Report of the

Supreme Court

Criminal Practice Committee

2007-2009 Term

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A. Proposed Rule Amendments Recommended for Adoption.

1. Post-Conviction Relief Rules

a. Background

During the 2002-2004 term, the Committee discussed ways in which to alleviate the statewide delays in scheduling and resolving petitions for post-conviction relief (PCR). The Committee also discussed State v. Rue, 175 N.J. 1 (2002), in which the New Jersey Supreme Court held that PCR counsel must advance even those arguments raised by their clients that counsel believes to be without merit. It was suggested that the volume of PCR petitions being filed affected the ability of the Public Defender's Office to identify the petitions raising issues for which representation would be warranted and for which relief would likely be granted. It was also suggested that delays occurred when some of the Criminal Division Manager's Offices forwarded cases to the Public Defender and when the Public Defender's Office assigned counsel. Additionally, it was suggested that once counsel was assigned, there were delays in the receipt transcripts and case files. Another issue discussed was whether R. 3:22-10 should be amended to expressly allow oral argument by defense counsel on a first petition for post-conviction relief. See State v. Mayron, 344 N.J. Super. 382 (App. Div. 2001).

As both the Public Defender's Office and the Conference of Criminal Presiding Judges were reportedly in the process of drafting proposals to address the backlog of post-conviction relief cases, the Committee postponed recommending any possible solutions during the 2002-2004 term. The Committee revisited the topic of PCR issues at

the beginning of the 2004-2007 term. At that time, the Committee considered whether to create a Subcommittee to look into the possibility of revising the PCR rules in light of Rue to limit, expand or clarify the rules regarding the scope of PCR issues that assigned counsel must raise on behalf of their clients. The Public Defender, however, agreed with Rue and its interpretation, and did not support a change in the rules, especially one that would narrow the constitutional claims that a defendant could raise in a PCR petition.

The Committee then discussed whether the Office of the Public Defender should be required to represent a defendant on a first PCR petition. It was reported that the Public Defender supported such a requirement, because if all of the defendant's claims were raised in the first PCR petition there would be no need for subsequent petitions to be filed, or alternatively, subsequent petitions could be handled via a form letter.

After a lengthy discussion, the Committee reached an impasse regarding how to proceed. It agreed to revisit the issue at a later time, when the Conference of Criminal Presiding Judges issued its PCR report. On June 22, 2005, the Conference of Criminal Presiding Judges sent its *Report of the Conference of Criminal Presiding Judges on Revisions to The Rules Governing Post Conviction Relief (PCR) and Establishment of PCR Time Goals* to the Acting Administrative Director of the Courts for discussion by the Judicial Council, which highlighted the Conference of Criminal Presiding Judges' concerns that defendants who had filed petitions for post-conviction relief have had to wait for unacceptable periods of time to have their petitions resolved. The Conference's

Report also outlined concerns with the PCR process, set forth steps taken to address the delays and provided recommendations to ameliorate the problem.

On July 12, 2006, the New Jersey Supreme Court decided State v. Webster, 187 N.J. 254 (2006). In Webster, the Court considered "whether PCR counsel violated R. 3:22-6(d) by failing to advance all of the issues raised by defendant." Id. at 257. The Court held that "the brief must advance the arguments that can be made in support of the petition and include defendant's remaining claims, either by listing them or incorporating them by reference so that the judge may consider them." The Court referred the matter to the Criminal Practice Committee, asking that it propose a revision to R. 3:22-6(d) to reflect the views expressed in the opinion. Id. at 258. In light of Webster, a Subcommittee was formed to draft a rule amendment. The Subcommittee consisted of judges, representatives from the Office of the Public Defender, representatives from the Division of Criminal Justice and was staffed by the Administrative Office of the Courts. Additionally, since the current court rules governing the handling of PCRs were not being followed, largely because of the backlog situation, the Subcommittee was also charged with reviewing the entire PCR process. The recommendations contained in the Conference of Criminal Presiding Judges' PCR report were used as a starting point for discussion.

The Subcommittee conducted an expansive review of the post-conviction relief rules and the current practice used by prosecutors, defense attorneys and the court. The Subcommittee prepared a detailed report recommending significant changes to the court

rules governing post-conviction relief. The Committee reviewed the Subcommittee's recommendations and adopted most, with some revisions. The following rule proposals focus on developing procedures to allow the court to dismiss, without prejudice, a deficient petition for post-conviction relief and allow a defendant to re-file it as a cognizable first post-conviction relief application with assignment of counsel. The proposals also clarify that post-conviction motions for reconsideration of a sentence should be filed pursuant to R. 3:21-10. This proposal is designed to ensure that a motion for reconsideration of a sentence is not misinterpreted to be a first post-conviction relief application. The proposed amendments would also provide that upon any motion filed pursuant to R. 3:21-10, "the matter may be referred to the Office of the Public Defender who shall represent the defendant as assigned by the judge." This proposal is intended to permit the court to assign counsel for difficult or possible meritorious issues "pursuant to the court rules" in compliance with the Public Defender Act. See N.J.S.A. 2A:158A-5. Additionally, the proposals modify the time frames and limitations to file petitions for post-conviction relief.

b. Proposed Rule Amendments

(1) R. 1:3-4. Enlargement of Time

R. 1:3-4(c) sets forth matters where a fixed time for doing an act may not be enlarged. The Committee is proposing a recommendation to amend paragraph (c) of this rule to make clear that the general time limits to file a petition for post-conviction relief as set forth in R. 3:22-12 cannot be enlarged or relaxed except as specifically set forth in

R. 3:22-12(a). This proposal is made in conjunction with a proposal to add a new paragraph (c) to R. 3:22-12 to state that the time limitation set forth in R. 3:22-12 shall not be relaxed, except as provided therein.

(2) R. 3:21-4. Sentence

R. 3:21-4 governs sentencing. Paragraph (h) of the rule explains the notification to defendants of the right to appeal. The Committee believes that because it is proposing changes to the time limitations to file petitions for post-conviction relief, that when being sentenced defendants should be made aware of these new, more stringent time limitations for filing post-conviction relief petitions. The proposal is to amend paragraph (h) of the rule to state that after imposing the sentence, the court shall inform the defendant of the time limitations for filing petitions for post-conviction relief. The Committee suggests also amending the caption of paragraph (h) to include notification to file a petition for post-conviction relief.

(3) R. 3:21-10. Reduction or Change of Sentence

The Committee is proposing that R. 3:21-10 be amended to include a new paragraph (b)(5), which would permit a motion to reduce or change a sentence to be filed and an order to be entered "correcting a sentence not authorized by law, including the Code of Criminal Justice." Along with this proposal, the Committee is recommending an amendment to paragraph (c) of R. 3:21-10 that would provide that "upon any motion filed pursuant to this rule, the matter may be referred to the Office of the Public Defender, who shall represent the defendant as assigned by the judge."

(a) New paragraph (b)(5)

The proposal to add a new paragraph (b)(5) to R. 3:21-10 is designed to include the procedures to file post-conviction motions to reduce or change a sentence, pursuant to R. 3:21-10, and PCR claims alleging that the sentence imposed was "in excess of or otherwise not in accordance with the sentence authorized by law," pursuant to R. 3:22-2(c), into one rule. There are several reasons for this proposal. First, the Committee recognized that often pro se defendants are not aware of, or may not fully understand, the different procedures for filing PCR applications pursuant to R. 3:22-1 to 3:22-12 and motions to change or reduce sentences pursuant to R. 3:21-10(b). As a result, the courts often receive PCR applications, filed pursuant to R. 3:22-1 to 3:22-12, which seek relief that falls within R. 3:21-10. For example, it was pointed out that a defendant may incorrectly file a motion to change a custodial sentence to permit entry into a drug rehabilitation program as a PCR petition pursuant to R. 3:22-2(c), rather than as a motion for reconsideration of a sentence pursuant to R. 3:21-10(b)(1). Consequently, when a motion for reconsideration of a sentence is incorrectly filed as a PCR application, the court is faced with dismissing the petition as not cognizable under the PCR rules, considering the motion as if it were correctly filed under R. 3:21-10(b) or forwarding the matter to the Public Defender's Office for the assignment of counsel.

Several problems arise with each of these options. First, the PCR rules are interpreted liberally regarding the assignment of counsel for a defendant's first PCR petition; however, the rules require a showing of good cause for counsel to be assigned

for second or subsequent petitions. If a defendant misfiles a sentencing reconsideration motion as a PCR petition and the court dismisses the petition as not cognizable under the PCR rules, the petition could be "counted" as the defendant's first PCR application triggering the assignment of counsel. Under this scenario if the defendant filed a subsequent PCR application, counsel would not be assigned absent a showing of good cause. The Committee agreed that this result was undesirable if the initial PCR petition could have properly been filed as a motion to reconsider the sentence under R. 3:21-10.

Alternatively, if the court considers a misfiled application as if it were correctly filed pursuant to R. 3:21-10, a question arises whether the court has authority to "convert" a PCR petition to a R. 3:21-10 motion. The Committee also discussed whether the Public Defender's Office had the responsibility to seek relief, such as filing a motion to amend the PCR petition or filing a motion to dismiss the petition without prejudice so that the defendant could re-file the matter pursuant to R. 3:21-10.

Furthermore, the Committee recognized that there is no court rule requiring the Public Defender to represent defendants on post-conviction motions filed pursuant to R. 3:21-10. Therefore, by referring the case to the Public Defender's Office for assignment of counsel in a matter that should have been filed pursuant to R. 3:21-10, the court would be ordering the assignment of counsel in cases where representation is not statutorily required.[3] See N.J.S.A. 2A:158A-5.

[3] The Committee is recommending amendments to R. 3:21-10(c) to address the assignment of counsel in post-conviction sentencing motions.

In light of these concerns, the Committee believes that when no other grounds for post-conviction relief are asserted, it is appropriate for defendants to file sentencing claims pursuant to R. 3:21-10. The proposal to amend R. 3:21-10(b)(5) includes language permitting the filing of a motion to correct "a sentence not authorized by law, including the Code of Criminal Justice." The Committee believes that this proposal will make it easier for the courts and the attorneys to appropriately resolve sentencing matters in a timely fashion.

The Committee has concluded, however, that if a PCR petition sets forth an allegation that a sentence imposed is in excess of or otherwise not in accordance with the sentence authorized by law, along with other grounds cognizable under R. 3:22-2(a), (b) or (d), the application should be filed pursuant to the rules governing post-conviction relief and the sentencing allegations should be considered as part of the PCR application. This option will allow the court to consider the entire PCR petition, including sentencing claims, in one filing. The Committee is proposing to amend R. 3:22-2(c) accordingly.

(b) Discretionary Assignment of Counsel

The Committee recognized that while defendants are entitled to counsel for the first PCR petition, R. 3:22-6(a), there is currently no court rule requiring the Public Defender to represent defendants who file motions to reconsider a sentence pursuant to R. 3:21-10. Nonetheless, occasionally post-conviction motions to reduce or change a sentence involve complex legal issues that would warrant the assignment of counsel. Representatives from the Office of the Public Defender pointed out that their statutory

authority, N.J.S.A. 2A:158A-5, mandates that their office represent defendants on "any direct appeal from conviction and such post-conviction proceedings as would warrant the assignment of counsel pursuant to the court rules."[4] The Public Defender has agreed that pursuant to N.J.S.A. 2A:158A-5, if a court rule required the assignment of counsel on a motion filed pursuant to R. 3:21-10, the Public Defender's Office would comply with it.

In light of the Committee's proposal to add procedures for challenging a sentence not authorized by law to R. 3:21-10(b)(5), the Committee is also recommending a modification to paragraph (c) of R. 3:21-10 to provide that counsel may be assigned by the judge where warranted and if such assignment is made, the Public Defender shall represent the defendant.

With the addition of paragraph (b)(5), the other subsections of R. 3:21-10(b) will be renumbered accordingly, and the proposed new language of paragraph (c) will permit counsel to be assigned by the judge for difficult or possibly meritorious issues.

(4) R. 3:22-2. Grounds

In correlation with the proposed amendments to R. 3:21-10, the Committee is proposing to amend R. 3:22-2(c) to provide that a PCR petition is cognizable if it is based upon the ground that the:

> [i]mposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law if raised together with other grounds cognizable under paragraph (a), (b), or (d) of this rule. Otherwise a claim alleging that the imposition of sentence in excess of or otherwise not in

[4] R. 3:22-6(a) provides that defendants are entitled to counsel for representation for a first petition for post-conviction relief.

accordance with the sentence authorized by law shall be filed pursuant to R. 3:21-10(b)(5).

This proposal will permit the court to consider claims that the sentence imposed was in excess or otherwise not in accordance with the law, together with other grounds for relief that are cognizable under paragraphs (a), (b) or (d) of R. 3:22-2. Otherwise, if the application only sets forth grounds that the sentence was excessive or otherwise not in accordance with the law, a motion should be filed pursuant to R. 3:21-10(b)(5), as proposed, and the court will have the discretion to assign counsel.

(5) R. 3:22-3. Exclusiveness of Remedy; Not Substitute for Appeal or Motion

The Committee considered a proposal to eliminate the bar contained in the last sentence of R. 3:22-3, which precludes the filing of a petition for post-conviction relief while appellate review is available. It was suggested that if a petition for post-conviction relief is filed while an appeal is pending, the Criminal Division Manager's office should notify the Appellate Division Clerk's Office of the filing. The Appellate Division Clerk's Office would then adjourn consideration of the pending appeal so that the Appellate Division could consider the direct appeal of the alleged trial errors and the appeal of the post-conviction relief application at the same time. The purpose of the suggestion was to, in most cases, eliminate the need for the Appellate Division to consider the same files on

two or more separate occasions.[5] The Committee considered adding new language as the last sentence of the paragraph to state:

> "Nothing in this Rule, however, shall prohibit the filing of a petition without first pursuing appellate review if the issues are raised in accordance with R. 3:22-4."

The Committee ultimately determined not to include this language in the rule.

While some members of the Committee agreed that the proposal could eliminate the need for the Appellate Division to consider duplicate files, some were concerned that drafting a rule permitting the filing of a post-conviction relief petition while an appeal is pending may add additional time to the appellate process. For instance, since a defendant must file an appeal within 45 days from the entry of a final judgment, the direct appeal could be briefed and ready to be heard and then the defendant could file a petition for post-conviction relief, which would delay the resolution of the appeal. After the post-conviction relief matter is resolved, the direct appeal may have to be re-briefed to address the issues raised in both the direct appeal and the post-conviction relief appeal. As a result, there may be a delay in time for an appeal to be heard and resolved, since the appeal would be stayed pending the resolution of the petition for post-conviction relief in the Law Division.

The Committee also considered a suggestion that the proposed rule amendments will not fix the concern with delays in resolving post-conviction applications. It was asserted that most PCR claims involve allegations of ineffective assistance of counsel,

[5] Along with this suggestion, it was also suggested that R. 3:22-12 be amended to require that a post-conviction relief application be filed within a year after the sentence is imposed.

and therefore, the PCR hearings should be held before appellate briefs are filed in a particular case. The suggestion was that when a defendant is informed of the right to appeal, the defendant should also be informed that if he has any complaints about his lawyer, he should either state those complaints or state that he has such complaints as part of the Notice of Appeal, which will cause the Appellate Division to remand the case to resolve the PCR claims.

After a discussion, the Committee concluded that staying an appeal to consider a petition for post-conviction relief or combining a direct appeal with a PCR appeal could cause a significant delay in the resolution of the appeal and that it would likely result in more complex appeals. While the proposals could eliminate duplicate efforts of the courts, prosecutors and defense attorneys, the Committee was unsure if the proposal would help accomplish the objective of revising the PCR rules to meet a specified time goal. Ultimately, the Committee believes that the rule should not be amended to allow a PCR application to be briefed and to toll the time to resolve the direct appeal. The Committee also believes that advising a defendant of the ability to raise PCR claims at the time of sentencing would invite numerous complaints, which may not be precluded by a subsequent filing of a PCR application.

Finally, the Committee is recommending deleting the word "available" at the end of the paragraph and replacing it with the word "pending. This proposal will clarify when a petition is barred from being filed during the appellate process and is consistent with proposed new R. 3:22-6A(2), which would require that the Public Defender notify

the court if a direct appeal, including a petition for certification, is pending so that the court can dismiss the post-conviction relief petition without prejudice.

(6) R. 3:22-4. Bar of Grounds Not Raised in Prior Proceedings; Exceptions

The Committee is recommending several amendments to R. 3:22-4 designed to curtail the filing of repeated post-conviction relief applications arising out of the same conviction, and to encourage defendants to include all post-conviction relief claims in their original petitions or be precluded from doing so at a later date, except where circumstances warrant an exception to this general rule. These amendments further impose corresponding limitations on defendants' ability to raise grounds for post-conviction relief which were not asserted in a prior proceeding.

The amendments incorporate the Supreme Court of New Jersey's decision in State v. Ways, 180 N.J. 171, 192 (2004), regarding the use of newly discovered evidence as a basis for post-conviction relief. As the Court held in Ways, the requirement that newly discovered evidence "must not have been discoverable earlier through the exercise of reasonable diligence" operates to "encourage defendants and attorneys to act with reasonable dispatch in searching for evidence." Ibid.; cf. R. 4:50-1(b) (addressing motion for new trial on basis of newly discovered evidence).

(a) R. 3:22-4(a)

The Committee is proposing to designate paragraph (a) to add explanatory language to the rule describing the bar of grounds for post-conviction relief that have not

been raised in a prior proceeding. Proposed paragraph (a)(1) includes the current language of the rule which provides that a ground for post-conviction relief would be barred unless the court found "that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding." The proposal includes new explanatory language that "[a] ground could not reasonably have been raised in a prior proceeding only if defendant shows that the factual predicate for that ground could not have been discovered earlier through the exercise of reasonable diligence."

Proposed paragraph (a)(2) includes the current language of the rule which provides that a ground for post-conviction relief would be barred unless the court found "that enforcement of the bar would result in fundamental injustice." Members from the Division of Criminal Justice proposed to include a definition of "fundamental injustice" in the rule as follows:

> A fundamental injustice occurs only when the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability of defendant's innocence.

The Committee recommends leaving the term "fundamental injustice" undefined being of the view that the interpretation of this term is best determined by caselaw. Thus, a definition of "fundamental injustice" is not included in the rule proposal**.**

Proposed paragraph (a)(3) includes the current language of the rule which states that a ground for post-conviction relief would be barred unless the denial of relief would be contrary to the Constitution of the United States or the State of New Jersey. The

Committee recommends amending this language to provide that a ground for post-conviction relief would be barred unless the court found that a denial of relief would be contrary to "a new rule of constitutional law" under either the Constitution of the United States or the State of New Jersey. The Committee also recommends adding explanatory language to the rule which states that:

> A denial of relief would be contrary to a new rule of constitutional law only if the defendant shows that the claim relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey that was unavailable during the pendency of any prior proceedings.

A concern was raised of whether under this explanatory language relief could be denied if a new rule of constitutional law was established by the Appellate Division that was not considered by the New Jersey Supreme Court or established by a federal district or federal circuit court that was not considered by the United States Supreme Court.

The Committee was informed that the proposed language, limiting relief to cases involving a new rule of constitutional law established by the United States Supreme Court or the New Jersey Supreme Court is based on federal habeas corpus jurisprudence. Nonetheless, some members were concerned with prohibiting a trial court reviewing an application for a second or subsequent post-conviction relief application from considering New Jersey Appellate Division Cases and federal district court or circuit court cases that may be widely followed, but never reach the United States Supreme Court or New Jersey Supreme Court. Also, some members expressed concern with preventing the trial court

from considering federal circuit court opinions when there is a split in the federal circuit courts that is not resolved by the United States Supreme Court.

An extensive discussion ensued, which resulted in a vote on three alternatives: (1) add “or Superior Court, Appellate Division” after “Supreme Court of New Jersey” in the explanatory paragraph of the rule proposal which would allow the trial court to consider cases decided by the Appellate Division in determining if a bar on a second or subsequent petition for post-conviction relief applies; (2) keep the proposed language, as is, which would allow the trial court to consider New Jersey Supreme Court and United States Supreme Court cases in determining if a bar on second or subsequent petitions for post-conviction relief applied; or (3) delete the explanatory paragraph, which would allow the trial court to consider cases, other than those decided by the New Jersey Supreme Court or United States Supreme Court in making this determination. The Committee conducted an initial vote: 5 members were in favor of adding “or Superior Court, Appellate Division” to the explanatory paragraph of the rule; 11 members were in favor of leaving the proposed language as is; 8 members were in favor of deleting the explanatory paragraph. As a final vote 14 members were in favor of leaving the proposed language as is, which would allow the trial court to consider New Jersey Supreme Court and United States Supreme Court decisions in determining if a bar on a second or subsequent petition for post-conviction relief applies, and 7 members were in favor of deleting the explanatory paragraph.

(b) R. 3:22-4(b)

The Committee is proposing to add a new paragraph (b) to the rule, which creates a two-prong analysis to consider if the bar of second and subsequent petitions for post-conviction relief applies. This proposal incorporates the New Jersey Supreme Court's decision in State v. Ways, 180 N.J. 171, 192 (2004) regarding the use of newly discovered evidence as a basis for post-conviction relief. This proposal is designed to limit the scope of matters for which a second or subsequent petition for post-conviction relief can be granted. To that end, it provides that a second or subsequent petition for post-conviction relief shall be dismissed unless it is timely pursuant to R. 3:22-12(a)[6] and it alleges on its face either:

> (A) that the petition relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings; or
>
> (B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted.

In light of the recommended addition of paragraph (b), the Committee also recommends adding the phrase "Bar of Second or Subsequent Petitions" to the caption of the rule.

[6] R. 3:22-12 addresses the general time limitations to file a petition for post-conviction relief.

(7) R. 3:22-6. Indigents; Waiver of Fees; Assignment of Counsel, and Grant of Transcript; Assigned Counsel May Not Withdraw

(a) R. 3:22-6(a)

The Committee is recommending that post-conviction relief petitions be prescreened by the criminal division manager's office to ascertain whether the petition is cognizable under R. 3:22-2, and if it is, whether it meets the requirements of R. 3:22-8. The purpose of the prescreening is to assist the trial court in determining whether the rules have been complied with. If not, the deficiencies can be set forth in the court's order sent to the Office of the Public Defender for assignment of counsel. The second proposal being made is to make the assignment of counsel be *via* a court order. The third recommendation is to require that the assignment orders contain the name of the judge to whom the case is assigned and set a place and date for a case management conference. This latter requirement, that the order contain a date for the next event, would be consistent with the practice in the Criminal Division for all other events. Finally, an amendment was proposed to require that the court set forth the reasons for its findings that a petition is not cognizable under R. 3:22-2, or that a petition does not meet the requirements of R. 3:22-8 and dismiss the petition.

Representatives from the Office of the Public Defender sought to add language to paragraph (a) of the rule to provide that the court shall set a place and date for a case management conference not less than 90 days after the matter is referred to the Office of the Public Defender. The Committee recognized that the Administrative Office of the

Courts has promulgated orders to be used when a trial judge refers a petition for post-conviction relief to the Office of the Public Defender for assignment of counsel.[7] The orders set forth time frames for the assignment of counsel and for assigned counsel to file an appearance with the court. The orders also require the court to set the date for a case management conference. However, the orders do not contain a specific time frame for which the case management conference must occur. The Committee rejected adding time frames to the rule to set the case management conference. Instead, it opted to give the trial judge discretion to schedule the case management conference within a reasonable time period.

The Committee agreed to amend language in the second sentence of paragraph (a) which provides that "a defendant who is not represented by the Office of the Public Defender" may complete an indigency form to "a defendant who wants to be represented by the Office of the Public Defender." This language is designed to address the situation where a defendant may not have been eligible for a Public Defender during trial or on appeal, but would like to allege indigency for representation on post-conviction relief.

(b) <u>R. 3:22-6(b)</u>

Addressing the assignment of counsel on a second or subsequent petition for post-conviction relief, paragraph (b) presently provides that when a defendant files a second or subsequent petition for post-conviction relief, the matter shall be referred to the Public Defender's Office for assignment of counsel upon a showing of good cause. The

[7] *See* Memorandum to Assignment Judges, Criminal – Post-Conviction Relief – Form Order Assigning Counsel, from Hon. Philip S. Carchman, Acting Administrative Director of the Courts (May 3, 2005).

Committee recommends amending paragraph (b) to define "good cause" for the assignment of counsel on a second or subsequent petition for post-conviction relief (in the last sentence of paragraph (b)) as follows:

> For purposes of this section, good cause exists only when the court finds that a substantial issue of fact or law requires assignment of counsel and when a second or subsequent petition alleges on its face a basis to preclude dismissal under R. 3:22-4.

This proposed amendment makes clear that such a showing of "good cause" for assignment of counsel on a second or subsequent petition requires, at a minimum, a showing that defendant's petition satisfies one of the exceptions to dismissal found in R. 3:22-4(b), as amended.

(c) R. 3:22-6(d)

This proposal was designed to help resolve conflicts between the requirements of State v. Rue, 175 N.J. 1 (2002) and State v. Webster, 187 N.J. 254 (2006) for counsel to include claims put forth by defendant in the petition, regardless of merit, and an attorney's ethical obligation under R. 3.1 of the Rules of Professional Conduct to refrain from raising frivolous claims.

The Committee first recommends amending the first sentence of paragraph (d) to state that the court will not substitute new counsel at defendant's request, except upon a showing of good cause and notice to the Public Defender. Representatives from the Public Defender's Office indicated that some defendants file motions for the court to replace or substitute counsel because of discontent with counsel. This proposal is

designed to discourage the filing of such motions and to notify the Public Defender's Office if the court is substituting counsel or considering such a motion.

The proposed amendments to the last few sentences of R. 3:22-6(d) respond to the decisions of the Supreme Court of New Jersey in State v. Rue, 175 N.J. 1 (2002) and State v. Webster, 187 N.J. 254 (2006). In Rue, the Court interpreted R. 3:22-6(d) and held that "[a]t the very least, where communication and investigation have yielded little or nothing, counsel must advance the claims the client desires to forward in a petition and brief and make the best available arguments in support of them." State v. Rue, 175 N.J. at 19. In Webster, the Court ruled that defense counsel had no obligation to advance any claim put forth by defendant for which counsel "can formulate no fair legal argument in support." State v. Webster, 187 N.J at 257. However, the Webster Court required defense counsel to include such claims in the petition "either by listing them or incorporating them by reference so that the judge may consider them." Ibid. As the Court held, this would "serve to preserve defendant's contentions for federal exhaustion purposes." Ibid.

The Committee proposes to amend the last few sentences of paragraph (d) to help resolve conflicts between the requirements set forth in Rue and Webster for counsel to raise and incorporate any claims put forth by their clients, regardless of merit, and an attorney's ethical obligation under R. 3:1 of the Rules of Professional Conduct to refrain from raising frivolous claims. The Committee's proposal is to amend the last two sentences of paragraph (d) to read as follows:

> Counsel should advance all of the legitimate arguments requested by the defendant that the record will support. If defendant insists upon the assertion of any grounds for relief that counsel deems to be without merit, counsel shall list such claims in the petition or amended petition or incorporate them by reference.

The Committee also recommends adding a sentence to the end of the paragraph to address the filing of pro se briefs which states: "Pro se briefs can also be submitted."

(d) <u>Changing Terms "Refer" And "Referral" To "Assign" And "Assignment"</u>

The Committee believes that using the terms "refer" or "referral" to describe the procedure when the court forwards petitions to the Office of the Public Defender for assignment of counsel is confusing. The Committee recommends using the terms "assign" or "assignment" to describe when the court is forwarding the petition to the Office of the Public Defender for assignment of counsel. This proposed change has been made in all of the rules governing post-conviction relief.

(e) <u>Proposed Paragraphs (e) and (f) – Not Recommended</u>

The Committee considered adding paragraphs (e) and (f) to address the Public Defender's concerns about obtaining the complete case file from the prosecutor and to define "good cause" for assignment of counsel on a second or subsequent petition for post-conviction relief. The proposals were as follows:

> (e) Discovery. Upon a showing of good cause by defense counsel, the State shall provide a new copy of discovery materials and relevant correspondence and documents previously provided to trial counsel.

> (f) Good Cause for Assignment of Counsel on a Second or subsequent Application for Post-conviction relief. Good cause exists when the defendant's assertions, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the post-conviction relief application would be granted. If good cause is found, a presumption that the procedural bars are relaxed is assumed.

The Committee decided that it was unnecessary to draft a rule requiring the prosecutor to provide case files to the Public Defender, because this involves communications between the parties and resources in their respective offices. With regard to the proposal to add a new paragraph (f), the Committee was of the view that the meaning of "good cause" is sufficiently explained in the proposed amendment to the last sentence of paragraph (b) in R. 3:22-6.

(8) New R. 3:22-6A. Notifying Court of Assignment; Filing of Appearance

(a) R. 3:22-6A(1)

On May 3, 2005, the Administrative Office of the Courts promulgated orders for judges to issue when forwarding a pro se petition for post-conviction relief to the Office of the Public Defender for assignment of counsel. One order addresses assignment of counsel on the first petition for post-conviction relief and the other addresses assignment of counsel for second or subsequent petitions of post-conviction relief. The Committee considered language in a new rule to address procedures for the Public Defender to notify the court of counsel who will handle the particular post-conviction relief petition after the

judge has issued an order forwarding the case to the Public Defender for the assignment of counsel.[8] The first paragraph of R. 3:22-6A would require that within ninety days of receipt of an order of assignment issued by the court, the Office of the Public Defender provide the court with the name of the attorney assigned to represent the defendant. That attorney would be required to file an appearance with the court within ten days.

The Public Defender's Office pointed out that the 90-day time period to assign counsel is reasonable because it takes time for the Post-Conviction Relief Unit to obtain the case file and transcripts, which are needed to appropriately assign counsel. The Office of the Public Defender also suggested adding language permitting an exception to the 90-day time limit to allow for an extension of time, upon a showing of good cause, to provide the court with the name of the attorney assigned to represent the defendant.

Concern was expressed with allowing a 90-day time period for the Public Defender to assign an attorney and permitting exceptions to enlarge that time frame after an order of assignment has been received by their office. It was opined that a defendant should not have to wait for 90 days after filing the PCR petition to have counsel assigned. It was suggested that the 90-day time frame for the assignment of counsel should be reduced to 30 days after the Public Defender's receipt of the order of assignment.

Representatives from the Office of the Public Defender and the private defense bar asserted that there is little meaningful function for a defense attorney handling a post-conviction relief case until the transcripts or case file are obtained. Without first having

[8] *See* Memorandum to Assignment Judges, Criminal – Post-Conviction Relief – Form Order Assigning Counsel, from Hon. Philip S. Carchman, Acting Administrative Director of the Courts (May 3, 2005).

the case file, a defense attorney is unable to answer many of the client's questions, have a meaningful conversation or respond to a defendant's allegations. Those members stated that unlike pretrial matters, there is no sense of urgency on post-conviction relief matters, because there is no presumption of innocence at that stage.

Some members disagreed and believed that defense counsel could meet with clients regarding allegations raised in the pro se post-conviction relief petition to possibly narrow or clarify some issues raised by the defendant. Some members also thought it was important for the defendant to have the name of an attorney to send correspondence, instead of sending correspondence to the court. It was pointed out that such correspondence would then be covered by the attorney-client privilege, however, when this correspondence is sent to the court after a petition is filed but before an attorney is assigned it can be made available to the prosecution. Members in support of the 90-day time limit to assign counsel pointed out that the proposed rule provides a 90-day outer limit on the assignment of counsel, however, counsel could be assigned before then, which is currently occurring in some counties.

The Committee voted and ten members were in favor of the proposal to require the assignment of counsel within 90 days after the Public Defender's receipt of the order of assignment. Nine members were in favor of changing the rule proposal to require the assignment of counsel within 30 days.

(b) R. 3:22-6A(2) and (3)

The Committee is recommending adoption of subsection (A)(2) to address the circumstance in which a petition for post-conviction relief is filed at the same time that a direct appeal is pending. Specifically, the Committee recommends adding language to proposed R. 3:22-6A(2) to state: "If a direct appeal, including a petition for certification, is pending, the Public Defender's Office shall notify the court, and the petition shall be dismissed without prejudice." This recommendation is consistent with the proposed amendment to R. 3:22-3 which will provide that a petition for post-conviction relief may not be filed while appellate review or a motion incident to trial proceedings is pending.

The Committee also suggests including language in paragraph (A)(2) to address the deadlines for re-filing a petition dismissed without prejudice because a direct appeal was pending. The suggested language provides that:

> if the defendant refiles the petition within 90 days of the date of the judgment on direct appeal, including consideration of a petition for certification or within five years after rendition of the judgment or sentence sought to be attacked, whichever is later, it shall be considered a first petition for post-conviction relief.

The Committee also recommends adoption of new paragraph (A)(3) to provide that where the order assigning the case to the Public Defender's office states that the petition is not cognizable under R. 3:22-2 or does not meet the requirements of R. 3:22-8 or the Public Defender determines such deficiencies exist and notifies the court, the court can dismiss the petition without prejudice, unless an amended petition is filed within a

certain time period that is cognizable under R. 3:22-2 and which meets the requirements contained in R. 3:22-8. In that regard, R. 3:22-6A(3) will differentiate petitions dismissed as not cognizable under R. 3:22-2 and R. 3:22-8 from petitions dismissed under R. 3:22-6A(2) because direct appeal was pending.

The proposals provide that any petition dismissed without prejudice pursuant to R. 3:22-6A(3) would be treated as a first petition for post-conviction relief if a cognizable petition is re-filed within certain time parameters. Therefore, the Committee also recommends language to this effect be added to R. 3:22-12. The Committee also recommends that the AOC develop a mechanism to track when PCR applications are dismissed without prejudice.

The Committee discussed how to craft a rule to address the "filing date" when a defendant misfiles a motion to change or reduce a sentence (R. 3:21-10) as a first petition for post-conviction relief. Currently, when this occurs the petition is referred to the Public Defender's Post-Conviction Relief Unit for assignment of counsel. After review, if the Public Defender's Post-Conviction Relief Unit determines that a motion should have been filed pursuant to R. 3:21-10, the attorney will typically ask the court to vacate the order assigning the matter to the Post-Conviction Relief Unit on the basis that the defendant's application is cognizable pursuant to R. 3:21-10. The Public Defender's Post-Conviction Relief Unit normally sends the case to the local Public Defender's Office for handling. Members from the Public Defender's Office explained that under the circumstances the attorney may ask the court to vacate the assignment order, because

there is no statutory authority mandating that the Public Defender's Office represent defendants in R. 3:21-10 motions for reconsideration of sentences. Therefore, the court's order referring the case to the Public Defender for assignment of counsel in a matter that should have been filed pursuant to R. 3:21-10 might now be ordering the Public Defender to represent defendants in cases where representation is not statutorily required.[9]

The Committee engaged in a discussion of whether the court had authority to "convert" a post-conviction relief petition to a R. 3:21-10 motion or if the Public Defender's Office had the responsibility to seek relief, such as filing a motion to amend the post-conviction relief petition or filing a motion to dismiss the petition without prejudice, and then the defendant could re-file the matter pursuant to R. 3:21-10.

To address this concern, the Committee suggests adding paragraph (A)(3) to permit the Public Defender to file an amended cognizable petition or to seek other relief as may be appropriate. The proposed language is as follows:

> Where the order of assignment sets forth reasons that the petition is not cognizable under R. 3:22-2, or does not contain the requirements of R. 3:22-8, or the Office of the Public Defender determines that such deficiencies exist and so notifies the court, the attorney assigned to represent the defendant shall, within 120 days of assignment, file an amended petition or new application that is cognizable under R. 3:22-2 and which meets the requirements contained in R. 3:22-8 or shall seek other relief as may be appropriate.

[9] The Committee is recommending amendments to R. 3:21-10 to address the issues of post-conviction sentencing motions and assignment of counsel for those motions.

(c) R. 3:22-6A(4)

The Committee recommends adding paragraph A(4) to provide that in cases where a defendant is not represented by the Office of the Public Defender, the attorney representing the defendant shall file an appearance contemporaneously with the filing of a petition for post-conviction relief.

(9) R. 3:22-7. Docketing; Service on Prosecutor; Assignment for Disposition

The Committee recommends technical amendments that will reflect and be consistent with the current practice in the Criminal Division. The Committee recommends that the references to "Clerk" in the rule be changed to "Criminal Division Manager." The Committee also recommends amending the rule to state that the criminal division manager shall promptly notify the Criminal Presiding Judge of the filing of the petition, as opposed to, the Assignment Judge. The proposal would also provide that the Criminal Presiding Judge shall refer the matter to a trial judge for disposition.

(10) R. 3:22-9. Amendments of Pleadings; Answer or Motion by Prosecutor

The Committee is recommending that the time period for assigned counsel to file an amended petition for post-conviction relief be increased from 25 to 90 days. The Committee recognized that sometimes, briefs are filed along with applications for post-conviction relief. The Committee believes that the 90-day time frame is a more realistic time period given counsel's responsibilities once counsel receives the case.

Representatives from the Office of the Public Defender pointed out that the proposed language in R. 3:22-6A(3) provides defense counsel with 120 days to file an amended petition that is not cognizable under R. 3:22-2 or does not contain the requirements of R. 3:22-8. However, the proposed amendment to R. 3:22-9 provides defense counsel with 90 days to file an amended petition. The Office of the Public Defender suggested that both rules should contain the 120-day deadline. The Committee believes that there is a distinction between providing a longer time frame of 120 days to file an amended petition in R. 3:22-6(A)(3), because that rule addresses petitions that are not in compliance with the rules. If those petitions are not amended, they may be dismissed without prejudice. On the other hand, R. 3:22-9 governs petitions that are properly filed and defense counsel may or may not amend the petition. The Committee does not believe that it is necessary to provide defense counsel with 120 days to file an amendment, or to file a notice that no amended petition is warranted, when the initial petition is cognizable.

The Committee also recommends increasing the time for the prosecutor to file a answer from 30 days to 60 days. The 60-day time period will commence once defense counsel has submitted the petition and brief. This proposal is designed to avoid situations in which the prosecutor must respond separately to the original petition filed by a defendant and an amended petition filed by the Office of the Public Defender after issuance of an order of assignment pursuant to the amendments to R. 3:22-6. As set forth above, the proposed amendments to R. 3:22-9 provide assigned counsel with 90 days

from the date of assignment to file an amended petition, require that assigned counsel provide notice of whether an amended petition will in fact be filed, and obviate the need for prosecutors to respond until such notice, or the amended petition, is served.

The Committee recognized that in practice, prosecutors rarely file motions to dismiss petitions for post-conviction relief. Instead of filing a formal dismissal motion, the prosecutor will typically mention dismissal as part of the answer or reply brief that is filed. The Public Defender's Office estimated that approximately 6-12 motions for dismissal were filed in the past two years. One judge did not recall receiving any motions for dismissal of a petition for post-conviction in ten years. The Committee therefore recommends deleting references to motions for dismissal and their respective filing requirements from the rule, as well as the reference to the dismissal motions in the caption of the rule.

Representatives from the Division of Criminal Justice proposed adding the following language to the rule to address situations where a defendant may be uncooperative or unresponsive to counsel and seeks to withdraw a PCR petition without prejudice:

> The court shall not permit a defendant to withdraw a petition for post-conviction relief without prejudice where the basis for the withdrawal is that the defendant is unresponsive to counsel, or where defendant is incarcerated in another jurisdiction.

The purpose of this proposal was to require that defendants fully prosecute their post-conviction relief petitions or face dismissal of such petitions with prejudice to

conserve judicial resources and prevent defendants from circumventing the bar on second or successive petitions imposed by R. 3:22-4(b), as proposed to be amended. The Committee concluded that this language should not be added to the rule. The Committee is of the view that situations where a defendant is uncooperative or unresponsive to counsel should be handled on a case-by-case basis.

(11) R. 3:22-10. Presence of Defendant at Hearing; Preference

The Committee is proposing amendments to the rule to delete the first sentence and recommends designating paragraph (a) to address a defendant's presence at an evidentiary hearing, and adding new paragraphs (b), (c), (d), and (e) to incorporate standards for evidentiary hearings that have been developed by case law over time.

(a) R. 3:22-10(a)

The Committee recommends that the first sentence of the rule, which states that the proceedings shall be given preference, be deleted to accurately reflect the current practice that post-conviction relief applications are handled as expeditiously as possible. The Committee notes that the resolution of other cases of significance may be given preference over the resolution of PCR cases. Additionally, the Committee proposes to designate new paragraph (a) and amend the current language to make clear that the defendant has a right to be present for oral argument, as well as, when testimony is being given. The Committee agreed that the rule should also make clear that the defendant can waive his right to be present at the oral argument or when testimony is adduced. If a

defendant is out-of-state or otherwise cannot be brought to a hearing, consent to the waiver of presence can be provided by counsel or be otherwise implied.

(b) New Paragraph R. 3:22-10(b)

The Committee recommends incorporating into R. 3:22-10 the standards set forth by the Supreme Court of New Jersey for determining whether an evidentiary hearing is warranted. See State v. Preciose, 129 N.J. 451 (1992); State v. Marshall, 148 N.J. 89, cert. denied, 522 U.S. 850 (1997). In Preciose, the Court ruled that evidentiary hearings should be granted only if a defendant "has presented a prima facie claim in support of post-conviction relief" by demonstrating a "reasonable likelihood" of success. State v. Preciose, 129 N.J. at 462-63. In Marshall, the Court made clear, however, that there is a "pragmatic dimension" to the post-conviction relief court's determination of whether an evidentiary hearing is warranted. State v. Marshall, 148 N.J. at 158. Thus, a defendant is not entitled to an evidentiary hearing if such a hearing would not "aid the court's analysis of whether the defendant is entitled to post-conviction relief" or if "defendant's allegations are too vague, conclusory, or speculative . . . ." Ibid. The Court further affirmed that the "purpose of an evidentiary hearing is to permit the defendant to prove that he or she was improperly convicted or sentenced; it is not an occasion for the defendant to question witnesses in an indiscriminate search for additional grounds for post-conviction relief." Ibid.

Paragraph (b), extracted primarily from State v. Preciose, sets forth new proposed language which provides that a defendant is entitled to a evidentiary hearing only upon:

(1) establishment of a prima facie case in support of post-conviction relief; (2) a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and (3) a determination that an evidentiary hearing is necessary to resolve the claims for relief.

The proposal also defines prima facie case as a reasonable likelihood that the claim for relief, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.

(c) New Paragraph R. 3:22-10(c)

Paragraph (c) sets forth new language explaining that before the court can grant a hearing, any factual assertion that provides a predicate for a claim of relief must be made by affidavit or certification, pursuant to R. 1:4-4 and be based on personal knowledge of the declarant.

(d) New Paragraph R. 3:22-10(d)

Paragraph (d) sets forth new language explaining that the scope of an evidentiary hearing shall be limited to the issue of whether the defendant was improperly convicted. The purpose of this rule is to ensure that the defendant does not attempt to investigate additional claims for relief during the post-conviction relief hearing, for which the defendant has not demonstrated a reasonable likelihood of success on the merits.

(e) New Paragraph - R. 3:22-10(e)

The Committee is proposing adding a new paragraph (e) that would set forth three circumstances for which the court shall not grant an evidentiary hearing: (1) if a hearing

will not assist the court in resolving defendant's claim; (2) if the allegations are too vague, conclusory or speculative; or (3) for the purpose of permitting a defendant to investigate additional claims for relief for which the defendant has not established a prima facie case of a reasonable likelihood of success as required by R. 3:22-10(b).

(12) R. 3:22-11. Determination; Findings and Conclusions; Judgment; Supplementary Orders

Concern was raised that the rules do not contain any time frames for rulings on motions to dismiss or final determinations in post-conviction relief cases. Therefore, the Committee is recommending an amendment to R. 3:22-11 to require that the court make a final determination on the PCR petition within 30 days of the hearing or in the absence of a hearing, within 30 days of the filing of the amended petition or answer filed in the case.

The Committee also recommends deleting references to motions for dismissals in light of its recommendation to amend R. 3:22-9 to delete the practice of motions for dismissals.

(13) R. 3:22-12. Limitations

The Committee considered when a deficient petition for post-conviction relief should be deemed filed. Typically the five-year time bar in R. 3:22-12 commences at the time of the conviction or the time of sentencing, depending upon what the defendant is challenging. State v. Milne, 178 N.J. 486, 491 (2004). If a defendant alleges facts

demonstrating that the delay was because of the defendant's inexcusable neglect or if the "interests of justice demand it", the court may relax the time bar. Id. at 492.

The Committee is proposing several amendments to R. 3:22-12 to incorporate Milne. First, the Committee proposes to amend paragraph (a) of R. 3:22-12 to state that "no petition shall be granted pursuant to this rule if filed more than 5 years after rendition of the judgment or sentence sought to be attacked" unless the defendant shows that the delay was due to excusable neglect and that there is a reasonable probability that if the defendant's factual assertions were found to be true, the defendant would have been found not guilty. Members from the Office of the Public Defender opposed the language requiring a finding of "a reasonable probability that if the defendant's factual assertions were found to be true the defendant would have been found not guilty" to relax the 5-year time bar. Those members proposed that the standard should be "a reasonable probability that if the defendant's factual assertions were found to be true the relief sought would be granted." The Office of the Public Defender's reasoning for this proposal is that requiring a reasonable probability that a defendant would be found not guilty would set the bar for a first petition for post-conviction relief higher than the bar set for a second or subsequent petition for post-conviction relief.

Second, the Committee proposes to add a new paragraph (a)(3) to R. 3:22-12 to provide that a petition dismissed without prejudice as not cognizable under R. 3:22-2, or for failing to meet the requirements of R. 3:22-8, shall not trigger the application of the provisions pertaining to second or subsequent post-conviction relief petitions so long as

that dismissed petition is amended to conform with R. 3:22-2 and R. 3:22-8 and is re-filed by the original 5-year deadline set forth in R. 3:22-12, or is re-filed within 90 days of dismissal, whichever is later. The Committee is of the view that this amendment will more "strongly encourage[] those believing they have grounds for post-conviction relief to bring their claims swiftly, and [will more strongly] discourage[] them from sitting on their rights until it is too late for a court to render justice." State v. Mitchell, 126 N.J. 565, 576 (1992).

In addition, in conjunction with the proposed amendments to R. 3:22-4(b), it is proposed that R. 3:22-12 be amended to add a new paragraph (a)(2) to impose a one-year time limit to file all second or subsequent petitions to encourage defendants to raise all of their claims in the first PCR petition that is filed.

The Committee also proposes deleting the first sentence from the rule which provides that a petition to correct an illegal sentence may be filed at any time, because it is recommending that similar language be included in R. 3:21-10, in light of the proposed amendments to R. 3:22-2.

In light of the foregoing discussions, the Committee is proposing that the Court adopt the following rule recommendations.

1:3-4. Enlargement of Time.

(a) . . . No Change

(b) . . . No Change

(c) Enlargements Prohibited. Neither the parties nor the court may, however, enlarge the time specified by R. 1:7-4 (motion for amendment of findings); R. 3:18-2 (motion for judgment of acquittal after discharge of jury); R. 3:20-2, R. 4:49-1(b) and (c) and R. 7:10-1 (motion for new trial); R. 3:21-9 (motion in arrest of judgment); R. 3:21-10(a); R. 3:22-12 (petitions for post-conviction relief); R. 3:23-2 (appeals to the Law Division from judgments of conviction in courts of limited criminal jurisdiction); R. 3:24 (appeals to the Law Division from interlocutory orders and orders dismissing the complaint entered by courts of limited criminal jurisdiction); R. 4:40-2(b) (renewal of motion for judgment); R. 4:49-2 (motion to alter or amend a judgment); and R. 4:50-2 (motion for relief from judgment or order).

Note: Source-R.R. 1:27B (a) (b) (c) (d) (e), 4:6-1, 8:12-5(a)(b). Paragraph (c) amended July 7, 1971, effective September 13, 1971; paragraph (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended July 22, 1983 to be effective September 12, 1983; paragraph (c) amended July 26, 1984 to be effective September 10, 1984; paragraphs (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended January 5, 1998 to be effective February 1, 1998; paragraph (c) amended July 10, 1998 to be effective September 1, 1998; paragraph (c) amended July 28, 2004 to be effective September 1, 2004[.]; paragraph (c) amended _____ to be effective _____.

3:21-4. Sentence

(a) . . . No Change.

(b) . . . No Change

(c) . . . No Change

(d) . . . No Change

(e) . . . No Change

(f) . . . No Change

(g) . . . No Change

(h) Notification of Right to Appeal and to File Petitions for Post-Conviction Relief.

After imposing sentence, whether following the defendant's plea of guilty or a finding of guilty after trial, the court shall advise the defendant of the right to appeal and, if the defendant is indigent, of the right to appeal as an indigent. The court shall also inform the defendant of the time limitations in which to file petitions for post-conviction relief.

(i) . . . No Change

(j) . . . No Change

Note: Source-R.R. 3:7-10(d). Paragraph (f) amended September 13, 1971, paragraph (c) deleted and paragraphs (d), (e) and (f) redesignated as (c), (d) and (e) July 14, 1972 to be effective September 5, 1972; paragraph (e) adopted and former paragraph (e) redesignated as (f) August 27, 1974 to be effective September 9, 1974; paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraphs (d) and (e) amended August 28, 1979 to be effective September 1, 1979; paragraph (d) amended December 26, 1979 to be effective January 1, 1980; paragraph (g) adopted July 26, 1984 to be effective September 10, 1984; paragraph (d) caption and text amended November 5, 1986 to be effective January 1, 1987; paragraph (d) amended November 2, 1987 to be effective January 5, 1988; to be effective February 1, 1988; new paragraph (c) adopted and former paragraphs (c), (d), (e), (f), and (g) redesignated (d), (e), (f), (g), and (h)

respectively June 29, 1990 to be effective September 4, 1990; paragraph (b) amended July 14, 1992 to be effective September 1, 1992; paragraph (I) adopted April 21, 1994 to be effective June 1, 1994; paragraphs (b), (e), (f) and (g) amended July 13, 1994 to be effective January 1, 1995; former paragraphs (f), (g), (h), and (I) redesignated as paragraphs (g), (h), (I), and (j) and new paragraph (f) adopted July 10, 1998 to be effective September 1, 1998; paragraph (j) amended July 5, 2000 to be effective September 5, 2000[.]; paragraph (h) caption and text amended _____to be effective_____.

3:21-10. Reduction or Change of Sentence

(a) . . . No Change.

(b) Exceptions. A motion may be filed and an order may be entered at any time (1) changing a custodial sentence to permit entry of the defendant into a custodial or non-custodial treatment or rehabilitation program for drug or alcohol abuse, or (2) amending a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant or (3) changing a sentence for good cause shown upon the joint application of the defendant and prosecuting attorney, or (4) changing a sentence as authorized by the Code of Criminal Justice, or (5) correcting a sentence not authorized by law including the Code of Criminal Justice, or [(5)](6) changing a custodial sentence to permit entry into the Intensive Supervision Program, or [(6)] (7) changing or reducing a sentence when a prior conviction has been reversed on appeal or vacated by collateral attack.

(c) Procedure. A motion filed pursuant to paragraph (b) hereof shall be accompanied by supporting affidavits and such other documents and papers as set forth the basis for the relief sought. A hearing need not be conducted on a motion filed under paragraph (b) hereof unless the court, after review of the material submitted with the motion papers, concludes that a hearing is required in the interest of justice. All changes of sentence shall be made in open court upon notice to the defendant and the prosecutor. An appropriate order setting forth the revised sentence and specifying the change made and the reasons therefor shall be entered on the record. Upon any motion filed pursuant to this rule, the

matter may be referred to the Office of the Public Defender who shall represent the defendant as assigned by the judge.

(d) . . . No Change.

(e) . . . No Change.

Source-R.R. 3:7-13(a)(b); paragraph (b) amended and redesignated as (c) and new paragraph (b) adopted July 17, 1975 to be effective September 8, 1975; paragraph (b) amended August 28, 1979 to be effective September 1, 1979; new paragraph (d) adopted July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (b) amended and paragraph (e) adopted July 22, 1983 to be effective September 12, 1983; paragraph (c) amended July 13, 1994 to be effective January 1, 1995; paragraph (b) amended June 28, 1996 to be effective September 1, 1996[.]; new paragraph (b)(5) adopted, former paragraphs (b)(5) and (b)(6) redesignated as (b)(6) and (b)(7) and paragraph (c) amended _____ to be effective _____.

3:22-2. Grounds

A petition for post-conviction relief is cognizable if based upon any of the following grounds:

(a) . . . No Change.

(b) . . . No Change.

(c) Imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law if raised together with other grounds cognizable under paragraph (a), (b), or (d) of this rule. Otherwise a claim alleging that the imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law shall be filed pursuant to R. 3:21-10(b)(5).

(d) . . . No Change.

Note: Source--R.R. 3:10A-2[.]; paragraph (c) amended _____ to be effective _____.

3:22-3. Exclusiveness of Remedy; Not Substitute for Appeal or Motion

Except as otherwise required by the Constitution of New Jersey, a petition pursuant to this rule is the exclusive means of challenging a judgment rendered upon conviction of a crime. It is not, however, a substitute for appeal from conviction or for motion incident to the proceedings in the trial court, and may not be filed while such appellate review or motion is [available] pending.

Note: Source--R.R. 3:10A-3[.]; amended _____to be effective_____.

3:22-4. Bar of Grounds Not Raised in Prior Proceedings; Bar of Second or Subsequent Petitions; Exceptions

(a) Any ground for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds**:**

[(a)] (1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or

[(b)] (2) that enforcement of the bar would result in fundamental injustice; or

[(c)] (3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

A ground could not reasonably have been raised in a prior proceeding only if defendant shows that the factual predicate for that ground could not have been discovered earlier through the exercise of reasonable diligence.

A denial of relief would be contrary to a new rule of constitutional law only if the defendant shows that the claim relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings.

(b) A second or subsequent petition for post-conviction relief shall be dismissed unless:

(1) it is timely under R. 3:22-12(a)(2); and

(2) it alleges on its face either:

(A) that the petition relies on a new rule of constitutional law, made retroactive to defendant's petition by the United States Supreme Court or the Supreme Court of New Jersey, that was unavailable during the pendency of any prior proceedings; or

(B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would raise a reasonable probability that the relief sought would be granted.

Note: Source--R.R. 3:10A-4[.]; caption amended, redesignation of paragraph (a), former paragraphs (a), (b), and (c) amended and redesignated as paragraphs (a)(1), (a)(2) and (a)(3) and new paragraph (b) added _____ to be effective _____.

3:22-6. Indigents; Waiver of Fees; Assignment of Counsel, and Grant of Transcript; Assigned Counsel May Not Withdraw

(a) Waiver of Fees; Assignment on First Petition. At the time of filing of a petition under this Rule, a defendant who [is not] wants to be represented by the Office of the Public Defender may annex thereto a sworn statement alleging indigency in the form prescribed by the Administrative Director of the Courts, which form shall be furnished to the defendant by the criminal division manager's office. The criminal division manager's office shall determine whether the defendant is indigent and screen the petition to determine whether the petition is cognizable under R. 3:22-2 and, if so, whether the requirements of R. 3:22-8 have been met. The Criminal Division Manager shall thereafter forthwith submit the same to the [Presiding Judge of the Criminal Division] Criminal Presiding Judge who, if satisfied therefrom that the defendant is indigent, shall order the criminal division manager's office to file the petition without payment of filing fees. At the same time, and without separate petition therefor, if the petition is the first one filed by the defendant attacking the conviction pursuant to this rule, the court shall as of course, unless defendant affirmatively states an intention to proceed pro se, [refer] assign, by order, the matter to the Office of the Public Defender if the defendant's conviction was for an indictable offense, or assign counsel in accordance with R. 3:4-2 if the defendant's conviction was for a non-indictable offense. All orders of assignment pursuant to this section shall contain the name of the judge to whom the case is assigned and shall set a place and date for a case management conference.

If the petition is not cognizable under R. 3:22-2, or if the petition does not meet the requirements of R. 3:22-8, the court shall set forth the reasons that the petition is not cognizable under R. 3:22-2, or fails to meet the requirements of R. 3:22-8, and shall dismiss the petition.

(b) Assignment of Counsel on Cause Shown. Upon any second or subsequent petition filed pursuant to this Rule attacking the same conviction, the matter shall be [referred] assigned to the Office of the Public Defender only upon application therefor and showing of good cause. For purposes of this section, good cause exists only when the court finds that a substantial issue of fact or law requires assignment of counsel and when a second or subsequent petition alleges on its face a basis to preclude dismissal under R. 3:22-4.

(c) . . . No Change.

(d) Substitution; Withdrawal of Assigned Counsel. [Absent a showing of good cause, t]The court [will] shall not substitute new assigned counsel at the request of defendant while assigned counsel is serving[.], except upon a showing of good cause and notice to the Office of the Public Defender. Assigned counsel may not seek to withdraw on the ground of lack of merit of the petition. Counsel should advance [any grounds insisted upon by defendant notwithstanding that counsel deems them without merit] all of the legitimate arguments requested by the defendant that the record will support. If defendant insists upon the assertion of any grounds for relief that counsel deems to be

without merit, counsel shall list such claims in the petition or amended petition or incorporate them by reference. Pro se briefs can also be submitted.

Note: Source--R.R. 3:10A-6(a)(b)(c)(d). Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (d) amended July 13, 1994 to be effective January 1, 1995[.]; paragraphs (a), (b) and (d) amended _____to be effective_____.

3:22-6A. Notifying Court of Assignment; Filing of Appearance

(1) Within ninety days of receipt of an order of assignment on a filed petition for post-conviction relief, the Public Defender shall provide the court with the name of the attorney assigned to represent the defendant. That attorney shall, within ten days, file an appearance with the judge.

(2) If a direct appeal, including a petition for certification, is pending, the Public Defender shall notify the court, and the petition shall be dismissed without prejudice. If the defendant refiles the petition within 90 days of the date of the judgment on direct appeal, including consideration of a petition for certification, or within five years after rendition of the judgment or sentence sought to be attacked, whichever is later, it shall be considered a first petition for post-conviction relief.

(3) Where the order of assignment sets forth reasons that the petition is not cognizable under R. 3:22-2, or does not contain the requirements of R. 3:22-8, or the Office of the Public Defender determines that such deficiencies exist and so notifies the court, the attorney assigned to represent the defendant shall, within 120 days of assignment, file an amended petition or new application that is cognizable under R. 3:22-2 and which meets the requirements contained in R. 3:22-8, or shall seek other relief as may be appropriate. In the absence of an amended petition, the court may dismiss the petition without prejudice.

(4) In all other cases in which an attorney is representing the defendant, the attorney shall file an appearance contemporaneously with the filing of a petition for post-conviction relief.

Note: Adopted _____.

3:22-7. Docketing; Service on Prosecutor; Assignment for Disposition

The [clerk] criminal division manager 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 thereof to the prosecutor of the county. If an attorney files the petition, that attorney shall serve a copy thereof on the prosecutor before filing and shall file proof, certification or acknowledgment of service with the petition. The [clerk] criminal division manager shall promptly notify the Criminal Presiding Judge [Assignment Judge or judge designated by the Assignment Judge] of the filing of the petition, [who] and the Criminal Presiding Judge shall forthwith refer the matter for disposition to a trial judge.

Note: Source--R.R. 3:10A-7; amended July 13, 1994 to be effective September 1, 1994[.]; amended_____to be effective_____.

3:22-9. Amendments of Pleadings; Answer [or Motion] by Prosecutor

Amendments of pleadings shall be liberally allowed. For all petitions assigned by the Office of the Public Defender pursuant to R. 3:22-6(a), [A]assigned counsel may as of course serve and file an amended petition within [25] 90 days after assignment. If assigned counsel determines that no amended petition is warranted, counsel must serve and file notice of that determination within 90 days after assignment. For all petitions assigned to the Office of the Public Defender, the prosecutor shall, within 60 days after service of a copy of the amended petition or the notice that no amended petition will be filed, serve and file an answer to the petition or amended petition. For all other petitions for post-conviction relief, w[W]ithin [30] 60 days after service of a copy of the petition or amended petition, the prosecutor shall serve and file an answer thereto. [or move on 10 days' notice for dismissal. If a motion for dismissal is denied the State's answer shall be filed within 15 days thereafter.] The court may make such other orders with respect to pleadings, as it deems appropriate.

Note: Source--R.R. 3:10A-9[.]; caption and text amended_____to be effective_____.

3:22-10. Presence of Defendant at Hearing; Preference; Evidentiary Hearing

[The proceedings shall be given preference and be determined promptly.]

(a) A defendant in custody [may be present in court in the court's discretion and] shall be entitled to be present when oral argument or testimony is adduced [on a material issue of fact within the defendant's personal knowledge]. The defendant's presence can be waived by counsel upon request of the defendant.

(b) A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.

(c) Any factual assertion that provides the predicate for a claim of relief must be made by an affidavit or certification pursuant to Rule 1:4-4 and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing.

(d) The scope of an evidentiary hearing shall be limited to the issue of whether the defendant was improperly convicted.

(e) A court shall not grant an evidentiary hearing:

(1) if an evidentiary hearing will not aid the court's analysis of the defendant's entitlement to post-conviction relief;

(2) if the defendant's allegations are too vague, conclusory or speculative; or

(3) for the purpose of permitting a defendant to investigate whether additional claims for relief exist for which defendant has not demonstrated a reasonable likelihood of success as required by R. 3:22-10(b).

Note: Source--R.R. 3:10A-11; amended July 13, 1994 to be effective September 1, 1994[.]; first paragraph of rule amended and designated as new paragraph (a) and new paragraphs (b), (c), (d) and (e) added _____to be effective_____.

3:22-11. Determination; Findings and Conclusions; Judgment; Supplementary Orders

The court shall make its final determination within 30 days of the hearing or, if there is no hearing, within 30 days of the filing of the last amended petition or answer. In making final determination upon 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 a judgment, which shall include an appropriate order or direction with respect to the 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.

Note: Source--R.R. 3:10A-12[.]; amended _____to be effective_____ .

3:22-12. Limitations

(a) General Time Limitations. [A petition to correct an illegal sentence may be filed at any time.]

(1) First Petition For Post-Conviction Relief**.** No [other] petition shall be [filed] granted pursuant to this rule if filed more than 5 years after rendition of the judgment or sentence sought to be attacked unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that there is a reasonable probability that if the defendant's factual assertions were found to be true the defendant would have been found not guilty.

(2) Second or Subsequent Petition for Post-Conviction Relief. Notwithstanding any other provision in this rule, no second or subsequent petition shall be filed more than one year after the latest of:

(A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or

(B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence.

(3) A petition dismissed pursuant to R. 3:22-6A(3) without prejudice as not cognizable under R. 3:22-2, or for failing to meet the requirements of R. 3:22-8, shall be treated as a first petition for purposes of these rules if amended and refiled within 90 days

after the date of dismissal, or 5 years after rendition of the judgment or sentence sought to be attacked, whichever is later.

(b) . . . No Change

(c) These time limitations shall not be relaxed, except as provided herein.

Note: Source--R.R. 3:10A-13. Caption added and text designated as paragraph (a), and new paragraph (b) added July 12, 2002 to be effective September 3, 2002[.]; paragraph (a) amended and redesignated as paragraph (a)(1) new paragraphs (a)(2), (a)(3) and (c) added _____ to be effective _____.

2. Rules 2:5-3(d) and 3:22-6(c) – Ordering Transcripts in Municipal Appeals and Appeals from Second or Subsequent Denials of Petitions for Post-Conviction Relief

The Committee is proposing amendments to R. 2:5-3(d) and R. 3:22-6(c) to make the ordering of transcripts in municipal appeals and in appeals from the denial of a second or subsequent post-conviction relief application discretionary. The reasoning behind this proposal is that the Appellate Division may not need transcripts in certain cases on appeal, other than those presented to the Law Division particularly those involving second or subsequent petitions for post-conviction relief that have been dismissed on the papers and there is a written statement of reasons for the decision made by the Superior Court so that the oral transcript is reduced to writing. The Committee is of the view that the court can avoid costs associated with the ordering of transcripts in these cases.

The Committee believes that as currently written, the "where necessary" language contained in R. 3:22-6 could be interpreted to make the ordering of transcripts either mandatory or discretionary in second or subsequent petitions for post-conviction relief. The proposed amendment would change "shall" to "may" in R. 2:5-3(d) and R. 3:22-6(c) in a effort to make it clearer that transcripts need not be ordered in cases that fall within these rules. The Committee is proposing amendments to R. 2:5-3(d) and R. 3:22-6(c).

R. 2:5-3. Preparation and filing of transcript; statement of proceedings; prescribed transcript request form

(a) . . . No Change.

(b) . . . No Change.

(c) . . . No Change.

(d) Deposit for Transcript; Payment Completion. The appellant, if not the State or a political subdivision thereof, shall, at the time of making the request for the transcript, deposit with the reporter or the clerk of the court or agency from whom a transcript is ordered, either the estimated cost of the transcript as determined by the court reporter, clerk or agency, or the sum of $ 500.00 for each day or fraction thereof of trial or hearing. If the appellant is the State or a political subdivision thereof, it shall provide a voucher to the reporter or the clerk or the agency for billing for the cost of the transcript. The reporter, clerk or agency, as the case may be, shall upon completion of the transcript, bill or reimburse the appellant, as appropriate, for any sum due for the preparation of the transcript or overpayment made therefore. If the appellant is indigent and is entitled to have a transcript of the proceedings below furnished without charge for use on appeal, either the trial or the appellate court, on application, may order the transcript prepared at public expense. Unless the indigent defendant is represented by the Public Defender or that office is otherwise obligated by law to provide the transcript to an indigent, the court may [shall] order the transcript of the proceedings below furnished at the county's expense if the appeal involves prosecution for violation of a statute and at the municipality's expense if the appeal involves prosecution for violation of an ordinance.

(e) . . . No Change.

(f) . . . No Change.

Note**:** Source-R.R. 1:2-8(e) (first, second, third, fourth, sixth and seventh sentences), 1:2-8(g), 1:6-3, 1:7-1(f) (fifth sentence), 3:7-5 (second sentence), 4:44-2 (second sentence), 4:61-1(c), 4:88-8 (third and fourth sentences), 4:88-10 (sixth sentence). Paragraphs (a)(b)(c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraphs (b) and (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended June 29, 1973 to be effective September 10, 1973; caption amended and paragraph (a) caption and text amended July 24, 1978 to be effective September 11, 1978; paragraphs (c) and (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended, paragraph (d) caption and text amended, former paragraph (e) redesignated paragraph (f), and paragraph (e) caption and text adopted November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c), (e) and (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (e) amended July 27, 2006 to be effective September 1, 2006[.]; paragraph (d) amended _____ to be effective _____.

R. 3:22-6. Indigents; waiver of fees; assignment of counsel, and grant of transcript; assigned counsel may not withdraw

(a) . . . No Change.

(b) . . . No Change.

(c) Transcript. After assignment of counsel, or if the indigent defendant proceeds without counsel, the court may [shall] grant an application for the transcript of testimony of any proceeding shown to be necessary in establishing the grounds of relief asserted.

(d) . . . No Change.

Note**:** Source-R.R. 3:10A-6(a)(b)(c)(d). Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (d) amended July 13, 1994 to be effective January 1, 1995[.]; paragraph (c) amended to be effective .

3. Rule 2:7-2(d) – Attorney of Record

During the 2004-2007 rules cycle, the Court adopted the Committee's recommendation to amend R. 2:7-2(d) to assure that a timely notice of appeal is filed in the Appellate Division after an unsuccessful trial *de novo* and to assure timely assignment of counsel where the assigned attorney filing the notice of appeal is seeking to withdraw and have the court appoint another attorney. As amended, the rule was designed to provide that if assigned counsel is the counsel of record in the Law Division and does not move to withdraw or be substituted as counsel, that attorney will remain the counsel of record for an appeal. These amendments were effective on September 1, 2007.[8]

In State v. Taimanglo, 403 N.J. Super. 112, 121 (App. Div. 2008), the Appellate Division stated, in footnote 7:

> We also note assigned counsel's obligation to file an appeal to us if desired by the client, and to move to be relieved thereafter. *See R.* 2:7-2(d); Pressler, *Current N.J. Court Rules*, comment 4 on *R.* 2:7-2(d) (2009). There is no indication of an intent to change the filing requirement when *R. 3:27-2* was deleted and *R. 2:7-4* was amended in 2004. *See also State v. Sheridan, 280 N.J. Super. 419, 655 A.2d 934 (App. Div. 1995)*; Pressler, *supra*.

As currently written, paragraph (d) of R. 2:7-2 provides that assigned counsel remain counsel on appeal, unless counsel moves to be relieved, but the rule does not provide that counsel must actually file the appeal. In light of Taimanglo, the Committee is proposing to add language to paragraph (d) to clarify that assigned counsel is also obligated to file the appeal. This proposed amendment addresses assigned counsel in

[8] The Court also adopted the Committee's recommendation to remove cross-references to other rules that were contained in paragraph (d) of the rule.

non-indictable cases when a defendant is convicted, has *de novo* review in the Law Division, and then files an appeal in the Appellate Division. The Committee agreed to also recommend an amendment to the caption of paragraph (d) to reflect that this paragraph of the rule addresses appeals filed in non-indictable prosecutions.

The Committee is recommends the proposed amendments to R. 2:7-2(d).

2:7-2. Assignment of Counsel on Appeal

(a) …No Change.

(b) …No Change.

(c) …No Change.

(d) ...Responsibility of Counsel Assigned by the Trial Court For Non-Indictable Offenses. Assigned counsel representing a defendant in a non-indictable prosecution shall file an appeal for a defendant who elects to exercise his or her right to appeal. An attorney filing a notice of appeal shall be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal an application for the assignment of counsel on appeal.

Note: Source--R.R. 1:2-7(b), 1:12-9(b) (d). Paragraph (c) adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended, paragraph (b) caption and text amended, paragraph (c) adopted and former paragraph (c) redesignated paragraph (d) November 5, 1986 to be effective January 1, 1987; paragraphs (b) and (d) amended July 10, 1998 to be effective September 1, 1998; paragraphs (b) and (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended June 15, 2007 to be effective September 1, 2007[.]; paragraph (d) caption and text amended to be effective .

4. Rule 3:30 – Expungement Fees

The Committee is proposing a new rule, R. 3:30, to address fees to file an application or petition for an expungement of records. Currently, the fees to process an application or petition for the expungement of records are contained in two separate statutes, N.J.S.A. 22A:2-25 and N.J.S.A. 2C:52-29, which has caused confusion as to the total fee required.

N.J.S.A. 22A:2-25 governs Law Division Filing fees and states:

> Upon the filing, entering or docketing with the deputy clerk of the Superior Court in the various counties of the herein-mentioned papers or documents by either party to any action or proceeding in the Law Division of the Superior Court, other than a civil action in which a summons or writ must be issued, he shall pay the deputy clerk of the court the following fees:
>
> . . . Filing first paper on petition for expungement …$ 22.50

N.J.S.A. 2C:52-29 also governs expungement filing fees. It states:

> Any person who files an application pursuant to this chapter shall pay to the State Treasurer a fee of $30.00 to defer administrative costs in processing an application hereunder.

Based upon these two statutes, when an individual files an application or petition for an expungement of records, the total fee is $52.50.

The Committee is recommending the adoption of a new rule, R. 3:30, to reference the two applicable statutes requiring fees to file an application or petition for an expungement of records in one court rule. The Committee recommends that new R. 3:30 be adopted.

Rule 3:30. Fees for Expungement of Records

Any person who files an application for an expungement of records, pursuant to N.J.S.A. 2C:52-1 to - 32, shall pay filing fees as required by N.J.S.A. 2C:52-29 and N.J.S.A. 22A:2-25.

Note: Adopted _____ to be effective _____.

B. Non-Rule Recommendations

1. Amendments to the Main Plea Form – Immigration Status Issues

The Committee is proposing that Question #17 of the *Main Plea Form*, which addresses a defendant's immigration status, be clarified. Currently, Question #17 of the *Main Plea Form* reads: "Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?" This question provides for a response of Yes, No or NA (i.e. not applicable). The Conference of Criminal Presiding Judges reported that when defendants select the response of "not applicable" in Question #17, often the record is unclear of why they provided that response. The Conference explained that many defendants have filed motions to vacate their guilty pleas arguing that the possible immigration/deportation consequences were not fully explained to them by counsel at the time the plea was entered. To alleviate this concern, the Conference of Criminal Presiding Judges recommended amending Question #17 of *Main Plea Form* as follows:

Question #17:

#17a.	Are you a citizen of the United States? (If no, answer question #17b)	[YES] [NO]
#17b.	Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?	[YES] [NO]

The Committee agreed to recommend the amendments without any objections. The revisions to the *Main Plea Form* were promulgated in Attachment 1 of Directive #14-08 (October 8, 2008).

2. Amendments to Main Plea Form – Interstate Compact for Adult Offender Supervision

The Federal Interstate Commission for Adult Offender Supervision (ICAOS) passed two amendments to the Interstate Compact Rules that went into effect on January 1, 2008. The ICAOS is charged with overseeing the day-to-day operations of the Interstate Compact for Adult Offender Supervision (Compact), a formal agreement between member states that seeks to promote public safety by systematically controlling the interstate movement of certain adult offenders. Upon request of the Administrative Office of the Courts, Probation Services Division, the Committee considered whether a rule amendment or an amendment to the plea forms was necessary in light of the Compact rules involving the transfer of supervision of sex offenders.

Effective January 1, 2008, the ICAOS adopted Rule 1.101 to define a "sex offender" as: "an adult placed under, or made subject to, supervision as the result of the commission of an offense and released to the community under the jurisdiction of the courts, paroling authorities, corrections or other criminal justice agencies, and who is required to register as a sex offender either in the sending or receiving state, and who is required to request transfer of supervision under the provisions of the Interstate Compact for Adult Offender Supervision." The ICAOS also adopted Rule 3.101-3 regarding transfer of supervision of sex offenders. The transfer rule provides that "a sex offender shall not be allowed to leave the sending state until the sending state's request for transfer of supervision has been approved, or reporting instructions have been issued by the receiving state." As far as timing, the receiving state has five business days to review the

defendant's proposed residence to ensure compliance with local laws before issuing reporting instructions. If the proposed residence is invalid because of an existing law or policy, the receiving state may deny reporting instructions. In effect the rule, as applied can prevent a defendant from leaving the sending state until the receiving state approves the transfer. As a consequence, some defendants may not be able to return home after being sentenced to probation by the court or after being released on parole.

The Committee first discussed the definition of a "sex offender" and recognized that offenses requiring sex offender registration in New Jersey may be different from offenses requiring sex offender registration under a receiving state's law or policy. As part of the package to transfer a defendant's supervision to another state, the New Jersey Probation Division normally provides the receiving state with information from police reports and presentence investigation reports (PSI). These investigative reports may reveal allegations of sexual conduct or a sexual component in the case. The receiving state will have available these allegations contained in the PSI and/or police report to possibly consider in determining whether a defendant falls within the definition of a "sex offender" pursuant to the ICAOS rules and under the receiving state's law and policy. Such consideration can even occur if the allegations of sexual conduct or a sexual component are not a part of the factual basis elicited in support of a guilty plea or the resulting conviction. For instance, the receiving state may consider allegations contained in the PSI or police report even when a defendant pleads guilty to a downgraded or lesser included offense that does not include an element involving sexual conduct or an alleged

sexual component. As an example, the Committee considered a hypothetical situation where a defendant resides in another state, is convicted of burglary in New Jersey and the facts set forth in the police report indicate a sexual component of the crime; however the defendant is not charged with or convicted of a sex offense under New Jersey law. Although the defendant is not charged with or convicted of a sex offense in New Jersey, the receiving state (i.e., the state of the defendant's residence) will have available the investigative reports prepared in the case when assessing whether the defendant qualifies as a "sex offender" pursuant to the receiving state's law or policy and the ICAOS rules. As a result, the defendant may fall within the definition of "sex offender" under the ICAOS rules and may not be able to return home until a transfer of supervision plan is approved.

A representative from the Office of the Attorney General contacted the National Association of Attorneys General to query how other states are handling the application of the ICAOS rules. Responses from seven states revealed that none of the states were providing notification to defendants of the possible consequences of the rules, either because the state considered the application of the rules to be a collateral consequence of the plea, which did not require notice or because the state had not yet developed any policies or procedures to address the rules. Although other states have not implemented any procedures to address the ICAOS rules, the Committee believes that is appropriate for New Jersey to do so.

The Committee considered different ways to inform a defendant, who lives in or may move to another state, that if there are allegations involving sexual conduct the Compact may apply and that the defendant may not be able to return home until a supervision plan is approved. Most members were of the view that a question should be included on one of the plea forms because it will alert defendants, attorneys and judges to this potential issue and will help ensure that a knowing and intelligent plea is taken. Some members believed a question would be best placed on the *Additional Questions For Certain Sex Offenses (Megan's Law) Plea Form*, because it would capture the majority of defendants who would be affected by the Compact Rules regarding sex offenders. Others were of the view that a question should be added to the *Main Plea Form* to provide notification to all defendants of the possible application of the ICAOS rules, even if the defendant is not convicted of a sex offense in New Jersey. Some members objected to including a question on either of the plea forms, being of the view that application of the Compact Rules is a collateral consequence of a plea and adding more questions "dilutes" the plea form. The Committee also discussed whether notice in the plea form was "too late" and whether this potential consequence should be explained by defense counsel prior to plea negotiations, to allow the defendant to raise any possible objections before the plea is taken.

A discussion ensued and by a 16-2 vote the Committee determined that a notification question should be added to the *Main Plea Form*. The Committee believed that a 2-part question is appropriate, because the Compact applies to probationers and

parolees who may reside in or to move to another state. Question #18a explains to all defendants that if they reside out-of-state, that return to their residence may be delayed until a transfer of supervision plan is approved. Question #18b focuses on the transfer of supervision to another state for defendants who may qualify as a "sex offender" under the ICAOS rules or the law or policy of the receiving state. The *Main Plea Form* has been amended to include new questions #18a and #18b, which state:

18a.	Do you understand that pursuant to the rules of The Interstate Compact for Adult Offender Supervision if you are residing outside the State of New Jersey at the time of sentencing that return to your residence may be delayed pending acceptance of the transfer of your supervision by your state of residence?	[YES]	[NO]
18b.	Do you also understand that pursuant to the same Interstate Compact transfer of your supervision to another state may be denied or restricted by that state at any time after sentencing if that state determines you are required to register as a sex offender in that state or if New Jersey has required you to register as a sex offender?	[YES]	[NO]

The revisions to the *Main Plea Form* were promulgated in Attachment 1 of AOC Directive #14-08 (October 8, 2008).

3. Presentence Reports

I. Introduction

The factual basis for a plea may not correspond to the allegations and facts embodied in a presentence report or may not be relevant to a negotiated plea recommendation. Therefore, during the 2002-2004 term, the Criminal Practice Committee considered various issues concerning corrections to adult presentence investigation (PSI) reports and which version of a criminal offense should be included in the "Offense Circumstances" section of the PSI. The Committee created a Subcommittee during the 2002-2004 term to examine these issues. Due to changes in the Committee's roster, the Subcommittee was reconvened with new members during the 2004-2007 term.

During the 2004-2007 term, the Subcommittee was also asked to consider implementing any forms and/or procedures to make the Department of Corrections and classification personnel aware of any particular dangers or needs for medication for prisoners being transferred into state custody following sentencing, and to make sure that any suicide or similar mental health illness possibilities are timely brought to the attention of institutional authorities upon commitment. With regard to the facts of the case, the Subcommittee was asked to consider the impact upon the use of presentence reports in Sexually Violent Predator Cases and Parole Board hearings, where presentence reports are relied upon in subsequent hearings to determine the actual facts of the case. The Committee considered this issue during its discussion of the version of the criminal offense that should be included in the "Offense Circumstances" section of the PSI.

To fully understand the current practice and to consider practical solutions, the Subcommittee asked the Conference of Criminal Division Managers and the Conference of Criminal Presiding Judges to consider developing a uniform protocol (1) to memorialize challenges and corrections made to the presentence report, (2) to incorporate the court's findings regarding challenges and corrections, and (3) to forward revised presentence reports to the parties and interested entities. The Subcommittee also asked the Conference of Criminal Presiding Judges to consider what is (or should be) the "official version" of the offense contained in the presentence report.

The Conference of Criminal Division Managers and the Conference of Criminal Presiding Judges forwarded their comments and recommendations on these matters to the Subcommittee. The Subcommittee took the Conferences' input into consideration in drafting a report. The full Committee reviewed the Subcommittee's Report. Set forth below is a discussion of the pertinent issues and proposed recommendations to address these issues.

II. Corrections To The Presentence Investigation (PSI) Report

A. Background

Challenges to the presentence report are normally raised during the sentencing proceeding in open court. Rarely are challenges presented to the court before the sentencing hearing. During the Criminal Practice Committee's 2002-2004 term, a Deputy Public Defender from Camden County appeared before the Committee and asserted that when challenges to entries in the PSI were raised at the sentencing hearing,

the court often accepted changes to the presentence report proposed by defense counsel or, based on defense counsel's objections, decided not to consider certain disputed information contained in the PSI for purposes of sentencing. The presentence report, however, would not be officially amended, so any changes made or objections raised at the time of sentencing were not contained in versions of the PSI that were forwarded to the Department of Corrections (DOC), the Probation Division or the State Parole Board.

The Committee recognized that presentence reports were initially intended only to aid the court during sentencing, but are now used by the Parole Board, the Probation Division and the DOC for far different purposes. For instance, the Committee learned that the DOC uses information contained in the PSI for classification purposes, to determine custody status, to make job assignments, to recommend drug treatment programs and to determine eligibility for community release. For the DOC's purposes the most important information in the PSI is contained in the sections describing the circumstances of the offense, the prior court history, the employment history, the mental health history and the defendant's version of the offense. While the DOC looks at the prior court history section of the PSI, it also conducts its own criminal history investigation.

The State Parole Board uses the information that is in the PSI in essentially the same way as the DOC. For the Parole Board, the most important information is contained in the sections describing the circumstances of the offense, medical and mental history, and the defendant's version of the offense. Unlike the DOC, the Parole Board

does not conduct an independent investigation regarding the offender's criminal history. It relies exclusively on the information that is set forth in the PSI. Likewise, the Probation Division utilizes the PSI to establish a meaningful case plan and develop conditions of supervision.

Consequently, if changes or challenges are made to the information contained in the PSI, often, those changes or challenges are not documented or forwarded to the interested parties or agencies. Therefore, when the Parole Board considers whether to release a particular defendant on parole, it could be relying on the original, uncorrected presentence report, rather than on a corrected version of the report. That, in turn, could have an impact on whether the defendant is paroled. Additionally, the DOC often relies on the information in the PSI to make classification and other decisions. Incorrect information contained in the PSI could impact upon those decisions, as well. Also, the Probation Division relies on the PSI to develop a case plan or monitoring strategy based upon behaviors that may not be reflected in the factual basis for the plea, but may be a part of the PSI.

B. Types of Challenges/Corrections to PSI

The Committee identified the following common substantive challenges and/or corrections that are made to the PSI: (1) jail credits (the Committee did not believe that this was a significant problem); (2) facts of the offense; and (3) prior arrests or convictions in the court history section of the PSI. Additionally, the Committee recognized that occasionally administrative corrections are made to the PSI, such as

changes to telephone numbers and addresses. The Committee agreed that to maintain the credibility of the presentence investigation process, it is imperative to develop a policy that all corrections or changes made to the PSI should be captured and forwarded to appropriate parties or interested entities, regardless of whether it is an administrative change or a substantive correction.

1. Challenges to the Court History Section of the PSI

Often defendants challenge entries contained in the court history section of the PSI. Frequently defendants assert that the court history section of the PSI contains incorrect charges and/or dispositions. The information set forth in the court history section of the PSI is primarily obtained from a defendant's Computerized Criminal History (CCH) which is maintained by the New Jersey State Police and is supported by fingerprint comparisons. In addition, some court history entries are derived by running a name check in the criminal Promis/Gavel[9] system or municipal Automated Complaint System (ACS) and comparing other personal identifiers, such as a social security number, address or date of birth. Promis/Gavel and ACS searches are not verified by fingerprint comparisons.

Normally, when presented with a challenge to an entry in the court history section of the PSI, sentencing judges will advise defense counsel and the defendant that the

[9] The Promis/Gavel system is an automated criminal case tracking system that captures information concerning defendants who have been charged with indictable offenses and tracks the processing of those defendants from initial arrest through appellate review. It provides the function of docketing, indexing, noticing, calendaring, statistical reporting, and case management reporting.

challenge, even if accepted as true, will not change the sentence they are planning to impose. The sentence is then imposed without consideration of the disputed entry and without any changes being made to the PSI. Copies of the PSI, as presented to the court, are then distributed to the Probation Department or the Department of Corrections and Parole Board depending on the type of sentence imposed.

The Conference of Criminal Division Managers expressed the view that many defense attorneys and defendants incorrectly assume that because the court proceeded with sentencing after a challenge is made, that the court accepted the challenge and that all of the PSI reports will be amended accordingly. However, unless formally requested by the court, the Criminal Division does not edit the criminal history contained in the PSI based solely on the assertions of defense counsel and the defendant. The Committee reached the consensus that a defendant challenging an entry in the PSI has the burden to provide documentation showing that the entry in the report is incorrect. This includes challenges to court history entries, jail credits or other substantive or administrative entries.[10]

Several objections were raised to the requirement that a defendant must provide documentation to challenge an entry in the PSI. Representatives from the defense bar explained that it is highly unlikely and probably unattainable for defendants to prove inaccuracies in the PSI because they do not have access to criminal history record

[10] The Committee also identified challenges to restitution amounts as a prevalent issue. The Committee determined, however, that the burden on the defendant to provide documentation showing that an entry in the PSI is incorrect does not apply to challenges to restitution amounts. See State v. Martinez, 392 N.J. Super. 307, 318-19 (App. Div. 2007) (holding that the State has the burden to prove the amount of restitution).

information and, therefore, objected to this recommendation. Another member raised a concern of requiring a defendant to provide "documentation" of an alleged inaccuracy and suggested that the defendant should only be required to provide "evidence" of an alleged inaccuracy. Moreover, it was explained that frequently, challenges to the PSI are raised on the date of sentencing leaving little or no time to conduct research on alleged discrepancies.

2. Verification of Court/Criminal History

As set forth above, a frequent challenge made by defendants to the PSI involves the defendants' prior court or criminal history. In all counties, the Criminal Division Manager's office has a policy of listing all court history that is available in Promis/Gavel and ACS, as well as information contained in the NCIC rap sheet. Some of the history can be verified by fingerprint comparisons. Other court information is derived by running a name check and comparing other information, such as a social security number, address, or date of birth and is not verified by fingerprint comparisons.

In some counties the PSI contains a notation indicating the criminal history entries that have been verified by a fingerprint comparison. While all counties are aware of the criminal history entries that are supported by fingerprint comparison, the majority do not note this verification in the court history section of the PSI. Instead, the court typically notes on its version of the PSI if there is a challenge to a record in the PSI. Depending on the offense, the court may or may not consider that record in determining the sentence. The Committee acknowledged that while both of these procedures, fingerprint

comparisons and the judge's notations on a hardcopy of the PSI, assist the judge at sentencing, neither takes the additional step of forwarding the challenges or the judge's findings to the DOC, Probation or the Parole Board.

The Committee agreed that it would be helpful to know if a court record or criminal history is verified by a fingerprint comparison. The Committee agreed that a statewide policy should be developed regarding verification of court/criminal history records and notations of whether or not the records are verified by fingerprint comparisons. It is referring this issue to the Conference of Criminal Division Managers for implementation.

3. Other Corrections or Amendments to the PSI

Occasionally, administrative changes to the PSI, such as, correcting inaccurate telephone numbers or addresses are raised at the time of sentencing. The Committee learned that these changes, like challenges to the court or criminal history entries, are normally documented on a hardcopy of the PSI, but may not be forwarded to the DOC, Probation Division or State Parole Board.

C. Referral to the Conference of Criminal Division Managers

At the request of the Subcommittee, the Conference of Criminal Division Managers developed a procedure to ensure that challenges and corrections to the presentence report that are accepted at the time of sentencing are incorporated into copies of the PSI that are distributed to the parties and other entities. The procedure also explains a method to address challenges a defendant raises to the court or criminal history

entries in the PSI, as well as other administrative corrections. The procedure proposed by the Conference of Criminal Division Managers has been supported by the Conference of Criminal Presiding Judges and is summarized in the recommendations set forth below.

D. Recommendations

The full Committee voted to adopt the following recommendations. Several Committee members, including representatives from the Office of the Public Defender objected to RECOMMENDATION 2, being of the view that it would place an unreasonable burden on defendants to challenge court or criminal history entries contained in the PSI.

RECOMMENDATION 1: Refer to the Conference of Criminal Division Managers to develop a protocol to provide notations on the PSI of whether or not an arrest or criminal history entry or court history entry is verified by a fingerprint comparison.

RECOMMENDATION 2: A defendant challenging an entry in the PSI has the burden to provide documentation showing that the entry in the report is incorrect. This includes challenges to court history or criminal history entries, jail credits or other substantive or administrative entries.[11]

- If the defendant's request to change information contained in the PSI involves a challenge to (1) a court history entry or criminal history entry that is not supported by a fingerprint comparison, (2) jail credit or other substantive entries or (3) administrative entries and the challenge is accepted by the Court, the judge shall note the changes on his or her copy of the report which should be given the team leader. Court-approved modifications should be made in accordance with RECOMMENDATION 3.

- If the defendant's request to change information contained in the PSI involves a challenge to a court history entry or criminal history entry that is supported

[11] Several Committee members including representatives from the Office of the Public Defender Office objected to the recommendation that a defendant have the burden to provide documentation that an entry in the PSI is inaccurate. Those members are of the view that this requirement places an unreasonable burden on defendants to challenge court history entries in the PSI.

by a fingerprint comparison, the defendant shall resolve the dispute with law enforcement.

- If the defendant challenges an entry in the PSI, but does not provide documentation to support the challenge, the disputed entry will remain in the PSI.

- The court should indicate on the record and on an affixed cover sheet whether a challenge was made, whether it accepted the challenge and modified the report or if it did not accept the challenge. The court should also indicate whether it is considering the disputed entry in imposing the sentence.

RECOMMENDATION 3: Court approved changes to the PSI must be made in the automated judiciary database.

- All changes that are made to the PSI must be approved by the court. Upon court approval, modifications to the automated version of the PSI shall be made by staff of the Criminal Division with proper security clearance, such as a team leader.

RECOMMENDATION 4: If changes are made to previously distributed copies of the PSI, revised copies of the PSI will be distributed to all parties, including the prosecutor and defense counsel and to interested agencies, including the Probation Division, the State Parole Board and the Department of Corrections, depending upon the sentence imposed.

- When an original PSI report is distributed to the parties and other interested agencies (i.e., the Department of Corrections, the State Parole Board or Probation Division) and a successful challenge is made to the report, the PSI will be amended in accordance with RECOMMENDATIONS 2 and 3, above, and be redistributed.

- When revised copies of the PSI report are redistributed, they will have transmittal sheet affixed to alert the receiving entity that the PSI has been revised.

- Revised copies of the PSI report will be forwarded to the parties and interested agencies who received the original version of the report.

III. "Official" Version Of The Offense

The most current version of the PSI report (rev. 1/2006) has sections to insert the "Offense Circumstances," "Special Factors Relative to the Offense" and the "Defendant's Version"[12] of the offense. Frequently, other documents are attached to the PSI detailing the alleged facts surrounding the case, such as, copies of police reports, indictments, and witness' statements. Most, if not all, of these documents are generated by the prosecution or law enforcement.

The Committee considered which "version" of the offense should be included in the "Offense Circumstances" section of the PSI. More specifically, the Committee discussed whether the PSI should include the police report version of the offense, the State's version of the offense (which may be different from the police report), the defendant's version of the offense and/or the factual basis for the offense that is provided in support of a guilty plea. The Committee learned that the descriptions contained in the "Offense Circumstances" section of the PSI can vary by county. In some counties, it is a verbatim recitation of what is contained in police reports. In other counties, the "Offense Circumstances" includes a recitation of what is contained in the indictment. In still others, it is a compilation of the circumstances from a variety of sources, including facts stated in police reports, witness statements, and the indictment, which are contained in the discovery package. As a result, often times, the facts described as the "Offense

[12] The PSI states that the defendant's version of the offense is to be completed only upon application for PTI and after conviction.

Circumstances" can be vastly different from the evidence adduced at trial or the facts that the defendant admits to when pleading guilty.

A. Referral to the Conference of Criminal Presiding Judges

The Subcommittee referred to the Conference of Criminal Presiding Judges to consider: (1) What is (or should be) the "official version" of the offense in the presentence report, and (2) should the factual basis provided at the time of the plea be incorporated into the presentence report? If so, how should this be done? The Conference reached several conclusions. First, the Conference concluded that no changes should be made at this time to recharacterize the "official version" of the facts in the presentence report. It reached the general consensus that the presentence report was designed to assist the courts in assessing the "whole person" to impose an appropriate sentence. The Conference believes that the problems raised are more a result of "the perception that recipients (other than the court) may use this information for different purposes than for which it was created, as opposed to any inherent problems with the 'official version' contained in the report."

The Conference pointed out that sentencing judges understand, and so should others, that there is a difference with regard to the events that lead to the defendant's arrest and indictment and the eventual charges to which the defendant admits guilt or is found guilty. The Conference stated that other agencies that come in contact with the defendant following sentencing should utilize the presentence report in conjunction with

the Judgment of Conviction focusing on the specific charges for which the defendant was found guilty or pled guilty and is subsequently sentenced.

Second, with regard to incorporating the factual basis provided at the time of a guilty plea into the PSI, the Conference ultimately reached the conclusion that the current practice should not be altered. In reaching this conclusion, the Conference extensively discussed various methods to possibly incorporate the actual facts admitted at the plea hearing into the PSI. First, it rejected a procedure requiring the court to memorialize the facts admitted at the plea. The Conference felt that this potential solution is problematic because the parties must agree with the judge's summary of the facts elicited as part of the plea and there is a possibility that long after sentencing, a defendant could allege that the judge's notes are inconsistent with the actual plea transcript, leading to future litigation.

The Conference also considered a suggestion to attach the plea transcript to the presentence report, which would reveal the facts admitted at the plea. The Conference discussed this option but wanted additional information before endorsing such a procedure, which would be costly. It agreed to consider this possibility after being provided with more specific details of how this procedure would be implemented. As discussed in subsection D, infra, the Committee decided to recommend the inclusion of disclaimer language to the offense circumstances section of the PSI. Therefore, the Conference of Criminal Presiding Judges did not reconsider a procedure to attach to the plea transcript to the PSI report.

B. Problems Arise Because of a Significant Difference Between the Facts Supporting Alleged Charges and the Facts Supporting the Conviction

The difference between the facts set forth in the police report, the indictment, and the factual basis offered at the time of plea often can be significant. For example, a 75-count indictment charging burglary and theft which is later pled down to five charges of theft may not present an accurate picture of the defendant's alleged criminal behavior. The dismissed charges would be lost if the offense circumstances described in the PSI were limited to only the crimes to which the defendant pled guilty. Both the Assistant Director of Probation and the Executive Assistant of the Parole Board reported that it was extremely important for their agencies to have a full account of a defendant's purported criminal behavior even though the defendant can be sentenced and punished only for the crimes to which he pled guilty.

One area of concern raised by the Parole Board and the Probation Division involves dismissed or downgraded charges of third degree endangering the welfare of a child that may involve a sexual component of the offense. In these cases, the police report may reveal facts describing a sexual component to the offense, however, the conviction and/or sentencing do not reveal any application of Megan's Law, Parole Supervision for Life or other consequences, which accompany convictions for certain sexual offenses. The Committee learned that, for these cases, upon request of the Parole Board, the Public Defender's Office has agreed to purchase plea transcripts when the

Parole Board has questions regarding whether a sexual component was admitted to in a guilty plea for endangering the welfare of a child cases.

Although the Public Defender's Office and the Parole Board have reached an agreement on how to handle factual questions in cases involving endangering the welfare of a child, some Subcommittee members were concerned about the impact of possible factual discrepancies in other cases where a description of the facts admitted at the plea is not incorporated in the PSI. For instance, the Committee was made aware that the facts contained in the presentence investigation report are often relied upon in subsequent hearings to determine the actual facts of cases that fall within the Sexually Violent Predator Act (N.J.S.A. 30:4-27.24, et. seq.) cases and also at parole board hearings.

The Committee also discussed a proposal to attach the plea transcript to the PSI. It was suggested that perhaps providing Parole Board and DOC with a transcript of the plea hearing might be helpful, because it would reflect the crime for which the defendant was convicted. However, there would be a cost involved in doing so, at least with respect to the cases that are not appealed. The Committee was informed that the Appellate Division has offered to provide the Department of Corrections and Parole Board with transcripts after appeals are concluded. However, this procedure has not been formally implemented.

The Committee concluded that a proposal to attach the plea transcript to the PSI report is impractical. First, there would be considerable and unacceptable delays in the preparation of transcripts of plea colloquies. Second, most courtrooms use tape recorders

and there are numerous pleas recorded on one tape. Therefore, the tapes would have to be transported from the courthouse to the transcriber as various defendants request preparation of the transcript. Third, the PSI will already have been sent to the State Prison or County Jail by the time the transcript is ready. By rejecting an option to attach the plea transcripts to the PSI, the Committee concluded that there was no need to have a pilot project that isolates certain serious crimes or certain offenses by the length of sentence to determine how much it would cost to get transcripts made for those offenses.

Finally, the Committee also considered requiring the lawyers to agree to the facts and to provide their agreed upon factual version to be included in the PSI. The Committee concluded that this would be unworkable. It would be difficult for the attorneys to agree to the facts of the case in advance of the plea or sentencing because typically, the prosecution and defense counsel do not meet before the court appearances. Also, it was pointed out that asking the lawyers to prepare a short summary of the defendant's factual statement immediately after the plea was entered was likely to slow the flow of other cases and pleas in that courtroom.

B. Problems with Use of Facts in Police Reports

The Committee was advised that some counties only include police reports in their presentence reports, a practice that is not acceptable. See *Manual for Preparation of the Presentence Investigation Report*, Section VI, page 1 (October 10, 1997). The Manual for Preparation of the Presentence Investigation Report states:

> The facts from police and prosecutor reports on both original and final charges need to be ascertained and described in

> summary form for the report. Sentencing judges, probation, prosecutors, correctional institutions, parole, the Avenel Diagnostic Center, the Appellate Court, the AOC (for research) need this information. Only attaching police reports or an indictment is not acceptable.
>
> See *Manual for Preparation of the Presentence Investigation Report*, Section VI, page 1 (October 10, 1997).

See also Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (holding that that a sentencing court may not review police reports or complaint applications to ascertain facts surrounding a prior conviction. A later court determining the character of a prior conviction that resulted from a guilty plea "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."). Moreover, it was noted that often police reports were a verbatim description of how the victim described the offense, and that this was not necessarily what the State alleged as the facts of the offense. It was suggested, however, that the sentencing judge is not always the judge who took the plea and that in this situation, it is important for the sentencing judge to be able to review the police report. The Committee believes that, ordinarily, a summary of the facts and charges should suffice in this regard, as opposed to attaching police reports or indictments to the PSI.

C. Defendant's Version of the Offense

The Committee also discussed how to ensure that the defendant's version of the offense was included in the presentence report. The Committee was informed that during the PSI interview process defendants generally are asked to provide their version of the

offense. However, sometimes defendants may be counseled not to provide a version of the case, because they may offer information that could support the finding of aggravating factors to be considered at the time of sentencing or create other potential consequences for themselves. The Committee considered developing a protocol that defense counsel advise the defendant to provide a version of the offense to be included in the PSI and that if no statement is made, when making future determinations, the DOC and the State Parole Board will typically rely on the State's version of the offense that is contained in the PSI.[13]

The Public Defender's Office opposed this recommendation. The Committee concluded that requiring this of defense counsel was impracticable, because it would involve a paradigm shift in current practice. Additionally, there is a likelihood that a defendant's statement to a probation officer could vary from the facts admitted in open court.

D. "Disclaimer Language"

Finally, the Committee considered adding "disclaimer" language to the PSI following the section heading "Offense Circumstances." It agreed that the best way to resolve this complex issue would be to add the following disclaimer language to the PSI:

> (These offense circumstances include descriptions of charges of which the defendant may not have been found guilty by a jury or may not have pled guilty to. This section should be

[13] The Conference of Criminal Presiding Judges supported the recommendation for defense counsel to advise their clients to provide a full and accurate "defendant's version" to the probation officer during the presentence investigation interview so that it can be included in the PSI report. However, this Subcommittee rejected that proposal.

read in conjunction with the Final Charges and the "Defendant's Version")

The Committee is of the view that this language would sufficiently alert recipients that the facts described in the “Offense Circumstances” may be different than the factual basis set forth in support of a guilty plea and/or the charges for which a defendant is convicted. The Committee believes that this recommendation would cover concerns that have been raised regarding the use of presentence reports in Sexually Violent Predator Cases and at parole board hearings, where presentence reports are relied upon in subsequent hearings to determine the actual facts of the case. As a result, the Committee concluded that there was no need for a rule amendment to indicate that individuals would be bound by the “Offense Circumstances” version of the offense.

E. Rule Amendment Regarding Defendant’s Admissions

The Committee considered recommending a rule amendment to include language that a defendant’s statements or admissions to a probation officer regarding his or her version of an offense for purposes of completing a PSI cannot be used against him if the plea is later rejected. The Committee reached the conclusion that a rule amendment was not necessary, since, as set forth above, it rejected a requirement that defense counsel advise their clients to provide a statement to the probation officer.

F. Recommendations

The full Committee voted to adopt the following recommendations.

RECOMMENDATION 1: The Committee recommends that disclaimer language be added to the “Offense Circumstances” Section of the PSI to state as follows: (These offense circumstances include descriptions of charges of which the defendant may not

have been found guilty by a jury or may not have pled guilty to. This section should be read in conjunction with the Final Charges and the "Defendant's Version").

RECOMMENDATION 2: Only attaching police reports or indictments to the PSI without a description in the “Offense Circumstances” section of the PSI is not acceptable. The staff member should complete the “Offense Circumstances” of the PSI describing the circumstances attending to the commission of the offense. Generally, police reports and indictments should not be included in presentence investigation reports, however, they may be included, if necessary, so long as the Offense Circumstances” of the PSI is also completed.

IV. FORMS AND PROCEDURES TO NOTIFY THE DEPARTMENT OF CORRECTIONS OF MEDICATION NEEDS FOR PRISONERS

The Committee was asked to consider developing forms and procedures to notify the Department of Corrections and classification personnel of suicide risks or needs for medication for prisoners being transferred into state custody following sentencing, and to make sure that any suicide or similar mental health illness possibilities are timely brought to the attention of institutional authorities upon commitment.

The Committee concluded that this was a function of the Department of Corrections and therefore, the court should not be involved in this issue. It was noted that any medical information that the court has will be included in the PSI. The Committee was informed that the DOC has periodic meetings with the County Jail Warden's Association. The Committee will refer this matter to be considered by the DOC and the County Jail Warden's Association.

A. Recommendation

RECOMMENDATION 1: The Committee will refer this matter to be considered by the DOC and the County Jail Warden's Association.

ATTACHMENT A
Copy of Adult Presentence Report

Adult Presentence Report
Superior Court of New Jersey, _____ County

This report shall remain confidential and copies thereof shall not be made nor the disclosure of the contents of such report be made to third persons except as may be necessary in subsequent court proceedings involving the sentence imposed or disposition made.

LAST NAME	FIRST NAME	MIDDLE NAME

ALSO KNOWN AS	SEX ☐ M ☐ F	DATE OF BIRTH	AGE	PLACE OF BIRTH

RACE	SOCIAL SECURITY NUMBER	DRIVER'S LICENSE NUMBER	EYE COLOR

ADDRESS	STATE	ZIP CODE	RESIDENCE PHONE

INDICTMENT / ACCUSATION / COMPLAINT NUMBER	PROMIS NUMBER	SPN	SBI #	FBI #

ORIGINAL CHARGES	FINAL CHARGES

PLEA AGREEMENT / SPECIAL FACTORS ☐ Trial ☐ Plea

MANDATORY MINIMUM SENTENCE PURSUANT TO NJSA 2C:

☐ 11-3	☐ 11-5	☐ 12-2	☐ 13-1
☐ 14-6	☐ 15-2	☐ 17-1	☐ 20-11
☐ 29-6	☐ 35-3	☐ 35-4	☐ 35-5
☐ 35-6	☐ 35-7	☐ 35-8	☐ 39-10
☐ 43-6	☐ 43-7	☐ 43-7.1	☐ 43-7.2

OFFENSE DATE	ARREST DATE	PLEA / CONVICTION DATE	SENTENCE DATE	☐ Pending Charges ☐ Detainers

CUSTODIAL STATUS ☐ ROR ☐ BAIL ☐ JAIL_____	BAIL AMOUNT	DATE BAIL POSTED	INTERPRETER NEEDED ☐ YES ☐ NO	LANGUAGE

Jail Time Credit			Gap Time Credit		
FROM (DATE)	TO (DATE)	TOTAL JAIL TIME CREDIT DAYS	FROM (DATE)	TO (DATE)	TOTAL GAP TIME CREDIT DAYS

☐ Public Defender ☐ Private ☐ Assigned

SENTENCING JUDGE	DEFENSE ATTORNEY	PHONE NUMBER

ASSISTANT PROSECUTOR	ADDRESS

COMMENTS

PROBATION OFFICER	DATE PREPARED	TEAM LEADER / SUPERVISOR	DATE APPROVED

Revised: 01/2006, CN: 10693-english

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Multiple Charges Sheet

LAST NAME	FIRST NAME	MIDDLE NAME

INDICTMENT / ACCUSATION / COMPLAINT NUMBER	PROMIS NUMBER

ORIGINAL CHARGES	FINAL CHARGES

PLEA AGREEMENT / SPECIAL FACTORS ☐ Trial ☐ Plea

MANDATORY MINIMUM SENTENCE PURSUANT TO NJSA 2C:

☐ 11-3	☐ 11-5	☐ 12-2	☐ 13-1
☐ 14-6	☐ 15-2	☐ 17-1	☐ 20-11
☐ 29-6	☐ 35-3	☐ 35-4	☐ 35-5
☐ 35-6	☐ 35-7	☐ 35-8	☐ 39-10
☐ 43-6	☐ 43-7	☐ 43-7.1	☐ 43-7.2

OFFENSE DATE	ARREST DATE	PLEA / CONVICTION DATE	SENTENCE DATE

CUSTODIAL STATUS	BAIL AMOUNT	DATE BAIL POSTED
☐ ROR ☐ BAIL ☐ JAIL_____		

Jail Time Credit			Gap Time Credit		
FROM (DATE)	TO (DATE)	TOTAL JAIL TIME CREDIT DAYS	FROM (DATE)	TO (DATE)	TOTAL GAP TIME CREDIT DAYS

PROSECUTOR NAME AND ADDRESS (IF DIFFERENT)	ATTORNEY NAME AND ADDRESS (IF DIFFERENT)

COMMENTS

Revised: 01/2006, CN: 10693-english

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Offense Information

LAST NAME	FIRST NAME	MIDDLE NAME
INDICTMENT / ACCUSATION / COMPLAINT NUMBER	PROMIS NUMBER	SBI #

OFFENSE CIRCUMSTANCES

SPECIAL FACTORS RELATIVE TO OFFENSE

DEFENDANT'S VERSION (COMPLETE ONLY UPON APPLICATION FOR PTI AND AFTER CONVICTION)

VICTIM STATEMENT(S) ATTACHED	IF NO, CHECK REASON	DATE REQUEST MADE
☐ YES ☐ NO	☐ NO RESPONSE ☐ NOT APPLICABLE	

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Case Analysis

LAST NAME	FIRST NAME	MIDDLE NAME
INDICTMENT / ACCUSATION / COMPLAINT NUMBER	PROMIS NUMBER	SBI #

ASSESSMENT OF FACTORS CONTRIBUTING TO PRESENT OFFENSE (2C:44-1)

ASSESSMENT OF DEFENDANT'S PERSONALITY, PROBLEMS & THE POTENTIAL FOR PROBATION AS A DISPOSITION, NOTING POTENTIALLY AVAILABLE COMMUNITY RESOURCES FOR ASSISTANCE

TEAM LEADER / PROBATION OFFICER	TEAM LEADER / PROBATION OFFICER SIGNATURE	DATE
SUPERVISOR	SUPERVISOR SIGNATURE	DATE

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Court History

LAST NAME	FIRST NAME	MIDDLE NAME

SBI #	FBI #	PENDING CHARGES	ACTIVE BENCH WARRANTS	DETAINERS
		☐ YES ☐ NO	☐ YES ☐ NO	☐ YES ☐ NO

DISCUSSION OF PRIOR COURT HISTORY AND PENDING CHARGES

COURT HISTORY

DATE	PLACE	OFFENSE	COURT	DISPOSITION

Court History Continued

LAST NAME	FIRST NAME	MIDDLE NAME

COURT HISTORY

DATE	PLACE	OFFENSE	COURT	DISPOSITION

Revised: 01/2006, CN: 10693-english

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PTI Recommendation
Superior Court of New Jersey, _____ County

LAST NAME	FIRST NAME	MIDDLE NAME
INDICTMENT / ACCUSATION / COMPLAINT NUMBER	PROMIS NUMBER	SBI #

DEFENDANT RECOMMENDED FOR ENROLLMENT ☐ YES ☐ NO

RECOMMENDATIONS AND COMMENTS

CODEFENDANT STATUS

INSTRUCTIONS: Attach Postponement Order and Participation Agreement if recommended.

PROBATION OFFICER	PROBATION OFFICER SIGNATURE	DATE
SUPERVISOR	SUPERVISOR SIGNATURE	DATE APPROVED

Revised: 01/2006, CN: 10693-english UDIR - 11

Additional Information

LAST NAME	FIRST NAME	MIDDLE NAME
INDICTMENT / ACCUSATION / COMPLAINT NUMBER	PROMIS NUMBER	SBI #

4. Ex Parte Post-Trial Communications between Judges and Jurors

I. Background

In a letter dated August 18, 2006, an attorney requested that the Administrative Director of the Administrative Office of the Courts enact a rule or policy prohibiting all *ex parte*, post-trial communications between judges and jurors. The Administrative Director asked the Criminal Practice Committee and the Civil Practice Committee to consider this matter.[14] At the September 20, 2006 meeting, the Criminal Practice Committee voted that post-verdict, *ex parte* communications between judges and juries should be permitted when the interviews are conducted on the record. The Committee also voted that there should be a *per se* prohibition against post-verdict, *ex parte* communications between judges and juries when the interviews are unrecorded.

A Subcommittee was formed to examine how judges throughout the state and in other jurisdictions handle post-verdict discussions, and to explore whether any verdicts have been compromised due to *ex parte*, post-trial conversations.

On September 21, 2006, the day after Criminal Practice Committee's meeting, the Appellate Division decided State v. Walkings.[15] In Walkings, after the jury rendered its verdict, the judge engaged in an *ex parte*, unrecorded conversation with a juror regarding the jury's deliberations. The Appellate Division stated that it saw "no principled reason for permitting *ex parte* communications concerning the jury's deliberations once a verdict

[14] The Civil Practice Committee is considering this matter separately.

[15] State v. Walkings, 388 N.J. Super. 149 (App. Div. 2006).

has been rendered and the jury discharged."[16] The court added that "no communication should have taken place without the defendant having been given notice of and an opportunity to be heard and to be present at any such communication between the judge and juror."[17] In light of Walkings, the Criminal Practice Committee considered whether there was still a need for a Subcommittee to examine *ex parte*, post-verdict communications.

The Criminal Practice Committee was divided on whether there should be a prohibition against all *ex parte*, post-verdict communications between judges and jurors or if this practice should be permitted either with or without procedural guidelines. The Criminal Practice Committee decided that the Subcommittee should continue examining *ex parte* communications, including whether the practice should be continued, and if so, the permissible scope of those communications. The *Ex Parte* Communications Subcommittee conducted an informal survey on the practice of conducting post-verdict discussions across the state. The survey revealed that this practice varied in different counties, and even among judges within the same county. For instance, some judges indicated that they never speak to jurors after the verdict. Some judges thank the jurors after the verdict, but do not engage in further communications. Other judges conduct post-verdict conversations to thank the jurors for their service, and answer questions about jury service, court improvements and matters of public knowledge. The majority

[16] Id. at 157-159.

[17] Id. at 159.

of judges who conduct post-verdict conversations do so off-the-record and the attorneys are not present.

The Conference of Criminal Presiding Judges considered this issue also, and the Presiding Judges expressed different views on conducting post-verdict discussions. The Conference concluded that since the practice varied across the state, there was no need for a court rule to be adopted. Rather, the decision to conduct the post-verdict discussions should be left to the discretion of the trial judge.

The *Ex Parte* Communications Subcommittee met and discussed these issues. The Subcommittee agreed that there are benefits to conducting post-verdict discussions between judges and juries and that standards should be developed for such discussions. The Subcommittee agreed that judges should not offer an opinion about the jury's verdict and that the post-verdict discussions should not include matters related to the jury's deliberations. The Subcommittee was unable to reach a consensus regarding the presence of counsel during post-verdict discussions, whether the post-verdict discussions should be held on the record and the ability of counsel to veto a judge's decision to have post-verdict discussions with jurors regardless of counsel's presence. The Subcommittee referred its conclusions to the full Committee for consideration.

Several members of the Criminal Practice Committee recognized the benefit of holding post-verdict discussions with jurors to allow judges to express their appreciation for the jurors' service and to gather comments related to their experience, such as potential areas for improvements in the court system. Some judges explained that they

issue questionnaires as a way to evaluate the jurors' experience. The Committee was informed that this practice is consistent with the recommendation of the Council for Court Excellence that, "[t]rial judges join jurors at the close of a trial in order to personally and informally thank them for their service to answer questions about the court and jury systems and to provide assistance for any juror who may have experienced extreme stress caused by the trial".[18] The Criminal Practice Committee was divided, however, on whether post-verdict interviews should go beyond "court improvement" and juror appreciation discussions, and if so, what procedures, if any, should be implemented.

II. Relevant Law

A. What Are *Ex Parte* Communications?

In Advisory Opinion 01-01, the Arizona Supreme Court Judicial Ethics Committee explained that Black's Law Dictionary defines "*ex parte*" as "actions taken 'at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested.'"[19] In considering the propriety of post-trial, *ex parte* communications between judges and juries, the Arizona Judicial Ethics Committee

[18] Council for Court Excellence, "Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington," D.C. 73 (1998).

[19] Judicial Ethics Advisory Committee, Arizona Supreme Court, Advisory Opinion 01-01, "Contacting or Speaking with Members of a Discharged Jury" at 2 (Reissued Jan. 22, 2003) (citing Black's Law Dictionary at 597 (7th ed. 1999)). See Erskine v. Baker, 22 S.W.3d 537, 539 (Tex. App. 2000) (*Ex parte* communications are "those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter. They are barred in order to ensure that every person who is legally interested in a proceeding [is given the] full right to be heard according to law." The principle underlying the prohibition against *ex parte* communications for matters pending in the judicial system is that the disposition of judicial matters is the public's business and ought to be conducted in public in open court).

reached the initial conclusion that under a strict interpretation, "statements made by jurors in post-verdict discussions are not *ex parte* communications."[20]

Nonetheless, the Arizona Judicial Ethics Committee further stated that "[t]o the extent that [the post-verdict discussions] contain information that may advantage or disadvantage one of the parties, . . . they should be treated in the same matter as *ex parte* communications." Recognizing that "[t]he purpose of the prohibition against *ex parte* communications is to ensure that every party is given the full right to be heard on matters before the court," the Arizona Judicial Ethics Committee found that when judges discuss certain topics with the jury after a verdict is rendered, the Canons of Judicial Conduct are not violated provided that appropriate safeguards are put in place to protect the rights of the parties and to prevent prohibited communications.[21]

B. New Jersey Law

The relevant court rule, R. 1:16-1, provides "except by leave of court granted on good cause shown, no attorney or party shall directly, or through any investigator or other person acting for the attorney interview, examine, or question any grand or petit juror with respect to any matter relating to the case." The rule prohibits others from talking to the jury but is silent about judges. Canon 3A(6) of the Code of Judicial Conduct addresses *ex parte* communications by judges concerning a pending or impending proceeding. It states:

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[20] Judicial Ethics Advisory Committee, Arizona Supreme Court, Advisory Opinion 01-01, "Contacting or Speaking with Members of a Discharged Jury" at 2 (Reissued Jan. 22, 2003).

[21] Id. at 2.

> A judge should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to or the subject matter of a proceeding if the judge gives notice to the parties of the person to be consulted and the nature of the advice, and affords the parties reasonable opportunity to participate and to respond.[22]

Nearly all of the cases in New Jersey address the issue of *ex parte* communications during deliberations or post-trial communications about deliberations. The majority of cases in this state have admonished *ex parte* communications between a judge and a deliberating jury or communications regarding the jury's deliberations either before or after the jury has been discharged. See e.g., The Matter of Wilbur H. Mathesius, 188 N.J. 496 (2006) (trial judge violated certain Canons of the Code of Judicial Conduct by reportedly, "entered the jury room upset and frustrated" and asked the jurors, "what the hell" were they thinking); State v. Athorn, 46 N.J. 247 (1965), cert. denied, 384 U.S. 962, 86 S.Ct. 1589, 16 L.Ed. 2d 674 (1966) (calling back jurors for interrogation about their deliberations after they have been discharged is an extraordinary procedure which should be invoked only upon a strong showing that a litigant may have been harmed by jury misconduct); State v. Walkings, 388 N.J. Super. 149 (App. Div. 2006) (the trial judge interviewed a juror about jury deliberations after the verdict and the Appellate Division

[22] The Commentary to this Canon states: "The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities."

remanded the matter for creation of a record that would disclose all communications between the juror and the judge); State v. Basit, 378 N.J. Super. 125 (App. Div. 2005) (where the judge entered the jury room to answer two questions posed by the jury during deliberations and the Appellate Division ordered a new trial stating that *ex parte* communications with the jury regarding its deliberations are barred); State v. Brown, 275 N.J. Super. 329 (App. Div. 1994), certif. denied, 138 N.J. 269 (1994) (where the court held that it was improper for the trial judge to answer a jury question by entering the jury room while the jury was deliberating without the presence of counsel and defendant).

B. Law In Other Jurisdictions

Like New Jersey, other jurisdictions have prohibited post-trial, *ex parte* discussions regarding jury deliberations. See People v. Delgado, 5 Cal. 4th 312, (1993) (where the trial judge engaged in a conversation with the jurors outside of the presence of counsel during jury deliberations in response to a question by a juror, the California Supreme Court stated "the trial judge should have declined to answer the juror's question, immediately terminated all discussion, and reminded the jury that any questions of law on which they desired guidance must be in writing"); State v. Hilliard, 133 Ariz. 364 (App. Div. 1982) (where the trial judge went into the jury room and had an off-the-record discussion with the jury while they were deliberating and the Arizona Court of Appeals held that it was reversible error for the judge to enter the jury room after the jury had retired to deliberate regardless of the content of the communications). With regard to post-verdict communications that do not involve jury deliberations, in an advisory

opinion, the Arizona Supreme Court Judicial Ethics Advisory Committee interpreted a Canon of Judicial Conduct that is identical to Canon 3A(6) in the New Jersey Code of Judicial Conduct and stated that discussing certain topics of public record after a verdict has been returned and the jury has been discharged may not violate the Canons of Judicial Conduct, provided that appropriate safeguards are put in place to protect the rights of the parties and to prevent prohibited communications.[23]

The Arizona Judicial Ethics Committee set forth the following procedure for courts to follow when engaged in post-verdict contact with jurors:

1. "[C]ounsel for all parties should be informed of the judge's intention to meet with the jurors and given an opportunity to be present, or to request that the meeting be on the record, or both."

2. "[T]he judge must admonish the jurors before the meeting that he or she cannot answer questions regarding matters still pending (such as sentencing) and must prohibit any statements on such matters. . . . This does not preclude the judge from giving a general explanation of the sentencing process in criminal cases and the range of sentences applicable to the defendant. However, the discussion may not include the jurors' opinions or recommendations as to the sentence the judge should impose in a specific case. "

3. "[T]he judge must also expressly and firmly prohibit any discussion of the jury's deliberations. . . . Such a topic is rife with opportunities for disclosures that may provide grounds for a new trial. Unless the prohibition is clearly understood and enforced, the judge is placing himself or herself in a position where prohibited communications must be anticipated. This alone may undermine public confidence in the fairness of the proceedings."

[23] Judicial Ethics Advisory Committee, Arizona Supreme Court, Advisory Opinion 01-01, "Contacting or Speaking with Members of a Discharged Jury" at 3 (Reissued Jan. 22, 2003). As set forth above, Canon 3A(6) of the New Jersey Code of Judicial Conduct states, in pertinent part: "A judge should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding."

The Arizona Judicial Ethics Committee went on to explain that notwithstanding the judge's admonition and establishment of clear parameters for the post-verdict discussion, there is a possibility that a juror may volunteer information that a judge would be prohibited from hearing outside the presence of the parties, if at all. The Arizona Judicial Ethics Committee stated that this information should be treated like any other unsolicited communication to the judge. It must be promptly disclosed to all parties on the record, and they must be given an opportunity to be heard on the matter. Depending on the circumstances of the case and the content of the communication, the judge may be required to disqualify himself or herself. However, the possibility of this occurrence should not preclude a dialogue that is otherwise permissible under the canons with appropriate safeguards in place.

Finally, Part IV of the American Bar Association (ABA) Criminal Justice Standards addresses Judicial Relations with the Jury. In particular, ABA Criminal Justice Standard 15-4.3 addresses Judicial Communication with Jurors and provides that after the conclusion of trial and the completion of the jurors' service, the court may engage in discussions with the jurors, as long as the discussions occur on the record and in open court with counsel having the opportunity to be present.[24]

[24] ABA Criminal Justice Section Discovery and Trial By Jury Standards (Standard 15-4.3, "Judicial Communication with Jurors") (3d ed. 1996).

IV. Benefits Of Post-Verdict Interviews With Jurors

The Committee discussed several benefits from conducting post-verdict discussions with jurors. First, these informal post-verdict discussions give judges the opportunity to informally and personally thank members of the jury for their service. This may provide useful and appropriate information about ways to improve the jury service experience. Many judges on the Committee who have spoken to jurors after the verdict confirmed how appreciative jurors are when a judge informally and personally thanked them for their service. Most Criminal Division judges who adopt this practice expressed that that it is a satisfying and uplifting experience.

Second, post-verdict discussions may help to ease the jurors' uncertainties about their service and their verdict. It was pointed out that a common question during post-verdict discussions concerns the publication of the jurors' names as part of jury selection. Judges are able to inform jurors of why their names are made public and ease concerns surrounding the possibility of retaliation by a defendant, by explaining the unlikelihood of retaliation and the severe penalties if such retaliation occurs. Also, some members noted that post-verdict discussions assist in avoiding juror contact with individuals involved in the trial and members of the press, as they occur while others are leaving the courthouse.

Third, frequently the post-verdict discussions address questions about matters of public record. For instance, jurors often ask if a defendant has a criminal record, if a defendant has pending charges, when a defendant will be sentenced or what is the

sentencing range. Some members expressed the view that the court should be able to explain matters of public record, because they do not involve the merits of an issue that has not yet been decided. These members stated that but for their selection to the jury, individual jurors could have attended any hearings in the case and would have been privy to any matters discussed in open court, such as discovery hearings and evidentiary motions, from which they were sequestered while serving on the jury. By responding to questions regarding matters discussed in open court, the judge is simply providing information that is a matter of public record.

V. Criticisms Of Post-Verdict *Ex Parte* Discussions Between Judges And Juries

The Committee also discussed concerns with permitting post-verdict discussions between judges and jurors. First, some members expressed the view that these conversations may lead to jurors being tainted in the future. Second, some members explained that the prosecutors and defense counsel would like to be present to speak with jurors after the verdict is rendered to learn about the jurors thoughts on counsel's performance or the evidence. Some members opposed permitting judges to speak to jurors without involvement of counsel. Others were concerned that if counsel were present, they would remain in an adversarial role and may lodge objections or ask questions, which would defeat the purpose of the informal discussions by creating a "chilling effect" on the discussions. Additionally, by raising objections, counsel could turn an innocuous issue into an adversarial one.

Third, another concern raised involved the possibility of a juror stating something that may lead the judge to conclude that there has been possible jury misconduct. If this occurred the matter must be disclosed, investigated and may lead to a mistrial. Some members disputed this concern asserting that it would be better for the trial judge to be made aware of possible jury misconduct rather than for these concerns to go unanswered or be revealed as a basis for an appeal or a petition for post-conviction relief.

The Committee voted and reached the following determination: eight members were in favor of a per se prohibition on post-verdict discussions between judges and juries in criminal cases; six members were in favor of permitting post-verdict discussions between judges and juries in criminal cases if the discussion took place on the record; eight members were in favor of permitting post-verdict discussions between judges and juries in criminal cases with procedures left to the sound discretion of the trial judge, without the Committee recommending a rule to address this issue.

VI. Recommendation

After further consideration, the Committee voted and reached the following determination: 14 members were in favor of a per se prohibition on post-verdict discussions between judges and juries in criminal cases; 2 members were in favor of permitting post-verdict discussions between judges and juries in criminal cases if the discussion took place on the record; 4 members were in favor of permitting post-verdict discussions between judges and juries in criminal cases with procedures left to the sound

discretion of the trial judge, without the Committee recommending a rule to address this issue.

5. Transmission of Discovery in Criminal Cases

The Criminal Practice Committee and the Conference of Criminal Presiding Judges have been concerned about the increasingly serious problems created by the various and often incompatible, means of recording and distributing discovery. The problem involves both software and hardware, and is not just limited to defense counsel being able to read or see what is provided by prosecutors. Sometimes equipment used by police departments is not compatible with the equipment prosecutor's use. Additionally, when a private entity uses surveillance video, prosecutors often have problems replicating the video.

The Criminal Practice Committee has recommended the formation of a special committee or task force to address this issue, because this problem is beyond the scope of any existing Supreme Court Committee or working group. It recommended that either the Administrative Director of the Courts or the Chief Justice establish a special committee charged with making recommendations regarding discovery in criminal cases. The Criminal Practice Committee recommended that the special committee should include Superior and Municipal Court Judges, members of the Criminal and Municipal Practice Committees, representatives of the Attorney General's Office, the State Police and Association of Police Chiefs, the Public Defender, private defense counsel and IT personnel.

C. Matters Previously Sent to the Supreme Court

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

In the previous rules cycle, the Supreme Court amended R. 3:26-1 to adopt a new paragraph (c), which requires defendants admitted to bail who are charged with crimes to which the bail restrictions set forth in N.J.S.A. 2A:162-12 apply to provide the Attorney General with information required by the statute. The Court also adopted new R. 3:26-8 to implement N.J.S.A. 2A:162-13, which authorizes the court, on the prosecutor's request to hold a hearing, subject to the terms and conditions stated in the rule regarding the source of bail funds and the identity and reliability of the surety.

The Court approved the rule proposals to implement N.J.S.A. 2A:162-13 during the 2006-2008 rules cycle. The amendments to R. 3:26-1(c) and new R. 3:26-8 were effective September 1, 2008.

2. Follow-Up Report On The Implementation Of The Recordation Of Custodial Interrogations

In State v. Thomahl Cook, 179 N.J. 533 (2004), the New Jersey Supreme Court called for a careful and deliberate study to evaluate the protections that electronic recordation of custodial interrogations affords both the State and criminal defendants. Id. at 562. Following State v. Cook, the Chief Justice appointed the Special Committee on the Recordation of Custodial Interrogations to make recommendations on the use of electronic recordation of custodial interrogations. On April 15, 2005, the Special Committee submitted its report to the Supreme Court. The report, as posted at http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf recommended that electronic recordation of custodial interrogations should be required in certain cases. The report also recommended that "the Supreme Court…periodically review the implementation of the recording requirement" (Recommendation 9).

On October 14, 2005, the Supreme Court issued an Administrative Determination regarding the Report of the Special Committee on the Recordation of Custodial Interrogations. In that Administrative Determination, the Court required that effective January 1, 2006, custodial interrogations in homicide cases were to be electronically recorded. Furthermore, effective January 1, 2007, the recordation requirement would apply to all other offenses specified in R. 3:17(a). The Court also asked that the Administrative Director of the Courts and the Criminal Practice Committee work with the Office of the Attorney General and the County Prosecutors to review the implementation of the recordation requirement, and that a status report be filed by June 1, 2007.

To meet this last requirement, the Criminal Practice Committee and the Conference of Criminal Presiding Judges recommended adoption of the Recordation of Custodial Interrogations Reporting Form, for use in cases where: (1) the defendant was charged with murder, aggravated manslaughter or manslaughter; and (2) the offense occurred on or after January 1, 2006; and (3) the defendant was tried or the State filed a notice of intent to rely on an unrecorded statement claiming an exception to the recording requirement, and the court made a ruling thereon. That form was promulgated on July 18, 2006, via Directive #11-06. The Criminal Practice Committee subsequently developed a revised form in order to collect data in the additional cases for which recordation would be required as of January 1, 2007. That form was promulgated on December 22, 2006, via Directive #22-06. Both directives require that trial judges complete the forms and forward them to the Administrative Office of the Courts (AOC), Criminal Practice Division. In addition, the Division of Criminal Justice created a separate form for use by prosecutors.

On May 30, 2007, the Administrative Director filed the *Report on the Implementation of the Requirement for Recordation of Custodial Interrogations* with the Supreme Court. The report noted that as of May 1, 2007, the Criminal Practice Division had not received any completed Recordation of Custodial Interrogations Reporting Forms, because no cases had met the criteria that triggered completion of the AOC's form. In other words, no homicide cases occurring on or after January 1, 2006 had gone to trial, and in no case had a judge ruled on the State's intent to rely on an unrecorded

statement that the State claimed was an exception to the recording requirement. The Attorney General's Office, however, had received forms in 111 cases homicide cases that occurred on or after January 1, 2006. In only three of those 111 cases were the custodial interrogations not recorded, and all three cases fell under one of the exceptions to the recording requirement. In two cases, the defendants made spontaneous statements; while the third case involved a juvenile who was not a suspect at the time of the interrogation. It was therefore clear that law enforcement was in complete compliance with the recordation requirement.

The Criminal Practice Committee subsequently recommended that recordation continue to be monitored in order to examine law enforcement's compliance with the requirement in non-homicide cases. After reviewing the form submissions the Committee is confident that, based on the available information, law enforcement has been making every effort to comply with the recordation requirement. Although the information that we have received is admittedly limited, we are not aware of any difficulties or issues pertaining to recordation that would cause us to question that conclusion. As a result, the Committee forwarded the follow-up report on the Implementation of the Recordation of Custodial Interrogations, dated October 21, 2008, to the Acting Administrative Director of the Courts with a recommendation that there is no longer a need to continue monitoring law enforcement's compliance with the recordation requirement, and that such monitoring should immediately cease.

D. Rule Proposals and Other Issues Considered and Rejected

1. Alibi Rule – State v. Bradshaw - R. 3:12-2

The Committee considered whether a rule amendment was necessary in light of the Appellate Division decision in State v. Bradshaw, 392 N.J. Super. 425 (App. Div. 2007), *aff'd on other grounds and remanded*, 195 N.J 493 (2008), where the Appellate Division held that the alibi notice requirements in R. 3:12-2 were unconstitutional as applied to a defendant's own testimony concerning his whereabouts at the time of the alleged crime. The Supreme Court granted certification and declined to address the constitutional issue finding that it was not necessary to resolve the appeal. Rather, the Court interpreted R. 3:12-2 to "mean that only in the rarest of circumstances should the 'interest of justice standard' result in a prohibition of a defendant's own alibi testimony as an appropriate sanction." State v. Bradshaw, 195 N.J. at 507. The Committee discussed whether it is still necessary to consider an amendment to R. 3:12-2 in light of the Supreme Court decision and determined that no rule change is necessary.

2. Bail Forfeiture Rule – R. 3:26-6

In letters dated June 14, 2007 and July 18, 2007, a private attorney requested that the Acting Administrative Director propose an amendment to R. 3:26-6, which addresses bail forfeiture procedures. The attorney raised an issue that once a judgment has been entered and a preclusion notice is sent by the superior Court Clerk's office to the surety, the Clerk will not stay the preclusion process despite the fact that the surety and county counsel have entered into a consent agreement which will be submitted to the Superior Court for approval. The attorney suggested amending R. 3:26-6 to address this concern. The Committee considered a proposed amendment to R. 3:26-6 to specifically provide for the automatic stay of a surety's obligation to satisfy in full the default judgment upon the filing of a motion seeking an order setting aside the forfeiture or default judgment.

The Committee referred the matter to the Bail Judge Subcommittee, which reviewed and discussed the matter at its March 27, 2008 meeting. Assignment Judge Donald Volkert, former chair of the Bail Judge Subcommittee, provided a letter response to the Committee explaining that upon becoming aware of this issue, the Superior Court Clerk's Office changed the procedures whereby a consent agreement signed by the parties would stay preclusion procedures. After thirty days, the Clerk's Office makes follow up contact with the parties to ensure that the consent order has been approved by the judge. The Bail Judge Subcommittee view was that this change in procedures by the Clerk's Office resolves the issue raised by the private attorney. The Bail Judges decided to take no further action and recommended that the Committee not amend the R. 3:26-6.

The Committee agreed with the recommendation from the Bail Judge Subcommittee that no rule change is necessary.

3. Electronic Recordation of Custodial Interrogations – R. 3:17

Currently, R. 3:17(a) states that unless an exception applies, custodial interrogations conducted in a place of detention must be electronically recorded when a person is charged with certain offenses. A question has arisen as to whether the "charged with" language in R. 3:17(a) creates confusion as to the "start time" of the recordation. The concern is that the current wording of R. 3:17(a) could be interpreted as requiring recordation only after a person has actually been ***charged*** with one of the applicable crimes.

The purpose of the rule, which was recommended in the Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations, and in light of State v. Cook, 179 N.J. 533 (2004), was to cover all aspects of the interrogation, not just those when a defendant is formally charged with the covered offense. In recommending that the Court adopt R. 3:17, the Special Committee on the Recordation of Custodial Interrogations clearly intended that the entire interrogation be recorded, beginning at the point at which Miranda warnings must be given:

> The *Committee* recommends that electronic recording occur when a custodial interrogation is conducted in a place of detention. The *Committee* further recommends that the recording be "stem-to-stern", i.e. the entire interrogation must be recorded, rather than just the final statement. Requiring stem-to-stern recordation is . . . essential if the benefits attendant to electronic recordation are to be fully realized. Recording should begin at, and include, the point at which Miranda warnings are required to be given. [See Report of the Special Supreme Court Committee on Recordation of Custodial Interrogations at 37 (April 15, 2005)]

Moreover, Recommendation 3 of the Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations was adopted by the Supreme Court in its Administrative Determination dated October 14, 2005. Recommendation 3 states: "Electronic Recording should occur when a custodial interrogation is being conducted in a place of detention and should be begin at, and include, the point at which Miranda warnings are given."

A representative from the Attorney General's office explained that the rule need not be amended because there is no confusion with regard to the start time of the recordation. The Committee agreed that no rule change is necessary.

4. Hypnotically Refreshed Testimony – State v. Moore

In State v. Moore, 188 N.J. 182 (2006), the New Jersey Supreme Court held that the hypnotically refreshed testimony of a witness in a criminal trial was generally inadmissible, and that State v. Hurd, 86 N.J. 525 (1981), should no longer be followed in New Jersey. In State v. Hurd, the Court established guidelines for the admissibility of hypnotically refreshed testimony proffered by a witness in a criminal trial.

In Moore, the Court further held that, based upon Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), which held that a defendant could not be denied his constitutional right to testify because of a state rule that excluded post-hypnotic testimony, a defendant may testify at his own trial after having been hypnotized. The Court requested that the Committee consider and recommend improvements to both the Hurd Guidelines and the Fertig (Hypnotically Refreshed Testimony) model jury charge.

The Attorney General's Office conducted a survey on the use of a defendant's hypnotically refreshed testimony in criminal cases. The survey revealed that the use of a defendant's hypnotically refreshed testimony has arisen in very few cases. Representatives from the Office of the Public Defender agreed that the use of a defendant's hypnotically refreshed testimony arises rarely. The Committee reached the consensus that because this issue arises on rare occasions, there is no need develop a procedure or to propose a rule to address the use of a defendant's hypnotically refreshed testimony in criminal cases at the present time.

5. State v. Luna – R. 3:20-2 - Defendant's Waiver of Presence at Trial

In State v. Luna, 193 N.J. 202 (2007) the Court held that when the trial court has actual knowledge, before or during trial, that a defendant is incarcerated and thus unable to appear at trial, the court must conduct an inquiry before proceeding with trial to determine if defendant's absence is knowing and voluntary. The Court further held that when the defendant's incarceration first comes to light after trial, the defendant may bring a post-trial motion, pursuant to R. 3:20-2, for a new trial. At the post-trial hearing the defendant bears the burden to show that the failure to attend trial was due to incarceration and there was no ability or means to advise his or her attorney or the court, directly or indirectly, of this fact. After giving the State the opportunity to respond, the court must determine if the defendant's absence was voluntary. The Court rejected the defendant's request for the Court to adopt formal guidelines for use by trial judges after finding a waiver or to adopt a rule requiring judges to evaluate certain factors in all cases. The Court determined that trial judges have the discretion in deciding whether to start a trial when a defendant is inexcusably absent.

R. 3:20-2 currently provides: "[a] motion for a new trial based on a claim that the defendant did not waive his or her appearance for trial shall be made prior to sentencing." The Committee determined that R. 3:20-2 need not be amended in light of Luna to permit a defendant to file a post-trial motion for a new trial. While the Committee did not recommend a rule amendment, it agreed that absent extraordinary circumstances,

defendants should not be tried in absentia if they are incarcerated before they can be produced for trial.

6. State v. McAllister

This is a matter held for future consideration from the 2004-2007 term. In State v. McAllister, 184 N.J. 17, 22 (2005), the defendant was convicted at a jury trial of forgery and theft. The State had alleged that, while employed as a caretaker for an elderly couple, she was forging their checks and stealing from their bank accounts. The investigation had begun when the couple received their own canceled checks, which they had not written, that had been endorsed by "McAllister" and marked with an account number. The Prosecutor's Office thereafter sent a Grand Jury subpoena to the defendant's bank and received records showing that the defendant had deposited monies from the couple's account into hers. Id. at 20-21

Prior to trial, the defendant filed a motion to suppress the bank records and argued that a Grand Jury subpoena was insufficient to obtain the records, which was denied. After a jury trial, the defendant was convicted of forgery and theft.

On appeal, defendant reasserted her argument that bank records must be obtained via a search warrant, with a probable cause standard. In the alternative, the defendant argued that she should have been notified of the subpoena so that she could have moved to quash the subpoena. Id. at 22.

The State argued that no other state requires a probable cause standard and urged the Court "to reaffirm the preexisting standard applicable to grand jury subpoenas *duces tecum*—that documents requested are relevant to the grand jury's investigation." The State further argued that notice to the subject that his or her bank records are being sought

during a criminal investigation "would violate grand jury secrecy and play havoc with the grand jury's investigative function." Id. at 23-24.

The New Jersey Supreme Court held that, under the New Jersey Constitution, account holders do have a reasonable expectation of privacy in their bank records. Id. at 32-33. The Court stated that there are circumstances that will arise that will justify state intrusion on that interest. Id. at 33. The Court rejected the defendant's argument that account holders should receive notice of the subpoena. The Court held that, "[s]imply stated, because providing notice to every account holder whose bank records are subpoenaed may unduly impair the grand jury's ability to investigate, the legitimate needs of law enforcement warrant a workable and practical exception." Id. at 38. The Court noted investigations concerning money laundering, identity theft, insurance fraud, and terrorist activity as examples of the importance of the Grand Jury obtaining such records in secrecy. Ibid.

The Court further rejected imposing a standard of probable cause and reaffirmed the standard of relevance. The Court noted In re Addonizio, 53 N.J. 107 (1968), where it had held that "grand juries have never been bound only to investigate charges that were already supported by probable cause. State v. McAllister, 184 N.J. at 34-36. The Court affirmed the defendant's conviction. It also referred "this issue to the Criminal Practice Committee for further study of the benefits and burdens of enhanced protections for bank records" and "the need, if any, for additional grand jury procedures." Id. at 42-43

The Criminal Practice Committee formed a Subcommittee, which informally surveyed prosecutors and defense counsel as to the handling of bank records in both the state and federal systems.

In the state system, the prosecutor obtains records as set forth in State v. McAllister. If the defendant is indicted, the records are released as part of the discovery. If the defendant has never been arrested, and is not indicted, the prosecutor closes the file and no notice is given to the target of the investigation. This file may be closed permanently, or the prosecutor may conclude that the file should be closed pending further evidence that may develop in the future.

In the federal system, when a prosecutor initiates a Grand Jury investigation, the prosecutor sends a Federal Criminal Rule 6(e) letter to the judge who is assigned to the Grand Jury. A 6(e) letter is sent to the judge in all cases, including those cases involving the subpoena of bank records, to advise the judge that the federal prosecutor is opening an investigation. Grand Jury subpoenas issued during the investigation are exempted from notice requirements under the Federal Right to Financial Privacy Act. 12 U.S.C. § 3420.

The Subcommittee reached a consensus that the procedures enumerated in State v. McAllister strike a fair balance between an account holder's right to privacy and the legitimate needs of law enforcement to investigate alleged criminal activity. The Subcommittee discussed its conclusions with the full Committee. The Committee agreed with the Supreme Court's conclusion that relevance is an appropriate standard for a

Grand Jury subpoena. The Committee further agreed that notice of the subpoena to an account holder could cause that target to flee and/or remove funds from the account, and could otherwise thwart or destroy an investigation.

The Committee ultimately concluded that no further recommendations need be made to the Supreme Court in this area.

7. Conditional Discharge Appeals – R. 3:23-2

In its 2004-2007 Report, upon request of the Municipal Court Practice Committee, the Committee proposed amendments to R. 3:23-2 that would: (1) permit a defendant who has been granted a conditional discharge, pursuant to N.J.S.A. 2C:36A-1, following the denial of a motion to suppress evidence to appeal the denial; (2) change the word "clerk" to "court administrator"; and (3) distinguish separate appeals by the defendant from appeals by the State. The reason for the first proposal was that pursuant to N.J.S.A. 2C:36A-1, a defendant who enters a guilty plea as part of a conditional discharge also receives a driver's license suspension and there is no mechanism to appeal from the denial of the motion to suppress, a process that is not currently provided for in the court rules because no judgment of conviction is entered. Other defendants who do not enter a guilty plea as part of conditional discharge do not receive a driver's license suspension.

With regard to the first rule proposal, during the 2004-2007 term, the Court asked for further research as to how appeals of motions to suppress are handled when a defendant is entered into Pretrial Intervention and a driver's license suspension or professional license suspension is ordered. As a result, the Committee continued to review this matter.

Thereafter, on April 17, 2007, the Appellate Division issued State v. Thomas, 392 N.J. Super. 169 (App. Div. 2007), which held that the trial court erred by imposing a lower sentence than that negotiated between the State and N.J.S.A. 2C:35-12, based on the court's belief that the agreement violated defendant's constitutional rights because it

imposed a greater sentence after the defendant invoked his right to a suppression hearing. In Thomas, the defendant was charged with possession of a controlled dangerous substance in a school zone. Pursuant to Brimage Guidelines, the State calculated the following pleas for the three categories: four years of prison, with two years of parole ineligibility for the pre-indictment offer; five years of prison, with thirty months of parole ineligibility for the initial post-indictment offer; and five years of prison with thirty-three months of parole ineligibility for the final post-indictment offer. Id. at 179. The defendant filed a motion to suppress, which was denied and thereafter entered a guilty plea which called for a sentence of five years imprisonment with thirty-three months of parole ineligibility. At sentencing the trial court imposed a sentence of five years of prison, with thirty months of parole ineligibility (as opposed to the thirty-three months of parole ineligibility), "because that was the maximum offer the State could have made under the Guidelines if defendant had *not* moved to suppress." The trial court opined that to do otherwise would "penalize defendant for exercising his constitutional right to a suppression hearing." Id. at 180.

The Appellate Division disagreed with the trial court's conclusion and held:

> [a]lthough it is true that plea agreements are unacceptable if based on an illegal term or condition, we disagree with the proposition that an agreement to forego filing a motion to suppress constitutes such an illegal term or condition. The prosecutor's offer of a harsher sentence because defendant filed a motion cannot be deemed to have violated any of his rights." [Id. at 180 (citing Pressler, *Current N.J. Court Rules*, comment 4.3 on R. 3:9-3 at 822 (2007))].

The Committee determined that Thomas case was dispositive of this issue regarding appeals of motions to suppress in conditional discharge cases, because the Appellate Division essentially held that the inability to file a motion to suppress is not an illegal term or condition of a plea. Thus, from the Committee's perspective, it follows that the inability to appeal the denial of a motion to suppress would not be an illegal condition of a plea. Thus, in the Committee's view, no rule amendments were necessary.

8. State v. Kent

This matter was discussed during the prior term after the Committee's report was filed. In State v. Kent, 391 N.J. Super. 352 (App. Div. 2007) the Appellate Division held that the Confrontation Clause of the Federal Constitution and the testimonial/non-testimonial standards of admissibility set forth in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004) apply to drunk driving prosecutions in municipal court. It asked the Legislature, the Criminal Practice Committee and the Municipal Court Practice Committee to:

> consider the adoption of statutes or court rules patterned after N.J.S.A. 2C:35-19 that would create similar notice-demand requirements for State Police lab reports used in DWI trials and also for blood sample certificates generated under N.J.S.A. 2A:62A-11. We do not suggest any particular timelines or procedures for such notice-demand provisions, but instead defer to the prospective development of appropriate measures through such rule-making or legislation."
>
> [State v. Kent, 391 N.J. Super. at 382.]

The Kent court also asked that the Legislature and Committees "explore means of abating the time and travel burdens upon nurses, chemists and other third-party witnesses who now will be constitutionally required to travel to municipal court for DWI trials," such as "the feasibility of remote video conferences at trials or de bene esse videotaped depositions, so that such witnesses need not physically appear in municipal courts late at night and whether the scheduling or venues of DWI trials might be altered to minimize logistical burdens on medical providers and laboratory personnel, including the creation

of special daytime court calendars to accommodate such witnesses." State v. Kent, 391 N.J. Super. at 383.

At the May 2007 meeting, a Joint Municipal/Criminal Subcommittee was formed to address these issues. On May 16, 2007, the Supreme Court granted certification in State v. Buda, State v. Berezansky, State v. Sweet, and State in the Interest of J.A., which addressed similar confrontation issues as those raised in Kent. The Subcommittee decided to await these rulings to reconvene. In June 2008, the Supreme Court decided State v. Buda, 195 N.J. 278 (2008); State v. Sweet, 195 N.J. 357 (2008) and State in the Interest of J.A., 195 N.J. 324 (2008). In State v. Sweet, the Court held that ampoule testing certificates at issue in State v. Sweet and the breath testing instrument inspection certificates at issue in State v. Dorman (companion case to Sweet) are hearsay statements, but are admissible under the business records exception to the hearsay rule codified at N.J.R.E. 803(c)(6). State v. Sweet, 195 N.J. at 371. The Court concluded that those records are nontestimonial under Crawford v. Washington and are thus inadmissible under the Confrontation Clause. State v. Sweet, 195 N.J. at 374. The Committee determined that in light of these decisions, it need not consider this issue further at this time.

E. No Action Necessary

1. Comprehensive Review of Existing Plea Forms

This matter was held over for future consideration from the 2002-2004 term. During the 2002-2004 term, the Committee considered whether the time had come for a comprehensive review of the plea forms, including a review of which questions should be considered relevant. Several members of the Committee felt that the forms were becoming unmanageable, largely because there were so many of them and they were in need of nearly constant revision. It was noted, for example, that the plea forms that had been revised and disseminated in August 2002 were in need of further revision within a month because of changes in the law.

The Committee also discussed whether several new surcharges should be added to the forms. One member thought that all substantial collateral consequences, including surcharges, should be on the forms. However, this was deemed to be impractical, as there are dozens of State and Federal collateral consequences of a guilty plea; e.g., N.J.S.A. 45:15C-6 provides that tree expert certification may be revoked or temporarily suspended if a person is convicted of a crime. Another member felt that all surcharges should be removed from the forms. It was also suggested that there be a separate sheet for all fines or penalties, so that only one form would have to be changed when the law was revised.

Finally, the Committee agreed that discussions should continue with the Administrative Office of the Courts about the possibility of computerizing the forms (for

the relevant information generated by offense and date), and placing them on the Judiciary's website.

The Committee could not reach a consensus on the first two issues, and decided to continue its deliberations on these issues during the next term. Since that time, all Administrative Directives, including those that promulgated the latest versions of the plea forms, have been placed on the Judiciary's website. The Committee has not revisited the two remaining issues, and will continue to seek computerized forms and judgments which can be generated for each case individually.

The Committee revisited this matter during the 2007-2009 term and was informed that all of the all Administrative Directives including those that promulgated the latest versions of the plea forms have been placed on the Judiciary's website. The individual plea forms will be placed on the judiciary website under the FORMS tab. The most recent plea forms will be posted at http://www.judiciary.state.nj.us/forms.htm

2. Public Access to Court Records

The Supreme Court Special Committee on Public Access to Court Records, chaired by Justice Barry Albin, was charged in 2006 to conduct a comprehensive review of the provisions of R. 1:38, "Confidentiality of Court Records" and to recommend any changes to the rule necessary to clarify or facilitate the public's access to court records. The Committee considered whether it should submit formal comments to the report. A discussion ensued and the Committee determined that because the membership reflected various organizations and individuals with differing views, the members should inform their respective organizations about the report and file comments individually.

F. Matters Held for Future Consideration

1. Bail Review Procedures

The Chief Justice asked the Committee, the Conference of Criminal Presiding Judges and the Conference of Municipal Court Presiding Judges to review and provide recommendations for bail review procedures in light of the Report on Procedures Following in the Setting and Consolidation of Bail on Charges Filed Against Defendant Jose Lachira Carranza, issued by retired Judge Arthur D'Italia on August 29, 2007. The Committee considered whether R. 3:26-2 should be amended and referred the matter to the Conference of Criminal Presiding Judges for review and comment. If necessary, the Committee will review this matter further after the Conference of Criminal Presiding Judges completes its work.

2. Criminal Defendants and Civil Commitment

The Office of the Attorney General asked the Committee to consider adopting standard language to notify the criminal court, defense attorney and prosecutor when a defendant who is in custody awaiting trial or sentencing or who is at the police station exhibits behavior of mental illness that may lead to civil commitment and the defendant is transferred to a screening center for an evaluation. It was suggested that the notification language be included in court orders transferring a defendant out of county jail and to a screening center to evaluate the defendant's behavior.[25] The reason for this proposal is because according to the civil commitment laws, if the defendant is in need of civil commitment and cannot be treated in jail, the law enforcement authority must seek appropriate treatment for that person. Currently, when a defendant is transferred out of county jail for an evaluation, notice of the transfer is not given to the judge, defense attorney or prosecutor in the criminal case. This is primarily because the civil commitment matter is typically handled by County Counsel, with defense representation by the Public Advocate, and a screening judge, often a Municipal Court Judge.

If an evaluation reveals a need for civil commitment, the screening judge can issue a temporary commitment order. While committed, the defendant can be subject to psychological evaluations in accordance with the civil commitment laws and policies.

[25] The commitments at issue fall under R. 4:74-4. The proposal does not address defendants who are civilly committed after being found not guilty by reason of insanity (NGRI) or defendants who are found incompetent to stand trial.

While the defendant is away from jail, the criminal judge, county prosecutor and defense counsel in the criminal case are not given updates on the defendant's status.

Specific concerns arise regarding: (1) the lack of notice of the transfer to the court, the prosecutor and the defendant's attorney in the criminal case; (2) the inability of the criminal court and the prosecutor to receive information related to defendant's whereabouts and the likely date of release; and (3) the discoverability of information contained in reports and notes of psychiatric evaluations that may impact the criminal proceedings. The Committee considered a proposal to include notice to the prosecutor, defense counsel and the criminal judge when a defendant is transferred out of county jail to a screening center, Anne Klein or other facility.

The Committee also discussed the confidentiality of records and reports generated as a result of a civil commitment. Because these records are confidential, they are not automatically sent to the court, the prosecutor or the defendant's attorney in the criminal case. Nonetheless, these records or reports may contain information relevant to the criminal court proceedings. It was suggested that the confidential records and reports could only be obtained by a court order for use in the criminal case. The Committee considered proposed modifications to the detainer to address this issue. The Committee agreed to refer this matter the Civil Practice Committee with a suggestion to form a Joint Criminal/Civil Committee to resolve these issues.

3. Disposition of Municipal Court Matters in Superior Court

The Conference of Criminal Presiding Judges and Municipal Presiding Judges have been jointly working on an Administrative Directive clarifying a paperwork flow when Superior Court judges dispose of Municipal matters that accompany indictable charges, instead of returning the non-indictable matters to the Municipal Court. The Conference of Criminal Presiding Judges referred this matter to the Criminal Practice Committee for input from the County Prosecutors' Association and the Office of the Public Defender. The Presiding Judges are of the view that there should be a statewide policy regarding disposition of these matters. Currently, the practice varies from county to county.

There are several reasons for creating a uniform policy to address the disposition of municipal court matters in Superior Court. In some counties, all matters, non-indictable and traffic are sent to the Superior Court with the indictable and are addressed at the Superior Court level. In other counties, the non-indictable or traffic matter is sent back to the municipal court for disposition. In still others, the indictable and non-indictable matters are addressed, but the traffic matters are not addressed but sent back to the municipal court. All agreed that in order for a uniform Directive to be successfully implemented, it should set forth a course of action that all interested parties will follow. The Committee discussed a proposed Directive and determined that this proposal should be considered by the County Prosecutors' Association and by the Public Defender for

their input. The Committee is forwarding this matter to County Prosecutors' Association and by the Public Defender's Office to consider the proposed procedure.

4. Model Jury Selection Questions for Criminal Cases

Administrative Office of the Courts' Directive #21-06 (Dec. 11, 2006), as modified by Directive #4-07 (May 16, 2007) set forth jury selection standards and the Model Jury Voir Dire questions for criminal and civil cases, that were recommended by the Special Committee of Peremptory Challenges and Jury Voir Dire, as approved by the Supreme Court. The Civil Practice Committee is recommending that the Model Jury Selection Questions for Civil Cases be included in the appendix of the Court Rules. The Criminal Practice Committee considered whether to make a recommendation to the Court to include the current Model Jury Selection Questions for Criminal Cases in the appendix of the court rules.

The Committee discussed whether only the Model Jury voir dire questions should be included in the appendix of the court rules or if the Directives, in their entirety, should be included in the appendix of the court rules. Some members were of the view that it would be best to include the Directives in their entirety, because they containing the Model Jury questions, along with necessary explanations for the questions.

The Committee believes that the procedures set forth in Directive #21-06 and Directive #4-07 contain valuable information to accompany the Model Jury voir dire questions. The Committee determined that both Directives should be included in the appendix of the Court Rules. During the term, the Committee was informed that the Special Committee on Peremptory Challenges and Jury Voir Dire was considering

possible revisions to the Directives. The Committee will revisit this proposal after the Special Committee on Peremptory Challenges and Jury Voir Dire completes its work.

5. Municipal Appeals

The Committee was asked to consider a recommendation that R. 3:23-3 should be amended to require that a notice of appeal from a judgment or order entered by a Municipal Court state the grounds for the appeal. A member of the Committee explained that the court has the discretion to order the parties to file briefs, and judges could do so for the parties to expand upon issues that may not be clear. The Committee then discussed whether the trial de novo system was based upon the Constitution, statutes, or court rules. In light of the varying opinions on the subject, the recommendation that R. 3:23-3 be amended was withdrawn, and the Committee agreed to table the issue for further review of the trial de novo system. The Committee will continue to consider this issue during the next term.

6. Nicole's Law – N.J.S.A. 2C:14-12 and N.J.S.A. 2C:44-8

N.J.S.A. 2C:14-12 and N.J.S.A. 2C:44-8, frequently referred to as Nicole's Law permit the court (1) to issue an order as a condition of bail or (2) to continue a prior order or issue a new order upon conviction, prohibiting a defendant charged with or convicted of a sex offense from having any contact with a victim, including restraining the defendant from entering a victim's residence, place of employment, business or school and from harassing or stalking the victim or victim's relatives. The law defines "sex offense" by referencing Megan's Law, N.J.S.A. 2C:7-2. Similar to Domestic Violence restraining orders a court order entered pursuant to Nicole's Law can remain in effect after a sentence to probation or incarceration has been served. The Committee was advised that the Conference of Criminal Presiding Judges and Conference of Criminal Division Managers were drafting an order and procedures to implement Nicole's Law. In addition, the AOC formed a Joint Family/Criminal Committee, with judges and AOC staff participating, to create procedures to prevent entry of conflicting orders by a criminal judge and a family judge.

If necessary, the Committee will review this matter further after the order and procedures to implement Nicole's Law are finalized by the AOC.

7. Preservation of Evidence

Several years ago the Office of the Public Defender proposed a rule recommendation mandating the preservation of evidence by prosecuting authorities. Shortly thereafter, the Division of Criminal Justice issued a Directive addressing the storage of DNA evidence. As a result, storage of DNA evidence has not been a problem and the rule proposal was not considered extensively by the Committee. The Public Defender's office has reported, however, that the preservation of large physical evidence is still an issue. Given technological advances, the Office of the Public Defender asked that the Committee reconsider this topic. A discussion ensued and the Committee created a Subcommittee comprised of representatives from the Attorney General's Office, Prosecutor's Office, Office of the Public Defender and private defense bar to address this issue.

8. Pretrial Intervention Guidelines

This is a matter held for future consideration from the 2004-2007 term. In light of a recent opinion, State v. Moraes-Pena, 386 N.J. Super. 569 (App. Div), certif.. denied, 188 N.J 492 (2006) in which the Appellate Division reversed the trial court's order admitting the defendant into the Pretrial Intervention (PTI) Program over the prosecutor's objection, the Committee was asked to consider whether the PTI Guidelines should be updated. Members of the Committee were asked to forward any proposed changes to the Committee staff at the Administrative Office of the Courts. This Committee is continuing to consider this topic.

9. Recording Requirements for Out-Of-Court Identifications

This was a matter held for future consideration from the 2004-2007 term. In State v. Delgado, 188 N.J. 48 (2006), the New Jersey Supreme Court exercised its supervisory powers under the New Jersey Constitution "to require that, as a condition to the admissibility of an out-of-court identification, law enforcement officers make a written record detailing the out-of-court identification procedure, including the place where the procedure was conducted, the dialogue between the witnesses and the interlocutor, and the results." The Court added that "[w]hen feasible, a verbatim account of any exchange between the law enforcement officer and witness should be reduced to writing. When not feasible, a detailed summary of the identification should be prepared." Id. at 63. The Court also noted that although electronic recordation was advisable in stationhouse interviews where recorders might be available, it was not mandated. Ibid. The Court requested that the Committee prepare a rule that required that law enforcement officials record out-of-court identification procedures consistent with the opinion. The Committee considered a rule proposal and had several comments. The Committee is continuing to review the proposal.

10. Review of Verdict Sheets at Charge Conference

The Committee consider adding a requirement to the court rules that the verdict sheet be reviewed and discussed at the charge conference as well as the charge itself, because, notwithstanding the fact that the oral charge may control, the wording and form of the verdict sheet can sometimes be critical and there should be an opportunity to object to the verdict sheet and for the objection to be placed on the record. The Committee discussed the use of verdict sheets in every case or just in multiple-count cases. The Committee reviewed a rule proposal and had several comments. The Committee is continuing to review this proposal.

11. R. 3:14-1(j) – Technical Amendment

The Committee considered a technical amendment to R. 3:14-1(j) in recognition of the rights accorded civil partners. The Civil Practice Committee is making similar amendments to the Part I and Part IV rules. Several members pointed out that other paragraphs of R. 3:14-1 many need to be amended because they may be outdated. The Committee is continuing to review this topic.

Respectfully Submitted,

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Hon. Linda G. Baxter
Hon. Marilyn C. Clark
Hon. Gerald J. Council
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