REPORT OF THE

SUPREME COURT COMMITTEE

ON

CRIMINAL PRACTICE

2013 – 2015 TERM

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APPENDIX

A. Dissent to the Proposed Amendments to R. 3:28 – New Rules 3:28-1 to 3:28-10 – Pretrial Intervention filed by Richard D. Barker, Esq., Representative, New Jersey State Bar Association

B. Dissent to the Proposed Amendments to R. 3:28 – New Rules 3:28-1 to 3:28-10 – Pretrial Intervention filed by John Cannel, Esq.

I. Rule Amendments Recommended For Adoption

A. Proposed Amendments to R. 3:28 - Pretrial Intervention – New Rules 3:28-1 to 3:28-10

1. Background

There have been many changes to the criminal laws in New Jersey since the inception of the Pretrial Intervention Program (PTI) in 1970. When PTI was first implemented, the New Jersey criminal laws were largely contained in Title 2A of the New Jersey statutes. Title 2A established an indeterminate sentencing structure built on a rehabilitative model of criminal justice. In 1979, New Jersey's criminal law underwent a whole-scale revision. Title 2A was replaced by Title 2C, the New Jersey Code of Criminal Justice. Title 2C was based on a just deserts model of criminal justice. Since its enactment in 1979 there have been numerous changes to the Title 2C Code, including upgraded penalties for many charges and increasingly more statutes requiring the imposition of mandatory parole ineligibility terms.[1]

Foremost, PTI is a diversionary program aimed at diverting first offenders from ordinary prosecution when they are charged with less serious types of criminal behavior. As the legal standards governing PTI have changed over the years, practices underlying the program also have shifted. As initially designed PTI involved a shared responsibility with the decisions of the prosecutor and the program director given equal weight. This practice changed with the decision in State v. Leonardis (*Leonardis II*), 73 N.J. 360, 381-

[1] In a 2007 report the New Jersey Commission to Review Criminal Sentencing noted that there had been 112 legislative changes to sentencing from 1979-2007. Of the 112 legislative changes 50 included upgrading the degree of a crime and 39 included a mandatory minimum term of imprisonment. See "Statutory Changes to Sentencing Under the N.J. Code of Criminal Justice: 1979 to Present," New Jersey Commission to Review Criminal Sentencing (September 2007).

83 (1977), which requires an enhanced standard of review of a prosecutor's decision on a PTI application in which the prosecutor's exercise of discretion is subject to reversal only if it constitutes a "patent and gross abuse of discretion." As such, most court personnel subscribe to the view that PTI primarily became a prosecutor-run program after *Leonardis II*. Given this, many have urged that the prosecutors' offices should assume responsibility for PTI. This proposal does not go that far. Rather, it is designed to recognize the preeminent role of prosecutors in the eligibility and enrollment decision-making process, while maintaining court control over the entire PTI program.

Given the significant changes to the Title 2C Criminal Code, including classifications of offenses, as well as numerous enhanced sentences and penalties that have been enacted during the past 40 years, the judiciary decided that the time had come to take a close look at the PTI program in the context of current criminal sentencing law. After reviewing R. 3:28, the *Guidelines for Operation of Pretrial Intervention in New Jersey* that are currently included in R. 3:28 (hereinafter *"Guidelines"*), and N.J.S.A. 2C:43-12, et. seq., an initial decision was made to incorporate the necessary procedures governing the operation of PTI into the court rules. Recognizing the need to reconcile whether the purpose of the PTI program was aligned with current practice, the Conference of Criminal Division Managers undertook a complete in-house review of the program and its governing procedures. The Criminal Division Managers prepared a comprehensive proposal recommending new draft Rules 3:28-1 to -10, which, if adopted, would incorporate the procedures for PTI into proposed court rules and eliminate the PTI

Guidelines. That proposal was subsequently reviewed and endorsed by the Conference of Criminal Presiding Judges and the Judicial Council.[2]

Thereafter, Acting Administrative Director Glenn Grant referred the proposal to the Criminal Practice Committee for its consideration. The Practice Committee formed a subcommittee comprised of judges, prosecutors, private attorneys, defense counsel and a representative from the Conference of Criminal Division Managers to provide appropriate recommendations to the full Committee for consideration. The subcommittee thoroughly reviewed the recommendations proposed in the original report, and after significant discussion, debate and compromise, agreed with some of the original proposals and disagreed with others. The Committee considered the recommendations of the subcommittee. Objections and comments were expressed during the Committee's discussions with respect to certain proposals. The Committee respectfully submits the following rule proposals to align the PTI program with current practice and to ensure that resources are expended in a fair and useful fashion.

A dissent to the proposed rule amendments was filed by Richard D. Barker, Esq., representing the New Jersey State Bar Association, which is contained in Appendix A of this report. This dissent was joined by Eric Breslin, Esq.; Tana McPherson, Esq., representing the Association of Black Women Lawyers of New Jersey; and by Mary Ciancimino, Esq., Deputy Public Defender; Jeffrey Coghlan, Esq., Deputy Public Defender; and John McMahon, Esq., Assistant Deputy Public Defender, the three representatives of the Office of the Public Defender on behalf of that office. A separate

[2] The Judicial Council, which is an administrative group formed in the judiciary, should be distinguished from the Judicial Conference, procedure for considering proposed rules dealing with supervisory treatment pursuant to N.J.S.A. 2C:43-12 to -20.

dissent to the proposed rule amendments was filed by John Cannel, Esq., which is contained in Appendix B of this report. This dissent was joined in by Richard D. Barker, Esq., representing the New Jersey State Bar Association; Eric Breslin, Esq.; Tana McPherson, Esq., representing the Association of Black Women Lawyers of New Jersey; and by Mary Ciancimino, Esq., Deputy Public Defender; Jeffrey Coghlan, Esq., Deputy Public Defender; and John McMahon, Esq., Assistant Deputy Public Defender, the three representatives of the Office of the Public Defender on behalf of that office.

2. Introduction

The Committee is recommending adoption of several proposed rules with an aim to re-align the New Jersey Pretrial Intervention Program to its original purpose to divert from prosecution first time offenders who would benefit from its rehabilitative components. Part of the proposal involves shifting the initial approval and screening process to the prosecutor to make a preliminary decision in certain cases where a defendant is unlikely to be admitted into PTI, and to preclude applications from those defendants who have traditionally been excluded from PTI, based upon prior criminal history.

Some of the proposed changes address remedies to administrative challenges in judiciary criminal case management offices, with a goal to ensure that the court dedicates its resources to those cases involving first offenders who are charged with less serious offenses. For purposes of allocating judicial resources, criminal case management will not be required to prepare a report, on applicants facing serious charges or applicants with substantial criminal history, until the prosecutor consents to further consideration of

the application, as those cases are typically rejected for enrollment into the program by the prosecutor. As such, the proposed rules continue the current practice in *Guideline* 3 permitting certain applications to be evaluated by the criminal division if the prosecutor consents to or jointly files the application. The following is a summary of the Committee's recommendations.

For eligibility to the PTI program, the proposal maintains the current age requirement, and in appropriate cases, develops a more flexible standard for non-residents, to relieve undue burdens on students and travelers who are suitable candidates for PTI. The proposal also creates categories of absolute ineligibility for PTI. Thus, these individuals are not permitted to file PTI applications. Specifically, the proposals preclude PTI applications from individuals who have a prior diversion or who currently are charged with a non-indictable offense. A new category of individuals also are precluded from filing PTI applications: persons with a prior conviction for a first or second degree crime or a prior conviction for a third or fourth degree crime for which the person received a prison sentence. The disqualifying prior convictions include equivalent convictions under any other state law or federal law. This category essentially deems ineligible, a defendant with a prior conviction for any first or second degree crime, regardless of the sentence that was imposed, or with a prior conviction for a third of fourth degree crime where a prison term was imposed. The Committee engaged in lengthy debates regarding the prior conviction ineligibility criteria with views expressed in opposition to this criteria.

As to individuals who may file applications for PTI, the rule proposals create two categories of applicants. The first category of applicants involves individuals who may file an application for PTI with the court, but who must obtain prosecutor consent to consideration of that application by the Criminal Division (hereafter "prosecutor consent" cases). This procedure is similar to the current process in *Guideline* 3(i) that, under certain circumstances, requires a joint PTI application by the defendant and the prosecutor. The second category of applicants involves individuals who do not need prosecutor consent to consideration of the application. This group of individuals comprise the primary target group for PTI: first time offenders who are charged with less serious crimes. For both categories of applicants, the PTI application must be filed "at the earliest possible opportunity, including before indictment, but in any event no later than 14 days after the arraignment/status conference, unless good cause is shown or consent by the prosecutor is obtained."

Prosecutor consent is required for (1) individuals who have no prior convictions but are currently charged with a crime for which there is a presumption of incarceration or mandatory minimum period of parole ineligibility; (2) individuals who have a prior conviction for a third or fourth degree crime and who were not sentenced to a term of imprisonment for that prior offense (e.g., the defendant received a probation sentence); and (3) defendants who are public officers or employees who are charged with a crime that involved or touched the public office or employment. Individuals who fall within one of these three categories must in their application include a statement of the extraordinary and compelling circumstances that justify consideration of the application

notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions.

When an application requiring prosecutor consent is filed with the Criminal Division, the Criminal Division shall not consider the merits of the application and shall forward the application to the prosecutor's office for consideration. In analyzing whether to consent to further consideration of the application, the prosecutor "shall not be required to consider any facts, materials, or circumstances other than the information presented in the defendant's application, but it shall not be an abuse of discretion for the prosecutor to consider only those additional facts and circumstances which may include the victim's position on whether the defendant should be admitted into the program, that the prosecutor deems relevant to a determination whether extraordinary and compelling circumstances justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions." The prosecutor must provide its written decision to either consent or refuse to consent to consideration of the application to the defendant, the defendant's attorney and the Criminal Division, within 14 days of receipt of the application.

If the prosecutor consents to consideration of the application, the application goes through the current process for the criminal division manager and prosecutor to conduct their evaluations and to make recommendations on enrollment into the PTI program. If the prosecutor refuses to consent to consideration of the application, the Criminal Division does not need to consider the application.

Where prosecutor consent is required, within ten days after receipt of the rejection, a defendant may appeal to the criminal judge from the decision of a prosecutor to refuse to consent to consideration of the application. The standard of appeal for prosecutor consent cases is: "[a] defendant challenging a prosecutor's decision to refuse to consent to consideration of an application must establish not only that the prosecutor's decision was a gross and patent abuse of discretion, but that information presented in the application and such additional information as the prosecutor chose to consider clearly and convincingly establishes that there are extraordinary and compelling circumstances that justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions." There shall be no pretrial review by an appellate court, if the rejection of the application is upheld by the judge. Denial of an application may be reviewed on appeal from a judgment of conviction notwithstanding that such judgment is entered following a plea of guilty.

Certain cases do not require prosecutor consent to consideration of the application. This category encompasses the core applicants for the PTI program – first time offenders who are charged with less serious crimes. There are no meaningful changes in the application and enrollment process for these individuals. When the application is filed with the Criminal Division, the application goes through the current process for the criminal division manager and prosecutor to conduct their evaluations and to make recommendations on enrollment. In accordance with current practice, if a PTI application is filed with the court, pre-indictment, the prosecutor may withhold action on

the application until the matter has been presented to the grand jury. In such cases the prosecutor shall inform the criminal division manager, the defendant, and defendant's attorney of the decision on the application and enrollment within 14 days of the return of the indictment. If the criminal division manager or prosecutor recommend against enrollment, the defendant may challenge those decisions by appealing to the criminal judge.

Once a defendant is recommended for admission into the PTI program, such enrollment shall not be conditioned upon either informal admission or entry of a guilty plea. Rather, "[e]nrollment of defendants who maintain their innocence is to be permitted unless the defendant's attitude would render pretrial intervention ineffective." The current postponement period and timeframe to review and dispose of a PTI matter at the conclusion of postponement remain intact.

The proposal updates references to the roles of the vicinage probation officer and criminal division manager in the application, enrollment, postponement, and disposition process. The proposal codifies and updates the current protocols regarding judges who can handle PTI, restitution and community services requirements for PTI, confidentiality of PTI records and statements, and written reasons and decisions regarding PTI applications, enrollments, and dispositions. Finally, the proposal recommends deletion of the current PTI Guidelines. To the extent the Committee deemed appropriate, the Guidelines have been incorporated into the rule proposals.

3. Recommendation – Procedure for Adoption

The Committee recommends that the rule amendments being proposed in this report to revise the current process and procedures for the PTI program be presented for consideration in accordance with the protocol set forth in N.J.S.A. 2C:43-14 to -20.[3] If the proposals being recommended herein are subsequently adopted, the Committee also recommends review of other court rules for any necessary conforming amendments.

4. Proposed Revision of R. 3:28

a. R. 3:28-1 – Eligibility for Pretrial Intervention

R. 3:28-1 is a new rule. The rule sets forth eligibility requirements for persons applying for the PTI program.

(1) R. 3:28-1 - Paragraph (a) – Age Requirements

Paragraph (a) governs the age requirements for PTI applicants and with some re-structuring, was taken from *Guideline* 3(a). This paragraph sets forth the basic premise that PTI is only available for persons 18 years of age or over. It retains the exception that PTI is available for juveniles who are treated as adults pursuant to R. 5:22-1 or R. 5:22-2.

(2) R. 3:28-1 - Paragraph (b) – Residence Requirements

Paragraph (b), which addresses the residence of the applicant, is derived from current *Guideline* 3(b). PTI *Guideline* 3(b) states: "New Jersey's PTI program is designed to address crime in New Jersey. Only those defendants are ineligible who

[3] In the past, the Supreme Court has followed the procedures set forth in N.J.S.A. 2C:43-14 to -20 when recommending changes to the PTI program. The Judicial Conference includes delegates from the Supreme Court, the Appellate Division of the Superior Court, the judges of the Superior Court, the judges of the municipal courts, the surrogates, the State Bar Association, the county bar associations, the Senate and General Assembly, the Attorney General, the county prosecutors, the law schools of this State, and members of the public. N.J.S.A. 2C:43-15.

reside such distances from New Jersey as to bar effective counseling or supervisory procedures." The *Commentary* to *Guideline* 3(b) further explains that residents of other States, who are charged with a crime in New Jersey, may, with the approval of the prosecuting attorney, the designated judge, and the Administrative Office of the Courts, be permitted to participate in an out-of-state program while enrolled in PTI. The Committee is recommending that paragraph (b) of proposed R. 3:28-1 provide as follows:

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

In reaching this conclusion, the Committee discussed whether persons residing out-of-state can effectively be counseled and supervised by New Jersey probation officers. It recognized that R. 1.106 of the *Interstate Compact for Adult Offender Supervision* provides that "persons subject to supervision pursuant to a pre-trial intervention program, bail, or similar program are not eligible for transfer under the terms and conditions of this compact." The Committee was in agreement that non-residents who cannot receive effective supervision or counseling would be ineligible for PTI. The members also believed that eligibility for PTI should not be tied to the distance between the defendant's residence and New Jersey, and a requirement for in-person reporting. Precluding otherwise eligible non-residents from PTI solely because of the distance between their residence and New Jersey would be burdensome on students, travelers and other individuals who reside out-of state, particularly when there is little need for in-person reporting. For example, an out-of-state defendant may successfully complete PTI by meeting the required reporting requirements, via telephone, and making arrangements

to pay the appropriate fines and penalties. Excluding these individuals from PTI would require placing the cases on a trial calendar, and unnecessarily expend resources and time on matters that could normally be disposed of early in the case through the PTI program.

As such, the Committee sought to clarify that for non-residents, the distance between a defendant's residence and New Jersey is not a factor in determining eligibility for PTI. If a Florida resident can receive effective supervision or counseling, that person should not be deemed ineligible from the PTI program, solely because of the distance between Florida and New Jersey. Rather, non-residents should be eligible for PTI as long as effective supervision and counseling can be accomplished.

Typically it is not until after a PTI application is filed that an assessment is made to ascertain the appropriate level of supervision or the applicant's need for counseling or treatment. Enrollment into the PTI program will be dependent upon whether such requirements can be accomplished by a non-resident. Further, the Committee was informed that with respect to authorization for a non-resident to participate in an out-of-state program, the provisions of the *Commentary* to *Guideline 3(b)* are not being followed inasmuch as the AOC is not being asked for its approval for a non-resident's admission into PTI under these circumstances. Going forward, if the Criminal Division and prosecutor recommend enrollment of a non-resident into the PTI program, the non-resident should be made aware of the counseling or supervision requirements before he or she decides to enroll into the program. The non-resident should also be informed that enrollment into PTI will be contingent upon the person's ability to receive effective counseling or supervision.

In sum, the proposed language in paragraph (b) of R. 3:28-1 addressing residence provides that non-residents should not be precluded from applying to the PTI program, but may be denied enrollment unless they can demonstrate that they can receive effective counseling or supervision. Additionally, prior to enrollment into the PTI program, non-residents should be made aware of any supervision, counseling or treatment requirements in their particular cases.

(3) R. 3:28-1 - Paragraph (c) – Absolute Bars/Ineligibility for PTI and Paragraph (d) – Situations Requiring Prosecutor Consent to Consideration of the Application

a) Overview

The Committee is recommending adoption of paragraphs (c) and (d) of R. 3:28-1 in an effort to streamline the PTI screening and application process with respect to offenders who are highly unlikely to be enrolled into the PTI program. By carving out clear eligibility standards, the proposal fosters uniformity with a focus on the purpose of PTI, namely, a rehabilitation program designed primarily for first offenders. The goal is to increase overall efficiency of the PTI program by dedicating the necessary resources to defendants who would benefit most from participation in the program. The proposed revisions will also reduce unnecessary paperwork and limit the expenditure of valuable judiciary resources, upfront, under certain circumstances set forth in the rule. Thus, the eligibility standards in paragraphs (c) and (d) focus upon those factors, identified by the Committee, that, in practice, have been the basis for exclusion from the PTI program: the defendant's prior convictions, the seriousness of the present charge, and the potential sentence that could be imposed if the defendant was convicted of the present charge.

In the instances set forth in paragraph (c) a defendant is automatically precluded from applying for PTI. Subsections (c)(1) and (c)(2) are derived from the *Guidelines* and more fully describe ineligibility for defendants who have a prior diversion or who are currently being charged with a non-indictable offense. Representing a change from the current *Guidelines*, subsection (c)(3) focuses on defendants with certain prior convictions. If adopted, subsection (c)(3) will preclude applications from defendants with prior convictions for first or second degree crimes or prior convictions for any crime for which the defendant was sentenced to a term of imprisonment.[4] This category includes equivalent prior convictions from other state and federal jurisdictions. By limiting PTI eligibility for defendants who have certain prior convictions, subsection (c)(3) seeks to conform the PTI program to its original purpose to focus on first offenders.

Paragraph (d) specifies situations where the defendant must first obtain consent from the prosecutor before the PTI application is considered by the court. Subsection (d)(1) addresses defendants who have no prior convictions but are currently charged with a crime that is subject to either a presumption of incarceration or a mandatory minimum sentence. Subsection (d)(2) addresses defendants who have prior convictions, but are not automatically precluded from PTI pursuant to subsection (c)(3); namely defendants previously convicted of third and fourth degree crimes where a sentence of imprisonment

[4] This category in subsection (c)(3) essentially deems ineligible, a defendant with a prior conviction for any first or second degree crime, regardless of the sentence that was imposed or a prior conviction for a third or fourth degree crime where a prison term was imposed. Eligibility criteria for defendants with prior convictions for third or fourth degree crimes where a sentence of imprisonment was not imposed (e.g., where a defendant was sentenced to probation) is addressed in proposed subsection (d)(2) of R. 3:28-1.

was not imposed. Subsection (d)(3) addresses defendants who are public officers or employees and are charged with a crime or crimes that involved or touched their public office or employment.

While a majority of the Committee is in favor of the standards set forth in paragraphs (c) and (d), a dissenting view also was strongly expressed. From the standpoint of some practitioners the current eligibility criteria and application process for the PTI program operate effectively and, therefore, should not be changed. Additionally, views were expressed that PTI eligibility criteria is a substantive area for legislative action, as opposed to a procedural area appropriate for the court rules. Finally, opposition was voiced that the proposed rules that preclude and refine PTI eligibility criteria are inconsistent with the PTI statute and the current *Guidelines*, and, in particular, go beyond the language of the current law.

b) Historical Perspective

In developing the eligibility criteria in paragraphs (c) and (d), the Committee discussed the historical background of PTI and recognized that consideration of procedural bars to PTI for defendants charged with serious crimes or who have prior convictions is not new. Over time there have been several recommendations to improve the efficiency of the PTI program, including proposals to bar admission of persons who are facing serious charges or who have a prior criminal record. See *Judicial Conference of New Jersey: An Approach to the Expeditious Processing of Criminal Cases*, 105 N.J.L.J. 521, 534 (1980); *Judicial Conference Task Force on Speedy Trial, Report of the Committee on Delay Points and Problems Affecting Speedy Trial*, 117 N.J.L.J. 747, 765

(1986), and *Report of the Supreme Court Committee on Criminal Practice 1988*, 122 N.J.L.J. 97, 114 (1988).

Specifically, in 1980, the report entitled the *Judicial Conference of New Jersey: An Approach to the Expeditious Processing of Criminal Cases*, 105 N.J.L.J. 521 (June 5, 1980), detailed recommendations of a Task Force with an emphasis on eliminating unwarranted delays resulting from the processing of PTI applications. In 1980, the Task Force recognized that:

> [s]ignificant delays in the criminal process are caused by applications for PTI and challenges to decisions not to permit enrollment. Offenders charged with serious crime[s] and recidivists are almost invariably rejected by prosecutors due to the nature of these offenses and the defendant's pattern of offenses. If defendants who are highly unlikely to receive PTI were excluded from the PTI application process, substantial expenditures of energy and time in the screening process would be saved. Moreover, since appeals of rejections are rarely successful, the time and effort required by the appellate process only delays the ultimate adjudication of the matter without countervailing benefits.
>
> [*Judicial Conference of New Jersey: An Approach to the Expeditious Processing of Criminal Cases*, 105 N.J.L.J. at 534.]

As a remedy, the Task Force recommended that certain offenders be ineligible to apply for PTI, except upon joint application of the defendant and the prosecutor: (1) defendants currently charged with first or second degree crimes; (2) defendants with any criminal convictions during the preceding five years who have received either sentences to incarceration or probation for those prior convictions; (3) defendants with a prior record of first or second degree crimes or high misdemeanors; and (4) defendants

presently charged with sale of or possession with intent to distribute controlled dangerous substances of the most serious grades.

In 1981, the *Report of the Supreme Court Committee on Pretrial Intervention*, 108 N.J.L.J. 485 (1981) was issued. That Committee reviewed the Task Force report and among its recommendations, the Committee proposed that the following defendants should not be considered for enrollment into PTI except upon joint application by the defendant and the prosecutor: (1) defendants with prior criminal convictions whose term of probation, incarceration or parole expired during the preceding 5 years; (2) defendants with a prior record of first or second degree crimes; or (3) defendants charged with a first or second degree crime or a serious drug offense. The 1981 Committee Report cited to N.J.S.A. 2C:43-12(a) as authority for this proposal. See 108 N.J.L.J. at 487. PTI *Guideline* 3(e) was amended the following year to implement this recommendation. See R. 3:28 (1982). Thereafter, the *1986 Judicial Conference Task Force on Speedy Trial Report*, 117 N.J.L.J. 747 (1986) examined delays in case processing and contained several recommendations regarding eligibility for PTI. Three key recommendations were that: (1) there be an automatic exclusion for persons previously convicted of first or second degree crimes; (2) persons presently charged with first or second degree crimes, or sale or dispensing Schedule I or II narcotic drugs by persons not drug dependent should not be allowed to apply to PTI unless they first receive the prosecutor's consent; and (3) methods to pre-screen applications should be developed. The *Report of the Criminal Practice Committee (1988)*, 122 N.J.L.J. 97 (July 14, 1988) also contained recommendations for streamlining applications for PTI. Among the recommendations in

1988 were the following eligibility criteria that: (1) persons convicted of a prior offense be excluded from applying to PTI; (2) persons charged with a first or second degree crime be excluded from applying to PTI; and (3) corporate defendants should be excluded from applying to PTI.

Currently, *Guidelines* 3(e) (Prior Record of Conviction) and (f) (Parolees and Probationers) and the corresponding *Commentary* create a rebuttable presumption against enrollment into PTI for persons who have a prior record of criminal convictions. *Guideline* 3(e) recognizes that while PTI "is not limited to 'first offenders', defendants who have been previously convicted of a criminal offense should ordinarily be excluded." Specifically, persons having a prior conviction for a first or second degree crime, or having completed a term of probation, incarceration or parole within five years prior to the application, shall ordinarily not be considered for enrollment in PTI unless there is joint consent by the defendant and the prosecutor. This *Guideline* has been upheld. See State v. Collins, 189 N.J. Super. 190, 196 (App. Div. 1981), aff'd, 90 N.J. 449 (1982) (the Supreme Court affirmed the Appellate Division decision to remand the matter for the trial court to enable the prosecutor to expand the reasons for PTI denial, and advised that if the only reason for denial is the defendant's prior conviction (simple possession), the court shall review in accordance with State v. Dalglish, 86 N.J. 503 (1981), in which the Court set forth the factors for determining whether there was a patent and gross abuse of discretion by the prosecutor); State v. Gray, 215 N.J. Super. 286, 291 (App. Div. 1987), (noting that under *Guideline* 3(e) diversion is unquestionably available to a repeat offender; however, where the "criminal history includes a conviction

or convictions of a serious nature [a defendant] should ordinarily be excluded," and citing to State v. Collins, 189 N.J. Super. at 196; State v. Brooks, 175 N.J. 215 (2002) (upheld the prosecutor's rejection of PTI based on the defendant's prior juvenile and adult arrest record).

c) Administrative Challenges In Light of Increased Statutory Penalties

The application of the *Guidelines* in light of increased statutory penalties, has continued to result in additional, and in some circumstances unnecessary, work for the criminal division manager's office to prepare reports and process other paperwork, upfront, in cases where PTI enrollment is ultimately rejected by the prosecutor's office. Allocation of judicial resources at the outset of the application process in situations where defendants are routinely not enrolled in the PTI program not only misallocates the expenditure of those important resources, but also frequently causes delays in the disposition of the case. Post-*Leonardis II* when a defendant is facing a serious charge or has a prior record, the time expended by criminal court staff on review and evaluation of the application, including interviews and report preparation, often has little or no effect on the outcome of the application decision that is made by the prosecutor, i.e., whether the defendant is enrolled into the PTI program. The decision on enrollment into PTI rests predominately with the prosecutor.

From an administrative standpoint, the data bears this out. During calendar year 2013, 168 persons applied to PTI who had a prior record. Of those, none were admitted. Of the 168 persons who applied, 13 had a prior conviction for a first or second degree offense. Additionally, during calendar year 2013, there were 1441 applications for

admission into PTI where a defendant was charged with a first or second degree offense. Of those 486 were admitted into PTI. Although the majority of the applications involved second degree crimes, 103 applications, and 22 admissions were for first degree crimes. From the criminal case management standpoint, it is estimated that it would take 6 full-time persons to process and write reports on the 955 applications that were denied admission into PTI. In that sense, the challenges with respect to delays in case processing, and the allocation of judiciary resources upfront to process PTI applications that have been expressed in the historical reports over the past 30 years still exist today. In fact, those challenges, perhaps are exacerbated with changes to the criminal sentencing laws. Defendants who previously may have been ideal candidates for PTI, are now exposed to heightened penalties and mandatory minimum terms of imprisonment, and therefore, are being rejected for enrollment by the prosecutor.

As such, the Committee recognized that there are a number of compelling reasons for limiting eligibility for PTI to certain applicants. Foremost, as a diversionary program, PTI is aimed at diverting first offenders from ordinary prosecution when they are charged with less serious criminal behavior. Simply put, PTI was designed for those individuals demonstrating amenability to the rehabilitation process. Additionally, regarding criminal staff resources, it is estimated that it takes two court employees to process and write reports on the 168 cases (cited above) where the applicant had a prior record, and, as stated above, 6 full-time court employees to process and write reports on the 955 applications which were denied admission because the defendant was facing charges for a first or second degree crime. Certainly substantial expenditures of energy and resources

can be saved by revising eligibility criteria, shifting the time in the application process when criminal case management is required to conduct the evaluation, and modifying the extent of the evaluation, particularly in those cases which have, over the years, been denied enrollment into the PTI program.[5] As such, paragraphs (c) and (d) of proposed R. 3:28-1 recommend several criteria, identified by the Committee, for PTI eligibility based upon the nature of the defendant's current charge or charges and the potential sentence that can be imposed, as well as, the defendant's prior criminal convictions. Although the Committee was in favor of the standards set forth in paragraphs (c) and (d), a dissenting view also was strongly expressed.

With this background in mind, the Committee is proposing the rule revisions that follow.

(4) R. 3:28-1 - Paragraph (c) – Absolute Bars/Ineligibility for PTI

Paragraph (c) sets forth three categories of absolute bars from eligibility for PTI: (1) individuals who have prior diversions; (2) individuals who are being charged with non-criminal offenses; and (3) individuals with certain prior convictions. Individuals who fall within at least one of these categories will not be eligible to apply for admission into the PTI program. The bars to admission into PTI discussed in subsections (c)(1), (c)(2) and (c)(3) are designed to streamline the PTI application process. Subsections (c)(1) and (c)(2) are derived from the *Guidelines* and more fully describe current ineligibility for defendants who have a prior diversion or who are being charged with a non-indictable offense. Subsection (c)(3) clarifies the categories of individuals who will

[5] See State v. Green, 413 N.J. Super. 556, 561 (App. Div. 2010).

not be eligible for PTI due to the circumstances of the defendant's prior criminal history. In particular, it precludes persons who have a prior conviction for a first or second degree crime or a prior conviction for any indictable offense, which resulted in a sentence to a term of imprisonment. It delineates eligibility criteria in an effort to address common concerns that have been expressed in numerous reports over the years regarding the time and resources expended for individuals to proceed through the entire PTI process, i.e., application, report prepared by the criminal division manager's office, review by the prosecutor, written reasons for rejection, and possible appeal by the defendant, in cases where the defendant has virtually no chance of being admitted into the PTI program.

a) R. 3:28-1 - Subsection (c)(1) – Prior Diversion

Paragraph (c)(1) would bar PTI applications from persons with a prior diversion, such as, a prior participation in PTI, conditional discharge or conditional dismissal in New Jersey or a diversion for a crime or felony committed in another state or under federal law. This bar primarily is contained in present *Guidelines* 3(g) and (h), except as it relates to diversions in other states or under federal law. In addition, N.J.S.A. 2C:43-12(g), adopted subsequent to R. 3:28 and the *Guidelines*, contains a bar against admission for defendants having a prior diversion. See State v. Collins, 180 N.J. Super. 190 (App. Div. 1981), aff'd, 90 N.J. 449 (1982) (a prior PTI admission bars a subsequent PTI admission); State v. Johnson, 282 N.J. Super. 296 (App. Div. 1995) (bar applies also to prior conditional discharge pursuant to N.J.S.A. 2C:36A-1); State v. McKeon, 385 N.J. Super. 559 (App. Div. 2006) (the term supervisory treatment, found in N.J.S.A. 2C:43-12(g), referred to diversionary programs under N.J.S.A. 2C:43-12 and to conditional

discharge under N.J.S.A. 24:21-27 and 2C:36A-1, not to diversionary programs under the laws of other states); and State v. O'Brien, 418 N.J. Super. 428 (App. Div. 2011) (prohibiting any person previously placed into supervisory treatment under the conditional discharge statute from subsequent admission into PTI, whether or not the conditional discharge is later vacated). More recently, effective January 1, 2014, N.J.S.A. 2C:43-13.1, et. seq., established a conditional dismissal program for first time offenders charged with disorderly persons offenses (non-indictable offenses) that are normally disposed of in the Municipal Courts. Thus, the proposed language in subsection (c)(1) codifies the current *Guidelines* and legislation with respect to prior diversions in New Jersey to provide that a person who was previously placed on PTI, conditional discharge or conditional dismissal is precluded from applying for PTI. It also clarifies that a defendant with a prior out-of-state or federal diversion for a felony or crime is precluded from applying for PTI in New Jersey.

b) R. 3:28-1 - Subsection (c)(2) – Non-Indictable Matters

Subsection (c)(2) would bar PTI applications from persons who are currently charged in a non-indictable matter, such as, a disorderly persons offense, a petty disorderly persons offense, an ordinance or health code violation or a similar violation. This language, slightly reworded, is from *Guideline* 3(d). Presently, PTI *Guideline* 3(d) does not exclude persons from PTI who are charged with disorderly persons or petty disorderly persons offenses, rather it provides that defendants should not be eligible for enrollment if the likely disposition would result in a suspended sentence without probation or a fine. On the other hand, *Guideline* 3(d) unequivocally excludes persons

from PTI who are charged with ordinance, health code or other similar violations. The proposed language for subsection (c)(2) would mirror the current practice, which is that persons who are charged with non-indictable offenses (i.e., municipal court matters) cannot apply for PTI. The practice of excluding non-indictable offenses from the PTI program recognizes that PTI was never given adequate resources to allow for admissions on municipal court matters.[6] Moreover, PTI does not apply to motor vehicle violations and offenses under Title 39 of the New Jersey statutes. State v. Negren, 178 N.J. 73, 83 (2003). Currently, there are diversion programs for individuals charged with non-indictable offenses. Persons charged with non-indictable drug offenses can be diverted *via* conditional discharge pursuant to N.J.S.A. 2C:36A-1. Individuals charged with disorderly persons offenses can be diverted *via* conditional dismissal pursuant to N.J.S.A. 2C:43-13.1, et. seq.

c) R. 3:28-1 - Subsection (c)(3) – Prior Convictions for First or Second Degree Crimes or Any Other Crime with a Sentence to a Term of Imprisonment

Subsection (c)(3) would deem persons with certain prior convictions ineligible for the PTI program. The language in subsection (c)(3), being proposed by the Committee, creates an absolute bar to admission into PTI for (1) individuals who have previously been convicted of any first or second degree offense in New Jersey or its equivalent under the laws of another state or the United States, regardless of the sentence that was imposed, and (2) individuals who have been convicted of any other indictable offense in

[6] The *Report of the Supreme Court Committee on Criminal Practice*, 111 N.J.L.J. 665, 666 (1983) included a recommendation to expand PTI to include admission for non-indictable offenses as soon as it was financially feasible.

New Jersey or its equivalent under the laws of another state or the United States for which the person was sentenced to a term of imprisonment.

The Committee recognized that this is not the first time that a recommendation has been made to bar admission of persons into PTI who have a prior record. See *Judicial Conference of New Jersey: An Approach to the Expeditious Processing of Criminal Cases*, 105 N.J.L.J. 521, 534 (1980); *Judicial Conference Task Force on Speedy Trial, Report of the Committee on Delay Points and Problems Affecting Speedy Trial*, 117 N.J.L.J. at 765 (1986), and *Report of the Supreme Court Committee on Criminal Practice 1988*, 122 N.J.L.J. at 114 (1988). Currently, *Guideline* 3(e) creates a rebuttable presumption against enrollment by the fact of a prior conviction, with a heavier onus "placed upon defendants whose prior conviction is of a first or second degree crime or who have completed a term of imprisonment, probation or parole within the five-year period immediately preceding the application for diversion." For those defendants, admission to the program is ordinarily dependent upon the prosecutor joining in the PTI application.

While the current *Guidelines* to R. 3:28 do not *per se* bar admission into PTI for persons with the prior convictions described in proposed subsection (c)(3), in practice, these types of cases are typically denied entry into PTI. As recognized in the *1981 Supreme Court Report on Pretrial Intervention* and *Guideline* 3(e), "a prior criminal record may be indicative of a behavioral pattern not conducive to short-term eligibility." Often defendants with a prior record for first or second degree crimes are not admitted into the PTI program because of the seriousness of the prior conviction for which the

defendant most likely served a prison sentence. Moreover, because sentences for third and fourth degree convictions typically result in probation, if a sentence of imprisonment was imposed for a prior conviction for a third or fourth degree crime, the sentencing court must have found that the nature and circumstances of the offense and the applicant's criminal history were such that imprisonment was warranted. Alternatively, the prior third or fourth degree crime, itself, must have been serious enough to statutorily require a prison term. See N.J.S.A. 2C:44-1(e). Either way, the Committee is of the view that defendants with prior convictions for first or second degree crimes or prior convictions for third or fourth degree crimes where a prison term was imposed are not ideal candidates for a rehabilitation program like PTI. Thus, the proposed language in subsection (c)(3) merely recognizes the current practice of excluding defendants with certain prior convictions from PTI, along with the significant role of the prosecutor in determining whether a case is appropriate for PTI diversion. Furthermore, enrollment criteria for parolees and probationers into the PTI program that is contained in *Guideline* 3(f) has not been separately categorized in this proposal because these persons would fall under subsection (c)(3) or paragraph (d) based upon their prior convictions.

Although the Committee recommends adoption of the proposed language in paragraph (c)(3), strong opposition, was expressed by some members that the current PTI process should not be changed to create new categories of offenses for which a defendant is ineligible to apply for PTI.

Despite the objections raised, in the Committee's view, current practice, which has evolved with relevant case law and the enactment of legislation enhancing criminal

penalties, justifies the proposed bars to PTI admission that are set forth in subsection (c)(3).

(i) Exception for Remoteness of a Prior Crime

The Committee explored whether the automatic bar in subsection (c)(3) should allow for discretion, in exceptional cases, to permit a defendant to file a PTI application when a disqualifying prior conviction occurred a significant period of time before the most recent offense. *Guideline* 3(e) provides that "defendants who have at any prior time been convicted of a first or second degree crime or who irrespective of the degree of the crime have completed a term of probation, incarceration or parole within five years prior to the date of application for diversion shall ordinarily not be considered for enrollment in PTI except on joint application by the defendant and the prosecutor." To that end, the Committee considered whether remoteness language should be included in the rule, similar to the language in *Guideline* 3(e). Under such language, if the prosecutor and defense attorney reached an agreement, there would be some discretion to admit a person into PTI, even if that individual has a certain prior conviction, so long as there is some distance of time between the commission of the most recent offense and the conviction for the prior crime.

The Committee explored developing various timeframes, such as a 10 or 15 year time period between the date of the prior conviction and the date of the present crime.[7] For example utilizing the 10-year timeframe, if the prior conviction occurred in the 10 years preceding the current offense, the defendant would be automatically barred from

[7] The remoteness timeframe set forth in the "Three Strikes Act," N.J.S.A. 2C:43-7.1, is 10 years.

admission. If, however, the prior conviction occurred more than 10 years before the most recent offense, the defendant would not automatically be barred from filing an application for the PTI program. Rather, there would be discretion for the prosecutor to consent to the application.

Among its discussions, the Committee considered including a remoteness exception only for those individuals, falling under subsection (c)(3), who have a prior conviction for a third or fourth degree offense for which the person was sentenced to a term of imprisonment. However, the language would not allow an exception for remoteness if the prior conviction was a first or second degree crime. Another suggestion discussed was that the proposed language in subsection (c)(3) be moved to paragraph (d) (discussed *infra)*, and to include remoteness language. Doing so would give the prosecutor discretion to allow defendants to apply to PTI based upon the remoteness of the prior conviction, rather than barring individuals with the prior convictions listed in subsection (c)(3) from applying at all.

The following reasons in support of including remoteness language in subsection (c)(3) were asserted by some Committee members: (1) there are several collateral consequences for defendants who are not accepted to PTI and end up with a criminal conviction; (2) unequivocally excluding persons who fall within subsection (c)(3) eliminates discretion of prosecutors to consent to the application or enrollment, if unique circumstances exist for that person or case; and (3) the remoteness exception enables prosecutors and defendants to resolve cases earlier in the process. These members recognized that while cases where a remoteness exception would apply will be rare, those

cases should fall within prosecutorial discretion, rather than be categorically excluded from the PTI program.

A concern voiced in opposition to including remoteness language in subsection (c)(3) was that including such language would "open the door" for too many defendants to apply for PTI, rather than just exceptional cases. For example, persons who have prior convictions for first or second degree offenses will be able to continue to apply, although enrollment will more than likely be denied by the prosecutor. From an administrative perspective, criminal case management will still be responsible for preparing a report for those cases, which in all likelihood will be denied enrollment by the prosecutor.

In light of these discussions, the Committee was opposed to adding language to the rule, which would allow for consideration of the remoteness of the prior crime. Most members were of the view that the PTI program was not designed to divert individuals who have a prior conviction for a first and second degree crime or a prior conviction for an indictable crime where a sentence to imprisonment was imposed. A minority view was expressed to include remoteness language in paragraph (c)(3) to afford flexibility for admission in certain cases. Alternatively, the minority expressed that the language in paragraph (c)(3) should include remoteness language and also be moved to paragraph (d) (discussed *infra*) in which the prosecutor would consent to the application and consider remoteness of a prior conviction before the application is filed with the criminal division.

By a narrow majority the Committee disagreed with including remoteness in subsection (c)(3). It is recommending that subsection (c)(3) provide an automatic

exclusion from PTI for individuals with the prior convictions described therein, regardless of the length of time between the present offense and the prior crime.

(5) R. 3:28-1 - Paragraph (d) – Prosecutor's Consent to Consideration of the PTI Application

Paragraph (d) of the proposal sets forth the categories of individuals who are ineligible for PTI unless the prosecutor first consents to consideration of the PTI application by the Criminal Division. The Committee is recommending that for the category of cases that fall within paragraph (d), the application should first be screened by the prosecutor's office for consent before the criminal division manager's office conducts an evaluation on the merits of the application. Under this streamlined process, the defendant would be required to include a statement of the extraordinary and compelling circumstances that justify the application and admission directly to the prosecutor. Court staff would then conduct a more meaningful evaluation after a preliminary decision has been made by the prosecutor that the application be processed.

In the circumstances specified in subsections (d)(1), (d)(2), and (d)(3) the prosecutor must consent to the PTI application before it is considered by the Criminal Division. After consent is provided, the application is then evaluated by the Criminal Division and a recommendation is forwarded to the prosecutor. Upon receipt of the Criminal Division's evaluation, the prosecutor can then determine whether to consent or object to the enrollment of the defendant into the PTI program.[8] If the prosecutor refuses to consent to consideration of the application by the Criminal Division, the application is

[8] The procedures and timeframes for the prosecutor to consent to consideration of the application or for the defendant's enrollment into PTI and for the criminal division to complete its evaluation are more fully set forth in proposed R. 3:28-3.

not evaluated further by the court, and the defendant has an opportunity to appeal.[9] Thus, for the categories of offenses that fall within subsection (d)(1), (d)(2), and (d)(3), the Committee's proposal creates a new process.

The prosecutor has substantial veto power with respect to a defendant's enrollment into PTI. In essence, the proposal recognizes that in practice, after the *Leonardis II* opinion, unless the prosecutor agrees that a defendant should be enrolled into PTI, in all likelihood the person will not be admitted into the program. Moreover, a recent Appellate Division opinion noted that "diversion into a PTI program is a quintessentially prosecutorial function." State v. Randall, 414 N.J. Super. 414, 419 (App. Div.), certif. denied, 203 N.J. 437 (2010).

Moreover, the concept of obtaining prosecutor approval before criminal staff conducts an evaluation is not novel. In State v. Rosario, 237 N.J. Super. 63, 66-67 (App. Div. 1989), the court upheld the PTI program, set forth in Camden County's Delay Reduction Plan for the Criminal Process (Speedy Trial Program), which was approved by the Supreme Court. The Camden County PTI program prescribed prosecutorial review once the application for diversion was filed with the program director, whereupon if the prosecutor did not reject the application, it would then be referred to the Camden PTI unit for review and action. Further, in Rosario the court noted that the "sense of the plan then is to recognize the prosecutor's control on the diversion issue" by avoiding "referral to the PTI program director because a prosecutor's rejection takes precedence over any favorable decision by the director." Id. at 67. In defining the PTI director's role, the

[9] The procedures and time frames for a defendant to appeal are set forth in proposed R. 3:28-6.

Appellate Division stated that it is the defendant's responsibility to present all the facts and materials in support of the application and that the director's role is not to marshal evidence beyond what the defendant submits; a PTI application is not "analogous to a pre-sentence report." Id. at 67-68.

With respect to the scope of the proposal, the Committee recognized that the proposed revisions in paragraph (d) go beyond State v. Green, 413 N.J. Super. 556, 561 (App. Div. 2010), where the Appellate Division concluded that the Criminal Division cannot simply "defer to the prosecutor in the sense of declining in advance to give any consideration to the merits of a defendant's application unless the prosecutor joins in the application." The Green court explained that the Criminal Division must consider the application and make a recommendation, "even if that evaluation is expressed in a very brief recommendation adopting the prosecutor's rationale for rejecting the application." Id. at 560. In addition, with regard to *Guideline* 3 and the offenses that create a rebuttable presumption against eligibility for PTI admission, the Green court noted that while the Criminal Division must consider the application and provide a recommendation based on that consideration, the PTI staff does not have to "engage in a full work-up of every application, including an in-depth interview with every defendant where under the Guidelines there is a rebuttable presumption against eligibility." Ibid.

In this vein, according to the proposed language in paragraph (d), the Criminal Division Manager (PTI Director) will still need to provide a recommendation, based upon the circumstances of the case. However, for cases that fall within subsection (d), such reports will not be prepared unless the prosecutor has consented to consideration of the

application. Recognizing the role of the prosecutor in the decision-making process and the deference that is given to that decision, paragraph (d) is designed to streamline the screening and application process for PTI by limiting the time and resources expended by court staff, upfront, in cases that may be rejected by the prosecutor. Such a shift in procedure, will allow the criminal division to dedicate the necessary resources to the core individuals that the PTI program was designed to address, those first offenders of less serious crimes. As such, the proposal will require that in certain circumstances, listed in the proposed rule, the prosecutor must consent to consideration of the PTI application before the criminal division conducts its review and evaluation of the matter.

Some members were opposed to this change in procedure to eliminate criminal case management involvement during the beginning stages of the PTI process and granting the prosecutor the sole authority to permit the application to be fully considered. Specifically, there was strong opposition expressed to a rule recommendation that would not require the criminal division to complete its evaluation before the prosecutor decides whether to consent to consideration of the PTI application. Members expressed that judiciary criminal case management represents a neutral and detached entity to gather pertinent information, during the PTI application process. By interviewing the defendant and making a recommendation regarding appropriate candidacy for PTI, criminal case management often sheds light on the case, which can assist the prosecutor in the decision-making process. Concerns were expressed that if criminal case management is not gathering that information, the prosecutor's office may not have enough information to make an appropriate decision on whether to consent to the application.

The Committee discussed that it should be the responsibility of defense counsel, as opposed to criminal case management, to present appropriate factors to the prosecutor to justify consent to consideration of a defendant's PTI application in this narrow class of cases. The Committee discussed, however, that defendants and defense attorneys may have limited, if any, access to certain information in support of compelling reasons that is available to criminal case management, particularly at this early stage of the proceedings. Therefore, concern was expressed that defendants and defense attorneys may not be in a position to present ample compelling reasons to the prosecutor to justify consent to consideration of the PTI application. The Committee also discussed that it was unclear whether prosecutors would rely on statements from defendants to support compelling reasons. Moreover, because the PTI application is filed in a pending case, it is unlikely that a defense attorney will allow a client to speak to someone in the prosecutor's office about a PTI application.

In light of the discussions above, the Committee is proposing the rule revisions that follow.

a) R. 3:28-1 - Subsection (d)(1) – No Prior Convictions, but Facing a Presumption of Incarceration or a Mandatory Minimum Period of Parole Ineligibility

The Committee is recommending adoption of the language in proposed subsection (d)(1), which addresses eligibility for individuals who have no prior convictions, but are currently charged with a crime for which there is a presumption of incarceration or a mandatory minimum period of parole ineligibility. The cases that fall within subsection (d)(1) essentially include defendants charged with a first and second degree crime where

the defendant does not have a prior conviction.[10] The proposal will also capture first-time offenders being charged with third and fourth degree crimes where there is a presumption of incarceration or a mandatory minimum period of parole ineligibility.[11] An example of a fourth degree crime that would fall under subsection (d)(1) is operating a motor vehicle during a period of license suspension, in violation of N.J.S.A. 2C:40-26, which requires a mandatory sentence of 180 days incarceration with no parole eligibility.[12] Third or fourth degree crimes that would require the imposition of a mandatory minimum period of parole ineligibility include crimes that fall within the

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[10] There is a presumption of incarceration for all first and second degree crimes. N.J.S.A. 2C:44-1(d). Subsection (d)(1) addresses defendants who have no prior convictions. Defendants with a prior conviction would fall under subsection (c)(3) or paragraph (d)(2) of R. 3:28-1.

[11] N.J.S.A. 2C:44-1(d) provides as follows:

> d. Presumption of imprisonment. The court shall deal with a person who has been convicted of a crime of the first or second degree, or a crime of the third degree where the court finds that the aggravating factor in paragraph (5) of subsection a. applies, by imposing a sentence of imprisonment unless, having regard to the character and condition of the defendant, it is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others. Notwithstanding the provisions of subsection e. of this section, the court shall deal with a person who has been convicted of theft of a motor vehicle or of the unlawful taking of a motor vehicle and who has previously been convicted of either offense by imposing a sentence of imprisonment unless, having regard to the character and condition of the defendant, it is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others.

N.J.S.A. 2C:44-1e provides that first time offenders who are convicted of a third or fourth degree crime generally are not subject to a prison sentence, except for those offenses specifically identified in a statute. See e.g., N.J.S.A. 2C:40-26 (4th degree crime requiring a sentence to a term of imprisonment); N.J.S.A. 2C:35-7 (3rd degree crime requiring a mandatory minimum term of imprisonment); N.J.S.A. 2C:43-6(c) (requiring a mandatory minimum term for certain firearm related offenses). *Note:* This list is not intended to be exhaustive. Relevant statutory provisions should be reviewed regarding the application of the presumption of incarceration and mandatory minimum terms.

[12] There are two unpublished decisions reversing the Law Division judges' decision to admit the person charged with a violation of N.J.S.A. 2C: 40-26 into PTI over the prosecutor's objection. In State v. Chauhan, No. A-2583-12 (App. Div. July 16, 2013) and State v. Sharp, No. A-1230-12 (App. Div. August 2, 2013), the Appellate Division found no patent and gross abuse of discretion in the prosecutor's denial of enrollment into PTI based upon their prior driving record and the policy consideration of the Legislature to impose a mandatory period of incarceration without parole).

Graves Act, N.J.S.A. 2C:43-6c. The Graves Act provides that a mandatory minimum term shall be imposed, under certain circumstances, when a person used or was in possession of a firearm while in the course of committing or attempting to commit the crime. The minimum term to be imposed "shall be fixed at one-half of the sentence imposed by the court or 42 months, whichever is greater, or 18 months in the case of a fourth degree crime." N.J.S.A. 2C:43-6c.

As the categories of charges expressed in subsection (d)(1) delineate the crimes for which a defendant, if convicted, would most likely receive a sentence to imprisonment, the Committee is of the view, that before a PTI application is considered by the court, the defendant must obtain consent from the prosecutor. From a historical perspective, both the 1980 and 1986 Judicial *Conference Reports* recommended that defendants who were charged with a first or second degree crime be ineligible for PTI except on joint application of the defendant and the prosecutor. Also, in the 1988 *Criminal Practice Committee Report*, the Committee recommended an automatic exclusion for persons charged with a first or second degree crime. The Committee's recommendation in 1988 was tempered because it would permit an application to be filed in "extraordinary" cases where automatic exclusion would create a hardship. To overcome automatic exclusion, the defendant would have had to first obtain the prosecutor's approval. See *Report of the Supreme Court Committee on Criminal Practice 1988*, supra, 122 N.J.L.J. at 114. Furthermore, currently *Guideline* 3(i) would allow an application for a first or second degree offense to be filed jointly by the defendant and the prosecutor. In such cases, the applicant has the opportunity to present to the criminal division manager and through the

criminal division manager to the prosecutor, any facts or materials demonstrating the applicant's amenability to the rehabilitative process, showing compelling reasons justifying the applicant's admission and establishing that a decision against enrollment would be arbitrary and unreasonable. While the *Commentary* to *Guideline* 3(i) notes that the *Guideline* creates a rebuttable presumption against admission for defendants charged with first and second degree offenses, State v. Nwobu, 139 N.J. 236 (1995) sets forth a heightened standard (compelling circumstances) for admission. Ironically, as a result, in some regards there is a more lenient standard for a defendant charged with a first or second degree crime to be admitted into PTI than it would be for that same defendant to overcome the presumption of incarceration and be sentenced to probation after a conviction. See N.J.S.A. 2C:44-1d (the court must sentence the person to imprisonment "…unless**,** having regard to the character and condition of the defendant, it is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others").

The proposed language in subsection (d)(1) differs from the current *Guidelines* and historical reports in two ways. First, under the rule proposal, prosecutor consent to consideration of the application is not tied to the degree of the crime, i.e., whether the defendant is charged with a first or second degree crime. Rather, it is tied to whether the sentence for the present crime will likely result in incarceration, i.e., has a presumption of incarceration or requires imposition of a minimum parole ineligibility term. In that way, the proposal captures all first and second degree crimes, as there is a presumption of incarceration for those charges. N.J.S.A. 2C:44-1(d). Moreover, because the proposal is

not tied to the degree of the crime, it also captures more third and fourth degree charges than the current *Guidelines* to R. 3:28, as the *Guidelines* do not provide an eligibility bar for all persons charged with such offenses. In that regard, if adopted, paragraph (d)(1) would require the prosecutor to consent to consideration of a PTI application for some additional third and fourth degree crimes, which presently do not require such prosecutorial approval.

Second, the proposal requires the defendant to submit compelling circumstances to the prosecutor and that the prosecutor approve of the application before it is considered by the court. In that regard, the preliminary application approval process takes place between the defendant and the prosecutor, without court involvement.

As set forth above, strong opposition was raised with respect to the proposed language in paragraph (d)(1).

b) R. 3:28-1 - Subsection (d)(2) – Prior Conviction for Third or Fourth Degree Crime without a Sentence to a Prison Term

Subsection (d)(2) addresses the category of individuals with prior convictions where prosecutor consent is necessary. As discussed above, this is not the first time that the issue of a bar for persons who have previously been convicted of a prior offense has been proposed. Pursuant to proposed subsection (c)(3) of R. 3:28-1 all persons previously convicted of first or second degree crimes, or convicted of a third or fourth degree crime with a sentence of imprisonment, are barred from applying for PTI. Subsection (d)(2) essentially covers applications for the remaining individuals with prior convictions, i.e., persons who have previously been convicted of a third or fourth degree

indictable offense in New Jersey, or its equivalent under the laws of any other State or of the United States and were sentenced to probation or received a disposition other than imprisonment. The Committee determined that if a defendant has a prior third or fourth degree conviction and did not receive a prison sentence for that prior conviction, the defendant should not be automatically excluded from PTI. Rather, in this category of cases, the defendant must obtain consent from the prosecutor to consideration of the application. See *Judicial Conference of New Jersey: An Approach to the Expeditious Processing of Criminal Cases*, 105 N.J.L.J. 521, 534 (1980); *Judicial Conference Task Force on Speedy Trial, Report of the Committee on Delay Points and Problems Affecting Speedy Trial*, 117 N.J.L.J. at 765 (1986), and *Report of the Supreme Court Committee on Criminal Practice 1988*, 122 N.J.L.J. at 114 (1988). To make clear that PTI is intended for first offenders, the Committee favored having the rule require that certain persons who have a prior criminal record must obtain the prosecutor's consent to consideration of the application. The proposal also would ensure that evaluations are conducted and reports are prepared by the Criminal Division after such consent is provided. Objections were expressed with respect to subsection (d)(2). Additionally, some members urged that a remoteness exception should apply when the eligibility criteria relates to a prior conviction.

c) R. 3:28-1 - Subsection (d)(3) – Public Officer or Employee

The PTI program is designed primarily for first time offenders charged with "victimless" crimes. Nonetheless, the statute recognizes that PTI may not be appropriate for defendants who are public officers or employees charged with offenses that touch or

involve such office or employment. See N.J.S.A. 2C:43-12a(3). Likewise, Guideline 3(i) provides that if the crime was "a breach of the public trust where admission to a PTI program would deprecate the seriousness of defendant's crime, the defendant's application should generally be rejected." The Committee recommends including language in paragraph (d)(3), which explains that prosecutor consent to consideration of the application is required for a person who is a public officer or employee and who is charged with a crime that involved or touched the public office or employment.

d) Crimes and Offenses Involving Domestic Violence

The Committee considered whether to include crimes or offenses involving domestic violence into the category of offenses requiring prosecutor consent to consideration of the application. The Committee recognized that a defendant charged with an indictable crime or offense involving domestic violence may fall within other eligibility factors in R. 3:28-1(c) or R. 3:28-1(d) and would be processed accordingly. The Committee saw no need to carve out a specific exception for domestic violence cases.

In sum, pursuant to proposed paragraph (d) of R. 3:28-1, prosecutor consent to consideration of the PTI application is required if the circumstances of the case fall within the parameters of subsections (d)(1), (d)(2) or (d)(3). Thus, in those category of cases the applicant must first obtain the prosecutor's consent to consideration of the PTI application before the application is considered by the criminal division.

The proposed language for new R. 3:28-1 follows.

RULE 3:28. PRETRIAL INTERVENTION PROGRAMS

3:28-1. Eligibility for Pretrial Intervention

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

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

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

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

(c) Persons Ineligible to Apply for Pretrial Intervention.

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

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

(3) Prior Convictions. A person who previously has been convicted of (i) any first or second degree offense or its equivalent under the laws of another state or the United States, or (ii) any other indictable offense or its equivalent under the laws of another state or the United States for which the person was sentenced to a term of imprisonment, shall be ineligible to apply for admission into pretrial intervention.

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

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

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

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

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

Adopted _____ to be effective _____.

b. R. 3:28-2 – Timing of Application

R. 3:28-2 is a new rule. The rule sets forth the time when applications for PTI can be made and accepted.

Currently, R. 3:28(h) provides that PTI applications "shall be made at the earliest possible opportunity, including before indictment, but in any event no later than twenty-eight days after indictment." The original proposal by the Criminal Presiding Judges and Criminal Division Managers provided a fixed time for PTI applications to be made: "[a]pplications for pretrial intervention shall be made at the earliest possible opportunity, including before indictment, but in any event no later than the arraignment/status conference." The Committee discussed whether a timeframe requiring PTI applications to be filed before the arraignment/status conference was realistic. It reached a consensus that there should be a balance in encouraging PTI filings early on in the case, and developing a deadline that does not exclude appropriate PTI applications. The Committee discussed a variety of options for timeframes to make and accept PTI applications, including: fixing the application deadline to a certain number of days after the assignment of counsel; creating a fixed date to file an application with a "good cause" or "prosecutor consent" exception to extend the filing deadline; creating a fixed date to file an application without any exceptions; and making the filing deadline longer. The Committee ultimately decided to recommend adoption of the following language: "[a]pplications for pretrial intervention, shall be made at the earliest possible opportunity, including before indictment, but in any event no later than 14 days after the

arraignment/status conference, unless good cause is shown or consent by the prosecutor is obtained."

It was not until the 1995 revisions of the Part III rules implementing the *Standards for the Operation of the New Jersey Criminal Division of the Superior Court* that time periods for the making and disposition of the PTI application and for seeking review by the trial court were added to R. 3:28. See Pressler, *Current N.J. Court Rules*, comments on R. 3:9-1 and R. 3:28 (1996). Paragraph (h) of R. 3:28, which has not been amended since being adopted, provides that an "application for pretrial intervention shall be made at the earliest possible opportunity, including before indictment, but in any event no later than twenty-eight days after indictment." See R. 3:28 (1996). *Guideline* 6 was also amended in accordance with these revisions. Ibid. See also *Supplemental Report of the Supreme Court Committee on Criminal Practice 1994*, 137 N.J.L.J. 75 (1994).

From the beginning, the Rule was intended to encourage applications as soon as possible after the commission of the offense as the purpose of PTI is to quickly divert persons from normal prosecution. Ideally, PTI should be a pre-indictment program. However, the reality is that not all defendants have counsel prior to indictment. Thus, it would be unfair to only allow PTI applications to be filed pre-indictment. Furthermore, in practice, late applications have been permitted despite the filing deadline in R. 3:28(h). Two prior reports have recognized this problem but did not propose a statewide method to address it. Rather, they proposed leaving solutions up to local option. See 1986 Judicial Conference Task Force on Speedy Trial, *Report of the Committee on Delay Points and Problems Affecting Speedy Trial*, 117 N.J.L.J. at 765 (1986); and *Report of*

the Supreme Court Committee on Criminal Practice (1988), 122 N.J.L.J. at 114. That being said, the Committee discussed that the vicinages should strongly encourage defendants to begin the application process pre-indictment, recognizing that the prosecutor can defer action on the application until after an indictment is filed.

The Committee is proposing new language that will require the filing of PTI applications no later than 14 days after the arraignment/status conference, unless good cause is shown or consent by the prosecutor is obtained. This change limits the current time frame to file an application, but also provides judicial discretion to extend the filing deadline if good cause is established or if the prosecutor consents to the late filing. The Committee recognized that the exceptions will not prevent the arbitrary filing of late applications, however, it acknowledged that vicinages have different practices which may warrant delayed filing of a PTI application in appropriate circumstances.

While the Committee was in favor of allowing some flexibility in belated filings, when necessary, it was also of the view that this additional time period should not be used to encourage delays in filing PTI applications. Although out of time applications are permitted by the proposal, they should be a rare occurrence and not the norm. This view was expressed in an unpublished Appellate Division opinion, which pointed out that the judge's consideration of defendant's application for admission into PTI was erroneous, citing to R. 3:28(h) in support. See State v. Myers, No. A-3304-05 (App. Div. January 4, 2007) (slip op. at 10). The court noted that the defendant's initial application for PTI was submitted more than four months following indictment and more than nine months after being charged with the offense. Ibid.

The proposed language for new R. 3:28-2 follows.

3:28-2 . Timing of Application

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

Adopted to be effective .

c. R. 3:28-3 – Application Process

R. 3:28-3 is a new rule. It sets forth procedures and time parameters for the criminal division and the prosecutor to review, evaluate and make recommendations regarding applications for PTI. Paragraph (a) explains that every applicant must complete a form prescribed by the Administrative Office of the Courts. Applications that do not require prosecutor consent, which typically involve first-time offenders charged with third or fourth degree crimes, will be processed as set forth in paragraph (d) which continues the current procedures utilized by the Criminal Division and prosecutors to assess applications and enrollment. Cases that require prosecutor consent to consideration of the application under R. 3:28-1(d) are governed by paragraph (b).

The Committee is recommending adoption of the language in paragraph (b), which sets forth procedures for cases that fall within R. 3:28-1(d), where the applicant must obtain prosecutor consent to consideration of the PTI application before it is considered by the Criminal Division. It creates an early screening process for those category of cases, identified by the Committee where defendants often are not enrolled into the PTI program. Under this screening process, to preserve the defendant's appeal rights, upon receipt, a PTI application will be filed with the Criminal Division. However, the Criminal Division is not required to complete an evaluation unless the prosecutor consents to further consideration of the application. If the prosecutor refuses to consent to consideration of the application, the application is not processed further by the Criminal Division. The defendant may elect to file an appeal from the rejection to the Criminal Judge as described in proposed R. 3:28-6.

Pursuant to subsection (b)(1), as part of the application, the defendant or the defendant's attorney must include a statement of the extraordinary and compelling circumstances that justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions. This language is designed to require the defendant to provide compelling circumstances upfront in the PTI process to justify consideration of the PTI application for select cases that fall within R. 3:28-1(d).

Similar to the opposition regarding R. 3:28-1(d), some members voiced the position that the proposed language in subsection (b)(1) is contrary to the statute[13] and *Guidelines* governing PTI. Additionally, because the criminal division manager's office will not conduct an evaluation on the application before the prosecutor makes a determination whether to provide consent, it was expressed that the "extraordinary and compelling circumstances" standard places an extreme burden on individuals who apply for PTI early in the process and who do not have an attorney. Removing the criminal division manager's evaluation from this category of cases before the prosecutor provides consent gives the prosecutor absolute power to veto an application without court involvement.

As proposed, under subsection (b)(2) when the Criminal Division receives a PTI application that requires prosecutor consent, the application is filed with the Criminal Division to preserve the defendant's right to appeal. As some PTI applications will be submitted by *pro se* defendants, the Committee believed that it was important for the

[13] N.J.S.A. 2C:43-12, et. seq.

court to file every application that is received. Upon the filing of an application requiring prosecutor consent, the Criminal Division shall not consider the merits of the application and shall forward the application to the prosecutor's office for consideration. The Criminal Division shall consider the PTI application only after receipt of the prosecutor's consent. Thus, according to the proposal, for prosecutor consent cases, other than filing the application, the court is not involved in the process between the defendant and prosecution regarding the prosecutor's grant of consent or refusal to consent to consideration of the application. Once consent is obtained the Criminal Division, and thereafter, the prosecutor will conduct an evaluation pursuant to R. 3:28-3(d) regarding the defendant's enrollment into the PTI program. If the prosecutor refuses to consent to consideration of the application, the defendant can file an appeal pursuant to R. 3:28-6.

Subsection (b)(3) sets forth criteria to guide the prosecutor when deciding whether to consent or refuse to consent to consideration of the PTI application. It provides that in making a determination to consent to further consideration of the application, the prosecutor shall not be required to consider any facts, materials, or circumstances other than the information presented in the defendant's application, but it shall not be an abuse of discretion for the prosecutor to consider only those additional facts and circumstances, which may include the victim's position on whether the defendant should be admitted into the program, that the prosecutor deems relevant to a determination whether extraordinary and compelling circumstances justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions.

Opposition was expressed that the factors set forth in paragraph (b)(3) regarding prosecutor consent to further consideration of the application are inconsistent with the factors listed in Rule 3:28-4 and the PTI statute[14]. The Committee discussed this difference and recognized that the proposed language in subsection (b)(3) creates new criteria for those cases, identified by the Committee, which require prosecutor consent to consideration of the application. After prosecutor consent is provided, the factors set forth in proposed R. 3:28-4 and the statute come into play to assess the merits of the PTI application and the defendant's enrollment. Similar to subsection (b)(2), the proposed language in subsection (b)(3) also involves the standard for a procedural screening mechanism for those cases that require prosecutor consent to further consideration of the application before the Criminal Division conducts its evaluation of the application.

Paragraph (c) is derived from *Guideline* 3e and allows defendants charged with more than one offense to apply to PTI. Paragraph (d) addresses review and evaluation conducted by the Criminal Division and prosecutor after an application is filed. For cases that require prosecutor consent to consideration of the application pursuant to R. 3:28-1(d), the criminal division manager shall complete the evaluation and make a recommendation to the prosecutor on enrollment twenty-five days after receipt of the prosecutor's consent. In all other cases, the criminal division manager shall complete the evaluation and make a recommendation on enrollment to the prosecutor within twenty-five days of the filing of the application with the Criminal Division. In either situation, within 14 days of the receipt of the criminal division manager's recommendation, the

[14] N.J.S.A. 2C:43-12, et. seq.

prosecutor shall complete a review of the application and inform the court, the defendant and the defendant's attorney of the decision on enrollment. Additionally, in accordance with current procedure, when an application is made pre-indictment, the prosecutor may withhold action on the application until the matter has been presented to the grand jury. When a PTI application is filed pre-indictment, the prosecutor shall inform the criminal division manager, the defendant, and defendant's attorney of the decision on enrollment within 14 days of the return of the indictment.

The current time parameters for review of and decisions on applications for PTI are contained in current R. 3:28(h) and *Guideline* 6. The Rule and *Guideline* require that the criminal division manager complete the evaluation and make a recommendation within twenty-five days of the filing of the application and that the prosecutor complete a review of the application and inform the court and defendant within fourteen days of the receipt of the criminal division manager's recommendation. Paragraph (d) slightly differentiates the time for the Criminal Division to conduct its evaluation when prosecutor consent to consideration of the application is required under R. 3:28-1(d). It also requires that the prosecutor provide the decision on enrollment to both the defendant and the defendant's attorney.

R. 3:28(h) also presently allows the prosecutor, where an application is made pre-indictment, to withhold action on the application until after the matter has been presented to the grand jury. The new rule would retain this procedure. However, it would set a time parameter, within 14 days of the return of the indictment, for the prosecutor to

inform the criminal division manager of his or her decision where he or she has withheld the decision until after indictment.

The proposed language for new R. 3:28-3 follows.

3:28-3. Application Process

(a) Application.

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

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

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

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

(3) In making a determination whether to consent to further consideration of the application, the prosecutor shall not be required to consider any facts, materials, or circumstances other than the information presented in the defendant's application, but it

shall not be an abuse of discretion for the prosecutor to consider only those additional facts and circumstances which may include the victim's position on whether the defendant should be admitted into the program, that the prosecutor deems relevant to a determination whether extraordinary and compelling circumstances justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions.

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

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

Adopted to be effective .

d. R. 3:28-4 – Factors to Consider in Assessing Applications

R. 3:28-4 is a new rule. It sets forth the criteria for evaluating admissions into PTI. The current criteria for evaluating admission are contained in *Guideline* 3 and N.J.S.A. 2C:43-12(e). The *Commentary* to *Guideline* 3 notes that the introductory statement of *Guideline* 3 requires consideration of the statutory criteria and that the criteria contained in *Guideline* 3 are supplemental to the statutory criteria. This proposed revision adopts the same approach.

In re-structuring the rules governing PTI some of the factors set forth in *Guideline* 3 and the *Commentary* to *Guideline* 3, for evaluating a defendant's application have been incorporated into newly-proposed rules. *Guidelines* 3(a)-(h) as well as part of *Guideline* 3(i), are covered by new proposed R. 3:28-1.[15] Part of *Guideline* 3(i) is contained in proposed R. 3:28-3. *Guideline* 3(k) is covered in proposed R. 3:28-5(d).[16] Since Guideline 3(j) is already included in N.J.S.A. 2C:43-12(e)(16), it is not included in this proposed rule.[17] The Committee engaged in a lengthy discussion as to what criteria should be included in this rule. The Committee determined that the rule should include references to N.J.S.A. 2C:43-12(e), to *Guideline* 3(i), and to a defendant's juvenile record. A dissenting view was expressed that proposed R. 3:28-4 should only refer to the governing statute, N.J.S.A. 2C:43-12, and not include either the four categories of factors to assess a PTI application that are discussed in *Guideline* 3(i), or a defendant's juvenile record.

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[15] *Guidelines* 3(a) – (i) address the following areas: (a) age; (b) residence; (c) and (d) jurisdiction, i.e., non-criminal offenses and minor violations; (e) prior record of convictions; (f) parolees and probationers; (g) and (h) defendants previously diverted; and (i) assessment of the nature of the offense.

[16] *Guideline* 3(k) addresses restitution and community service.

[17] *Guideline* 3(j) addresses co-defendants.

Guideline 3(i) states:

> In evaluating a defendant's application for participation in a pretrial intervention program, consideration shall be given to the criteria set forth in N.J.S.A. 2C:43-12(e). In addition thereto, the following factors shall also be considered together with other relevant circumstances:
>
> (i) Assessment of the Nature of the Offense. Any defendant charged with a crime is eligible for enrollment in a PTI program, but the nature of the offense is a factor to be considered in reviewing the application. If the crime was (1) part of organized criminal activity; or (2) part of a continuing criminal business or enterprise; or (3) deliberately committed with violence or threat of violence against another person; or (4) a breach of the public trust where admission to a PTI program would deprecate the seriousness of defendant's crime, the defendant's application should generally be rejected. A defendant charged with a first or second degree offense or sale or dispensing of Schedule I or II narcotic drugs as defined in L.1970, c. 226 (N.J.S.A. 24:21-1 et seq.) by persons not drug dependent, should ordinarily not be considered for enrollment in a PTI program except on joint application by the defendant and the prosecutor. However, in such cases, the applicant shall have the opportunity to present to the criminal division manager and through the criminal division manager to the prosecutor, any facts or materials demonstrating the applicant's amenability to the rehabilitative process, showing compelling reasons justifying the applicant's admission and establishing that a decision against enrollment would be arbitrary and unreasonable.

Regarding a defendant's juvenile record, despite there being no direct reference in N.J.S.A. 2C:43-12(e), R. 3:28, or the *Guidelines*, it is well established that a defendant's juvenile record is a factor to be considered when evaluating a PTI application. See State v. Brooks, 175 N.J. 215, 226-28 (2002); see also State v. Negran, 178 N.J. 73, 84-85 (2003). Further, in Brooks, the Court explained that:

> N.J.S.A. 2C:43-12e(9) permits a prosecutor to consider [t]he applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others. We are satisfied that that provision is broad enough on its fact to include a

> defendant's juvenile record. Similarly, N.J.S.A. 2C:43-12(8) authorizes prosecutors to consider whether "the applicant's crime constitutes part of a continuing pattern of anti-social behavior."…That reference to anti-social behavior suggests that in this setting a prosecutor may consider not only serious criminal acts, but less serious conduct, including disorderly person offenses, offenses found under the juvenile code, and acts that technically do not rise to the level of adult criminal conduct.
> [Id. at 227.]

In addition, the Court cautioned that "when examining a defendant's juvenile history, it should be recognized that "some juvenile adjudications may be so minor or distant in time that they provide no reasonable basis on which to reject an otherwise meritorious PTI application." State v. Brooks, supra, 175 N.J. at 229-30. The Committee is in favor of this proposal, however a dissenting view was expressed, as set forth above, that proposed R. 3:28-4 should not reference an applicant's juvenile record as a factor to assess an application. Rather, the rule should only refer to the governing statute, N.J.S.A. 2C:43-12.

The Committee considered language that would provide that although a PTI application is not subject to denial solely because a defendant is an illegal alien, such status is a relevant factor to consider. See State v. Liviaz, 389 N.J. Super. 401 (App. Div. 2007). The Committee disagreed with including this language in the rule by concluding that absent information to suggest that an applicant's immigration status has any impact on whether the applicant is a good candidate for PTI, it should not be included as a factor in proposed rule. The Committee recognized that the list of factors in the proposed R. 3:28-4 is not all-inclusive, and thus immigration status need not be specified in the rule.

The Committee considered adding a paragraph, derived from the last sentence of *Guideline 2,* that would continue the current policy found in the *Commentary* to *Guideline 2,* which assigns to the applicant the duty "to allege and present any facts and materials to the criminal division manager for reconsideration either by the criminal division manager or prosecutor, if the prosecutor has denied consent, showing compelling reasons justifying admission, and establishing that a decision against enrollment would be arbitrary and unreasonable." See State v. Green, 413 N.J. Super. 556, 560 (App. Div. 2010) (noting that it makes sense for a defendant to provide compelling reasons for admission to PTI at the beginning of the process rather than waiting for the prosecutor to reject his application and then submit compelling reasons). The Committee determined that it was unnecessary to add such language to this rule, in light of the proposed language in R. 3:28-3(b)(1) that "an application that requires prosecutor consent pursuant to R. 3:28-1(d) shall include a statement of the extraordinary and compelling circumstances that justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions."

The proposed language for new R. 3:28-4 follows.

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

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

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

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

Adopted to be effective .

e. R. 3:28-5 – Admission into Pretrial Intervention

R. 3:28-5 is a new rule. It governs admission into PTI.

(1) R. 3:28-5 - Paragraph (a) – Any Superior Court Judge Can Handle PTI Applications.

Paragraph (a) is being proposed to make clear that PTI can be handled by any Superior Court Judge. R. 3:28(a) presently provides that the Assignment Judge shall designate a judge or judges to act on all matters relating to pretrial intervention. Currently every judge in the Criminal Division runs an individual calendar. See *Criminal Division Operating Standard I*. Therefore, all criminal division judges handle applications for admission into PTI. The change being proposed would make the rule consistent with present practice.

(2) R. 3:28-5 - Paragraph (b) – Guilty Pleas

Paragraph (b) addresses the entry of a guilty plea during the PTI process. The proposed language for paragraph (b) provides:

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

Guideline 4 sets forth a slightly less definitive policy statement that enrollment in PTI programs should be conditioned upon neither informal admission nor entry of a plea of guilty. The *Guideline* also states that enrollment of defendants who maintain their innocence should be permitted unless the defendant's attitude would render pretrial intervention ineffective. Moreover, N.J.S.A. 2C:43-12(g) provides that "… supervisory

treatment…shall be available to a defendant irrespective of whether the defendant contests his guilt of the charge or charges against him."

The Committee discussed whether the proposed rule should allow for a guilty plea as a condition to enrollment into PTI. The original proposal by the Criminal Presiding Judges and Criminal Division Managers provided that enrollment into PTI should "ordinarily" not be conditioned upon either informal admission or entry of a guilty plea and that enrollment of defendants who maintain their innocence is to be permitted unless the defendant's attitude would render pretrial intervention ineffective. The generally expressed reason for requiring a conditional guilty plea is that the prosecutor's case may deteriorate over time as a witness's memory fades or a witness may become unavailable. For instance, because a defendant can be enrolled in the PTI program for up to three years, if a defendant is terminated from the program and returned to normal prosecution after two years the prosecutor's position of being able to prove the case may be compromised. AOC data from CY 2010 revealed a discrepancy of whether entry of a guilty plea is required as part of enrollment into PTI. Thus, *Guideline* 4 is interpreted differently across the State. The overall policy of the PTI program is not to condition enrollment upon the entry of a guilty plea.

Two unpublished Appellate Division opinions have held that a prosecutor's condition to require a guilty plea in exchange for defendant's PTI admission constituted a patent and gross abuse of discretion.[18] Moreover, in State v. Randall, 414 N.J. Super.

[18] See State v. Ocampo, No. A-2119-06 (App. Div. October 26, 2007) (slip op. at 13-14) (prosecutor's requirement of a guilty plea and his simultaneous insistence that defendant apply for citizenship as a condition of PTI acceptance constituted a patent and gross abuse of discretion). See also State v. Jones, No. A-0375-08 (App. Div. April 3, 2009) (slip op. at 11) (prosecutor's condition of a guilty plea in

414, 421 (App. Div. 2010), certif. denied, 203 N.J. 437 (2010) the Appellate Division found that the prosecutor's office "erred in requiring defendant to plead guilty as a prerequisite for admission into PTI." This view is in accord with the PTI program when it was being developed into a statewide program. See *Proposal for Statewide Implementation of a Uniform Program of Pretrial Intervention under New Jersey Court Rule 3:28*, at 35 (1975). (hereinafter *1975 Proposal)*. The *1975 Proposal* took the position that "by definition, pretrial intervention cannot involve entry of a guilty plea." Id. at 35.

Three years after the adoption of *Guideline* 4, the Court addressed admissions of guilt in State v. Maddocks, 80 N.J. 98 (1979), by advising that:

> Prosecutors are forewarned not to *condition* PTI enrollment upon admissions of guilt. That is, a prosecutor cannot deny consent to enrollment to a particular individual simply because that individual has elected not to tender self-incriminatory information.
>
> [Id. at 106.]

However, the Court added that it was not taking the position that:

> A prosecutor may not take into consideration that fact that a specific defendant has refused to admit his guilt. In certain circumstances, a voluntary proffering of self-incriminatory information may indicate defendant's degree of repentance for the crime he has committed and hence bear upon his 'amenability to correction and potential 'responsiveness to rehabilitation.' . . . Indeed, Guideline 4 explicitly notes that failure to admit guilt may be considered if 'defendant's attitude would render pretrial intervention ineffective.'
>
> [Id. at 106-07.]

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exchange for defendant's PTI admission constituted a legal error and improper consideration of inappropriate factors (the guilty plea) amounting to a clear error in judgment and a patent and gross abuse of discretion).

Notwithstanding, the 1981 Supreme Court Committee on Pretrial Intervention believed "that any diversion from the position that an admission of guilty is not required would seriously hamper the effectiveness of PTI *Guideline* 4." See 1981 *Report of the Supreme Court Committee on Pretrial Intervention*, 108 N.J.L.J. 485, 488 (1981). Therefore, the Pretrial Intervention Committee recommended issuance of an administrative directive "reaffirming that neither a guilty plea nor an acknowledgement of guilt is required as a condition of admission to PTI." Ibid.

In State v. Mosner, 407 N.J. Super. 40 (App. Div. 2009)[19] the Appellate Division addressed the requirement of a guilty plea to connected non-indictable charges in exchange for defendant's admission to the PTI program in the Superior Court. The Appellate Division found that it was not a patent and gross abuse of discretion for a prosecutor to require a guilty plea for connected motor vehicle violations as a condition of PTI enrollment, because, notwithstanding the penal consequences, PTI does not apply to motor vehicle offenses. Therefore, when a defendant is facing indictable and connected non-indictable charges that are being handled in the Superior Court, the prosecutor may condition entry into PTI upon a guilty plea to the connected non-indictable charges.

[19] In Mosner, the defendant was charged with fourth degree offenses and five motor vehicle violations. The prosecutor consented to defendant's admission into PTI, conditioned on, among other things, his guilty plea to the five motor vehicle charges. The defendant agreed to plead guilty to four of the motor vehicle offenses, but not to the violation that carried a mandatory 180-day term of imprisonment. Defendant appealed the prosecutor's decision to a Law Division judge, who denied the appeal. State v. Mosner, 407 N.J. Super. at 57. See State v. Negren, 178 N.J. 73, 83 (2003) (PTI does not apply to motor vehicle violations and offenses under Title 39 of the New Jersey statutes); State v. Mosner, 407 N.J. Super. at 54 (same).

The Committee recognized that the Appellate Division opinions dealing with conditional guilty pleas are largely based upon interpretations of the current court rules. If the rules governing PTI are being revised, those decisions need not be regarded as conclusive of this issue. It was reasoned that it makes sense to allow a prosecutor to request conditional guilty pleas, especially in those cases which would otherwise be ineligible for PTI absent the prosecutor's consent. In fact, it was pointed out that presently the rule specifically states that admissions of guilt are not required "unless the defendant's attitude would render pretrial intervention ineffective." It was maintained that this caveat recognizes that admissions of guilt are appropriate in some cases.

Given the changes being proposed regarding PTI eligibility and emerging case law, to encourage uniformity, the Committee is proposing that subsection (b) expressly state that PTI enrollment shall not be conditioned upon either informal admission or the prior entry of a guilty plea. This proposal is being recommended with the caveat that similar to the circumstances in State v. Mosner, a guilty plea to connected non-indictable charges or violations should be permissible. Thus, the restriction being proposed in paragraph (b) to the entry of a guilty plea or admission of guilt as a condition for enrollment into PTI is limited to indictable charges. As proposed, paragraph (b) does not effect the holding in Mosner, wherein, prosecutors are permitted to require a guilty plea for connected non-indictable offenses i.e., municipal court matters, such as disorderly offenses, petty disorderly offenses, traffic, ordinance or health code violations, or other similar violations, as a condition for admission into PTI.

(3) R. 3:28-5 – Paragraph (c) – Postponement of Proceedings

The language in paragraph (c) regarding postponement of the proceedings is essentially a restatement of current R. 3:28(b). See also *Guideline* 8 (second paragraph, first and second sentences).

(4) R. 3:28-5 – Paragraph (d) – Restitution and Community Service

The language in paragraph (d) regarding restitution and community service comes verbatim from *Guideline* 3(k). However, the last sentence of present *Guideline* 3(k), which states: "[w]here appropriate to further rehabilitation, symbolic or partial restitution may be included in the service" has not been retained as the Committee believes that it is unnecessary. The proposal also provides that setting the amount of restitution is a judicial function and determination. See State v. Martinez, 392 N.J. Super. 307 (App. Div. 2007).[20] The Committee is recommending adoption of the proposed language in paragraph (d), with the understanding the setting of restitution is a judicial function and determination.

The proposed language for new R. 3:28-5 follows.

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[20] In Martinez, a defendant disputed the restitution ordered as part of his PTI conditions. The Appellate Division stated:

> We discern no reason why standards governing the resolution of issues where restitution is a condition of probation should not apply in the same manner when restitution is a condition of defendant's participation in a pretrial intervention program. Where there is a good faith dispute over the amount of the loss or defendant's ability to pay, the trial court as a matter of defendant's due process entitlement must hold a hearing on the issue, the character of which should be appropriate to the nature of the question presented. (citation omitted).
>
> [Id. at 319.]

3:28-5. Admission into Pretrial Intervention

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

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

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

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

Adopted _____ to be effective _____.

f. R. 3:28-6 – Appeal of Decision by Criminal Division Manager or Prosecutor

R. 3:28-6 is a new rule. It governs appeals of decisions of the criminal division manager or prosecutor.

(1) R. 3:28-6 - Paragraph (a) – Time to File

Paragraph (a) of the rule sets forth the process to be followed when a defendant is appealing the decision of the criminal division manager or the prosecutor refusing to permit enrollment of the defendant into PTI, or the prosecutor's decision to refuse to consent to the defendant's application where required pursuant to R. 3:28-1(d). It incorporates the present language in R. 3:28(h) (second paragraph) and in *Guideline* 8 (second paragraph, third sentence) that discuss the time to file an appeal. The proposed language in paragraph (a) provides the applicant with a 10 day time frame to appeal (1) the prosecutor's decision not to consent to the further consideration of an application pursuant to Rule 3:28-1(d); (2) the criminal division manager's decision not to recommend enrollment; or (3) the prosecutor's decision not to consent to enrollment into PTI.

The last sentence in paragraph (a) has been slightly modified from R. 3:28(h) (second paragraph), to replace the phrase that the return date for the motion will be the "next status conference" to a time the judge determines will promote "expeditious disposition of the case." This change recognizes that the judge and parties should schedule the motion in accordance with their schedules and still remain committed to promptly disposing of the case. In addition, having the return date of the motion as the

"next status conference" would not be applicable if the application is rejected pre-indictment.

(2) R. 3:28-6 – Paragraph (b) - Standards

Paragraph (b) lists the standard of review for decisions of the criminal division manager and the prosecutor. Subsection (b)(1) sets forth the new standard to appeal from the prosecutor's decision not to consent to further consideration of the application for cases that fall within R. 3:28-1(d). It also conforms with the application requirements for prosecutor consent cases as set forth in R. 3:28-3(b)(1).

Subsection (b)(2) sets forth the current "arbitrary and capricious" standard to appeal the criminal division manager's decision not to recommend enrollment. Under the standard of review set forth in *Guideline* 8 the defendant must show that the decision was "arbitrary and capricious." This standard has been affirmed as it relates to the decision of the criminal division manager. See State v. Imbriani, 280 N.J. Super. 304 (Law Div. 1994), aff'd, 291 N.J. Super. 171 (App. Div. 1996); State v. Lopes, 289 N.J. Super. 460 (Law Div. 1995); and State v Burbano, 304 N.J. Super. 215 (Law Div. 1996).

Subsection (b)(3) sets forth the current "patent and gross abuse of discretion" standard to appeal the prosecutor's decision not to consent to enrollment into PTI. The Committee recognized that the Supreme Court's holding that the standard of review for overturning a prosecutor's decision to reject enrollment into PTI is a "patent and gross abuse of discretion." See *Leonardis II*. Paragraph (a) (fifth sentence) was taken from *Guideline* 8 (second paragraph, sentence four).

(3) R. 3:28-6 – Paragraphs (c) and (d) – Review by an Appellate Court

Paragraph (c) is derived from current R. 3:28(f) to preclude pretrial review, by an appellate court, of a judge's decision upholding the prosecutor's refusal to consent to consideration of an application and the rejection of a defendant's enrollment into PTI in situations where the prosecutor or criminal division manager recommend rejection. It also addresses an appeal by the prosecutor when a judge orders a defendant enrolled into PTI over the prosecutor's objection. Paragraph (d) originates from R. 3:28(g). It is slightly reworded to change the phrase "denial of acceptance" in current R. 3:28-(g) to state "denial of an application or enrollment" in recognition of the category of prosecutor consent cases in R. 3:28-1(d).

The Committee discussed whether, in prosecutor consent cases, a defendant should have the opportunity to file an interlocutory appeal when the prosecutor refuses to consent to further consideration of the application. It was voiced that in light of State v. Bell, 217 N.J. 336 (2014) a defendant should be able to do so, as Bell held that if a defendant goes to trial and is convicted of an eligible PTI offense, the defendant cannot, after trial, be admitted into the PTI. The Committee rejected this suggestion to allow an interlocutory appeal for defendants in cases where the prosecutor refuses to consent to further consideration of the application. Rather, under the proposal, in prosecutor consent cases, the"[d]enial of an application . . . may be reviewed on appeal from a judgment of conviction notwithstanding that such judgment is entered following a guilty plea."

The proposed language for new R. 3:28-6 follows.

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

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

(b) Standards.

(1) A defendant challenging a prosecutor's decision to refuse to consent to consideration of an application must establish not only that the prosecutor's decision was a gross and patent abuse of discretion, but that information presented in the application and such additional information as the prosecutor chose to consider clearly and convincingly establishes that there are extraordinary and compelling circumstances that justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions.

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

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

(c) If the rejection is upheld by the judge, there shall be no pretrial review by an appellate court of a decision of the prosecutor to refuse to consent to consideration of the application, or of a decision of the criminal division manager, or of the prosecutor to refuse to enroll a defendant into the pretrial intervention program. An order enrolling a defendant into the pretrial intervention program over the prosecutor's objection shall be deemed final for purposes of appeal, as of right, and shall be automatically stayed for fifteen days following its entry and thereafter pending appellate review.

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

Adopted _____ to be effective _____.

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

Former R. 3:28 has been re-designated as R. 3:28-7. Some paragraphs have been moved to other rules and others have been retained in this rule. It sets forth the process upon conclusion of PTI and also covers the PTI Registry.

Language from former paragraph (a) has been removed from this rule. It is now contained, as slightly reworded in R. 3:28-5(a).

Former paragraph (b) has been re-designated paragraph (a).

Former paragraph (c) has been re-designated paragraph (b). The first sentence of former paragraph (c) and former paragraph (c)(1) have been slightly reworded and are now contained in paragraphs (b) and (b)(1). One change to note is that the rule now delineates the vicinage chief probation officer, instead of the criminal division manager, as the party recommending dismissal of the charges at the conclusion of the postponement, along with the prosecutor. This language reflects the fact that the probation division monitors persons being supervised in the PTI program and makes recommendations with respect to the appropriate dispositions for PTI, as opposed to the criminal division manager.

Another change that is being proposed in newly-designated paragraph (b)(1) deletes the phrase "matter-adjusted" to reflect that the general term for this type of disposition is that the complaint, indictment or accusation was dismissed. The term "matter adjusted" seems to have originated in the draft form of Orders of Dismissal under R. 3:28, which ordered the clerk of the court to mark the court record: "Complaint

dismissed—matter adjusted." See *1975 Proposal*, supra, at Appendix A-37. The current form of Order of Dismissals promulgated by Supplement to Directive #14-05 (1/2/07), states that the "Complaint(s)/Indictment(s)/Accusation(s) is/are hereby dismissed pursuant to *Rule* 3:28 and the matter is adjusted without cost to the defendant."

Proposed language in paragraph (b)(3) provides that when there is a recommendation to order the prosecution of a defendant to proceed in the ordinary course, a copy of the recommendation should be provided to the defendant and the defendant's known attorney of record. Currently, the rule only requires that a copy of the recommendation be given to "the defendant or the defendant's attorney." Presently, the original attorney who assisted the defendant to enroll into PTI may not receive notice regarding the recommendation to terminate the individual from PTI. Even when the Office of the Public Defender originally represents the defendant with respect to enrollment into PTI, that office may not receive notice of the termination hearing unless that defendant reapplies for representation for the scheduled PTI termination hearing. In some instances, a defendant may not receive the termination hearing notice due to circumstances, such as being temporarily hospitalized, homeless, or unreliable mail delivery. When a defendant fails to appear, the defendant may be terminated from PTI without a summary hearing. As a consequence for failing to appear, a bench warrant may be issued, resulting in the defendant's arrest. The Committee agreed that the rule should require service of the written termination notice to both the defendant and the defense attorney of record as of the time of the PTI admission. The attorney can then attempt to contact the defendant and seek an adjournment of the scheduled termination hearing, or

other relief, if necessary. As proposed, the revision will ensure that both the defendant and the last known attorney who represented the defendant receives notice of a recommendation for a defendant's termination from PTI.

Paragraph (c)(2) has been re-designated as paragraph (b)(2). The only change to this paragraph reflects that the vicinage chief probation officer rather than the criminal division manager will make recommendations with respect to an additional period of postponement.

Paragraph (c)(3) has been re-designated as paragraph (b)(3) and addresses a recommendation to order the prosecution of defendant to proceed in the ordinary course. The first two sentences of new paragraph (b)(3) were taken verbatim from former paragraph (c)(3). The last two sentences of paragraph (b)(3) were taken from the third paragraph of current *Guideline* 8. Former paragraphs (c)(4) and (c)(5) have been removed from this rule. They are now contained in new proposed R. 3:28-8(a) and (b), which will govern the confidentiality of the PTI process and PTI records.

Former paragraph (d) has been re-designated paragraph (c), and now references paragraph (b) rather than (c) to reflect the proposed changes to this rule.

Former paragraph (e) has been re-designated paragraph (d) and the first sentence of former paragraph (e), addressing the PTI Registry, has been supplemented to clarify that this information is contained in Promis Gavel. The last sentence of former paragraph (e) has been removed from this rule. It is now contained verbatim as paragraph (c) of new proposed R. 3:28-8 that addresses confidentiality of the PTI process and records.

Former paragraph (f) has been deleted from this rule. It is now contained in R. 3:28-6 that discusses appeals from the decision of the criminal division manager or prosecutor.

Former paragraph (g) has been removed from this rule. It is now contained verbatim in R. 3:28-6 that discusses appeals from the decision of the criminal division manager or prosecutor. Former paragraph (h) has been removed from this rule. The time parameter contained in this sentence has been modified and is contained in new proposed R. 3:28-2 that deals with the timing of PTI applications. The second and third sentences of the first paragraph, as well as the third paragraph, of former paragraph (h) are now contained in R. 3:28-3 that explains the application process. The second paragraph of paragraph (h) is now contained in R. 3:28-6, which discusses appeals of the decision by the criminal division manager or prosecutor.

The proposed revisions to R. 3:28-7 follow.

[3:28. Pretrial Intervention Programs]

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

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

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

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

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

(2) On recommendation of the [criminal division manager] vicinage chief probation officer and with the consent of the prosecutor and the defendant, further postpone all proceedings against such defendant on such charges for an additional

period of time as long as the aggregate of postponement periods under the rule does not exceed thirty-six months; or

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

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

(5) No statement or other disclosure regarding the charge or charges against the participant made or disclosed by a participant in pretrial intervention to a person

designated to provide supervisory treatment shall be disclosed by such person at any time, to the prosecutor, nor shall any such statement or disclosure be admitted as evidence in any civil or criminal proceeding against the participant, provided that the criminal division manager shall not be prevented from informing the prosecutor, or the court, on request or otherwise, whether the participant is satisfactorily responding to supervisory treatment.]

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

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

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

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

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

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

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

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

h. R. 3:28-8 – Confidentiality of Pretrial Intervention Process and Records

R. 3:28-8 is a new rule. It governs the confidentiality of the PTI process and PTI records. Paragraphs (a) and (b) were moved verbatim from current R. 3:28(c)(4) and (c)(5). *Guideline* 5 also addresses use of information obtained as part of a PTI application or participation in a PTI program. That *Guideline* states that information obtained as a result of a defendant's application to or participation in a pretrial intervention program should not be used, in any subsequent proceeding, against his or her advantage. It is believed that new proposed paragraph (b) sufficiently covers this and thus there is no reason to include this sentence from *Guideline* 5. Paragraph (c) was moved, with some slight wording changes, from R. 3:28(e) (last sentence).

The proposed rule conforms with the exclusion of PTI records and reports from public access under R. 1:38-3(c)(5). In particular, the exclusion from public access of certain records in Criminal and Municipal Court proceedings under R. 1:38-3(c) provides that:

> (5) Records relating to participants in drug court programs and programs approved for operation under R. 3:28 (Pre-trial Intervention), and reports made for a court or prosecuting attorney pertaining to persons enrolled in or applications for enrollment in such programs, but not the fact of enrollment and the enrollment conditions imposed by the court.
> [R. 1:38-3.]

The proposed language for new R. 3:28-8 follows.

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

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

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

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

Adopted _____ to be effective _____.

i. R. 3:28-9 – Written Reasons and Decisions

R. 3:28-9 is a new rule. It sets forth the requirement that the decisions and reasons of prosecutors, criminal division managers, and vicinage chief probation officers on a defendant's application for and enrollment into the pretrial intervention program or for recommending termination from the pretrial intervention program or dismissal of charges in all cases shall be reduced to writing and disclosed to the defendant and the defendant's attorney. Recommendations of termination or dismissal of charges, shall be in writing and disclosed to the defendant and the defendant's last known attorney of record. Similar language is contained in current *Guideline* 8 (first paragraph) and N.J.S.A. 2C:43-12(c). The language concerning the reasons and decisions being in writing was changed from "must" to "shall" to conform to the statute. In addition, this rule was changed to recognize that some judges place their decisions on the record rather than in writing. If the decision is placed on the record it must be in accordance with R. 1:7-4 and accompanied by an order.

The proposed language for new R. 3:28-9 follows.

3:28-9. Written Reasons and Decisions

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

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

Adopted _____ to be effective _____.

j. R. 3:28-10 – Pretrial Intervention Program Director

R. 3:28-10 is a new rule. When the PTI Program was first instituted a program director made recommendations to the judge regarding admission and termination. However, to ensure uniform statewide development, the rule was soon after amended to permit the trial court administrator or the chief probation officer to have authority over this program. See R. 3:28 (1974). In 1984, Superior Court support staff was re-assigned to Divisions of the Superior Court, e.g. criminal, civil, family, probation. Over time there was no specified individual known as the program director. Rather, the criminal division manager assumed this responsibility. In 1995, R. 3:28 was changed to reflect that the criminal division manager was the person responsible for making PTI decisions. See R. 3:28 (1995). Despite the change in the rule N.J.S.A. 2C:43-12(i) still provides that PTI programs and appointment of program directors require approval by the Supreme Court with the consent of the Assignment Judge and prosecutor. It should be noted that the Supreme Court Committee on Pretrial Intervention pointed out that this appointment is a judicial function. See *Report of the Supreme Court on Pretrial Intervention*, 108 N.J.L.J. 485 (1981).

R. 3:28-10 would establish that the criminal division manager is the program director for purposes of making recommendations on applications for enrollment into pretrial intervention; and the vicinage chief probation officer is the program director for purposes of recommending: (1) dismissal of the complaint, indictment or accusation against the defendant, or (2) further postponement of all proceedings for additional time, or (3) termination of the defendant from the program and having the prosecution of the

defendant proceed in the ordinary course, pursuant to proposed R. 3:28-7. While the current rule requires that the criminal division manager make decisions regarding dismissal and termination, the fact is that they are not equipped to do so. Although the criminal division manager reviews termination requests and signs off on letters recommending termination the criminal division manager does not have access to probation case notes. Once a person is admitted into PTI the probation division is responsible for the case. This proposed rule amendment would conform the rule to what actually is the current practice.

The new rule would also allow the criminal division manager and vicinage chief probation officer to delegate their ability to make recommendations to another person or persons.

The proposed language for new R. 3:28-10 follows.

3:28-10. Pretrial Intervention Program Director

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

Adopted _____ to be effective _____.

5. Deletion of Guidelines

When the Supreme Court in *Leonardis I* mandated that uniform *Guidelines* be implemented only twelve counties in New Jersey had PTI programs. See Pressler, supra, comment on R. 3:28 (1978). In *Leonardis II,* the Court again reiterated the importance of the *Guidelines* in the "early stages of PTI's development" to provide "uniformity." Id. at 383-84. A year after *Leonardis II,* the Legislature statutorily enacted the statewide PTI program. The adoption of proposed R. 3:28-1 to R. 3:28-10 will make the *Guidelines*, and commentary thereto, unnecessary as what was deemed necessary from the *Guidelines* has been included in the revision to the rules. Furthermore, incorporating the procedures for PTI into just the rules should simplify the process for all parties. Therefore, the Committee agreed to recommend an elimination of the PTI *Guidelines* and C*ommentary.*

[GUIDELINES FOR OPERATION OF PRETRIAL INTERVENTION IN NEW JERSEY

As Amended Effective September 1, 1996.

SUPREME COURT OF NEW JERSEY

ORDERED that the attached revised guidelines governing pretrial intervention programs are approved for implementation as applicable in counties where such programs have been authorized by the Supreme Court pursuant to R. 3:28; and FURTHER ORDERED that the guidelines approved by the order of January 10, 1979 are hereby superceded.

For the Court,
Robert N. Wilentz C.J.
Dated: July 13, 1994

Guideline 1

The purposes of pretrial intervention are:

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

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

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

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

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

Comment

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

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

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

Guideline 1(d) provides for removing from ordinary prosecution those who can be deterred from criminal behavior by short term rehabilitative work or supervision. It is to be emphasized that the potential for rehabilitation must be considered in light of the time periods embodied in Rule 3:28(b), (c), (d).

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

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

[Guideline 2

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

Comment

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

[Guideline 3

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

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

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

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

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

(e) Prior Record of Convictions. While the pretrial intervention program is not limited to "first offenders", defendants who have been previously convicted of a criminal offense should ordinarily be excluded. Such defendants who have at any

prior time been convicted of a first or second degree crime or who irrespective of the degree of the crime have completed a term of probation, incarceration or parole within five years prior to the date of application for diversion shall ordinarily not be considered for enrollment in PTI except on joint application by the defendant and the prosecutor. Defendants charged with more than one offense may be considered for enrollment.

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

(g) Defendants Previously Diverted. Supervisory treatment may occur only once with respect to any defendant who has previously been enrolled in a program of pretrial intervention or conditionally discharged pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1. All applications for enrollment in a PTI program must proceed in accordance with the rules of the Supreme Court and these guidelines after reference to the Pretrial Intervention Registry established pursuant to R. 3:28(e) and N.J.S.A. 2C:43-21(a). No order to expunge or seal records of arrest after dismissal of a complaint, indictment or accusation under paragraph (c) or (d) shall bar the retention of material and information in the Pretrial Intervention Registry for the purposes of determining a defendant's prior applications to, enrollments in, and the degree of completion of a Pretrial Intervention Program or for statistical reports required of the Administrative Director of the Courts, by law or the Supreme Court.

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

(i) Assessment of the Nature of the Offense. Any defendant charged with a crime is eligible for enrollment in a PTI program, but the nature of the offense is a factor to be considered in reviewing the application. If the crime was (1) part of organized criminal activity; or (2) part of a continuing criminal business or enterprise; or (3) deliberately committed with violence or threat of violence against another person; or (4) a breach of the public trust where admission to a PTI program would deprecate the seriousness of defendant's crime, the defendant's application should generally be rejected. A defendant charged with a first or second degree offense or sale or dispensing of Schedule I or II narcotic drugs as defined in L.1970, c. 226 (N.J.S.A. 24:21-1 et seq.) by persons not drug dependent, should ordinarily not be considered for enrollment in a PTI program except on joint application by the defendant and the

prosecutor. However, in such cases, the applicant shall have the opportunity to present to the criminal division manager, and through the criminal division manager to the prosecutor, any facts or materials demonstrating the applicant's amenability to the rehabilitative process, showing compelling reasons justifying the applicant's admission and establishing that a decision against enrollment would be arbitrary and unreasonable.

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

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

Comment

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

(1) The nature of the offense;

(2) The facts of the case;

(3) The motivation and age of the defendant;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Guideline 3(k) recognizes that the use of restitution and community service may play an integral role in rehabilitation. Requiring either is strongly consonant with the individual approach defined in State v. Leonardis, 71 N.J. 85, 363 A.2d 321 (1976) and 73 N.J. 360, 375 A.2d 607 (1977), which emphasized the needs of the offender. In determining the restitution requirement and its terms including ability of the offender to pay, the Court should rely on the procedures outlined in State in Interest of DGW, 70 N.J. 488, 361 A.2d 513 (1976) and State v. Harris, 70 N.J. 586 (1976).

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

[Guideline 4

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

Comment

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

[Guideline 5

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

Comment

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

applications may subject themselves to charges of perjury or false swearing in instances where supporting affidavits may be required by the criminal division manager. Affidavits relating to the facts and circumstances of the underlying offense shall not be required.)

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

[Guideline 6

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

Comment

To relieve defendants from the anxiety of facing prosecution, to apply appropriate rehabilitative measures at an early date, and to effect savings in criminal justice resources, PTI programs should endeavor to divert qualified defendants from the ordinary course of prosecution as soon as possible after the filing of a complaint. The court must advise defendant of the opportunity to be considered for PTI at the first appearance before the court. See R. 3:4-2. While a PTI application should be made before indictment, there are nevertheless problems involved in securing public defender counsel before arraignment. Thus, while pre-indictment filing is encouraged, the application may be made no later than 28 days after indictment, but not thereafter. This time requirement should permit all defendants sufficient opportunity to make a voluntary and informed choice concerning enrollment in a PTI program.

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

processing applications are designed to facilitate speedy trials and are realistic in view of the limited scope of review following rejection.]

[Guideline 7

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

Comment

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

[Guideline 8

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

A defendant may be accepted into a PTI program by the designated judge (or the Assignment Judge) on recommendation of the criminal division manager, and with the consent of the prosecuting attorney and the defendant. Applications that are recommended for enrollment by the criminal division manager and consented to by the prosecutor must be presented to the designated judge (or Assignment Judge) authorized to enter orders. If a defendant desires to challenge the decision of a criminal division manager not to recommend enrollment or of a prosecutor refusing to consent to enrollment into a PTI program, a motion must be filed before the designated judge (or the Assignment Judge) authorized to enter orders under R. 3:28. The challenge is to be based upon alleged arbitrary or capricious action, and the defendant has the burden of showing that the criminal division manager or prosecutor abused discretion in processing the application. No direct appeal can be filed to the Appellate Division challenging the actions of the criminal division manager or the prosecutor. The decision of the criminal division manager or prosecutor may be challenged at a hearing on defendant's motion before the designated judge (or Assignment Judge) and, thereafter, defendant or

prosecutor can seek leave to appeal from the court's decision denying or permitting enrollment.

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

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

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

B. Proposed Amendments to R. 3:26-2 – Authority to Set Bail for Contempt for Violating a Domestic Violence Restraining Order

R. 3:26-2(a) provides that only a Superior Court judge can set bail for certain crimes and offenses, including bail for a person charged with contempt under N.J.S.A. 2C:29-9b for violating a domestic violence restraining order. This language was adopted based upon a recommendation in the Committee's 1992-1994 report to add contempt charges as a class of cases for which only a Superior Court judge may set bail. Currently, the Domestic Violence Procedures Manual provides that if the contempt charge has been initially screened as a disorderly persons offense, as opposed to a fourth-degree crime, bail may be set by a Municipal Court judge if the Assignment Judge in that vicinage has issued a directive or an order allowing this practice. The Committee considered this conflict between the language in R. 3:26-2(a) and the Domestic Violence Procedures Manual.

The Committee recommends amending R. 3:26-2(a) to clarify that only a Superior Court judge is authorized to set bail for a defendant arrested for fourth-degree contempt pursuant to N.J.S.A. 2C:29-9(b) for violating a domestic violence restraining order. Thus, a Municipal Court judge would be authorized to set bail for a non-indictable contempt offense in violation of N.J.S.A. 2C:29-9(b) for violating a domestic violence restraining order.

The proposed amendments to R. 3:26-2(a) follow.

3:26-2. Authority to Set Bail

(a) Authority to Set Initial Bail. A Superior Court judge may set bail for a person charged with any offense. Bail for any offense except murder, kidnapping, manslaughter, aggravated manslaughter, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, a person arrested in any extradition proceeding or a person arrested for a fourth-degree contempt offense under *N.J.S.A. 2C:29-9(b)* for violating a domestic violence restraining order may be set by any other judge, or in the absence of a judge, by a municipal court administrator or deputy court administrator.

(b) . . . no change.

(c) . . . no change.

(d) . . . no change.

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

C. Proposed Revisions to R. 3:5-7(a) – Referral from the Municipal Court Practice Committee - Conforming Amendments For Motions to Suppress

The Municipal Court Practice Committee asked the Committee to consider amending R. 3:5-7, which governs motions to suppress, to be consistent with amendments being proposed by the Municipal Court Practice Committee to R. 7:5-2 and new R. 7:5-4. According to the referral, the revision to R. 7:5-2 would "permit [M]unicipal [C]ourt judges to hear motions to suppress evidence not only obtained as a result of warrantless searches, but also evidence obtained as result of search warrants where the charges resulting are returnable in [M]unicipal [C]ourt." New R. 7:5-4 would clarify "as to where a motion to suppress evidence obtained as a result of a Dyal subpoena would be heard. The [Municipal Court Practice] Committee concluded that if the matters were returnable in [M]unicipal [C]ourt that the motion would also be heard in [M]unicipal [C]ourt."

With respect to the referral, the Criminal Practice Committee reviewed the scope of the Part III rules. Specifically, the Committee reviewed the language in R. 3:1-1, which states:

> The rules in Part III govern the practice and procedure in all indictable and non-indictable proceedings in the Superior Court Law Division, and, insofar as they are applicable, the practice and procedure on indictable offenses in all other courts, including the municipal courts, and the practice and procedure in juvenile delinquency proceedings in the Chancery Division, Family Part except as otherwise provided for in Part V.

Regarding jurisdiction for motions to suppress evidence, currently R. 3:5-7(a) provides that a person "may apply to the Superior Court only and in the county in which the matter

is pending or threatened to suppress the evidence and for the return of the property seized even though the offense charged or to be charged may be within the jurisdiction of a municipal court."

The Committee was unaware of any reasons why a Municipal Court judge who issues a search warrant in a non-indictable matter cannot handle a motion to suppress for that matter when it is returnable to the Municipal Court. The Committee noted that the Municipal Court Practice Committee's proposal only addresses procedures for Municipal Court judges to handle motions to suppress. The proposed amendments do not authorize Municipal Court judges to issue search warrants. Therefore, it was the understanding of the Committee that the proposed amendments to R. 7:5-2 and new R. 7:5-4 would not affect the practice in those vicinages where Municipal Court judges are not authorized by the Assignment Judge to issue search warrants.

Based upon this discussion, the Committee agreed to recommend adoption of conforming amendments to R. 3:5-7(a) if the Court adopts the revisions to R. 7:5-2 and new R. 7:5-4 as being recommended by the Municipal Court Practice Committee. The Committee agreed that R. 3:5-7 should be amended to provide that a motion to suppress evidence should be filed in the Superior Court (1) when an indictable crime charged or to be charged falls within the jurisdiction of the Superior Court, or (2) when a Superior Court judge issued the search warrant, even if the offense charged is a non-indictable offense.

The proposed amendments to R. 3:5-7 follow.

3:5-7. Motion to suppress evidence and for return of property

(a) Notice; Time. On notice to the prosecutor of the county in which the matter is pending or threatened, to the applicant for the warrant if the search was with a warrant, and to co-indictees, if any, and in accordance with the applicable provisions of R. 1:6-3 and R. 3:10, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him or her in a penal proceeding, may apply to the Superior Court [only and] in the county in which the matter is pending or threatened to suppress the evidence and for the return of the property seized (1) without a warrant if the matter involves an indictable crime or (2) where the search warrant was issued by a Superior Court judge, even though the offense charged or to be charged may be within the jurisdiction of a municipal court. [Such] A motion filed in the Superior Court shall be made pursuant to R. 3:10-2. When an offense charged or to be charged is within the jurisdiction of the municipal court, a motion to suppress evidence resulting from a search warrant issued by a municipal court judge or seized without a warrant shall be filed pursuant to R. 7:5-2.

(b) Briefs. . . . no change.

(c) Hearing. . . . no change.

(d) Appellate Review. . . . no change.

(e) Return of Property. . . . no change.

(f) Consequences of Failure to Move. . . . no change.

(g) Effect of Irregularity in Warrant. . . . no change.

Source-R.R. 3:2A-6(a)(b). Paragraph (a) amended, paragraphs (b), (c), (d) adopted and former paragraphs (b), (c), (d) redesignated as (e), (f), (g) respectively January 28, 1977 to be effective immediately; paragraphs (a) and (c) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended June 9, 1989 to be effective June 19, 1989; paragraph (a) amended July 13, 1994 to be effective January 1, 1995; paragraph (a) amended January 5, 1998 to be effective February 1, 1998[.]; paragraph (a) amended to be effective .

D. Proposed Amendments to R. 3:14-1 – Updates to the Venue Rule

Last term, the Committee recommended proposed revisions to the venue rule to restructure the rule and update obsolete provisions. This term, upon referral by the Supreme Court, the Committee prepared revised amendments to update the language of R. 3:14-1 while maintaining the same structure as the current rule.

Subsections (e) and (f) have been recommended for deletion because the crimes covered by those subsections no longer exist. Current paragraph (e) addresses venue for treason. The treason statute, N.J.S.A. 2A:148-1 to -22.1 was repealed by L. 1978, c. 95 (eff. Sept. 1, 1979). Current paragraph (f) addresses venue for libel. The libel statute, N.J.S.A. 2A:120-1 was repealed by L. 1978, c. 95 (eff. Sept. 1, 1979). Subsection (g) has been redesignated as subsection (e) with no changes to the text of the Rule. Subsections (h), (i) and (j) have been redesignated as subsections (f), (g), (h), respectfully, and are recommended for amendment to reflect changes in nomenclature. The crime covered in new subsection (f) is now described as "receiving stolen property" and it does not distinguish between property stolen in or outside the state. The changes in new subsection (g) reflect the change in nomenclature from "embezzlement, conversion or misappropriation" to the current terms, "theft by deception, and theft by unlawful disposition." The reference to "fraud" has been added because that crime seems similar to the others in terms of defining its location. The change in new subsection (h) reflects the abolition of the crime of "desertion." The desertion statute, N.J.S.A. 2A:100-1 to -8 was repealed by L. 1978, c. 95 (eff. Sept. 1. 1979). Its closest equivalent, "nonsupport" pursuant to (N.J.S.A. 2C:24-5) has been substituted. New subsection (h) is also being

revised to update the reference from "wife" to "spouse" and to include "statutory partner" in recognition of the rights of civil partners. Subsection (k) is being redesignated as subsection (i) with no changes to the text of the Rule.

The Committee also considered whether to incorporate language from N.J.S.A. 2C:1-3(g) to address jurisdiction over crimes occurring wholly outside the state if the victim was in this state. The main focus of the statute was to address computer crimes and identity theft and nothing in the venue rule now provides for these cases. The proposed paragraph provided: "(l) Offenses occurring wholly outside the state by non-residents of the state may be prosecuted in the county where the victim resides." The Committee considered this language, however, determined that it did not need to be included in the rule.

The proposed amendments to R. 3:14-1 follow.

3:14-1. Venue

An offense shall be prosecuted in the county in which it was committed, except that

(a) If it is uncertain in which one of 2 or more counties the offense has been committed or if an offense is committed in several counties prosecution may be had in any of such counties.

(b) If a person dies in one county as a result of an offense committed in any other county or counties, the prosecution may be had in any of such counties.

(c) Whenever the body of any person who died as a result of an offense is found in any county, prosecution may be had in such county, regardless of where the offense was committed.

(d) Whenever a person dies within the jurisdiction of this State as a result of an offense committed outside the jurisdiction of this State, or dies outside the jurisdiction of this State as a result of an offense committed within the jurisdiction of this State, the prosecution shall be had in the county in which the death occurred or the offense was committed.

[(e) Prosecution for acts of treason against this State which were committed outside the jurisdiction of this State shall be had in any county designated by the Chief Justice.

(f) Prosecutions for libel shall be had either in the county in which the publication was made or the county in which the libeled person resided at the time of the publication.]

[(g)] (e) An accessory may be prosecuted as such either in the county in which the offense to which he or she is an accessory is triable or the county in which he or she became such accessory.

[(h)] (f) Any person [who steals the property of another, outside this State, or receives such property knowing it to have been stolen, and brings it into this State,] charged with receiving stolen property may be prosecuted in any county [into or through] in which the stolen property is [brought] possessed.

[(i)] (g) Prosecutions for acts of forgery, [embezzlement, conversion or misappropriation] fraud, theft by deception, or theft by unlawful disposition may be had either in the county in which such offense was committed or in the county in which the offender last resided.

[(j)] (h) Prosecutions for [desertion] nonsupport may be had either in the county in which the [wife] spouse, statutory partner or any child resided at the time of the [desertion] nonsupport or in the county in which the [wife] spouse or statutory partner resides when the prosecution is begun.

[(k)] (i) The county of venue for purposes of trial of indictments returned by a State Grand Jury shall be designated by the Assignment Judge appointed to impanel and supervise the State Grand Jury or Grand Juries pursuant to *R. 3:6-11(b).*

History**:** Source-R.R. 3:6-1; paragraph (k) adopted July 17, 1975 to be effective September 8, 1975; paragraph (g) amended July 13, 1994 to be effective September 1, 1994[.]; paragraphs (e) and (f) text deleted; paragraph (g) redesignated as paragraph (e); paragraph (h) amended and redesignated as paragraph (f); paragraph (i) amended and redesignated as paragraph (g); paragraph (j) amended and redesignated as paragraph (h); and paragraph (k) redesignated as paragraph (i) to be effective .

E. Proposed R. 3:10-3 - Notice By The State - Expert Witness Testimony When Testifying Expert Did Not Participate In Underlying Tests

In State v. Williams, 219 N.J. 89 (2014) the defendant alleged that his right to confront witnesses against him pursuant to the *Sixth Amendment to the United States Constitution* and *Article I, Paragraph 10 of the New Jersey Constitution* was violated when a medical examiner, who did not conduct the victim's autopsy, testified about both his own and the absent medical examiner's findings. The defendant did not object to the medical examiner's testimony presented by the State at trial. Rather, defense counsel cross-examined the medical examiner, eliciting information seemingly consistent with the defense. For the first time on appeal, the defendant raised a Confrontation Clause claim, "asserting that the medical examiner's testimony was constitutionally barred because his testimony did not give a first-hand account of how the autopsy was performed and merely passed through the findings of the absent medical examiner." State v. Williams, 219 N.J. at 93. The Supreme Court considered the limited issue "of whether the admission of the testimony by the pathologist who did not perform the autopsy violated defendant's right of confrontation." State v. Williams, 219 N.J. at 97. It held that in the circumstances of that case, the defendant's "failure to object on confrontation grounds and his decision to cross-examine the medical examiner constitute a waiver of his confrontation right." State v. Williams, 219 N.J. at 93.

The Court also observed that "Confrontation Clause objections to the expected testimony of a State's expert witness on the ground that he or she did not conduct, supervise, or participate in a scientific or other such test are best addressed before trial to

avoid surprise or unfairness." State v. Williams, 219 N.J. at 102. With respect to developing a pretrial notice and demand procedure, the Court stated that "at a reasonable time before trial, but no later than the pretrial conference, absent extenuating circumstances, the State should notify the defendant of its intention to call an expert witness who did not conduct, supervise, or participate in a scientific or other such test about which he or she will testify. After the State gives notice, the defense should be required, within ten days, or longer if necessary, to notify the State that it objects to the expected testimony of the expert witness on Confrontation Clause grounds." State v. Williams, 219 N.J. at 102 (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 326-27, 129 S. Ct. 2527, 2541, 174 L. Ed. 2d 314, 330-31 (discussing notice and demand laws)). In footnote 2, the Court stated:

> Notably, N.J.S.A. 2C:35-19(c) provides for notice and demand in cases involving the use of controlled-dangerous-substance reports and certificates issued by State Forensic Laboratories.
>
> [State v. Williams, 219 N.J. at 102 at n.2. (citing State v. Simbara, 175 N.J. 37, 48-49 (2002) (construing notice-and-demand procedure of N.J.S.A. 2C:35-19 to allow defendant to assert or waive right to confront certificate's preparer))].

The Court referred "to the Supreme Court Committee on Criminal Practice the crafting of a rule, with any needed improvements, on pretrial notice and demand." State v. Williams, 219 N.J. at 102. The Committee is recommending adoption of new R. 3:10-3, which is primarily derived from the Williams case and the procedures outlined in N.J.S.A. 2C:35-19(c).

Paragraph (a) of the proposed rule addresses the notice requirements applicable to the State. It provides that when the State intends to call an expert witness to testify at trial, and that expert did not conduct, supervise, or participate in a scientific or other such test about which he or she will testify, the State shall serve written notice upon the defendant and defense counsel of the intent to call that witness. The written notice shall include a proffer of the intended testimony, all reports pertaining to such testimony, and any underlying tests. For purposes of the rule, the term "test" includes any test, demonstration, forensic analysis or other type of expert examination.

Regarding the timeframe for the State to provide notice, in Williams, the Court stated that notice should be provided "at a reasonable time before trial, but no later than the pretrial conference, absent extenuating circumstances." State v. Williams, 219 N.J. at 102. N.J.S.A. 2C:35-19(c) provides that "[w]henever a party intends to proffer in a criminal or quasi-criminal proceeding, a certificate executed pursuant to this section, notice of an intent to proffer that certificate and all reports relating to the analysis in question, including a copy of the certificate, shall be conveyed to the opposing party or parties at least 20 days before the proceeding begins." In paragraph (a) of the proposed rule, the Committee is recommending that written notice must be served by the State at least twenty days before the pretrial proceeding begins, but in any event no later than the pretrial conference absent extenuating circumstances. The "extenuating circumstances" language allows for delayed notice by the State, when warranted. For example, when there is the death of an expert. The reference to the "pretrial conference" refers to the conference that occurs at plea cutoff. (See R. 3:9-3(g)).

Paragraph (b) of the proposed rule addresses objections by the defendant. It provides that if the defendant intends to object to the expert testimony, the defendant shall serve written notice upon the State of any objection within ten days of receiving the State's notice of intent. This language is derived from both the Williams case and N.J.S.A. 2C:35-19(c). In Williams, the Court explained that "[a]fter the State gives notice, the defense should be required, within ten days, or longer if necessary, to notify the State that it objects to the expected testimony of the expert witness on Confrontation Clause grounds." State v. Williams, 219 N.J. at 102. N.J.S.A. 2C:35-19(c) states that "[a]n opposing party who intends to object to the admission into evidence of a certificate shall give notice of objection and the grounds for the objection within 10 days upon receiving the adversary's notice of intent to proffer the certificate."

Paragraph (b) of the proposed rule further provides that in the notice of objection, the defendant must specify the grounds for such objection, including any Confrontation Clause grounds under either the United States or New Jersey State Constitution. This language tracks the Williams opinion, set forth above, that a defendant must "notify the State that it objects to the expected testimony of the expert witness on Confrontation Clause grounds." State v. Williams, 219 N.J. at 102.

Paragraph (c) of the proposed rule governs the timeframe for the court to decide the admissibility of the expert testimony after a defendant raises an objection. N.J.S.A. 2C:35-19(c) provides "[w]henever a notice of objection is filed, admissibility of the certificate shall be determined not later than two days before the beginning of the trial." The Committee is proposing that paragraph (c) of the proposed rule provide that when the

defendant files an objection, "the court shall decide admissibility of the testimony on the grounds alleged no later than seven days before the beginning of trial." This 7-day time frame is designed to give the party that receives an unfavorable ruling an opportunity to either move for a stay or file an interlocutory appeal.

If a defendant objects to the notice provided by the State, paragraph (c) is not designed to give the judge authority to procedurally deny the objection without considering the merits of the objection. Rather, the Committee was of the view that per the Williams case, if a defendant objects, the court must accept the objection and then make a separate substantive ruling on admissibility of the testimony. The Committee was in agreement that the proposed language in paragraph (c) provides a procedural mechanism for notice by the State, an opportunity for the defendant to object to a substitute expert and a timeframe for the court to rule on the objection. It agreed that the substantive standard for the judge to rule on the objection falls under the evidence rules and related case law, as opposed to the court rules.

Paragraph (d) of the proposed rule governs procedures when a party fails to comply with the time limitations for notice and objections set forth in the rule. For the State's failure to comply with the notice requirements, the Committee is proposing that "[t]he State's failure to comply with the time limitations regarding notice of intent required by this rule shall for good cause shown extend the time for defendant to object pursuant to paragraph (b) and for the court to decide admissibility of the testimony pursuant to paragraph (c) but in any event, the court may take such action as the interest of justice requires." For the defendant's failure to object, the Committee is proposing

that "[t]he defendant's failure to comply with the time limitations regarding the notice of objection required by this rule shall constitute a waiver of any objection to the admission of the expert testimony." The defendant's failure to specify a particular ground for such objection shall constitute a waiver of any ground not specified, including any Confrontation Clause ground under either the United States or New Jersey State Constitution." The waiver language codifies the holding in Williams that in the circumstances of that case, the defendant's "failure to object on confrontation grounds and his decision to cross-examine the medical examiner constitute a waiver of his confrontation right." State v. Williams, 219 N.J. at 93.

Paragraph (e) of the proposed rule explains that the time limitations set forth in the rule "shall not be relaxed except upon a showing of good cause."

While reviewing the proposed rule, the Committee engaged in discussions about whether a court rule is necessary to address notice and demand where the State intends to call a substitute expert to testify at trial. In support of the rule proposal, the Committee discussed that in the Williams opinion, the Court expressly referred "to the Supreme Court Committee on Criminal Practice the crafting of a rule, with any needed improvements, on pretrial notice and demand." State v. Williams, 219 N.J. at 102. As such, the proposed rule alerts the parties and the court as to the issue of notice when the State intends to call an expert witness to testify at trial when that expert witness did not conduct, supervise, or participate in a scientific or other such test about which he or she will testify. It also provides a framework for the time to provide notice, to object and for the court to rule upon admissibility of the expert testimony.

The Committee also discussed the view that notice and demand for drug cases would be governed by N.J.S.A. 2C:35-19 and therefore, the proposed rule may only apply to notice of expert testimony in other types of cases. Some members expressed the view that this issue may arise only in limited circumstances or would be encountered without an objection, and therefore questioned whether a rule was necessary. Thus, while the Committee is recommending adoption of proposed new R. 3:10-3, some members expressed the view that a rule may not be necessary to address this situation.

The proposed language for new R. 3:10-3 follows.

3:10-3. Notice By The State - Expert Witness Testimony When Testifying Expert Did Not Participate In Underlying Tests

(a) Notice by the State. Whenever the State intends to call an expert witness to testify at trial and that expert witness did not conduct, supervise, or participate in a scientific or other such test about which he or she will testify, the State shall serve written notice upon the defendant and counsel of intent to call that witness, along with a proffer of such testimony, all reports pertaining to such testimony, and any underlying tests, at least 20 days before the pretrial proceeding begins, but in any event no later than the pretrial conference absent extenuating circumstances. For purposes of this rule the term "test" shall include any test, demonstration, forensic analysis or other type of expert examination.

(b) Objection by the Defendant. If the defendant intends to object to the expert testimony, the defendant shall serve written notice upon the State of any objection within 10 days of receiving the State's notice of intent. In the defendant's notice of objection, he or she must specify the grounds for such objection, including any Confrontation Clause grounds under either the United States or New Jersey State Constitution.

(c) Determination. Whenever a defendant files a notice of objection specifying the grounds for objection, the court shall decide admissibility of the testimony on the grounds alleged no later than seven days before the beginning of trial.

(d) Failure to Comply With Time Limitations. The defendant's failure to comply with the time limitations regarding the notice of objection required by this rule shall constitute a waiver of any objection to the admission of the expert testimony. The defendant's

failure to specify a particular ground for such objection shall constitute a waiver of any ground not specified, including any Confrontation Clause ground under either the United States or New Jersey State Constitution. The State's failure to comply with the time limitations regarding notice of intent required by this rule shall for good cause shown extend the time for defendant to object pursuant to paragraph (b) and for the court to decide admissibility of the testimony pursuant to paragraph (c) but in any event, the court may take such action as the interest of justice requires.

(e) Time Limitations. The time limitations set forth in this rule shall not be relaxed except upon a showing of good cause.

Adopted_____to be effective_____.

F. Proposed R. 3:21-11 - Motion to Vacate Certain Convictions - N.J.S.A. 2C:44-1.1 – Motion to Vacate Prostitution-Related Conviction if the Conviction was a Result of Having Been a Victim of Human Trafficking

N.J.S.A. 2C:44-1.1a(1) provides that a person who has been convicted of N.J.S.A. 2C:34-1, prostitution or a prostitution-related offense; or N.J.S.A. 2C:34-1.1, loitering for the purpose of engaging in prostitution; or a similar ordinance; may file an application with the Superior Court to have the prostitution-related conviction vacated at any time following entry of a judgment of conviction when the person's participation in the offense was a result of having been a victim of human trafficking. The statute specifically states that the application may be filed "in accordance with the Rules of Court." The Criminal Practice Committee is recommending adoption of proposed new R. 3:21-11 in accordance with the statute.

The AOC provided the following statistics relating to indictable and non-indictable prostitution-related convictions that fall under N.J.S.A. 2C:34-1; or loitering for the purpose of engaging in prostitution that fall under N.J.S.A. 2C:34-1.1. For indictable convictions, since 1980**,** 1475 defendants have been convicted in violation of N.J.S.A. 2C:34-1 or N.J.S.A. 2C:34-1.1, with the following breakdown:

Years	**# of Defendants Convicted of Indictable Charges**
1980-1989	74
1990-1999	222
2000-2009	735
2010-2014	404

For non-indictable convictions from 1996 through April 2014, there were 10,530 convictions of non-indictable prostitution-related offenses. Of those convictions, 418 occurred in the 2013 court year. The chart below does not include convictions pursuant to local ordinances.

Offense	**# of Non-Indictable Convictions for Court Year 2013**	**Cumulative # of Non- Indictable Convictions from 1996 - April 2014**
N.J.S.A. 2C:34-1, et seq.	256	6675
N.J.S.A. 2C:34-1.1, et seq.	162	3855

Paragraph (a) of the proposed rule was derived from paragraphs a(1) and a(2) of N.J.S.A. 2C:44-1.1. Paragraph (a) explains that a person who has been convicted of a prostitution related offense, when the person's participation in the offense was a result of having been a victim of human trafficking, can file a motion in the Superior Court in the county where the conviction occurred to vacate the conviction and contemporaneously expunge any reference to the person's arrest, conviction, and any proceeding for prostitution. To streamline the process, the proposal combines the motion to vacate the conviction and the expungement of records together as one motion. Additionally, the proposed rule states that the motion should be filed in the Superior Court in the county where the conviction occurred, as the rule covers motions to vacate convictions that were disposed of in both municipal and criminal courts.

The Committee considered whether the rule should address the county where a motion should be filed when the applicant seeks to vacate multiple convictions that were disposed of in different counties. Specifically, the Committee discussed whether multiple

convictions from different counties can be consolidated in one motion or if the applicant should file a separate motion in each county where the convictions arose. Currently, applications to expunge convictions from different counties can be consolidated, however, petitions for post-conviction relief and motions to vacate a guilty plea for convictions disposed of in different counties are not consolidated. The Committee determined that a motion should be filed in the county where the conviction arose and after the filing, the parties can consent to consolidation, if appropriate.

Paragraph (b) of the proposed rule addresses the time to file the motion and is derived from N.J.S.A. 2C:44-1.1b(2). The Committee discussed that language in paragraph a of the statute and paragraph b(2) of the statute are inconsistent. Paragraph a of N.J.S.A. 2C:44-1.1 provides that a person convicted of certain prostitution and related offenses "may file an application with the Superior Court in accordance with the Rules of Court to have the conviction vacated at any time following entry of a judgment of conviction, when the person's participation in the offense was a result of having been a victim of human trafficking." N.J.S.A. 2C:44-1.1a (emphasis added). On the other hand, paragraph b(2) of the statute states: "[t]he application shall be made and heard within a reasonable time after the person has ceased to be a victim of human trafficking or has sought services for being a victim of human trafficking, whichever occurs later,…" N.J.S.A. 2C:44-1.1b(2) (emphasis added). The Committee recognized the inconsistencies in the statutory language and determined that the language in paragraph (b) of the proposed rule should be aligned with the more specific language that is set forth N.J.S.A. 2C:44-1.1b(2).

Paragraph (c) of the proposed rule is primarily derived from N.J.S.A. 2C:44-1.1b(1) and sets forth the entities that must receive notice of the motion. The statute states that an application, together with a copy of all supporting documents, shall be served upon relevant law enforcement entities and courts pursuant to the court rules. To address the proper method of service, the Committee discussed that currently service for expungements requires notice by certified mail. The Committee considered whether the rule proposal should require service as set forth in R. 4:4-4 (which is the rule governing service for complaints, i.e., in person or by substitute service), or whether the rule should state that notice should be by certified mail or registered mail, return receipt requested. The Committee is proposing that notice should be provided by certified mail or registered mail, return receipt requested. Under the proposal, a noticed party may make an appearance or file a submission responding to the motion.

Paragraph (d) of the proposed rule sets forth guidelines for the contents of the motion, certification by the moving party and procedures for a hearing. Derived mostly from N.J.S.A. 2C:44-1.1c(2) (which lists the information that the court can consider in determining the motion); normal motion practice; and R. 3:22-8; subsection (d)(1) of the proposed rule addresses materials that may be included in the motion papers. Subsection (d)(1) of the rule proposal also states that the applicant should include the prosecutor's consent to the motion to vacate and to expunge records, if such consent is obtained.

While parameters for certification of documents submitted to the court and requirements regarding a hearing are not set forth in the governing statute, the Committee is recommending procedures to address these topics. The language in subsection (d)(2)

of the proposed rule requires that the motion include an affidavit or certification. It also explains that the motion can be disposed of on the papers without a hearing, unless the court concludes that a hearing is required in the interest of justice.

The language in paragraph (e) of the proposed rule is derived from N.J.S.A. 2C:44-1.1d and provides that the court may grant the motion and vacate a conviction upon a finding by a preponderance of the evidence that the applicant was a victim of human trafficking at the time of the prostitution-related offense, and that the violation was a result of the applicant having been a victim of human trafficking. Consistent with the language in paragraph (a) of the proposed rule upon granting the motion, the court shall enter an order vacating the conviction; directing that all court records be revised accordingly; and requiring that any court, law enforcement entity, correctional agency, and other party noticed pursuant to the rule, expunge all references to the applicant's arrest, conviction, and proceedings that relate to the vacated conviction.

Paragraph (f) of the proposed rule references the expungement statute to explain that a motion filed pursuant to this rule to vacate and expunge a prostitution-related conviction is separate and apart from an expungement application filed pursuant to N.J.S.A. 2C:52-1 to - 32.

The Committee recommends that if proposed new R. 3:21-11 is adopted by the Court, a conforming amendment should be made to R. 3:16, which addresses the presence of the defendant at court events. The Committee is recommending that R. 3:16 should be revised so that the defendant/applicant is not required to be present in order for the court to decide a motion to vacate a conviction pursuant to proposed R. 3:21-11. The

Committee also reviewed R. 1:3-4 of the rules of general application, which discusses enlargement of time, and R. 3:22-3 of the rules governing post-conviction of relief, which discusses exclusiveness of remedy and concluded that no rule changes were necessary to those rules.

The Committee discussed whether a filing fee should be assessed for this type of motion. Filing fees are typically not assessed for motions filed in connection with a criminal case. For instance, currently a fee is not assessed to a defendant filing a petition for post-conviction relief or filing a motion to vacate a guilty plea. There is a filing fee assessed for an expungement application, as expungements are not considered to be criminal matters. See R. 3:30 (referencing N.J.S.A. 2C:52-29 and N.J.S.A. 22A:2-25). The Committee concluded that there should not be a filing fee for motions to vacate and expunge prostitution-related offenses that are filed pursuant to the proposed R. 3:21-11, as they are primarily criminal motions, as opposed to civil matters.

The proposed language for new R. 3:21-11 follows.

Rule 3:21-11. Motion to Vacate Certain Convictions.

(a) Motion for Relief. At any time following entry of a judgment of conviction, a person convicted of N.J.S.A. 2C:34-1, prostitution and related offenses; or N.J.S.A. 2C:34-1.1, loitering for the purpose of engaging in prostitution; or a similar local ordinance may file a motion with the Superior Court in the county where the conviction occurred, to vacate the conviction and contemporaneously expunge any reference to the person's arrest, conviction, and any proceeding for prostitution, when the person's participation in the offense was a result of having been a victim of human trafficking pursuant to N.J.S.A. 2C:13-8 or as defined in 22 U.S.C. 7102(14).

(b) Time. A motion shall be made and heard within a reasonable time after the applicant has ceased to be a victim of human trafficking or has sought services for being a victim of human trafficking, whichever occurs later, subject to reasonable concerns for the safety of the applicant, family members of the applicant, or other victims of human trafficking that may be jeopardized by the bringing of the motion, or for other reasons consistent with this rule.

(c) Notice. The notice of motion, together with a copy of all supporting documents, shall be served by certified or registered mail, return receipt requested, upon the Attorney General; the county prosecutor of the county where the court is located; the Superintendent of State Police; the chief of police or other executive head of the police department of the municipality where the offense was committed; the chief law enforcement officer of any other law enforcement agency of this State that participated in the arrest of the applicant; the superintendent or warden of any institution in which the

applicant was confined; and, if a disposition was made in municipal court, upon the judge of that court. A noticed party may make an appearance or file a submission responding to the motion.

(d) Contents of Motion; Certification; Procedure.

(1) Contents of Motion. The motion shall set forth the following information: a notice of motion; the movant's certification setting forth the claim, along with a description of all of the evidence included; the movant's certification of victimization; packet of evidence documenting the applicant's status as a victim of human trafficking at the time of the offense; the date, docket number, and content of the complaint, indictment or accusation upon which the conviction was based and the county where filed; the date and content of the sentence or judgment complained of and the name of the presiding judge; if obtained consent from the prosecutor where the offense occurred to vacate the conviction and expunge any reference to the applicant's arrest, conviction, and any proceeding for prostitution; form of order to vacate the conviction and expunge records; and proof of service upon the parties. Evidence documenting the applicant's status as a victim of human trafficking at the time of the offense may include, but not be limited to:

(A) certified records of federal or State court proceedings which demonstrate that the applicant was a victim of a trafficker charged with a human trafficking offense under N.J.S.A. 2C:13-8 or chapter 77 of Title 18 of the United States Code;

(B) certified records of approval notices or law enforcement certifications generated from a federal immigration proceeding available to victims of human trafficking;

(C) testimony or a sworn statement from a trained professional staff member of a victim services organization, an attorney, a member of the clergy or a health care or other professional from whom the applicant has sought assistance in addressing the trauma associated with being a victim of human trafficking; or

(D) any other evidence that the court deems appropriate.

(2) Certification; Hearing. 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. A hearing need not be conducted on the motion, unless the court, after review of the material submitted, concludes that a hearing is required in the interest of justice.

(e) Order. The court may vacate a conviction pursuant to this rule upon a finding by a preponderance of the evidence that the applicant was a victim of human trafficking pursuant to N.J.S.A. 2C:13-8 or as defined in 22 U.S.C. 7102(14) at the time of the offense, and that the violation was a result of the applicant having been a victim of human trafficking. If the court finds that the applicant was a victim of human trafficking it shall enter an order vacating the conviction and directing that all court records be revised accordingly, and requiring that any court, law enforcement, correctional agencies, and other parties noticed pursuant to this rule expunge all references to the applicant's arrest, conviction, and related proceedings for the violation of N.J.S.A. 2C:34-1,

prostitution and related offenses; or N.J.S.A. 2C:34-1.1, loitering for the purpose of engaging in prostitution; or a similar local ordinance from all records in their custody that relate to the vacated conviction.

(f) Nothing herein shall prohibit a person from seeking an expungement pursuant to N.J.S.A. 2C:52-1 to -32.

Adopted _____ to be effective _____.

II. Non Rule Recommendations

The Committee is not proposing any non rule recommendations at this time.

III. Matters Previously Sent to the Supreme Court

A. Amendments to Rules 2:7-2; 2:7-4; 3:23-8; and the Appendix to Part VII, Appendix 2 – Guidelines for Determination of a Consequence of Magnitude

As a carry-over item from the Committee's 2009-2011 term, effective September 1, 2014, the Court adopted amendments to Rules 2:7-2; 2:7-4; 3:23-8; and the Appendix to Part VII, Appendix 2 – Guidelines for Determination of a Consequence of Magnitude. In a municipal court matter, an indigent defendant is entitled to be represented by assigned counsel, normally a Municipal Public Defender, if the indigent defendant is facing a sentence that would constitute a consequence of magnitude (as described in the Appendix to Part VII, Appendix 2 – Guidelines for Determination of a Consequence of Magnitude and R. 7:3-2). Occasionally, although counsel is assigned to represent the indigent defendant in the municipal court, the actual sentence that is imposed for the municipal court conviction does not amount to a consequence of magnitude. Strict application of the court rules in this situation appeared to require that, irrespective of the actual sentence that is imposed, once an indigent defendant is assigned counsel in the municipal court, that indigent defendant is entitled to assigned counsel throughout the appeal process.

Effective September 1, 2014, Rules 2:7-2; 2:7-4; 3:23-8 were amended to provide that an indigent person convicted of a non-indictable offense shall be assigned counsel for purposes of appeal: (1) if the sentence imposed constitutes a consequence of magnitude, or (2) if the person is constitutionally or otherwise entitled by law to counsel. The rules further provide that "[i]f the sentence imposed does not constitute a

consequence of magnitude, the court hearing the appeal may, in its discretion, determine whether to assign counsel for purposes of the appeal, irrespective of whether counsel was previously assigned in the case." Pursuant to those amendments when an indigent person is involved in an appeal from a conviction in municipal court and the sentence imposed does not constitute a consequence of magnitude, the indigent person is not automatically entitled to assigned counsel for purposes of the appeal. However, the court handling the appeal has discretion to assign counsel as it deems appropriate. The rule amendments do not alter the current practice wherein the attorney assigned to represent the indigent person in the municipal appeal is normally selected from the Madden pro bono attorney list maintained in the respective vicinage. See Madden v. Delran, 126 N.J. 591 (1992).

Also, effective September 1, 2014, the Appendix to Part VII, Appendix 2 – Consequence of Magnitude Guidelines was revised to increase the monetary sanction from $750 to $800, exclusive of court costs, to reflect the Drug Abuse Education Fund (DAEF) Penalty, (N.J.S.A. 2C:43-3.5). Aligned with current practice, the $800 monetary sanction amount is consistent with the minimum monetary sanction that can be imposed for defendants receiving a conditional discharge.

B. Revisions to the Supplemental Plea Form for No Early Release Act (NERA) Cases (N.J.S.A. 2C:43-7.2); Supplemental Plea Form for Graves Act Offenses (N.J.S.A. 2C:43-6c); and Additional Questions for Certain Sexual Offenses (Megan's Law Plea Form)

The Committee recommended revisions to the Supplemental Plea Form for No Early Release Act (NERA) Cases (N.J.S.A. 2C:43-7.2); Supplemental Plea Form for Graves Act Offenses (N.J.S.A. 2C:43-6c); and the Additional Questions for Certain Sexual Offenses (Megan's Law Plea Form) in light of legislative amendments. The proposed revisions were promulgated by Administrative Office of the Courts (AOC) Directive #04-14 on July 31, 2014.

C. State v. Blann – Waiver of Criminal Jury Trial Form

R. 1:8-1(a) requires that a jury trial is to be held in criminal matters, unless the defendant executes a written waiver. On May 28, 2014, in State v. Blann, 217 N.J. 517 (2014) the Supreme Court directed the Administrative Director of the Courts to promulgate a statewide jury waiver form for use in criminal cases. The Court stated that the form, at a minimum, must highlight that a defendant who elects to waive the right to a jury trial has been advised that:

> (1) a jury is composed of 12 members of the community, (2) a defendant may participate in the selection of jurors, (3) all 12 jurors must unanimously vote to convict in order for a conviction to be obtained, and (4) if a defendant waives a jury trial, a judge alone will decide his/her guilt or innocence.
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> [State v. Blann, 217 N.J. at 518 (quoting State v. Blann, 429 N.J. Super. 220, 250 (App. Div. 2013) (Lisa, J.A.D., retired and temporarily assigned on recall, dissenting))].

The Committee developed a waiver of jury trial form for use in criminal cases, which was promulgated by Administrative Office of the Courts (AOC) Directive #03-14 on June 27, 2014.

IV. Rule Amendments and Other Issues Considered and Rejected

A. State v. Handy – Procedures When a Claim of both Self Defense and an Insanity Defense are Raised at Trial

In the 2011-2013 term, the Committee considered a referral in the Appellate Division decision in State v. Handy, 421 N.J. Super. 559, 565 (App. Div. 2011), certif. granted, 209 N.J. 99 (2012), to consider implementing procedures, consistent with the case, to address situations when a defendant asserts both a self-defense claim and an insanity defense. The Committee agreed to defer consideration of the issues raised in Handy until the resolution of the Supreme Court appeal. The Supreme Court decision in Handy was issued on September 9, 2013. See State v. Handy, 215 N.J. 334 (2013). The Court did not specifically refer an issue to the Committee to consider. The Committee determined that absent guidance from the Supreme Court it was not necessary to propose an amendment to the court rules.

B. Trial De Novo Standard of Review for Municipal Appeals

1. Background

R. 3:23 and R. 3:24 govern appeals from courts of limited jurisdiction. Pursuant to current procedures such appeals, commonly referred to as "municipal appeals," are filed with the Superior Court, Law Division in the Criminal Division. Pursuant to R. 3:23-8(a)(2) "[t]he court to which the appeal has been taken may reverse and remand for a new trial or may conduct a trial de novo on the record below."[22] Under the *de novo* standard of review, "the reviewing court does not apply the substantial evidence rule but is obliged to make independent findings of fact and conclusions of law, determining defendant's guilt independently but for deference to the municipal court's credibility findings." Pressler and Verniero, Current N.J. Court Rules, comment 1.1 on R. 3:23-8 (2015).

With the increasing high caliber and experience of municipal court judges since R. 3:23 was developed, the Committee was asked to consider whether the *de novo* standard of review for municipal court appeals should be revised. The Committee formed a subcommittee to explore alternative standards of review for municipal appeals. The Committee identified three goals when considering possible revisions to the standard of

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[22] Additionally, R. 3:24(d) provides that:

> On appeal by the State from the grant of a motion to suppress the matter shall be tried de novo on the record. In cases in which the Attorney General or county prosecutor did not appear in the municipal court, the State shall be permitted to supplement the record and to present any evidence or testimony concerning the legality of the contested search and seizure. The defendant shall be permitted to offer related evidence in opposition to the supplementary evidence offered by the State. On appeal by the State from the grant of a motion to suppress the matter shall be tried de novo on the record.

review: (1) reducing the workload on trial division judges to consider the case anew in a municipal appeal; (2) avoiding the difficulties of a Superior Court judge "second-guessing" a Municipal Court judge's decisions regarding facts, particularly in light of the increased training and professionalism of Municipal Court judges and development of the Municipal Court system as a whole; and (3) creating a fair and timely resolution for the parties.

Over the past few years the Committee undertook a comprehensive review of this subject to ensure that a thorough and well-informed recommendation could be made. Significant to this process was an understanding of the appellate standards of review, consideration of views from Municipal Court judges, perspectives from municipal practitioners, gathering of statistics on the number of municipal appeals that are filed and categories of matters that would be impacted by a change, and a review of the current case law governing the municipal appeals process.

2. <u>Recommendation</u>

As detailed in this report after an in-depth and thorough consideration of all of the interests involved, the Committee respectfully recommends that the trial *de novo* standard of review for municipal appeals heard in the Law Division should not be modified at this time. This recommendation is predominately guided by the fact that inherent in the municipal court process there is no opportunity for independent factual determinations to be made in municipal matters. Although a defendant charged with non-indictable offense may face a term of imprisonment, suspension of driving privileges, or a significant fine, unlike indictable matters, in the Municipal Court there is no right to have an independent

factual assessment made by a jury or other neutral body. While non-indictable offenses that fall within the jurisdiction of the municipal court are not "crimes" within the meaning of the New Jersey Constitution, many, especially driving while intoxicated (DWI) matters, can carry significant consequences. For the reasons set forth in this report, the Committee respectfully submits that the trial *de novo* standard of review for municipal appeals provides an important safeguard in our judicial system of checks and balances to ensure a fair process for the parties involved.

3. Historical Overview of the Municipal Court System

In 1983, Chief Justice Robert N. Wilentz created the Task Force on the Improvement of Municipal Courts, chaired by Associate Justice Robert L. Clifford, and comprised of judges, lawyers, state and local elected officials, court administrators, and private citizens, to conduct a thorough review of the operation of New Jersey's municipal courts and to recommend changes to improve the municipal system. In 1985, the Task Force issued its comprehensive 327-page report recommending sweeping changes throughout the municipal system, including greater uniformity, accountability, efficient administration and the establishment of a statewide computerized court system designed to significantly improve the quality, operations and professionalism of the municipal court system.[23]

[23] The history of New Jersey Municipal Courts is excerpted from the *1985 Report by the Supreme Court Task Force on the Improvement of Municipal Courts* ("1985 Task Force Report"), along with various training materials provided by the Administrative Office of the Courts - Municipal Court Services Division. The Task Force Report can be found at: http://ttnapacheweb1.courts.judiciary.state.nj.us:84/mcs/1985_task_force/1985_task_force_report.pdf

The 1985 Task Force Report details much of the history and development of the municipal court system, from its origins in the original State Constitution of 1776, which created justice courts or justices of the peace (as many local judges were then called), through the enactment and subsequent implementation of Chapter 8 of Title 2A (N.J.S.A. 2A:8-1 to 2A:8-41).[24] Suffice it to say that over time municipal courts have moved from highly decentralized local courts comprised of some non-lawyers with virtually no administrative control in place, to a vastly improved system involving highly qualified judges and uniform procedures. As highlighted in the Task Force Report, over time, non-lawyer judges were phased-out by attrition and state training programs were developed for judges and court personnel. Moreover, as a result of the Task Force recommendations, the Municipal Court Services Division was created within the Administrative Office of the Courts to provide assistance to the over 500 municipal courts throughout the State.[25] Areas ranging from administration, accountability, budgets, personnel, space, traffic/computerization and trials were also addressed.

One recommendation in the 1985 Task Force Report involved the abolishment of the trial *de novo* standard of review for municipal appeals.[26] Specifically, the Task Force recommended that the trial *de novo* system be eliminated in favor of procedures that recognize the enhanced professionalism of the municipal court bench. It was proposed

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[24] *New Jersey Constitution, Article VI, §§ I, II, III, VI.* Article VI, § 1, ¶ 1, provides that: "judicial power shall be vested in a Supreme Court, a Superior Court, County courts and inferior courts of limited jurisdiction. The inferior courts and their jurisdiction may from time to time be established, altered or abolished by law." As such, the New Jersey municipal courts are not constitutional courts, but rather legislative courts which are under the complete administrative control of the Supreme Court.

[25] 1985 Task Force Report, at 19-22.

[26] 1985 Task Force Report, at 142-144.

that: ". . . [w]hen deciding a municipal-court appeal, the Superior Court should be bound by the same standards of appellate review as exist for appeals to the Appellate Division from the Law Division." The following commentary is excerpted from the 1985 Task Force Report delineating support for the abolishment of the *de novo* standard of review:

> Simply stated, an appeal that is heard de novo is a new trial on the record. It allows the Superior Court judge to reconsider completely the testimony and/or replace the findings of the municipal -court judge with his own findings of fact. When the Municipal Court system was established following the 1947 Constitutional Convention, there were two reasons for requiring appeals to be heard de novo. First, the municipal court was not a court of record, and therefore the Superior Court could not review earlier proceedings. Second, municipal - court judges were often laymen and not viewed as professionals whose findings of fact could be accepted without question. The overwhelming majority of the bench was staffed by either police recorders or by lay (non-attorney) magistrates. It was, therefore, considered essential for the Superior Court to be able completely to review an appealed case and, if necessary, to call for additional testimony and to be able to substitute findings of fact for those of the municipal-court judge. During the past twenty years, the quality and professionalism of the municipal –court bench has improved dramatically and today every sitting municipal court judge, with but one exception, is an attorney. In addition, by Supreme Court order, since September 1, 1975, every municipality has had to provide sound - recording equipment, thereby resolving the second problem that the de novo trial was meant to correct. In the vast majority of cases, the decision on an appeal is now made after the Superior Court judge reviews a written transcript and exhibits of the initial trial, and considers arguments presented by the attorneys. For these reasons, it is now appropriate to change an archaic system by changing the procedure for appealing a municipal court judgment. With regard to the review of factual determinations, the Task Force recommends that the standards in the Appellate Division governing the review of Law Division matters should be applicable to the review of municipal court decisions on appeal to the Law Division. In

> essence, such a standard would require determining "whether the findings made [below] could reasonably have been reached on sufficient credible evidence present in the record... considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge on their credibility." Close v. Kordulak, 44 N.J. 589, 599 (1965). In addition, the reviewing court would, of course, be empowered to correct any errors involving questions of law.[27]

At the time, the fifteen local advisory committees reviewed and concurred with the recommendation to abolish the trial *de novo* standard, with none reporting a desire to retain the existing system.[28]

The laws relating to municipal courts were further revised with the enactment of the Title 2B statutes on December 22, 1993.[29] Title 2B modernized the language and clarified the law in such areas as the appointment of temporary and acting judges, the subject matter jurisdiction of the courts and the power of court officials to act for the court, including, but not limited to:

(1) requiring that all municipalities to establish a municipal court and permitting municipalities to form "joint" or "shared" municipal courts;

(2) establishing that an attorney must be admitted to practice for at least five years in order to be qualified to serve as a municipal court judge, except for sitting judges.[30] Under chapter 8 of Title 2A, there was no experience requirement for appointment as a municipal court judge;

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[27] Id.

[28] 1985 Task Force Report, at 143. In the 1985 Task Force's recommendation it also provided suggested language to revise R. 3:23-8, which can be found in Exhibit 2 – Proposed Court Rules and Amendments, (page 10-11) of the 1985 Task Force Report.

[29] L. 1993, c. 293.

[30] N.J.S.A. 2B:12-7. The statute grandfathered any attorney-at-law who was serving as a municipal court judge on the effective date of the act.

(3) establishing a procedure for the Chief Justice to designate a Superior Court judge or a municipal court judge as the presiding judge of the municipal courts in a vicinage;[31]

(4) establishing a Municipal Court Administrative Certification Board and setting forth the procedures for certification of municipal court administrators;[32]

(5) requiring municipalities to appoint counsel to represent indigents in municipal court, Counsel so appointed could serve on a full-time, part-time or per case basis;[33]

(6) permitting a municipal court judge serving as an acting judge in another municipality to hear matters arising out of that other municipality in his own court; and

(7) permitting a municipal court administrator, in addition to the judge, to set conditions for the pretrial release of persons charged with non-indictable offenses.[34]

On February 1, 1998, Part VII of the court rules went into effect to govern the practice and procedure in the municipal courts in all matters within their statutory jurisdiction, including disorderly and petty disorderly persons offenses; other non-indictable offenses not within the exclusive jurisdiction of the Superior Court; violations of motor vehicle and traffic, fish and game, and boating laws; proceedings to collect penalties where jurisdiction is granted by statute; violations of county and municipal ordinances; and all other proceedings in which jurisdiction is granted by statute.[35] Moreover, the Assignment Judge for each vicinage is responsible for administration of all

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[31] N.J.S.A. 2B:12-9.
[32] N.J.S.A. 2B:12-11.
[33] N.J.S.A. 2B:12-28.
[34] See Senate Judiciary Statement to S-875 (Oct. 15, 1992).
[35] Part III of the court rules govern the practice and procedure in indictable actions, and Rule 5:7A governs the practice and procedure in the issuance of temporary restraining orders pursuant to the Prevention of Domestic Violence Act of 1990.

courts therein, including municipal courts. R. 1:1-1; R. 1:33-1; R. 1:33-4. As evidenced in the governing statutes, court rules and administration through the Administrative Office of the Courts (AOC), over the years there has been substantial improvement in the municipal court system.

4. Current Standard of Review for Municipal Appeals in New Jersey

a. Law Division *de novo* Standard of Review for Municipal Appeals

In 1971, Supreme Court observed that the initial reasons for the trial *de novo* standard of review for municipal court appeals was the "weaknesses inherent in the system of local courts whose judges were locally appointed, served part-time, and frequently were not even members of the Bar." State v. DeBonis, 58 N.J. 182, 188 (1971); State v. Cerefice, 335 N.J. Super. 374, 383 (App. Div. 2000). In DeBonis, the Court observed that:

> [a] structure of that kind could not command the complete confidence of the public. Although the municipal court of today is much improved over its ancestors, the structure remains unsound. There are 523 municipal courts. Their judges are still appointed locally, still serve part-time, and although membership at the Bar is now required (subject to grandfather clause, *N.J.S.A. 2A:8-7*), this antiquated system of local courts cannot inspire the confidence with which the public approaches our county courts. We intend no reflection upon the many judges of the municipal courts who work hard and conscientiously notwithstanding the shortcomings of the system itself. Rather we recognize that, so long as this system endures, the need remains to afford the litigant, frequently a stranger to the locality, the opportunity to seek a redetermination by a court at a higher level . . .
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> [State v. DeBonis, 58 N.J. at 188-89.]

Municipal Court decisions are appealed first to the Law Division of Superior Court. R. 7:13-1; R. 3:23-1; State v. Buchan, 119 N.J. Super. 297 (App. Div. 1972). There is an exception to that rule: when a Law Division judge is assigned to hear a municipal court matter, then the appeal is taken directly to the Appellate Division, rather than have one Law Division judge review the decision of another. State v. Cerefice, 335 N.J. Super. at 381-82.

Pursuant to the *de novo* standard of review for municipal appeals the Law Division judge determines the case completely anew on the record made before the Municipal Court judge, giving due, although not necessarily controlling, regard to the opportunity of the Municipal Court judge to assess the credibility of the witnesses. State v. Cerefice, 335 N.J. Super. at 382-83. As such *de novo* review contemplates an independent fact-finding function. In other words, the reviewing judge must make his or her own independent findings of fact with respect to the defendant's guilt or innocence. Id. at 383. However, because the Law Division judge is not in a position to judge the credibility of witnesses, on *de novo* review he or she should defer to the credibility findings of the Municipal Court judge. State v. Locurto, 157 N.J. 463, 472-74 (1999); State v. Johnson, 42 N.J. 146, 157 (1964). The reviewing court must give deference to the findings of the trial judge, which are substantially influenced by his or her opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy. State v. Cerefice, 335 N.J. Super. at 383.

b. Appellate Division Standard of Review for Municipal Appeals

Upon review, the Appellate Division determines whether there is sufficient credible evidence present in the record to uphold the findings of the Law Division, not the municipal court. State v. Johnson, 42 N.J. at 162. Like the Law Division, the Appellate Division should not make new credibility findings. State v. Locurto, 157 N.J. at 470. The Appellate Division may not "weigh the evidence, assess the credibility of the witnesses, or make conclusions about the evidence." State v. Barone, 147 N.J. 599, 615 (1998). Rather, it should defer to the trial court's credibility findings. State v. Cerefice, supra, 335 N.J. Super. at 383.[36]

5. Numbers of Municipal Appeals Filed Annually Statewide

In assessing whether to change the standard of review for municipal appeals, the Committee reviewed the total number of municipal appeals that have been filed annually statewide and it conducted an informal survey on the types of matters that are appealed. Statistics from the Administrative Office of the Courts reveal that for the 2012 court year 5,930,940 non-indictable matters were filed statewide.[37] 426,719 of the cases involved disorderly persons and petty disorderly persons charges; 35,063 involved charges of driving while intoxicated (DWI); 219,381 involved "other criminal" matters; and 5,249,777 matters involved parking and traffic (moving) violations. During that same

[36] For a discussion on the standard of review by the Supreme Court, see State v. Locurto, supra, 157 N.J. at 470-74, and State v. Johnson, supra, 42 N.J. at 163.

[37] The 12-month time period for the 2012 court year was from July 1, 2011 through June 30, 2012. The total number of filings was 6,129,854 of which 198,914 were indictable matters. The remaining 5,930,940 matters involved non-indictable charges. This statistical information can be found on the judiciary webpage at: http://www.judiciary.state.nj.us/quant/index.htm

time period, 1035 municipal appeals were filed statewide. Over the past 5 years, the number of non-indictable matters filed has ranged from 6.1 million to 5.8 million. During the same timeframe, the number of municipal appeals that have been filed has remained below 1400 statewide. For example, 1253 municipal appeals were filed in 2008; 1367 municipal appeals were filed in 2009; 1317 municipal appeals were filed in 2010; 1087 municipal appeals were filed in 2011; and 1035 municipal appeals were filed in 2012.[38] In general, less than 1% of municipal matters are appealed to the Law Division.

To ascertain the categories of matters for which municipal appeals are typically filed in the Law Division in a court year, the Committee conducted an informal survey. Utilizing a subset of 6 counties[39], the Committee determined that 195 municipal appeals were filed in the Law Division; and 91 appeals involved DWI; 24 appeals involved ordinance violations; 40 appeals involved motor vehicle offenses; 40 appeals involved disorderly persons offenses. Of the 195 appeals filed in the Law Division, in 79 the defendant was found guilty; in 39 the defendant was found not guilty; 30 cases were dismissed and 10 were withdrawn. The remaining cases were either remanded or modified on appeal. In the informal survey, the largest number of municipal appeals involved DWI convictions.

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[38] See New Jersey Judiciary Superior Court Caseload Reference Guide (2008 – 2012), Criminal Division Summary, Municipal Appeals, page 9.

[39] The six counties were: Atlantic, Camden, Hunterdon, Monmouth, Passaic and Union.

6. Impact on the Workload of Law Division Judges

The Committee explored whether a change in the standard of review would impact upon the workload of the Law Division judge who is handling the municipal appeal. Several judges reported that a change in the standard of review from *de novo* to a more traditional "appellate" standard of review will likely not change the workload of a reviewing judge. It was expressed that the Law Division judge will still be responsible for reviewing the transcripts and considering legal arguments. If the standard was changed, the main difference would be that the reviewing judge would not have the option to make independent factual findings. Therefore, it was opined that reviewing judges would likely devote a similar amount of time to dispose of municipal appeals, regardless of the standard of review.

7. Discussion

As stated above, in considering this issue, the Committee took into consideration views from Superior Court judges and Municipal Court judges, as well as perspectives from municipal practitioners. The Committee reviewed statistics regarding the number of municipal appeals that were filed in the Law Division for a specific period of time, along with the categories of matters that would be impacted by a change in the standard of review.

The Committee considered several options for the standard of review for municipal appeals. First, the Committee considered whether to keep the current *de novo* standard of review for all municipal appeals. Second, the Committee considered changing the standard of review for all municipal appeals to one similar to the standard

used in the appellate courts. The Committee also discussed whether the plain error and harmless error standards of review for appellate matters would apply. Third, the Committee discussed whether the *de novo* standard of review should remain in place for matters involving a consequence of magnitude[40] and a standard - without independent fact finding - should apply for all other municipal appeals. Finally, the Committee considered whether there should be a more limited exception to keep the *de novo* standard of review solely for municipal appeals involving DWI offenses. See State v. Kashi, 180 N.J. 45 (2004).[41]

Overall to support a change in the standard of review, the Committee recognized that there has been significant training and increased experience of Municipal Court judges since the *de novo* standard was created. Over the years, as evidenced in the governing statutes, court rules and administration through the Administrative Office of the Courts (AOC), there has been substantial improvement in the Municipal Court system. As a centralized division of the AOC, the Municipal Court Services Division

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[40] A Consequence of Magnitude includes:

(1) Any sentence of imprisonment;

(2) Any period of (a) driver's license suspension, (b) suspension of the defendant's nonresident reciprocity privileges or (c) driver's license ineligibility; or

(3) Any monetary sanction imposed by the court of $800 or greater in the aggregate

A more detailed explanation of a consequence of magnitude can be found in the N.J. Court Rules, Part VII, Appendix 2.

[41] In State v. Kashi, the Court held that the offense of driving while intoxicated, created by N.J.S.A. 39:4-50, is a unified offense that can be proven by alternative evidential methods: (1) proof of a defendant's physical condition or (2) proof of a defendant's blood alcohol level, and a failure of proof on one aspect is not an acquittal. State v. Kashi, 360 N.J. Super. 538 (App. Div. 2003), aff'd, 180 N.J. 45 (2004). Therefore, a defendant charged with driving while intoxicated could be found guilty in a *de novo* appeal based on evidence that that the Municipal Court had found insufficient, instead convicting him on other evidence. State v. Kashi, 180 N.J. at 48. Furthermore, the Kashi Court held that there was no double jeopardy violation where a Superior Court judge found defendant guilty of driving under the influence based on roadside sobriety tests after a Municipal Court judge had rejected the tests, because the Superior Court judge was permitted to make own assessment of sufficiency of evidence. Id.

provides comprehensive training and technological support to the Municipal Courts across the state. The AOC also provides a vast informational site for Municipal Court judges and staff, which includes correspondence, training, statistics and valuable resources to enable the Municipal Courts to run smoothly and efficiently. See Judiciary Infonet, Municipal Courts Web. Newly-appointed Municipal Court judges attend an orientation seminar covering legal topics ranging from bail to search and seizure and from motor vehicle offenses to domestic violence.

Administrative areas, such as budget and fiscal management, court management techniques and systems are covered as well. Moreover, at an annual conference of Municipal Court judges training has been provided on a wide variety of subject matters, including bench demeanor and professionalism, court management, and updates on recent legislation and caselaw. Municipal Court judges are also encouraged to participate in brainstorming efforts to improve the court rules and procedures.[42] Municipal Court judges are experienced attorneys with extensive training in Municipal Court matters, including: the annual conference, support from the AOC Municipal Court Services Division; monthly meetings of the Conference of Municipal Presiding Judges, participation on the Municipal Court Practice Committee to recommend practices and procedures in the Municipal Courts, and information available for judges on the Municipal Court Division's webpage. Municipal Court judges develop a specialization in

[42] Copies of recent agendas detailing the topics presented at the training for Newly-Appointed Municipal Court Judges and the Annual Conference of Municipal Court Judges are available from the AOC Municipal Court Services Division.

complicated subject matters, such as DWI cases involving alcotest matters. This vast amount of training and expertise favors a change in the *de novo* standard of review.

It was expressed that if the standard of review was modified, it is likely that the number of appeals that are filed would decrease because a defendant would have to specifically assert a legal error that would have to be decided based on the Municipal Court judge's factual findings on the record below. As an example, it was pointed out by a prosecutor that there are approximately 30-40 municipal appeals pending in the office at any given time. It is anticipated that the number of appeals would decrease, if the standard of review was changed.

In opposition to changing the standard of review, the Committee recognized that there is a perception that because of the local relationships and the fact that Municipal Court judges are not afforded the same tenure and appointment safeguards as Superior Court judges, there is still a need for the *de novo* standard of review by a Superior Court judge. Moreover, by the very nature of the Municipal Court system, Municipal Courts handle a large volume of cases that demand a need to resolve matters quickly and efficiently. The sheer volume of cases create constraints on the amount of time that a Municipal Court judge can devote to matters. Because of this, the Municipal Court record may not be as developed as a record from a *de novo* review in the Law Division. From an appellate perspective, it was suggested that a better court record can be created on *de novo* review in the Superior Court than in the Municipal Court. If the standard was changed, the only court record in the case would be the Municipal Court record. The Committee also recognized that any changes to the standard of review could result in

more appeals, remands or other unintended consequences. Because of this uncertainty, it was expressed that if the current standard of review is working, there should be a sound reason to revise it. Finally, the Committee discussed that if the standard of review is changed, the same standard would be applied in two or three levels of appeal (i.e., Law Division, Appellate Division and, possibly the Supreme Court). The end result being duplicate standards of review for municipal appeals.

8. Conclusion

As set forth above, the Committee identified three goals when considering possible revisions to the standard of review: (1) reducing the workload on trial division judges to consider the case anew in a municipal appeal, (2) avoiding the difficulties of a Superior Court judge "second-guessing" a Municipal Court judge's decisions regarding facts, particularly in light of the increased training and professionalism of Municipal Court judges and development of the Municipal Court system as a whole, and (3) creating a fair and timely resolution for the parties. As it is clear that Municipal Courts have significantly improved and that it is estimated that the workload of Law Division judges will not change if the standard of review is revised, the Committee focused on creating a fair and timely resolution for the parties. The Committee's discussion focused on the fact that inherent in the Municipal Court process, a defendant may face a considerable penalty, such as a term of imprisonment for up to six months, a suspension of driving privileges for a fixed period of time, or a sizable fine or other consequence of magnitude, without the right to have access to a jury or other neutral body to access factual circumstances. As non-indictable offenses that fall within the jurisdiction of the

Municipal Court are not "crimes" within the meaning of the New Jersey Constitution, when a matter proceeds in the Municipal Court, there is no right to an indictment by a grand jury, nor any right to a trial by jury.[43] Unlike indictable charges, which involve screening by a grand jury and the safeguard of a jury system, non-indictable charges do not share the same protections. If the *de novo* standard of review for municipal appeals was abolished, a Municipal Court judge's factual determinations would always be the sole factual determinations made in a case. As such, defendants charged with non-indictable offenses are not afforded the same safeguards as individuals who are facing indictable charges.

Moreover, the Committee recognized that the sheer volume of cases filed in Municipal Courts dictate a quick and efficient process to dispose of matters in a timely fashion. While it is clear that Municipal Court judges carefully schedule matters, the system, itself, dictates time constraints for judges to resolve matters. The Committee is therefore of the view that the *de novo* standard of review provides an appropriate and balanced layer of judicial review in a less quick-paced environment.

In reaching its conclusion to recommend maintaining the *de novo* standard of review, the Committee recognizes the vast development and professionalism of the entire

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[43] N.J. Const., Art. I, Para. 8 ("No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury . . ."); N.J.S.A. 2C:1-4b ("An offense is a disorderly persons offense if it is so designated in this code or in a statute other than this code. An offense is a petty disorderly persons offense if it is so designated in this code or in a statute other than this code. Disorderly persons offenses and petty disorderly persons offenses are petty offenses and are not crimes within the meaning of the Constitution of this State. There shall be no right to indictment by a grand jury nor any right to trial by jury on such offenses."); State v. Hamm, 121 N.J. 109, 111 (1990) ("the statutory penalties for DWI are not so severe as to clearly reflect a legislative determination of a constitutionally 'serious' offense requiring jury trial.").

Municipal Court system. Despite the significant advances in Municipal Court practice, the Committee is of the view that the trial *de novo* standard of review, which allows another independent judicial officer to weigh in on the record, is an important safeguard in our judicial system of checks and balances to ensure a fair process for the parties involved.

In light of fact that less than 1% of the Municipal Court decisions are appealed annually and those matters that are appealed typically involve the most serious offenses that are handled in the Municipal Courts, the Committee is of the view that a change in the standard of review is not warranted. After a thorough review of the current practice for municipal appeals, options to revise the standard of review, and the support of and opposition to changing the *de novo* standard of review, the Committee respectfully recommends that the *de novo* standard of review for municipal appeals remain in place.

C. Referral from Supreme Court Clerk's Office – Inmate Filing Dates

By letter dated June 18, 2014, the Supreme Court Clerk's Office asked the Committee to consider an inmate's request to develop a rule, similar to the federal appellate rule, where "properly deposited mail in the institutional mail system would be recognized by the court as 'filed' on that date." The Committee considered this request and recognized that currently the criminal division accommodates late filings by inmates. In many criminal matters, even if an inmate misses a deadline for a motion, the motion will be filed with the criminal court "nunc pro tunc." It was raised that if a rule-based filing system was created, as described in the inmate letter, judges may become less flexible with filing deadlines. The Committee also queried whether the Department of Corrections (DOC) has a filing/stamping system similar to the federal system that is referenced in the inmate letter. It was expressed that if a rule were to be developed for criminal filings, the DOC (including state prison, county jail, wardens and sheriffs) would have to be involved in the process.

A member suggested that the requested rule proposal may be important in matters involving child support, as the date of the filing may delay or effect the amount or enforcement of child support obligations. There was a suggestion, therefore, that the inmate request be referred to other Divisions for consideration. The Committee determined that there was no need for a rule amendment.

D. Proposed Revisions to R. 3:6-6(a) – Who May be Present at the Grand Jury

Upon the request of the Conference of Criminal Presiding Judges, the Committee considered whether to revise R. 3:6-6 with respect to the presence of the prosecutor in the grand jury room during deliberations. Currently, R. 3:6-6 provides:

> (a) Attendance at Session. No person other than the jurors, the prosecuting attorney, the clerk of the grand jury, the witness under examination, interpreters when needed and, for the purpose of recording the proceedings, a stenographer or operator of a recording device may be present while the grand jury is in session. No person other than the jurors, the clerk, the prosecuting attorney and the stenographer or operator of the recording device may be present while the grand jury is deliberating. The grand jury, however, may request either (1) the prosecuting attorney and the stenographer or operator or (2) the clerk to leave the jury room during its deliberations. The prosecuting attorney may return to the grand jury room during deliberations, only upon request of the grand jury.

The Conference requested that the Committee consider proposing revisions to paragraph (a) of R. 3:6-6 "which would bar the prosecutor from being present during grand jury deliberations rather than requiring the grand jury to ask the prosecutor to leave. The grand jury could then ask the prosecutor to return if they so desired."

To explore this issue more closely, the Committee asked for a survey to be conducted regarding the current practices that occur during grand jury deliberations. The Committee formed several questions for consideration: (1) What is the recording process in the grand jury room? Is the CourtSmart recording system turned off during grand jury deliberations? Is there a back-up CourtSmart system (24 hours) running during grand jury deliberations? When is the "official record" turned on and off during grand jury proceedings and deliberations?; (2) How does the CourtSmart system work when the

matter is back on the record? If the CourtSmart system is turned off, does it go back "on the record" when the prosecutor speaks, asks or answers a question?; (3) What is the current judiciary protocol for the operation of CourtSmart for grand jury proceedings and deliberations and what is the current protocol for the grand jury clerk?; and, (4) In each county, does the Assistant Prosecutor and/or grand jury clerk remain in the grand jury room during deliberations? The Committee referred these issues to the judiciary operations managers and criminal division managers for consideration. The County Prosecutors' Association undertook a separate informal survey, as well.

The survey results revealed that currently in 17 counties the prosecutor remains in the grand jury room during deliberations, unless as stated in R. 3:6-6, the grand jurors ask the prosecutor to leave the jury room during deliberations. In 4 counties the prosecutor does not remain in the jury room at all. In all 21 counties: (1) the grand jury clerk or operator remains in the grand jury room; (2) CourtSmart is used to record grand jury proceedings; (3) the CourtSmart system is turned off during grand jury deliberations; (4) the backup CourtSmart system does not run during grand jury deliberations; and (5) the CourtSmart system is turned on (goes back on the record) when the prosecutor speaks or asks or answers a question.

Opposition to a rule amendment was expressed and the Committee was made aware that in the experience of many prosecutors, the procedure where the prosecutor remains in the grand jury room during deliberations works well to guide the grand jury if the jurors engage in discussions that are off-topic. If that occurs, the prosecutor can go back on the record and re-instruct the grand jury on the law and facts of the particular

case. A view was expressed that if the prosecutor does not remain in the grand jury room during deliberations misconduct of the grand jurors would go unnoticed. In support of a rule change, which would expressly state that the prosecutor would not remain in the grand jury room during deliberations, it was expressed that a prosecutor may use non-verbal cues or methods to communicate his or her feelings to the grand jurors. Such non-verbal cues would not be captured by the CourtSmart digital recording system. Based upon the referral by the Conference of Criminal Presiding Judges, the Committee was unsure if there was a widespread concern relating to the prosecutor's presence in the grand jury room during deliberations.

The Committee agreed to keep the current procedures in R. 3:6-6 in place, which allow the prosecutor to remain in the grand jury room during deliberations, unless the grand jurors ask the prosecutor to leave. Therefore, it is not recommending any revisions to R. 3:6-6 at this time.

E. State v. Smullen – Ineffective Assistance of Counsel – Advice Regarding Community Supervision for Life when a Defendant Resides in a Different State

State v. Smullen, 437 N.J. Super. 102 (App. Div. 2014) involved a petition for post-conviction relief where the defendant was a life-long resident of the State of New York. As a mandatory part of his negotiated guilty plea to sexual assault in New Jersey, the defendant was placed on community supervision for life (CSL) to commence upon his release from prison on federal charges. State v. Smullen, 437 N.J. Super. at 104-05. In his petition for post-conviction relief, the defendant alleged that

> he was denied effective representation of counsel because his attorney did not discuss with him the specific requirements under N.J.S.A. 2C:43-6.4 during plea negotiations, including whether, as a New York resident, he would be subject to different or additional restrictions upon completion of his custodial sentence.
>
> [State v. Smullen, 437 N.J. Super. at 105-06].

The Appellate Division held that the defendant established a prima facie case of ineffective assistance of counsel and therefore was entitled to an evidentiary hearing on post-conviction relief pursuant to R. 3:22-10(b). State v. Smullen, 437 N.J. Super. at 109. In reaching this conclusion, the Appellate Division panel found that defense counsel was "entirely uninformed at the plea hearing about the particular requirements of community supervision for life." Id. It also determined that

> [e]ven more relevant from defendant's perspective, neither the court nor his attorney provided him with any information about how these restrictions would apply in his home state of New York. We expect a reasonably competent New Jersey attorney to be able to research New York law and make at least a preliminary determination of his or her ability to advise

> a client about the New York ramifications of pleading guilty to a crime in New Jersey. If after researching New York law, counsel believes he or she is not competent to offer professionally sound advice to the client, then it is counsel's responsibility to consult with, or refer the client to, an attorney who can do so. Leaving the client uninformed about this vital aspect of his decision to accept or reject the State's plea offer is not an option.
>
> [State v. Smullen, 437 N.J. Super. at 109-10].

The Committee considered whether the plea forms need to be revised or if any guidance should be issued in light of the Smullen decision. The Committee explored several options, including whether the plea forms should include a question on out-of-state residency, similar to the way that immigration is addressed on the plea form. It was discussed that this type of question would alert defense attorneys to check restrictions in other states. Some members recognized, however, that unlike immigration where a defendant's current status normally is known or can be ascertained at the time of a plea, a convicted person's state of residence can more readily change in the future.

Some members expressed the view that this issue need not be included on the plea form, but should be covered by the judge during the colloquy to ascertain whether a defendant understands that if he or she lives or moves out-of-state, the other state's laws would apply. In an effort to alert the parties to potential issues, it was suggested that during the colloquy, the judge could ask the defendant "Do you currently live out-of-state? Are you planning to return home? Are you moving or transferring out of New Jersey? Are you satisfied with the advice provided by your attorney regarding the applicable law or potential consequences of moving to your home state? Do you or your

attorney need more time to discusses this further?"

The Committee also reviewed current Questions 18a and 18b of the Main Plea form, which address the Interstate Compact for Adult Offenders and state as follows:

18.	a.	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]
	b.	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]

Some members were of the view that Questions 18a and 18b provide adequate guidance to cover the situation raised in Smullen. Other members recommended adding language to Questions 18a and 18b, such as, "Do you understand that you may be subject to restrictions in other states?" As Smullen addressed advice given with respect to a conviction for sexual assault, the Committee also explored whether the parole supervision for life (PSL) form should be revised to put defendants on notice that if they move out-of-state, another state's laws would apply to convictions for certain sex offenses.

The Committee was unsure of how often this issue arose and recognized that in the Smullen decision, the Appellate Division did not make a specific referral for the implementation of a rule amendment or any guidelines. Therefore, the Committee ultimately decided not to recommend any changes at this time, and to consider recommending any necessary procedures in the future, if the Court so directs.

F. Technical Revisions – Update Rule Language from "Written" to "Printed"

When reviewing the Committee's off-cycle report filed in March 2012 on the *Distribution of Written Jury Instructions to the Jury – State v. O'Brien, 200 N.J. 520 (2009),* the Court considered a comment recommending that the language in R. 1:8-7 and R. 1:8-8 be updated to change the word "written" to "printed." The purpose of the recommendation was to reflect the development of electronic formats and other technological advances. The Court asked the Committee to review Part III of the court rules and update appropriate language. The Committee considered proposed amendments to R. 1:8-7 and R. 1:8-8, along with proposed revisions to twenty-three Part III court rules[44] incorporating this change. The Committee also reviewed the definition of the term "record," as used in different contexts, and the definition of a "writing" as set forth in N.J.R.E. 801(e). After consideration, the Committee expressed the view that the term "written" encompasses printed and electronic materials. The Committee voted that the term "written" in Part III of the court rules should not be changed to the term "printed."

[44] The Committee considered revisions to R. 1:8-7; R. 1:8-8; R. 3:1-4; R. 3:1-5; R. 3:2-1; R. 3:2-3; R. 3:4-2; R. 3:5-3; R. 3:5-5; R. 3:5A-3; R. 3:7-3; R. 3:7-8; R. 3:9-2; R. 3:11; R. 3:12-1; R. 3:12-2; R. 3:13-2; R. 3:16; R. 3:17; R. 3:19-1; R. 3:21-4; R. 3:23-4; R. 3:25A-1; R. 3:26-6; and R. 3:28.

G. R. 3:21-5 - Electronic Signature of a Judge on the Judgment of Conviction

This matter is held from the 2011-2013 term where the Committee was informed that Chief Justice Rabner issued an order relaxing R. 3:21-5 "to permit the Superior Court to issue and transmit to the New Jersey Department of Corrections and the New Jersey State Parole Board electronic judgments of conviction containing an electronically affixed signature of a Superior Court judge rather than an original signature and having the same force and effect as such judgments of conviction containing a judge's handwritten signature." Effective September 1, 2013, the Supreme Court adopted R. 1:32-2A(c), which addresses electronic signatures. The Committee considered whether R. 3:21-5 needs to be amended, in light of the language in R. 1:32-2A(c). The Committee agreed that R. 3:21-5 need not be amended as the language addressing electronic signatures in R. 1:32-2A(c) covers electronic signatures of a judge on the judgment of conviction.

V. Other Business

A. Written Orders in the Appellate Division

By letter dated July 16, 2014, the Supreme Court Clerk's Office asked the Committee to consider an inmate's request to develop a rule requiring the Appellate Division to provide its "findings of facts and state its conclusion of law in all actions reviewed, on every motion decided by a written order." The Committee referred this request to the Appellate Division Rules Committee for consideration.

B. Bar Admission for Spouses of Active Duty Service Members

The Committee considered a proposal that was reviewed by the Civil Practice Committee to change to the bar admission rules to provide for admission without examination of qualified attorneys who are spouses of active duty service members stationed in New Jersey. Upon reviewing the Civil Practice Committee's recommendations, the Committee deferred to the recommendation of the Civil Practice Committee with respect to this topic. Thereafter, effective September 1, 2014, the Court adopted new R. 1:27-4: Temporary Admission of a Military Spouse During Military Assignment in New Jersey.

C. Housekeeping – L. 2012, c. 16 – Division of Youth and Family Services (DYFS) Name Change to Department of Child Protection and Permanency (DCP&P)

In L. 2012, c. 16, the Division of Youth and Family Services (DYFS) was reorganized and renamed the Department of Child Protection and Permanency (DCP&P). By order dated July 10, 2012, the Supreme Court relaxed the court rules so that any references to DYFS shall be deemed references to DCP&P. The Committee reviewed Part III of the court rules and did not find any references to DYFS. Therefore, no rule changes are necessary. The Committee recommends that the AOC review the plea forms and any other AOC documents may need to be revised to update references to DYFS.

D. Housekeeping – Revisions to R. 1:21-1 ("Bona Fide Office") and residual impact on Part III rules

In 2013, the Supreme Court adopted amendments to R. 1:21-1, relating to the bona fide office requirement. Those amendments provide that "an attorney need not maintain a fixed location for the practice of law" so long as the attorney meets the other requirements of the rule. On July 12, 2013, Acting Administrative Director Glenn A. Grant issued a Notice to the Bar, which explained that the Court approved the Professional Responsibility Rules Committee's (PRRC) recommendation that the other rules committees "consider the impact of the amendments to R. 1:21-1(a) on rules within their scope of authority."

The Committee reviewed the Part III rules and did not find any references to "bona fide office" terminology. Regarding the impact of the bona fide office rules on criminal matters, for mailing and notice purposes, the Criminal Division uses the address that the attorney provides when the attorney files an appearance, pursuant to R. 3:8-1, with the understanding that the attorney is in compliance with R. 1:21-1.

VI. Matters Held for Future Consideration

A. Rules Governing Plea Negotiations, R. 3:9-3(c); Plea Cut off, R. 3:9-3(g); Central Judicial Processing (CJP) and Setting of Bail by Municipal Court Judges, R. 3:26-2; and Subcommittee on Enforcement of Non-Financial Conditions of Bail

The Committee agreed to consider proposing amendments to: (1) R. 3:9-3(c) - Plea Negotiations; (2) R. 3:9-3(g) - Plea Cutoff; and (3) R. 3:26-2 - Central Judicial Processing (CJP) and Setting of Bail by Municipal Court Judges; and to create a Subcommittee on Enforcement of Non-Financial Conditions of Bail. During the term, the Committee was advised that the Special Supreme Court Joint Committee on Criminal Justice (JCCJ) formed by Chief Justice Rabner to explore issues related to bail, pre-indictment procedures, and post-indictment procedures considered revisions to the current protocols and procedures in these areas. The Special Joint Committee was comprised of individuals representing the Attorney General's Office, County Prosecutors, Public Defender, judiciary (including judges and staff), Governor's Office, legislative staff and the private bar. The Committee agreed to revisit these areas, if necessary, after the Special Joint Committee completed its work. The JCCJ Report was filed for public comment on March 10, 2014. The Committee was informed that the Supreme Court has not yet acted upon the recommendations set forth in the JCCJ Report. The Committee agreed that the above-mentioned items relating to bail, the pre-indictment process and post-indictment process will be held as matters for future consideration, pending further direction from the Supreme Court.

B. Joint Criminal/Municipal Subcommittee on Electronic Discovery Formats

The Hon. Glenn Grant, Acting Administrative Director of the Courts, asked the Criminal Practice Committee and Municipal Court Practice Committee to form a joint subcommittee to periodically review the approved list of preferred formats for electronic discovery and to recommend changes to the list, as new formats become standard and current formats become obsolete. The joint subcommittee is charged with working with the Attorney General's office toward an eventual creation of a statewide protocol to ensure discovery systems' compatibility so that electronic evidence can move from the scene of the offense through the police and prosecutor to discovery and then to trial and appeal. A subcommittee was formed comprised of criminal judge, municipal court judge, defense attorneys (private and public defender) and a prosecutor. The subcommittee is continuing to review this topic.

C. Presentence Investigation Reports

In the 2007-2009 term, the Committee submitted a package of recommendations to the Supreme Court addressing corrections to presentence investigation (PSI) reports, including: developing a uniform protocol to memorialize challenges and corrections made to the presentence investigation report; incorporating the court's findings regarding challenges and corrections; and forwarding revised presentence investigation reports to the parties and interested entities. The Committee also recommended adding "disclaimer" language to the "offense circumstances" section of the presentence investigation report to clarify that the offense circumstances includes descriptions of charges of which the defendant may not have been found guilty by a jury or may not have pled guilty to and that the offense circumstances section should be read in conjunction with the final charges and the defendant's version of the offense. The Court considered these recommendations and the Committee was asked to further consider the following:

1. Developing a procedure to ensure that a defendant's challenge to a criminal or court history record is resolved, memorialized and forwarded to the appropriate parties and entities.

2. Reconsidering the recommendation to add "disclaimer" language to the offense circumstances section of the PSI report, in that it may not sufficiently address the impact upon the use of PSI reports by outside agencies and during post-sentencing proceedings, such as in Sexually Violent Predator cases and parole board hearings, where PSI reports are relied upon in subsequent hearings to determine the actual facts of the case.

The Committee is continuing to explore these issues.

D. Telephonic Issuance of Search Warrants by Municipal Court Judges

The Honorable Glenn A. Grant, Acting Administrative Director of the Courts, asked the Criminal Practice Committee and Municipal Court Practice Committee to form a joint subcommittee to consider and make recommendations regarding the scope of authority for Municipal Court judges to issue telephonic search warrants. A subcommittee was formed comprised of Superior Court judges, Municipal Court judges, prosecutors, defense attorneys (private and public defender), and judiciary managers from the Municipal Court Services Division, Criminal Division and Operation Division. The subcommittee is continuing to explore this topic.

E. State v. Amparo – Referral to the Committee – Consolidation of Complaints

An unpublished decision State v. Amparo involves a motion for consolidation arising from various complaints against a defendant. In the opinion the judge raised several practical issues surrounding the consolidation of complaints and suggested that "this may be an issue ripe for discussion by the Criminal Practice Committee and the Municipal Practice Committee." A subcommittee was formed to review the Amparo case more closely and explore whether any rule changes may be necessary.

Respectfully submitted,

Hon. Harry Carroll, Chair *(Sept. 2014 - present)*; Vice Chair *(Sept. 2013 - Aug. 2014)*
Hon. Lawrence Lawson, ret., Chair *(Sept. 2013 - Aug. 2014)*
Hon. Christine Allen-Jackson
Richard Barker
Joseph Barraco
Robert Bernardi
Eric Breslin
Hilary Brunell
John Cannel
Ehsan Chowdry
Mary Ciancimino
Jeffrey Coghlan
Hon. Gerald Council
Hon. Martin Cronin
Philip Degnan
Donald DiGioia
Hon. Joseph Donohue
Patrice Hayslett
Paul Heinzel
Dorothy Howell
Hon. Adam Jacobs
Hon. Edward Jerejian
Fredric Knapp
Francis Koch
John McMahon
Tana McPherson
Hon. Samuel Natal
Michael Noreiga
Hon. Alberto Rivas
Hon. Mark Sandson
Ronald Susswein
Hon. Siobhan Teare
Hon. Sheila Venable
Michael Williams
Paul Yoon

AOC Staff:
Melaney Payne

APPENDIX A

Dissent to the Proposed Amendments to R. 3:28
New Rules 3:28-1 to 3:28-10 – Pretrial Intervention
filed by Richard D. Barker, Esq., representing the
New Jersey State Bar Association

Joined In By:

Eric Breslin, Esq.

Tana McPherson, Esq.
(representing the Association of Black Women Lawyers of New Jersey)

Mary Ciancimino, Esq., Deputy Public Defender
Jeffrey Coghlan, Esq., Deputy Public Defender
John McMahon, Esq., Assistant Deputy Public Defender (the three representatives of the Office of the Public Defender on behalf of that office)

NEW JERSEY STATE BAR ASSOCIATION
Richard D. Barker, Representative
Supreme Court Criminal Practice Committee

January 27, 2015

To: New Jersey Supreme Court Criminal Practice Committee

RE: Committee Report for the 2013-2015 Term – Dissent as to Proposed PTI Rule Revisions

Please accept this letter as my dissent, on behalf of the New Jersey State Bar Association, to those parts of the proposed PTI rule revisions which seek to restrict those who are eligible to apply for PTI by creating categories of individuals who are not permitted to file PTI applications [R.3:28-1(c)(3)], expands the category of those who are ineligible to apply without Prosecutorial consent and creating a category whereby the criminal division manager's office will not conduct an evaluation on the merits of an application unless the prosecutor's office consents to the criminal division manager's office consideration of the application which does not bind the Prosecutor to consenting to ultimate enrollment into PTI [R.3:28-1(d)(1)(2)(3)]. There is no substantive justification for modifying the existing PTI rules and guidelines regarding eligibility and thereby reducing the number of people who are eligible to apply for PTI.

The proposed changes as noted in the Committee's report, are the result of the historical tension between the Administrative Office of the Courts/Criminal Case Management (hereinafter CCM) and the County Prosecutor's Offices (hereinafter CPO) regarding the workload and allocation of resources (read as budget/personnel costs) associated with the PTI program. The following comments are based on my experience and that of others and should not be interpreted as the position of those agencies which I refer to: CCM takes the position that PTI is a Prosecutor's program and that CPO's should perform the tasks related thereto and pay the costs therefore; that CCM should not have to waste it's time writing reports when the CPO's know that they are going to oppose/reject a defendant's admission because the CPO's having indicted the case should be familiar enough with the case to know in advance if they are going to accept or reject the defendant. CPO's take the position that CCM should continue its role of taking the application and issuing a report because CPO's do not have staff trained to perform this function and so that the CPO can make a decision based on the merits of the defendant's application not just its information which is limited to that related to crime with which the defendant is charged.

These proposals limiting the number of people who may apply or expanding the category of those who are ineligible to apply or have their application considered without Prosecutorial consent, as distinguished from consent to enrollment or rejection by the Prosecutor, do not serve the interests of the people of New Jersey and they impinge upon the ability of an attorney to advocate for an individualized review of those factors which would mitigate in favor of their individual client's admission into PTI. Advocacy of this kind is consistent with the opinions of our Judiciary that the decision to admit a person into PTI should be based upon the merits of that individual's application. Without an application there can be no consideration of the merits.

As set forth at page 19 of the Committee's report during calendar year 2013 there were 1441 applications for admission into PTI where a defendant was charged with a first or second degree offense. Of those 486 were admitted into PTI. Although the majority of the applications involved second degree crimes, 103 applications, and 22 admissions were for first degree crimes. If the Committee's proposals are accepted almost 500 people a year would no longer be eligible for PTI and they and their families would be subjected to the devastating collateral consequences outlined below. Similarly, attorneys would no longer be in a position to advocate on behalf of these potential clients. Maintaining the status quo leaves CPO's free to accept or reject these applicants.

Our Executive and Legislative branches of government increasingly have come to recognize that criminal convictions and incarceration for certain offenses are not in the best interest of society at large. Their focus on rehabilitation, treatment and employability is readily apparent from recent changes to our expungement statute, the expansion of conditional discharges/PTI for Municipal Court offenses and the Attorney General's Guidelines to Prosecutors regarding the prosecution of drug offenses. These changes were in part motivated by a desire to reduce the constantly escalating costs associated with incarceration, to reduce the ever increasing number of people who are unable to find employment as the result of a criminal conviction and a recognition of the human and financial costs from the expansion of the category of people who are unable to make an economic contribution as well as a personal contribution thru their own rehabilitation/education to their families and society as a whole.

In my experience a CCM report recommending admission/rejection for PTI makes reference to such factors as: age, marital status/children, military service history, residence location-cohabitants-length of time at residence/in county/in state, family history (parents/siblings/DYFS), criminal (Superior/Municipal) and family court history and compliance with court imposed conditions, education, defendant's physical appearance, defendant's health status (disabilities/cognitive impairments, prior medical/mental health treatment, substance abuse history/treatment), employment history, financial status (assets/liabilities), instant offense circumstances, special factors relative to the offense, victim's statement, defendant's version of the offense. CCM also has the defendant execute releases and sends releases to institutions/agencies to obtain documentation to verify a defendant's statements. Given the collateral consequences that flow from a criminal conviction (inability to obtain employment, loss of housing, loss of educational opportunities due to ineligibility for financial aid, loss of driver's license, etc.) we should continue our existing broad approach to applications for PTI and the gathering of information related thereto so that CPO's are in the position to make informed decisions regarding acceptance or rejection while at the same time maximizing the benefits to individuals, families and society as a whole.

Expanding the category of those who are ineligible to apply without Prosecutorial consent shifts the initial approval and screening process to the prosecutor to make a preliminary decision to permit the defendant to apply, thereby excluding defendants from the application process and precluding those defendants and their attorneys from advocating for their admission based upon their individual and unique circumstances. Such shifting is unworkable. CPO's do not have staff dedicated to the acquisition of the necessary information nor do they have staff trained in the various disciplines which would allow them to consider the breadth and depth of

information enabling CPO's to make a decision on the merits. Likewise, shifting to defendants who do not have an attorney or shifting to defendant's attorneys the burden of gathering the extensive information usually amassed by CCM, is unworkable within the time frames proposed by the Committee. Requests for "confidential" information from various persons/agencies by CCM usually result in prompt and positive replies, in part because CCM has the client execute the necessary current release forms required and because of its status as a part of the Judiciary.

Additionally, it is likely that unrepresented defendants and/or defendant's attorneys would be wary of and/or unwilling to provide directly to the CPO information which could be considered "confidential" (and in violation of attorney client confidentiality) that the Prosecutor could be used against them. Furthermore, it is unlikely that CPO's will accept a defendants or their attorney's mere recitation of extraordinary and compelling circumstances justifying consideration of the PTI application without supporting documentation. Our Appellate Division's recent decision in State v. Green, App. Div., per curiam, Docket No. A-4456-11T4, unpublished, decided January 29, 2014, is instructive in this regard. In granting the defendant the right to apply the Appellate Division went on to say:

"The State has presented no authority to support the proposition that the breadth of the prosecutor's discretion is so expansive as to include a gatekeeper function of determining who may or may not apply for PTI in the first instance. One of the bedrock principles underlying pretrial intervention is that "[a]ny defendant accused of crime shall be eligible for admission into a PTI program." Guidelines for Operation of Pretrial Intervention in New Jersey, Pressler and Verniero, Current N.J. Court Rules, Guideline 2 at 1143 (2014). In Caliguiri, the State argued that "if a defendant is presumptively ineligible for PTI for committing a crime that carries the second-degree presumption of incarceration, then a defendant must be completely ineligible for PTI when the crime . . . requires incarceration." Caliguiri, supra, 158 N.J. at 38-39. The Court rejected this argument, observing that, although N.J.S.A. 2C:43-12 creates rebuttable presumptions against eligibility for certain offenses, it does not render any offender "categorically ineligible." Id. at 39. Guideline 2 in Rule 3:28 states in pertinent part: When the application indicates factors which would ordinarily lead to exclusion under the guidelines established hereinafter, the applicant nevertheless shall have the opportunity to present to the criminal division manager, and through the criminal division manager to the prosecutor, any facts or materials demonstrating the defendant's amenability to the rehabilitative process, showing compelling reasons justifying the defendant's admission, and establishing that a decision against enrollment would be arbitrary and unreasonable. [Pressler and Verniero, supra, Guideline 2 (emphasis added).] The Official Comment to this Guideline states, "each applicant for a PTI program is entitled to full and fair consideration of his or her application." Id. at comment on Guideline 2. Moreover, Guidelines 6 and 8 establish the procedures for an unsuccessful applicant's challenge to a rejection by the criminal division manager or the prosecutor's consent to enrollment. See id. at Guidelines 6 and 8."

The Green Court's holding makes it clear why this proposed category of *ineligible to apply without Prosecutor consent* is a denial of due process and from a practical point

unworkable. Individual defendants and/or their counsel will not be in a position to present compelling reasons justifying taking an application and/or justifying admission of the same scope and breadth of that contained in the present CCM report and consequently there could not be a decision based on the actual merits of the applicant. *"Our point is simply that the court's PTI program must actually consider the merits of the defendant's application and provide a recommendation based on that consideration. The criminal division may not "defer" to the prosecutor in the sense of declining in advance to give any consideration to the merits of a defendant's application unless the prosecutor joins in the application.* ***The latter form of "deference" gives the prosecutor complete control over the PTI application process, while abdicating the role of the court-managed PTI program in evaluating PTI applications. It also deprives the Law Division judge of the criminal division manager's independent evaluation of the application, in case there is a PTI appeal.*** *Here, both the prosecutor and the PTI program provided reasons why defendant should be denied admission to the program. However, those statements cannot be considered the product of a consideration of the merits of defendant's application simply because defendant was never permitted to submit an application which, as the trial court observed, he had the absolute right to do. The prosecutor's exercise of a gatekeeper function, precluding defendant's admission based upon a vicinage policy amounts to a clear error in judgment that subverts the goals of the PTI program."* Green supra, emphasis added, citations omitted.

The proposed rules regarding ineligibility to apply for PTI also exclude any consideration of remoteness in time of a conviction for a prior crime regardless of the length of time between the present offense and prior crime and regardless of the facts/circumstances surrounding the prior crime. Under the existing PTI guidelines and rules defendants who have a prior conviction for a first or second degree crime or who irrespective of the degree of the crime have completed a term of probation, incarceration or parole within five years prior to the date of application can *apply* for PTI. The rule as proposed does not allow an individual defendant or their attorney to advocate the existence of unique and compelling circumstances justifying their admission or enable CPO's to exercise their discretion to resolve appropriate cases.

As previously stated there is no substantive justification for modifying the existing PTI rules and guidelines regarding eligibility and thereby reducing the number of people who are eligible to apply for PTI. On the other hand we offer the following alternative to the rule changes proposed by the Committee:

R.3:28-1(c)(3). Prior Convictions. A person who previously has been convicted of any first or second degree offense or its equivalent under the laws of another state or the United States and **who has completed a term of probation, incarceration or parole more than five years prior to the date of application for diversion shall be eligible to apply** for admission into pretrial intervention, **but they shall ordinarily not be considered for enrollment in PTI unless the prosecutor consents to his or her enrollment into the pretrial intervention program."**

R. 3:28-1(d)(1). No Prior Convictions. A person who has not previously been convicted of an indictable offense in New Jersey, and who has not previously been convicted of an indictable or felony offense under the laws of another state or the United States, **but who is charged with a crime, or crimes, for which there is a presumption of incarceration or a mandatory minimum period of parole ineligibility shall be eligible to apply for pretrial intervention. When a person is charged with a crime, or crimes, for which there is a presumption of incarceration or a mandatory minimum period of parole ineligibility, the nature of those crimes shall be a factor to be considered as set forth in Guideline 3(i).**

R. 3:28-1(d)(2). Prior Convictions. A person who has previously been convicted of a third or fourth degree indictable offense in New Jersey, or its equivalent under the laws of another state or of the United States , **and who have completed a term of probation, incarceration or parole within five years prior to the date of application for diversion shall be eligible to apply for pretrial intervention but they shall ordinarily not be considered for enrollment in PTI unless the prosecutor consents to his or her enrollment into the pretrial intervention program.**

Thank you for your consideration of the above,

Richard D. Barker, NJSBA Representative

NJ Supreme Court Criminal Practice Committee

cc: Paris P. Eliades, Esq., President, NJSBA

APPENDIX B

Dissent to the Proposed Amendments to R. 3:28
New Rules 3:28-1 to 3:28-10 – Pretrial Intervention
filed by John Cannel, Esq.

Joined In By:

Richard D. Barker, Esq.
(representing the New Jersey State Bar Association)

Eric Breslin, Esq.

Tana McPherson, Esq.
(representing the Association of Black Women Lawyers of New Jersey)

Mary Ciancimino, Esq., Deputy Public Defender
Jeffrey Coghlan, Esq., Deputy Public Defender
John McMahon, Esq., Assistant Deputy Public Defender (the three representatives of the Office of the Public Defender on behalf of that office)

I am writing to dissent from the rule revisions on Pre Trial Intervention being proposed in the report of the Criminal Practice Committee. From time to time I have disagreed with the Committee's decisions, but this is the first dissent that I have filed. This dissent concerns only the recommendation for *Rule* 3:28-1(c)(3). That rule would absolutely bar certain defendants from applying for PTI even with consent by the prosecution to the application. I believe that adoption of this provision is legally questionable and unwise.

Winberry v. Salisbury, 5 *N.J.* 240, 247, 255, *cert. denied*, 340 *U.S.* 877 (1950) establishes a bright line between the power of the Court and that of the Legislature. If the matter is one of procedure, the Court is authoritative and legislative enactments are invalid. Matters that are substantive are in the province of the Legislature, and the Court has been careful to avoid intrusion. As with many areas, PTI involves both substantive and procedural rules. However, as the Criminal Practice Committee has drafted its proposed rules, the distinction is clear. Most of what the Committee proposes is procedural. When a defendant may apply, to whom he applies, and how the application is considered are matters of procedure. Even proposed *Rule* 3:28-1(d) is procedural as it allows applications but changed the way these applications are considered. But proposed *Rule* 3:28-1(c), which limits which defendants are eligible to apply for PTI is substantive. Not only is eligibility substantive and appropriate for legislative action, it has been the subject of law. Subsections (c)(1) and (c)(2) of proposed *Rule* 3:28-1(c) reflect the Legislature's decisions on eligibility and, as such, are appropriate. However, subsection (c)(3) deviates from legislation. *N.J.S.A.* 2C:43-12 does not provide restrictions on who may apply, saying, that it was available to applicants "on an equal basis." In most cases where the Legislature has placed limitations it has used phrases like "should ordinarily be limited" (*N.J.S.A.* 2C:43-12(a)) and "there shall be a presumption against admission" (*N.J.S.A.* 2C:43-12(b)). This kind of limitation can be appropriately reflected in the kind of procedural rule the Committee proposes as *Rule* 3:28-1(d). For instance, the Legislature does make an absolute restriction in subsection (g) of *N.J.S.A.* 2C:43-12 by limiting supervisory treatment, including PTI, to a single time. The Committee appropriately adopts that as proposed in *Rule* 3:28-1(c)(1). The Committee's proposed language in *Rule* 3:28-1(c)(2) is fairly implied by consistent interpretation and the language of *N.J.S.A.* 2C:43-12(a). But there is no legislative basis for proposed *Rule* 3:28(c)(3). If the Legislature intended such a bar to admission, it could have included similar provisions in the statute.

Since the PTI program was incorporated into a statute within the Criminal Code, the Court has been careful to assure that *Rule* 3:28 and the *Guidelines* governing PTI are consistent with the statutory program. Procedural changes were made, but the principle of open availability for applicants was never limited. There was a concern that any variation between rules and statutes could give rise to claims that there were two PTI programs, a Court program and a statutory program, rather than one PTI program. That could lead to multiple applications and litigation. That is not to say that court rules have no role in making PTI more efficient and in dealing with baseless applications fairly but expeditiously. Procedural devices can be used to avoid devoting judicial resources to evaluating cases that will inevitably be rejected. That was the approach taken by the Supreme Court Committee in 1981 chaired by Justice Pashman. That is also the approach that is now being taken by the Criminal Practice Committee in most of its proposal including that for *Rule* 3:28-1(d). The proposal for *Rule* 3:28-1(d) would require that particular classes of applications go first to the prosecutor for initial consideration. Only if the prosecutor consents would the application be developed fully by criminal case managers in the judiciary. That approach prevents wasted effort but preserves the legislative scheme that PTI be available to everyone though to some only in extraordinary cases. The same logic that impelled the Committee to adopt a procedural approach in *Rule* 3:28-1(d) should apply to those cases that the Committee put in *Rule* 3:28(c)(3).

In short, the Committee had an option to achieve almost all of its goal without raising concerns related to *Winberry v. Salisbury*. Its proposal for *Rule* 3:28-1(c)(3) is unnecessary. The Committee appears to rely on the procedure established by *N.J.S.A.* 2C:43-14 through 20 to allow the court to make substantive changes to the PTI program. That procedure seems to be based on the process for Rules of Evidence. *N.J.S.A.* 2A:84A-33, et. seq. But rules on the "admission and rejection of evidence" lie in the no-mans-land between procedure and substance. A few parts of evidence law have always been considered substantive. For example, the Supreme Court has never used the rule-making procedure for a rule establishing an evidentiary privilege. That subject was considered substantive and left exclusively to the Legislature. A similar approach should be taken to *N.J.S.A.* 2C:43-14. If a matter is purely procedural, the Court may choose to act on its own without submitting the rule to a Judicial Conference. If the matter is substantive, it should be left to the Legislature, as are testamentary privileges. If there

are matters that could be classified as partly procedural and partly substantive, like rules on the admission of evidence, the Court may decide to follow the statutory procedure.

One final note. The original Report prepared by the Conference of Criminal Division Managers, and endorsed by the Conference of Criminal Presiding Judges and the Judicial Council, based its recommendations on a finding of a waste of resources in considering PTI applications. While I trust that there is a problem, the nature of the problem may deserve more study. The only clear statistics in the Report concerned applications in cases where a first or second degree crime was charged. Those statistics indicate that in 2009, in second degree cases, 42% of those applicants were admitted into PTI and in first degree cases, 18% were admitted. In both cases the percentages are surprisingly high raising questions about the nature and degree of the problem.

Respectfully submitted,

John M. Cannel