NOTICE TO THE BAR

SEPTEMBER 2, 2015 JUDICIAL CONFERENCE ON PROPOSED NEW RULE OF EVIDENCE 534 (MENTAL HEALTH SERVICE PROVIDER PRIVILEGE); AND PROPOSED AMENDMENTS TO COURT RULE 3:28 (PRETRIAL INTERVENTION)

Pursuant to N.J.S.A. 2A:84A-34 and N.J.S.A. 2C:43-15, the Judiciary is convening a Judicial Conference on Wednesday, September 2, 2015, to discuss proposed amendments to the Rules of Evidence and Part III of the New Jersey Court Rules governing Criminal Practice. The specific proposals that will be considered at this session will be:

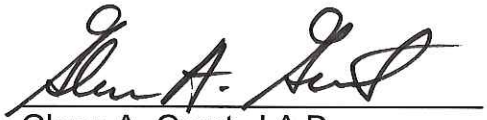
(1) New Jersey Rule of Evidence 534, Mental Health Service Provider - Patient Privilege; and
(2) New Jersey Court Rule 3:28, R. 3:28-1 through R. 3:28-10, Pre-Trial Intervention.

The proposed rules along with summaries thereof are appended to this Notice.

The September 2, 2015 Judicial Conference session will be held at the New Jersey Law Center, One Constitution Square, off Ryders Lane in New Brunswick and will begin at 5:30 p.m. Anyone who wishes to speak at this session should notify the Acting Administrative Director of the Courts by Friday, August 28, 2015, at the address set forth below. The request to speak must identify the individual who seeks to speak and whether the speaker will be representing an organization. Please note that the limit on each speaker's presentation is five minutes. The address to mail such request is:

Hon. Glenn A. Grant, Acting Administrative Director
Attention: Judicial Conference 2015
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Requests to speak at the Judicial Conference also may be made by e-mail to the following address: Comments.mailbox@judiciary.state.nj.us.



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

Dated: August 7, 2015

Evidence Rules Material

Summary of Proposed N.J.R.E. 534

Proposed N.J.R.E. 534 creates a unified mental health service provider privilege. This privilege is intended to replace the different and occasionally inconsistent privileges that currently exist for communications between patients and various mental health service providers. The privilege applies to confidential communications between a mental health service provider and a patient during the course of treatment of, or related to, the patient's mental or emotional health condition. The proposed rule applies to confidential communications made to the following mental health service providers: (1) psychologists; (2) physicians, including psychiatrists; (3) marriage and family therapists; (4) social workers, including social work interns and certified school social workers; (5) alcohol and drug counselors; (6) nurses; (7) professional counselors, associate counselors or rehabilitation counselors; (8) psychoanalysts; (9) midwives; (10) physician assistants; and (11) pharmacists. The proposed rule, however, specifically excludes communications made between those service providers and victims of violent crimes. Those communications are instead evaluated under the "Victim Counselor Privilege" contained in N.J.R.E. 517.

N.J.R.E. 534 (new). Mental Health Service Provider – Patient Privilege

(a) Definitions. In this rule:

(1) "Confidential communications" means such information transmitted between a mental-health service provider and patient in the course of treatment of, or related to, that individual's condition of mental or emotional health, including information obtained by an examination of the patient, as is transmitted in confidence, and which is not intended to be disclosed to third persons, other than:

(i) those present to further the interest of the patient in the diagnosis or treatment;

(ii) those reasonably necessary for the transmission of the information, including the entity through which the mental-health service provider practices; and

(iii) persons who are participating in the diagnosis or treatment of the patient under the direction of a mental-health service provider, including authorized members of the patient's family, the patient's guardian, the patient's conservator, and/or the patient's personal representative.

(2) "Diagnosis or treatment" shall include consultation, screening, interview, examination, assessment, evaluation, diagnosis or treatment.

(3) "Mental-health service provider" means a person authorized or reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition, and is specifically intended to include:

(i) Psychologists, consistent with the definition under N.J.R.E. 505 and N.J.S.A. 45:14B-2(a), "licensed practicing psychologist," and N.J.S.A. 45:14B-6(a)(1), (b), (d), (d), (e), (f), and (g), governing persons engaged in authorized activities of certain unlicensed practicing psychologists;

(ii) Physicians, including psychiatrists, consistent with the definition under N.J.R.E. 506 and N.J.S.A. 2A:84A-22.1(b);

(iii) Marriage and family therapists, consistent with the definition under N.J.R.E. 510 and N.J.S.A. 45:8B-2(a), "licensed marriage and family therapist," and N.J.S.A. 45:8B-6, governing unlicensed persons who may engage in specified activities related to, consisting of marriage and family therapy;

(iv) Social workers, consistent with the definition under N.J.R.E. 518 and N.J.S.A. 45:15BB-3, and including social work interns and certified school social worker as defined in N.J.S.A. 45:15BB-5(b) and (c);

(v) Alcohol and drug counselors, consistent with the definitions under N.J.S.A. 45:2D-3 and N.J.A.C. 13:34C-4.5 (licensed and certified Alcohol and drug counselors);

(vi) Nurses, consistent with the definition under N.J.S.A. 45:11-23;

(vii) Professional counselors, associate counselors or rehabilitation counselors consistent with the definition under N.J.S.A. 45:8B-40, -41, -41.1 8, and persons authorized to provide counseling pursuant to N.J.S.A. 45:8B-48(b), (c), (d);

(viii) Psychoanalysts, consistent with the definition under N.J.S.A. 45:14BB-3;

(ix) Midwives, consistent with the definition under N.J.S.A. 45:10-1

(x) Physician assistants, consistent with the definition under N.J.S.A. 45:9-27.15; and

(ix) Pharmacists, consistent with the definition under N.J.S.A. 45:14-41.

(4) "Patient" means an individual, who undergoes diagnosis or treatment with or by a mental-health service provider for the purpose of diagnosis or treatment related to that patient's condition of mental or emotional health, including addiction to legal or illegal substances, whether referred to as client, victim or some other equivalent term in the context of the relationship.

(b) General rule of privilege.

A patient has a privilege to refuse to disclose in a proceeding, and to prevent any other person from disclosing confidential communications, as defined in subsection (a)(1).

(c) Who may claim the privilege.

(1) The privilege under this rule may be claimed by the patient, the patient's guardian or conservator, the personal representative of a deceased patient, or if authorized by the patient, a member or members of the patient's family. The person who was the mental-health service provider at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the patient or deceased patient. The mental-health service provider shall claim the privilege unless otherwise instructed by the patient or, as applicable, members of the patient's family, the patient's guardian or conservator, or the personal representative of a deceased patient.

(d) (1) Violent Crime Victim.

Any confidential communication between any of the mental health service providers listed in this rule and a victim of violent crime, as defined in N.J.S.A. 2A:84A-

22.14c, shall be evaluated under the provisions of the "Victim Counselor Privilege" contained in N.J.R.E. 517, and not under the provisions set forth herein. Nothing in this act shall be construed to dilute or alter the scope of the Victim Counselor Privilege.

(2) Other Communications.

Nothing in this rule shall be construed to limit or otherwise affect any privileges that may apply to communications outside the scope of confidential communications as defined in subsection (a)(1) above.

(e) Exceptions. There is no privilege under this rule for a communication:

(1) Relevant to an issue of the patient's condition in a proceeding to commit the patient or otherwise place the patient under the control of another or others because of alleged incapacity;

(2) Relevant to an issue in a proceeding in which the patient seeks to establish his competence, or in a criminal matter where the defendant's competence to stand trial is put at issue;

(3) Relevant to an issue in a proceeding to recover damages on account of conduct of the patient which constitutes a crime;

(4) Upon an issue as to the validity of a will of the patient;

(5) Relevant to an issue in a proceeding between parties claiming by testate or intestate succession from a deceased patient;

(6) Made in the course of any investigation or examination, whether ordered by the court or compelled pursuant to Court Rule, of the physical, mental, or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise, and provided that a copy of the order is served upon the patient prior to the communication, indicating among other things that such communications may not be privileged in subsequent commitment proceedings;

(7) Relevant to an issue in a proceeding in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party or under which the patient is or was insured;

(8) If the court finds that any person, while a holder of the privilege, has caused the mental-health service provider to testify in any proceeding to any matter of which the mental-health service provider gained knowledge through the communication;

(9) In the course of mental health services sought or obtained in aid of the commission of a crime or fraud, provided that this exception is subject to the protections found in N.J.R.E. 501 and N.J.R.E. 509 and is not intended to modify or limit them;

(10) Relevant to an issue in a proceeding against the mental-health service provider, arising from the mental-health services provided, in which case the waiver shall be limited to that proceeding.

(11) Relevant to a proceeding concerning an application to purchase, own, sell, transfer, possess or carry a firearm, including but not limited to applications pursuant to N.J.S.A. 2C:58-3, or 2C:58-4, or a proceeding concerning the return of a firearm pursuant to N.J.S.A. 2C:25-21(d)(3).

(f) Nothing in this rule shall prevent a court from compelling disclosure of a statement by a mental-health service provider, patient or other third party to a public official when such statement is made in compliance with a statutory duty to report to a public official, or information required to be recorded in a public office that was in fact recorded in a public office, including but not limited to reports of child or elder abuse or neglect or the abuse or neglect of disabled or incompetent persons, unless the statute requiring the report of record specifically provides that the statement or information shall not be disclosed.

(g) Nothing in this rule shall prevent a court from compelling disclosure where:

(1) the patient has expressly or implicitly waived the privilege or authorized disclosure;

(2) exercise of the privilege would violate a constitutional right.

Pretrial Intervention (PTI) Rules Material

Summary of Proposed PTI Rules

Attached are proposed court rules governing the New Jersey Pretrial Intervention (PTI) Program. The proposed rules are designed to realign the PTI program to its original purpose to divert from prosecution first time offenders who would benefit from its rehabilitative components. Part of the proposal involves shifting the initial approval and screening process to the prosecutor to make a preliminary decision in certain cases where a defendant is unlikely to be admitted into the PTI program. The proposal will create two categories of PTI applicants, those who must obtain prosecutor consent to the application, and those who need not. Along with the statutory disqualifiers, the proposal also precludes applications from those defendants who have traditionally been excluded from the program based upon their prior criminal history.

Pursuant to the proposed court rules, a defendant's enrollment into the PTI program is not to be conditioned upon either informal admission or entry of a guilty plea. The current postponement period and timeframe to review and dispose of a PTI matter at the conclusion of postponement remain intact. As with current practice, the proposed court rules set forth the avenues for a defendant to appeal from an unfavorable ruling. Relevant provisions from the PTI Guidelines have been incorporated into the rule proposals. The proposal, thus, recommends deletion of the current PTI Guidelines.

RULE 3:28. PRETRIAL INTERVENTION PROGRAMS

3:28-1. Eligibility for Pretrial Intervention [new]

(a) Age. To be eligible to apply for admission into the pretrial intervention program, a person must be:

(1) age 18 or older at the time of the commission of the offense for which an application is made, or

(2) a juvenile at the time of the commission of the offense, who is treated as an adult under R. 5:22-1 or R. 5:22-2.

(b) Residence. Non-residents are eligible to apply for the pretrial intervention program but may be denied enrollment unless they can demonstrate that they can receive effective counseling or supervision.

(c) Persons Ineligible to Apply for Pretrial Intervention.

(1) Prior Diversion. A person who has previously been enrolled in a program of pretrial intervention; previously been placed into supervisory treatment in New Jersey under the conditional discharge statute pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1, or the conditional dismissal statute, N.J.S.A. 2C:43-13.1, et. seq.; or enrolled in a diversionary program under the laws of any other state or the United States for a felony or indictable offense, shall be ineligible to apply for admission into pretrial intervention.

(2) Non Criminal Matters. A person who is charged with a disorderly persons offense, a petty disorderly persons offense, an ordinance or health code violation or a similar violation shall be ineligible to apply for pretrial intervention.

(3) Prior Convictions. A person who previously has been convicted of (i) any first or second degree offense or its equivalent under the laws of another state or the United States, or (ii) any other indictable offense or its equivalent under the laws of another state

or the United States for which the person was sentenced to a state prison, institution or other state facility shall be ineligible to apply for admission into pretrial intervention.

(d) Persons Ineligible for Pretrial Intervention Without Prosecutor Consent to Consideration of the Application.

The following persons who are not ineligible for pretrial intervention under paragraph (c) shall be ineligible for pretrial intervention without prosecutor consent to consideration of the application:

(1) Certain Crimes. A person who has not previously been convicted of an indictable offense in New Jersey, and who has not previously been convicted of an indictable or felony offense under the laws of another state or the United States, but who is charged with a crime, or crimes, for which there is a presumption of incarceration or a mandatory minimum period of parole ineligibility,

(2) Prior Convictions. A person who has previously been convicted of a third or fourth degree indictable offense in New Jersey, or its equivalent under the laws of another state or of the United States, and who was not sentenced to a term of imprisonment for that prior offense,

(3) Public Officer or Employee. A person who was a public officer or employee and who is charged with a crime that involved or touched the public office or employment.

Adopted _____ to be effective _____.

3:28-2. Timing of Application [new]

Applications for pretrial intervention, shall be made at the earliest possible opportunity, including before indictment, but in any event no later than 14 days after the arraignment/status conference, unless good cause is shown or consent by the prosecutor is obtained.

Adopted _____ to be effective _____.

3:28-3. Application Process [new]

(a) Application.

Every applicant for pretrial intervention shall complete a form as prescribed by the Administrative Director of the Courts for filing with the Criminal Division.

(b) Procedure for Persons Ineligible for Pretrial Intervention without Prosecutor Consent to Consideration of the Application.

(1) An application that requires prosecutor consent pursuant to R. 3:28-1(d) shall include a statement of the circumstances that justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions.

(2) Upon filing of an application that requires prosecutor consent, the Criminal Division shall not consider the merits of the application and shall forward the application to the prosecutor's office for consideration. Within 14 days of receipt of the application, the prosecutor shall advise the defendant, the defendant's attorney and the Criminal Division, in writing, of the decision to either consent or refuse to consent to further consideration of the application. The writing shall include a copy of the application, the basis for the prosecutor's decision, and accompanying information, if any, in support of the decision. Only after receipt of the prosecutor's consent to further consideration of the application, the Criminal Division shall consider the application.

(3) In making a determination whether to consent to further consideration of the application, the prosecutor shall not be required to consider any facts, materials, or circumstances other than the information presented in the defendant's application, but it shall not be an abuse of discretion for the prosecutor to consider only those additional facts and circumstances which may include the victim's position on whether the defendant

should be admitted into the program, that the prosecutor deems relevant to a determination whether circumstances justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions.

(c) Defendants Charged with More than One Offense. Defendants charged with more than one offense may be considered for enrollment.

(d) Criminal Division and Prosecutor Review After the Filing of the Application. The criminal division manager shall complete the evaluation and make a recommendation to the prosecutor (1) within twenty-five days of the filing of the application with the Criminal Division or (2) for cases that require prosecutor consent to further consideration of the application pursuant to R. 3:28-1(d), within twenty-five days after receipt of the prosecutor's consent. The prosecutor shall complete a review of the application and inform the court, the defendant and the defendant's attorney of the decision on enrollment within 14 days of the receipt of the criminal division manager's recommendation. Where an application is made pre-indictment, the prosecutor may withhold action on the application until the matter has been presented to the grand jury. In such cases the prosecutor shall inform the criminal division manager, the defendant, and defendant's attorney of the decision on the application and enrollment within 14 days of the return of the indictment.

Adopted _____ to be effective _____.

3:28-4. Factors to Consider in Assessing Applications [new]

In evaluating a defendant's application for participation in a pretrial intervention program, consideration shall be given to the criteria set forth in N.J.S.A. 2C:43-12(e). In addition thereto, the following factors shall also be considered together with other relevant circumstances:

(a) The nature of the offense should be considered in reviewing the application. If the crime was (1) part of organized criminal activity; or (2) part of a continuing criminal business or enterprise; or (3) deliberately committed with violence or threat of violence against another person; or (4) a breach of the public trust where admission to a PTI program would deprecate the seriousness of defendant's crime, the defendant's application should generally be rejected.

(b) A defendant's juvenile record, if applicable.

Adopted _____ to be effective _____.

3:28-5. Admission into Pretrial Intervention [new]

(a) A Superior Court Judge shall act on all matters pertaining to pretrial intervention programs in the vicinage in accordance with N.J.S.A. 2C:43-12 and -13.

(b) Enrollment in PTI programs shall not be conditioned upon either informal admission or entry of a plea of guilty. Enrollment of defendants who maintain their innocence is to be permitted unless the defendant's attitude would render pretrial intervention ineffective.

(c) A Superior Court judge may, on the recommendation of the criminal division manager, and with the consent of the prosecutor and the defendant, postpone all further proceedings against said defendant on such charges for a period not to exceed thirty-six months.

(d) A restitution or community service requirement, or both, may be included as part of an individual's service plan when such a requirement promises to aid the rehabilitation of the offender. Any such requirement and its terms shall be judicially determined at the time of enrollment following recommendation by the criminal division manager and consent by the prosecutor. Evidence of the restitution condition is not admissible against defendant in any subsequent civil or criminal proceeding. Admission to the program shall not be denied solely on the basis of anticipated inability to meet a restitution requirement.

Adopted _____ to be effective _____.

3:28-6. Appeal of Decision by Criminal Division Manager or Prosecutor [new]

(a) Time to File. A defendant challenging the decision of the criminal division manager not to recommend enrollment, or of a prosecutor refusing to consent to consideration of the defendant's application where required pursuant to R. 3:28-1(d), or of a prosecutor's refusing to consent to the defendant's enrollment into the pretrial intervention program, shall file a motion with the Presiding Judge of the Criminal Division, or the judge to whom the case has been assigned, within ten days after receipt of the rejection and, if prepared, of the Criminal Division Manager's report. The motion shall be made returnable at such time as the judge determines will promote an expeditious disposition of the case.

(b) Standards.

(1) A defendant challenging a prosecutor's decision to refuse to consent to consideration of an application must establish that the prosecutor's decision was a gross and patent abuse of discretion. When considering an appeal, the court shall make an individualized determination, on a case-by-case basis, of whether a prosecutor's decision to refuse to consent to consideration of an application for pretrial intervention was a gross and patent abuse of discretion.

(2) A defendant challenging the criminal division manager's recommendation against enrollment into the pretrial intervention program must establish that the decision was arbitrary and capricious.

(3) A defendant challenging the prosecutor's recommendation against enrollment into the pretrial intervention program must establish that the decision was a patent and gross abuse of discretion.

(c) If the rejection is upheld by the judge, there shall be no pretrial review by an appellate court of a decision of the prosecutor to refuse to consent to consideration of the

application, or of a decision of the criminal division manager, or of the prosecutor to refuse to enroll a defendant into the pretrial intervention program. An order enrolling a defendant into the pretrial intervention program over the prosecutor's objection shall be deemed final for purposes of appeal, as of right, and shall be automatically stayed for fifteen days following its entry and thereafter pending appellate review.

(d) Denial of an application or enrollment pursuant to this rule may be reviewed on appeal from a judgment of conviction notwithstanding that such judgment is entered following a plea of guilty.

Adopted _____ to be effective _____.

[3:28. Pretrial Intervention Programs]

3:28-7. Conclusion of Period of Pretrial Intervention; Pretrial Intervention Registry

[(a) Each Assignment Judge shall designate a judge or judges to act on all matters pertaining to pretrial intervention programs in the vicinage in accordance with N.J.S.A. 2C:43-12 and -13.]

[b] (a) Where a defendant charged with a penal or criminal offense has been accepted by the program, the [designated] judge may, on the recommendation of the criminal division manager and with the consent of the prosecutor and the defendant, postpone all further proceedings against said defendant on such charges for a period not to exceed thirty-six months.

[c] (b) At the conclusion of the period set forth in paragraph (c) or earlier upon motion of the [criminal division manager] vicinage chief probation officer, the [designated] judge shall make one of the following dispositions:

(1) On recommendation of the [criminal division manager] vicinage chief probation officer and with the consent of the prosecutor and the defendant, dismiss the complaint, indictment or accusation against the defendant, such a dismissal to be designated "[matter-adjusted-] complaint (or indictment or accusation) dismissed"; or

(2) On recommendation of the [criminal division manager] vicinage chief probation officer and with the consent of the prosecutor and the defendant, further postpone all proceedings against such defendant on such charges for an additional period of time as long as the aggregate of postponement periods under the rule does not exceed thirty-six months; or

(3) On the written recommendation of the [criminal division manager] vicinage chief probation officer or the prosecutor or on the court's own motion order the prosecution of the defendant to proceed in the ordinary course. Where a recommendation for such an order is made by the [criminal division manager] vicinage chief probation officer or the prosecutor, such person shall, before submitting such recommendation to the [designated] judge, provide the defendant [or] and defendant's last known attorney of record with a copy of such recommendation, shall advise the defendant of the opportunity to be heard thereon, and the [designated] judge shall afford the defendant such a hearing. A defendant shall also be entitled to a hearing challenging a vicinage chief probation officer's or prosecutor's recommendation for termination from the program and that the prosecution of defendant proceed in the normal course. The decision of the court shall be appealable by the defendant or the prosecutor as in the case of any interlocutory order.

[(4) During the conduct of hearings subsequent to an order returning the defendant to prosecution in the ordinary course, no program records, investigative reports, reports made for a court or prosecuting attorney, or statements made by the defendant to program staff shall be admissible in evidence against such defendant.

(5) No statement or other disclosure regarding the charge or charges against the participant made or disclosed by a participant in pretrial intervention to a person designated to provide supervisory treatment shall be disclosed by such person at any time, to the prosecutor, nor shall any such statement or disclosure be admitted as evidence in any civil or criminal proceeding against the participant, provided that the criminal division manager shall not be prevented from informing the

prosecutor, or the court, on request or otherwise, whether the participant is satisfactorily responding to supervisory treatment.]

[d] (c) Where proceedings have been postponed against a defendant for an additional period as provided in paragraph [(c)(2)] (b)(2), at the conclusion of such period the [designated] judge may not again postpone proceedings but shall make a disposition in accordance with paragraph[(c)(1) or (3)] (b)(1) or (3). The aggregate of postponement periods under this rule shall in no case exceed thirty-six months.

[e] (d) The Administrative Director of the Courts shall [establish and] maintain a record in Promis Gavel [a Pretrial Intervention Registry for the purpose of determining] of all applications, enrollments and the degree of completion thereof by a defendant in a program approved by the Supreme Court in accordance with [paragraph (a)] R. 3:28-5(a). [The Pretrial Intervention Registry] Promis Gavel shall contain such information and material as directed by the Supreme Court. [No order to expunge or seal records of arrest after dismissal of a complaint, indictment or accusation under paragraph (c) or (d) shall bar the retention of material and information in the Pretrial Intervention Registry for the purposes of determining a defendant's prior applications to, enrollments in and the degree of completion of a Pretrial Intervention Program or for statistical reports required of the Administrative Director of the Courts, by law or the Supreme Court.]

[(f) When the criminal division manager and prosecutor reject an application for participation in the pretrial intervention program, there shall be no pretrial review by an appellate court if the rejection is upheld by the designated judge or the Assignment Judge. An order enrolling a defendant into the pretrial intervention program over the prosecutor's objection shall be deemed final for purposes of appeal, as of right, and shall be

automatically stayed for fifteen days following its entry and thereafter pending appellate review.

(g) Denial of acceptance pursuant to this rule may be reviewed on appeal from a judgment of conviction notwithstanding that such judgment is entered following a plea of guilty.

(h) Application for pretrial intervention shall be made at the earliest possible opportunity, including before indictment, but in any event no later than twenty-eight days after indictment. The criminal division manager shall complete the evaluation and make a recommendation within twenty-five days of the filing of the application. The prosecutor shall complete a review of the application and inform the court and defendant within fourteen days of the receipt of the criminal division manager's recommendation.

An appeal by the defendant shall be made on motion to the Presiding Judge of the Criminal Division or to the judge to whom the case has been assigned within ten days after the rejection and shall be made returnable at the next status conference or at such time as the judge determines will promote an expeditious disposition of the case.

Where application is made pre-indictment, the prosecutor may withhold action on the application until the matter has been presented to the grand jury.]

Note: Adopted as Rule 3:28 October 7, 1970, effective immediately. Paragraphs (a)(b)(c)(d) amended June 29, 1973, to be effective September 10, 1973; caption and paragraphs (a)(b)(c)(d) amended April 1, 1974 effective immediately; paragraph (e) adopted January 10, 1979 to be effective January 15, 1979; paragraphs (a)(b)(c)(d) amended August 28, 1979 to be effective September 1, 1979; paragraphs (f) and (g) adopted October 25, 1982 to be effective December 1, 1982; paragraphs (a) (b) (c) (d) and (f) amended and paragraph (h) added July 13, 1994, to be effective January 1, 1995; paragraph (f) amended June 28, 1996 to be effective September 1, 1996; paragraph (f) amended July 12, 2002 to be effective September 3, 2002; paragraph (c)(4) amended June 15, 2007 to be effective September 1, 2007[.]; paragraphs (a), (f), (g) and (h) deleted and paragraphs (b), (c), (d), and (e) amended and redesignated as paragraphs (a), (b), (c), and (d) respectively of new Rule 3:28-7 to be effective .

3:28-8. Confidentiality of Pretrial Intervention Process and Records [new]

(a) During the conduct of hearings subsequent to an order returning the defendant to prosecution in the ordinary course, no program records, investigative reports, reports made for a court or prosecuting attorney, or statements made by the defendant to program staff shall be admissible in evidence against such defendant.

(b) No statement or other disclosure regarding the charge or charges against the participant made or disclosed by a participant in pretrial intervention to a person designated to provide supervisory treatment shall be disclosed by such person at any time, to the prosecutor, nor shall any such statement or disclosure be admitted as evidence in any civil or criminal proceeding against the participant, provided that the vicinage chief probation officer shall not be prevented from informing the prosecutor, or the court, on request or otherwise, whether the participant is satisfactorily responding to supervisory treatment.

(c) No order to expunge or seal records of arrest after dismissal of a complaint, indictment or accusation shall bar the retention of material and information in Promis Gavel for the purposes of determining a defendant's prior applications to, enrollments in, and the degree of completion of a Pretrial Intervention Program or for statistical reports required of the Administrative Director of the Courts, by law or the Supreme Court.

Adopted _____ to be effective _____.

3:28-9. Written Reasons and Decisions [new]

(a) The decisions and reasons made by the prosecutor and criminal division manager in recommending or denying a defendant's application for enrollment into the pretrial intervention program in all cases shall be reduced to writing and disclosed to the defendant and defendant's attorney. The decision of the judge to grant or deny the application shall be written or placed on the record pursuant to R. 1:7-4 and accompanied by an order.

(b) The decisions and reasons made by the prosecutor and vicinage chief probation officer in recommending termination from the pretrial intervention program or dismissal of charges in all cases shall be reduced to writing and disclosed to the defendant and defendant's last known attorney of record. The decision of the judge to order termination or dismissal of the charges shall be written or placed on the record pursuant to R. 1:7-4 and accompanied by an order.

Adopted _____ to be effective _____.

3:28-10. Pretrial Intervention Program Director [new]

For purposes of R. 3:28-1 et seq. and N.J.S.A. 2C:43-12 the criminal division manager shall be considered the program director for purposes of making recommendations on applications for enrollment into pretrial intervention. For purposes of R. 3:28-1 et seq. and N.J.S.A. 2C:43-12 the vicinage chief probation officer shall be considered the program director for purposes of recommending: (1) dismissal of the complaint, indictment or accusation against the defendant, (2) further postponement of all proceedings for additional time, or (3) termination of the defendant from the program and having the prosecution of the defendant proceed in the ordinary course. The criminal division manager and vicinage chief probation officer shall have the authority to delegate their ability under R. 3:28-1 et seq. to make recommendations to another person or persons.

Adopted _____ to be effective _____.

Proposed Deletion of the "Guidelines for Operation of Pretrial Intervention in New Jersey," Currently Included in the Rules of Court, upon the Adoption of the Proposed New Court Rules on Pretrial Intervention

[Guideline 1

The purposes of pretrial intervention are:

(a) To provide defendants with opportunities to avoid ordinary prosecution by receiving early rehabilitative services, when such services can reasonably be expected to deter future criminal behavior by the defendant, and when there is an apparent causal connection between the offense charged and the rehabilitative need, without which cause both the alleged offense and the need to prosecute might not have occurred.

(b) To provide an alternative to prosecution for defendants who might be harmed by the imposition of criminal sanctions as presently administered, when such an alternative can be expected to serve as sufficient sanction to deter criminal conduct.

(c) To provide a mechanism for permitting the least burdensome form of prosecution possible for defendants charged with "victimless" offenses.

(d) To assist in the relief of presently overburdened criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correctional problems.

(e) To deter future criminal or disorderly behavior by a defendant/participant in pretrial intervention.

Comment

Guideline 1(a) states a rehabilitative model on which PTI programs in New Jersey are based. The rehabilitative model emphasizes that social, cultural and economic conditions often result in a defendant's choice of environmental compulsion to commit crime. PTI seeks to solve personal problems which tend to result from the conditions that appear to cause crime.

Guideline 1(b) recognizes that diversion in appropriate circumstances can serve as sufficient sanction to deter future criminal conduct.

Guideline 1(c) provides for the use of PTI as a mechanism for minimizing penetration into the criminal process for broad categories of offenders accused of "victimless crimes," without relinquishing criminal justice control over such persons while statutes proscriptive of such behavior remain in force.

Guideline 1(d) provides for removing from ordinary prosecution those who can be deterred from criminal behavior by short term rehabilitative work or supervision. It is

to be emphasized that the potential for rehabilitation must be considered in light of the time periods embodied in Rule 3:28(b), (c), (d).

The deterrence of criminal behavior in many cases requires intensive work: counseling, psychotherapy, drug-abuse prevention and control, employment placement. Programs in these cases should be measured against available treatment facilities and the time constraints of PTI. For other defendants, however, no more than a supervised pretrial probationary period may be necessary when no extensive need for rehabilitative services can be discerned.

Guideline 1(e) acknowledges that pre-conviction rehabilitation can be in the public interest when it results in the deterrence of future misconduct.]

[Guideline 2

Eligibility for PTI is broad enough to include all defendants who demonstrate sufficient effort to effect necessary behavioral change and show that future criminal behavior will not occur. Any defendant accused of crime shall be eligible for admission into a PTI program. When the application indicates factors which would ordinarily lead to exclusion under the guidelines established hereinafter, the applicant nevertheless shall have the opportunity to present to the criminal division manager, and through the criminal division manager to the prosecutor, any facts or materials demonstrating the defendant's amenability to the rehabilitative process, showing compelling reasons justifying the defendant's admission, and establishing that a decision against enrollment would be arbitrary and unreasonable.

Comment

Guideline 2 provides that each applicant for a PTI program is entitled to full and fair consideration of his or her application. When the application indicates factors that cause either the criminal division manager to reject the application or the prosecutor to deny consent to an enrollment, a statement particularizing the reasons for the rejection or the withholding of consent by the prosecutor must be furnished to the defendant. If the defendant wishes to challenge a rejection by the criminal division manager, or the prosecutor's denial of consent to enrollment, the defendant may do so in accordance with the procedures set forth in guidelines 6 and 8. It is the duty of the applicant to allege and present any facts and materials to the criminal division manager for reconsideration either by the criminal division manager or prosecutor, if the prosecutor has denied consent, showing compelling reasons justifying admission, and establishing that a decision against enrollment would be arbitrary and unreasonable. The presentation of this material should be done concurrently with the filing of a motion under guideline 8 for review of a decision by a criminal division manager not to recommend or of a prosecutor not to consent to enrollment.]

[Guideline 3

In evaluating a defendant's application for participation in a pretrial intervention program, consideration shall be given to the criteria set forth in N.J.S.A. 2C:43-12(e). In addition thereto, the following factors shall also be considered together with other relevant circumstances:

(a) Age. Pretrial intervention is designed to deal only with adult defendants who, in accordance with New Jersey law, are those persons above the age of 18. Also included are those juveniles between the ages of 14 and 18 who are treated as adults under R. 5:22-1 or 5:22-1.

(b) Residence. New Jersey's PTI program is designed to deal with the problem of crime in New Jersey. Only those defendants are ineligible who reside such distances from New Jersey as to bar effective counseling or supervisory procedures.

(c) Jurisdiction. Only defendants charged with criminal or penal offenses in the criminal or municipal courts of the State of New Jersey may be enrolled pursuant to R. 3:28.

(d) Minor Violations. Defendants should not be eligible for enrollment if the likely disposition would result in a suspended sentence without probation or a fine. Those charged with ordinance, health code and other similar violations are not eligible.

(e) Prior Record of Convictions. While the pretrial intervention program is not limited to "first offenders", defendants who have been previously convicted of a criminal offense should ordinarily be excluded. Such defendants who have at any prior time been convicted of a first or second degree crime or who irrespective of the degree of the crime have completed a term of probation, incarceration or parole within five years prior to the date of application for diversion shall ordinarily not be considered for enrollment in PTI except on joint application by the defendant and the prosecutor. Defendants charged with more than one offense may be considered for enrollment.

(f) Parolees and Probationers. Defendants who, at the time of arrest, are probationers or parolees should be considered for enrollment under R. 3:28 only after consultation with the Chief Probation Officer or District Parole Supervisor whose departments supervise the defendants, and only after they have agreed that revocation of probation or parole need not be recommended or after the appropriate authority has made the decision not to revoke probation or parole.

(g) Defendants Previously Diverted. Supervisory treatment may occur only once with respect to any defendant who has previously been enrolled in a program of pretrial intervention or conditionally discharged pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1. All applications for enrollment in a PTI program must proceed in accordance with the rules of the Supreme Court and these guidelines after reference to the Pretrial Intervention Registry established pursuant to R. 3:28(e) and N.J.S.A.

2C:43-21(a). No order to expunge or seal records of arrest after dismissal of a complaint, indictment or accusation under paragraph (c) or (d) shall bar the retention of material and information in the Pretrial Intervention Registry for the purposes of determining a defendant's prior applications to, enrollments in, and the degree of completion of a Pretrial Intervention Program or for statistical reports required of the Administrative Director of the Courts, by law or the Supreme Court.

(h) Eligibility Under N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1. The statutes set forth the criteria for eligibility and guidelines for exclusion. Defendants eligible for pretrial intervention or conditional discharge pursuant to N.J.S.A. 2C:36A-1 or § 27 of the Controlled Dangerous Substances Act may be placed under the supervision of a pretrial intervention program.

(i) Assessment of the Nature of the Offense. Any defendant charged with a crime is eligible for enrollment in a PTI program, but the nature of the offense is a factor to be considered in reviewing the application. If the crime was (1) part of organized criminal activity; or (2) part of a continuing criminal business or enterprise; or (3) deliberately committed with violence or threat of violence against another person; or (4) a breach of the public trust where admission to a PTI program would deprecate the seriousness of defendant's crime, the defendant's application should generally be rejected. A defendant charged with a first or second degree offense or sale or dispensing of Schedule I or II narcotic drugs as defined in L.1970, c. 226 (N.J.S.A. 24:21-1 et seq.) by persons not drug dependent, should ordinarily not be considered for enrollment in a PTI program except on joint application by the defendant and the prosecutor. However, in such cases, the applicant shall have the opportunity to present to the criminal division manager, and through the criminal division manager to the prosecutor, any facts or materials demonstrating the applicant's amenability to the rehabilitative process, showing compelling reasons justifying the applicant's admission and establishing that a decision against enrollment would be arbitrary and unreasonable.

(j) Co-defendants. The impact of diversion on the prosecution of co-defendants is a factor to be considered.

(k) Restitution and Community Service. A restitution or community service requirement, or both, may be included as part of an individual's service plan when such a requirement promises to aid the rehabilitation of the offender. Any such requirement and its terms shall be judicially determined at the time of enrollment following recommendation by the criminal division manager and consent by the Prosecutor. Evidence of the restitution condition is not admissible against defendant in any subsequent civil or criminal proceeding. Admission to the program shall not be denied solely on the basis of anticipated inability to meet a restitution requirement. Where appropriate to further rehabilitation, symbolic or partial restitution may be included in the service.

Comment

Guideline 3, in its introductory statement, requires that the statutory criteria of N.J.S.A. 2C:43-12(e) be considered in the evaluation of a defendant's application for pretrial intervention. That statutory provision requires consideration of those criteria "among others." Accordingly, the original criteria of this guideline have also been retained as explanatory of and supplemental to the statutory criteria. For convenience in reference, the statutory criteria are as follows:

(1) The nature of the offense;

(2) The facts of the case;

(3) The motivation and age of the defendant;

(4) The desire of the complainant or victim to forego prosecution;

(5) The existence of personal problems and character traits which may be related to the applicant's crime and for which services are unavailable within the criminal justice system, or which may be provided more effectively through supervisory treatment and the probability that the causes of criminal behavior can be controlled by proper treatment;

(6) The likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his participation in supervisory treatment;

(7) The needs and interests of the victim and society;

(8) The extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior;

(9) The applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others;

(10) Whether or not the crime is of an assaultive or violent nature, whether in the criminal act itself or in the possible injurious consequences of such behavior;

(11) Consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act;

(12) The history of the use of physical violence toward others;

(13) Any involvement of the applicant with organized crime;

(14) Whether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution;

(15) Whether or not the applicant's involvement with other people in the crime charged or in other crime is such that the interest of the State would be best served by processing his case through traditional criminal justice system procedures;

(16) Whether or not applicant's participation in pretrial intervention will adversely affect the prosecution of co-defendants; and

(17) Whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program.

Guideline 3(a) indicates that the services of PTI programs may, in appropriate instances and at the request of juvenile authorities and programs, be made available to juvenile defendants when the need for inter-program cooperative work is indicated.

Under Guideline 3(b), residents of other States, charged with offenses in New Jersey counties in which there exist pretrial intervention programs may, with the approval of the prosecuting attorney, the designated judge, and Administrative Office of the Courts, be permitted to participate in such out-of-state program while enrolled pursuant to R. 3:28.

Regardless of the New Jersey jurisdiction in which the complaint, indictment or accusation has been filed, defendants or participants may, with the agreement of the PTI coordinators involved, be transferred for participation among the various county or vicinage programs.

Guideline 3(c) establishes jurisdictional requirements. However, defendants charged in other States or in the Federal Courts, may in appropriate instances and with the permission of the Administrative Office of the Court, be permitted to participate in the counseling or supervision regimes of the county or vicinage PTI programs on request of the Federal Authorities or a PTI program in another State.

Guideline 3(d) sets forth the policy that those charged with minor violations should not be admitted to a PTI program. It is felt that while no per se exclusion of non-indictable offenses is appropriate, the PTI process is not appropriate for such cases which do not involve a potential sentence of consequence. Rodriguez v. Rosenblatt, 58 N.J. 281, 277 A.2d 216 (1971).[1]

Guideline 3(e) makes it clear that a prior criminal record may be indicative of a behavioral pattern not conducive to short term rehabilitation. Therefore, pretrial intervention should ordinarily be limited to persons who have not previously been convicted of a crime and hence a rebuttable presumption against enrollment is created by the fact of a prior conviction. An even heavier onus is placed upon defendants whose prior conviction is of a first or second degree crime or who have completed a term of imprisonment, probation or parole within the five-year period immediately preceding the

[1] Of course, all defendants with an indictable offense are eligible for PTI.

application for diversion. As to those defendants, admission to the program is ordinarily dependent upon the prosecutor joining in the PTI application.

Guideline 3(f) sets forth a policy permitting probationers and parolees to enter PTI programs. Since the parolee/probationer is under the supervision of the District Parole Supervisor or Chief Probation Officer, consultation should be sought prior to recommending enrollment of the defendant into a PTI program.

Guideline 3(g) creates a bar against admission into a PTI program for those defendants who have previously been diverted under N.J.S.A. 2C:43-12 et seq. or conditionally discharged pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1. The Pretrial Intervention Registry established pursuant to N.J.S.A. 2C:43-21(a) and R. 3:28 serves as the means of identifying defendants previously diverted through a PTI program. This registry is designed to complement the Controlled Dangerous Substance Registry Act of 1970, pursuant to N.J.S.A. 26:2G-17 et seq.

Guideline 3(h) deems it appropriate that PTI programs may assume the supervision of N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1 cases.

Guideline 3(i) recognizes that consistent with State v. Leonardis, 71 N.J. 85, 363 A.2d321 (1976) and 73 N.J. 360, 375 A.2d 607 (1977), there must be a balance struck between a defendant's amenability to correction, responsiveness to rehabilitation and the nature of the offense. It is to be emphasized that while all persons are eligible for pretrial intervention programs, those charged with offenses encompassed within certain enumerated categories must bear the burden of presenting compelling facts and materials justifying admission. First and second degree crimes (and their Title 2A cognates) and the sale or dispensing of Schedule I and II narcotics by persons not drug dependent are specific categories of offenses that establish a rebuttable presumption against admission of defendants into a PTI program. This presumption reflects the public policy of PTI. PTI programs should ordinarily reject applications by defendants who fall within these categories unless the prosecutor has affirmatively joined in the application. A heavy burden rests with the defendant to present to the criminal division manager at the time of application (a) proof that the prosecutor has joined in the application and (b) any material that would otherwise rebut the presumption against enrollment. When a defendant charged with a first or second degree crime or the sale or dispensing of Schedule I or II narcotics has been rejected because the prosecutor refuses to consent to the filing of the application, or because in the sound discretion of the criminal division manager the defendant has not rebutted the presumption against admission, the burden lies with the defendant upon appeal to the court to show that the prosecutor or criminal division manager abused such discretion. When an application is rejected because the defendant is charged with a crime of the first or second degree or sale or dispensing of Schedule I or II narcotics, and the prosecutor refuses to join affirmatively in the filing of an application or later refuses to consent to enrollment, such refusal should create a rebuttable presumption against enrollment.

Guideline 3(k) recognizes that the use of restitution and community service may play an integral role in rehabilitation. Requiring either is strongly consonant with the individual

approach defined in State v. Leonardis, 71 N.J. 85, 363 A.2d 321 (1976) and 73 N.J. 360, 375 A.2d 607 (1977), which emphasized the needs of the offender. In determining the restitution requirement and its terms including ability of the offender to pay, the Court should rely on the procedures outlined in State in Interest of DGW, 70 N.J. 488, 361 A.2d 513 (1976) and State v. Harris, 70 N.J. 586 (1976).

Full restitution need not be completed during participation in the program. In determining whether a restitution requirement has been fulfilled, the designated judge shall consider good-faith efforts by the defendant. In appropriate cases, at the conclusion of participation, a civil judgment by confession may be entered by the court. However, restitution should never be used in PTI for the sole purpose of collecting monies for victims.]

[Guideline 4

Enrollment in PTI programs should be conditioned upon neither informal admission nor entry of a plea of guilty. Enrollment of defendants who maintain their innocence should be permitted unless the defendant's attitude would render pretrial intervention ineffective.

Comment

A PTI program is presented to defendants as an opportunity to earn a dismissal of charges for social reasons and reasons of present and future behavior, legal guilt or innocence notwithstanding. This stance produces a relation of trust between counselor and defendant. Within the context of pretrial intervention when and whether guilt should be admitted is a decision for counselors. Counselors should be free to handle each case individually according to their best judgment. Neither admission of guilt nor acknowledgment of responsibility is required. Steps to bar participation solely on such grounds would be an unwarranted discrimination. Nevertheless, many guilty defendants blame their behavior on society, family, friends or circumstance, and avoid recognition of the extent of their own role and responsibility. While such an attitude continues, it is unlikely that behavioral change can occur as a result of short-term rehabilitative work. An understanding and acceptance of responsibility for behavior achieved through counseling, can and often does, result in the beginnings of the defendant's ability to control his/her acts and is an indication that rehabilitation may, in large measure, have been achieved.]

[Guideline 5

Effective operation of pretrial intervention programs requires that a relationship of confidence and trust be initiated and maintained between participating defendants and staff. No information, therefore, obtained as a result of a defendant's application to or participation in a pretrial intervention program should be used, in any subsequent proceeding, against his or her advantage.

Comment

That a relationship based on trust is necessary for the rehabilitation/attitude change process to operate cannot seriously be doubted, and the policy reflected in the admissibility and defendant protection provisions of R. 3:28 and R. 1:38 recognizes such a need. The priority of the maintenance of the counselor-participant relation over the need for disclosures resulting from this relationship is the same, of course, as the priority for the maintenance of, for example, the confidentiality of lawyer-client, physician/psychologist-patient communications. (Counselors should feel free to shroud their association in an air of confidentiality. Use of information gathered in this process would most likely be barred from future proceedings "as contrary to basic standards of due process and fundamental fairness." See In the Interest of J.P.B., 143 N.J.Super. 96, 362 A.2d 1183 (App.Div.1976). Of course, defendants who give false information on PTI applications may subject themselves to charges of perjury or false swearing in instances where supporting affidavits may be required by the criminal division manager. Affidavits relating to the facts and circumstances of the underlying offense shall not be required.)

The essential PTI format is to give participating defendants a true second chance to accomplish rehabilitation or to show otherwise that criminal conduct is not likely to occur in the future; and if the defendant fails in this effort, to return him or her to that stage of ordinary prosecution at which proceedings had been stopped under R. 3:28, and to the extent possible, enable prosecution to take place as if such defendants had not participated in the PTI program so that defendants will not be prejudiced by an unsuccessful attempt to earn a R. 3:28 dismissal.]

[Guideline 6

Application for PTI should be made as soon as possible after commencement of proceedings, but, where an indictable offense is charged, not later than 28 days after indictment. All applications for PTI should be processed in the order of their filing. However, where the application is filed after an indictment has been returned, the PTI Program should complete its evaluation and make its recommendation thereon within 25 days after filing. The prosecutor should complete a review and advise the defendant within 14 days thereafter. An appeal by defendant to the trial court shall be brought within 10 days after the rejection notice and should be determined either before or at the pretrial conference.

Comment

To relieve defendants from the anxiety of facing prosecution, to apply appropriate rehabilitative measures at an early date, and to effect savings in criminal justice resources, PTI programs should endeavor to divert qualified defendants from the ordinary course of prosecution as soon as possible after the filing of a complaint. The court must advise defendant of the opportunity to be considered for PTI at the first appearance before the court. See R. 3:4-2. While a PTI application should be made before indictment, there are nevertheless problems involved in securing public defender

counsel before arraignment. Thus, while pre-indictment filing is encouraged, the application may be made no later than 28 days after indictment, but not thereafter. This time requirement should permit all defendants sufficient opportunity to make a voluntary and informed choice concerning enrollment in a PTI program.

The time requirements set forth in the guidelines for evaluation, recommendation and review are intended to enable complete processing of a defendant's application before the pretrial conference. See R. 3:9-1e. Early filing as encouraged by this guideline, will afford PTI programs and prosecutors the opportunity to manage their resources better by providing them sufficient time to make informed evaluations. The time limits for processing applications are designed to facilitate speedy trials and are realistic in view of the limited scope of review following rejection.]

[Guideline 7

Where application is made in an indictable offense, the prosecutor may withhold action on the application until the matter has been presented to the grand jury.

Comment

Guideline 7 recognizes that at times it may be in the public interest to have a particular defendant screened out of the criminal justice system, either by administrative decision or grand jury action, rather than diverted into a PTI program. Thus, the prosecutor is given the discretion to choose an appropriate route and the court will not be burdened by hearing challenges if no indictment is to be returned. However, the option of delaying action until the grand jury has voted on the case should be considered only in rare instances. Generally, expeditious handling of PTI applications is in consonance with the purpose of diversion. Of course, if the prosecutor consents to the application, enrollment into a PTI program should not be delayed and the defendant should generally be enrolled before indictment.]

[Guideline 8

The decisions and reasons therefor made by the designated judges (or Assignment Judges), prosecutors and criminal division managers in granting or denying defendants' applications for PTI enrollment, in recommending and ordering termination from the program or dismissal of charges, in all cases must be reduced to writing and disclosed to defendant.

A defendant may be accepted into a PTI program by the designated judge (or the Assignment Judge) on recommendation of the criminal division manager, and with the consent of the prosecuting attorney and the defendant. Applications that are recommended for enrollment by the criminal division manager and consented to by the prosecutor must be presented to the designated judge (or Assignment Judge) authorized to enter orders. If a defendant desires to challenge the decision of a criminal division manager not to recommend enrollment or of a prosecutor refusing to consent to enrollment into a PTI program, a motion must be filed before the designated judge (or

the Assignment Judge) authorized to enter orders under R. 3:28. The challenge is to be based upon alleged arbitrary or capricious action, and the defendant has the burden of showing that the criminal division manager or prosecutor abused discretion in processing the application. No direct appeal can be filed to the Appellate Division challenging the actions of the criminal division manager or the prosecutor. The decision of the criminal division manager or prosecutor may be challenged at a hearing on defendant's motion before the designated judge (or Assignment Judge) and, thereafter, defendant or prosecutor can seek leave to appeal from the court's decision denying or permitting enrollment.

A defendant shall also be entitled to a hearing challenging a criminal division manager or prosecutor's recommendation (following an initial or subsequent adjournment under Rule 3:28) that the prosecution of defendant proceed in the normal course. The decision of the court shall be appealable by the defendant or the prosecutor as in the case of any interlocutory order.

A defendant aggrieved by the decision of the designated judge or assignment judge respecting the joint decision of the criminal division manager and prosecutor to deny an application for participation in a pretrial intervention program may not seek appellate review thereof until after entry of judgment of conviction. A defendant may then seek such review even if the judgment was entered following a plea of guilty. However, a prosecutor whose denial of consent has been reversed by the designated judge or assignment judge may seek leave to appeal pursuant to R. 2:2.

Guidelines 2, 3, 6 and 8 and Comments to Guidelines 2, 3, 5 and 6 amended July 13, 1994 to be effective January 1, 1995; Guidelines 3(g) and (h) and Comments to Guidelines 3(g) and (h) amended June 28, 1996 to be effective September 1, 1996; Guideline 3(a) amended July 19, 2012 to be effective September 4, 2012[.]; Guidelines deleted to be effective .