2004 - 2007 REPORT

OF

THE MUNICIPAL COURT PRACTICE

COMMITTEE

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TABLE OF CONTENTS

I. RULE AMENDMENTS RECOMMENDED

1. Proposed Amendments to Guideline 4 of R. 7:6-2 – Pleas Plea Agreements to Permit the Dismissal of N.J.S.A. 39:4-50(g) Operating a Motor Vehicle in a School Zone 1

2. Proposed Amendments to the Title and the Content of R. 7:8-1 5

3. Proposed Amendments to R. 7:8-7. Appearance; Exclusion of the Public -- Appearance for the Prosecution and Video Links 8

4. Proposed Amendments to R. 7:10-2 – Post Conviction Relief 13

5. Amendment to R. 7:13-2. Stay 18

6. Amendment to R. 7:3-1(b)(2) Procedure After Arrest 20

7. Amendment to R. 7:6-2 – State v. Tutolo 22

8. Amendment to R. 7:12-4 – Violations Bureau; Designation; Function ... 24

9. Proposed Revision to R. 7:10-1 – Time Limitation for a New Trial 26

10. New Rule – R. 7:6-3. Guilty Plea by Mail in Non-Traffic Offenses 28

11. Revision to R. 7:12-3 Pleas of Not Guilty and Pleas of Guilty by Mail in Certain Traffic and Parking Offenses 30

12. Amendment to R.7:5-2(c) Motion to Suppress Evidence - Order Denying Suppression 34

II. OTHER RECOMMENDATIONS

1. Appeal of the Dismissal of Municipal Court Complaints 36

2. Proposed Amendments to R. 7:8-7 – Appearance; Exclusion of the Public – Right to Counsel at Probable Cause Hearings 38

3. Appeal of Motions to Suppress 40

4. Deputy Court Administrators Issuing Warrants 43

III. PREVIOUSLY APPROVED RECOMMENDATIONS

1. Amendments to the Statewide Violations Bureau Schedule 44

2. Proposed Amendments to the Guidelines for the Operation of Plea Agreements in Municipal Courts 45

IV. RULES PROPOSED BUT NOT RECOMMENDED

1. Administrative Holds 47

2. Driving While Intoxicated Warrants 47

3. Examination of Bail 48

4. Proposed Amendment to R. 7:7-7(b)(5) – Requiring Motor Vehicle Abstracts to be a Part of Discovery 49

5. Proposed Amendment to R. 7:2-4(c) – Notice to Prosecuting Attorney and Complaining Witness; Dismissal of Complaint 49

6. R. 7:6-2 – Opposition to Protective Orders by Victims in Careless and Reckless Driving Cases 49

7. Proposed Amendment to Appendix to Part VII – Guideline 4 for Plea Agreements in Municipal Court: Correspondence from William J. Vosper, Esq. 50

8. Proposed Amendment to R. 7:6-1 – Arraignments 51

9. Proposed Amendment to R. 7:6-2(d) and Guideline 4 – Dismissal of N.J.S.A. 39:4-49.1 51

10. Certified Municipal Court Attorneys 51

IV. CONCLUSION 52

APPENDIX 1:

Guilty Plea by Mail – Certification Form 54

I. RULE AMENDMENTS RECOMMENDED

1. Proposed Amendments to Guideline 4 of R. 7:6-2 - Pleas, Plea Agreements to Permit the Dismissal of N.J.S.A. 39:4-50(g) Operating a Motor Vehicle in a School Zone

The Guidelines for the Operation of Plea Agreements in the Municipal Courts of New Jersey[1] prohibit the dismissal of a complaint charging a drunk driving offense defined under N.J.S.A. 39:4-50 as part of a plea agreement.[2] The Court's current view of the drunk driving statute is that it defines a single offense that may be proved by alternative evidential methods.[3] Moreover, whenever one of the enumerated offenses in N.J.S.A. 39:4-50(a) occurs within a school zone or school crossing, the statute provides for enhanced sentencing.[4]

The New Jersey County Prosecutors' Association is represented on the Committee by its first vice-president, Morris County Prosecutor Michael M. Rubbinaccio. Mr. Rubbinaccio reported to the Committee that, by a unanimous vote, the County Prosecutors' Association proposed an amendment to Guideline 4 of the Plea Bargaining Guidelines. The proposed amendment would permit the municipal court to dismiss complaints charging "school zone" violations set forth under N.J.S.A. 39:4-50(g) as part of a plea agreement in cases where there was no accident, no school activity in the school zone at the time of the offense and the defendant will agree to enter a plea to the companion charge of N.J.S.A. 39:4-50(a). Mr. Rubbinaccio advised that from the prosecutors' perspective, the proposed amendment would provide a powerful incentive for defendants to plead to N.J.S.A. 39:4-50(a) and would result in more dispositions within the 60-day target disposition goal for drunk driving cases as expressed in Administrative Directive 1-84.

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[1] See Appendix I to Part VII of the Rules of Court, Guideline 4.

[2] State v. Hessen, 145 N.J. 441, 454-59, 678 *A.*2d 1082 (1996).

[3] State v. Kashi, 180 N.J. 45, 48, 848 A.2d 744 (2004)

[4] N.J.S.A. 39:4-50(g).

It should be noted that under this Court's ruling in State v. Reiner, 180 N.J. 307 (2004), school zone violations must be dismissed by way of merger into violations of N.J.S.A. 39:4-50(a) when the authorized penalties for second and third DWI offenses exceed the sanctions required for the school zone violation. In practice, this means that, in most instances, a school zone violation that is companion to a second or third drunk driving offense will always be dismissed by way of merger.[(5)]

In order to effect the proposed amendment to Guideline 4, the Committee suggests the following revisions:

[5] The exception to this general rule occurs when the defendant is entitled to a "step-down" because of the passage of 10 or more years from the date of the prior offense. (See N.J.S.A. 39:4-50(a)(3); State v. Burroughs, 349 N.J.Super. 225 (App. Div. 2002)).

GUIDELINE 4. LIMITATION

No plea agreement whatsoever will be allowed in drunken driving or certain drug offenses. Those offenses are:

A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and

B. Possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4)), being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10b), and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).

No plea agreements will be allowed in which a defendant charged for a violation of N.J.S.A. 39:4-50 with a blood alcohol concentration of 0.10% or higher seeks to plead guilty and be sentenced under section a(1)(i) of that statute (blood alcohol concentration of .08% or higher, but less than 0.10%).

If a defendant is charged with a second or subsequent offense of driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.4a) arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50 offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge. A refusal charge in connection with a first offense N.J.S.A. 39:4-50 charge shall not be dismissed by a plea agreement, although a plea to a concurrent sentence for such charges is permissible.

Except in cases involving an accident or those that occur when school properties are being utilized, if a defendant is charged with driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50(a)) and a school zone or school crossing violation under N.J.S.A. 39:4-50(g), arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50(a) offense, the judge, on the recommendation of the prosecutor, may dismiss the N.J.S.A. 39:4-50(g) charge.

If a defendant is charged with more than one violation under Chapter 35 or 36 of the Code of Criminal Justice arising from the same factual transaction and pleads guilty to one charge or seeks a conditional discharge under N.J.S.A. 2C:36A-1, all remaining Chapter 35 or 36 charges arising from the same factual transaction may be dismissed by the judge on the recommendation of the prosecutor.

Nothing contained in these limitations shall prohibit the judge from considering a plea agreement as to the collateral charges arising out of the same factual transaction connected with any of the above enumerated offenses in sections A and B of this Guideline.

The judge may, for certain other offenses subject to minimum mandatory penalties, refuse to accept a plea agreement unless the prosecuting attorney represents that the possibility of conviction is so remote that the interests of justice requires the acceptance of a plea to a lesser offense.

Note: Guidelines and Comment adopted June 29, 1990, simultaneously with former R. 7:4-8 ("Plea Agreements") to be effective immediately; as part of 1997 recodification of Part VII rules, re-adopted without change as Appendix to Part VII and referenced by R. 7:6-2 ("Pleas, Plea Agreements"), October 6, 1997 to be effective February 1, 1998; Guideline 4 amended July 5, 2000 to be effective September 5, 2000; Guidelines 3 and 4 amended July 28, 2004 to be effective September 1, 2004; Guideline 4 amended June 7, 2005 to be effective July 1, 2005. Guideline 4 amended _____, 2007 to be effective September _____, 2007.

2. Proposed Amendments to the Title and Content of R. 7:8-1

R.7:8-1, entitled "Mediation of Minor Disputes; Notice in Lieu of Complaint," controls court-directed mediation in municipal courts. Although "Notice in Lieu of Complaint" appears in the title, it is no longer mentioned in the body of R. 7:8-1 or in any other rule. Moreover, the actual notice in lieu of complaint form has not been in use in our municipal courts for many years.

R. 7:8-1 is intended to implement the procedures that are generally authorized under R.1:40 related to complementary dispute resolution programs. R.1:40-8 provides the structure for all mediation programs held in the municipal courts. Since this Court's initial adoption of R.1:40 in 1992, the title of the section referring to mediation in the municipal courts has remained the same: Mediation of Minor Disputes in Municipal Court Actions.[6] Accordingly, the Committee recommends an amendment to the title of R.7:8-1 that will more accurately describe the rule's purpose.

The Committee also recommends an additional exclusion of a class of cases from municipal court mediation. Currently, R. 7:8-1 and R. 1:40-8 carve out six exceptions to the mediation process. For example, there may be no referral to mediation if the underlying complaint involves serious injury or if there have been repeated acts of violence between the parties.

Another example of ineligible cases relates to traffic and parking violations under the New Jersey Motor Vehicle Code (N.J.S.A. Title 39). The complete exclusion of parking tickets, moving violations, accidents and general traffic law from the mediation process is based upon the fact the resolution of these matters does not lend itself to mediation as do, for example, minor neighborhood disputes where the parties are likely to have an on-going relationship with each other following the resolution of the case in municipal court.

[6] In 1992 R. 1:40-7 was entitled Mediation of Minor Disputes in Municipal Court Actions. In 2007, Mediation of Minor Disputes in Municipal Court Actions can be found in R. 1:40-8.

Under the same reasoning, the Committee determined that penalty enforcement actions[7] should also be excluded from mediation. These cases constitute civil actions between a political subdivision of the State of New Jersey and a private individual or business. To the extent that mediation may be helpful in these civil cases, it can be accomplished in court as part of the normal plea bargaining process with the participation of the parties and the municipal prosecutor.

In order to update the title of the rule and exclude penalty enforcement actions from the mediation process, the Committee proposes the following amendatory language to R. 7:8-1.

[7] See N.J.S.A. 2A:58-10 et seq. and N.J.S.A. 2B:12-17(e).

7:8-1. Mediation of [m]Minor [d]Disputes[; notice in lieu of complaint] in Municipal Court Actions

If a person seeks to file or has filed a complaint charging an offense that may constitute a minor dispute, the court may issue a notice to the person making the charge and the person charged, requiring their appearance before the court or before a person or program designated by the court and approved by the Assignment Judge pursuant to R. 1:40-8 (Mediation of Minor Disputes in Municipal Court Actions). If on the return date of a summons it appears to the court that the offense charged may constitute a minor dispute, the court may order the persons involved to participate in mediation in accordance with R. 1:40-8. No referral to mediation shall be made, however, if the complaint involves (1) serious injury, (2) repeated acts of violence between the parties, (3) clearly demonstrated psychological or emotional disability of a party, (4) incidents involving the same persons who are already parties to a Superior Court action between them, (5) matters arising under the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.) [or] (6) a violation of the New Jersey Motor Vehicle Code (Title 39) or (7) matters involving penalty enforcement actions.

Source-R. (1969) 7:3-2. Adopted October 6, 1997, effective February 1, 1998; amended July 5, 2000, to be effective September 5, 2000, amended _____, to be effective _____.

3. Proposed Amendments to R. 7:8-7. Appearance; Exclusion of the Public – Appearance for the Prosecution and Video Links

Over the past decade, the Committee has noted a growing dissatisfaction expressed in the published case law with prosecutions by private citizens.[8] Although there has been a long history of private prosecutions in New Jersey's municipal courts,[9] the trend, as expressed in the recent case law, is for involvement by a public prosecutor in all criminal cases.

With this in mind, the Committee recommends that the time has come to eliminate private prosecutors in municipal court. This can be accomplished via an amendment to R. 7:8-7(b) which will eliminate the authority of anyone other than a public prosecutor to appear on behalf of the State of New Jersey in municipal court. With elimination of private prosecutions, the municipal prosecutor will be involved in the disposition of all matters that are resolved in open court.

At present, New Jersey statutory law also authorizes private prosecutions on a discretionary basis, by leave of the municipal court judge and with the consent of the prosecutor as otherwise authorized by the Rules of Court.[10] The Legislature's reliance on the Rules of Court in the statutory law would seem to recognize that this discretionary

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[8] In re Loigman, 183 N.J. 133, 140 (2005) ("Private prosecutions in municipal court are a permissible, R. 7:8-7(b), but not favored, practice." Fn 1) See State v. Storm, 141 N.J. 245, 252-54, 661 *A.*2d 790 (1995); State v. Ward, 303 N.J.Super. 47, 52, 696 A.2d 48 (App.Div.1997)." Footnote 1); State v. Valentine, 374 N.J.Super. 292, (App. Div. 2005), State v. Clark, 162 N.J. 201 (1998) and State v. Dwyer, 229 N.J. Super. 531 (App. Div. 1989).

[9] For example, see Gardner v. State, 55 N.J.L. 17, 33, 26 A. 30 (1892) where private prosecutions are described as "the settled practice in this State."

[10] N.J.S.A. 2B:25-5(b) "A municipal prosecutor may, with the approval of the court and pursuant to the Rules of Court, authorize private attorneys to prosecute citizen complaints filed in the municipal court. A municipal prosecutor may, with the approval of the court, decline to participate in municipal court proceedings in which the defendant is not represented by counsel.

The court shall afford the citizen complainant an opportunity to be heard prior to determining whether to approve a municipal prosecutor's decision to authorize a private attorney to prosecute a citizen complaint or to decline to participate in a municipal court proceeding in which the defendant is not represented by counsel. When the municipal prosecutor declines to prosecute, the prevailing complainant may make an application to the court for counsel fee reimbursement to be paid out of applicable fines, but such reimbursement shall not exceed the amount of the applicable fines. Upon a finding that a conflict of interest precludes a municipal prosecutor from participating in a proceeding, the court shall excuse the municipal prosecutor and may, in such a case, request the county prosecutor to provide representation in accordance with section 6 of this act unless the municipality has provided for alternative representation."

manner of prosecuting cases in municipal court is controlled by and may be modified or eliminated by an amendment to the Rules.

In studying the revision of R. 7:8-7(b), the Committee considered that the responsibility for the prosecution of criminal offenses in New Jersey is vested in the Attorney General and county prosecutors.[11] Municipal prosecutors are subordinate to the Attorney General and the county prosecutor and may be replaced by either of them when prosecuting a case.[12] However, it is unclear what authority, if any, the Attorney General or county prosecutor maintains over private prosecutors. Moreover, it is equally unclear whether the special ethical responsibilities of municipal prosecutors[13] also apply to private attorneys who appear in municipal court to prosecute a case on behalf of a private client.

The proposed amendment to R. 7:8-7(b) was presented to the Criminal Practice Committee for its consideration. That Committee agreed that, given the ongoing efforts of the judiciary and the legislature to enhance the professionalism of municipal courts, the use of private municipal prosecutors should be eliminated. The Criminal Practice Committee suggested, however, that in order to give municipal prosecutors time to adjust to this change to municipal court practice, the effective date should be set for January 1, 2008.

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[11] N.J.S.A. 2A:158-4 and N.J.S.A. 2A:158-5.

[12] N.J.S.A. 2B:25-7.

[13] "It is recognized that it is not the municipal prosecutor's function merely to seek convictions in all cases. The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is done and the truth is revealed in each individual case. The goal should be to achieve individual justice in individual cases," Guidelines for the Operation of Plea Agreements in the Municipal Courts of New Jersey. Pressler, current Rules Governing the Courts of the State of New Jersey, Supreme Court Comment on Appendix to Part VII at 2135 (2007).

The Committee also considered the issue of utilizing video links for trials or other municipal court events. Under R. 7:8-7(a) a defendant must either appear in court in person or via video link. However, in order to assure the defendant's active participation in his own defense and safeguard his right of confrontation, the Committee has proposed an amendment to R. 7:8-7(a) which will permit the use of a video link for trials and motions to suppress evidence only with the affirmative consent of the defendant, coupled with a voluntary waiver of his right to be present in the court room for these particular court events. The proposed amendments to R. 7:8-7 provides the following.

7:8-7. Appearances; Exclusion of the Public; Appearance by Video Link

(a) Presence of Defendant. Except as otherwise provided by R. 7:6-1(b) R. 7:6-3, and R. 7:12-3**,** or this rule, the defendant shall be present at every stage of the proceedings and at the imposition of sentence unless excused by the Judge because of undue hardship. A defendant may also be present for court events by means of a video link as approved by the Administrative Office of the Courts. In the event of a trial or motion to suppress evidence, a video link shall only be used with the defendant's affirmative consent and voluntary waiver on the record of the right to be present personally in court.

If the defendant is absent voluntarily without consent of the Judge after a proceeding has begun in the defendant's presence or the defendant fails to appear at the proceeding without leave of the court after having been informed in open court of the time and place of the proceeding, the proceeding may continue to and including entry of judgment. A corporation, partnership or unincorporated association shall appear by its attorney unless an appearance on its behalf by an officer or agent has been permitted pursuant to R. 7:6-2(a)(2). The defendant's presence is not, however, required at a hearing on a motion for reduction of sentence.

(b) Appearance for the Prosecution. The municipal prosecutor, municipal attorney, Attorney General, county prosecutor, or county counsel, as the case may be, may appear in any municipal court in any action on behalf of the government and conduct the prosecution either on the court's request or on the request of the respective public official. The court may also, in its discretion and in the interest of justice, direct the municipal prosecutor **[**, if there is one, to represent the government or may permit a private prosecutor**]** to represent the government. **[**A prosecutor may, however, be so permitted only if the court has first

reviewed the attorney certification submitted on a form prescribed by the Administrative Director of the Courts, ruled on the contents of the certification, and granted the attorney's motion to act as private prosecutor for good cause shown. The finding of good cause shall be made on the record.**]**

(c) No change.

Note: Source—R. (1969) 7:4-2(g). Adopted October 6, 1997 to be effective February 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (b) amended _____, 2007, to be effective _____, 2007.

4. Proposed Amendments to R. 7:10-2(g)(1) – Post Conviction Relief

In State v. Hrycak, 184 N.J. 351 (2005), this Court strongly endorsed the continuing vitality of the post-conviction procedures it first announced in State v. Laurick, 120 N.J. 1 (1990). At the time of the Court's decision in Laurick, the Rules of Court did not provide for post-conviction relief in municipal court. In essence, the Laurick decision initially authorized the post-conviction relief procedure in municipal court. Thereafter, in 1997, this Court promulgated R. 7:10-2, which formally set forth the general procedures for post-conviction relief applications in municipal court.

Both Laurick and Hrycak acknowledge that there are, in essence, two types of relief capable of being sought in a post-conviction relief (PCR) proceeding in municipal court. The first type is the more traditional form of PCR proceeding (i.e., where the relief sought is to vacate the prior conviction entirely, return the case back to a plea of not guilty and have either a re-trial of the entire action or a re-entry of a plea of guilty). The second type of relief sought in a municipal court PCR proceeding is to have an enhanced custodial sentence reduced on a subsequent conviction because of a failure to have a pro se defendant advised of the right to counsel or to have the pro se defendant advised but not fully enough in order to constitute a proper waiver of the right to counsel. (See State v. Tutolo, 2005 WL 2877777 (App. Div. 2005-unpublished)).

With the implementation of Michael's Law, the amendments to N.J.S.A. 39:4-50 on January 20, 2004, and because of the information the Committee has received concerning the procedural anomalies involved in the hearing of PCR petitions on a statewide basis, the need for statewide uniformity for filing and hearing PCR petitions in municipal court has increased.

First, the rule amendments recognize that two types of PCR petitions exist in municipal court. Accordingly, the rule has been amended to provide for the second type of PCR petition in subsection (g).

Second, the venue of a PCR petition (in the court of original jurisdiction for all PCR petitions) has now been clarified in the rules.

Third, the contents of a petition that a defendant seeking PCR must present to the court in writing has been clarified in subsection (f).

Fourth, since the imposition of a jail term has become mandatory under Michael's Law for third or subsequent offenders,[14] the time for the second type of PCR proceeding is not limited to five years from the original date of conviction, but rather may be filed at any time following the original conviction.

It should be noted that the proposed amendments to R. 7:10-2 complement the proposed amendment to R. 7:6-2(a)(1). If there is a need to resort to a PCR petition, the amendments to R. 7:10-2, as proposed, will clarify the procedure to be used in the hearing of those petitions in municipal court.

[14] N.J.S.A. 3a:4-50(a)(3); N.J.S.A. 39:4-51; State v. Luth, 383 N.J. Super. 512 (App. Div. 2006); see October 25, 2006 Memorandum from Philip S. Carchman, J.A.D., to Municipal Court Judges regarding Sentencing of Third or Subsequent DWI Offenders – State v. Luthe and "Michael's Law."

7:10-2. Post-Conviction Relief

(a) No change.

(b) No change.

(c) No change.

(d) No change.

(e) No change.

(f) Procedure.

(1) The municipal court administrator shall make an entry of the filing of the petition in the proceedings in which the conviction took place and, if it is filed pro se, shall forthwith transmit a copy to the municipal prosecutor. An attorney filing the petition shall serve a copy on the municipal prosecutor before filing.

(2) The petition shall be verified by defendant and shall set forth with specificity the facts upon which the claim for relief is based, the legal grounds of the complaint asserted and the particular relief sought. The petition shall include the following information:

(A) the date, docket number and contents of the complaint upon which the conviction is based and the municipality where filed;

(B) the sentence or judgment complained of, the date it was imposed or entered, and the name of the municipal court judge then presiding;

(C) any appellate proceedings brought from the conviction, with copies of the appellate opinions attached;

(D) any prior post-conviction relief proceedings relating to the same conviction, including the date and nature of the claim and the date and nature of disposition, and whether an appeal was taken from those proceedings and, if so, the judgment on appeal;

(E) the name of counsel, if any, representing defendant in any prior proceeding relating to the conviction, and whether counsel was retained or assigned; and

(F) whether and where defendant is presently confined. A separate memorandum of law may be submitted.

(G) In addition, the moving papers in support of such an application shall include, if available, records related to the underlying conviction, including, but not limited to, copies of all complaints, applications for assignment of counsel, waiver forms and transcripts of the defendant's first appearance, entry of guilty plea and all other municipal court proceedings related to the conviction sought to be attacked. The petitioner shall account for any unavailable records by way of written documentation from the municipal court administrator or the custodian of records, as the case may be.

(3) Amendments of the petitions shall be liberally allowed. Assigned counsel may, as a matter of course, serve and file an amended petition within 25 days after assignment. Within 30 days after service of a copy of the petition or amended petition, the municipal prosecutor shall serve and file an answer to the petition or move on ten days' notice for dismissal. If the motion for dismissal is denied, the government's answer shall be filed within fifteen days after entry of the order denying the dismissal.

(4) A defendant in custody shall be present in court if oral testimony is adduced on a material issue of fact within the defendant's personal knowledge. A defendant in custody may otherwise be present in court only in the judge's discretion.

(5) In making a final determination on a petition, either on motion for dismissal or after hearing, the court shall state separately its findings of fact and conclusions of law and shall enter judgment or sentence in the conviction proceedings and any appropriate provisions as to rearraignment, retrial, custody, bail, discharge, correction of sentence or as may otherwise be required.

(g) Petition to Obtain Relief from an Enhanced Custodial Term Based upon a Prior Conviction

(1) Venue – A post-conviction petition to obtain relief from an enhanced custodial term based upon a prior conviction shall be brought in the court where the prior conviction was entered.

(2) Time Limitations - A petition for post-conviction relief under this section may be filed at any time.

(3) Procedure – A petition for post-conviction relief sought under this section shall be in writing and shall conform to the requirements of R. 7:10-2(f). In addition, the moving papers in support of such an application shall include, if available, records related to the underlying conviction, including, but not limited to, copies of all complaints, applications for assignment of counsel, waiver forms and transcripts of the defendant's first appearance, entry of guilty plea and all other municipal court proceedings related to the conviction sought to be attacked. The petitioner shall account for any unavailable records by way of written documentation from the municipal court administrator or the custodian of records, as the case may be.

(4) Appeal - Appeals from a denial of post-conviction relief from the effect of a prior conviction shall be combined with any appeal from proceedings involving the repeat offense. Appeals by the State may be taken under R. 3:23-2(a)

Note: Source-Paragraph (a): R. (1969) 3:22-1; paragraph (b)(1),(2): R. (1969) 3:22-12; paragraph (b)(3): R (1969) 3:22-3; paragraph (c): R. (1969) 7:8-1, 3:22-2; paragraph (d)(1): R. (1969) 3:22-4; paragraph (d)(2): R. (1969) 3:22-5; paragraph (e): R. (1969) 3:22-6(a),(c),(d); paragraph (f)(1): R. (1969) 3:22-7; paragraph (f)(2): R. (1969) 3:22-8; paragraph (f)(3): R. (1969) 3:22-9; paragraph (f)(4): R. (1969) 3:22-10; paragraph (f)(5): R. (1969) 3:22-11. Adopted October 6, 1997 to be effective February 1, 1998; paragraph (f)(2) amended _____, 2007 to be effective _____, 2007. Paragraph (g) new section, added _____, 2007 to be effective _____, 2007.
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5. Amendment to R. 7:13-2. Stay

The Committee noted that R. 7:13-2, as currently written, provides no authority for a municipal court judge to stay a jail sentence pending appeal. Because of the unique severity of incarceration[15], the Committee suggests that R. 7:13-2 be kept as flexible as possible so as to give judges the discretionary authority to stay any aspect of a sentence, including a term of incarceration, pending appeal.

The proposed amendment to R. 7:13-2 is as follows.

[15] "To this we would add a special note of concern when we deal with imprisonment. There is a difference between money and freedom. No one can deny that the loss of liberty, next to the loss of life, is the greatest deprivation that a free citizen may suffer. In addition, imprisonment poses an extraordinary threat to the person who is imprisoned, both of violence in the prison setting, and the unknown and unanticipated reaction of the prisoner. And, for an officer of the court, the indignity of imprisonment may be regarded as perhaps the greatest loss," (citation omitted), In re Daniels, 118 N.J. 51, 65.

7:13-2. Stay

Notwithstanding R. 3:23-5, [A] a sentence [to pay a fine, a fine and costs, a forfeiture, an order for probation, or a revocation of the license to operate a motor vehicle] or a portion of a sentence may be stayed by the court in which the conviction was had or to which the appeal is taken on such terms as the court deems appropriate.

6. Amendment to R. 7:3-1(b)(2) Procedure After Arrest

Both the Rules of Court[16] and New Jersey statutory law[17] vest authority in court administrators and their deputies to issue process in the form of summonses and arrest warrants when authorized by the judge of the municipal court. As a result, court administrators and their deputies are intimately involved with issuing process in the form of arrest warrants following apprehension of a criminal suspect by the police. These same judicial officers are also called upon to issue arrest warrants in advance when the police seek to apprehend a person not yet in custody.

A technical requirement in R. 7:3-1(b)(2) imposes a restriction on the ability of court administrators and deputies to issue process. The rule limits the issuance of process in those cases where the police seek a warrant for a defendant who has been arrested without a warrant and is in custody. When this occurs, the administrator or deputy is authorized to issue process only on offenses for which he or she may also set bail.[18] By contrast, no such limitation exists when the court administrator or deputy is called upon to authorize an arrest warrant for a person who is not yet in custody.[19] In practice, this means that a court administrator court may lawfully issue an arrest warrant for a murder suspect if the defendant is at large but would be precluded from issuing an arrest warrant after the suspect has been arrested by the police without a warrant.

The Committee recommends that R. 7:3-1(b)(2) be amended to eliminate this anomaly. The proposed amendment will conform R. 7:3-1(b)(2) to R. 7:2-1(c) and to the statutory law as set forth in N.J.S.A. 2B:12-21(a).

R. 7:3-1(b)(2) is amended as follows.

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[16] R. 7:2-1(c).

[17] N.J.S.A. 2B:12-21(a). "An administrator or deputy administrator of a municipal court, authorized by a judge of that court, may exercise the power of the municipal court to administer oaths for complaints filed with the municipal court and to issue warrants and summonses."

[18] Generally speaking, a court administrator and a deputy administrator may not set bail for any of the serious offenses set forth under R. 3:26-2(a).

[19] See generally R. 7:2-1(c).

7:3-1. Procedure After Arrest

(b)(2) Probable Cause; Issuance of Process; Bail. If a complaint-warrant form (CDR-2) is prepared, the law enforcement officer shall, without unnecessary delay, but in no event later than 12 hours after arrest, present the matter to a judge, or in the absence of a judge, to a municipal court administrator or deputy court administrator who has been granted authority by the judge to issue process **[**set bail for the offense charged**]**. The judicial officer shall determine whether there is probable cause to believe that the defendant has committed an offense. If probable cause is found, a summons or warrant may issue, but if the judicial officer determines that the defendant will appear in response to a summons, a summons shall be issued consistent with the standard prescribed by R. 7:2-2(b). If a warrant is issued, bail shall be set without unnecessary delay, but in no event later than 12 hours after arrest. The finding of probable cause shall be noted on the face of the summons or warrant. If no probable cause is found, no process shall issue and the complaint shall be dismissed by the judge.

7. Amendment to R. 7:6-2 – State v. Tutolo (App. Div. 2005 – Unpublished)

In State v. Tutolo, (App. Div. 2005 – Unpublished)[20] the Appellate Division found that the municipal court had failed to elicit a knowing waiver of counsel from the defendant and thus had violated the defendant's right to counsel. Based upon the holding in this case, the Committee proposed an amendment to R. 7:6-2 to ensure that in cases involving a consequence of magnitude,[21] a full and proper waiver of counsel be elicited from the defendant before a court accepts a guilty plea.

The proposed amendment to R. 7:6-2 is as follows.

[20] State v. Tutolo, 2005 WL 2877777 (App. Div. 2005).

[21] Consequences of magnitude are generally understood to include any term of incarceration, any term of driver's license suspension and a monetary sanction that exceeds $750. See Rodriguez v. Rosenblatt, 58 N.J. 281, (11971); State v. Hermanns, 278 N.J. Super. 19 (App. Div. 1994), Second Appendix to Part VII Rules of Court.

7:6-2. Pleas, Plea Agreements

(a) Pleas Allowed, Guilty Plea.

(1) Generally. A defendant may plead not guilty or guilty, but the court may, in its discretion, refuse to accept a guilty plea. Except, as otherwise provided by R. 7:6-2, R. 7:6-3 and R. 7:12-3, the court shall not accept a guilty plea without first addressing the defendant personally and determining by inquiry of the defendant and, in the court's discretion, of others, that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea and that there is a factual basis for the plea. Prior to accepting a guilty plea in those cases where an unrepresented defendant faces a consequence of magnitude, the judge shall make a finding on the record that the court is satisfied that the defendant's waiver of the right to counsel is knowing and intelligent. Upon the request of the defendant, the court may, at the time of the acceptance of a guilty plea, order that the plea shall not be evidential in any civil proceeding. If a defendant refuses to plead or stands mute or if the court refuses to accept a guilty plea, the court shall enter a plea of not guilty. If a guilty plea is entered, the court may hear the witnesses in support of the complaint prior to judgment and sentence and after such hearing may, in its discretion, refuse to accept the plea.

8. Amendment to R. 7:12-4 – Violations Bureau; Designation; Function

The Committee noted a discrepancy in R. 7:12-4(a). A municipal court, a joint municipal court or a central municipal court may establish a violations bureau and designate a violations clerk. The rule permits a violations clerk to be the municipal court administrator, the deputy court administrator or, with the prior approval of the Supreme Court, any other appropriate official or employee of the municipality, except an elected official or officer or employee of a police department where the court is held. In addition any other suitable and responsible person may be the violations bureau clerk if approved by the Supreme Court.

The second part of the rule permits the judge designated to preside over the Special Civil Part of the Superior Court *or a joint or central municipal court* to designate the court administrator, deputy court administrator, other employee of the court or other responsible person as the violations clerk. The requirements are more lenient.

The Committee did not see a valid reason to have different requirements for the violations bureau clerk for a municipal court than for a joint or central municipal court. Therefore, the Committee recommends revising R. 7:12-4(a) as follows.

7:12-4. Violations Bureau; Designation; Functions

(a) Establishment. If the court determines that the efficient disposition of its business and the convenience of defendants so requires, it may establish a violations bureau and designate the violations clerk. The violations clerk may be the municipal court administrator, the deputy court administrator, other employee of the court or, with the prior approval of the Supreme Court, any other appropriate official or employee of the municipality, except an elected official or officer or employee of a police department in which the court is held. If no municipal official or employee of the municipality is available, any other suitable and responsible person may be appointed subject to the prior approval of the Supreme Court. The judge designated to preside over **[**the Special Civil Part of the Superior Court or**]** a joint or central municipal court may establish a **[**Violations Bureau**]** violations bureau. The violations clerk may be the municipal court administrator, the deputy court administrator, other employee of the court or, with the prior approval of the Supreme Court, any other appropriate official or employee of the municipality or municipalities comprising the joint court, except an elected official or officer or employee of a police department in which the court is held. If no municipal official or employee of the municipality is available, any other suitable and responsible person may be appointed subject to the prior approval of the Supreme Court. **[**and may similarly designate the court administrator, deputy court administrator, other employee of the court or other responsible person as the violations clerk.**]** The violations clerk shall accept appearances, waiver of trial, pleas of guilty and payments of fines and costs in non-indictable offenses, subject to the limitations as provided by law or [this rule] Part VII of the Rules of Court or the Statewide Violations Bureau Schedule approved by the Supreme Court. The violations clerk shall serve under the direction and control of the designating court.

(b) No change.

(c) No change.

(d) No change.

Source-Paragraph (a): R. (1969) 7:7-1; paragraph (b): R. (1969) 7:7-2; paragraph (c): R. (1969) 7:7-3; paragraph (d): R. (1969) 7:7-4. Adopted October 6, 1997 to be effective February 1, 1998; paragraph (d) amended July 5, 2000 to be effective September 5, 2000; amended _____ to be effective _____.

9. Proposed Revision to R. 7:10-1 – Time Limitation for a New Trial

The Committee noted that in 1998, the time limitation for a new trial in R. 1:7-4 was amended from 10 days to 20 days. However, the corresponding Part VII R. 7:10-1, has not been changed and currently maintains the 10-day limitation. The Committee proposes that the time limitation in R. 7:10-1 be amended from 10 days to 20 days to conform to the limitation in R. 1:7-4.

A copy of the proposed rule is as follows.

7:10-1. New Trial

On defendant's motion, the court may, pursuant to the time limitations of this rule, grant the defendant a new trial if required in the interest of justice. The court may vacate the judgment if already entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial, based on the ground of newly discovered evidence, shall be made within two years after entry of a final judgment. A motion for a new trial on the grounds of fraud or lack of jurisdiction may be made at any time. A motion for a new trial, based on any other grounds, shall be made within **[**ten**]** twenty days after the entry of judgment of conviction or within such further time as the court fixes during the **[**ten**]** twenty-day period.

10. New Rule – R. 7:6-3. Guilty Plea by Mail in Non-Traffic Offenses

The Committee proposed R. 7:6-3 (Guilty Plea by Mail in Non-Traffic Matters), a new rule that would allow defendant to plead guilty by mail for non-traffic matters.[22] The purpose of the rule is to offer defendants the opportunity to plead guilty to certain non-traffic matters, where a personal appearance would constitute an undue hardship, such as illness, physical incapacity, substantial distance to travel or incarceration of the defendant.

The proposed new rule is as follows.

[22] See Appendix 1 for an exemplar of the "Guilty Plea by Mail-Certification" form.

7:6-3. Guilty Plea by Mail in Non-Traffic Offenses

(a) Entry of Guilty Plea by Mail. In all non-traffic and non-parking offenses, except as limited below, upon consideration of a written application, supported by certification, with notice to the complaining witness and prosecutor, and at the time and place scheduled for trial, the judge may permit the defendant to enter a guilty plea by mail if the court is satisfied that a personal appearance by the defendant would constitute an undue hardship such as illness, physical incapacity, substantial distance to travel or incarceration. The guilty plea by mail form may also include a statement for the court to consider when deciding upon the appropriate sentence. A guilty plea by mail shall not be available for the following:

(i) cases involving the imposition of a mandatory term of incarceration upon conviction, unless defendant is presently incarcerated, and the mandatory term of incarceration would be served concurrently, and would not extend the period of incarceration;

(ii) cases involving an issue as to the identity of the defendant;

(iii) cases involving acts of domestic violence;

(iv) cases where the prosecution intends to seek the imposition of a custodial term in the event of a conviction, unless defendant is presently incarcerated, and the proposed term of incarceration would not extend the period of incarceration and would be served concurrently; and

(v) any other case where excusing the defendant's appearance in municipal court would not be in the interest of justice.

(b) Plea Form-Certification. The Guilty Plea by Mail shall be submitted on a form approved by the Administrative Director of the Courts.

(c) Judgment. The court shall send the defendant and complaining witness a copy of its decision by ordinary mail.

11. Revision to R. 7:12-3 Statement in Mitigation or Defense by Certification; Judgment – Pleas of Not Guilty and Pleas of Guilty by Mail in Certain Traffic and Parking Offenses

The Committee proposed amending the title of R. 7:12-3 to "Pleas of Not Guilty and Pleas of Guilty by Mail in Certain Traffic and Parking Offenses." This title more accurately suggests to users of the Rules of Court the purpose and procedures set forth in this rule.

The committee also proposed a comprehensive amendment to the procedures in R. 7:12-3 that would clarify when the procedure may be used and what should be included in the pleadings when a defendant wishes to plead guilty by mail or enter a defense by mail.

The proposed amendment is as follows.

[7:12-3. <u>Statement in Mitigation or Defense by Certification; Judgment</u>

(a) Statement in Mitigation or Defense by Certification: In all traffic cases, except those involving indictable offenses, accidents resulting in personal injury, operation of a motor vehicle while under the influence of intoxicating liquor or a narcotic or habit-producing drug or permitting another person who is under such influence to operate a motor vehicle owned by the defendant or in the defendant's custody or control, reckless driving or leaving the scene of an accident, the court may permit the defendant to present a statement in defense or mitigation of penalty imposed upon conviction or enter a guilty plea by certification, provided the court determines that it would be an undue hardship on the defendant to require appearance in person at the time and place set for trial, and the defendant, having been fully informed of his or her right to a reasonable postponement of the trial, waives in writing the right to be present at the trial.

(b) Certification Language: The certification shall include the following language and must be signed by the defendant, "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

(c) Judgment: If a defendant presents a statement in mitigation or defense by certification, the court shall send the defendant a copy of the judgment by ordinary mail.**]**

<u>7:12-3 Pleas of Not Guilty and Pleas of Guilty by Mail in Certain Traffic or Parking Offenses</u>

<u>a. In all traffic or parking offenses, except as limited below, a defendant may resolve the case by way of a guilty plea by mail or may plead not guilty and submit a written defense for use at trial by mail. The judge may permit the defendant to enter a guilty plea by mail, or plead not guilty and submit a written defense for use at trial, if a personal appearance by the defendant would constitute an undue hardship such as illness, physical incapacity, substantial distance to travel or incarceration. This procedure shall not be available in the following types of cases:</u>

(i) traffic offenses or parking offenses that require the imposition of a mandatory loss of driving privileges upon conviction;

(ii) traffic offenses or parking offenses involving an accident that resulted in personal injury to anyone other than the defendant;

(iii) traffic offenses or parking offenses that are related to non-traffic matters which are not resolved;

(iv) any other traffic offense or parking offense where excusing the defendant's appearance in municipal court would not be in the interest of justice.

b. Plea of Guilty by Mail

(i) A defendant may enter a plea of guilty to a traffic offense or parking offense by mail shall include:

(a) an acknowledgement that defendant committed the traffic violation or parking offense set forth in the complaint(s);

(b) a waiver of the defendant's right to contest the case at a trial, the right to personally appear in court and, if unrepresented by an attorney, the right to be represented by an attorney;

(c) an acknowledgement by the defendant that the plea of guilty is being entered voluntarily;

(ii) A plea of guilty to a traffic offense or parking offense by mail may also include a statement for the court to consider when deciding upon the appropriate sentence.

c. Plea of Not Guilty by Mail

(i) A defendant may enter a plea of not guilty to a traffic offense or parking offense and submit any defense to the charge(s) by mail. Any defense to a traffic offense submitted by mail shall include the following:

(a) A waiver of the defendant's right to personally appear in court to contest the charge(s) and, if unrepresented by an attorney, a waiver of the right to represented by an attorney;

(b) Any factual or legal defenses that the defendant would like the court to consider;

(ii) A defense to a traffic offense or parking offense submitted by mail may also include a statement for the court to consider when deciding upon the appropriate sentence in the event of a finding of guilty.

d. Any forms necessary to implement the provisions of this rule, may be approved by the Administrative Director of the Court.

e. Judgment: If a defendant elects to enter a plea of guilty or enter a plea of not guilty under the procedures set forth in this rule, the court shall send the defendant a copy of the judgment by ordinary mail.

12. Amendment to R. 7:5-2(c) Motion to Suppress Evidence – Order Denying Suppression

A recommendation was made to the Criminal Practice Committee that R. 3:23-2 be amended to permit a defendant, who seeks a conditional discharge, to appeal a denial of a motion to suppress without a finding of guilt. The Criminal Practice Committee agreed to the Municipal Court Practice Committee's recommendation and amended R. 3:23-2. (See page 40 of this report.) In order for the Municipal Court Practice Committee to conform its practice to the proposed change in R. 3:23-2, the Committee recommended that R. 7:5-2 be amended to permit the court to grant a motion for a conditional discharge without a plea of guilty.

The proposed amendment to R. 7:5-2(c) provides the following:

7:5-2. Motion to suppress evidence

(a) No change.

(b) No change.

(c) Order; Stay.

(1) Order Granting Suppression. An order granting a motion to suppress evidence shall be entered immediately upon decision of the motion. Within ten days after its entry, the municipal court administrator shall provide a copy of the order to all parties and, if the county prosecutor is not the prosecuting attorney, also to the county prosecutor. All further proceedings in the municipal court shall be stayed pending a timely appeal by the State, pursuant to R. 3:24. The property that is the subject of the suppression order shall, if not otherwise subject to lawful detention, be returned to the person entitled to it only after exhaustion by the State of its right to appeal.

(2) Order Denying Suppression. An order denying suppression may be reviewed on appeal from an ensuing judgment of conviction pursuant to R. 3:23 whether the judgment was entered on a guilty plea, **[**or**]** on a finding of guilt following trial or on the court granting a motion for conditional discharge without a plea of guilty.

(d) No change.

Source-Paragraphs (a),(b),(c): R. (1969) 7:4-2(f); paragraph (d): R. (1969) 3:5-7(f). Adopted October 6, 1997 to be effective February 1, 1998. Paragraph (c)(2) amended _____ 2007, effective _____ 2007.

II. OTHER RECOMMENDATIONS

1. Appeal of the Dismissal of Municipal Court Complaints

The Committee received a number of inquiries concerning the right of a citizen complainant to appeal a case that has been dismissed by the court for a lack of probable cause or upon the application of the municipal prosecutor as a matter of discretion. At present, R. 7:2-1(a) mandates that the municipal court administrator or deputy court administrator accept for filing every complaint made by every person. Upon receiving the complaint, the administrator or deputy court administrator, if authorized, may make a probable cause determination. If probable cause is found, process will issue. However, if no probable cause is found, the matter is then referred to the municipal court judge to determine whether there is sufficient probable cause to issue process. If the judge finds no probable cause to believe an offense has occurred, the complaint is dismissed by the court.

There is a practice in some vicinages that permits private citizens to appeal complaints that are dismissed by the court for lack of probable cause or dismissed by the prosecutor exercising prosecutorial discretion. The Committee noted that in State v. Vitiello, 377 N.J. Super. 452 (App. Div. 2005) it was determined that a complainant in a criminal prosecution has no right to appeal a dismissal of the case to the Appellate Division of the Superior Court of New Jersey. This case suggested that the only person who has standing to appeal a dismissal of a case is the prosecutor as a representative of the State.[23]

The Municipal Court Practice Committee recommended that the Criminal Practice Committee seek the amendment of R. 3:24 (Appeals From Orders in Courts of Limited Criminal Jurisdiction) to clarify that only a public prosecutor can appeal a case that has been dismissed on a pre-trial basis. The Criminal Practice Committee agreed with the Municipal Court Practice Committee and revised the language of R. 3:24. The revisions to the rule are as follows.

[23] An identical result was reached by a different panel of the Appellate Division in an unpublished decision related to the dismissal of a municipal court case. See State v. Preto, 2006 WL 66475 (App. Div. 2006).

3:24. APPEALS FROM ORDERS IN COURTS OF LIMITED CRIMINAL JURISDICTION

(a) . . No Change.

(b) [The prosecuting attorney] Only the Attorney General, County Prosecutor, or municipal prosecutor may appeal, as of right, [a pre-trial or post-trial judgment dismissing a complaint and, notwithstanding the provisions of paragraph (a),] the dismissal of a complaint or an order suppressing evidence entered in a court of limited criminal jurisdiction.

(c) . . . No Change.

(d) . . . No Change.

Note: Adopted February 25, 1969 to be effective September 8, 1969. Caption amended, paragraph designation added, former rule amended and designated as paragraphs (a) and (c), and new paragraph (b) adopted July 16, 1979 to be effective September 10, 1979; paragraphs (b) and (c) amended, paragraph (d) added June 9, 1989 to be effective June 19, 1989; paragraph (c) amended July 10, 1998 to be effective September 1, 1998[.]; paragraph (b) amended to be effective _____.

2. Proposed Amendments to R. 7:8-7 – Appearance; Exclusion of the Public – Right to an Attorney at Probable Cause Hearings

The Committee discussed the Supreme Court's decision State v. Dennis, 185 N.J. 300 (2005) in relation to Municipal Court practice. In that case, the Atlantic City Municipal Court conducted a probable cause hearing in which the defendant was not represented by counsel. Probable cause was found, and the defendant was subsequently found guilty. On appeal, the defendant contended that his lack of representation at the probable cause hearing was a violation of his constitutional rights guaranteed by the Sixth Amendment. The Appellate Division held that the defendant was not entitled to counsel at his hearing because his right to counsel did not attach prior to indictment. The Supreme Court granted certification and, in a per curiam decision, ruled that probable cause hearings in New Jersey are preliminary hearings that require representation by counsel, pursuant to Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970). The decision required that an attorney be provided to indigent defendants at probable cause hearings.

The Committee noted that probable cause hearings in municipal court are informal and do not require notification of the defendant or the complaining witness. They are conducted by the court administrator, deputy court administrator or judge based upon the written statement under oath of the complaining witness.

The Committee also noted that the Rules of Court suggest that a defendant only has a right to a formal, adversarial probable cause hearing on indictable matters. The opinion in Dennis did not provide guidance on whether representation for an indigent defendant in municipal court who desires a formal, adversarial probable cause hearing on an indictable matter would be provided by the municipal public defender, the office of the State Public defender or appointed counsel. With these issues in mind, this matter was brought to the attention of the Criminal Practice Committee.

Subsequently, the Municipal Court Practice Committee requested that the Criminal Practice Committee seek to amend R. 3:4-3 so as to eliminate municipal courts from maintaining the authority to conduct probable cause hearings in indictable matters. The Criminal Practice Committee agreed that there are not a large number of probable cause hearings held in either the Municipal Court or Superior Court. Moreover, the proposed amendment is not designed to change an individual's right or non-right to a probable cause hearing. Rather, the proposal clarifies where the hearings should be held and who should conduct them. There was no opposition to the proposed amendment subject to explaining in the commentary that this proposed amendment is a clarification of a current practice, where it exists, and that it is not designed to resurrect a practice that no longer exists.

3. Appeal of Motions to Suppress

The Committee brought to the attention of the Criminal Practice Committee certain procedural anomalies related to the interplay among motions to suppress evidence, conditional discharges and municipal appeals. By way of background, a defendant who has been charged with a drug offense may challenge the constitutionality of a seizure of evidence by the police in a motion to suppress evidence under R. 7:5-2. The defendant's right to appeal from an adverse ruling on the motion in such cases is preserved under R. 7:5-2(c)(2). Following the denial of the motion to suppress, if the defendant is convicted, he or she may appeal the municipal court's ruling, as well as the court's trial decision and sentence under R. 3:23-2.

Defendants charged with drug offenses under Chapters 35 and 36 of the New Jersey Code of Criminal Justice who meet the statutory qualifications may seek diversion from the criminal justice system through the conditional discharge program under N.J.S.A. 2C:36A-1. This option may be exercised by an eligible defendant following the denial of a motion to suppress evidence. Moreover, such a defendant may request a diversion following a finding of guilty after trial, or following either a plea of guilty or not guilty.[24] However, in those instances where there has been a plea or finding of guilty, by statute, no judgment of conviction is entered pending the defendant's completion of the term of supervisory treatment required by the court.[25] Thus, without a judgment of conviction, technically, there is no jurisdiction for the Superior Court to entertain an appeal under R. 3:23-2. For this reason, in some vicinages, a defendant who seeks a conditional discharge following the denial of a motion to suppress evidence cannot appeal the motion judge's ruling.

Another anomaly related to these issues involves, what in practice becomes the loss of driving privileges as a condition of appeal to the Superior Court. A defendant who seeks a conditional discharge following a plea or finding of guilty in municipal court is subject to a mandatory loss of driving privileges ranging from six months to two years.[26] Thus, in

[24] N.J.S.A. 2C:36A-1(a).
[25] N.J.S.A. 2C:36A-1(a)(2).
[26] N.J.S.A. 2C:36A-1(a)(2).

those vicinages where the Superior Court will consider an appeal of a motion to suppress following a plea or finding of guilt without the formal entry of conviction, the defendant must subject himself to loss of driving privileges as the price of the appeal. By contrast, after the denial of a motion to suppress, a defendant who seeks a conditional discharge without a license suspension may do so by maintaining a plea of not guilty. [27] However, without an underlying plea or finding of guilty, the Superior Court has no jurisdiction under R. 3:23-2 to consider the defendant's appeal.

In order to address these procedural anomalies, a presentation detailing the issues was made to the Criminal Practice Committee. The Criminal Practice Committee agreed with the recommendations of the Municipal Court Practice Committee and subsequently proposed the following amendment to R. 3:23-2.

[27] N.J.S.A. 2C:36A-1(a)(2).

3:23-2. Appeal; How Taken; Time

The defendant may appeal from [a defendant's legal representative or other person aggrieved by] a judgment of conviction, [or the defendant or State, if aggrieved by] a final post-judgment order entered by a court of limited jurisdiction, or an order denying a motion to suppress evidence followed by granting the suspension of proceedings pursuant to N.J.S.A. 2C:36A-1 [shall appeal there from] by filing a notice of appeal with the [clerk] court administrator of the court below within 20 days after the entry of judgment or order. An appeal by the State challenging an illegal sentence, a final post-judgment order or granting the suspension of proceedings pursuant to N.J.S.A. 2C:36A-1 shall be filed with the court administrator within 20 days after the entry of judgment or order. Within five days after the filing of the notice of appeal, one copy thereof shall be served on the prosecuting attorney, as hereinafter defined, and one copy thereof shall be filed with the Criminal Division Manager's office together with the filing fee therefore and an affidavit of timely filing of said notice with the clerk of court below and service on the prosecuting attorney (giving the prosecuting attorney's name and address). On failure to comply with each of the foregoing requirements, the appeal shall be dismissed by the Superior Court, Law Division without further notice or hearing. However, if the appeal is from a final judgment of the Superior Court arising out of a municipal court matter heard by a Superior Court judge sitting as a municipal court judge, the appeal shall be to the Appellate Division in accordance with R. 2:2-3(a)(1) and the time limits of R. 2:4-1(a) shall apply.

Note: Source—R. 1:3-1(c), 1:27B(d), 3:10-2, 3:10-5. Amended November 22, 1978 to be effective December 7, 1978; amended July 11, 1979 to be effective September 10, 1979; amended November 5, 1986 to be effective January 1, 1987; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 12, 2002 to be effective September 3, 2002; amended July 28, 2004 to be effective September 1, 2004[.]; amended _____ to be effective _____.

4. Deputy Court Administrators Issuing Warrants

The Committee was asked to review the authority of deputy court administrators to issue warrants. There was some concern about the ability of deputy court administrators to resist a police officer's insistence that a warrant be issued on a defendant. The Committee discussed this matter in detail. The Committee noted that the authority of deputy court administrators to issue process in the form of an arrest warrant has long been part of the procedural fabric of our law. The practice was commonplace and reaffirmed in 1968 with the New Jersey Supreme Court's decision in State v. Ruotolo, 52 N.J. 508 (1968). In Ruotolo, the Court held that deputy court administrators were capable of making probable cause determinations because they possess the qualifications and neutral status to comport with the requirements of the Constitution.

Today, both the Rules of Court and statutory law authorize deputy court administrators to issue process in the form of an arrest warrant when given authority to do so by the municipal court judge. See R. 7:2-1(c), R. 3:2-3(a), R. 3:3-1(a)(1) and (2). (See also N.J.S.A. 2B:12-21(a) and N.J.S.A. 39:5-6).

The Committee concluded that to the extent that a verifiable problem exists, they could be addressed by increased training of deputy court administrators. This option would not require any rule changes and would have the collateral benefit of enhancing the knowledge base of the deputies in the State. Also, the Assignment Judge may always, pursuant to R. 1:33-4, issue an order requiring municipal court judges to revoke the individual grant of authority to deputy court administrators to issue arrest warrants.

III. PREVIOUSLY APPROVED RECOMMENDATIONS

1. Amendments to the Statewide Violations Bureau Schedule

During the 2004-2007 term, the Committee periodically presented proposed amendments to the Supreme Court to update the Statewide Violations Bureau Schedule. That Schedule is a listing of offenses and corresponding fines in a fixed amount that may be paid directly to the municipal court without the necessity of a court appearance. These amendments included: (1) the addition of a $1.00 assessment for all Title 39 violations pursuant to P.L. 2003, c.200, Brain Injury Research Act; (2) the removal of N.J.S.A. 39:3-29 from the list of payable offense because court appearance was required; and (3) the addition of the payable amount of $56 for N.J.S.A. 39:5B-29a ("Non-out-of-service" commercial motor vehicle violation).

These recommendations were previously approved by the Court during the 2004-2007 Committee term and are reflected in the revised Schedule now in effect.

2. Proposed Amendments to the Guidelines for the Operation of Plea Agreements in Municipal Courts

In 2000, the Supreme Court amended Guideline 4 of the Guidelines for Operation of Plea Agreements in Municipal Court to provide, "If a defendant is charged with driving under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.2) arising under the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50 offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge. Subsequently, in 2005, the Legislature amended N.J.S.A. 39:4-50 to create a second DWI offense of BAC level of greater that 0.08% but less than 0.10%. The penalty for a first-time offender of this offense would be the loss of license for three months. The Committee anticipated that because of this change, first time offenders would refuse to take a chemical breath test, which carried a penalty of six month loss of license for a first offense, and would plea to driving while intoxicated with a BAC level of greater than 0.08% but less than 0.10%. This would have the unintended effect of discouraging first time offenders from submitting to chemical breath tests and would foster a culture of plea bargaining DWI cases. To avert this, the Committee proposed that Guideline 4 be amended to provide: "No plea agreements will be allowed in which a defendant charged for a violation of N.J.S.A. 39:4-50 with a blood alcohol concentration of 0.10% or higher seeks to plead guilty and be sentenced under section (a)(1)(i) of that statute (blood alcohol concentration of 0.08% or higher, but less than 0.10%)."

Shortly after the rule was published for comments, a large number of comments were received from the bar opposing the proposed amendment to Guideline 4. In a letter dated March 24, 2005, Philip S. Carchman, J.A.D., Acting Administrative Director, requested the Committee to review and react to public comments received regarding proposed amendments. After reviewing the comments, the Committee reversed its position and recommended the proposed prohibition on plea bargaining a DWI violation with a BAC level of 0.10% to 0.08%. This recommendation was submitted to the Supreme Court.

After careful review, the Court decided that in order to avoid creating a culture of plea bargaining DWI cases, it would accept the Committee's original recommendation to prohibit plea agreements downgrading a violation of N.J.S.A. 39:4-50 with a BAC of 0.10% or higher so that a defendant could plead guilty and be sentenced under section (a)(1)(i) of that statute (blood alcohol concentration of 0.08% or higher, but less than 0.10%).

IV. RULES PROPOSED BUT NOT RECOMMENDED

1. Administrative Holds

A number of municipal court judges had requested the Committee to consider amending R. 7:8-5 (Dismissal) to allow "administrative holds." Administrative holds would be an alternative to adjudicating cases where the interest of the State is to compel the defendant to comply with an ordinance, statute or court order rather than to punish. An example would be enforcing a code violation. After much discussion it was concluded that municipal courts already have the authority to accomplish the objective of administrative holds. The procedure would require the prosecutor to request a postponement of the case pursuant to R. 7:8-3, to give the defendant time to cure or ameliorate a given problem. The court may then grant the postponement and reschedule the hearing at a future date. On the re-hearing date, if the prosecutor is satisfied with the response of the defendant, he or she may ask for the case to be dismissed and the court, if it feels it is appropriate, may grant the dismissal pursuant to R. 7:8-5. It was opined that because this authority already exists, a rule amendment was unnecessary.

2. Driving While Intoxicated Warrants

For a number of years the Committee had considered amending R. 7:2-1 to permit the issuance of warrants for DWI. As a part of its consideration of this amendment, the Committee requested an opinion from the Office of the Attorney General to determine what impact, if any, such an amendment would have on the operation procedures of police officers. Subsequently, the Attorney General's Office advised that a DWI arrest warrant would not be of any assistance to law enforcement agencies. It would, in fact, prove to be a burden to municipalities because although they would have to collect bail to ensure the appearance of defendants, they would lose money in overtime paying municipal police officers who would have to make the arrest, file a report and transport defendants to holding cells. Moreover, New Jersey case law has established that violations of N.J.S.A. 39:4-50 (DWI) are traffic offenses. The creation of a DWI warrant

may have the impact of increasing the severity of these offenses so that they would require jury trials. It was also noted that N.J.S.A. 39:5-25 gives police the authority to arrest drunk drivers and that the enactment of "John's Law" has addressed the problems associated with DWI offenders.

Based on the opinion of the Attorney General's Office, the Committee concluded that no further action should be taken on this matter and that an amendment creating a new form of process (i.e., the DWI arrest warrant) was unnecessary.

3. Examination of Bail

It was noted that the legislature had enacted P.L. 2003, c. 213 (N.J.S.A. 2A:162-13. Bail sufficiency hearings). The law permitted courts, upon the request of the prosecutor, to "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." It was suggested that R. 7:4-4 (Justification of Sureties) should be amended to accommodate this provisions of the enactment. Because the amendment would also affect municipal prosecutors, the Committee asked for an opinion from the Office of the Attorney General. The Attorney General's Office opined that this statute was intended primarily to be used by prosecutor in indictable matters to determine if bail being posted was gained through illegal activities. It was that Office's position that a rule change was unnecessary. Based upon the Attorney General's opinion, the Committee decided that R. 7:4-4 should remain unchanged.

4. Proposed Amendment to R. 7:7-7(b)(5) – Requiring Motor Vehicle Abstracts to be a Part of Discovery

There was a request that the Committee consider revising R. 7:7-7(b) to require that defense attorneys be provided with the abstracts that the municipal prosecutor will rely on at trial. It was thought that including abstracts with routine discovery would prevent unfair surprise to the defendant and would assure that parties are working with the same records. After reviewing R. 7:7-7(b), the Committee opined that the section of R. 7:7-7(b)(1), that provides that "reports or records of defendant's prior convictions" are discoverable, imply that drivers' abstracts are discoverable. Therefore, it was the consensus of the Committee that R. 7:7-7(b) should not be amended.

5. Proposed Amendment to R. 7:2-4(c) – Notice to Prosecuting Attorney and Complaining Witness; Dismissal of Complaint

Samuel C. Inglese, Esq., a former member of the Committee requested that the Committee consider amending R. 7:2-4(c) to include protocol for service of process on defendants who reside outside of the United States. Mr. Inglese asserted that there were no clear procedures in the rules that stipulate how process should be served under such circumstances nor who should bear the cost of service. After discussion, it was concluded that R. 4:4-4 already sets out the procedures for such service. Therefore, no action was taken on this proposal.

6. R. 7:6-2 – Opposition to Protective Orders by Victims in Careless and Reckless Driving Cases

It was brought to the attention of the Committee by one of its members that pursuant to R. 7:6-2, that when a defendant pleads guilty to an offense in municipal court and requests the court to issue an order excluding the guilty plea from being used in a civil matter in Superior Court, the court is obligated to issue such an order. R. 7:6-2 states: "Upon the request of the defendant, the court may, at the time of the acceptance of

of a guilty plea, order that the plea shall not be evidential in any civil proceeding." The analogous criminal rule, R. 3:9-2, provides that "For good cause shown, the court may, in accepting a plea of guilty, order that such plea not be evidential in any civil proceeding."[28] It was proposed that the municipal practice rule should conform to the criminal practice rule.

It was the Committee's position that R. 3:9-2 differs from R. 7:6-2 because criminal cases are more serious than municipal court cases. Moreover, in criminal cases, there is often an element of intent when an offense is committed that is lacking in most municipal court cases, especially traffic cases. The rule, as it is currently written, gives the discretion to the judge whether to issue an order that the plea may not be used in a civil proceeding and, importantly, it enables courts to move cases expeditiously. The Committee concluded that that R. 7:6-2 should remain unchanged.

7. Proposed Amendment to Appendix to Part VII – Guideline 4 for Plea Agreements in Municipal Court: Correspondence from William J. Vosper, Esq.

In a letter dated September 19, 2005, William J. Vosper, Esq., a member of the New Jersey bar requested that the Committee consider amending Appendix to Part VII – Guidelines 4 for Plea Agreements in Municipal Court so that a defendant charged with refusal could plead guilty on a first-time DWI offense, stipulate that a breathalyzer test had been administered and that the BAC was .10% or higher, and have the refusal charged dismissed. The result would be that the defendant would plead guilty to the more serious offense and the loss of license would be seven months, equivalent to the loss of license for refusal. After discussing this request, the Committee opined that the suggestion was prohibited by Acting Administrative Director Philip S. Carchman's memorandum of June 24, 2005, which explained the Supreme Court was reluctant to permit any form of plea bargaining for DWI offenses.

It was the consensus of the Committee that no rule change was necessary pursuant to this request.

[28] State v. LaResca, 267 N.J. Super. 411 (App. Div. 1993); see also State v. Tsilimidos, 364 N.J. Super. 454 (App. Div. 2003).

8. Proposed Amendment to R. 7:6-1 – Arraignments

The Committee received e-mail correspondence from Mitch Ignatoff, a member of the New Jersey Bar, requesting that the Committee consider amending R. 7:6-1(b) so that a defendant would not be required to make a first appearance when he or she has retained counsel and counsel has advised the court that the defendant wishes to plead not guilty.

After discussing the matter the Committee concluded that currently R. 7:6-1(b) confers discretionary authority to the court to determine whether or not to require the physical presence of a defendant at first appearance when counsel has entered an appearance. Therefore, the Committee opined that there was no need to amend the rule.

9. Proposed Amendment to R. 7:6-2(d) and Guideline 4 – Dismissal of N.J. S.A. 39:4-49.1

Kenneth Vercammen, Esq., a former member of the Municipal Court Practice Committee, requested that the Committee consider amending R. 7:6-2(d) and Guideline 4 to clarify that a prosecutor may dismiss a charge of N.J.S.A. 39:4-49.1 if there is a conditional discharge or guilty plea to a 2C drug violation. After discussion, the Committee determined that under the current Guidelines there is no impediment to dismissing violations of N.J.S.A. 39:4-49.1. There was no further action on this request.

10. Certified Municipal Court Attorneys

Kenneth Vercammen, Esq., a former member of the Committee, requested that the Committee consider creating a rule to establish a program for Certified Municipal Court Attorneys. The Committee determined that the creation of such a program was not within the jurisdiction of the Committee. It concluded that the request should be forwarded to the Board of Attorney Certification for consideration. It was decided that the Committee would offer no opinion on this matter unless requested.

VII. CONCLUSION

The members of the Municipal Practice Committee appreciate the opportunity to serve the Supreme Court in this capacity.

Respectfully submitted:

Hon. Joan Robinson Gross, P.J.M.C., Chair
Hon. H. Robert Switzer, J.M.C., Vice-Chair
Hon. Russell W. Annich, Jr., J.M.C.
Hon. Mark T. Apostolou. J.M.C.
Dennis L. Bliss, Esq.
Hon. Mary S. Brennan, J.M.C.
Karen Brown, Esq.
Hon. Steven P. Burkett, J.M.C.
Hon. Brenda Coppola Cuba, J.M.C.
Hon. Paul Daniele, J.m.C.
John Dell'Aquilo, D.A.G.
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Hon. Sybil Elias, J.M.C.
Arnold Fishman, Esq.
Franklin Flacks, Esq.
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Helene C. Herbert, Esq.
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John J. McKniff, Esq.
Hon. Wanda Molina, J.M.C.
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John Paragano, Esq.
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Hon. Robert C. Pollock, Jr., P.J.M.C.
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Michael M. Rubbinaccio, Esq.
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Hon. Robert Schaul, J.M.C.
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James Trabilsy, Esq.
Vincent Villamor, Esq.
William J. Zaorski, Esq.
Hon. Frank J. Zinna, P.J.M.C.

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Lawrence E. Walton, Chief
Florence S. Powers, Esq.

A P P E N D I X 1

GUILTY PLEA BY MAIL - CERTIFICATION
IN CERTAIN NON-TRAFFIC MATTERS

Please complete this form and return it to the court by _____. If you fail to return the enclosed form by the date listed, you may be required to personally appear in court to resolve your case.

State of New Jersey
vs

Defendant's Name: _____ _____ _____
FIRST M.I. LAST

Defendant's Address: _____ Defendant's Phone #:_____
STREET ADDRESS

_____ _____ _____
CITY STATE ZIP

INSTRUCTIONS - PLEASE READ CAREFULLY

I am the defendant in this case and certify that it would be an undue hardship for me to come to court for the following reasons:

I understand that I have a right to a trial, and that at a trial the prosecution would have to prove each of the elements of the charge or charges against me beyond a reasonable doubt, that I would have a right to call witnesses on my own behalf and that I would have the right to confront all witnesses against me. I have been fully informed of my right to a reasonable postponement. I give up my right to a trial. I give up my right to have an attorney, to apply for a public defender, and to remain silent. I also give up my right to be present in court at the time and place scheduled for trial. I understand that an acceptance of my guilty plea may result, in addition to fines, costs and penalties, in a loss of my driving privileges for a period of time, and, if I am presently incarcerated, a custodial sentence not to extend beyond my present custodial sentence. In addition, I understand that if I am on probation or parole, a plea of "Guilty" may result in a violation of same. I enter this plea voluntarily with a full understanding of the charges against me and the consequences of my plea.

I understand that the judgment of the Court will be sent to me by ordinary mail at the address set forth above, and I understand that I must pay all fines, penalties and costs imposed by the court. I further understand that I may appeal my sentence within 20 days of the date of the decision. Information on how to appeal the municipal court's sentence may be obtained from the municipal court or the Judiciary's website at www.njcourtsonline.com.

I plead **Guilty** to the above charges and offer the following factual statement admitting to the charges against me:

I offer the following statement for the court to consider in sentencing:

(Continue on the back of this for, or use additional sheets, if necessary. You must date and sign each additional sheet.)

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

_____ _____
DATE DEFENDANT'S SIGNATURE