of a party to an action or proceeding was defeated or prejudiced  
10 by the contempt, or the failure to honor a subpoena or refusal to be sworn or  
11 answer as a witness under AS 09.50.010(10) was in connection with a court  
12 proceeding relating to a felony crime or an appearance before the grand jury, in  
13 which case the penalty shall be as prescribed for contempts described in  
14 AS 09.50.010(1), (2), and (10) [AS 09.50.010(1) AND (2)].

1 \* Sec. 2. AS 12.50 is amended by adding a new section to read:

2 **Article 3. Temporary Detention and Identification of Persons.**

3 **Sec. 12.50.201. Temporary detention and identification of persons.** (a) A  
4 peace officer may temporarily detain a person under circumstances that give the  
5 officer reasonable suspicion that

6 (1) the person

7 (A) witnessed the commission of a crime against a person  
8 under AS 11.41 or a felony property crime under AS 11.46; or

9 (B) was at the scene, or in the vicinity, during the commission  
10 of a crime against a person under AS 11.41 or a felony property crime under  
11 AS 11.46;

12 (2) the person may have information of material aid in the  
13 investigation of that crime; and \*

14 (3) the temporary detention of the person is reasonably necessary to  
15 obtain or verify the identification of the person, to obtain an account of the crime, to  
16 protect a crime victim from imminent harm, or for other exigent circumstances.

17 (b) A peace officer who temporarily detains a person under (a) of this section  
18 may

19 (1) take one or more photographs of the person, if photographs can be  
20 taken without unreasonably delaying the person or removing the person from the  
21 vicinity;

22 (2) serve a subpoena on the person to appear before the grand jury  
23 where the crime was committed, if the person fails to provide valid government-issued  
24 photographic identification; and

25 (3) take the person's fingerprint impressions if

26 (A) the person is detained in connection with the investigation  
27 of a murder, attempted murder, or misconduct involving weapons in the first  
28 degree under AS 11.61.195; and

29 (B) fingerprint impressions can be taken without unreasonably  
30 delaying the person or removing the person from the vicinity.

31 (c) A peace officer electing to serve a subpoena under (b) of this section may

1 not require the person to sign the subpoena or another document. The officer or the  
2 subpoena must advise the person that failure to honor the subpoena is punishable as  
3 criminal contempt of court under AS 09.50.010. A person receiving a subpoena to  
4 testify under (b) of this section may request the district attorney to withdraw the  
5 subpoena if, before the grand jury proceeding for which the person has been served a  
6 subpoena to appear, the person provides the peace officer who served the subpoena  
7 with valid government-issued photographic identification.

8 (d) A person who refuses or resists the taking of photographs or fingerprints  
9 under this section commits a class B misdemeanor, punishable as provided in  
10 AS 12.55, except that a sentence of imprisonment, if imposed, may not exceed 10  
11 days.



## FAIRBANKS POLICE DEPARTMENT

911 Cushman Street  
Fairbanks, AK 99701-4616  
Phone: (907) 450-6500  
Fax: (907) 452-1588  
Email: [fpd@ci.fairbanks.ak.us](mailto:fpd@ci.fairbanks.ak.us)



Senator Ralph Seekins  
119 N. Cushman Street  
Fairbanks, AK 99701

March 14, 2006

Dear Senator Seekins:

I am writing to voice my strongest support for **HB 206**, a measure introduced by Senator Con Bunde, which would allow police officers to briefly detain and identify material witnesses in homicide cases.

I am appreciative of the concerns that may arise from this bill- most notably from those who are concerned with an erosion of civil liberties, and are hesitant to grant "additional powers" to the police. I believe that these concerns are effectively addressed by the revised language of this bill, whose *very narrow focus* dictates that such brief detentions and identification efforts shall only be employed in the immediate aftermath of a homicide.

One only needs to look at the escalating gang-violence and homicide rate in Anchorage to know that this is a *very real problem* which needs to be addressed in a common-sense fashion. As one whom I view to be a long-time supporter of law-enforcement in Alaska, I'm hopeful that you will lend your support to the passage of HB 206.

Sincerely,

A handwritten signature in black ink that reads "Daniel P. Hoffman". The signature is written in a cursive style with a long horizontal flourish at the end.

Daniel P. Hoffman, Chief  
Fairbanks Police Department

CS FOR SENATE BILL NO. 206( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): SENATOR RUNDE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the penalty for contempt of court and to temporary detention and  
2 identification."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 \* Section 1. AS 09.50.020(a) is amended to read:

5 (a) A person who is guilty of contempt is punishable by a fine of not more  
6 than \$300 or by imprisonment for not more than six months. However, when the  
7 contempt is one mentioned in AS 09.50.010(3) - (9), (11), and (12) [AS 09.50.010(3)  
8 - (12)], or in an action before a magistrate, the person is punishable by a fine of not  
9 more than \$100 unless it appears that a right or remedy of a party to an action or  
10 proceeding was defeated or prejudiced by the contempt, in which case the penalty  
11 shall be as prescribed for contempts described in AS 09.50.010(1), (2), and (10)  
12 [AS 09.50.010(1) AND (2)].

13 \* Sec. 2. AS 12 is amended by adding a new chapter to read:

14 Chapter 27. Temporary Detention and Identification.



1  
2  
3  
4  
5

(1) fingerprints or photographs permitted under (b) of this section; or

(2) photographs permitted under (c) of this section.

(e) Interfering with a peace officer is a class B misdemeanor, punishable as provided in AS 12.55, except that a sentence of imprisonment if imposed, may not be for a term of more than 10 days.



Alaska State Legislature  
Senator Con Bunde  
Senate District P  
Vice Chair: Senate Finance Committee  
Chair: Senate Labor & Commerce Committee

## SPONSOR STATEMENT

### SB 206

*"An Act relating to material witnesses; amending Rule 58.1, Alaska Rules of Civil Procedure, and Rule 204, Alaska Rules of Appellate Procedure; and providing for an effective date."*

Written in Alaska's constitution is an acknowledgement of an individual's freedom and an individual's corresponding obligation to our state. Striking a balance between the needs of society to prosecute crime, the rights of a defendant to witnesses on their behalf and the right of an individual to be free from unreasonable arrest is the central issue in Senate Bill 206 Detention of Material Witnesses.

A material witness is a "witness whose testimony is crucial to either the defense or prosecution."<sup>1</sup> Regrettably, citizens do not always come forward to fulfill their "corresponding obligations" as a witness during the investigation or prosecution of a crime. Nearly all states and the federal government have adopted statutes dealing with the pretrial confinement of material witnesses and SB 206 sets the guidelines and protections for issuing a material witness order in the state of Alaska.

Giving the court system the ability to compel a person to testify protects both the needs of society and the rights of the individual. For law enforcement officials, material witnesses can be the deciding factor in bringing indictments and prosecuting crime. For defendants, a material witness order can ensure that testimony crucial to their defense is offered. For individuals, the process in SB 206 protects them from unreasonable arrests or confinement.

SB 206 attempts to balance these competing interests to give law enforcement officials tools to fight crime and individuals testimony crucial to their defense.

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# Alaska State Legislature

**Senate Majority** Web: [www.akrepublicans.org](http://www.akrepublicans.org)

**Sponsor:** Senator Con Bunde  
**Current Version:** SB 206  
**Contact:** Lauren Wickersham, 465-3881

## Fact Sheet for: Senate Bill 206

**Short Title:** DETENTION OF MATERIAL WITNESSES

### Summary:

- Sets guidelines and protections for issuing a material witness order in Alaska.
- Allows a prosecuting attorney or defendant to apply to the superior court to compel a person to appear at a material witness hearing if there is probable cause to believe the person has information material to the prosecution or defense, and the witness is unlikely to respond to a subpoena.
- Gives courts the authority to:
  - Issue an arrest warrant if there is clear and convincing evidence that the person named in a material witness order will not be available unless immediately arrested;
  - Order the witness to appear at a hearing to determine whether the person should be adjudged a material witness;
- Authorizes a law enforcement officer to arrest an alleged material witness without a warrant only if the arrest occurs before the filing of an indictment and other conditions are met.
- Outlines the rights of a material witness, including the right to be represented by an attorney and appeal a material witness order to the court of appeals
- Outlines the conditions of release, confinement and fees for a material witness, which prohibit holding a witness in a correctional facility and entitle the witness to fees as provided in Rule 7, Alaska Rules of Administration.
- Requires the office of public advocacy to provide legal representation to a material witness.

### Benefits:

- Balances the need to protect individual freedom with the ability to prosecute crime and to provide defendants with witnesses on their behalf.

### Background:

- A material witness is a "witness whose testimony is crucial to either the defense or prosecution." Unfortunately, material witnesses often refuse to cooperate with law enforcement officials, significantly impeding the ability to bring indictments or prosecute crime. SB 206 protects material witnesses from unreasonable arrests or confinement and helps ensure the availability of crucial testimony.

# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB206  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title An act relating to material witnesses; ... RDU Legal and Advocacy Services  
 Component Office of Public Advocacy  
 Sponsor Senator Bunde  
 Requester (S) Judiciary Component No. 43

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2007 | FY 2008 | FY 2009 | FY 2010 | FY 2011 | FY 2012 |
|------------------------|---------|---------|---------|---------|---------|---------|
| Personal Services      | *       | *       | *       | *       | *       | *       |
| Travel                 |         |         |         |         |         |         |
| Contractual            | *       | *       | *       | *       | *       | *       |
| Supplies               |         |         |         |         |         |         |
| Equipment              |         |         |         |         |         |         |
| Land & Structures      |         |         |         |         |         |         |
| Grants & Claims        |         |         |         |         |         |         |
| Miscellaneous          |         |         |         |         |         |         |
| <b>TOTAL OPERATING</b> | *       | *       | *       | *       | *       | *       |

|                             |  |  |  |  |  |  |
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| <b>CAPITAL EXPENDITURES</b> |  |  |  |  |  |  |
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| <b>CHANGE IN REVENUES ( )</b> |  |  |  |  |  |  |
|-------------------------------|--|--|--|--|--|--|

**FUND SOURCE** (Thousands of Dollars)

|   |   |   |   |   |   |   |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts                   |   |   |   |   |   |   |
| 1003 GF Match                           |   |   |   |   |   |   |
| 1004 GF                                 | * | * | * | * | * | * |
| 1005 GF/Program Receipts                |   |   |   |   |   |   |
| 1037 GF/Mental Health                   |   |   |   |   |   |   |
| Other (Specify Type--Do not abbreviate) |   |   |   |   |   |   |
| <b>TOTAL</b>                            | * | * | * | * | * | * |

Estimate of any current year (FY2006) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

|           |  |  |  |  |  |  |
|-----------|--|--|--|--|--|--|
| Full-time |  |  |  |  |  |  |
| Part-time |  |  |  |  |  |  |
| Temporary |  |  |  |  |  |  |

**ANALYSIS:** (Attach a separate page if necessary)

This legislation would establish a process through which a prosecutor or defendant could apply to the superior court for an order compelling a person to appear at a material witness hearing if the individual has relevant information for the prosecution or defense and the person is unlikely to respond to a subpoena. The bill also provides a process to arrest material witnesses with or without a warrant, and a process under which a material witness could be confined. The bill further provides that alleged material witnesses are entitled to legal representation through the Office of Public Advocacy, regardless of the financial need of the individual.

Prepared by: Josh Fink, Director Phone 269-3500  
 Division: Office of Public Advocacy Date/Time 2/27/06 12:00 AM  
 Approved by: Michael Tibbles, Deputy Commissioner Date 2/27/2006  
 Agency: Department of Administration

FISCAL NOTE

STATE OF ALASKA  
2006 LEGISLATIVE SESSION

BILL NO. SB206

ANALYSIS CONTINUATION

If this statute were rarely used, the costs to OPA would be de minimus. However, if prosecutors and/or defense attorneys made significant use of this legislation (for instance, to hold alleged gang members who do not cooperate with police), costs could be significant. Each individual held in relation to a particular case would be entitled to conflict-free counsel. This would mean OPA would first use staff attorneys and then have to retain private counsel on contract for each additional material witness held in relation to a particular case. Because there is no financial indigency requirement, even those who could afford counsel would receive counsel through OPA.

# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB 206  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Corrections  
 Title "An act relating to material witnesses. . ." RDU Institutional Facilities  
 Component Institution Director's Office  
 Sponsor Senator Bunde  
 Requester Senate Judiciary Component No. 1381

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2007    | FY 2008    | FY 2009    | FY 2010    | FY 2011    | FY 2012    |
|------------------------|------------|------------|------------|------------|------------|------------|
| Personal Services      | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Travel                 | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Contractual            | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Supplies               | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Equipment              | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Land & Structures      | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Grants & Claims        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Miscellaneous          | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| <b>TOTAL OPERATING</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

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| <b>CAPITAL EXPENDITURES</b> |  |  |  |  |  |  |
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| <b>CHANGE IN REVENUES ( )</b> |  |  |  |  |  |  |
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**FUND SOURCE** (Thousands of Dollars)

|   |            |            |            |            |            |            |
|---|------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts                   | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| 1003 GF Match                           | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| 1004 GF                                 | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| 1005 GF/Program Receipts                | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| 1037 GF/Mental Health                   | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Other (Specify Type -Do not abbreviate) | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| <b>TOTAL</b>                            | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

|           |     |     |     |     |     |     |
|-----------|-----|-----|-----|-----|-----|-----|
| Full-time | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Part-time | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Temporary | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**ANALYSIS:** (Attach a separate page if necessary)

Passage of this legislation should not have a significant fiscal impact on the Department of Corrections based on the following language, located on page 5, lines 2 and 3 of the legislation, "...The party obtaining the material witness order bears the cost of confinement and payment, unless the party is indigent." And on page 4, lines 20, 21, and 22 "...An arrested or confined material witness may not be held in a correctional facility but shall be provided food and board as is provided to a member of a jury when sequestered."

Prepared by: Sharleen Griffin, Director Phone (907) 465-3339  
 Division Administrative Services Date/Time 2/16/06 9:02 AM  
 Approved by: Portia C.K. Parker, Deputy Commissioner Date 2/16/2006  
 Agency Department of Corrections

# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB 206  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): 2/16/06/10:04 a.m. Dept. Affected: Administration  
 Title: An Act relating to material witnesses RDU: Legal and Advocacy Services  
 Component: Public Defender Agency  
 Sponsor: Sen. Bunde  
 Requester: (S)JUD Component No.: 1631

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2007    | FY 2008    | FY 2009    | FY 2010    | FY 2011    | FY 2012    |
|------------------------|------------|------------|------------|------------|------------|------------|
| Personal Services      | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Travel                 |            |            |            |            |            |            |
| Contractual            |            |            |            |            |            |            |
| Supplies               |            |            |            |            |            |            |
| Equipment              |            |            |            |            |            |            |
| Land & Structures      |            |            |            |            |            |            |
| Grants & Claims        |            |            |            |            |            |            |
| Miscellaneous          |            |            |            |            |            |            |
| <b>TOTAL OPERATING</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

|                             |  |  |  |  |  |  |
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| <b>CAPITAL EXPENDITURES</b> |  |  |  |  |  |  |
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|-------------------------------|--|--|--|--|--|--|
| <b>CHANGE IN REVENUES ( )</b> |  |  |  |  |  |  |
|-------------------------------|--|--|--|--|--|--|

**FUND SOURCE** (Thousands of Dollars)

|   |            |            |            |            |            |            |
|---|------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts                   |            |            |            |            |            |            |
| 1003 GF Match                           |            |            |            |            |            |            |
| 1004 GF                                 | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| 1005 GF/Program Receipts                |            |            |            |            |            |            |
| 1037 GF/Mental Health                   |            |            |            |            |            |            |
| Other (Specify Type--Do not abbreviate) |            |            |            |            |            |            |
| <b>TOTAL</b>                            | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

Estimate of any current year (FY2006) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

|           |  |  |  |  |  |  |
|-----------|--|--|--|--|--|--|
| Full-time |  |  |  |  |  |  |
| Part-time |  |  |  |  |  |  |
| Temporary |  |  |  |  |  |  |

**ANALYSIS:** (Attach a separate page if necessary)  
 This bill permits a material witness to be arrested and confined under an order of the court, and provides for legal representation in the event that a person can not afford an attorney. The Office of Public Advocacy would be required to represent indigent material witnesses.  
  
 This bill is not expected to affect the Public Defender Agency's fiscal operations.

Prepared by: Quinlan Steiner, Director Phone 907.334.4414  
 Division: Public Defender Agency Date/Time 2/16/06 10:04 a.m.  
 Approved by: Mike Tibbles, Deputy Commissioner Date 2/17/2006  
 Agency: Administration

# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB206-LAW-CJL-2-16-06  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: LAW  
 Title "An Act relating to material witnesses..." RDU CRIMINAL  
 Component Criminal Justice Litigation  
 Sponsor Senator Bunde  
 Requester Senate Judiciary Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2007    | FY 2008    | FY 2009    | FY 2010    | FY 2011    | FY 2012    |
|------------------------|------------|------------|------------|------------|------------|------------|
| Personal Services      |            |            |            |            |            |            |
| Travel                 |            |            |            |            |            |            |
| Contractual            |            |            |            |            |            |            |
| Supplies               |            |            |            |            |            |            |
| Equipment              |            |            |            |            |            |            |
| Land & Structures      |            |            |            |            |            |            |
| Grants & Claims        |            |            |            |            |            |            |
| Miscellaneous          |            |            |            |            |            |            |
| <b>TOTAL OPERATING</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

|                             |  |  |  |  |  |  |
|-----------------------------|--|--|--|--|--|--|
| <b>CAPITAL EXPENDITURES</b> |  |  |  |  |  |  |
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|                               |  |  |  |  |  |  |
|-------------------------------|--|--|--|--|--|--|
| <b>CHANGE IN REVENUES ( )</b> |  |  |  |  |  |  |
|-------------------------------|--|--|--|--|--|--|

**FUND SOURCE** (Thousands of Dollars)

|   |            |            |            |            |            |            |
|---|------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts                   |            |            |            |            |            |            |
| 1003 GF Match                           |            |            |            |            |            |            |
| 1004 GF                                 |            |            |            |            |            |            |
| 1005 GF/Program Receipts                |            |            |            |            |            |            |
| 1037 GF/Mental Health                   |            |            |            |            |            |            |
| Other (Specify Type--Do not abbreviate) |            |            |            |            |            |            |
| <b>TOTAL</b>                            | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

Estimate of any current year (FY2006) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

|           |  |  |  |  |  |  |
|-----------|--|--|--|--|--|--|
| Full-time |  |  |  |  |  |  |
| Part-time |  |  |  |  |  |  |
| Temporary |  |  |  |  |  |  |

**ANALYSIS:** (Attach a separate page if necessary)

This bill adds new sections to Article 2 (Witness Immunity) of the Code of Criminal Procedure, Sentencing and Probation. These changes would allow the arrest of people who are important witnesses, when there is probable cause that they won't appear to testify. The bill requires that those arrested be housed in hotels rather than jails. The Department of Law assumes that the Department of Corrections would be responsible for such individuals and the resultant fiscal impact from the higher costs associated with hotel bills would be borne by that agency. If that assumption is correct, there would be no fiscal impact on the Department of Law as a result of passage of this legislation.

Prepared by: Kathryn Daughhete, Director Phone 465-3673  
 Division Administrative Services Division Date/Time 2/16/06 9:44 AM  
 Approved by: Kathryn Daughhete for David Márquez, Attorney General Date 2/16/2006  
 Agency Department of Law

**REPORT AND RECOMMENDATIONS  
RELATING TO MATERIAL WITNESSES**

**NEW JERSEY LAW REVISION COMMISSION  
15 Washington Street  
Newark, New Jersey 07102  
(201)648-4575**

## INTRODUCTION

The New Jersey material witness statute authorizes a judge to detain a person believed to be a material witness to a crime.<sup>1</sup> The statute, enacted in 1898, is not written in plain English and does not address the problems posed by the arrest and confinement of material witnesses who are often innocent witnesses to crimes. The material witness statute implicates the right of citizens to remain free from unreasonable arrest, and the state's need to prosecute crime. The present material witness statute does not protect either the citizen's or the state's interest as the decision in State v. Misik discussed below makes clear. The right of innocent citizens to remain free, as well as the need to prosecute crime, are serious matters requiring fair and well-balanced legislation. The New Jersey Law Revision Commission recommends the repeal of the present material witness statute and the adoption of its proposed statute.

In State v. Misik, 238 N.J. Super. 367 (Law Div. 1989), the court found that a warrant issued under the material witness statute violated the Fourth and Fourteenth Amendments of the United States Constitution, and article 1, paragraph 1 of the New Jersey Constitution, because the statute failed to require a pre-deprivation hearing and to prescribe other procedural safeguards to enforce due process requirements.<sup>2</sup> The court prescribed guidelines to implement the statute consistent with the federal and New Jersey constitutions. The court recommended that the Supreme Court promulgate rules or that "the legislature enact additional statutory provisions in order to carry out the mandate of the Due Process Clause of both the federal and state constitutions." Id. at 385.

The Supreme Court Committee on Criminal Practice is considering the issue, but has not yet recommended a rule.<sup>3</sup> Because the guidelines that would make the material witness statute meet constitutional concerns raise issues of substantive law, the legislature, not the Supreme Court, is the proper forum to establish the guidelines. The rule-making power of the Supreme Court is limited to procedural issues. N.J. Const. art. IV, § II, ¶ 3. Even if the court rule deals with some matters of substance, it cannot treat

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<sup>1</sup> The term "material witness statute" refers to N.J.S. 2A:162-2, N.J.S. 2A:162-3 and N.J.S. 2A:162-4. The key provision, N.J.S. 2A:162-2, provides: "Every judge and magistrate shall, when in his judgment the ends of justice so require, bind by recognizance with sufficient surety, any person who shall declare against another person for any crime punishable by death or imprisonment in state prison, or any person who can give testimony against any person so accused of any such crime, whether the offender be arrested, imprisoned, bailed or not." N.J.S. 2A:162-3 mainly concerns the conditions of confinement; N.J.S. 2A:162-4 requires the county to pay the witness a fee of \$3 per day of confinement.

<sup>2</sup> The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

The fourteenth amendment provides in pertinent part that "nor shall any State deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV.

Article 1, paragraph 1 of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. art. 1, ¶ 1.

<sup>3</sup> The existing court rule, R. 3:26-3, merely reiterates the broad language of N.J.S. 2A:162-2.

the range of substantive issues or employ the range of remedies available to legislation. Moreover, to rely on the Supreme Court Committee on Criminal Practice to amend the existing court rule on material witnesses to rectify the constitutional defects of a statute is an abdication of legislative responsibility.

The Commission identified several procedural and substantive problems in the material witness statute: N.J.S. 2A:162-2 through N.J.S. 2A:162-4. First, N.J.S. 2A:162-2 does not specify whether a criminal action must be pending before the state may apply for a warrant to arrest a person alleged to be a material witness. The failure of the statute to specify the preconditions for a warrant have engendered uncertainty as to when the statute is applicable. Second, the statute does not contain procedural safeguards to make certain that the arrest and detention of the witness comply with federal and state constitutional due process requirements. Third, while 2A:162-3 forbids lodging the material witness in an ordinary jail, it does not require the court to impose the least restrictive constraint to detain the witness. Fourth, 2A:162-4 sets the payment of an unreasonably low fee of \$3 per day for detained witnesses. The material witness statutes do not deal with other issues such as warrantless arrests, finality of the order for purposes of appeal and the effects of taking the witness's deposition.

The Commission examined the material witness statutes of other states, the case law in New Jersey and the scholarly literature. None of the foreign material witness statutes addressed all important issues. The Commission thus drafted a comprehensive statute to regulate judicial orders directing the appearance or detention of a material witness. The proposed statute has three objectives: (1) to strike a balance between the need of the law enforcement community to prosecute crime and the right of the citizen not charged with a crime to remain free from arrest, (2) to resolve the inconsistencies in the common law, and (3) to establish the payment of a reasonable fee for confined witnesses and create other procedural rules to effectuate the interests of the law enforcement community and material witnesses.

The statute affords both the state and the defendant the right to apply for material witness orders if three threshold requirements are met: (1) an indictment, accusation or complaint for a crime is pending, or a criminal investigation before a grand jury is pending (2) the alleged witness has information material to the pending criminal action and (3) the alleged witness is unlikely to respond to a subpoena. The proposed statute specifies the content of the application for a material witness order, and lists the rights that must be afforded to a witness during a material witness hearing. In addition, the proposed statute establishes standards of review for the issuance of material witness orders, and sets the conditions of release and of confinement. The statute permits police officers to arrest an alleged material witness without a warrant in emergencies, but requires them to bring the witness before a judge immediately after arrest. Finally, the proposed statute increases to \$40 per day the fee paid to detained witnesses, and gives material witnesses additional rights such as the right to appeal and to modify the material witness order.

#### Background

a. Material witness: definition and foreign law.

A material witness is "a witness whose testimony is crucial to either the defense or prosecution." Black's Law Dictionary 826 (5th ed. abridged 1983). "In most states, he may be required to furnish bond for his appearance and, for want of surety he may be confined until he testifies." Id. A material witness often is an innocent observer of a crime who happens to be in the wrong place at the wrong time. For example, a tourist from California who witnesses a crime in Newark by chance and gives a report to the police is a potential material witness in New Jersey. One court has observed that a material witness is "an innocent citizen whose right to the full enjoyment of liberty is threatened solely because of his potential usefulness as a witness for the government ... the deprivation of liberty, although temporary by definition, can be measured in weeks or even months." Application of Cochran, 434 F. Supp. 1207, 1213 (D. Neb. 1977).

Material witness statutes authorize the arrest and detention of alleged material witnesses. Carlson, Jailing the Innocent: The Plight of the Material Witness, 55 Iowa L. Rev. 1 (1969). "Nearly all states and the federal government have enacted provisions dealing with pretrial confinement of material witnesses." Carlson and Voelpel, Material Witness and Material Injustice, 58 Wash. U. L. Q. 1, 21 (1980). Witness laws are justified under the concept that every citizen has a duty to testify. Hurtado v. United States, 410 U.S. 578, 589 (1973). Most material witness statutes are old. For example, the New Jersey material witness statutes derive from 1898. "[W]hen dusted off and put into operation, these archaic statutes result in innocent citizens spending weeks -- even months -- in custody." Carlson and Voelpel, Material Witness and Material Injustice, 58 Wash. L. Q. 1 (1980).

Several states have developed modern legislation in the area of material witness detention. E.g. Ariz. Rev. Stat. Ann. sec. 13-4083(b) (1989) (deposition of detained witness requires discharge); Hawaii Rev. Stat. sec 835-2 (1988) (detention system based on material witness order); and N.Y. Crim. Pro. Law sec. 620.20 (McKinney 1984) (detention system based on material witness order). However, notwithstanding this legislative activity, most state statutes contain little or no procedural or substantive protection for detained witnesses. Carlson and Voelpel, supra at 27. None of the newer state statutes address the constitutional concerns raised in State v. Misik, or resolve the procedural and substantive problems identified by the Commission. Thus none of the material witness laws of foreign states provides a model to follow.

The federal material witness law also does not constitute a model law. The federal law is not a single comprehensive statute. Rather, the federal material witness law consists of a matrix of statutes and rules. 18 U.S.C. 3144 (1989)(release or detention of a material witness); 18 U.S.C. 3142 (1989)(release or detention of a defendant pending trial); 28 U.S.C. 1821 (1989)(witness fees); 18 U.S.C. 3006(a) (1989) (assignment of counsel rule); Fed. R. Crim. P. 46 (release from custody); and Fed. R. Crim. P. 15 (deposition of detained witness). In addition to being unduly complicated, the federal statutes and rules fail to authorize the arrest of material witnesses. The

judiciary had to infer the power to arrest from the federal material witness statute. Bacon v. United States, 449 F. 2d 933, 937 (9th Cir. 1971).

b. New Jersey law and State v. Misik

In Misik, a Superior Court judge issued a warrant for the arrest of Janos Misik as a material witness pursuant to N.J.S. 2A:162-2 based on the ex parte application of a detective of the New Jersey State Police. State v. Misik, 238 N. J. Super. at 371. The application alleged that Misik had information concerning the commission of environmental crimes and that his arrest was necessary because he would not be available for service by subpoena. Id.

The affidavit in support of the application contained the following allegations: (1) Misik had knowledge that his employer, Petro King Terminal Corporation, released petroleum products into the Hackensack River, (2) Misik, though initially cooperative with the police, had missed an appointment, (3) Misik was a foreigner suspected of being an illegal alien because he once failed to produce his "green card" to the police, (4) Misik lived on a boat displaying a "for sale" sign, (5) Misik did not give the police the exact location of his boat in the marina and (6) Misik had a criminal record for drug offenses. State v. Misik, 238 N. J. Super. at 371. No criminal action or proceeding against Petro King Terminal Corporation was pending when the State applied for the arrest warrant.

The court held an in camera discussion with an assistant prosecutor concerning the State's authority to obtain an ex parte arrest warrant of Misik. The assistant prosecutor maintained that the State had authority to arrest Misik without a warrant. State v. Hand, 101 N. J. Super. 43, 55-56 (Law Div. 1968) holds that a peace officer may arrest without a warrant when he has a reasonable basis or probable cause to believe a person is a material witness. The court then issued the warrant which authorized the police to arrest Misik. The warrant required the police to bring Misik before the court immediately after his arrest so that the court could inform Misik of his rights and the nature of the proceedings.

The police arrested Misik the day the arrest warrant was issued and, contrary to the court's order, brought Misik to the prosecutor's office, not the court. State v. Misik, 238 N. J. Super. at 372. The police subjected Misik to a lengthy custodial interrogation and detained him overnight in jail where he was treated like a prisoner contrary to N.J.S. 2A:162-3. The next morning Misik was brought to court handcuffed and in prison garb. State v. Misik, 238 N. J. Super. at 372. Misik's attorney objected to the procedures adopted by the court to issue the arrest warrant and requested leave to file a brief challenging the constitutionality of the material witness statutes. The court released Misik on his own recognizance, subject to the condition that he report weekly to the prosecutor's office for one month. Id. The court informed the prosecutor that if the State did not convene a grand jury investigation of Petro King Terminal Corporation within one month, the court would vacate the reporting requirement. Id. The court further

granted leave to Misik's attorney to file a brief challenging the constitutionality of the material witness statute. Id. at 373.

At the hearing, the court held that the federal and New Jersey constitutions require that an alleged material witness be provided with notice and an opportunity to be heard before being detained under the New Jersey material witness statute. State v. Misik, 238 N. J. Super. at 388. The court also held that a criminal action must be pending against an accused before a person may be apprehended or detained as an alleged material witness. Id. In support of its holding, the court found that the "express language of the statute compels the conclusion that a criminal action must be pending against an accused before a court may sanction the detention of a person believed to be a material witness." Id. at 375. The court also noted that "it is well-established that our Rules do not give a prosecutor any pre-trial subpoena power independent of the grand jury." Id. at 376. Consequently, Misik was free to refuse to cooperate with the police. Because the prosecutor could not compel Misik's appearance by subpoena absent a grand jury investigation, the court found that the prosecutor had misused the material witness statute to detain and arrest Misik. Id. at 377.

The court also found that Misik was deprived of his constitutional rights under both the federal and New Jersey constitutions. The judge stated that "Misik was arrested without prior notice and an opportunity to be heard before he was arrested and committed to jail", and thus found that the arrest and detention violated the due process requirements of the Fourteenth Amendment of the United States Constitution and article 1, paragraph 1 of the New Jersey Constitution. State v. Misik, 238 N. J. Super. at 377. The court also stated that "it was patently unreasonable under the Fourth Amendment of the United States Constitution to have arrested and detained Misik because of his refusal to cooperate with the police." Id. While the court found that the procedures followed to arrest Misik violated the federal and New Jersey constitutions, the court did not hold that the New Jersey material witness statute (N.J.S. 2A:162-2) was unconstitutional. Id. at 384.

Because the statute is silent as to constitutional safeguards, the court looked to federal and foreign state legislation for guidance. E.g. 18 U.S.C. § 3142 (e) and (f) and § 3144 (detention subject to clear and convincing evidence standard); N.Y. Crim. Pro. Law. § 620.30 (McKinney 1984) (order directs alleged material witness to appear at pre-deprivation hearing); Neb. Rev. Stat. § 29-507 (1989) (specifies the conditions of release for material witnesses). The court, deciding the New Jersey statute could be rehabilitated if procedural safeguards were established, then set forth a list of guidelines to fill the gap. State v. Misik, 238 N. J. Super. at 385-86.

Most important, the court held that a person could not be arrested or detained as a material witness unless the justification for the arrest or detention was based on probable cause. The judge stated, "This court believes that at the very least a heavy burden of proof should be imposed upon the State whenever it decides it is necessary to seek detention of an innocent person, not even a suspect, much less an accused." Id. at 383. The court cited Addington v. Texas, 441 U.S. 418 (1979) in support of its position. In

Addington, the United States Supreme Court established the "clear and convincing" standard of proof to commit a person for mental care on an involuntary basis. The United States Supreme Court stated, "The function of a standard of proof, as that concept is embodied in the Due Process and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Addington v. Texas, 441 U.S. at 423 (citation omitted). The court in Misik found that the interests at stake in material witness proceedings are the liberty interests of an innocent citizen and the State's need to gather evidence of crimes. The clear and convincing standard allocates the risk of error to the state and thus minimizes the risk of erroneous decisions. It also "reflects the value society places on individual liberty." Id. at 426 [quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)]. The court in Misik thus held that the "clear and convincing" standard is constitutionally compelled for the arrest and detention of material witnesses.

Prior to Misik, the two principal decisions on New Jersey material witness law were State v. Price, 108 N. J. Super. 272 (Law Div. 1970) and State v. Hand, 101 N. J. Super. 43 (Law Div. 1968). When read together, Price, Hand and Misik do not constitute a coherent statement of law on material witnesses, and therefore do not provide clear guidelines to the court, prosecutor or defendant. The inconsistencies concern primarily the right of the police to arrest a material witness without a warrant, and the necessity of a pending criminal action to detain a material witness.

For example, the court in Price indicated that the police may not hold a potential witness unless there is a pending criminal action against an accused. State v. Price, 108 N. J. Super. at 280-281. To the contrary, the court in Hand sanctions the detention of a person believed to be a material witness despite the absence of any formal charges against an accused. State v. Hand, 101 N. J. Super. at 56. The court in Misik held that a pending criminal action is necessary to obtain a material witness order. State v. Misik, 238 N. J. Super. at 385. In addition, the court in Hand authorizes the warrantless arrest of potential material witnesses. State v. Hand, 101 N. J. Super. at 56. The court in Misik prohibits the warrantless arrest of potential material witnesses. State v. Misik, 238 N. J. Super. at 388. The court in Misik stated that "under no circumstances may a person be arrested or detained without court process ...." Id. The decisions in Misik and Hand thus directly contradict one another on this issue. Because Price, Hand and Misik are law division opinions, each decision has equivalent legal weight and thus the inconsistencies generated by them unsettle the law on material witnesses.

## PROPOSED STATUTE

### 2C:104-1. Definitions

a. A material witness is a person who has information material to the prosecution or defense of a crime.

b. A material witness order is a court order fixing conditions necessary to secure the appearance of a person who is unlikely to respond to a subpoena and who has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury.

Source: New

#### COMMENT

This section defines a material witness and a material witness order. A material witness is a person who has information crucial to the prosecution or defense. A material witness order is a court order finding that a person is a material witness, and commanding the person to appear before the court. A material witness order may not issue unless the court finds that: (1) a person is a material witness, (2) the person is unlikely to respond to a subpoena and (3) there is a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury. The material witness statute therefore does not apply to offenses that are not crimes. See, N.J.S. 2C:1-4(a) and 1-14(k). The inclusion of definitions cures the defect noted by State v. Misik that the former statute did not define a material witness or material witness order. State v. Misik, 238 N. J. Super. 367, 374 (Law Div. 1989)

### 2C:104-2. Application for material witness order

a. The Attorney General, county prosecutor or defendant in a criminal action may apply to a judge of the Superior Court for an order compelling a person to appear at a material witness hearing, if there is probable cause to believe that (1) the person has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, and (2) the person is unlikely to respond to a subpoena. The application may be accompanied by an application for an arrest warrant when there is probable cause to believe that the person will not appear at the material witness hearing unless arrested.

b. The application shall include a copy of any pending indictment, complaint or accusation and an affidavit containing: (1) the name and address of the person alleged to be a material witness, (2) a summary of the facts believed to be known by the alleged material witness and their relevance to the pending criminal action or investigation, (3) a summary of the facts supporting the belief that the person possesses information material to the pending criminal action or investigation, and (4) a summary of the facts supporting the claim that the alleged material witness is unlikely to respond to a subpoena.

c. If the application requests an arrest warrant, the affidavit shall set forth why immediate arrest is necessary.

Source: 2A:162-2

#### COMMENT

Subsection (a) substantially changes the source section, which merely established the power to bind material witnesses. Subsection (a) allows the Attorney General, county prosecutor or defendant to apply to the Superior Court for a material witness order. The present statute does not give defendants the right to apply for material witness orders. Subsection (a) gives defendants the right to secure the testimony of witnesses to balance the powers of the State and defendants in criminal proceedings. The federal statute and the laws of several foreign jurisdictions provide defendants the right to obtain material witness orders. 18 U.S.C. 3144 (1989); Hawaii Rev. Stat. sec. 835-2(a)(1988); N.Y. Crim. Proc. Law sec. 620.20 (1) (McKinney 1984); and N.C. Gen. Stat. sec. 15A-803(a)(1990).

The Superior Court may issue a material witness order when there is probable cause to believe that: (1) there is a pending indictment, accusation, or complaint for a crime, or a criminal investigation before a grand jury, (2) a person possesses information material to the pending criminal action and (3) the person is unlikely to respond to a subpoena. These requirements derive from the guidelines prescribed by State v. Misik, 238 N. J. Super. at 385-386.

However, the requirements of this subsection differ in one important respect from the Misik guidelines. Misik limits applications for material witness orders to situations where a complaint, indictment or accusation is pending. Subsection (a), in addition, allows applications where a grand jury is conducting an investigation. The addition recognizes that a witness's testimony may be necessary to determine the identity of the person to be indicted. To the extent that the present statute may not allow the use of material witness orders in aid of grand jury investigations this section represents a change in the law. See State v. Price, 108 N. J. Super. 272, 280-281 (Law Div. 1970).

Subsection (b) requires the party making an application for a material witness order to provide facts to the court establishing the need for the material witness order. The affidavit must contain a summary of the facts believed to be known by the alleged material witness and their relevance to the pending investigation. The affidavit also must contain a summary of facts showing that the person is unlikely to respond to a subpoena, and a summary of facts supporting the affiant's belief that the person is a material witness. The requirements of subsection (b) are intended to provide a court with information needed to make an independent judgment on the application. Mere conclusory allegations do not satisfy these requirements. When applicable, subsection (b) requires the application to include a copy of the pending indictment, accusation or complaint.

Subsection (c) governs the special situation where the applicant seeks the arrest of the alleged material witness. In this event, the application must establish that, without the arrest, the material witness will not be available as a witness.

#### **2C:104-3. Order to appear**

a. If there is probable cause to believe that a material witness order may issue against the person named in the application, the judge may order the person to appear at a hearing to determine whether the person should be adjudged a material witness.

b. The order and a copy of the application shall be served personally upon the alleged material witness at least 48 hours before the hearing, unless the judge adjusts the time period for good cause, and shall advise the person of: (1) the time and place of the hearing and (2) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one.

Source: New

#### COMMENT

Subsection (a) identifies the standard of review governing an application for a material witness order. The standard of review is the probable cause standard. To issue a material witness order, the judge must find that it is more probable than not that the facts set forth in the application are true.

Subsection (b) requires the party who obtains a material witness order to serve a copy of the order and application upon the person named in the application. Service must take place at least 48 hours before the hearing unless the judge enlarges or contracts the prescribed time period. The judge may alter the prescribed time period if the party making the application for a material witness order demonstrates that exigent circumstances justify a deviation from the prescribed time period. The order to appear informs the alleged material witness of the time and place of the hearing and of the right to counsel.

#### 2C:104-4. Arrest With Warrant

a. If there is clear and convincing evidence that the person named in the application will not be available as a witness unless immediately arrested, the judge may issue an arrest warrant. The arrest warrant shall require that the person be brought before the court immediately after arrest. If the arrest does not take place during regular court hours, the person shall be brought to the emergency-duty Superior Court judge.

b. The judge shall inform the person of: (1) the reason for arrest, (2) the time and place of the hearing to determine whether the person is a material witness, and (3) the right to an attorney and to have an attorney appointed if the person cannot afford one.

c. The judge shall set conditions for release, or if there is clear and convincing evidence that the person will not be available as a witness unless confined, the judge may order the person confined until the material witness hearing which shall take place within 48 hours of the arrest.

Source: 2A:162-2

#### COMMENT

Subsection (a) establishes the standard of review that the judge applies to an application for an arrest warrant. The standard of review is the "clear and convincing" evidence standard. State v. Misik, 238 N. J. Super. at 386. The "clear and convincing" standard is the intermediate standard of proof located between the preponderance of the evidence and reasonable doubt standards. Addington v. Texas, 441 U.S. 418, 423 (1979). While it is difficult to define the term "clear and convincing" evidence precisely, it denotes a rigorous level of proof. The "clear and convincing" standard of proof minimizes the risk of erroneous decisions and reflects the value society places on individual liberty. Id. at 425 [quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)].

Subsection (a) also directs that the person be brought before the court immediately after arrest. If the arrest takes place outside of regular court hours, the person must be brought before the emergency-duty Superior Court judge. The purpose of this requirement is to make certain that the arrested person has an immediate judicial review of the arrest. The statute does not specify a penalty for noncompliance with the requirement to bring the arrested person before the court immediately after arrest, since a violation of a court order is a contempt of court.

Subsection (b) requires the judge at this first appearance to inform the arrested person of the time and place of the material witness hearing and the right to counsel.

Subsection (c) requires the judge to release the arrested person with appropriate conditions unless confinement is the only method to secure the appearance of the witness. When the judge orders the person confined, the judge must hold the material witness hearing within 48 hours of the person's arrest.

#### **2C:104-5. Arrest Without Warrant**

a. A law enforcement officer may arrest an alleged material witness without a warrant only if the arrest occurs prior to the filing of an indictment, accusation or complaint for a crime, or the initiation of a criminal investigation before a grand jury, and if the officer has probable cause to believe that:

- (1) a crime has been committed,
- (2) the alleged material witness has information material to the prosecution of that crime,
- (3) the alleged material witness will refuse to cooperate with the officer in the investigation of that crime, and
- (4) the delay necessary to obtain an arrest warrant or order to appear would result in the unavailability of the alleged material witness.

b. Following the warrantless arrest of an alleged material witness, the law enforcement officer shall bring the person immediately before a judge. If court is not in session, the officer shall immediately bring the person before the emergency-duty Superior Court judge. The judge shall determine whether there is probable cause to believe that the person is a material witness of a crime and, if an indictment, accusation or complaint for that crime has not issued or if a grand jury has not commenced a criminal investigation of that crime, the judge shall determine whether there is probable cause to believe that, within 48 hours of the arrest, an indictment, accusation or complaint will issue or a grand jury investigation will commence. The judge then shall proceed as if an application for a warrant has been made under 2C:104-4.

#### **COMMENT**

This subsection settles the law regarding the right to arrest material witnesses without a warrant. Compare State v. Hand, 101 N. J. Super. at 56 (allowing warrantless arrests) with State v. Misik, 238 N. J. Super. at 388 (forbidding warrantless arrests). Subsection (a) allows the warrantless arrest of alleged material witnesses under precisely defined circumstances. The warrantless arrest power applies in exigent circumstances such as the encounter between a law enforcement officer and a witness at the scene of a crime. As a result, the power to arrest without a warrant ceases to exist subsequent to the filing of an indictment, accusation or complaint for a crime or the initiation of a criminal investigation before a grand jury.

Subsection (b) follows the procedure set forth in 2C:104-4 regarding arrests upon warrant. The law enforcement officer must bring the arrested person before a judge immediately after arrest so that the judge may review the propriety of the arrest and set appropriate conditions of release. The failure of the law enforcement officer to comply with the requirement to bring the arrested person before a judge immediately after arrest makes the arrest unlawful thereby providing the wrongfully arrested person with remedies for an unlawful arrest.

## **2C:104-6. Material witness hearing**

a. At the material witness hearing, the following rights shall be afforded to the person: (1) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one, (2) the right to be heard and to present witnesses and evidence, (3) the right to have all of the evidence considered by the court in support of the application, and (4) the right to confront and cross-examine witnesses.

b. If the judge finds that there is probable cause to believe that the person is unlikely to respond to a subpoena and has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, the judge shall determine that the person is a material witness and may set the conditions of release of the material witness.

c. If the judge finds by clear and convincing evidence that confinement is the only method that will secure the appearance of the material witness, the judge may order the confinement of the material witness.

d. The judge shall set forth the facts and reasons in support of the material witness order on the record.

Source: 2A:162-2

### **COMMENT**

Subsection (a) establishes the rights afforded to the alleged material witness at the hearing. The alleged material witness has the full panoply of rights afforded to a person at an adversarial hearing. Among the rights granted is the right to know the evidence used by the court as the basis for grant of the application. If disclosure of particular evidence would obstruct the ongoing criminal investigation, the court may exclude that evidence from consideration in deciding whether to grant the application. Cf. State v. Kunz, 55 N. J. 128 (1969) and R. 3:21-2(a).

Subsections (b) and (c) distinguish conceptually between the finding that a person is a material witness and the decision to impose restraints to assure the appearance of the witness. Subsection (b) identifies the standard of review for determining that a person is a material witness and to impose non-custodial restraints on the witness. The standard of review is the probable cause standard. Subsection (c) identifies the standard of review for ordering the confinement of the witness. The judge may order the confinement of the material witness only when the judge finds by clear and convincing evidence that no other form of restraint will assure the appearance of the material witness. The clear and convincing standard is used to indicate that confinement is a last resort. The clear and convincing standard protects the constitutional right of the person to be free from arbitrary seizure. State v. Misik, 238 N. J. Super. at 387.

Subsection (d) requires that the judge set forth facts and reasons in support of the order. The requirement to set forth facts and reasons furnishes a record for appeal.

## **2C:104-7. Conditions of release; confinement**

a. A confined person shall not be held in jail or prison, but shall be lodged in comfortable quarters and served ordinary food.

b. The conditions of release for a material witness or for a person held on an application for a material witness order shall be the least restrictive to effectuate the appearance of the material witness. A judge may: (1) place the witness in the

custody of a designated person or organization agreeing to supervise the person, (2) restrict the travel of the person, (3) require the person to report (4) set bail or (5) impose other reasonable restrictions on the material witness.

c. A person confined shall be paid \$40 per day, and when the interests of justice require it, the judge may order additional payment not exceeding the actual financial loss resulting from the confinement. The party obtaining the material witness order bears the cost of confinement and payment unless the party is indigent.

Source: 2A:162-3, 2A:162-4

#### COMMENT

Subsection (a) identifies the conditions of detention, and is substantially identical to the requirements of N.J.S. 2A:162-3. A material witness, if confined, cannot be treated like a prisoner because the material witness has not committed a crime. Rather, the state or defendant must provide comfortable lodging and ordinary food to a confined material witness.

Subsection (b) requires the judge to impose the least restrictive restraint upon a non-confined material witness to secure the appearance of the material witness. The list of alternatives is designed to guide the judge in the decision making process, but is not meant to exhaust the range of possible and appropriate alternatives. Subsection (b) permits the judge to exercise discretion in setting the appropriate restraints.

Subsection (c) substantially departs from present law which provides for payment of \$3 for each day the person is "committed or detained in jail." N.J.S. 2A:162-4. Subsection (c) requires the payment of \$40 for each day the material witness is confined. The amount of payment is the same as that provided by federal law. 28 U.S.C.A. § 1821(b). In addition, this subsection allows a court to order additional payment not to exceed actual financial losses, if the additional payment would serve the interests of justice.

N.J.S. 2A:164-2 required the board of chosen freeholders of the county where the confinement occurs to pay the costs of confinement regardless of the entity seeking the confinement. Subsection (c) reflects the fact that the county is not always responsible for the costs of prosecution when the prosecution is brought by the State. Cf. 2A:73A-9. The effect of subsection (c) is that the prosecution, whether county or State, bears the cost of a material witness confined on its behalf. Likewise, a defendant obtaining the material witness order requiring confinement is obligated to pay the cost of confinement, plus additional payment if ordered, unless the party is indigent.

#### 2C:104-8. Deposition

A material witness may apply to the Superior Court for an order directing that a deposition be taken to preserve the witness's testimony. After the deposition is taken, the judge shall vacate the terms of confinement contained in the material witness order and impose the least restrictive conditions to secure the appearance of the material witness.

Source: New

#### COMMENT

This section gives a material witness a statutory right to apply to the Superior Court for an order requiring the taking of a deposition pursuant to court rules to preserve the testimony of the witness. Deposition as an alternative to continued confinement is now allowed by court rule. R. 3:13-2. The

federal rules and other state laws take a similar approach. E.g. Fed. R. Crim. P. 15; Ariz. Rev. Stat. Ann. § 13-4083(b) (1989). The taking of a deposition to preserve testimony vacates the confinement terms of the material witness order and requires the judge to modify the material witness order to assure that the least restrictive conditions of release remain imposed on the material witness.

#### **2C:104-9. Orders appealable**

**A material witness order shall constitute a final order for purposes of appeal, but, on motion of the material witness, may be reconsidered at any time by the court which entered the order.**

**Source: New**

#### **COMMENT**

This section makes a material witness order a final order for purposes of appeal entitling the material witness to file an appeal without leave of the Appellate Division. In the absence of the statute it would be unclear whether a material witness order is interlocutory or final. The Superior Court which entered the order retains jurisdiction when an appeal is taken to enable the witness to apply to the court for a modification of the original order.

TABLE OF DISPOSITIONS

| <u>SECTION</u> | <u>DISPOSITION</u> |
|----------------|--------------------|
| 2A:162-2       | 2C:104-2, 4 and 6  |
| 2A:162-3       | 2C:104-7           |
| 2A:162-4       | 2C:104-7           |

# CRS Report for Congress

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## **Arrest and Detention of Material Witnesses: Federal Law In Brief and Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199)**

September 8, 2005

Charles Doyle  
Senior Specialist  
American Law Division

# Arrest and Detention of Material Witnesses: Federal Law In Brief and Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199)

## Summary

Witnesses at Congressional oversight hearings alleged that the authority to arrest and hold material witnesses until their appearance at federal criminal proceedings (including grand jury proceedings) had been abused following September 11, 2001. Section 12 of the USA PATRIOT Act and Terrorism Prevention Reauthorization Act (H.R. 3199) as reported by the House Judiciary Committee called for a periodic review and reports on the use of the material witness statute. In the face of Administration opposition, however, the provision was dropped from the bill prior to House consideration. No similar proposal can be found in the version of H.R. 3199 (S. 1389) approved in the Senate. The episode illustrates the level of controversy easily generated by material witness statutes.

This is an overview of the law under the federal material witness statute which authorizes the arrest of material witnesses, permits their release under essentially the same bail laws that apply to federal criminal defendants, but favors their release after their depositions have taken.

A list of citations to comparable state statutes and a bibliography of law review articles and notes are appended.

The report is available in an abridged form – without footnotes, citations to most authorities and appendices – as CRS Report RS22259, *Arrest and Detention of Material Witnesses and the USA PATRIOT and Terrorism Reauthorization Act*.

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# Arrest and Detention of Material Witnesses: Federal Law in Brief and Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199)

## Introduction

When reported by the House Committee on the Judiciary, section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199) directed the Department of Justice to review the detention of individuals under the federal material witness statute, "including their length [of detention], conditions of access to counsel, frequency of access to counsel, offense at issue, and frequency of appearance before a grand jury." The Office of Management and Budget announced that the Administration strongly opposed section 12 on the grounds that the review by the Department of Justice's Inspector General and reports to the House and Senate Judiciary Committees called for by that section would "entail wholesale violation" of the grand jury secrecy provisions.<sup>1</sup> Perhaps as a consequence, the section was dropped from the bill prior to House consideration and no comparable provision appears in the version of H.R. 3199 which the Senate approved.

The episode illustrates the level of controversy easily generated by material witness statutes. Under the federal statute, 18 U.S.C. 3144, witnesses in a federal criminal case may find themselves arrested, held for bail, and in some cases imprisoned until they are called upon to testify. The same is true in most if not all of the states.<sup>2</sup> Although subject to intermittent criticism,<sup>3</sup> it has been so at least from

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<sup>1</sup> Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy: H.R. 3199 - USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005*, available on September 5, 2005 at [<http://www.whitehouse.gov/omb/legislative/sap/109-1/hr3199sap-h.pdf>].

<sup>2</sup> A discussion of the provisions of state law is beyond the scope of this report. Citations to the state statutes are appended.

<sup>3</sup> 1 BISHOP, CRIMINAL PROCEDURE, 18-9 (2d ed. 1872) ("The committing magistrate, having the witnesses for the prosecution before him, will take their recognizances to appear and testify before the upper court. Sometimes the purposes of justices require that these recognizances should be with sureties, and occasionally the unpleasant result follows that a witness cannot obtain sureties, and he is detained in prison"; ALI, CODE OF CRIMINAL PROCEDURE, §58 note (Tent. Draft 1928) ("One of the evils in connection with the administration of the criminal law in most states is the practice of confining for long periods of time, generally in the country jail, witnesses who cannot give bail"); *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATHOLIC UNIVERSITY LAW REVIEW 37, 50 ("Failure of state and federal government to come up with

the beginning of the Republic.<sup>4</sup> The Supreme Court has never squarely considered the constitutionality of section 3144 or any of its predecessors, but it has observed in passing that, "[t]he duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained in the absence of bail, as a material witness," *Stein v. New York*, 346 U.S. 156, 184 (1953).<sup>5</sup> Even more telling may be an earlier remark from the Court to the effect that, "[t]he constitutionality of this [federal material witness] statute apparently has never been doubted," *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 617 (1929).

In spite of the concerns of some that the authority can be used as a means to jail a suspect while authorities seek to discover probable cause sufficient to support a

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a sound policy in dealing with the problem of material witnesses is manifestly a deplorable situation"); Studnicki, *Material Witness Detention: Justice Served or Denied?* 40 WAYNE LAW REVIEW 1533, 1568 (1994) ("The continued use of material witnesses statutes will undoubtedly be an issue debated well into the next century. Whether the criminal justice system abandons this ancient practice in favor of a more humane policy toward the treatment of witnesses remains to be seen"); Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 NEW YORK LAW SCHOOL LAW REVIEW 13, 13 (2003) ("Upon the mere conclusory statement of a government official that a person has material information and might not respond to a subpoena, the person may be incarcerated for an indefinite period of time, without bail, and under onerous conditions").

<sup>4</sup> 1 Stat. 91 (1789) ("copies of the process [criminal complaint] shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment"); see also, Rev. Stat. §879 (1878) ("Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case"); 28 U.S.C. 657 (1926 ed.); F.R.Crim.P. 46(b), 18 U.S.C. App. (1946 ed.); 18 U.S.C. 3149 (1970 ed.).

<sup>5</sup> See also, *Blair v. United States*, 250 U.S. 273, 280-81 (1919) ("At the foundation of our federal government the inquisitorial function of the grand jury and compulsion of witnesses were recognized as incidents of the judicial power of the United States. . . [B]y the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy trial and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act, the mode of proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. . . [The Revised Statutes] contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance. In all of these provisions . . . it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned . . . The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, [is] yet so necessary to the administration of justice to the forms and modes established in our system of government. . ."); VIII WIGMORE ON EVIDENCE §§2190-2192 (3d ed. 1940).

criminal accusation<sup>6</sup> or as a preventive detention measure,<sup>7</sup> the lower courts have denied that the federal material witness statute can be used as a substitute for a criminal arrest warrant.<sup>8</sup> Particularly in the early stages of an investigation, however, an individual's proximity to a crime may make him both a legitimate witness and a legitimate suspect.<sup>9</sup>

The case law and statistical information suggest that the federal statute is used with surprising regularity<sup>10</sup> and most often in the prosecution of immigration offenses involving material witnesses who are foreign nationals.<sup>11</sup> Critics, however, contend

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<sup>6</sup> Carlson & Voelpel, *Material Witness and Material Injustice*, 58 WASHINGTON UNIVERSITY LAW REVIEW 1, 9 (1980) ("Over the years prosecutors and police have sometimes invoked the power to confine criminal suspects as witnesses while gathering evidence against the witness-defendant").

<sup>7</sup> Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOYOLA OF LOS ANGELES LAW REVIEW 1217, 1225 (2002) ("Material witness laws provide the government with the perfect avenue to jail those it considers dangerous. It is preventive detention. . . The government uses these laws to round up people because of what it expects them to do, rather than what it can prove they have done").

<sup>8</sup> *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003) ("The district court noted (and we agree) that it would be improper for the government to use §3144 for other ends, such as the detention of persons suspected of criminal activity for which probable cause has not yet been established. However, the district court made no finding (and we see no evidence to suggest) that the government arrested Awadallah for any purpose other than to secure information material to a grand jury investigation"); *In re De Jesus Berrios*, 706 F.2d 355, 358 (1<sup>st</sup> Cir. 1983) ("no showing has been made that the arrest was a subterfuge designed to obtain non-testimonial evidence or to bring a target before the grand jury") (even though the witness had been subpoenaed to appear before the grand jury to testify, provide hair samples, and take part in a lineup).

<sup>9</sup> Those subject to arrest under the federal statute include Terry Nichols (subsequently convicted for complicity in the Oklahoma City bombing), *In re Material Witness Warrant*, 77 F.3d 1277, 1278 (10<sup>th</sup> Cir. 1996); Jose Padilla (subsequently transferred to military custody as an "enemy combatant"), *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2715 (2004); and Brandon Mayfield (whose fingerprint was erroneously thought to match one linked to the Madrid train bombing), *In re Federal Grand Jury Proceedings*, 337 F.Supp.2d 1218, 1220-221 (D. Ore. 2004).

<sup>10</sup> United States magistrate judges conducted 4882 material witness hearings in FY2004; 4070 in FY2003; 2961 in FY2002; 3344 in FY2001; and 3603 in FY2000, Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, Table M-3 (2005); *id.* (2004); *id.* (2003); *id.* (2002); *id.* (2001), available on August 31, 2005 at [http://www.uscourts.gov]. The annual reports of the Administrative Office of the United States Courts indicate that the statistics have not changed a great deal over the last quarter century, United States magistrates conducted 6865 material witness hearings in FY1981; 8221 in FY1980; 6481 in FY1978; 3230 in FY1977; and 2048 in FY1976, *Reports of the Proceedings of the Judicial Conference of the United States/Annual Report of the District of the Administrative Office of United States Courts*, Table M-3 (1981); *id.* (1980); *id.* (1978); *id.* (1977); *id.* (1976).

<sup>11</sup> See e.g., *In re Class Action Application of Habeas Corpus on Behalf of All Material Witnesses in the Western District of Texas*, 612 F.Supp. 904 (W.D. Tex. 1985); *United States v. Nai*, 949 F.Supp. 42 (D.Mass. 1996); *United States v. Aguilar-Tamayo*, 300 F.3d

that since September 11, 2001, seventy individuals, mostly Muslims, have been arrested and detained in abuse of the statute's authority.<sup>12</sup>

## Arrest

The federal material witness statute provides that:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title [relating to bail]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure. 18 U.S.C. 3144.

An arrest warrant for a witness with evidence material to a federal criminal proceeding may be issued by federal or state judges or magistrates.<sup>13</sup> The statute

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562 (5<sup>th</sup> Cir. 2002); *United States v. Lai Fa Chen*, 214 F.R.D. 578 (N.D. Cal. 2003), all involving illegal alien smuggling. Statistics from the Administrative Office of the United States Courts indicate that an overwhelming majority of the material witness hearings conducted by United States magistrate judges occur in judicial districts bordering Mexico:

| District   | FY2004 | FY2003 | FY2002 | FY2001 | FY2000 |
|------------|--------|--------|--------|--------|--------|
| S.D. Cal.  | 1210   | 936    | 721    | 601    | 728    |
| D. Ariz.   | 808    | 495    | 295    | 313    | 597    |
| D. N. Mex. | 287    | 288    | 253    | 233    | 220    |
| W.D. Tex.  | 503    | 406    | 474    | 533    | 566    |
| S.D. Tex.  | 1423   | 1290   | 676    | 814    | 765    |

Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, Table M-3, (2005); *id.* (2004); *id.* (2003); *id.* (2002); *id.* (2001), *United States Courts*, Table M-3, (2005); *id.* (2004); *id.* (2003); *id.* (2002); *id.* (2001), available on August 31, 2005 at [<http://www.uscourts.gov>]. The historical picture is much the same:

| District   | FY1981 | FY1980 | FY1978 | FY1977 | FY1976 |
|------------|--------|--------|--------|--------|--------|
| S.D. Cal.  | 2637   | 3636   | 2821   | 1095   | 755    |
| D. Ariz.   | 603    | 691    | 978    | 770    | 366    |
| D. N. Mex. | 57     | 16     | 147    | 154    | 85     |
| W.D. Tex.  | 651    | 734    | 1267   | 252    | 211    |
| S.D. Tex.  | 2232   | 1946   | 2244   | 461    | 374    |

*Reports of the Proceedings of the Judicial Conference of the United States/Annual Report of the District of the Administrative Office of United States Courts*, Table M-3 (1981); *id.* (1980); *id.* (1978); *id.* (1977); *id.* (1976).

<sup>12</sup> *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*, 17 HUMAN RIGHTS WATCH 1-3 (June 2005), available on September 5, 2005 at, [[http://hrw.org/english/docs/2005/06/27/usdom11213\\_txt.htm](http://hrw.org/english/docs/2005/06/27/usdom11213_txt.htm)].

<sup>13</sup> 18 U.S.C. 3156(a)(1) ("As used in sections 3141-3150 of this chapter— (1) the term 'judicial officer' means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release

applies to potential grand jury witnesses as well as to potential trial witnesses.<sup>14</sup> Section 3144 on its face authorizes arrest at the behest of any party to a criminal proceeding. In the case of criminal trial, both the government and the defendants may call upon the benefits of section 3144.<sup>15</sup> Availability is a bit less clear in the case of grand jury proceedings. In a literal sense, there are no parties to a grand jury investigation other than the grand jury.<sup>16</sup> Moreover, it seems unlikely that a suspect, even the target of a grand jury investigation, would be considered a "party" to a grand jury proceeding. The purpose of section 3144 is the preservation of evidence for criminal proceedings. Potential defendants, even if they are the targets of a grand jury investigation, have no right to present evidence to the grand jury.<sup>17</sup> On the other hand, a federal prosecutor ordinarily arranges for the presentation of witnesses to the grand jury.<sup>18</sup> It is therefore not surprising that the courts seem to assume without deciding that the government may claim the benefits of section 3144 in the case of grand jury witnesses.<sup>19</sup>

Issuance of a section 3144 arrest warrant requires affidavits establishing probable cause to believe (1) that the witness can provide material evidence, and (2) that it will be "impracticable" to secure the witness' attendance at the proceeding simply by subpoenaing him.<sup>20</sup> Neither the statute nor the case law directly address

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a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia"). Section 3041 authorizes federal and state judges and magistrates to issue arrest warrants and conduct bail proceedings in federal criminal cases.

<sup>14</sup> *United States v. Awadallah*, 349 F.3d 42, 49-51 (2d Cir. 2003); *United States v. Bacon*, 449 F.2d 933, 939-41 (9th Cir. 1971); *contra*, *United States v. Awadallah*, 202 F.Supp.2d 55, 61-79 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (2d Cir. 2003).

<sup>15</sup> *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992); *United States v. Nai*, 949 F.Supp. 42, 44 (D. Mass. 1966).

<sup>16</sup> *United States v. Williams*, 504 U.S. 36, 47 (1992)("the grand jury . . . has not been textually assigned [by the Constitution] to any of the branches described in the first three Articles. It is a constitutional fixture in its own right. In fact the whole theory of its function is that it belongs to no branch of the institutional government").

<sup>17</sup> *Chandler v. Moscicki*, 253 F.Supp.2d 478, 490 (W.D.N.Y. 2003), quoting, *United States v. Williams*, 504 U.S. 36, 52 (1992)("a suspect under investigation by the grand jury does not have a right to testify or have exculpatory evidence presented").

<sup>18</sup> Rule 17(a) of the Federal Rules of Criminal Procedure states that federal criminal subpoenas are issued in blank by the clerk of the court and filled in by "the party" requesting them. Nevertheless, federal prosecutors complete and see to the service of most grand jury subpoenas, *Lopez v. United States*, 393 F.3d 1345, 1349 (D.C.Cir. 2005)("the term 'grand jury subpoena' is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does").

<sup>19</sup> See e.g., *United States v. Awadallah*, 349 F.3d 42, 66 (2d Cir. 2003)("in the case of a grand jury proceeding, we think that a statement by a responsible official, such as the United States Attorney is sufficient"), quoting on the question of affidavit sufficiency under section 3144, *United States v. Bacon*, 449 F.2d 933, 943 (9th Cir. 1971).

<sup>20</sup> *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982); *United States v. Bacon*, 449 F.2d 933, 943 (9th Cir. 1971);

the question of what constitutes "material" evidence for purposes of section 3144, but in other contexts the term is understood to mean that which has a "natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed."<sup>21</sup> At the grand jury level, the government may establish probable cause to believe a witness can provide material evidence through the affidavit of a federal prosecutor or a federal investigator gathering evidence with an eye to its presentation to the grand jury.<sup>22</sup> This may not prove a particularly demanding standard in some instances given the sweeping nature of the grand jury's power of inquiry.<sup>23</sup>

As to the second required probable cause showing, a party seeking a material witness arrest warrant must establish probable cause to believe that it will be impractical to rely upon a subpoena to securing the witness' appearance. The case law on point is sketchy, but it seems to indicate that impracticality may be shown by evidence of possible flight,<sup>24</sup> or of an expressed refusal to cooperate,<sup>25</sup> or of difficulty

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*United States v. Coldwell*, 496 F.Supp. 305, 307 (E.D.Okla. 1979).

<sup>21</sup> *Neder v. United States*, 527 U.S. 1, 16 (1999), quoting, *United States v. Gaudin*, 515 U.S. 506, 509 (1995)(materiality as an element of various federal fraud statutes). In the context of the prosecution's failure to disclose material exculpatory evidence, "the material standard *Brady* claims is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *Banks v. Dretke*, 540 U.S. 668, 698 (2004), quoting, *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

<sup>22</sup> *United States v. Awadallah*, 349 F.3d 42, 66 (2d Cir. 2003); *United States v. Oliver*, 683 F.2d 224, 231 (7<sup>th</sup> Cir. 1982); *United States v. Bacon*, 449 F.2d 933, 943 (9<sup>th</sup> Cir. 1971).

<sup>23</sup> *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)("Because [the grand jury's] task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime"); *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991)("The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed").

<sup>24</sup> The government's affidavit merely asserted "with respect to the probability of Nichol's flight: Terry Nichols' renunciation of his U.S. citizenship and his association with Tim McVeigh, a person involved in such a heinous crime, indicates that his testimony cannot be secured through the issuance of a subpoena." *In re Material Witness Warrant*, 77 F.3d 1277, 1278 (10<sup>th</sup> Cir. 1996), dismissing as moot an appeal from, *United States v. McVeigh*, 940 F.Supp. 1541, 1562 (D.Colo. 1996)(denial of a motion to quash a material witness arrest warrant on grounds of impracticality).

<sup>25</sup> *United States v. Coldwell*, 496 F.Supp. 305, 307 (E.D. Okla. 1979)(As to impracticality, "the Dempewolf affidavit shows that (a) Alston has refused to cooperate with law enforcement officials. . . (b) Alston has indicated that he will not testify in this case unless the Oklahoma Bureau . . . satisfies certain conditions that . . . are impossible to meet; (c) two unsuccessful attempts have been made to serve Alston with a subpoena through his attorney;

experienced in serving a subpoena upon a trial witness,<sup>26</sup> or presumably by evidence that the witness is a foreign national who will have returned or been returned home by the time his testimony is required.<sup>27</sup> Evidence that investigators have experienced difficulties serving a particular grand jury witness may not be enough to justify the issuance of an arrest warrant in all cases.<sup>28</sup>

## Bail

With limited variations, federal bail laws apply to material witnesses arrested under section 3144.<sup>29</sup> Arrested material witnesses are entitled to the assistance of counsel during bail proceedings and to the appointment of an attorney when they are unable to detain private counsel.<sup>30</sup> The bail laws operate under an escalating system in which release is generally favored, then release with conditions or limitations is

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and (d) Alston's attorney has indicated that Alston has expressed a definite unwillingness to cooperate with the government").

<sup>26</sup> *United States v. Feingold*, 416 F.Supp. 627, 628 (E.D.N.Y. 1976) ("We are not here dealing with a witness before a grand jury where disregard of a subpoena would simply mean a continuation of the grand jury's deliberations until an appropriate warrant might be served and executed. Here, Feingold's testimony is needed at Nashi's trial. Once commenced, the trial would continue on consecutive days, and Feingold's testimony would be needed before the Government rested its case. Since Feingold is presumably in California, for the Government to have to defer its arrest warrant until he ignored a subpoena to attend the trial will preclude his testifying altogether. The . . . affidavit showed unsuccessful attempts to serve Feingold with a subpoena either through his California attorney or on seven different days at Feingold's home").

<sup>27</sup> Perhaps because the point seems too obvious for dispute or discussion, none of the reported federal cases appear to have held the impracticality of future appearance requirement can be satisfied by evidence that a material witness, who is a foreign national illegally present in this country, may be overseas and thus beyond the reach of the court's subpoena when his testimony is required. The number of foreign material witnesses arrested and held for the trial of immigration prosecutions indicate the government has experienced little difficulty satisfying the impracticality requirement in such cases, see e.g., *Torres-Ruiz v. United States District Court*, 120 F.3d 933 (9<sup>th</sup> Cir. 1997); *United States v. Allie*, 978 F.2d 1401 (5<sup>th</sup> Cir. 1992); *United States v. Nai*, 949 F.Supp. 42 (D.Mass. 1996); *United States v. Huang*, 827 F.Supp. 945 (S.D.N.Y. 1993).

<sup>28</sup> *Arnsberg v. United States*, 757 F.2d 971, 976-77 (9<sup>th</sup> Cir. 1985) ("In the district court's view, the difficulties encountered by agents . . . in attempting to serve Arnsberg did not establish probable cause for believing that it would be impracticable to secure Arnsberg's presence by subpoena. . . . The facts do not show that Arnsberg was a fugitive or that he would be likely to flee the jurisdiction; rather, they only show a man somewhat obstinately insisting upon his right to refuse to appear before a grand jury until personally served. Those facts are insufficient to provide probable cause for believing that Arnsberg's attendance could not be secured by subpoena").

<sup>29</sup> 18 U.S.C. 3144 (" . . . a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title . . .").

<sup>30</sup> *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in Western District of Texas*, 612 F.Supp. 940, 943-45 (W.D.Tex. 1985); 18 U.S.C. 3142(f); 18 U.S.C. 3006A(a)(1)(G).

preferred, and finally as a last option detention is permitted.<sup>31</sup> A defendant is released on his word (personal recognizance) or bond unless the court finds such assurances insufficient to guarantee his subsequent appearance or to ensure public or individual safety.<sup>32</sup> A material witness need only satisfy the appearance standard.<sup>33</sup> A material witness who is unable to do so is released under such conditions or limitations as the court finds adequate to ensure his later appearance to testify.<sup>34</sup> If neither word nor bond nor conditions will suffice, the witness may be detained.<sup>35</sup> The factors a court may consider in determining whether a material witness is likely to remain available include his deposition, character, health, and community ties.<sup>36</sup>

## Depositions

Section 3144 declares that “[n]o material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.” The corresponding federal deposition rule permits the witness,<sup>37</sup> the government, or the defendant to request that a detained material witness’ deposition be taken.<sup>38</sup> A court enjoys only limited discretion to deny a

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<sup>31</sup> 18 U.S.C. 3142(a)(“Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be – (1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section; (2) released on a condition or combination of conditions under subsection (c) of this section; (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or (4) detained under subsection (e) of this section.”).

<sup>32</sup> 18 U.S.C. 3142(b)(“The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release, unless the judicial officer determines that 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”).

<sup>33</sup> *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003), citing, S.Rep.No. 98-225, at 28 no.90 (1983)(“Of course a material witness is not to be detained on the basis of dangerousness”); *United States v. Nai*, 949 F.Supp. 42, 44 (D.Mass. 1996)(“a material witness may be detained only if the judicial officer finds by a preponderance of the evidence, that the material witness poses a risk of flight”)

<sup>34</sup> 18 U.S.C. 3142(c).

<sup>35</sup> 18 U.S.C. 3142(e).

<sup>36</sup> *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003); 18 U.S.C. 3142(g).

<sup>37</sup> F.R.Crim.P. 15(a)(2)(“A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript”).

<sup>38</sup> F.R.Crim.P. 15(a)(1)(“A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is

detained witness' request. The Fifth Circuit has observed that, "Read together, Rule 15(a) and section 3144 provide a detained witness with a mechanism for securing his own release. He must file a written motion requesting that he be deposed. The motion must demonstrate that his testimony can adequately be secured by deposition, and that further detention is not necessary to prevent a failure of justice. Upon such showing, the district court must order his deposition and prompt release," *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5<sup>th</sup> Cir. 1992). Other courts seem to agree.<sup>39</sup> The "failure of justice" limitation comes into play when release of the witness following the taking of his deposition would ultimately deny a defendant the benefit of favorable material testimony in derogation of his right to compulsory process.<sup>40</sup> It does not include the fact that a judicial officer will not be present at the taking of the deposition or that the witness is an illegal alien subject to prosecution.<sup>41</sup>

Unlike the request of a detained witness, a government or defendant's request that a witness' deposition be taken must show "exceptional circumstances" and that granting the request is "in the interest of justice," F.R.Crim.P. 15(a)(1).<sup>42</sup> Nevertheless, the fact that a witness is being detained will often be weighed heavily regardless of who requests that depositions be taken.<sup>43</sup> The Circuits appear to be divided over whether in compliance with a local standing order the court may authorize depositions to be taken *sua sponte* in order to release a detained material

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not privileged, including any book, paper, document, record, recording, or data.").

<sup>39</sup> *Torres-Ruiz v. United States District Court*, 120 F.3d 933, 935 (9<sup>th</sup> Cir. 1997); *United States v. Nai*, 949 F.Supp. 42, 44 (D. Mass. 1996); *United States v. Huang*, 827 F.Supp. 945, 948 (S.D.N.Y. 1993).

<sup>40</sup> *United States v. Huang*, 827 F.Supp. 945, 950-52 (S.D.N.Y. 1993); cf., *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-73 (1982) (The government may deport "illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. The mere fact that the government deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense").

<sup>41</sup> *Torres-Ruiz v. United States District Court*, 120 F.3d 933, 936 (9<sup>th</sup> Cir. 1997).

<sup>42</sup> *United States v. Allie*, 978 F.2d 1401, 1404 (5<sup>th</sup> Cir. 1992); *United States v. Lai Fa Chen*, 214 F.R.D. 578, 579 (N.D.Cal. 2003).

<sup>43</sup> *United States v. Fai Fa Chen*, 214 F.R.D. 578, 580-81 (N.D.Cal. 2003) (Other courts faced with a motion brought by the government to depose material witnesses have considered their detained status when finding exceptional circumstances [citing *United States v. Allie*, 978 F.2d 1401 (5<sup>th</sup> Cir. 1992) and *United States v. Rivera*, 859 F.2d 1204 (4<sup>th</sup> Cir. 1988)]. . . Although detention itself does not amount to a per se 'exceptional circumstance' under Rule 15(a)(1), it would be the rare case when it would not"). In *Rivera*, the court observed that "[i]f the court had denied the motion for depositions, these alien witnesses would have been incarcerated for more than three months, even though they were neither indicted nor convicted of a crime. The appellant was both indicted and convicted on nine counts, and he spent less time incarcerated than did these witnesses, who were deposed and deported," 859 F.2d at 1207.

witness.<sup>44</sup> In any event, whether any such depositions may be introduced in later criminal proceedings will depend upon whether the defendant's constitutional rights to confrontation and compulsory process have been accommodated.<sup>45</sup>

### Related Matters

The government must periodically report to the court on the continuing justification for holding an incarcerated material witness.<sup>46</sup> While a material witness is being held in custody he is entitled to the daily witness fees authorized for attendance at judicial proceedings.<sup>47</sup> Upon his release, the court may also order that he be provided with transportation and subsistence to enable him to return to his place of arrest or residence.<sup>48</sup> Should he fail to appear after he has been released from custody he will be subject to prosecution,<sup>49</sup> an offense which may be punished more severely if his failure involves interstate or foreign travel to avoid testifying in a felony case.<sup>50</sup>

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<sup>44</sup> Compare, *United States v. Lopez*, 918 F.2d 111, 112-114 (10<sup>th</sup> Cir. 1990)(depositions should not have been taken), and, *United States v. Allie*, 978 F.2d 1401, 1403-405 (5<sup>th</sup> Cir. 1992)(depositions were validly taken).

<sup>45</sup> *United States v. Allie*, 978 F.2d 1401, 1406-408 (5<sup>th</sup> Cir. 1992); *United States v. Eufracio-Torres*, 890 F.2d 266, 268-71(10<sup>th</sup> Cir. 1989); *United States v. Rivera*, 859 F.2d 1204, 1207-209 (4<sup>th</sup> Cir. 1988); *United States v. Huang*, 827 F.Supp. 945, 947-52 (S.D.N.Y. 1993).

<sup>46</sup> F.R.Crim.P. 46(h)(2) ("An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a)").

<sup>47</sup> 28 U.S.C. 1821 (" . . . (b) A witness shall be paid an attendance fee of \$40 per day for each day's attendance. . . (d) . . . (4) When a witness is detained pursuant to section 3144 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section").

<sup>48</sup> 18 U.S.C. 4282 ("On the release from custody of . . . a person held as a material witness, the court in its discretion may direct the United States marshal for the district wherein he is released, pursuant to regulations promulgated by the Attorney General, to furnish the person so released with transportation and subsistence to the place of his arrest, or, at his election, to the place of his bona fide residence if such cost is not greater than to the place of arrest").

<sup>49</sup> 18 U.S.C. 3146 ("(a) Offense.— Whoever, having been released under this chapter [relating to bail] knowingly — (1) fails to appear before a court as required by the conditions of release . . . shall be punished as provided in subsection (b) of this section. (b) Penalties — (1) The punishment for an offense under this section is . . . (B) if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for not more than one year, or both").

<sup>50</sup> 18 U.S.C. 1073 ("Whoever moves or travels in interstate or foreign commerce with intent either . . . to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, is charged shall be fined under this title or imprisoned not more than five years, or both. . .").