

2C:104-1

LEGISLATIVE HISTORY CHECKLIST
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(Material witnesses)

NJSA: 2C:104-1
LAWS OF: 1994 **CHAPTER:** 126
BILL NO: A1043
SPONSOR(S): Frelinghuysen
DATE INTRODUCED: January 20, 1994
COMMITTEE: **ASSEMBLY:** Judiciary
SENATE: Judiciary
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DATE OF PASSAGE: **ASSEMBLY:** March 15, 1994
SENATE: September 19, 1994
DATE OF APPROVAL: October 26, 1994

FOLLOWING STATEMENTS ARE ATTACHED IF AVAILABLE:

SPONSOR STATEMENT: Yes
COMMITTEE STATEMENT: **ASSEMBLY:** Yes
SENATE: Yes
FISCAL NOTE: No
VETO MESSAGE: No
MESSAGE ON SIGNING: No

FOLLOWING WERE PRINTED:

REPORTS: Yes
HEARINGS: No

Report mentioned in statements:
974.90 New Jersey. Law Revision Commission.
L446 Annual report...1992. Trenton, March 1993.
[see pp.3-4, Appendix A]

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P.L.1994, CHAPTER 126, approved October 26, 1994
1994 Assembly No. 1043
CORRECTED COPY

1 AN ACT concerning material witnesses, enacting a new chapter
2 104 of Title 2C of the New Jersey Statutes and repealing parts
3 of the statutory law.

4
5 BE IT ENACTED by the Senate and General Assembly of the
6 State of New Jersey:

7 1. A new chapter 104 is added to Title 2C of the New Jersey
8 Statutes as follows:

9 2C:104-1. Definitions.

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

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

18 Source: New.

19 2C:104-2. Application for material witness order.

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

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

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

43 Source: 2A:162-2.

44 2C:104-3. Order to appear.

45 a. If there is probable cause to believe that a material witness
46 order may issue against the person named in the application, the
47 judge may order the person to appear at a hearing to determine

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

10 2C:104-4. Arrest With Warrant.
11 a. If there is clear and convincing evidence that the person
12 named in the application will not be available as a witness unless
13 immediately arrested, the judge may issue an arrest warrant.
14 The arrest warrant shall require that the person be brought
15 before the court immediately after arrest. If the arrest does not
16 take place during regular court hours, the person shall be brought
17 to the emergency-duty Superior Court judge.
18 b. The judge shall inform the person of:
19 (1) the reason for arrest;
20 (2) the time and place of the hearing to determine whether the
21 person is a material witness; and
22 (3) the right to an attorney and to have an attorney appointed
23 if the person cannot afford one.
24 c. The judge shall set conditions for release, or if there is
25 clear and convincing evidence that the person will not be
26 available as a witness unless confined, the judge may order the
27 person confined until the material witness hearing which shall
28 take place within 48 hours of the arrest.
29 Source: 2A:162-2.

30 2C:104-5. Arrest Without Warrant.
31 a. A law enforcement officer may arrest an alleged material
32 witness without a warrant only if the arrest occurs prior to the
33 filing of an indictment, accusation or complaint for a crime or
34 the initiation of a criminal investigation before a grand jury, and
35 if the officer has probable cause to believe that:
36 (1) a crime has been committed;
37 (2) the alleged material witness has information material to
38 the prosecution of that crime;
39 (3) the alleged material witness will refuse to cooperate with
40 the officer in the investigation of that crime; and
41 (4) the delay necessary to obtain an arrest warrant or order to
42 appear would result in the unavailability of the alleged material
43 witness.
44 b. Following the warrantless arrest of an alleged material
45 witness, the law enforcement officer shall bring the person
46 immediately before a judge. If court is not in session, the officer
47 shall immediately bring the person before the emergency-duty
48 Superior Court judge. The judge shall determine whether there is
49 probable cause to believe that the person is a material witness of
50 a crime and, if an indictment, accusation or complaint for that
51 crime has not issued or if a grand jury has not commenced a
52 criminal investigation of that crime, the judge shall determine
53 whether there is probable cause to believe that, within 48 hours
54 of the arrest, an indictment, accusation or complaint will issue or
55 a grand jury investigation will commence. The judge then shall

1 proceed as if an application for a warrant has been made under
2 N.J.S.2C:104-4.

3 Source: New.

4 2C:104-6. Material witness hearing.

5 a. At the material witness hearing, the following rights shall
6 be afforded to the person:

7 (1) the right to be represented by an attorney and to have an
8 attorney appointed if the person cannot afford one;

9 (2) the right to be heard and to present witnesses and evidence;

10 (3) the right to have all of the evidence considered by the
11 court in support of the application; and

12 (4) the right to confront and cross-examine witnesses.

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

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

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

26 Source: 2A:162-2.

27 2C:104-7. Conditions of release; confinement.

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

30 b. The conditions of release for a material witness or for a
31 person held on an application for a material witness order shall be
32 the least restrictive to effectuate the appearance of the material
33 witness. A judge may:

34 (1) place the witness in the custody of a designated person or
35 organization agreeing to supervise the person;

36 (2) restrict the travel of the person;

37 (3) require the person to report;

38 (4) set bail; or

39 (5) impose other reasonable restrictions on the material
40 witness.

41 c. A person confined shall be paid \$40.00 per day, and when
42 the interests of justice require, the judge may order additional
43 payment not exceeding the actual financial loss resulting from
44 the confinement. The party obtaining the material witness order
45 bears the cost of confinement and payment unless the party is
46 indigent.

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

48 2C:104-8. Deposition.

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

1 Source: New.

2 2C:104-9. Orders appealable.

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

6 Source: New.

7 2. The following are repealed:

8 N.J.S.2A:162-2 through 2A:162-4 inclusive.

9 3. This act shall take effect immediately.

10

11

12 STATEMENT

13

14 In criminal law, a witness whose testimony is crucial to either
15 the defense or prosecution is referred to as a material witness.
16 In most jurisdictions, if a material witness refuses to testify
17 willingly, that witness may be requested to furnish bond for his
18 appearance and, for want of surety, be confined until he
19 testifies. The constitutionality of the present New Jersey
20 statutes (N.J.S.2A:162-3 et seq.) governing the compelling of
21 testimony in criminal proceedings was challenged in State v.
22 Misik, 238 N.J. Super. 367 (Law Div. 1989). The court in Misik,
23 while upholding the basic authority of the State to compel
24 testimony in criminal proceedings, ruled that the present statutes
25 lacked sufficient procedural safeguards and suggested guidelines
26 to be followed by courts in the future in dealing with material
27 witnesses. The court in Misik further suggested that the
28 Legislature should enact statutory provisions governing material
29 witnesses.

30 In response to the concerns raised in Misik, this bill would
31 repeal the existing statutes dealing with testimony in criminal
32 cases and enact a new chapter (Chapter 104) pertaining to
33 material witnesses as part of Title 2C, New Jersey's criminal
34 code. The provisions of the bill are based on recommendations of
35 the Law Revision Commission.

36 The following is a brief description of the provisions of the bill:

37 2C:104-1. This section defines a material witness as a person
38 who has material evidence to the prosecution or defense of a
39 crime. The section also defines a material witness order as a
40 court order fixing conditions necessary to secure the appearance
41 of a material witness.

42 2C:104-2. This section provides that either the prosecution or
43 the defense may apply to Superior Court for an order compelling
44 a person to appear at a material witness hearing if there is
45 probable cause to believe that the person has information
46 material to a pending criminal investigation and the person is
47 unlikely to respond to a subpoena. An application may be
48 accompanied by an application for an arrest warrant if there is
49 probable cause to believe that person will not appear unless
50 arrested.

51 This section contains two changes from present law. First,
52 present law does not seem to authorize the defense to compel the
53 testimony of a material witness. Secondly, the court in Misik
54 ruled that a material witness may only be compelled to testify if

1 there is a pending indictment. This section contemplates that a
2 material witness could be compelled to testify during the grand
3 jury phase of a criminal investigation.

4 2C:104-3. This section provides that if there is probable cause
5 to believe that a material witness order may issue against the
6 person named in the application, the court shall issue an order
7 requiring the person to appear at a hearing. Notice of the
8 hearing should be served upon the alleged material witness at
9 least 48 hours before the hearing and the witness shall be notified
10 of his right to be represented by an attorney.

11 2C:104-4. This section provides that a court may issue an
12 arrest warrant for an alleged material witness if there is clear
13 and convincing evidence that the person will not be available to
14 testify unless arrested. Any person so arrested would be
15 immediately brought to court. The court would then be required
16 to release the arrested person under appropriate conditions unless
17 confinement is the only method which would insure the
18 appearance of the witness. If a person is confined, the material
19 witness hearing must be held within 48 hours.

20 2C:104-5. This section authorizes law enforcement officers to
21 arrest alleged material witnesses without a warrant in exigent
22 circumstances such as an encounter between a law enforcement
23 officer and a potential witness at a crime scene. The law
24 enforcement officer must bring the arrested person before a
25 judge immediately after arrest so that the judge may review the
26 propriety of the arrest and set appropriate conditions of release.

27 2C:104-6. This section establishes procedures governing
28 material witness hearings. If the court finds probable cause to
29 believe that the person is unlikely to respond to a subpoena and
30 has material information, the court shall declare that person to
31 be a material witness and release the person under appropriate
32 restraints. If the court finds by clear and convincing evidence
33 that no other form of restraint will assure the appearance of a
34 material witness, the court may order that the witness be
35 confined.

36 At a material witness hearing, the alleged material witness
37 would have the right to be represented by counsel; the right to
38 present witnesses and evidence and the right to cross-examine
39 witnesses.

40 2C:104-7. This section lists conditions which a court may
41 impose to insure the appearance of a material witness. Those
42 conditions include placement in the custody of another person;
43 travel restrictions, and bail.

44 This section also provides that a person confined as a material
45 witness may not be held in jail but must be lodged in comfortable
46 quarters and provided ordinary food. The State or the defense
47 shall also pay the material witness \$40.00 for each day confined.
48 Present law requires a \$3.00 per day payment. Federal law
49 provides for the payment of \$40.00 per day to material witnesses
50 confined in connection with federal prosecutions.

51 2C:104-8. This section gives a material witness the right to
52 apply to court for an order requiring the taking of a deposition to
53 preserve the testimony of the witness. Deposition as an
54 alternative to continued confinement is now allowed by court

1 rule. The taking of a deposition to preserve testimony vacates
2 any confinement order by the court and requires the court to
3 modify the material witness order to assure that the least
4 restrictive conditions of release be imposed on the material
5 witness.

6 **2C:104-8.** This section makes a material witness order a final
7 order for purposes of appeal entitling the material witness to file
8 an appeal without leave with the Appellate Division. In the
9 absence of this provision it is unclear whether a material witness
10 order is interlocutory or final. The court which entered the order
11 retains jurisdiction when an appeal is taken to enable the witness
12 to apply to the court for a modification of the original order.

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47 unlikely to respond to a subpoena. An application may be
48 accompanied by an application for an arrest warrant if there is
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51 This section contains two changes from present law. First,
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53 testimony of a material witness. Secondly, the court in Misik
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3 jury phase of a criminal investigation.

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10 of his right to be represented by an attorney.

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15 immediately brought to court. The court would then be required
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18 appearance of the witness. If a person is confined, the material
19 witness hearing must be held within 48 hours.

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ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY
COMMITTEE

STATEMENT TO

ASSEMBLY, No. 1043

STATE OF NEW JERSEY

DATED: FEBRUARY 7, 1994

The Assembly Judiciary, Law and Public Safety Committee reports favorably Assembly Bill No. 1043.

In criminal law, a witness whose testimony is crucial to either the defense or prosecution is referred to as a material witness. In most jurisdictions, if a material witness refuses to testify willingly, that witness may be requested to furnish bond for his appearance and, for want of surety, be confined until he testifies. The constitutionality of the present New Jersey statutes (N.J.S.2A:162-3 et seq.) governing the compelling of testimony in criminal proceedings was challenged in State v. Misik, 238 N.J. Super. 367 (Law Div. 1989). The court in Misik, while upholding the basic authority of the State to compel testimony in criminal proceedings, ruled that the present statutes lacked sufficient procedural safeguards and suggested guidelines to be followed by courts in the future in dealing with material witnesses. The court in Misik further suggested that the Legislature should enact statutory provisions governing material witnesses.

In response to the concerns raised in Misik, this bill would repeal the existing statutes dealing with testimony in criminal cases and enact a new chapter (Chapter 104) pertaining to material witnesses as part of Title 2C, New Jersey's criminal code. The provisions of the bill are based on recommendations of the Law Revision Commission.

The following is a brief description of the provisions of the bill:

2C:104-1. This section defines a material witness as a person who has material evidence to the prosecution or defense of a crime. The section also defines a material witness order as a court order fixing conditions necessary to secure the appearance of a material witness.

2C:104-2. This section provides that either the prosecution or the defense may apply to Superior Court for an order compelling a person to appear at a material witness hearing if there is probable cause to believe that the person has information material to a pending criminal investigation and the person is unlikely to respond to a subpoena. An application may be accompanied by an application for an arrest warrant if there is probable cause to believe that person will not appear unless arrested.

This section contains two changes from present law. First, present law does not seem to authorize the defense to compel the testimony of a material witness. Secondly, the court in Misik ruled that a material witness may only be compelled to testify if there is a pending indictment. This section contemplates that a material witness could be compelled to testify during the grand jury phase of a criminal investigation.

2C:104-3. This section provides that if there is probable cause

to believe that a material witness order may issue against the person named in the application, the court shall issue an order requiring the person to appear at a hearing. Notice of the hearing should be served upon the alleged material witness at least 48 hours before the hearing unless that time period is adjusted by a judge and the witness shall be notified of his right to be represented by an attorney.

2C:104-4. This section provides that a court may issue an arrest warrant for an alleged material witness if there is clear and convincing evidence that the person will not be available to testify unless arrested. Any person so arrested would be immediately brought to court. The court would then be required to release the arrested person under appropriate conditions unless confinement is the only method which would insure the appearance of the witness. If a person is confined, the material witness hearing must be held within 48 hours.

2C:104-5. This section authorizes law enforcement officers to arrest alleged material witnesses without a warrant in exigent circumstances such as an encounter between a law enforcement officer and a potential witness at a crime scene. 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.

2C:104-6. This section establishes procedures governing material witness hearings. If the court finds probable cause to believe that the person is unlikely to respond to a subpoena and has material information, the court shall declare that person to be a material witness and release the person under appropriate restraints. If the court finds by clear and convincing evidence that no other form of restraint will assure the appearance of a material witness, the court may order that the witness be confined.

At a material witness hearing, the alleged material witness would have the right to be represented by counsel, the right to present witnesses and evidence and the right to cross-examine witnesses.

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The bill repeals N.J.S.2A:162-2 through N.J.S.2A:162-4.

SENATE JUDICIARY COMMITTEE

STATEMENT TO

ASSEMBLY, No. 1043

STATE OF NEW JERSEY

DATED: MAY 5, 1994

The Senate Judiciary Committee reports favorably Assembly Bill No. 1043.

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At a material witness hearing, the alleged material witness would have the right to be represented by counsel, the right to present witnesses and evidence and the right to cross-examine witnesses.

2C:104-7. This section lists conditions which a court may impose to insure the appearance of a material witness. Those conditions include placement in the custody of another person, travel restrictions and bail.

This section also provides that a person confined as a material witness may not be held in jail but must be lodged in comfortable quarters and provided ordinary food. The State or the defense shall also pay the material witness \$40.00 for each day confined. Present law requires a \$3.00 per day payment. Federal law provides for the payment of \$40.00 per day to material witnesses confined in connection with federal prosecutions.

2C:104-8. This section gives a material witness the right to apply to court for an order requiring the taking of a deposition to preserve the testimony of the witness. Deposition as an alternative to continued confinement is now allowed by court rule. The taking of a deposition to preserve testimony vacates any confinement order by the court and requires the court to modify the material witness order to assure that the least restrictive conditions of release be imposed on the material witness.

2C:104-9. This section makes a material witness order a final order for purposes of appeal entitling the material witness to file an appeal without leave with the Appellate Division. In the absence of this provision it is unclear whether a material witness order is interlocutory or final. The 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.

The bill repeals N.J.S.2A:162-2 through N.J.S.2A:162-4.