REPORT OF THE

SUPREME COURT COMMITTEE

ON

CRIMINAL PRACTICE

2011 – 2013 TERM

January 31, 2013

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I. Rule Amendments Recommended for Adoption

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

During the 2009 - 2011 term, the Committee considered a technical amendment to R. 3:14-1(j) in recognition of the rights of civil partners, as recommendations were being proposed to make similar amendments to Part I and Part IV of the court rules. The Committee recognized that, since its inception R. 3:14-1 has only been amended twice. In 1975, prior to the enactment of the Title 2C Criminal Code (L. 1978, c. 95), the rule was amended to add paragraph (k) to address venue for indictments returned by the State Grand Jury. Thereafter, R. 3:14-1 was amended in 1994 in conformance with the Supreme Court's policy on gender-neutrality. Upon reviewing the language of the rule in its entirety, the Committee agreed that the substance of the entire language of R. 3:14-1 governing venue should be updated. The Committee's review was guided by language in the "Territorial Applicability" statute, N.J.S.A. 2C:1-3, which governs jurisdiction for a person to be convicted of an offense under the laws of the State of New Jersey. The Committee is recommending several revisions to R. 3:14-1, which are set forth below.

1. Proposed Revisions to Paragraph (a): As currently written, the rule provides: "[a]n offense shall be prosecuted in the county in which it was committed" and it continues to list several exceptions to the rule that are listed in paragraphs (a) through (k). The Committee is recommending that paragraph (a) be revised to list six general categories for venue, which are similar to the language in N.J.S.A. 2C:1-3(a) to determine jurisdiction for a person to be convicted of an offense in New Jersey. As amended, the proposed language R. 3:14-1(a) would provide that an offense shall be prosecuted in the

county where: (1) conduct which is an element of the offense occurred; (2) the result which is an element of the offense occurred; (3) if harm to a victim or depriving a victim of a benefit is an element of the offense, where the victim resides; (4) conduct sufficient to constitute an attempt occurred; (5) conduct sufficient to constitute a conspiracy to commit an offense occurred; or (6) conduct establishing complicity in the commission of, or an attempt, or conspiracy to commit, an offense occurred. In recommending the revisions to paragraph (a), the Committee is also recommending that the current language in paragraph (a), which addresses situations where the offense occurred in more than one county, be moved to new paragraph (f), which is discussed below.

2. Proposed Revisions to Paragraph (b): Currently, paragraphs (b), (c) and (d) of the rule discuss venue for homicides. Paragraphs (b) – (d) of R. 3:14-1 currently state:

> (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.

N.J.S.A. 2C:1-3(d) provides:

> d. When the offense is homicide, either the death of the victim or the bodily impact causing death

> constitutes a "result," within the meaning of subsection a.(1) and if the body of a homicide victim is found within the State, it may be inferred that such result occurred within the State.

The Committee is recommending revisions to paragraph (b) of R. 3:14-1 that would consolidate current paragraphs (b), (c), and (d) that govern venue for homicide offenses into one subsection. These revisions are similar to the language in N.J.S.A. 2C:1-3(d), which governs when a person can be convicted of a homicide under the laws of this state. As revised, the new language in paragraph (b) of the rule would provide as follows:

> (b) A homicide may be prosecuted in a county in which either the death of the victim or the bodily impact causing death occurred; if the body of a homicide victim is found within a county, it may be inferred that the death of the victim or the bodily impact causing death occurred within the county.

3. New Language for Paragraph (c): The Committee is recommending that paragraphs (h) and (i) be redesignated and incorporated into new paragraph (c) to consolidate venue for acts of forgery, fraud, theft by deception or unlawful disposition, and receiving stolen property. Currently, paragraphs (h) and (i) of R. 3:14-1 provide that

> (h) 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, may be prosecuted in any county into or through which the stolen property is brought.
>
> (i) Prosecutions for acts of forgery, embezzlement, conversion or misappropriation may be had either in the county in which such offense was committed or in the county in which the offender last resided.

First, paragraph (c) is being revised to update and incorporate the crimes of fraud, theft by deception or unlawful disposition, or receiving stolen property, some of which are currently referenced in paragraph (h) and (i) of the rule. The proposed revisions to paragraph (c) also delete references to embezzlement, conversion and misappropriation, formerly governed by the Title 2A statutes, which now fall within the categories of theft offenses in Title 2C of the Criminal Code. The proposed revisions to paragraph (c) (with the additions underlined and the deletions in brackets) are as follows:

> (c) Acts of forgery, [embezzlement, conversion or misappropriation] fraud, theft by deception or unlawful disposition, or receiving stolen property may be prosecuted [had] either in the county in which [such] the offense was committed or in the county in which the offender last resided.

4. New Language for Paragraph (d)

The Committee is recommending that new language for paragraph (d) be added to the rule to address venue for nonsupport, N.J.S.A. 2C:24-5. The proposed language for new paragraph (d) provides:

> (d) Nonsupport may be prosecuted in any county in which the victim resided at the time of the nonsupport or in the county in which the victim resides when the prosecution is begun.

5. New Language for Paragraph (e)

The Committee is recommending that the current language in paragraph (k) of the rule, which governs the county of venue for trials for indictments returned by a State Grand Jury be redesignated as new paragraph (e). The Committee is not recommending any substantive changes to the current language of the rule.

6. New Language for Paragraph (f)

The Committee is recommending that the current language in paragraph (a) of the rule, which governs situations where venue may be had in multiple counties be redesignated as new paragraph (f). The Committee is not recommending any substantive changes to the current language of the rule.

7. Deleted Paragraphs: In light of the revised paragraph designations above, the Committee is recommending that current paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) of the current rule be deleted. Paragraphs (c) and (d) address venue for homicide offenses and, as discussed above, that language has been revised and incorporated into new paragraph (b) of the rule. Paragraph (e) addresses venue for treason. The treason statute, N.J.S.A. 2A:148-1 to -148-22.1 was repealed by L. 1978, c. 95 (eff. Sept 1, 1979). 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). Paragraph (j) addresses venue for desertion. The desertion statute, N.J.S.A. 2A:100-1 to -8 was repealed by L. 1978, c. 95 (effective Sept. 1. 1979). The Committee is therefore recommending that current paragraphs (e), (f), and (j) of the rule, which address treason, libel and desertion, respectively, should be deleted because those statutes were repealed effective September 1, 1979. Paragraph (g) of the rule addresses venue for an accessory to a crime. The Committee is recommending that current paragraph (g) of the rule should be deleted and that a corresponding amendment to subsection (a)(6), as set forth above, be made to incorporate venue for complicity. Furthermore, as current paragraphs (h) and (i) of the rule address crimes which are now codified as theft offenses and crimes involving

receiving stolen property, the Committee recommends deleting paragraphs (h) and (i) and moving the appropriate language to revised paragraph (c), as set forth above.

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

3:14-1. Venue

(a) An offense shall be prosecuted in [the] a county where [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.]

(1) conduct which is an element of the offense occurred;

(2) the result which is an element of the offense occurred;

(3) if harm to a victim or depriving a victim of a benefit is an element of the offense, where the victim resides;

(4) conduct sufficient to constitute an attempt occurred;

(5) conduct sufficient to constitute a conspiracy to commit an offense occurred; or

(6) conduct establishing complicity in the commission of, or an attempt, or conspiracy to commit, an offense occurred.

(b) A homicide may be prosecuted in a county in which either the death of the victim or the criminal act or conduct resulting in death occurred, or in a county in which the body of a homicide victim is found, regardless of where the offense was committed. [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) 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) 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, may be prosecuted in any county into or through which the stolen property is brought.

(i) Prosecutions for a]

(c) Acts of forgery, [embezzlement, conversion or misappropriation] fraud, theft by deception or unlawful disposition, or receiving stolen property may be prosecuted [had] either in the county in which [such] the offense was committed or in the county in which the offender last resided.

[(j) Prosecutions for desertion may be had either in the county in which the wife or any child resided at the time of the desertion or in the county in which the wife resides

when the prosecution is begun.]

(d) Nonsupport may be prosecuted in any county in which the victim resided at the time of the nonsupport or in the county in which the victim resides when the prosecution is begun.

[k] (e) 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).

(f) 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.

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 (a) and (b) amended, paragraphs (c), (d), (e), (f), (g), (h) and (j) deleted, paragraph (i) redesignated as amended paragraph (c), text of paragraph (a) redesignated as new paragraph (f), text of paragraph (k) redesignated as new paragraph (e) and new paragraph (d) adopted to be effective .

B. Proposed Amendments to R. 3:26-2(d) – Bail Reduction Motions

The Committee is recommending an amendment to R. 3:26-2 to address a possible conflict between R. 3:26-2(d), which governs bail reduction motions and R. 1:6-2(a), which governs the form of motions. R. 1:6-2(a) provides that, in general, motions "shall be by notice of motion in writing unless the court permits it to be made orally." The rule provides an exception from the writing requirement for bail motions made pursuant to R. 3:26-2(d). R. 3:26-2(d) specifically governs bail reduction motions and provides that the first motion for a bail reduction shall be heard no later than seven days after it is filed. The Committee recognized that oral motions, such as those made in bail reduction matters, are not "filed."

The Committee discussed the various practices for filing bail reduction motions across the state, ranging from: a notice of motion filed in writing; a form completed for the court to consider whether bail is excessive; and informal oral motions. The Committee considered whether there should be a requirement to file written motions for bail reductions. However, it recognized that most counties have an informal procedure to request a reduction in the bail amount, and that it would be too time-consuming for the parties to file briefs for these types of matters. The Committee agreed that the court rules should continue to reflect that bail reduction motions can be filed orally. For purposes of clarity, it is recommending revisions to R. 3:26-2(d) to provide that a first application for a bail reduction shall be heard by the court no later than seven days after it is made.

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

3:26-2. Authority to set bail

(a) . . . no change.

(b) . . . no change.

(c) . . . no change.

(d) Bail Reductions. A first [motion] application for bail reduction shall be heard by the court no later than seven days after it is [filed] made.

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 to be effective .

C. Proposed Amendments to R. 3:26-4(g) – Bail Restrictions for Certain Domestic Violence Crimes and Offenses

P.L. 2011, c. 138 amended N.J.S.A. 2A:162-12 to provide that crimes with bail restrictions include certain crimes or offenses involving domestic violence, as set forth in the statute. The Committee is recommending an amendment to R. 3:26-4(g) to include a reference to certain domestic violence crimes or offenses that are ineligible for posting of 10% bail.

The proposed amendments to R. 3:26-4(g) follow.

3:26-4. Form and Place of Deposit; Location of Real Estate; Record of Recognizances, Discharge and Forfeiture Thereof

(a) . . . No change.

(b) . . . No change.

(c) . . . No change.

(d) . . . No change.

(e) . . . No change.

(f) . . . No change.

(g) Ten Percent Cash Bail. Except in first or second degree cases and certain crimes or offenses involving domestic violence as set forth in N.J.S.A. 2A:162-12 and unless the order setting bail specifies to the contrary, whenever bail is set pursuant to Rule 3:26-1, bail may be satisfied by the deposit in court of cash in the amount of ten-percent of the amount of bail fixed and defendant's execution of a recognizance for the remaining ninety percent. No surety shall be required unless the court fixing bail specifically so orders. When cash equal to ten-percent of the bail fixed is deposited pursuant to this Rule, if the cash is owned by someone other than the defendant, the owner shall charge no fee for the deposit other than lawful interest and shall submit an affidavit or certification with the deposit so stating and also listing the names of any other persons for whom the owner has deposited bail. The person making the deposit authorized by this subsection shall file an affidavit or certification concerning the lawful ownership thereof, and on discharge such cash may be returned to the owner named in the affidavit or certification.

Source-R.R. 3:9-5(a)(b)(c)(d)(e)(f)(g). Paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended July 16, 1979 to be effective

September 10, 1979; paragraph (g) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraphs (f) and (g) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (b) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (g) amended February 27, 1995 to be effective immediately; paragraphs (a), (d), (e), (f) and (g) amended June 15, 2007 to be effective September 1, 2007[.]; paragraph (g) amended to be effective .

II. Non Rule Recommendations

A. Proposed Amendments to the Notice of Appeal Rights and Time to File a Petition for Post-Conviction Relief Form

The Supreme Court Clerk's Office asked the Committee to consider a request to revise the court rules to require that trial counsel of record in a criminal matter file a notice of appeal even if trial counsel will not continue to represent the defendant for purposes of appeal. Currently, AOC Directive #3-10 includes the Notice of Appeal Rights and Time to File a Petition for Post-Conviction Relief form (hereafter "Notice of Appeal Rights form"), as well as the related colloquy. The form was developed in response to State v. Molina, 187 N.J. 531 (2006) and was revised to conform with amendments to the rules governing post-conviction relief. Typically, the form is signed by trial counsel and the defendant at sentencing, and it requires that private trial counsel notify the Office of the Public Defender if the defendant will be seeking the services of the Public Defender for purposes of appeal. Specifically, it provides:

> *(To be filled out by Private Counsel Only)*
> If defendant decides to appeal and cannot afford to continue to retain private counsel, I will notify the Office of the Public Defender within 45 days of today's date.

Before the Public Defender's Office can become counsel of record in an appeal, a defendant must be deemed indigent.[1] See N.J.S.A. 2A:158A-5; R. 2:7-2(a). Indigency determinations are conducted by the Criminal Case Management Office in the county

[1] Pursuant to N.J.S.A. 2A:158A-5 the duties of the Public Defender include providing legal representation to indigent defendants charged with the commission of an indictable offense and such representation includes direct appeals.

where the conviction occurred.[2] See N.J.S.A. 2A:158A-15.1. In practice, there can be a delay in the filing of a notice of appeal if an indigency determination is not made before the private attorney notifies the Public Defender's Office that the defendant wishes to seek its services. On the other hand, if a private attorney files a notice of appeal on behalf of the defendant, the attorney will be the "counsel of record" for purposes of the appeal. A concern arises if the defendant cannot afford the private attorney's services, because the attorney may not be able to subsequently withdraw from the case.

In analyzing this issue, the Committee explored whether a rule amendment is necessary to: (1) require that trial counsel of record in a criminal matter file a notice of appeal even if trial counsel will not continue to represent the defendant for purposes of appeal, and (2) to allow a private attorney who files a notice of appeal to withdraw from the case if there is a subsequent finding that the defendant is not indigent, and therefore is ineligible for the services of the Office of the Public Defender. The Committee also considered how often the substantive rights of defendants are being affected by the failure to file a timely notice of appeal.

The Committee sought the perspectives of various members, including: (1) Appellate Division, (2) Office of the Public Defender, (3) private defense bar, including the ACDL and the State Bar Association, (4) Criminal Division Managers, and (5) Federal Criminal Practice. Specifically, the Committee explored where the delay in filing the Notice of Appeal occurs. First, it was expressed that Appellate Division did not favor

[2] The standards to determine indigency and establish eligibility for the services of the Office of the Public Defender are in N.J.S.A. 2A:158A-14.

a procedure that would result in an automatic filing of a notice of appeal for every defendant who is sentenced, because many defendants do not appeal from their convictions. Thus, an "automatic" appeal filing system would unnecessarily create an increased workload with the end result being the dismissal of appeals that otherwise would not have been filed. Furthermore, the Committee recognized that once an appeal is filed, the trial court no longer has jurisdiction to handle motions for reconsideration. See R. 4:49-2. As a result, if an appeal was automatically filed in every case, pursuant to R. 2:9-1, the trial court would generally lack jurisdiction to hear motions for reconsideration.

A member of the private defense bar expressed that as a general practice private defense attorneys will file the appeal on behalf of their clients or will inform defendants about the procedures to obtain an indigency determination and to seek the services of the Public Defender as set forth in R. 2:7-2. R. 2:7-2 provides:

> (**a) Indictable Offenses.** All persons convicted of an indictable offense who are not represented by the Office of the Public Defender and who desire to appeal, and who assert they are indigent, shall complete and file, without fee, with the court in which they were convicted, the appropriate form prescribed by the Administrative Director of the Courts, which shall be made available to them by the court in which they were convicted. They shall thereupon be referred to the Office of the Public Defender, which shall represent them on such appeal or review and on such subsequent post-conviction proceedings or appeal therein as would warrant the assignment of counsel.

It was expressed that familiarity with the process for an indigency determination to be made, for purposes of appeal, may vary based upon the experience of the attorney.

The Office of the Public Defender expressed the view that substantive rights of defendants are being affected by the failure to file a timely notice of appeal. It was noted that oftentimes defendants, who are represented by private trial counsel, have completed their jail sentences before the Appellate Section of the Public Defender's Office receives the court-approved 5A indigency application that is necessary to secure representation for the filing of an appeal.[3] The Public Defender's Office recommended revising the Notice of Appeal Rights form to reflect the language in R. 2:7-2(a) that the court, as opposed to the Public Defender's Office, is responsible for processing 5A applications and making indigency determinations. Specifically, the Office of the Public Defender recommended that the Notice of Appeal Rights Form should be amended as follows:

1. Delete the address of the Office of the Public Defender from the bottom of the form and replace it with the address of the Criminal Case Management Office for the county where the conviction occurred, and

2. Amend language on the Notice of Appeal Rights Form to state:

> *(To be filled out by private counsel only)*
> If defendant decides to appeal and cannot afford to continue to retain private counsel, I will direct him/her to contact the Criminal Division Manager's Office in the county of venue and complete an indigency application for appointment of the Office of the Public Defender within 45 days of today's date.

[3] Historically, Form 5A ("Application for the Assignment of Defense Counsel Pursuant to Supreme Court Rule 1:12-9" (printed in Appendix of Forms of the Rules Governing the New Jersey Courts (1968)) was used to ascertain a defendant's eligibility for the services of the Public Defender, consistent with the guidelines in N.J.S.A. 2A:158A-14. The colloquial term "5A" is still routinely used to refer to these types of applications. Currently, the "indigency application" is reflected in pages 1 and 3 of the Uniform Defendant Intake Report that is utilized by the courts. See AOC Directive #1-06 (Jan. 3, 2006). The same type of "indigency" evaluation would be conducted by the Criminal Case Management Office for a defendant who retained private counsel for the trial and seeks representation by the Public Defender for purposes of appeal.

The proposed revisions to the form would help ensure that the indigency determination is made before the matter is referred to the Office of the Public Defender. In that way, the Public Defender's Office, as opposed to the private attorney, will be able to file the notice of appeal on behalf of indigent individuals who have been deemed eligible for its services.

With respect to a rule revision, representatives from the Public Defender's Office expressed the view that it would not be helpful to revise the court rules to provide that after a private attorney files a notice of appeal the attorney may withdraw from the case, if there is no finding of indigency. It was discussed that under R. 2:5-1, filing a notice of appeal is a complicated process, involving completion of a case information statement, ordering transcripts, and service upon various parties and the trial court. Subsequent withdrawal by the private attorney could potentially raise issues, such as, determining who is responsible for handling the appeal and for the payment of transcripts. The Public Defender's Office expressed the view that the matter that was raised in the referral to the Committee could be best dealt with by revising the Notice of Appeal Rights form and educating private attorneys and defendants about the indigency determination process.

The Committee is recommending that the Notice of Appeals Rights form be revised as proposed by the Office of the Public Defender. The Committee is also recommending that if the revisions are approved, the AOC should issue guidance to further educate practitioners about the procedures to file timely notices of appeal and to seek evaluations of indigency to determine a defendant's eligibility for the services of the Office of the Public Defender. The revisions to the form follow.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - _____ COUNTY
INDICTMENT NO. _____

STATE OF NEW JERSEY

- v. -

_____
Defendant

NOTICE OF APPEAL RIGHTS AND TIME TO FILE A PETITION FOR POST-CONVICTION RELIEF

I, _____, hereby certify as follows:

1. I am the defendant in the above referenced case.

2. I am being represented in this sentencing by _____ and he/she has reviewed this Form with me.

3. **Appeal Rights.** I understand that:
   (a) An appeal means having my case reviewed by a higher court,
   (b) I have a right to appeal my conviction(s) and sentence(s),
   (c) I have the right to be represented by counsel for that appeal,
   (d) If I am unable to hire private counsel for my appeal, the Office of the Public Defender will represent me or arrange for my representation, and
   (e) If I fail to file a notice of appeal with the Appellate Division within **45 days** of today's date, and unless I obtain a thirty-day extension of time on a showing of good cause and absence of prejudice, I will lose my right to appeal.

4. **Time Limits To File a Petition for Post-Conviction Relief.** I understand that I have **5 years** from today's date to file a petition for post-conviction relief, unless an exception to this general rule applies, as set forth in *R.* 3:22-12.

5. I am appearing before Judge _____, for sentencing today.

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

DATED: _____ _____
Defendant

I have reviewed this Form with defendant and I am satisfied that he/she has been fully advised of the rights it describes.
DATED: _____ _____
Counsel for Defendant

(To Be Filled Out By Private Counsel Only)
If defendant decides to appeal and cannot afford to retain private counsel, I will direct him/her to contact the Criminal Division Manager's Office in the county of venue and complete an indigency application for appointment of the Office of the Public Defender within 45 days of today's date.

DATED: _____ _____
Counsel for Defendant

For information on appellate representation by the Office of the Public Defender, please write to the Superior Court Criminal Case Management Office in the county where the conviction occurred:

SPACE FOR ADDRESS OF
CRIMINAL CASE MANAGEMENT OFFICE

(Complete in duplicate: one fully executed copy to be delivered to the court for the court jacket and one to be given to the defendant.)

B. Proposed Amendment to the Grave's Act Plea Form

The Committee considered proposed revisions to the Grave's Act Plea Form to conform to N.J.S.A. 2C:43-6c; 6g and N.J.S.A. 2C:39-5. N.J.S.A. 2C:43-6c provides as follows:

> A person who has been convicted under subsection b. or d. of *N.J.S.2C:39-3*, subsection a. of *N.J.S.2C:39-4*, subsection a. of section 1 of P.L.1998, c.26 (*C.2C:39-4.1*), subsection a., b. or c. of *N.J.S.2C:39-5*, subsection a. or paragraph (2) or (3) of subsection b. of section 6 of P.L.1979, c.179 (*C.2C:39-7*), or subsection a., b., e. or g. of *N.J.S.2C:39-9*, or of a crime under any of the following sections: *2C:11-3*, *2C:11-4*, *2C:12-1* b., *2C:13-1*, *2C:14-2* a., *2C:14-3* a., *2C:15-1*, *2C:18-2*, *2C:29-5*, who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a firearm as defined in *2C:39-1* f., shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.

The Committee agreed that the Grave's Act Plea form should be revised to be consistent with the statute. The revisions to the plea form follow.

New Jersey Judiciary
Supplemental Plea Form for Graves Act Offenses (*N.J.S.A.* 2C:43-6c)

You are pleading to a Graves Act offense. This means:

A. You are pleading guilty to possession of a firearm with intent to use it against the person of another or to murder, aggravated manslaughter, manslaughter, aggravated assault, kidnapping, aggravated sexual assault, aggravated criminal sexual contact, robbery, burglary or escape; or if one of the following offenses occurred on or after January 13, 2008: possession of a shotgun, *N.J.S.A.* 2C:39-3b; possession of a defaced weapon, *N.J.S.A.* 2C:39-3d; possession of a weapon (firearm) for an unlawful purpose, *N.J.S.A.* 2C:39-4a; possession of a firearm while in the course of committing a CDS offense or other offenses, *N.J.S.A.* 2C:39-4.1a; unlawful possession of a machine gun, handgun, rifle or shotgun, *N.J.S.A.* 2C:39-5a, b or c; certain persons not to have weapons, *N.J.S.A.* 2C:39-7; or manufacture, transport, disposition and defacement of machine guns, sawed-off shotguns, defaced firearms or assault firearms. *N.J.S.A.* 2C:39-9a, b, e or g.

AND/OR

B. You are also admitting, by virtue of this plea, that while in the course of committing or attempting to commit one of the crimes, including the immediate flight therefrom, you used or were in possession of a firearm.

1. Do you understand that because of your plea of guilty to [Yes] [No]

   _____

   you will be subject to a minimum period of time before you will be eligible for parole (a parole ineligibility term) under the Graves Act (as set forth in question 7 on the three-page plea form)?

2. Do you understand that by pleading guilty and admitting that you used or were in possession of a firearm while in the course of committing or attempting to commit one of the crimes, you are waiving your right to have a jury determine, beyond a reasonable doubt, that you used or possessed a firearm during the course of committing or attempting to commit one of the crimes? [Yes] [No]

3. Does any other mandatory sentencing provision apply to the Graves Act count that provides for a greater period of parole ineligibility (e.g., NERA, Three Strikes, Murder)? [Yes] [No] [NA]

   If so, which one?

   _____

Date _____ Defendant _____

Defense Attorney _____

Prosecutor _____

C. Proposed Amendments to the Supplemental Plea Form for Theft of a Motor Vehicle or Unlawful Taking of a Motor Vehicle and a New Form – Notice to Defendants Convicted of Eluding

N.J.S.A. 2C:29-2b provides that when a person is convicted of eluding an officer "[i]n addition to the penalty prescribed under this subsection or any other section of law, the court shall order the suspension of that person's driver's license, or privilege to operate a vessel[4], whichever is appropriate, for a period of not less than six months or more than two years." The statute further provides that the court shall inform the person orally and in writing that if the person is convicted of personally operating a motor vehicle during the period of the license suspension or postponement the person shall, upon conviction, be subject to the penalties set forth in N.J.S.A. 39:3-40. According to the eluding statute, "[a] person shall be required to acknowledge receipt of the written notice in writing." N.J.S.A. 2C:29-2b. The Committee considered whether to revise the *Supplemental Plea Form for Theft of a Motor Vehicle or Unlawful Taking of a Motor Vehicle* to include the driver's license suspension and possible future penalty for persons convicted of eluding, N.J.S.A. 2C:29-2b, and/or (2) develop a separate notice form setting forth the possible future penalties for individuals who are convicted of operating a motor vehicle while their driver's license is suspended as a result of an eluding conviction.

[4] The eluding statute also references notification to defendants about the penalties in N.J.S.A. 12:7-83 when a defendant is convicted of operating a vessel on the waters of the state during the period of a license suspension. The notice form being proposed by the Committee only includes notice as it relates to future penalties related to driver's license suspensions. It does not include the future penalties related to suspension of licenses to operate a vessel on the waters of the State.

The Committee reviewed the statutory provisions and agreed that the *Supplemental Plea Form for Theft of a Motor Vehicle or Unlawful Taking of a Motor Vehicle* should be revised to include the driver's license suspension applicable to convictions for eluding. The Committee was also of the view that a separate notice form for eluding convictions should be developed to notify individuals convicted of eluding about potential future penalties if the person is convicted of driving a motor vehicle during the suspension period. The Committee agreed that a separate notice form should be developed because the statutory notifications are necessary when eluding convictions result from either a guilty plea or a trial verdict. As the bulk of the eluding charges involve driver's license suspensions, the Committee is of the view that the notice form need not include references to N.J.S.A. 12:7-83, which governs penalties for operating a vessel on the waters of the State when the license to operate is suspended or revoked.

The proposed revisions to the *Supplemental Plea Form for Theft of a Motor Vehicle or Unlawful Taking of a Motor Vehicle* and the New Notice for Eluding Offenses follow.

New Jersey Judiciary
Supplemental Plea Form for Eluding (*N.J.S.A.* 2C:29-2b) or Theft of a Motor Vehicle or Unlawful Taking of a Motor Vehicle (*N.J.S.A.* 2C:20-2.1)

The following question needs to be answered only if you are pleading guilty for a violation of *N.J.S.A*. 2C:29-2b for eluding.

1. Do you understand that if you plead guilty you will be required to forfeit your driver's license for a period of time between 6 months and 2 years? [Yes] [No]

The following questions need to be answered only if you are pleading guilty for a violation of *N.J.S.A.* 2C:20-2 for theft of an automobile and the offense occurred on or after April 2, 1991, or for a violation of *N.J.S.A.* 2C:20-10 for unlawful taking of a motor vehicle ("Joyriding") and the offense occurred on or after August 2, 1993.

1. Do you understand that if you plead guilty you will be required to forfeit your driver's license? [Yes] [No]

   1st Offense - 1 year license suspension

   2nd Offense - 2 year license suspension

   3rd or Subsequent Offense - 10 year license suspension

2. Do you understand that if you plead guilty you will be required to pay a mandatory penalty? [Yes] [No]

   The mandatory penalties are as follows:

1st Offense	$ 500
2nd Offense	$ 750
3rd or Subsequent offense	$1,000
Total Penalty	$ _____

3. Do you understand that if you plead guilty to more than one theft of an automobile or unlawful taking of a motor vehicle that the license forfeitures and mandatory penalties imposed can be consecutive to each other? [Yes] [No]

Date _____ Defendant _____

Defense Attorney _____

Prosecutor _____

State of New Jersey

v.

_____
Defendant

Superior Court of New Jersey
Law Division - _____ County
Indictment No. _____

NOTICE TO DEFENDANT
PURSUANT TO N.J.S.A. 2C:29-2b
MANDATORY SUSPENSION OF DRIVING PRIVILEGES

This is to inform you that, as a person convicted of Eluding pursuant to N.J.S.A. 2C:29-2b, your driver's license is suspended for a period of _____ [6 months to 2 years], effective today. In addition, if during the period of suspension you are convicted of personally operating a motor vehicle, you will be subject to the penalties set forth in N.J.S.A. 39:3-40:

Upon conviction for a first offense, a fine of $500;

Upon conviction for a second offense, a fine of $750, and imprisonment in the county jail for at least 1 day but not more than 5 days;

Upon conviction for a third offense or subsequent offense, a fine of $1,000, and imprisonment in the county jail for 10 days.

In addition, under certain circumstances, conviction for a first, second, third or subsequent offense could result in revocation of your motor vehicle registration privilege and/or an additional period of your driver's license suspension.

You have also been informed of the above consequences orally in open court by the Judge.

I, _____, the defendant in the above-entitled cause(s) having been convicted of Eluding pursuant to N.J.S.A. 2C:29-2b, hereby acknowledge receipt of written notice of the penalties for driving while suspended for a violation of said statute. I have also been informed of these consequences by the judge orally in open court.

Dated: _____ _____
Defendant

APPROVED BY: _____
J.S.C

To be completed by defendant if driver's license is not collected at time of sentencing:

Full name:

Address:

Date of Birth:

Eye Color:

Gender:

III. Matters Previously Sent to the Supreme Court

A. State v. Henderson and State v. Delgado -Recording Requirements For Out-Of-Court Identification Procedures

On February 2, 2012, the Committee filed an off-cycle report: "*Report Of The Supreme Court Committee Criminal Practice Committee On Revisions To The Court Rules Addressing Recording Requirements For Out-Of Court Identification Procedures And Addressing The Identification Model Charges*," which recommended that the Supreme Court adopt the Committee's proposed revisions to the court rules and the Model Criminal Jury Charge Committee's proposed revisions to the identification jury charges to address State v. Henderson, 208 N.J. 208 (2011), State v. Chen, 208 N.J. 307 (2011) and State v. Delgado, 188 N.J. 48 (2006). The report was published for public comment in a Notice to the Bar dated March 9, 2012.[5]

Thereafter, the Supreme Court considered the recommendations that were filed by the Criminal Practice Committee, along with a separate report that was filed by the Model Criminal Jury Charge Committee. The Court adopted new R. 3:11 – Record of an Out-of-Court Identification Procedure and amendments to R. 3:13-3(c) (now codified at R. 3:13-3(b)(1)(J)) governing discovery by the defendant. Additionally, the Court revised three Model Criminal Jury Charges: (1) In-Court Identification Only, (2) Out-of-Court Identification Only, and (3) In-Court and Out-of-Court Identifications. On July 19, 2012, Administrative Director of the Courts Glenn A. Grant issued a Notice to the Bar

[5] The Model Criminal Jury Charge Committee filed a separate report explaining the revisions to the identification jury charges.

distributing the rule amendments and the identification model jury charges. The revisions went into effect on September 4, 2012.

B. State v. O'Brien – Distribution of Written Jury Instructions

In State v. O'Brien, 200 N.J. 520 (2009), the Supreme Court asked the Civil and Criminal Practice Committees to consider developing standards for the submission of written jury instructions to the jury during deliberations. On March 28, 2012, the Committee filed an off-cycle report, which recommended revisions to R. 1:8-7 and R. 1:8-8 to provide that written jury charges must be provided to the jury in all criminal cases, unless the preparation of the instructions will cause an undue delay in the trial. To successfully implement the rule amendments, the Committee also filed the following recommendations: (1) "To allow for appropriate training and transition for judges and practitioners, the Committee recommends that, if adopted, the rule revisions be phased-in for at least one Judicial College cycle, but no less than six months, after the rule is approved. If necessary, standard procedures to implement the rule should be promulgated by the Administrative Director of the Courts;" (2) "To assist judges and parties in preparing and tailoring the written instructions to the circumstances in a specific case, the Committee recommends that the Model Criminal Jury Charge Committee post on the judiciary internet and infonet webpages two additional versions of each model criminal jury charge omitting the corresponding footnotes and annotations and one using male pronouns and the other female pronouns;" (3) "The Committee recommends that the Model Criminal Jury Charge Committee consider developing a standard instruction addressing the distribution of written charges to the jury and the use of those charges during deliberations." The report was published, for public comment, in a notice to the bar dated April 2, 2012.

Earlier this term, the Court considered the rule proposals and recommendations that were filed by the Criminal Practice Committee and the Civil Practice Committee. The Court adopted revisions to R. 1:8-8(a) that were proposed by the Civil Practice Committee, but deferred action on the rule amendments that were submitted by the Criminal Practice Committee. It asked the AOC to begin implementing the recommendations in the Committee's report to create a clean version of the charges to be made available on the judiciary's internet website and also on the judiciary's internal infonet website.

Editor's Note: The AOC has developed the Automated Model Criminal Jury Charges System (AMCJS). Specifically, AMCJCS permits the user to:

- Select the charges that are needed for the criminal trial;
- Combine them in the order they will appear in the final document;
- Select the gender of the defendant and automatically change all singular pronouns, such as "he/she," "his/her," "him/her," and himself/herself throughout the charges;
- Select whether to keep or delete the footnotes; and
- Generate a Word document that can be saved on the person's computer and edited like any other Word document.

Effective January 2, 2013, the system was made available to judges and judiciary staff. It is expected that the AMCJCS will be made available on the internet for non-judiciary users in February 2013.

IV. Rule Amendments and Other Issues Considered and Rejected

A. R. 3:13-3 - State v. W.B. – Discovery of Law Enforcement Notes

In State v. W.B., 205 N.J. 588, 607 (2011), the Supreme Court reiterated that "law enforcement officers may not destroy contemporaneous notes of interviews and observations at the scene of a crime after producing their final reports." The Court held that R. 3:13-3 "encompasses the writings of any police officer under the prosecutor's supervision as the chief law enforcement officer of the county." State v. W.B., 205 N.J. at 608. The Court asked the Committee to consider "any necessary clarification" to the court rules. Ibid. During the past term, the Committee considered proposed amendments to R. 3:13-3(c)(8) (now codified at R. 3:13-3(b)(1)(H)), which provides that post-indictment discovery by the defendant shall include "police reports that are within the possession, custody and control of the prosecutor." After an extensive discussion and consideration of a variety of rule proposals, the Committee has concluded that it is not necessary to revise the court rules. The Committee reached the conclusion that the present court rules need not be revised in light of W.B., and that any issues that may arise concerning the interpretation of the discovery rules, post-W.B., should be litigated.

Before reaching this conclusion, the primary discussions among the Committee members focused upon whether the court rules should place an affirmative duty on law enforcement to preserve their notes or whether the language in W.B. and the guidance set forth in *Attorney General Directive No. 2011-2, Regarding Retention And Transmittal Of Contemporaneous Notes Of Witness Interviews And Crime Scenes*, are sufficient.

As the Committee explored the scope of possible rule revisions, it became apparent that the members had different views on what language, if any, should be recommended for inclusion in the discovery rules. From one perspective, concerns were raised regarding a rule amendment that would give operational direction to law enforcement or would regulate police procedures. Some members were of the view that if the discovery rule is amended, it should be limited to codifying the language in W.B. Specifically, that only law enforcement notes of "crime scene observations" and "contemporaneous notes of interviews" would be discoverable.

Others expressed the view that the discovery rule already required an affirmative duty for the State to provide all law enforcement notes in discovery and that W.B. did not change that duty. It was expressed that if the discovery rule was amended, it should affirmatively state that all law enforcement notes are to be provided to the defense in discovery, unless they were protected by the work-product exception. Otherwise, it was suggested, that the court rule should not be amended.

Although the Committee ultimately decided not to recommend a rule amendment, in its discussion of possible variations, it discussed whether to revise paragraph (c)(8) to delete the phrase "which are within the possession, custody or control of the prosecutor." While this suggestion was designed to clarify that the police officer's notes need not be in the physical possession of the prosecutor to fall within the scope of the discovery rule, the Committee recognized that phrase "which are within the possession, custody or control of the prosecutor" is also used in other subsections of the rule. The Committee recognized that if it proposed this amendment, it would be necessary to consider whether other

subsections of the rule, which include the "which are within the possession, custody or control of the prosecutor" language, should also be revised.

In discussing the language in W.B., where the Supreme Court referred to a law enforcement officer's preservation of the contemporaneous notes of interviews or observations of the crime scene, the Committee queried how to define the term "crime scene." Specifically, the Committee discussed what would constitute a crime scene for a crime involving ongoing criminal conduct, such as eluding. Members in favor of a broad interpretation of the term "crime scene" suggested that the rule could be modified to state that discovery includes, police reports, including contemporaneous notes of interviews or observations of the crime scene or other matters related to the investigation. Other members expressed that the court rule should be more limited and track the language in W.B., leaving the determination of what encompasses a crime scene for litigation.

In W.B., the Court stated that "the time has come to join other states that require the imposition of 'an appropriate sanction' whenever an officer's written notes are not preserved." State v. W.B., 205 N.J. at 608. The Committee considered this issue, yet it was unable to reach a consensus on whether the rules should set forth a sanction if the officer's notes are not preserved, or if a sanction should be developed by caselaw. The Committee ultimately decided the appropriate sanction for noncompliance with W.B., may have to be resolved by caselaw.

Finally, the Committee recognized that it appeared that in its opinion, the Court used the terms "police officer" and "law enforcement officer" interchangeably. It queried whether a rule amendment should refer to a "law enforcement officer" or a "police

officer," being of the view that the term "law enforcement officer" is broader than "police officer." As the Committee ultimately decided not to recommend a rule amendment, it decided not to extensively explore which terms should be embodied in a rule amendment.

After a lengthy discussion, the Committee revisited the language in W.B. where the Court asked the Committee to consider "any necessary clarification of the Rules." Committee members were unaware of noncompliance with W.B., at this point, because of the present language of the court rules. The Committee unanimously agreed that it was not necessary to clarify the rules at this time. Rather, it concluded that any issues that may arise concerning the interpretation of the discovery rules, post-W.B., should left for litigation. The Committee was made aware that in response to W.B., the Model Criminal Jury Charge Committee has drafted an adverse inference charge to address the failure of a police officer or law enforcement officer to preserve notes. Furthermore, recognizing that discovery practices in the municipal courts may differ from those in criminal courts, the Committee did not express any views on the proposed amendments to R. 7:7-7 that are being recommended by the Municipal Court Practice Committee.

B. State v. Morgan - *Ex Parte* Communications Between the Judge and Jury During Deliberations

In State v. Morgan, 423 N.J. Super. 453, 458 (App. Div. 2011), certif. granted, 210 N.J. 477 (2012) the Appellate Division addressed: "whether a series of communications between the trial judge and the [deliberating] jury, conducted without the knowledge and outside the presence of both the prosecutor and defense counsel, warrants reversal of defendant's conviction."[6] Although the Morgan court did not find that the *ex parte* communications reached the level of reversible error, it reiterated that *ex parte* communications between judges and jurors during deliberations are improper. Id. at 467.

The Morgan court did not specifically ask the Committee to develop a rule about *ex parte* communications, however, during the 2007-2009 term, the Committee considered a similar issue about post-verdict, *ex parte* communications between judges and jurors. In its 2007-2009 report, the Committee agreed that, consistent with the current law, the judge should not engage in *ex parte* communications with the jury during deliberations or in post-verdict, *ex parte* communications about their deliberations. Additionally, regarding post-verdict discussions that do not involve deliberations, in the 2007-2009 report, 14 members were in favor of a *per se* prohibition on post-verdict discussions between judges and juries in criminal cases; 2 members were in favor of permitting post-verdict

[6] In Morgan, the Appellate Division also addressed whether the deliberating jury should be permitted to take home the jury instructions over the weekend. State v.Morgan, 423 N.J. Super. at 468-74. It asked the Committee to develop recommendations to the Supreme Court to either explicitly forbid the practice, or permit it under specific guidelines." Id. at 474. In its off-cycle report that addressed State v. O'Brien and the distribution of written instructions to the jury, the Committee unanimously agreed that the jury should not be permitted to take home the written jury instructions. The Committee recommended revisions to R. 1:8-8(a) that would specifically provide that written jury instructions are given to the jury for its use in the jury room during deliberations. As discussed in Item # III.B. above, the Court deferred action on the proposed rule amendments.

discussions between judges and juries in criminal cases if the discussion took place on the record; and 4 members were in favor of permitting post-verdict discussions between judges and juries in criminal cases with procedures left to the sound discretion of the trial judge. The Committee did not recommend a rule revision to address this issue.

This term, the Committee discussed that in Morgan, the Appellate Division reiterated that "*ex parte* communications between a judge and a deliberating jury are improper." State v. Morgan, 423 N.J. Super. at 467 (citing State v. Basit, 378 N.J. Super. 125, 131, 134 (App. Div. 2005)). The Committee recognized that its decision in the 2007-2009 report to prohibit this practice is consistent with Morgan. The Committee unanimously agreed that there is no need to amend the court rules. On June 5, 2012, the Supreme Court granted certification in State v. Morgan. The Committee will revisit this topic, if necessary, in the future, after the Court issues its decision.

C. R. 3:9-3 - State v. Hand - Joinder of Municipal and Criminal Cases - Double Jeopardy and Guilty Pleas

In State v. Hand, 416 N.J. Super. 622, 629 (App. Div. 2010), the Appellate Division held that the "same evidence" test for double jeopardy, set forth in State v. DeLuca, 108 N.J. 98 (1987) applies to guilty pleas. In Hand, the Appellate Division rejected the argument that the "same evidence" test should only apply to trials. In light of the Hand opinion, in a letter dated May 16, 2011, Hon. Roy F. McGeady, P.J.M.C., Chair, Municipal Practice Committee, requested that the Committee "consider an amendment of the Part III Rules, perhaps, R. 3:9-2 or R. 3:9-3, to provide for a mandatory joinder of a plea of guilty to any indictable crimes, along with a plea of guilty to any underlying lesser infraction based upon the 'same evidence' analysis at the time the guilty pleas are entered in Superior Court." The Conference of Criminal Presiding Judges reviewed this matter and was of the view that the court rules need not be amended. The Criminal Practice Committee considered this matter and agreed with the position of the Conference of Criminal Presiding Judges.

In support of this decision, the Committee recognized that AOC Directive #4-11 (July 11, 2011) provides that "[i]f a Superior Court judge is aware of an associated municipal court complaint, whether motor vehicle or quasi-criminal, and for good reason does not adjudicate that associated complaint, the Superior Court judge shall instruct the prosecutor to return the original paperwork to the appropriate municipal court without delay, but no later than 7 days after such direction, so that the municipal court can schedule a court date for that matter." The Committee concluded that the current

procedures in AOC Directive #4-11 adequately explains how superior court judges can handle potential double jeopardy issues, and therefore, no rule revisions are necessary.

D. State v. Moran – Standards to Impose a License Suspension Pursuant to N.J.S.A. 39:5-31

In State v. Moran, 202 N.J. 311 (2010), the Supreme Court developed standards for Municipal Court and Law Division judges to consider in determining whether to impose a license suspension pursuant to N.J.S.A 39:5-31. That statute grants a judge the authority to revoke a motorist's driving privileges for the willful violation of certain motor vehicle statutes. State v. Moran, 202 N.J. at 324-25. Last term, the Municipal Court Practice Committee decided not to recommend a rule amendment.

The Criminal Practice Committee considered whether the factors to be considered in determining whether to impose a driver's license suspension under N.J.S.A. 39:5-31 should be codified in a court rule. The Committee discussed the view that, unless expressly directed to do so, the Committee should not incorporate substantive law in the court rules. Rather, the court rules should only address procedure. The Committee also discussed whether there was a problem that resulted from the Moran decision, and if not, the Committee should be cautious in recommending revisions to court rules. The Committee membership was unaware of any problems resulting from Moran, and agreed that the substantive law in Moran need not be restated in the court rules. It decided not to recommend a rule amendment. The Committee agreed, however, that, if necessary, the Conference of Criminal Presiding Judges can issue a memorandum to Criminal Judges with respect to the Moran decision.

E. Revisions to the Statutes Governing Expungements

A private attorney filed a letter asking the Committee to consider recommending amendments to N.J.S.A. 2C:52-19 and N.J.S.A. 2C:52-30 addressing the release of expunged records and disclosure of expungement orders. The Committee discussed the inquiry and recognized that the inquiry involved proposed statutory revisions, as opposed to revisions to the court rules. The Committee therefore agreed that the inquiry should be considered by the legislature and decided not to take action on the matter.

F. Guilty Plea Cases – Missouri v. Frye and Lafler v. Cooper

In Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) and Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), the United States Supreme Court addressed issues surrounding a defendant's right to the effective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984) during plea negotiations and defense counsel's duty to properly communicate formal plea offers to defendant. In Frye, defense counsel failed to communicate the plea offer to the defendant and the offer expired. After being re-arrested, the defendant entered a plea to the initial charges without an agreement and received a more severe sentence than the plea offer. In Lafler, the defendant rejected the plea offer based on defective legal advice from defense counsel. Defendant proceeded to trial, was convicted and received a more severe sentence than the plea offer. Both cases resulted in the defendants losing out on what would have been more favorable outcomes.

The Committee considered if the court rules or plea forms need to be revised in light of these opinions, with respect to formal plea negotiations and offers occurring pre-indictment and post-indictment. The Committee agreed that post-indictment, plea offers are in writing or are reflected in the record as part of a court event. The Committee expressed that because pre-indictment court programs vary across the state, not all pre-indictment plea offers are reflected as part of a court event. Nonetheless, the Committee recognized that the vast majority of pre-indictment plea offers are in writing or on the record. A suggestion was made to consider revising the arraignment/status conference order to add a line to identify if there was a pre-indictment offer and if it was

communicated to the defendant. The Committee disagreed with this suggestion. A member expressed that the court rules were not designed to adapt to ineffective assistance of counsel claims. The Committee also recognized that Frye and Lafler did not develop new substantive law in New Jersey. See State v. Nichols, 71 N.J. 358, 468-69 (1976) (providing that "an attorney's conduct is incompetent when a plea offer is never communicated by the attorney to the client"); State v. Powell, 294 N.J. Super. 557, 565 (App. Div. 1996)) (recognizing that "the plea bargain stage is a critical stage with regard to the right to effective assistance of counsel"). The Committee concluded that there is no need to craft or revise a court rule to address the Frye and Lafler cases. The Committee also determined that there is no need to amend the plea forms at this time.

G. Preservation of Evidence

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

On January 6, 2011, the Attorney General issued Directive #2011-1, which updated the Attorney General Guidelines for the Retention of Evidence. In light of the Directive and current practices, this matter was withdrawn by the Office of the Public Defender.

H. R. 3:9-3(d) – Time Limits for the State to Move to Annul Plea Agreements

The Appellate Division Rules Committee requested that the Committee consider revisions to R. 3:9-3(d) to shorten the time in which the State must exercise its right to annul a plea agreement. The Committee began exploring this issue to determine if it raised widespread concerns or if it could be addressed without amending the court rules. The Appellate Division Rules Committee recently reconsidered the proposed amendment and decided to withdraw its request that R. 3:9-3(d) be amended.

I. R. 3:15-3 – Joinder of Indictable and Non-Indictable Complaints

A private citizen requested that the Committee consider amending R. 3:15-3(a)(1) to specify that joinder of a non-indictable complaint with a indictable criminal complaint applies when the charges are against the same defendant. The inquiry raised concerns about grouping together a complaint with indictable charges that are being filed against an arrested person with a separate complaint with non-indictable charges that are being filed by the arrested person against the police. The Committee discussed whether in this scenario, where the complaints arose out of the same incident and there are different defendants (i.e., a citizen-defendant in one complaint and police-defendant in another), both complaints should proceed in Superior Court.

To address this issue, the Committee discussed whether the rule should be amended to provide that all complaints involving the same incident should be forwarded to the County Prosecutor's Office for screening to determine whether the County Prosecutor's Office will handle the non-indictable complaint, dismiss the complaint or refer the complaint back for disposition in the municipal court. A discussion then ensued about whether the court rules governing joinder were developed to cover the issue raised by the inquiry.

Being unaware of the extent of this issue, the Committee was concerned about any unintended consequences that may flow from a revision to court rules. Therefore, it decided not to recommend a rule amendment at this time. The Committee agreed that it was more appropriate to refer this matter to the Municipal Court Practice Committee to determine whether the issue raised was an isolated incident or if it is a widespread

concern. The Committee agreed to revisit this matter, if necessary, based upon feedback from the Municipal Court Practice Committee.

J. Scheduling Conflicts For Municipal Court and Superior Court Matters

A private attorney asked that the Committee consider whether there is a need to develop guidance addressing scheduling conflicts for criminal defense attorneys who handle municipal and criminal matters. Prior to its deletion, R. 1:2-5 provided guidance to attorneys on the priority of matters for scheduling purposes. The official comment to R. 1:2-5 provides:

> The deleted rule attempted to accord preference in the scheduling of cases for trial, hearing or argument across trial court and Appellate Division lines. The rule was deleted as the Supreme Court takes the position that the issue of calendar preference is best addressed administratively rather than in the context of court rules. Nonetheless, as a matter of policy, the preferences enumerated in the rule should be looked to as guidelines in determining priority of cases scheduled for trial, hearing or argument in the trial courts and the Appellate Division. These preferences include: (1) all contested matters where a principal issue is the custody, status, welfare and protection of minors; criminal and quasicriminal cases, election actions, actions (except negligence actions) to which the State, a county, municipality or other public or quasipublic agency is a party; (2) if the action is in a trial court, all cases to be tried without a jury; (3) appeals on leave granted pending in the appellate courts; (4) workers' compensation appeals; and (5) such other cases as any court may from time to time order.

The Committee reviewed the commentary along with several AOC Directives governing scheduling matters.[7] Specifically, it discussed whether a current problem with

7 See AOC Directive #24-63 "Conflicting Trial Engagements" (December 20, 1963); AOC Directive #22-68 "Trial Motions on Fridays" (May 2, 1969); and AOC Directive #1-84 "Directive on Statewide DWI Backlog Reduction" (July 26, 1984).

attorney conflicts exists warranting a need to develop further guidance. The Committee discussed that Superior Court cases normally take precedence over municipal matters, usually with older cases being scheduled first. Often Superior Court judges can make arrangements to accommodate any scheduling conflicts that arise when attorneys must appear in two courts at the same time. The Committee's discussion did not reveal a problem with scheduling conflicts warranting a revision to the court rules. It also concluded that there is no need for the Administrative Office of the Courts issue a directive on this issue.

K. State v. Parker - Oral Argument in Petitions for Post-Conviction Relief

In State v. Parker, 212 N.J. 269 (2012) the New Jersey Supreme Court considered whether the defendant was entitled to oral argument in connection with his first petition for post-conviction relief. In Parker, the defendant urged that "a defendant is entitled to oral argument as a matter of right in support of his petition for post-conviction relief and that a denial of oral argument, without an explicit waiver, represents a denial of a defendant's Sixth Amendment right to the effective assistance of counsel." Id. at 277. Alternatively, the defendant contended that the trial court abused its discretion by dispensing with oral argument. In considering these issues, the Supreme Court "decline[d] to hold as a matter of law that each defendant has a right to present oral argument to the trial judge in support of a petition for post-conviction relief." Id. at 278. Nevertheless, the Court was satisfied that the defendant in the Parker case was entitled to oral argument. Therefore, the Court reversed and remanded the matter for further proceedings." Id.

In considering this issue, the Court recognized that "R. 3:22 contains no explicit statement with respect to whether a defendant is entitled to present oral argument in support of his petition for post-conviction relief." Id. at 280. It analyzed the two reported Appellate Division cases that have commented on the issue, State v. Flores, 228 N.J. Super. 586, 588 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989) and State v. Mayron, 344 N.J. Super. 382, 384 (App. Div. 2001) and noted its agreement with the statement in State v. Mayron, "that there is a strong presumption in favor of oral argument in connection with an initial petition for post-conviction relief." State v.

Parker, 212 N.J. at 282-83. It recognized that the Mayron panel listed several factors that a trial judge should weigh when deciding whether to hear oral argument or to dispense with it, such as, the apparent merits and complexity of the issues, whether oral argument by counsel would add to the written positions, and whether the goals and purposes of the post-conviction procedure are furthered by oral argument. State v. Parker, 212 N.J. at 282 (citing State v. Mayron, 344 N.J. Super. at 387). In Parker, the Supreme Court agreed that the trial judge has discretion to consider and weigh the factors enumerated in Mayron when considering whether to grant oral argument, and that in considering the factors, "they should be approached with the view that oral argument should be granted." State v. Parker, 212 N.J. at 282. The Court further stated that "[j]ust as when determining whether a defendant is entitled to an evidentiary hearing in connection with his petition for post-conviction relief the facts should be 'view[ed] in the light most favorable to a defendant,' so too, in determining whether to entertain oral argument, the facts should be viewed through the same generous lens." State v. Parker 212 N.J. at 282 (citing State v. Preciose, 129 N.J. 451, 463 (1992)).

Finally, the Court explained that when a trial judge determines that the arguments presented in the papers filed in connection with the petition for post-conviction relief do not warrant oral argument, "the judge should provide a statement of reasons that is tailored to the particular application, stating why the judge considers oral argument unnecessary." State v. Parker, 212 N.J. at 283. The Criminal Practice Committee considered whether to recommend revisions to the court rules in light of Parker, which would describe procedures for trial judges to follow when deciding whether to grant oral

argument. The Committee reached the conclusion that it was unnecessary to revise the court rules to codify the substantive law discussed in Parker. It was of the view that the parties and judges should be aware of the Parker opinion and be knowledgeable of the standards that should be applied when a request for oral argument is made.

VI. Other Business

A. Request for Comment on Confidentiality of Addresses in Citizen Complaints and Criminal Complaints of Domestic Violence Victims

By memo dated May 17, 2011, Acting Administrative Director Grant requested, on behalf of the Supreme Court Committee on Public Access to Court Records, that the Criminal Practice Committee consider the following questions:

1. Should the home address in a citizen complaint be confidential when the complainant is alleging that he or she has been assaulted and fears that the attacker may threaten or intimidate him or her if the address is made public?

2. Should the address of a domestic violence victim who files a criminal complaint for assault be confidential even though the matter is a criminal misdemeanor and not specifically identified as a domestic violence matter?

3. Is there a confidential form that is used in the Criminal Division when a domestic violence victim files a criminal complaint?

The Criminal Practice Committee discussed this matter and voted 18-5 in favor of confidentiality of addresses in citizen complaints and in criminal complaints of domestic violence victims. The majority of Committee members were in favor of confidentiality and pointed out that confidentiality can only be accomplished if the victim's address is not on, or is redacted from, the complaint. However, while the majority of Committee members were in favor of confidentiality with respect to public access to this information, some concerns were raised about the impact of a confidentiality rule on the requirements for discovery, pursuant to R. 3:13-3, in criminal cases. It was submitted that a rule governing confidentiality of the address of a domestic violence victim should

balance the need to provide immediate security and/or peace of mind to an alleged victim in a way that is consistent with a defendant's discovery rights. It was suggested that a criminal defense attorney can make an application to the court for relevant identification information in an individual case when it is needed. Additionally, the Committee recognized that if addresses for certain victims were deemed confidential, there would need to be procedures in place to allow for contact and communications with the court.

The majority of the Criminal Practice Committee was in favor of confidentiality of the address of a domestic violence victim. However, the Committee expressed that if a confidentiality rule is proposed there should be procedures in place to allow for communications between the victim and the court. Also, consideration must be made with respect to the confidentiality and the discovery obligations of the parties under R. 3:13-3. By a letter dated March 23, 2012, the Committee forwarded its comments to the Supreme Court Advisory Committee on Public Access to Court Records.

B. Electronic Signature of a Judge on the Judgment of Conviction

The Committee was informed that 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." The Committee will revisit this issue in the future if a revision to the court rules is necessary.

V. Matters Held for Future Consideration

A. State v. Robert Handy

In State v. Handy, 421 N.J. Super. 559, 565 (App. Div. 2011), certif. granted, 209 N.J. 99 (2012), the Appellate Division held that "a defendant who wishes to present a substantive defense based upon at least some evidence, or who otherwise wishes to put the State to its burden of proving the elements of the offense beyond a reasonable doubt, should not be required to first submit to a trial restricted to the issue of insanity. Such an insanity trial, which might result in the defendant's indefinite commitment in a mental institution, should not have to proceed first." The Handy panel asked the Criminal Practice Committee to consider implementing procedures, consistent with the case, to address situations when a defendant asserts both a self-defense claim and an insanity defense. On January 18, 2012, the Supreme Court granted certification in Handy. The Committee agreed to defer consideration of Handy until the resolution of the Supreme Court appeal.

B. Pretrial Intervention (PTI) Guidelines

In the 2004-2007 term, the Committee was asked to consider whether the PTI Guidelines should be updated in light of State v. Moraes-Pena, 386 N.J. Super. 569 (App. Div. 2006) in which the Appellate Division reversed the trial court's order admitting the defendant into the Pretrial Intervention (PTI) Program over the prosecutor's objection. The Committee continued its consideration of this topic and considered State v. Werkheiser, App. Div. Dkt. No. A-2355-07T4 (unpublished opinion) (App. Div. May 12, 2010) in which the Appellate Division affirmed the order denying defendant's enrollment into PTI, but stated that "PTI was not designed to be a prosecutor's tool to gain cooperation, and in fact acknowledgement of guilt is not required under the guidelines." (Slip. op. at 2). A month later, in State v. Green, 413 N.J. Super. 556 (App. Div. 2010), the Appellate Division considered circumstances surrounding a defendant's application for PTI. It stated that the "Criminal Practice Committee may wish to consider developing a uniform set of PTI application forms and directions, and uniform procedures to be used in processing those applications." Id. at 562.

Thereafter, in State v. Randall, 414 N.J. Super. 414 (App. Div. 2010), the Appellate Division stated that "[i]n this case, the Prosecutor's Office incorrectly attempted to condition defendant's participation in PTI upon her pleading guilty." Id. at 421. The court quoted Guideline 4 governing the PTI program, which states:

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

> Id. at 421 (quoting Pressler, Current New Jersey Court Rules, Guideline 4 at 1067.]

In Randall, the court also referenced the official comment to Guideline 4 governing PTI, which explains that "[n]either admission of guilt nor acknowledgment of responsibility is required. Steps to bar participation solely on such grounds would be an unwarranted discrimination." Id. at 421. Thus, the Appellate Division concluded that "the Prosecutor's Office erred in requiring defendant to plead guilty as a prerequisite for admission into PTI." Id. at 421.

In light of these cases, the Committee discussed whether a subcommittee should be formed to address PTI matters. Prior to forming a subcommittee, the Committee was informed that the Conference of Criminal Presiding Judges began considering a report containing proposed revisions to PTI guidelines and procedures. The Committee decided to wait until the Presiding Judges reviewed the PTI proposals to determine whether to form a subcommittee to handle the issues raised in State v. Moraes-Pena, State v. Werkheiser, State v. Randall and State v. Green.

Recognizing that the PTI program has remained relatively unchanged from its inception in 1970 and that the law governing PTI has evolved over the years, in May, the Supreme Court authorized referral of a proposal for revisions to the PTI program to the Committee for its consideration. Upon receipt of the referral, the Committee formed a subcommittee comprised of judges, prosecuting attorneys and defense attorneys to review and comment upon the proposal. The subcommittee is continuing to review the proposal, and will, in the future, provide recommendations to the full committee for consideration.

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 will continue to explore these issues.

D. Trial *De Novo* Standard of Review – Municipal Appeals

With the increasing high caliber and experience of municipal court judges, the Committee considered whether the *de novo* standard of review for municipal court appeals should be revised and to consider alternative standards of review for these matters. 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 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. This training, along with the increasing high caliber and experience of municipal court judges, since R. 3:23

was developed provides strong support that the *de novo* review for municipal appeals is no longer necessary. The Committee has formed a subcommittee to explore alternative standards of review for municipal appeals. The subcommittee is continuing to review this topic.

E. Telephonic Issuance of Drug Offender Restraining Orders and Nicole's Law Restraining Orders

The Drug Offender Restraining Order Act of 1999 ("DOROA"), N.J.S.A. 2C:35-5.7 and Nicole's Law, N.J.S.A. 2C:14-12, provide authority for the court to issue restraining orders when a person is charged with eligible drug and sex crimes or disorderly persons offenses as set forth in the respective statutes. Amendments to the DOROA that were enacted in 2011 permit the issuance of pretrial DOROA orders in certain circumstances when an applicant is not physically present in the same location as the court when the application is made. When the legislative amendments to DOROA were pending, the Supreme Court issued an order, dated March 8, 2011, relaxing Part III (Criminal) and Part VII (Municipal Court) of the court rules "so as to permit the issuance of restraining orders, pursuant to (a) N.J.S.A. 2C:35-5.7 (the "Drug Offender Restraining Order Act of 1999" or DOROA); or (b) N.J.S.A. 2C:14-12 and 2C:44-8 ("Nicole's Law"), by telephone, radio, or other electronic communication upon the sworn oral testimony of a law enforcement officer or prosecuting attorney communicated electronically to the issuing judge, pursuant to procedures approved by the Supreme Court and promulgated by the Administrative Director of the Courts." The Court also asked the Criminal Practice Committee and Municipal Court Practice Committee to draft appropriate rule revisions, for its consideration, to comport with the rule relaxation and the DOROA legislation, should it be enacted.

A joint subcommittee comprised of members from the Criminal Practice Committee and the Municipal Court Practice Committee was formed to develop

procedures to allow for the issuance of DOROA and Nicole's Law orders, as a condition of release, by telephone, radio or other means of electronic communication (hereafter referred to as "telephonic procedures" or "electronic communication") in situations when the law enforcement officer or prosecuting attorney (hereafter referred to as "law enforcement officer") seeking the order is not physically present in the same location as the court. With respect to the telephonic procedures governing the issuance of DOROA and Nicole's Law orders, the subcommittee took the approach to draft revisions to R. 3:3-1 and to forward its recommendations to the Criminal Practice Committee for adoption and to the Municipal Court Practice Committee for corollary revisions to the appropriate Part VII rules. The Criminal Practice Committee reviewed proposed amendments to R. 3:3-1 and has asked that the subcommittee consider developing further revisions to address conditions of release for a defendant who is charged with a crime or offense involving domestic violence.

Additionally, the joint subcommittee began exploring whether to revise R. 3:26-1 to develop procedures for the enforcement of non-monetary conditions of release including, but not limited to, conditions imposed pursuant to DOROA or Nicole's Law. The joint subcommittee recognized the need to examine this issue; however, it was cognizant that developing enforcement procedures goes beyond the Court's referral to the Criminal Practice Committee and the Municipal Court Practice Committee to revise the court rules in accordance with its March 8, 2011 order. The Committee considered this issue and will seek clarification that the Supreme Court's referral extends to developing

procedures to handle the enforcement of violations of monetary and non-monetary conditions of pretrial release.

Respectfully submitted,

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