NOTICE TO THE BAR

CRIMINAL JUSTICE REFORM – SUPREME COURT CRIMINAL PRACTICE COMMITTEE SUPPLEMENTAL REPORT ON COURT RULES TO IMPLEMENT THE BAIL REFORM LAW – COMMENTS REQUESTED

This notice publishes for written comment the October 26, 2016 **Supplemental Report of the Supreme Court Criminal Practice Committee on Recommended Court Rules to Implement the Bail Reform Law**. The further rule amendments proposed in this report would be effective January 1, 2017.

Please send any comments on this report and its rule recommendations in writing by **Monday, November 28, 2016** to:

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Comments may also be submitted via Internet e-mail to the following address: Comments.Mailbox@njcourts.gov.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address (and those submitting comments by e-mail should include their name and e-mail address). Comments submitted are subject to public disclosure.

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: November 3, 2016

SUPPLEMENTAL REPORT
OF THE SUPREME COURT
COMMITTEE ON CRIMINAL PRACTICE
ON
RECOMMENDED COURT RULES
TO
IMPLEMENT THE BAIL REFORM LAW

October 26, 2016

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I. Introduction

On August 11, 2014, Governor Christie signed S-946 into law, as L. 2014, c. 31, referred to hereafter as the Bail Reform Law. That law, codified at N.J.S.A. 2A:162-15 to -26, takes effect on January 1, 2017. The law contained provisions for pretrial release, pretrial detention, and speedy trial requirements for defendants who are detained.

The Criminal Practice Committee made a series of recommendations for new rules and amendments to the Part III Rules to implement the Bail Reform Law. See Report of the Supreme Court Committee on Criminal Practice on Recommended Court Rules to Implement the Bail Reform Law Part 1 Pretrial Release (May 9, 2016) at 222 N.J.L.J. 1441, 1527 (2016). See also Report of the Supreme Court Committee on Criminal Practice on Recommended Court Rules to Implement the Bail Reform Law Part 2 Pretrial Detention and Speedy Trial (May 12, 2016) at 222 N.J.L.J. 1545, 1622 (2016).

The Supreme Court considered those recommendations and adopted amendments, effective January 1, 2017, to the Part III Rules as part of its August 30, 2016 Criminal Justice Reform Omnibus Rule Amendment Order.

This Supplemental Report recommends further amendments to three of the Part III Rules that were amended, effective January 1, 2017, in the August 30, 2016 Criminal Justice Reform Omnibus Rule Amendment Order. The recommendations in this report therefore are proposed amendments to the three rules as they will exist on January 1, 2017. In other words, the underscored language in the rule proposals represents language that would be added to the January 1, 2017 version of the rule, and bracketed language is language that would be deleted from that January 1, 2017 version.

II. Rules Recommended

3:4-2. First Appearance After Filing Complaint

(a) Time of First Appearance. Following the filing of a complaint the defendant shall be brought before a judge for a first appearance as provided in this Rule.

(1) If the defendant remains in custody, the first appearance shall occur within 48 hours of a defendant's commitment to the county jail, and shall be before a judge with authority to set conditions of release for the offenses charged. However, if a motion for pretrial detention is filed at or prior to the first appearance for a person charged with homicide, the judge designated to preside over the centralized first appearance may conduct that proceeding in accordance with this Rule, except that conditions of pretrial release shall not be set.

(2) If a defendant is released on a complaint-summons, the first appearance shall be held no more than 60 days after the issuance of the complaint-summons or the defendant's arrest.

(b) ... No change

(c) ... No change

(1) ... No change

(A) ... No change

(B) ... No change

(2) ... No change

(3) ... No change

(4) ... No change

(5) ... No change

(6) ... No change

(7) ... No change

(8) ... No change

(9) ... No change

(10) ... No change

(11) ... No change

(d) ... No change

(1) ... No change

(2) ... No change

(3) ... No change

(4) ... No change

(5) ...No change

(e) ... No change

(f) ... No change

(1) ... No change

(2) ... No change

(3) ... No change

(4) ... No change

(5) ... No change

Note: Source – R.R. 3:2-3(b), 8:4-2 (second sentence). Amended July 7, 1971 effective September 13, 1971; amended April 1, 1974 effective immediately; text of former Rule 3:4-2 amended and redesignated paragraphs (a) and (b) and text of former Rules 3:27-1 and -2 amended and incorporated into Rule 3:4-2, July 13, 1994 to be effective January 1, 1995; paragraphs (a) and (b) amended June 28, 1996 to be effective September 1, 1996; paragraph (b) amended January 5, 1998 to be effective February 1, 1998; caption amended, paragraphs (a) and (b) deleted, new paragraphs (a), (b), (c), and

(d) adopted July 5, 2000 to be effective September 5, 2000; new paragraph (e) adopted July 21, 2011 to be effective September 1, 2011; paragraph (a) amended, new paragraph (b) added, former paragraphs (b), (c), and (e) amended and redesignated as paragraphs (c), (d), and (f), and former paragraph (d) redesignated as paragraph (e) April 12, 2016 to be effective September 1, 2016; paragraphs (a) and (b) amended, subparagraph (c)(1) amended, new subparagraphs (c)(1)(A) and (c)(1)(B) adopted, subparagraphs (c)(9) and (c)(10) amended, new subparagraph (c)(11) adopted, subparagraphs (d)(3) and (d)(4) amended, and new subparagraph (d)(5) adopted August 30, 2016 to be effective January 1, 2017[.]; paragraph (a) amended and new subparagraphs (a)(1) and (a)(2) adopted _____ to be effective _____.

Commentary

Paragraph (a)

The Supreme Court approved revisions to paragraph (a), effective January 1, 2017, that require the first appearance for a defendant that remains in custody to occur within "48 hours of a defendant's commitment to the county jail" before a judge with authority to set "conditions of release" for the offenses charged. Paragraph (b) was also amended, effective January 1, 2017, to require that first appearances for indictable offenses shall occur at a centralized location before a judge designated by the "Chief Justice."

The authority to set conditions of pretrial release is provided for in the revisions to R. 3:26-2(a) adopted by the Court, effective January 1, 2017. Pursuant to paragraph (a), a Superior Court judge may set "conditions of pretrial release" for a person charged with any offense. "Conditions of pretrial release" may also be set by the designated municipal court judge as part of the first appearance except for a person charged with homicide or who is arrested in any extradition proceeding.

Those two exceptions for municipal court judges not to set conditions of release for these defendants was formerly recommended by the Criminal Practice Committee to conform with the rule relaxation entered by the Supreme Court on April 29, 2013. See Report of the Supreme Court Committee on Criminal Practice on Recommended Court Rules to Implement the Bail Reform Law Part 1 Pretrial Release, supra, 222 N.J.L.J. at 1532-33.

The Committee recommends the adoption of two subparagraphs for paragraph (a) in R. 3:4-2. These subparagraphs would address (1) defendants who are in custody and (2) defendants released on a complaint-summons.

Paragraph (a)(1)

Paragraph (a)(1) would permit the judge designated to preside over the centralized first appearance for a person charged with homicide if the prosecutor has filed a motion for pretrial detention. Consistent with the requirement in N.J.S.A. 2A:162-19d(2) that a defendant in custody who is the subject of a motion for pretrial detention remain detained pending disposition of the motion, the proposed language further provides that pretrial release conditions cannot be set.

When pretrial detention motions are filed for defendants charged with homicide prior to or at the first appearance, there is no reason that a Superior Court judge needs to conduct that court proceeding. The procedural requirements required for the first appearance can be handled by the designated municipal court judge. For example, the judge could assign the Office of the Public Defender to represent an unrepresented defendant, inform the defendant of the charges against him or her, schedule the detention hearing, etc.

It is anticipated that in the majority of these cases prosecutors will be filing these motions prior to or at the first appearance. In the event that the prosecutor does not file the motion for pretrial detention, the first appearance would be conducted by the Superior Court judge in accordance with R. 3:26-2(a).

Paragraph (a)(2)

The Committee is not proposing any amendments to this language which is contained in current paragraph (a) for first appearances for defendants released on complaint-summonses.

3:26-1. Right to Pretrial Release Before Conviction

(a) Persons Entitled; Standards for Fixing.

(1) Persons Charged on a Complaint-Warrant. Except when the prosecutor files a motion for pretrial detention pursuant to N.J.S.A. 2A:162-18 and 19 and R. 3:4A, all persons for whom a complaint-warrant or a complaint-warrant on indictment is issued for an initial charge involving an indictable offense, disorderly persons offense, or petty disorderly persons offense, shall be released before conviction on either personal recognizance, the execution of an unsecured bond, or the least restrictive non-monetary conditions that, in the judgment of the court, will reasonably ensure their presence in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process. In addition to these non-monetary conditions, monetary conditions may be set for a defendant but only when it is determined that no other conditions of release will reasonably assure the defendant's appearance in court when required. The court shall consider all the circumstances, the Pretrial Services Program's risk assessment and recommendations and any information that may have been provided by a prosecutor or the defendant on conditions of release before making any pretrial release decision. If the court enters a release order containing conditions contrary to those recommended by the Pretrial Services Program obtained using a risk assessment instrument then the court shall set forth its reasons for not accepting those recommendations. The court shall make a pretrial release determination no later than 48 hours after a defendant's commitment to the county jail.

When a defendant is charged with a crime or offense involving domestic violence, the court authorizing the release may, as a condition of release, prohibit the defendant from having any contact with the victim. The court may impose any additional limitations upon contact as otherwise authorized by N.J.S.A. 2C:25-26.

(2) Persons Charged on a Complaint-Summons. A defendant who is charged on a complaint-summons shall be released from custody. If the defendant later fails to appear in court when required and the court issues a bench warrant for the defendant's arrest, the court shall at that time either set a monetary bail or order that the defendant be released on personal recognizance upon arrest.

(b) ... No change

(c) ... No change

(d) Extradition Proceedings. Where a person has been arrested in any extradition proceeding pursuant to the Uniform Criminal Extradition Law, N.J.S.A. 2A:160-6, et seq., the court may set monetary bail or bond [conditions of pretrial release] except where that person is charged with a crime punishable by death or life imprisonment. The court may also commit the person to the county jail as provided by the Uniform Criminal Extradition Law, N.J.S.A. 2A:160-6, et seq.

(e) ... No change

(1) ...No change

(2) ... No change

(3) ... No change

Note: Source-R.R. 3:9-1(a)(b)(c)(d); paragraph (a) amended September 28, 1982 to be effective immediately; paragraphs (a), (b), (c) and (d) amended July 13, 1994 to be effective January 1, 1995; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; new paragraph (b) adopted, and former paragraphs (b), (c), and (d)

redesignated as paragraphs (c), (d), and (e) June 15, 2007 to be effective September 1, 2007; new paragraph (c) adopted and former paragraphs (c), (d), and (e) redesignated as paragraphs (d), (e), and (f) July 9, 2008 to be effective September 1, 2008; paragraph (a) amended and new paragraph (g) adopted July 9, 2013 to be effective September 1, 2013; caption amended, text of paragraph (a) redesignated as paragraph (a)(1) with caption added, new paragraph (a)(2) adopted, paragraphs (b) and (c) amended, former paragraphs (d) and (e) deleted; former paragraph (f) amended and redesignated as paragraph (d), former paragraph (g) amended and redesignated as paragraph (e) August 30, 2016 to be effective January 1, 2017[.]; paragraphs (a)(1), (a)(2) and (d) amended _____ to be effective _____.

Commentary

Paragraph (a)(1)

The Criminal Practice Committee recommends an amendment to paragraph (a)(1) to include that persons charged on a complaint-warrant or complaint-warrant on indictment can also be released by "personal recognizance or the execution of an unsecured bond" for consistency with the Bail Reform Law. See N.J.S.A. 2A:162-17(a).

Paragraph (a)(2)

The proposed amendment for this paragraph would require that when a defendant charged on a complaint-summons (CDR-1) fails to appear for a required court proceeding and a bench warrant for his or her arrest is ordered, the judge upon issuance of that bench warrant shall order that the defendant be released on personal recognizance upon arrest or set the monetary bail amount, if appropriate.

Having the judge who issued the bench warrant make this determination at the outset ensures compliance with the statutory requirement that monetary bail be set within 12 hours of the defendant's arrest if it was not set upon issuance of the bench warrant. See N.J.S.A. 2A:162-16d(2)(a). Additionally, the judge who ordered the bench warrant will have more information relevant to assessing the defendant's risk of failure to appear. This recommendation will also obviate the need that an emergent duty judge be called upon to make this determination when the person is subsequently arrested on that bench warrant and the arrest occurs after hours or on a weekend or holiday.

It should be noted that a bench warrant will not be issued for a defendant charged on a complaint-summons who fails to appear at the first appearance. Rather, a notice will be issued to advise the defendant that the first appearance has been rescheduled

and that if he or she fails to appear at that the rescheduled court event a bench warrant will be issued. See R. 3:2-2, effective January 1, 2017.

The majority of these bench warrants for defendants charged on a complaint-summons will likely occur when the defendant misses the rescheduled first appearance. In these circumstances, the designated municipal court judge who presided at the centralized first appearance will be issuing the failure to appear bench warrant.

Another court proceeding that could result in a relatively high number of bench warrants is the post-indictment arraignment because many months will have passed since the defendant's last contact with the court system, and this event must take place within 14 days of the return of the indictment. These post-indictment bench warrants would be issued by the Criminal Division Superior Court judge to whom the case has been assigned.

The law further requires a prompt review for these defendants who cannot post bail and that applications for a bail reduction shall be heard in an "expedited manner." See N.J.S.A. 2A:162-16d(2)(a). To conform with these statutory provisions, procedures should be implemented to meet these requirements.

For example, if the defendant was arrested on a warrant for failure to appear at the first appearance, the review could be conducted at the next centralized first appearance court session, which could occur the next day (or potentially two days later if the arrest occurred on a Saturday).

A failure to appear at a post-indictment arraignment could be listed for the next business day before the Superior Court judge who issued the bench warrant or any other

available Superior Court judge. This is the process currently in place for post-indictment defendants who are arrested on a bench warrant for failing to appear in Superior Court.

Paragraph (d)

The Committee is recommending that this paragraph be amended to clarify that when defendants are arrested in an extradition proceeding the procedures for this determination are governed by the Uniform Criminal Extradition Law (hereafter UCEL), N.J.S.A. 2A:160-6, et seq., and not the standards under the Bail Reform Law.

The Committee notes that substantively different standards apply to the setting of monetary bail under the UCEL and the Bail Reform Law (N.J.S.A. 2A:162-15, et seq.) Under the UCEL emphasis is upon delivering the defendant to the demanding State. More specifically, if the court exercises its discretion to set a monetary bail under the UCEL, that "power must be most circumspectly exercised and with due regard for the Governor's ultimate obligation to deliver the defendant to the demanding state in the event of the failure of defendant's *habeas corpus* challenge." In re Basto, 205 N.J. Super. 233, 243 (App. Div. 1985) [dictum], aff'd 108 N.J. 480 (1987). In contrast, under the Bail Reform Law, emphasis is upon releasing the defendant awaiting trial. See N.J.S.A. 2A:162-17c(1).

To conform with the bail authorized under the UCEL, the Committee is recommending that the court set "monetary bail or bond" and not "conditions of pretrial release." See N.J.S.A. 2A:160-24. Furthermore, an additional sentence is being proposed to recognize that the court can commit the person to the county jail for certain time periods under the UCEL. The defendant can be committed for such a time "not exceeding 30 days," as will enable the arrest of the accused to be made under a warrant

of the governor on a requisition of the executive authority of the state having jurisdiction of the offense. See N.J.S.A. 2A:160-23. If the person is not arrested under warrant of the governor by the expiration of the time specified, the person may be committed for a further period "not to exceed 60 days." See N.J.S.A. 2A:160-25.

"Life imprisonment" has also been added to conform with the non-bailable offenses under the UCEL for persons who are charged with an offense punishable by death or life imprisonment under the laws of the state in which it was committed. See N.J.S.A. 2A:160-24. See also, State v. Morel, 253 N.J. Super. 470 (App. Div. 1992).

3:26-2. Authority to Set Conditions of Pretrial Release

(a) Authority to Set Conditions of Pretrial Release. A Superior Court judge may set conditions of pretrial release for a person charged with any offense and may set monetary bail or take any action in accordance with the Uniform Criminal Extradition Law, N.J.S.A. 2A:160-6, et seq. for any person arrested in any extradition proceeding. Conditions of pretrial release for any offense except homicide or a person arrested in any extradition proceeding may be set by any other judge provided that judge is setting conditions of pretrial release as part of a first appearance pursuant to Rule 3:4-2(b).

(b) ... No change

(1) ... No change

(2) ... No change

(A) ... No change

(B) ... No change

(C) ... No change

(D) ... No change

(3) ... No change

(A) ... No change

(B) ... No change

(C) ... No change

(D) ... No change

(E) ... No change

(F) ... No change

(G) ... No change

(H) ... No change

(I) ... No change

(J) ... No change

(K) ... No change

(L) ... No change

(c) ... No change

(1) ... No change

(2) ... No change

(d) ... No change

(1) ... No change

(2) ... No change

(e) ... No change

Note: Source-R.R. 3:9-3(a) (b) (c); amended July 24, 1978 to be effective September 11, 1978; amended May 21, 1979 to be effective June 1, 1979; amended August 28, 1979 to be effective September 1, 1979; amended July 26, 1984 to be effective September 10, 1984; caption amended, former text amended and redesignated paragraph (a) and new paragraphs (b), (c) and (d) adopted July 13, 1994 to be effective January 1, 1995; paragraph (b) amended January 5, 1998 to be effective February 1, 1998; paragraph (d) amended July 9, 2013 to be effective September 1, 2013; paragraph (a) amended July 27, 2015 to be effective September 1, 2015; caption amended, paragraphs (a) and (b) caption and text amended, former paragraphs (c) and (d) deleted, and new paragraphs (c), (d), and (e) adopted August 30, 2016 to be effective January 1, 2017[.]; paragraph (a) amended _____ to be effective _____.

Commentary

The Committee is recommending additional language in paragraph (a) of R. 3:26-2 to conform with the proposed changes to R. 3:26-1(d). This language is intended to clarify that the procedures for the Superior Court judge to set monetary bail or order any other action for persons arrested in New Jersey in an extradition proceeding are governed by the Uniform Criminal Extradition Law (UCEL), N.J.S.A. 2A:160-6, et seq.