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June 8, 2016

**The Honorable Glenn A. Grant, J.A.D.**  
Acting Administrative Director of the Courts  
Comments on Bail Judge Subcommittee Report  
Hughes Justice Complex, PO Box 037  
Trenton, New Jersey 08625-0037

Re: **Comments - Bail Forfeiture Recovery Process; Bail Bond System-**  
Report of the Bail Judge Subcommittee of the Conference of  
Criminal Presiding Judges

To the Honorable Court:

Enclosed are responsive comments prepared upon review of the recent report of the Bail Judge Subcommittee on the Bail Forfeiture Recovery Process and the Bail Bond System.

**Background:**

Despite the recent changes to the New Jersey Constitution, which have yet to be actually adopted, the relevant rights of the criminal defendant are found at Article I of the New Jersey Constitution, and closely follow the federal Bill of Rights, Amendments I-X of the United States Constitution:

**N.J. Const., Article I**

**Section 10.** *In all criminal prosecutions the accused shall have the right to a **speedy and public trial by an impartial jury....***

**Section 11.** No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.

**Section 12.** Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted.

Further, Title 2A: Chapter 162, Bail and Recognizances, specifically, N.J.S. 2A:162-1, *et seq.* governs bails and recognizances. There is a six-year statute of limitations for seeking a judgment on forfeiture (N.J.S. 2A:162-5), and a four-year statute of limitations for seeking remission of forfeiture (N.J.S. 2A:162-8). Through these chapters, the Supreme Court may adopt rules to determine the “sufficiency of bail,” (N.J.S. 2A:162-14).

The report relies on State v. Hyers, 122 N.J. Super. 177 (App. Div. 1973) as the underpinning for the remission of funds in New Jersey. In fact, *Hyers* addressed a question of whether return of a fugitive after entry of judgment justified a return of funds minus costs. The Appellate Division neither granted return of funds nor denied the return of funds opting instead to remand for a hearing to review equitable factors. State v. Hyers, 122 N.J. Super. 177 (App. Div. 1973). The Court in *Hyers* stated:

“When any court which has ordered or shall order the forfeiture of a recognizance, the amount whereof has been or shall be paid into the county treasury of any county in accordance with law, shall thereafter, in its discretion, order the return of the moneys so paid upon the forfeited recognizance, the treasurer of the county shall thereupon repay the amount of such recognizance, less the taxed costs on the proceedings to forfeit the same, to the recognizer or recognizers or the personal representatives of any deceased recognizer, who shall have paid the same into the county treasury. Application for a return of moneys so paid shall be made to the court **within 4 years** after the recognizance shall have been declared forfeited.” N.J.S. 2A:162-8 (Emphasis supplied.)

The Court went on to find:

“As we read the record, the trial judge appears to have determined that a decision as to whether the ‘interest of justice’ will be served requires only a consideration of whether there has been some excuse for the nonappearance of defendant. **We find this interpretation of R. 3:26-6(b) to be too restrictive.**” State v. Hyers, 122 N.J. Super. 177, 180 (App. Div. 1973). (Emphasis supplied).

It is important, therefore, to examine the procedural and substantive developments that led to the suggested changes.

### **General Procedural Objections:**

The Subcommittee report contains specific recommendations designed to radically alter the bail bond forfeiture process and streamline the collection of monies arising as a result of these bail bond forfeitures. In sum, these changes have been designed to increase the collection of funds on the front end of Criminal Justice System. In reviewing these changes, careful attention should be paid to the following: (1) who was invited to discuss the bail forfeiture process with the Subcommittee; (2) whether the changes invade the province of the New Jersey Legislature; and, (3) whether these recommendations have a chilling effect on an accused’s Constitutional Right to bail. A review of these issues leads to the inescapable conclusion that the May 09, 2016, ex parte Report of the Bail Judge Subcommittee invades the province of the Legislature while simultaneously subverting the liberties guaranteed to an accused by the United States and New Jersey Constitutions.

At the outset, it is important to recognize that this report and the recommendations which flow from this report were prepared with little or no input from either the bail agents or sureties directly. The discussions with County Counsel on these issues should have been open to

counter- analysis. Such discussions should have included a robust debate on the solutions to the “problems” perceived by the judiciary.

To address the “problems”, the Subcommittee dedicated itself to obtaining a “**full understanding**” of the bail forfeiture recovery process. In order to educate itself about the bail forfeiture process, the Subcommittee “invited (**only**) county counsel from various counties to discuss their thoughts” on specific bail forfeiture topics. There is something troubling about how the Subcommittee attempted to obtain this “full understanding” about the bail forfeiture recovery process.

No indication was made in the Subcommittee’s report that the Subcommittee attempted to discuss the bail forfeiture recovery process with any member of the insurance industry, or counsel for corporate sureties; or, that the Committee consulted any member of the criminal defense bar who handle these types of issues in Court. Rather, the Subcommittee invited only those tasked with prosecuting and collecting current and impending bail forfeiture cases to discuss their views on the current system and make recommendations regarding a future system.

Without input from those individuals who represent corporate sureties, the Subcommittee could not possibly obtain a “**full understanding**” of the bail bond forfeiture recovery process. Without a full understanding, the efforts to properly recommend any changes to the bail process is inextricably tainted.

It is odd that the members of the judiciary tasked with hearing current and impending bail forfeiture matters would have solicited the opinions only of those charged with prosecuting these matters. The invitation and participation of the “county counsel from various counties” is even more alarming when viewed in conjunction with N.J.A.C. 1:1-14.5. In New Jersey the Administrative Code, specifically N.J.A.C. 1:1-14.5, addresses the issue of ex parte

communications. The Code provides:

“Except as specifically permitted by law or this chapter, a judge may not initiate or consider ex parte any evidence or communications concerning issues of fact or law in a pending or impending proceeding. Where ex parte communications are unavoidable, the judge shall advise all parties of the communications as soon as possible thereafter.”

In addition, communications with an interested party are set forth in Canon 3 of the Code of Judicial Conduct. Canon 3 of the Code of Judicial Conduct mandates that a judge should perform the duties of office impartially and diligently. Subsection A(6) of this Canon sets forth the prohibition on ex parte communications. Canon 3(A)(6) states:

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

It appears as though the Administrative Code and the Canons of Judicial Conduct provide the means by which a judge, or judicial committee, may obtain a full understanding of a process and procedure. Both the Administrative Code and the Cannons of Judicial Conduct prohibit a judge from initiating or considering ex parte or other communications concerning a pending or impending matter. *See generally, New Jersey Racing Commission v. Silverman*, 303 N.J. Super. 293 (App. Div. 1997).

It is beyond dispute that there are commercial sureties who have pending and impending forfeitures matters in the State of New Jersey. It is beyond dispute that there are commercial sureties who have an interest in these matters were not asked to participate in the discussion

concerning the future of the bail bond forfeiture process prior to the Subcommittee making its recommendations. Finally, it is worth noting that the Subcommittee did not give commercial sureties an opportunity to participate in the discussion concerning the bail forfeiture recovery process prior to formulating its recommendations.

As the New Jersey Appellate Division noted in New Jersey Racing Commission v. Silverman, 303 N.J. Super. 293 (App. Div. 1997), "... it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert." Id. The task of the Subcommittee was administrative. They were tasked with determining whether any facets of the bail forfeiture process required revision. The Subcommittee openly professed that they sought a "full understanding" of the process. Yet, this process did not provide any commercial surety with a meaningful opportunity to participate and led to the advancement of the State's pecuniary interest to the detriment of the surety and an accused's Eighth Amendment Right to bail.

Prior to issuing their recommendations, New Jersey Commercial Sureties were never notified of the Subcommittee's ex parte communications with the County Counsel. *See generally*, New Jersey Racing Commission v. Silverman, 303 N.J. Super. 293 (App. Div. 1997). The unfairness of the Subcommittee's communications became clear when it revealed its recommendations. Without speaking to a commercial surety the Subcommittee propounded recommendations that: (1) reduce the statute of limitations in bail bond forfeiture actions from four years to one year; (2) reimburse the State for its costs strictly based upon the passage of time; and, (3) produced a chilling effect on a defendant's ability to obtain pre-trial release as guaranteed by the United States Constitution. In order to obtain a full understanding of the bail

bond forfeiture process, one must be truly sensitive to: the interplay of current statutes; the current case law; and, the actors involved in facilitating an accused's right to pre-trial release.

**General Substantive Objections:**

The report based a large portion of its comments on the laws governing bail forfeitures from the state of Connecticut. It failed, however, to recognize the full body of Connecticut law on this topic. The Committee cites Connecticut Practice Book § 38-22. It does not, however, acknowledge the automatic stay of enforcing judgments for six (6) months prior to the calculation of remission. *Conn. Practice Book § 38-21 (a) & § 38-21(b)*. Both sections of §38-21 provide a six (6) month stay of judgment provision, wherein the judgement of forfeiture is stayed. If the accused is returned to justice within that time frame, the forfeiture is nullified by operation of law.

In addition, the Committee also erred when it failed to contemplate other sources of information outside of the Connecticut framework that would come directly to bear on the issue of bail forfeiture recovery and may make the process more efficient, effective an economic. The Committee is encouraged to review the recently enacted bail forfeiture recovery laws located at 42 Pa. C.S. 5747.1 of the Pennsylvania Judicial Code. 42 Pa. C.S. 5747.1 establishes a bright-line statewide rule that requires a 90 day delay of an order of judgment of forfeiture following non-appearance. The statute further limits defenses for the implementation of forfeiture and further provides for a two (2) year partial remission schedule. Similar to Connecticut, the order of revocation or forfeiture is nullified by operation of law if the accused person is returned to custody.

Beyond what is contained in the Conn. Practice Book, on March 16, 2010, the Chief State's Attorney for the state of Connecticut issued a letter, with explanatory comment and compromise

schedule on March 16, 2010. This correspondence makes clear the terms used and applied in the bail forfeiture process and also makes clear the settlement rate for forfeitures to be paid *after the expiration of the statutory stay*.

Consistent with the principals of assured appearance and public safety contained in the recent Constitutional amendment, such stay of judgment or delayed judgment provisions are necessary to afford a bail agent an opportunity to conduct the necessary investigation to return the accused person to Court. Moreover, the requirement that stays be signed by Judges to avoid preclusion is cumbersome and time-consuming. Automatic stay of judgment or delayed judgment would avoid unnecessary allocation of precious resources.

Of equal concern to the shifting purposes of bail, is the abandonment of all appellate case law precedent requiring the trial court to weigh the equitable issues involved before imposing a cost figure on these contract disputes. The proposed changes to the guidelines do not provide authority for a judge to consider the amount of the bond in determining the amount of remission. In State v. dela Hoya the Appellate Division wisely noted that “in determining the amount of a partial remission, the court should take into account not only an appropriate percentage of the bail bond but also its quantum. Illustratively, fifty percent of a \$100,000.00 bond is a very different matter from fifty percent of a \$5,000.00 bond.” State v. dela Hoya, 359 N.J. Super. 194, 199 (2003). Moreover, the current proposed structure contradicts the purpose of a forfeiture proceeding.

In State v. Harmon, 361 N.J. Super. 250 (App. Div. 2003) the Appellate Division reminded the trial courts that their decisions were to be consistent with the policy concerns set forth in de la Hoya, 359 N.J. Super. at 199. Paramount among the Court’s policy concerns was,

... the necessity to provide a reasonable incentive to the surety to attempt the recapture of the non-appearing defendant and to assure that the onus is placed on commercial sureties is not so great as to risk the impairment of a defendant **realistic** right to post pretrial bail. (Emphasis added.)

The proposed guidelines are unduly harsh on those who post bail. They impose heavy handed penalties for defendant's who are out for what could only be described as a nominal period of time. As such, the proposed guidelines will impair a defendant's realistic right to post pretrial bail because of how harshly they treat commercial sureties. These rules, therefore, contradict a the litany of case law established to vindicate the public interest and result in the return of fugitive defendants.

In New Jersey, the purpose of bail has never been to raise money for the State or County coffers. Once again, the Harmon Court noted that bail should not, "be viewed as primarily a revenue-raising technique for the public fisc." State v. Harmon, 361 N.J. Super. 250, 254 (App. Div. 2003). In addition, the Court also noted that the purpose of bail is "not to produce revenue for the county or state, but to facilitate a viable bail system fair to all concerned." State v. Dillard, 361 N.J. Super. 184, 188 (App. Div. 2003). In its current incarnation, the proposed guidelines do not comport with the Appellate Division's holdings on the issue of bail.

### **Objections to the Recommendations of the Committee**

As stated above, the language of the proposed revision seeks to specifically avoid the consideration of factors not expressly contained in the rules. However, the guidelines attempt to capture judicial discretion by including factors for the court to weigh. If the desire is to adopt a series of guidelines that establishes bright line tests that are used to statutorily weigh whether a forfeiture should be remitted, then permitting such discretion is counter-productive. If the desire

is to ensure that judicial discretion is preserved, then guidelines should be abandoned. Reconciling the guideline with the preservation of judicial discretion will result in ambiguous and often inconsistent results not unlike that which these rules seek to discontinue.

Secondly, the rule establishes a complicated procedure where in bail must be set aside by written objection to receive an initial seventy five (75) day stay, which can be extended one time only for thirty (30) days if ruled upon by the Court. A meaningful alternative would be to fix an automatic stay period of one hundred and eighty (180) days from the notice of forfeiture being served until the date that the forfeiture was due, following the Connecticut model touted by the Subcommittee as a solution.

Moreover, the guidelines proposed by the Committee begin the monetary penalty calculations from the date that the defendant fails to appear in court - not from the date of the notice. State v. Hawkins, 382 N.J.Sup. 67 (App.Div. 2005). In Hawkins, the date of notice is the date that the notice was mailed to the surety. This notification process provides all parties with Due Process prior to the deprivation of property.

In addition to bright line deadlines, there should be an automatic nullification procedure if the defendant is either returned to custody in the jurisdiction where the forfeiture arose or in any jurisdiction in New Jersey or the United States of America. Again, keeping consistent with the principles of the recent constitutional amendment, this would best reasonably assure public safety will be protected.

Finally, the proposed guidelines usurp a legislative function by overriding the law set forth in N.J.S.A. 2A:162-8. The proposed guidelines begin to penalize the surety at a rate of 1% -10% after a nonappearance. This avoids a stay provision and removes the time period for

remissions as set forth in N.J.S.A. 2A:162-8, which provides a 4 year remission period after a forfeiture is entered.

Often enough, defendants appear in court within a very short period of time after a nonappearance, the warrant is vacated but bail is not reinstated. Many times a defendant's nonappearance was excusable, or for a legitimate reason, such as an emergency medical procedure or need. Often a surety will produce a defendant within days of a forfeiture. Courts should have the discretion to order "zero" forfeiture.

In New Jersey the "primary focus" should be on the surety's efforts under the circumstances of the case. State v. Toscano, 389 N.J. Super. 366 (App. Div. 2007). New Jersey has long since recognized the equitable principles involved in each fact specific case. The Toscano Court noted that,

"Cases in which the surety simply checks court records while waiting for the authorities to recapture the defendant are different than cases in which the defendant has been located and is no longer a fugitive when the surety receives the notice of failure to appear. The trial court **must consider** differences in exercising its discretion to accept, increase or decrease the remission amount..."

Id.

The Subcommittee Report is premised on the erroneous assumption that all bail bond forfeiture cases are the same. Simply put, they are not. New Jersey has always recognized that a recognizance is a contract. State v. Midland Ins. Co., 167 N.J. Super. 419 (App. Div. 1979). Accordingly, the traditional rules of contract law are applicable. Id. at 422. The Subcommittee's attempt to obtain a uniform result in each and every bail forfeiture that is resolved by way of a negotiated agreement taxes credulity. No one would dare suggest that every breach of contract in an employment case should have the same result. Why? The answer is simply that every contract has a different set of facts that a court must consider when deciding a dispute. The

same is true when dealing with bail bond forfeitures. If the Subcommittee were to simply abandon the erroneous premise that all bail bond contracts are the same, then it would be in a position to understand that the differences in settlements are predicated upon the differences in the facts of each and every case. Once the erroneous premise has been abandoned, the case law and the current guidelines take care of the rest. No further reform is necessary.

**Conclusion**

For the foregoing reasons it is respectfully submitted that the May 09, 2016, Report of the Bail Judge Subcommittee (1) invades the province of the Legislature; (2) subverts the well-established purpose of bail; and, (3) simultaneously subverts the liberties guaranteed to an accused by the by both the United States and New Jersey Constitutions.

The Court and the Committee should reconvene with all of those who have a stake in the process and address the concerns over process, practice and comparison, with the goal of taking that which works and making it more efficient, economic and impactful for all.

Respectfully Submitted;

  
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A Member