

NOTICE TO THE BAR

CRIMINAL PRACTICE COMMITTEE – BAIL SOURCE/SUFFICIENCY HEARINGS – RULE RECOMMENDATIONS – PUBLICATION FOR COMMENT

This notice publishes for written comment the March 31, 2008 out-of-cycle report from the 2007-2009 Supreme Court Criminal Practice Committee regarding bail source/sufficiency hearings. The report proposes amendments to Rule 3:26-1 (“Right to Bail Before Conviction”) and adoption of a new rule 3:26-8 (“Bail Sufficiency; Source Hearing”). This emergent report also will be available for downloading on the Judiciary’s Internet web site at <http://www.judiciary.state.nj.us/reports2008/index.htm>.

Please send any comments on the Criminal Practice Committee’s bail source/sufficiency report and rule recommendations in writing by Monday, May 5, 2008 to:

Philip S. Carchman, P.J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Comments on the committee’s report and recommendations may also be submitted via Internet e-mail to the following address: Comments.Mailbox@judiciary.state.nj.us.

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). However, comments submitted in response to this notice will be maintained in confidence if the author specifically requests confidentiality. In the absence of such a request, the author’s identity and his or her comments may be subject to public disclosure after the Court has acted on the Committee reports and supplemental reports.

The Supreme Court will be acting on the Criminal Practice Committee’s bail source/sufficiency rule recommendations in June 2008, with any rule amendments to become effective September 1, 2008.

/s/ Philip S. Carchman

Philip S. Carchman, P.J.A.D.
Acting Administrative Director of the Courts

Dated: March 31, 2008

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

**EDWIN H. STERN
PRESIDING JUDGE FOR ADMINISTRATION**



FOUR HEADQUARTERS PLAZA
SUITE 1101, NORTH TOWER
158 HEADQUARTERS PLAZA
MORRISTOWN, N.J. 07960-3965

March 31, 2008

MEMORANDUM TO: Honorable Philip S. Carchman

FROM: Honorable Edwin H. Stern, Chair, Criminal Practice Committee

RE: Criminal Practice Committee Report
Rule Recommendations - Rules 3:26-1 and 3:26-8
Bail Source/Sufficiency Hearings

On behalf of the Criminal Practice Committee, I am submitting the attached proposals to amend Rule 3:26-1 and to adopt new Rule 3:26-8 to address procedures for Bail Source/Sufficiency hearings. Also attached is a summary of the Bail Source Legislation, N.J.S.A. 2A:162-13 and the reasons why the Committee is proposing this rule amendment.

Thank you for your courtesies and consideration in this matter.

Attachment

cc: Honorable Lawrence M. Lawson, Vice-Chair, Criminal Practice Committee
John J. McCarthy, Jr., Esq
Steven D. Bonville, Esq., Special Assistant
Joseph J. Barraco, Esq.
Vance D. Hagins, Esq.
Melaney D. Payne, Esq.
Criminal Practice Committee members

A. Proposed Rule Amendment Recommended for Adoption.

1. Rule 3:26-1 and Rule 3:26-8 – Bail Source/Sufficiency Hearings; Implementation of N.J.S.A. 2A:162-13.

(a) Background – Bail Source Law effective January 9, 2004

On January 9, 2004, the Governor signed Senate Bill No. 1322 into law as P.L. 2003, c. 213, which permitted the court to inquire into the source of bail. The law was codified at N.J.S.A. 2A:162-13 and N.J.S.A. 2A:162-14. The law went into effect on January 9, 2004. N.J.S.A. 2A:162-13 permitted the court, upon request of the prosecutor, to examine the reliability of the obligor or person posting cash bail; the value and sufficiency of any security offered; the relationship between the obligor and the defendant, along with the defendant's interest in ensuring bail is not forfeited; and whether the funds used to post bail or secure the bond were lawfully acquired.

N.J.S.A. 2A:162-14 stated that “[t]he procedure to determine the sufficiency of bail shall be governed by rules adopted by the Supreme Court.” To meet this statutory directive, during the 2004-2007 term, the Criminal Practice Committee formed a Bail Source Subcommittee, chaired by the Honorable John Kennedy and comprised of prosecutors and a public defender, to develop procedures to implement the law. The Bail Source Subcommittee submitted several rule proposals for the Criminal Practice Committee to consider, during which the members engaged in an in-depth dialogue regarding many aspects of the rule. Representatives from various County Prosecutor's offices and the Attorney General's Office opposed several aspects of the proposal. The Public Defender's Office submitted written comments to the rule with the position that the proposal was unconstitutional and that it placed a hardship on indigent pretrial defendants who are unable to post bail because of a bail source inquiry. Other constitutional concerns

were voiced particularly with respect to holding a defendant who posts the bail as set. After lengthy discussions, by a 9-8 vote, the Criminal Practice Committee decided to recommend a rule proposal to create a new Rule 3:26-8. The Committee agreed to allow members to provide comments on their respective positions, without prejudice to any constitutional challenges that may be raised and developed through case law.

On May 4, 2006, the Honorable Edwin Stern, Chair, Criminal Practice Committee, forwarded a rule proposal to the Honorable Philip Carchman, Acting Administrative Director of the Courts, to be considered by the Supreme Court. Shortly thereafter, the Committee learned of pending legislation, Assembly Bill No. 2987 and Senate Bill No. 2012, which would amend the bail source statute. If the bills were passed into law, the Committee's proposal would have to be revised. Thus, the rule proposal was not forwarded to the Supreme Court for consideration at that time and the rule was never adopted. In its 2004-2007 report, that was filed on January 26, 2007, the Committee agreed to revisit the proposal during the next term, after the bills were signed into law.

(b) Background – Bail Source Law effective June 1, 2007

On February 21, 2007, the Governor signed Assembly Bill No. 2987 into law as P.L. 2007, c. 46, which amended the bail source law, N.J.S.A. 2A:162-13. The new law went into effect on June 1, 2007. Under the new law, a person charged with a crime with bail-restrictions as defined in N.J.S.A. 2A:162-12¹, who posts cash bail or secures a bail bond,

¹ Effective June 1, 2007, pursuant to N.J.S.A. 2A:162-12, crimes with bail restrictions are any first or second degree crime as follows:

- | | |
|--------------------------------|----------|
| (1) Murder | 2C:11-3. |
| (2) Manslaughter | 2C:11-4. |
| (3) Kidnapping | 2C:13-1. |
| (4) Sexual Assault | 2C:14-2. |
| (5) Robbery | 2C:15-1. |
| (6) Carjacking | 2C:15-2. |
| (7) Arson and Related Offenses | 2C:17-1. |

must provide the prosecutor with relevant information about the obligor, indemnifier or person posting cash bail, the security offered, and the source of any money or property used to post the cash bail or secure the surety or bail bond. The information must be provided no later than the time that the bail is posted on a form promulgated by the Attorney General. The new law provides that bail may not be accepted from a person charged with a bail-restricted crime until the completed form is provided to the prosecutor. A prosecutor would then use this information to decide whether to seek a bail source hearing.

Pursuant to the new law, when the offense is a bail-restricted crime the court shall, upon the request of the prosecutor, conduct a bail source inquiry and then issue an order either approving or disapproving of the bail. The court may conduct such an inquiry, at the request of the prosecutor, if a person is charged with an offense, other than a bail-restricted crime, and posts cash bail or secures a bail bond. Under the new law, if a hearing is held the court cannot issue an order approving the bail unless it is satisfied that the evidence adduced in the inquiry establishes the reliability of the source of funds used to post bail or security offered, that the relationship of the obligor or person posting cash bail is sufficient

(8) Causing or Risking Widespread Injury or Damage	2C:17-2.
(9) Burglary	2C:18-2.
(10) Theft by Extortion	2C:20-5.
(11) Endangering the Welfare of Children	2C:24-4.
(12) Resisting Arrest; Eluding Officer	2C:29-2.
(13) Escape	2C:29-5.
(14) Corrupting or Influencing a Jury	2C:29-8.
(15) Possession of Weapons for Unlawful Purposes	2C:39-4.
(16) Weapons Training for Illegal Activities	2C:39-14.
(17) Soliciting or Recruiting Gang Members	2C:33-28.

"Crime with bail restrictions" also includes any first or second degree drug-related crimes under chapter 35 of Title 2C of the New Jersey Statutes and any first or second degree racketeering crimes under chapter 41 of Title 2C of the New Jersey Statutes.

The new statute added "soliciting or recruiting gang members" as a crime with bail restrictions.

to ensure the defendant's presence in court when required, and that the funds used to post cash bail or secure a bond were not acquired as a result of criminal or unlawful conduct.

At its May 2007 meeting, the Criminal Practice Committee discussed the new law and considered two rule proposals, an amendment to Rule 3:26-1 and a new Rule 3:26-8. The Committee recognized that bail can be posted in Municipal Court for some of the crimes with bail restrictions that fall under the bail source statute. Thus, the Committee discussed possible procedures to distribute, collect and review the bail source inquiry forms that would be completed by arrested individuals who seek to post bail either in Superior or Municipal Court.

On May 30, 2007, the Division of Criminal Justice issued a Memorandum to the County Prosecutors distributing the English-language version of the "Bail Source Inquiry Questionnaire," as required by N.J.S.A. 2A:162-13. The Memorandum directed the County Prosecutors to disseminate the form to the chief administrator of the county jail in each county and to all law enforcement agencies, along with instructions for submitting copies of completed forms to their offices by fax.

On May 30, 2007 and May 31, 2007, the Honorable Philip Carchman, Acting Administrative Director of the Courts, issued two memoranda to the Assignment Judges addressing the statute. The Assignment Judges Memorandum dated May 30, 2007, sets forth initial procedures to implement the bail source law, including suggestions for distribution of the "Bail Source Inquiry Questionnaire" to both individuals who are arrested and to sureties along with procedures to forward the completed forms to the County Prosecutors. The Assignment Judges Memorandum dated May 31, 2007, circulated the "Bail Source Inquiry Questionnaire" throughout the judiciary.

The amended bail source law went into effect on June 1, 2007. On June 12, 2007, the Honorable Philip Carchman, Acting Administrative Director of the Courts, issued a memorandum to the Assignment Judges distributing the Attorney General's Spanish-language version of the "Bail Source Inquiry Questionnaire" and advising that the form is available on the Attorney General's website.²

Thereafter, the Criminal Practice Committee reconsidered the proposed amendments to Rule 3:26-1 and new Rule 3:26-8. In developing the rule proposals, the Committee was mindful of an accused's constitutional right to bail. N.J. Const. art. 1, ¶ 11 ("All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great"). The Committee also reviewed similar statutes and case law from New York and Rhode Island, and the constitutional provisions in those states.

The New York law, N.Y.C.P.L. 523.30, empowers the court to conduct an inquiry into the source of bail, either on its own initiative, or the by State's request upon a showing of "reasonable cause." In People v. Esquivel, 601 N.Y.S. 2d 541, 545 (N.Y. Sup. Ct. 1993), a New York trial court held that "the defendant bears the ultimate burden of persuading the court by a preponderance of the evidence" that the source of bail was lawfully acquired. In State v. Zorillo, 565 A.2d 1259 (R.I. 1989), the Rhode Island Supreme Court held that its bail source statute was unconstitutional. That statute allowed the State to request a bail source hearing after the judge had already ordered bail. There was no burden of proof on the State to request a hearing. The defendant then had to prove by clear and convincing evidence that the funds used to post bail were lawfully acquired. The Rhode Island

² The Attorney General's Office indicated that the form may be revised to make it more user-friendly, but to use the version provided until any revisions are made.

Supreme Court held that placing the ultimate burden of proof on a defendant violated Article 1, section 9 of the Rhode Island Constitution that affords a defendant a constitutional right to bail. Id. at 1261.

Subsequent to the Zorillo decision, the Rhode Island statute was amended to mirror the New York law, which places an initial burden of proof on the State to show “reasonable cause” to initiate an inquiry into the source of bail. The New Jersey law, N.J.S.A. 2A:162-13 is similar to the New York Law, N.Y.C.P.L. 523.30, and the revised Rhode Island statute, R.I. Gen. Laws § 12-13-23, except that no burdens of proof are set forth in the New Jersey statute. Also, the New Jersey statute states that persons charged with a crime with bail restrictions, as set forth in N.J.S.A. 2A:162-12, must complete the “Bail Source Inquiry Questionnaire” (promulgated by the Attorney General), which details the source of bail funds. According to the statute, bail may not be accepted until the prosecutor is provided with the completed “Bail Source Inquiry Questionnaire.” If a defendant is charged with a crime with bail restrictions and the prosecutor requests a hearing, the court must hold a hearing. For all other offenses, the court may grant a hearing, upon request.

The Committee extensively discussed several issues surrounding the rule proposals. This report sets forth the issues discussed by the Committee regarding the bail source statute that was enacted in 2004, as well as the recent amendments to the law in 2007.

(c) Rule 3:26-1 – Amendment to add a new paragraph

The Criminal Practice Committee first considered an amendment to Rule 3:26-1, which addresses a person’s right to bail before a conviction. The Committee considered adding a new paragraph to the rule, which sets forth the requirement that persons charged

with a crime with bail restrictions, as defined in N.J.S.A. 2A:162-12, must complete a form promulgated by the Attorney General and provide the prosecutor with the completed form. The proposal also tracked the statutory language regarding the relevant information that should be contained in the form, such as, information about the obligor or person posting cash bail, the security offered, the source of money or property used to post cash bail or secure a bail bond.

The statute provides that the person charged with the offense should complete the form under penalty of perjury. Initially, the rule proposal included this language. However, this language was deleted, as it was noted that the court rules rarely, if ever, include such language. The Committee considered a proposal to delay release of a defendant for a brief period after defendant submitted the Attorney General's form in order to give the State a limited time to review the form, but the Committee elected not to adopt this proposal.

The Committee agreed to recommend a proposed amendment to R. 3:26-1 to add a new paragraph (c), without the "penalty of perjury" language.

(d) Rule 3:26-8 – New Rule Proposal

1. Time and Notice to Request a Hearing.

The proposed language in paragraph (a) of Rule 3:26-8 states:

(a) Time and Notice. The State may request either orally or in writing, at any time prior the commencement of trial a hearing pursuant to N.J.S.A. 2A:162-13. The request shall be made upon notice to the defendant's counsel, or upon notice to the defendant if he or she is unrepresented at the time the request is made.

An earlier draft of paragraph (a) of the proposed rule provided that the State could request a hearing "at any time prior to the defendant's release on bail, or upon good cause

shown, up to 10 days after the defendant has been released on bail.” Some members expressed concern with the time constraints, because in some counties, prosecutors are not involved in initial bail determinations. Frequently, bail is posted and a defendant is released before the prosecutor receives the complaint.

The Committee also considered language allowing the prosecutor to request a hearing at any time. Some members were concerned that if no time frame was specified in the rule, requests for hearings could be made during trial. These members thought that a request for a bail source hearing at that point could be disruptive to the trial and could compromise a defense strategy, particularly because the details regarding the source of bail and the alleged offense may overlap.

The Committee also identified a potential problem regarding post-release bail source hearings. If a defendant posts bail and is released, and the court later disapproves of the source of bail, the defendant would most likely forfeit any deposit paid for the bond, based upon the contract between the defendant and the bail bondsman. The Committee reached a compromise to allow a prosecutor to request a bail source hearing “at any time prior to the commencement of trial.” The Committee earlier considered a proposal to delay release of a defendant for a brief period after defendant submitted the Attorney General’s form in order to give the State a limited time to review the form, but the Committee elected not to adopt this proposal.

2. Request for Hearing

The proposed language in paragraph (b) provides that if the State requests a hearing and the defendant is charged with a crime enumerated in paragraph (a) of N.J.S.A. 2A:162-12, the court shall conduct a hearing within the time frame set forth in section (c) of

the proposed rule. The proposal further states that if the State requests a hearing and the defendant is not charged with a crime enumerated in paragraph (a) of N.J.S.A. 2A:162-12, “the State must demonstrate a reasonable and well grounded basis to warrant an inquiry by the court” regarding the reliability of the obligor or person posting cash bail, the value and sufficiency of any security offered, the relationship of the obligor or person posting cash bail to the defendant and the defendant’s interest in ensuring that the bail is not forfeited, or whether the funds used to post the cash bail or secure the bail bond were lawfully acquired.

During the 2004-2007 term, the Committee engaged in a lengthy discussion regarding the burden of proof that either one or both of the parties must demonstrate pursuant to N.J.S.A. 2A:162-13.³ First, the Committee was mindful that the statute is silent

³ Prior to the amendments that went into effect on June 1, 2007, the Bail Source Law provided:

1. When a person charged with an offense posts cash bail or secures a bail bond, the court may, upon the request of the prosecutor, conduct an inquiry to determine the reliability of the obligor or person posting cash bail, the value and sufficiency of any security offered, the relationship of the obligor or person posting cash bail to the defendant and the defendant’s interest in ensuring that the bail is not forfeited, and whether the funds used to post the cash bail or secure the bail bond were acquired as a result of criminal or unlawful conduct. The court may examine, under oath or otherwise, any person who may possess relevant information, and may inquire into any matter appropriate to its determination, including, but not limited to, the following:

- a. The character, background and reputation of the person posting cash bail;
- b. The relationship of the person posting cash bail or securing a bail bond to the defendant;
- c. The source of any money posted as cash bail and whether any such money constitutes the fruits of criminal or unlawful conduct;
- d. The character, background and reputation of any person who has indemnified or agreed to indemnify and obligor on the bond;
- e. The character, background and reputation of any obligor, or, in the case of a surety bond, the qualifications of the surety and its executing agent;
- f. The source of any money or property deposited by any obligor as security and whether such money or property constitutes the fruits of criminal or unlawful conduct; and
- g. The source of any money or property delivered or agreed to be delivered by any obligor as indemnification on the bond and whether such money or property constitutes the fruits of criminal or unlawful conduct.

At the conclusion of the inquiry, the court shall issue an order either approving or disapproving the bail.

Under this version of the statute, there was no requirement to complete a bail source inquiry form. In addition, the court had discretion to grant or deny any request by the prosecutor for a bail source hearing. The June 2007 statutory amendments require that the court grant a bail source hearing if an individual is charged

with respect to any burden of proof or standard by which either party must convince the court to grant a hearing, and if a hearing is granted, to grant or deny relief. Some members questioned whether the Committee should establish a burden of proof in a court rule, or if this was a substantive matter that should be developed through case law or legislation.

An earlier draft of the rule required the prosecution meet an initial burden to show that a rational basis existed to warrant a bail source hearing. Pursuant to this earlier draft of the rule, if the court granted the hearing, the burden shifted to the defendant to establish, by a preponderance of the evidence, that the bail will ensure his or her presence in court and that the funds were not acquired as a result of criminal or unlawful conduct. This suggested language was based upon the process used in New York. See People v. Esquivel, 601 N.Y.S. 2d 541 (N.Y. Sup. Ct. 1993).

The Committee discussed whether a burden higher than “rational basis” should be placed on the prosecution, particularly if a burden is also placed on a defendant to produce evidence. Some members were of the view that bail source hearings provide a large grant of power to prosecutors. They believed that the rational basis test was too low of a threshold, in light of a defendant’s constitutional right to bail. Other members explained that the rational basis test is sufficient, because it provides judges with discretion to deny applications. For instance, proof of the required factors beyond a reasonable doubt, would leave judges without discretion to deny a request for a hearing.

Representatives from the Attorney General’s Office and the County Prosecutor’s Association (hereafter prosecutors) opposed having an initial burden placed on the State to demonstrate a “reasonable and well grounded basis” to warrant a bail source hearing. It is

with a crime with bail restrictions, and the prosecutor requests a bail source hearing. The court has discretion to grant or deny the prosecutor’s request for a hearing for all other offenses.

their view that because the statute is silent with respect to a burden of proof on the State, a burden should not be set forth in the rule.

The Committee also extensively discussed whether a burden of proof should be placed on a defendant, at all. Some members were concerned that shifting the burden of proof to a defendant could interfere with a defendant's right to bail. During this discussion, the Committee identified a potential Fifth Amendment issue if defendants post their own bail and then have to explain the source of the funds, particularly in the absence of an adequate immunity. The Committee also discussed whether to adopt a standard of proof similar to McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973). For example, (1) the State meets a threshold to grant a hearing, (2) the defendant comes forward with enough information regarding a legitimate source to deny a hearing and (3) the State has ultimate burden of persuasion.

The Committee decided to draft the rule to: (1) require an initial burden on the State "to demonstrate a reasonable and well grounded basis to warrant an inquiry" in order to obtain a hearing for an offense, other than a crime with bail restrictions as set forth in N.J.S.A. 2A:162-12 (see paragraph (a) of the proposed rule); (2) not require that a burden of proof be placed on the defendant; and (3) include language from the statute describing the court's inquiry if a hearing is granted (see paragraph (e) of the proposed rule).

3. Grant or Denial of Request for Hearing; Timing of Hearing

The last sentence of paragraph (b) of the proposal states that if the court grants the State's request for a bail source hearing for an offense other than a crime with bail restrictions as enumerated in N.J.S.A. 2A:162-12, the court must set forth the reasons for doing so, both on the record and in the bail order. Pursuant to paragraph (c) of the

proposal, for incarcerated defendants, the hearing that is required or authorized pursuant to N.J.S.A. 2A:162-13 must be held within three business days after bail is posted or proffered. If a defendant has already been released on bail, the source hearing should be conducted “within a reasonable time after granting the request.” The Committee believed that this language is significant because the rule is designed to achieve finality in a short period of time. However, some members were concerned about the possibility of detaining a defendant for three business days after bail is posted or proffered. Those members opposed detention of a defendant who has posted bail, so that the court can hold a hearing. The Committee decided to submit the language in paragraph (c) with the understanding that notwithstanding a detention pending a source hearing after the posting of bail, the rule must be interpreted to permit another source to post bail for a defendant or to permit that bail, as set, can be amended.

4. Release of Defendant; Failure to Appear.

Paragraph (d) of the proposed rule states that if the defendant is incarcerated when the State requests a bail source hearing for a crime with bail restrictions, pursuant to N.J.S.A. 2A:162-12, or when the court grants a hearing for any other offense, the defendant shall remain in custody until further order of the court. The proposal further provides that if a defendant has already been released on bail, the defendant shall maintain that bail status and will be notified of when to appear in court for the bail source hearing. If the defendant fails to appear for the hearing, the rule requires the court to forfeit bail and issue a warrant for the defendant’s arrest. Several members, including representatives from the Public Defender’s Office, expressed opposition to detaining an individual who has posted bail so that the court can hold a hearing. These members were of the view that if a defendant

posts bail, the defendant should be released pending a bail source hearing.

5. Hearing on Petition

Paragraph (e) of the rule tracks the language of the statute, N.J.S.A. 2A:162-13, to describe the inquiry the court may undertake if it holds a hearing. The rule states no burden of proof in paragraph (e) to permit the issue to be developed by case law. There were no objections to including this language in the proposed rule.

6. Order

Pursuant to paragraph (f) of the rule, at the conclusion of the bail source hearing, the court must issue an order, complying with N.J.S.A. 2A:162-13, memorializing its findings. More specifically, pursuant to the statute, the court shall not issue an order approving bail

unless it is satisfied that the evidence adduced in the inquiry establishes the reliability of the source of the funds used to post bail or security offered, that the relationship of the obligor or person posting cash bail is sufficient to ensure the defendant's presence in court when required, and that the funds used to post cash bail or secure a bond were not acquired as a result of criminal or unlawful conduct.

[N.J.S.A. 2A:162-13b].

Paragraph (f) further provides that a defendant, who is in custody, shall not be released until he or she complies with the conditions of the court's order. A defendant who has already been released on bail shall be returned to custody and not released until the conditions of the court's order are satisfied. There were no objections to including this language in the rule proposal.

7. Effect on Other Court Rules

Paragraph (g) of the rule proposal states that nothing in this court rule shall prevent the court from otherwise setting bail, or altering bail on motion therefor, in accordance with

these court rules. This paragraph is designed to permit the bail as set to be satisfied by an alternative means or source and permit that bail, as set, can be amended. As such, the Committee envisioned that the prosecutor could withdraw the motion for a bail source hearing, if the defendant provided a new source to satisfy the bail.

8. Conclusion

The Committee is requesting that the Court consider these rule proposals during this rules cycle to implement procedures pursuant to the Bail Source statute, N.J.S.A. 2A:162-13.

RULE PROPOSAL

RULE 3:26-1 – new paragraph (c)

3:26-1. Right to bail before conviction

(a) Persons Entitled; Standards for Fixing. All persons, except those charged with crimes punishable by death when the prosecutor presents proof that there is a likelihood of conviction and reasonable grounds to believe that the death penalty may be imposed, shall be bailable before conviction on such terms as, in the judgment of the court, will ensure their presence in court when required. The factors to be considered in setting bail are: (1) the seriousness of the crime charged against defendant, the apparent likelihood of conviction, and the extent of the punishment prescribed by the Legislature; (2) defendant's criminal record, if any, and previous record on bail, if any; (3) defendant's reputation, and mental condition; (4) the length of defendant's residence in the community; (5) defendant's family ties and relationships; (6) defendant's employment status, record of employment, and financial condition; (7) the identity of responsible members of the community who would vouch for defendant's reliability; (8) any other factors indicating defendant's mode of life, or ties to the community or bearing on the risk of failure to appear, and, particularly, the general policy against unnecessary sureties and detention. In its discretion the court may order the release of a person on that person's own recognizance. The court may also impose terms or conditions appropriate to the defendant's release including conditions necessary to protect persons in the community.

(b) Restrictions on Contact. If the court imposes conditions of bail that include restrictions on contact between the defendant and the defendant's minor child, (1) a copy of the order including the restrictions shall be transmitted to the Family Part, and (2) restrictions shall not affect contact authorized by an order of the Family Part in a

child abuse/neglect case made after any restriction on contact was imposed as part of a bail order.

(c) Crimes with Bail Restrictions defined in N.J.S.A. 2A:162-12. If a person is charged with a crime with bail restrictions as defined in N.J.S.A. 2A:162-12, no later than the time of posting bail or proffering the surety or bail bond, the person shall provide to the prosecutor, on a form promulgated by the Attorney General, relevant information about the obligor, indemnifier or person posting cash bail, the security offered, and the source of any money or property used to post the cash bail or secure the surety or bail bond.

[(c)](d) On Failure to Indict. . . . No Change.

[(d)](e) On Failure to Move Indictment. . . . No Change.

[(e)](f) Extradition Proceedings. . . . 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).

RULE PROPOSAL

RULE 3:26-8 – New Rule

3:26-8. Bail Sufficiency; Source Hearing

(a) Time and Notice. The State may request either orally or in writing, at any time prior to the commencement of trial a hearing pursuant to N.J.S.A. 2A:162-13. The request shall be made upon notice to the defendant's counsel, or upon notice to the defendant if he or she is unrepresented at the time the request is made.

(b) Request for Hearing. If the State requests a hearing pursuant to N.J.S.A. 2A:162-13 and the defendant is charged with a crime enumerated in paragraph (a) of N.J.S.A. 2A:162-12, the court shall conduct a hearing within the time prescribed by section (c) hereof. If the State requests a hearing pursuant to N.J.S.A. 2A:162-13 and the defendant is not charged with a crime enumerated in paragraph (a) of N.J.S.A. 2A:162-12, the State must demonstrate a reasonable and well grounded basis to warrant an inquiry by the court regarding:

(1) the reliability of the obligor or person posting cash bail, the value and sufficiency of any security offered, the relationship of the obligor or person posting cash bail to the defendant and the defendant's interest in ensuring that the bail is not forfeited,
or

(2) whether the funds used to post the cash bail or secure the bail bond were acquired as a result of criminal or unlawful conduct.

If the court grants the State's request for a hearing as to a defendant who is not charged with a crime enumerated in paragraph (a) of N.J.S.A. 2A:162-12, the court shall set forth on the record and in the bail order the reasons for granting the request.

(c) Time of Hearing. The court shall conduct a hearing required or authorized pursuant to N.J.S.A. 2A:162-13 within three (3) business days after bail is posted or proffered if

defendant is incarcerated, or within a reasonable period of time after granting the request if the defendant has been released on bail.

(d) Release of Defendant; Failure to Appear. If the defendant has not yet been released when the State requests a hearing for a person charged with a crime with enumerated in N.J.S.A. 2A:162-12 or when the court grants a request for a hearing for any other offense, the defendant shall remain in custody until further order of the court. If the defendant has already been released after posting bail, the defendant's bail status shall be maintained until the completion of the hearing and the defendant will be notified when to appear in court for the hearing. Should the defendant fail to appear for the hearing the bail shall be forfeited and a warrant shall issue for the arrest of the defendant.

(e) Hearing. At the hearing pursuant to N.J.S.A. 2A:162-13, the court may order the examination, under oath or otherwise, of any person who may possess relevant information, and may inquire into any matter appropriate to its determination, including, but not limited to, the following:

- (1) The character, background and reputation of the person posting cash bail;
- (2) The relationship of the person posting cash bail or securing a bail bond to the defendant;
- (3) The source of any money posted as cash bail and whether any such money constitutes the fruits of criminal or unlawful conduct;
- (4) The character, background and reputation of any person who has indemnified or agreed to indemnify an obligor on the bond;
- (5) The character, background and reputation of any obligor, or, in the case of a surety bond, the qualifications of the surety and its executing agent;

(6) The source of any money or property deposited by any obligor as security and whether such money or property constitutes the fruits of criminal or unlawful conduct; and

(7) The source of any money or property delivered or agreed to be delivered by any obligor as indemnification on the bond and whether such money or property constitutes the fruits of criminal or unlawful conduct.

(f) Order. At the conclusion of the hearing, the court shall make specific findings of fact and issue an order complying with N.J.S.A. 2A:162-13(b) regarding the person posting or proffering cash bail or serving as obligor on any bond, the sufficiency and value of the security for bail posted or proffered by the defendant, the source of funds used to post cash bail or secure a bail bond and identifying the approved source(s) of bail. The defendant shall not be released from custody unless he or she complies with the conditions of the court's order. If the defendant has already been released, he or she shall be returned to custody, immediately, and not be released until the conditions of the court order regarding the bail are satisfied.

(g) Nothing herein shall prevent the court from otherwise setting bail, or altering bail on motion therefor, in accordance with these court rules.

Note: Adopted _____ to be effective _____.

Respectfully Submitted,

Hon. Edwin H. Stern, Chairman
Hon. Lawrence Lawson, Vice-Chairman
Hon. Christine Allen-Jackson
Hon. Linda G. Baxter
Hon. Marilyn C. Clark
Hon. Gerald J. Council
Hon. Frederick P. DeVesa
Hon. Garry J. Furnari
Hon. Albert J. Garofolo
Hon. John C. Kennedy
Hon. Joseph F. Lisa
Hon. James F. Mulvihill
Hon. Ramona A. Santiago
Hon. Shelia A. Venable
Hon. Barbara Ann Villano
J. Patrick Barnes, Esquire, Prosecutor, Hunterdon
Robert D. Bernardi, Esquire, Prosecutor, Burlington
Robert Bianchi, Esquire, Prosecutor, Morris
Alan Dexter Bowman, Esquire
Milagros Camacho, Esquire
John M. Cannel, Esquire
Lori Caughman, Esquire
Philip James Degnan, Esquire, Assistant United States Attorney
John J. Eastlack, Esquire
Dale Jones, Esquire, Assistant Public Defender
Henry E. Klingeman, Esquire
James P. Lynch, Esquire, Assistant United State Attorney
John J. McMahon, Esquire, Assistant Deputy Public Defender
Boris Moczula, Esquire, Division of Criminal Justice, Deputy Director
Dennis A. Murphy, Esquire, Hudson County Criminal Division Manager
Brian Neary, Esquire
Gregory Paw, Esquire, Director, Division of Criminal Justice
Joan H. Richardson-Bowser, Esquire, First Assistant Public Defender
Simon L. Rosenbach, Esquire, Assistant Prosecutor, Middlesex
Elizabeth Smith, Esquire
Ronald Susswein, Esquire, Assistant Attorney General
Tracy Thompson, Esquire, Assistant Attorney General

AOC Staff: Joseph J. Barraco, Esquire
Melaney S. Payne Esquire

March 31, 2008