# Report of the

# Supreme Court

# Criminal Practice Committee

# 2004-2007 Term

**January 26, 2007**

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## A. Proposed Rule Amendments Recommended for Adoption.

### 1. Responsibility of Counsel

The Committee considered an amendment to R. 2:7-2(d) to assure that a timely notice of appeal is filed in the Appellate Division after an unsuccessful trial *de novo* and to assure timely assignment of counsel where the assigned attorney filing the notice of appeal is seeking to withdraw and have the court appoint another attorney. Additionally, the Committee considered whether the reference to R. 3:4-2(c) in the rule should be deleted. The reference to R. 3:4-(c) makes no sense without referencing R. 7:3-2(b). See Pressler, Current N.J. Court Rules, comment 4 on R. 2:7-2.

The Committee considered the proposal and agreed to amend the rule to remove cross-references to other rules in paragraph (d). As amended, the rule will provide that if assigned counsel is the counsel of record in the Law Division and does not move to withdraw or be substituted as counsel, that attorney will remain the counsel of record for an appeal. The Committee is proposing amendments to R. 2:7-2.

**2:7-2. Assignment of Counsel on Appeal**

(a) . . . No Change.

(b) . . . No Change.

(c) . . . No Change.

(d) Responsibility of Counsel Assigned by the Trial Court. An attorney filing a notice of appeal [pursuant to R. 3:4-2(c)] shall be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal an application for the assignment of counsel on appeal [as required by R. 3:4-2(c)].

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

## 2. Probable Cause Hearings

In State v. Dennis, 185 N.J. 300 (2005), the Court held that a defendant has a right to counsel at probable cause hearings. The Municipal Court Practice Committee indicated that the Dennis opinion created issues regarding who should represent indigent defendants in probable cause hearings, the Municipal Public Defender or the State Public Defender, and where the hearings should be held. The Municipal Court Practice Committee was of the view that probable cause hearings should be held in Superior Court. Therefore, the Municipal Court Practice Committee asked the Committee to consider a proposed amendment to R. 3:4-3 that would require all probable cause hearings to be held in Superior Court.

The Committee agreed that there were not a large number of probable cause hearings held in either the Municipal Court or Superior Court. Moreover, the proposed amendment was not designed to change an individual's right or non-right to a probable cause hearing. Rather, the proposal clarified where the hearings should be held and who should conduct them.

There was no opposition to the proposed amendment, subject to explaining in the commentary that it is simply a clarification of the current practice, where it exists, and that it is not designed to resurrect a practice that no longer exists, i.e., holding probable cause hearings in most cases.

The Committee is proposing amendments to R. 3:4-3.

**3:4-3. Hearing as to Probable Cause on Indictable Offenses**

(a) If the defendant does not waive indictment and trial by jury but does waive a hearing as to probable cause, the court shall forthwith bind the defendant over to await final determination of the cause. If the defendant does not waive a hearing as to probable cause and if before the hearing an indictment has not been returned against the defendant with respect to the offense charged, after notice to the county prosecutor [the court] a judge of the Superior Court shall hear the evidence offered by the State within a reasonable time and the defendant may cross-examine witnesses offered by the State. If, from the evidence, it appears to the court that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind the defendant over to await final determination of the cause; otherwise, the court shall discharge the defendant from custody if the defendant is detained. Notice to the county prosecutor may be oral or in writing. An entry shall be made on the docket as to when and how such notice was given. [A probable cause hearing shall be prosecuted by the municipal prosecutor in the absence of a county prosecutor.]

(b) . . . No Change.

Note: Source--R.R. 3:2-3(c). Paragraph designations added and paragraphs (a) and (b) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000[.]; paragraph (a) amended to be effective .

## 3. Contents of the Indictment

The Committee was asked to consider whether R. 3:7-3(b) needed clarification. Currently, the last sentence of R. 3:7-3(b) states that it is sufficient for an indictment to "charge that the defendant committed aggravated manslaughter or manslaughter." This language seems contradictory to the requirement that indictments provide notice and allege the essential elements of the crime. Paragraph (b) was amended as part of the rule amendments proposed after the death penalty was reinstituted in 1982. It was enacted to ensure that a defendant received notice, in the indictment, that he or she could be subject to the death penalty. Prior to the 1982 amendment, the rule provided that

> (b) Indictment for Murder or Manslaughter. It is sufficient in every indictment for murder to charge that the defendant did murder the deceased contrary to N.J.S.A. 2C:11-3, and in every indictment for aggravated manslaughter or manslaughter, to charge that the defendant committed aggravated manslaughter or manslaughter contrary to N.J.S.A. 2C:11-4.

The last sentence of the present rule is an historical carryover from the rule prior to the 1982 death penalty amendments which require the language embodied in R. 3:7-3(a) as a prerequisite to a prosecution for capital murder.

During the Committee's discussion, it was noted that most indictments include the statutory language for the elements of aggravated manslaughter and manslaughter, which meets the requirements of the rule. However, this practice is not universal, and in some counties there are cases where the indictments do not include the statutory elements for these crimes. The Committee is of the opinion that indictments for aggravated manslaughter or manslaughter should be subject to the same requirements as crimes other than murder.

The Committee believes that the language of R. 3:7-3(b) could be confusing and therefore a rule change is appropriate. The Committee recommends to deleting the last sentence of R. 3:7-3(b), to remove the reference to aggravated manslaughter and manslaughter charges. The Committee also believes that the words "or Manslaughter" should be deleted from the caption of paragraph (b). This amendment is not intended to apply to any outstanding or pending indictments. This amendment also is not designed to require the filing of amended or superseding indictments.

The Committee is proposing amendments to R. 3:7-3(b) and the caption to paragraph (b) of the rule.

**3:7-3. Nature and Contents of Indictment or Accusation; Timing of Supplemental Indictment**

(a) . . .No Change.

(b) . . .Indictment for Murder [or Manslaughter]. Every indictment for murder shall specify whether the act is murder as defined by N.J.S.A. 2C:11-3(a)(1), (2) or (3) and whether the defendant is alleged: (1) to have committed the act by his or her own conduct or (2) to have procured the commission of the offense by payment or promise of payment, of anything of pecuniary value or (3) to be the leader of a drug trafficking network, as defined in N.J.S.A.2C:35-3, and who, in furtherance of a conspiracy enumerated in N.J.S.A. 2C:35-3, commanded or by threat or promise solicited the commission of the offense. [In every indictment for aggravated manslaughter or manslaughter, it is sufficient to charge that the defendant committed aggravated manslaughter or manslaughter contrary to N.J.S.A. 2C:11-4.]

(c). . . No Change.

(d). . . No Change.

Note: Source-R.R. 3:4-3(a)(b)(c), 3:4-4. Paragraphs (a) and (b) amended August 28, 1979 to be effective September 1, 1979; paragraph (b) amended September 28, 1982 to be effective immediately; paragraph (b) amended July 13, 1993 to be effective immediately; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; caption amended and new paragraph (c) and (d) adopted March 14, 2005 to be effective immediately[.]; paragraph (b) amended to be effective .

## 4. Notice for Extended Terms

The Committee considered whether a rule change is necessary in light of the New Jersey Supreme Court opinions in State v. Thomas, 188 N.J. 137 (2006) and State v. Pierce, 188 N.J. 155 (2006). Although the Committee determined that neither Thomas nor Pierce required a rule change, it believes that R. 3:21-4(e) and/or (f) should be amended so that the filing of motions for extended terms are not required when extended term exposure is developed on the record with respect to a negotiated plea.

The Committee recognized that R. 3:21-4 requires the prosecutor to file a motion when seeking an extended term of imprisonment. The practice in some counties, however, is that such motions are not required when there is a negotiated disposition for an extended term. The belief in those counties is that it was not necessary to file a motion, because during plea negotiations, the defendant is asked on the record about his or her understanding of the extended term exposure. That practice, however, is not uniform across the state. In addition, some members of the Committee feel that if a motion for an extended term is not filed, the resulting sentence would be illegal. The purpose of the rule requirement is to provide notice to the defendant and provide an opportunity to challenge application of the prerequisites of the enhanced term. In the context of a plea bargain, this notice is accomplished when it is part of the plea bargain itself and is reviewed with defendant by the trial court on the record.

Therefore, the Committee is of the opinion that both R. 3:21-4(e) and (f) should be amended. Consequently, the Committee is proposing amendments to R. 3:21-4(e) and (f)

that would provide for an exception to the motion requirement when there is a negotiated disposition for an extended term.

The Committee also believes that the references to N.J.S.A. 24:21-29 in R. 3:21-4(e) are no longer necessary and should therefore be deleted.

**3:21-4. Sentence**

(a) . . . No Change.

(b) . . . No Change.

(c) . . . No Change.

(d) . . . No Change.

(e) Extended or Enhanced Term of Imprisonment; Sentence Pursuant to [*N.J.S.A. 24:21-29* or] *N.J.S.A. 2C:35-8*. A motion pursuant to *N.J.S.A. 2C:44-3* or *N.J.S.A. 2C:43-6*f for the imposition of an extended term of imprisonment, [or a motion for enhancement of a sentence pursuant to *N.J.S.A. 24:21-29*] or a motion for enhanced sentence pursuant to *N.J.S.A. 2C:35-8*, shall be filed with the court by the prosecutor within 14 days of the entry of the defendant's guilty plea or the return of the verdict. Where the defendant is pleading guilty pursuant to a negotiated disposition, the prosecutor shall make the motion at or prior to the plea. If the negotiated disposition includes the recommendation of an extended term, the prosecutor's oral notice and the recordation of the extended term exposure in the plea form completed by defendant and reviewed on the record shall serve as the State's motion. For good cause shown the court may extend the time for filing the motion. The sentence shall include a determination as to whether the defendant was convicted and sentenced to an extended term of imprisonment as provided in *N.J.S.A. 2C:43-7*, *2C:44-3* and *2C:44-6*e, *N.J.S.A. 2C:43-6*f or whether the defendant was being sentenced pursuant to [*N.J.S.A. 24:21-29*, or] *N.J.S.A. 2C:35-8*, and the commitment or order of sentence which directs the defendant's confinement shall so specify.

(f) Sentence Pursuant to *N.J.S.A. 2C:43-7.1*, *2C:43-7.2*, or *2C:44-5.1*. A notice to impose sentence pursuant to *N.J.S.A. 2C:43-7.1*, *N.J.S.A. 2C:43-7.2*, or *2C:44-5.1* shall be filed with the court and served upon the defendant by the prosecutor within 14 days of the entry of the defendant's guilty plea or return of the verdict. Where the defendant is pleading guilty pursuant to a negotiated disposition, the prosecutor shall file and serve the notice at or prior to the plea. If the negotiated disposition includes the recommendation of an extended term, the prosecutor's oral notice and the recordation of the extended term exposure in the plea form completed by defendant and reviewed on the record shall serve as the State's notice. For good cause shown the court may extend the time for filing the notice. The sentence shall include a determination as to whether the defendant was convicted and sentenced pursuant to *N.J.S.A. 2C:43-7.1*, *N.J.S.A. 2C:43-7.2*, or *2C:44-5.1* and the judgment and commitment shall so specify.

(g) . . . No Change.

(h) . . . No Change.

(i) . . . No Change.

(j) . . . No Change.

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

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

## 5. Conditional Discharge Appeals

The Municipal Court Practice Committee asked the Committee to consider amendments to R. 3:23-2 that would: (1) permit a defendant who has been granted a conditional discharge following the denial of a motion to suppress evidence to appeal the denial; (2) change the word "clerk" to "court administrator"; and (3) distinguish separate appeals by the defendant from appeals by the State.

Presently, N.J.S.A. 2C:36A-1(a) provides that upon notice to the prosecutor, the court may on its motion or on the motion of the defendant: (1) suspend further proceedings and place the defendant on supervisory treatment or (2) after a guilty plea or a finding of guilt and without entry of a judgment of conviction, place a defendant on supervisory treatment. Under the statute there are two categories of defendants: (1) defendants placed under supervisory treatment before a plea or finding of guilt where further proceedings are suspended; and (2) defendants who are placed under supervisory treatment after a plea or finding of guilt and a judgment of conviction is withheld.

N.J.S.A. 2C:36A-1(b) provides that a "if a person is placed under supervisory treatment under this section after a plea of guilty or finding of guilt, the court as a term and condition of supervisory treatment shall suspend the person's driving privileges for a period to be fixed by the court at not less than six months or more than two years." According to the statute, upon a violation of a term or condition of supervisory treatment, the court may enter a judgment of conviction.

When a defendant receives a conditional discharge following a motion to suppress evidence, no judgment of conviction is entered, even following a plea of guilty. Without

a judgment being entered, there is no right to appeal under R. 3:23-2. Thus, technically, there is no procedure available to have the Superior Court review the Municipal Court's findings of fact and law regarding the denial of the motion to suppress despite the consequences. This is problematic for a defendant who enters a guilty plea and receives a mandatory driver's license suspension pursuant to N.J.S.A. 2C:36A-1(b). The Committee is proposing amendments to R. 3:23-2 to allow a defendant who has been granted a conditional discharge following a motion to suppress to appeal the denial order within 20 days.

A technical amendment is also being proposed to change the word "clerk" to "municipal administrator."

Finally, the Committee is proposing that the first sentence of the rule, which covers appeals by the State and the defendant, be separated into two sentences for the sake of clarity. The first sentence would govern appeals by defendants; the second appeals by the State.

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

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

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

## 6. Elimination of Private Prosecutor in Municipal Appeals

The Municipal Court Practice Committee is proposing an amendment to R. 7:8-7(b) that would eliminate the practice of private attorneys appearing in Municipal Court to prosecute citizen complaints. The rule proposal is also consistent with language in In re Grand Jury Appearance Request by Loigman, 183 N.J. 133, 140 (2005), which states that "[p]rivate prosecutions in municipal court are a permissible, R. 7:8-7(b), but not favored, practice."

If adopted, as a result of the proposed amendments to the Part III and Part VII rules, the Municipal Prosecutor would be involved in every case. The Municipal Court Practice Committee anticipated that the elimination of private prosecutors would phase-in over a period of six months.

The Municipal Court Practice Committee asked the Committee to consider amendments to R. 3:23-9 and R. 3:24 that would limit the authority to file appeals in Municipal Court to public prosecutors. Under the proposed amendments, neither private prosecutors nor private citizens would be able to file appeals based upon an unfavorable decision in Municipal Court.

The Committee proposes amendments to R. 3:23-9 and R. 3:24 contingent upon the following: (1) providing notice to the private citizen that he/she may contact the municipal prosecutor to pursue an appeal; (2) reconsidering the 6-month phase-in time for the elimination of private prosecutors and aligning the phase-in with the budgets of the individual municipalities; and (3) aligning the amendment to R. 3:23-9 to the same phase-in as R. 7:8-7.

**3:23-9. Prosecuting Attorney Defined**

In all appeals under R. 3:23 the prosecuting attorney shall be:

(a) The Attorney General, where required by law.

(b) The municipal attorney, in a case involving a violation of a municipal ordinance.

(c) The county prosecutor, in all other cases.

[(d) With the assent of the prosecuting attorney and the consent of the court, the attorney for a complaining witness or other person interested in the prosecution may be permitted to act for the prosecuting attorney; provided, however, that the court has first reviewed the attorney certification submitted on a form prescribed by the Administrative Director of the Courts, ruled on the contents of the certification, and granted the attorney's motion to act as private prosecutor for good cause shown. The finding of good cause shall be made on the record.]

Note: Source--R.R. 3:10-13. Paragraph (b) amended September 5, 1969 to be effective September 8, 1969; paragraph (d) amended November 22, 1978 to be effective December 7, 1978; paragraph (d) amended July 11, 1979 to be effective September 10, 1979; amended July 28, 2004 to be effective September 1, 2004[.];paragraph (d) deleted to be effective .

**3:24. Appeals From Orders In Courts Of Limited Criminal Jurisdiction**

(a) . . . No Change.

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

(c) . . . No Change.

(d) . . . No Change.

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

## 7. Bail Recognizance Form

At the request of the Municipal Court Services Division of the Administrative Office of the Courts, the Committee was asked to consider amendments to R. 3:26-4(f) and (g) that would provide that a person making a cash deposit for bail can file an affidavit or certification concerning the lawful ownership of the funds, and that on discharge the funds will be returned to the owner. Currently, R. 3:26-4 only permits affidavits. The proposed change would not apply to bail involving property, or types of surety other than cash.

The Committee examined N.J.S.A. 2A:162-9, which addresses cash deposits in lieu of bail and requires an affidavit as to ownership of a cash bail deposit. That statute also authorizes the Supreme Court to promulgate rules addressing the form of the affidavits and the proceedings pertaining to cash bail deposits. The Committee also considered the present language of R. 3:26-4(f), which provides that when a person other than the defendant deposits cash in lieu of bond, the depositor shall file an affidavit concerning the lawful ownership, and that on discharge, the cash may be returned to the owner named in the affidavit. R. 1:4-4(b), as a rule of general application, permits an affiant to submit a certification in lieu of an affidavit, oath or verification that is required by the court rules.

The Supreme Court can promulgate rules dictating the form of the affidavit for cash bail deposits under N.J.S.A. 2A:162-9, and that R. 1:4-4 appears to allow a person who deposits cash bail to submit a certification in lieu of the affidavit required by R.

3:26-4(f). The Committee therefore unanimously recommends amending R. 3:26-4(f), and (g) to permit affidavits or certifications.

The proposed amendments are consistent with a change that has already been made to R. 7:4-3, the corollary Municipal Court Rule in Part VII of the New Jersey Rules of the Court, and with changes to the New Jersey Judiciary Bail Recognizance Form issued in Directive #13-04 (November 17, 2004).

**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) Cash Deposit. When a person other than the defendant deposits cash in lieu of bond, the person making the deposit 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.

(g) Ten Percent Cash Bail. Except in first or second degree cases 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.

Note: 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 (a) amended February 27, 1995 to be effective immediately[.]; paragraphs (f) and (g) amended to be effective .

## 8. Pretrial Intervention (PTI)

The Committee was asked to consider whether R. 3:28(c)(4) should be amended, as the last sentence seems to prohibit the same judge from ordering PTI termination and then retaining the case after it is reactivated for ordinary prosecution. That provision occasionally creates difficulties in cases in which the defendant is represented by a Public Defender, because it requires that Public Defenders either move with their clients to different courts, or that defendants be appointed new Public Defenders in new courts.

The Committee is of the opinion that there was no substantial reason for not allowing the judge who ordered the termination from handling the subsequent prosecution of that same case. Since there are no prohibitions barring a judge who hears and denies pretrial motions; e.g., a motion to suppress, from conducting the trial, it does not seem to make sense to bar a judge who ordered the termination from handling the underlying criminal case.

The Committee recommends deleting the last sentence of R. 3:28(c)(4). This amendment would eliminate the language that precludes the designated judge who issued the order returning the defendant to prosecution from conducting subsequent hearings.

## 3:28. PRETRIAL INTERVENTION PROGRAMS

(a) . . . No Change.

(b) . . . No Change.

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

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

(2) On recommendation of the criminal division manager and with the consent of the prosecutor and the defendant, further postpone all proceedings against such defendant on such charges for an additional period of time as long as the aggregate of postponement periods under the rule does not exceed thirty-six months; or

(3) On the written recommendation of the criminal division manager or the prosecutor or on the court's own motion order the prosecution of the defendant to proceed in the ordinary course. Where a recommendation for such an order is made by the criminal division manager or the prosecutor, such person shall, before submitting such recommendation to the designated judge, provide the defendant or defendant's attorney with a copy of such recommendation, shall advise the defendant of the opportunity to be heard thereon, and the designated judge shall afford the defendant such a hearing.

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

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

(d) . . . No Change.

(e) . . . No Change.

(f) . . . No Change.

(g) . . . No Change.

(h) . . . No Change.

Note: Adopted October 7, 1970, effective immediately. Paragraphs (a)(b)(c)(d) amended June 29, 1973, to be effective September 10, 1973; caption and paragraphs (a)(b)(c)(d) amended April 1, 1974 effective immediately; paragraph (e) adopted January 10, 1979 to be effective January 15, 1979; paragraphs (a)(b)(c)(d) amended August 28, 1979 to be effective September 1, 1979; paragraphs (f) and (g) adopted October 25, 1982 to be

effective December 1, 1982; paragraphs (a) (b) (c) (d) and (f) amended and paragraph (h) added July 13, 1994, to be effective January 1, 1995; paragraph (f) amended June 28, 1996 to be effective September 1, 1996; paragraph (f) amended July 12, 2002 to be effective September 3, 2002[.]; paragraph (c) amended to be effective .

## 9. Bail Recognizance Rule – Technical Amendments

R. 3:26-4 has not been updated since the Judiciary assumed the responsibility of the bail function. The Committee is proposing two technical amendments to the rule. The Committee recommends that, in paragraphs (a) and (e), "clerk of the county" be replaced with "Finance Division Manager in the county." It is also recommending an amendment to paragraph (d) to state that the recognizance should be recorded into the Central Automated Bail System (CABS).

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

(a) Deposit of Bail. A person admitted to bail shall, together with that person's sureties, sign and execute a recognizance before the person authorized to take bail or, if the defendant is in custody, the person in charge of the place of confinement. The recognizance shall contain the terms set forth in *R. 1:13-3(b)* and shall be conditioned upon the defendant's appearance at all stages of the proceedings until final determination of the matter, unless otherwise ordered by the court. One or more sureties may be required. Cash may be accepted, and in proper cases no security need be required. A corporate surety shall be one approved by the Commissioner of Insurance and shall execute the recognizance under its corporate seal, cause the same to be duly acknowledged and shall annex thereto proof of authority of the officers or agents executing the same and of corporate authority and qualification. Bail given in the Superior Court shall be deposited with the [clerk of] Finance Division Manager in the county in which the offense was committed, provided that upon order of the court bail shall be transferred from the county of deposit to the county in which defendant is to be tried. Real estate offered as bail for indictable and non-indictable offenses shall be approved by and deposited with the clerk of the county in which the offense occurred and not with the Municipal Court clerk. In any county, with the approval of the Assignment Judge, a program may be instituted for the deposit in court of cash in the amount of 10 percent of the amount of bail fixed.

(b) . . . No Change.

(c) . . . No Change.

(d) Record of Recognizance. The clerk of every court, except the municipal court, before which any recognizance shall be entered into shall record immediately into the Central Automated Bail System (CABS), [in alphabetical order in a book kept for that purpose,] the names of the persons entering into the recognizance, the amount thereof and the date of its acknowledgment. The Central Automated Bail System [Such book] shall be kept in the clerk's office of the county of which such court shall be held, and be open for public inspection. In municipal court proceedings the record of the recognizance shall be entered in the docket book maintained by the clerk.

(e) Record of Discharge; Forfeiture. When any recognizance shall be discharged by court order upon proof of compliance with the conditions thereof or by reason of the judgment in any matter, the clerk of the court shall enter the word "discharged" and the date of discharge at the end of the record of such recognizance. When any recognizance is forfeited, the [clerk of the court] Finance Division Manager shall enter the word "forfeited", and the date of forfeiture at the end of the record of such recognizance, and shall give notice of such forfeiture to the county counsel. When real estate of the surety located in a county other than the one in which the bail was taken is affected, the clerk of the court in which such recognizance is given shall forthwith send notice of the discharge or forfeiture and the date thereof to the clerk of the county where such real estate is situated, who shall make the appropriate entry at the end of the record of such recognizance.

(f) . . . No Change.

(g) . . . No Change.

Note: 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 (a) amended February 27, 1995 to be effective immediately[.]; paragraphs (a), (d) and (e) amended to be effective .

**10. Discovery of Birthdates of Witnesses**

The Committee considered an amendment to R. 3:13-3 that would require defendants to furnish birthdates of witnesses during discovery. The purpose of the rule proposal is to assist in checking the criminal history of witnesses. The Committee adopted the proposal, provided that it allowed for reciprocal discovery of birthdates by both parties. The Committee is proposing amendments to R. 3:13-3(c)(6) and R. 3:13-3(d)(3) to implement this change.

**3:13-3. Discovery and Inspection**

(a) . . . No Change.

(b) . . . No Change.

(c) Discovery by the Defendant. The prosecutor shall permit defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package under section (b):

(1) books, tangible objects, papers or documents obtained from or belonging to the defendant;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;

(3) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of the prosecutor;

(4) reports or records of prior convictions of the defendant;

(5) books, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the prosecutor;

(6) names, [and] addresses and birthdates of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the prosecutor as to which of those persons may be called as witnesses;

(7) record of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecutor and any relevant record of prior conviction of such persons;

(8) police reports which are within the possession, custody, or control of the prosecutor;

(9) names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Except in the penalty phase of a capital case if this information is requested and not furnished 30 days in advance of trial, the expert witness may, upon application by the defendant, be barred from testifying at trial.

(d) Discovery by the State. A defendant shall permit the State to inspect and copy or photograph the following relevant material if not given as part of the discovery package under section (b):

(1) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of defense counsel;

(2) any relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of defense counsel;

(3) the names, [and] addresses, and birthdates of those persons known to defendant who may be called as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements;

(4) written statements, if any, including any memoranda reporting or summarizing the oral statements, made by any witnesses whom the State may call as a witness at trial;

(5) names and address of each person whom the defense expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, and a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Except in the penalty phase of a capital case if this information is requested and not furnished 30 days in advance of trial the expert may, upon application by the prosecutor, be barred from testifying at trial.

(e) . . . No Change.

(f) . . . No Change.

(g) . . . No Change.

Note: Source--R.R. 3:5-11(a)(b)(c)(d)(e)(f)(g)(h). Paragraphs (b)(c)(f) and (h) deleted; paragraph (a) amended and paragraphs (d)(e)(g) and (i) amended and redesignated June 29, 1973 to be effective September 10, 1973. Paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraphs (a) and (b) amended July 22, 1983 to be effective September 12, 1983; new paragraphs (a) and (b) added, former paragraphs (a), (b), (c), (d) and (f) amended and redesignated paragraphs (c), (d), (e), (f) and (g) respectively and former paragraph (e) deleted July 13, 1994, to be effective January 1, 1995; Rule redesignation of July 13, 1994 eliminated December 9, 1994, to be effective January 1, 1995[.]; paragraphs (c) and (d) amended to be effective .

## 11. Technical Amendment to R. 3:6-8(a)

The Committee believes that R. 3:6-8(a) should be gender-neutral. The Committee is proposing an amendment that would change "foreman" to "foreperson."

**3:6-8. Finding and Return of Indictment; No Bill**

(a) Return; Secrecy. An indictment may be found only upon the concurrence of 12 or more jurors and shall be returned in open court to the Assignment Judge or, in the Assignment Judge's absence, to any Superior Court judge assigned to the Law Division in the county. With the approval of the Assignment Judge, an indictment may be returned to such judge by only the [foreman] foreperson or the deputy [foreman] foreperson rather than with all other members of the grand jury. Such judge may direct that the indictment shall be kept secret until the defendant is in custody or has given bail and in that event it shall be sealed by the clerk, and no person shall disclose its finding except as necessary for the issuance and execution of a warrant or summons.

(b) . . . No Change

Note: Source-R.R. 3:3-8(a)(b); paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994[.] ; paragraph (a) amended to be effective .

## B. Non-Rule Recommendations

### 1. Sex Crime Victim Treatment Fund

On April 26, 2005, Acting Governor Codey signed S-781 into law as P.L. 2005, c. 73. The new law was effective on April 26, 2005. The law requires that a monetary penalty for the Sex Crime Victim Treatment Fund be assessed against sex offenders. Specifically, any person convicted of a sex offense (as defined in N.J.S.A. 2C:7-2) must be assessed a penalty for each offense not to exceed $2,000 for a crime of the first degree, $1,000 for a crime of the second degree, $750 for a crime of the third degree, and $500 for a crime of the fourth degree. These penalties are in addition to, not in lieu of, any fine currently authorized by law.

The Committee agreed to add Question #8 to the *Additional Questions for Certain Sexual Offenses (Megan's Law) Plea Form* to state the following:

> 8. Sex Crime Victim Treatment Fund Penalty (S.C.V.T.F.)
>
> Do you understand that if the crime occurred on or after April 26, 2005, as a result of your guilty plea you will be required to pay a mandatory Sex Crime Victim Treatment Fund (S.C.V.T.F.) penalty as listed below for each offense for which you pled guilty? [YES] [NO]
>
> The mandatory penalties are as follows:
>
> (1) Up to $2,000 in the case of a 1st degree crime
> (2) Up to $1,000 in the case of a 2nd degree crime
> (3) Up to $ 750 in the case of a 3rd degree crime
> (4) Up to $ 500 in the case of a 4th degree crime
>
> TOTAL S.C.V.T.F. Penalty: _____

The revised *Additional Questions for Certain Sexual Offenses (Megan's Law) Plea Form* was promulgated via Directive #13-05 on September 19, 2005. The Committee also agreed to amend the Judgment of Conviction to reflect the Sex Crime Victim Treatment Fund. The revised Judgment of Conviction form has not yet been promulgated.

**State of New Jersey**

**v.**

Defendant:
(Specify Complete Name)

**New Jersey Superior Court**
**Law Division – Criminal**
**CountyName County**

☐ JUDGMENT OF CONVICTION
☐ CHANGE OF JUDGMENT
☐ ORDER FOR COMMITMENT
☐ INDICTMENT / ACCUSATION DISMISSED
☐ JUDGMENT OF ACQUITTAL

| DATE OF BIRTH | SBI NUMBER |
|---|---|
| DATE OF ARREST | DATE INDICTMENT/ ACCUSATION FILED |
| DATE OF ORIGINAL PLEA | ORIGINAL PLEA ☐ **Not Guilty** ☐ **Guilty** |

ADJUDICATION BY

☐ GUILTY PLEA DATE: ☐ NON-JURY TRIAL DATE:

☐ JURY TRIAL DATE: ☐ DISMISSED / ACQUITTED DATE:

**ORIGINAL CHARGES**

| IND / ACC NO. | COUNT | DESCRIPTION | DEGREE | STATUTE |
|---|---|---|---|---|
| | | | | |

**FINAL CHARGES**

| COUNT | DESCRIPTION | DEGREE | STATUTE |
|---|---|---|---|
| | | | |

It is, therefore, on _____ **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows:

☐ The defendant is hereby sentenced to parole supervision for life **(if the offense occurred on or after 1/14/2004)**.

☐ The defendant is hereby sentenced to community supervision for life **(if the offense occurred on or after 1/14/2004)**.

☐ The defendant is hereby ordered to serve a _____ year term of parole supervision which term shall begin as soon as defendant completes the sentence of incarceration.

☐ The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.

☐ The court finds that the defendant is amenable to sex offender treatment.

☐ The court finds that the defendant is willing to participate in sex offender treatment.

☐ The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided.

☐ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

| | | |
|---|---|---|
| ☐ Defendant is to receive credit for time spent in custody (*R*. 3:21-8). | TOTAL NUMBER OF DAYS | DATE: (From/To)<br>DATE: (From/To) |
| ☐ Defendant is to receive gap time credit for time spent in custody (*N.J.S.A.* 2C:44-5b(2)). | TOTAL NUMBER OF DAYS | DATE: (From/To)<br>DATE: (From/To) |

Total Custodial Term _____ Institution _____ Total Probation Term _____

State of New Jersey v. S.B.I. # Ind / Acc #

**Total Fine $_____**

**Total RESTITUTION $_____**

If the offense occurred on or after December 23, 1991, an assessment of $50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to *N.J.S.A.* 2C:43-3.1. (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $25 if offense is before January 9, 1986.)

☐ Assessment imposed on

count(s) _____

is $_____ each.

**Total VCCB Assessment $_____**

Installment payments are due at the rate of

$_____ per _____

beginning _____

(Date)

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)

_____ 1st Degree @ $3000 _____ 4th Degree @ $750

_____ 2nd Degree @ $2000 _____ Disorderly Persons or Petty Disorderly Persons @ $500

_____ 3rd Degree @ $1000

**Total D.E.D.R. Penalty $_____**

☐ Court further Orders that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED. _____ Offenses @ $50.

**Total Lab Fee $_____**

3) Name of Drugs involved _____

4) A mandatory driver's license suspension of _____ months is ORDERED.

The suspension shall begin today, _____ and end _____.

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant's Address _____

Eye Color _____ Sex _____ Date of Birth

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____. Driver's License Number _____

☐ Defendant's non-resident driving privileges are hereby revoked for _____ months.

If the offense occurred on or after February 1, 1993 but was before March 13, 1995 and the sentence is to probation or to a state correctional facility, a transaction fee of up to $1.00 is ordered for each occasion when a payment or installment payment is made. (*P.L.* 1992, *c.* 169). If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, a transaction fee of up to $2.00 is ordered for each occasion when a payment is made. (*P.L.* 1995, *c.* 9).

If the offense occurred on or after August 2, 1993, a $75 Safe Neighborhood Services Fund assessment is ordered for each conviction. (*P.L.* 1993, *c.*220)

If the offense occurred on or after January 5, 1994 and the sentence is to probation, a fee of up to $25 per month for the probationary term is ordered. (*P.L.* 1993, *c.* 275) Amount per month $_____.

If the crime occurred on or after January 9, 1997, a $30 Law Enforcement Officers Training and Equipment Fund penalty is ordered.

If the crime occurred on or after May 4, 2001, and the defendant has been convicted of aggravated sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endanger the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of a minor under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(3), (4) or (5)(a), luring or enticing a child pursuant to 2C:13-6, criminal sexual contact pursuant to 2C:14-3b if the victim is a minor, kidnapping pursuant to 2C:13-1, criminal restraint pursuant to 2C:13-2 or false imprisonment pursuant to 2C:13-3 if the victim is a minor and the offender is not the parent, promoting child prostitution pursuant to 2C:34-1b(3) or (4), or an attempt to commit any of these crimes, a $800 Statewide Sexual Assault Nurse Examiner Program Penalty is ordered for each of these offenses.

| Name (Court Clerk or Person preparing this form) | Telephone Number | Name (Attorney for Defendant at Sentencing) |
|---|---|---|
| | | |

If the crime occurred on or after April 26, 2005, and the defendant has been convicted of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(3), (4) or (5)(a), luring or enticing a child pursuant to 2C:13-6, criminal sexual contact pursuant to 2C:14-3b if the victim is a minor; kidnapping pursuant to 2C:13-1, criminal restraint pursuant to 2C:13-2 or false imprisonment pursuant to 2C:13-3 if the victim is a minor and the offender is not the parent, promoting child prostitution pursuant to 2C:34-1b(3), (4), or any attempt to commit any such offense.

A mandatory Sex Crime Victim Treatment Fund penalty of $ _____

First degree crime: up to $2000
Second degree crime: up to $1000
Third degree crime: up to $750
Fourth degree crime: up to $500

**STATEMENT OF REASONS – Include all applicable aggravating and mitigating factors**

| Judge (Name) | Judge (Signature) | Date |
|---|---|---|
| | | |

## ADDITIONAL QUESTIONS FOR CERTAIN SEXUAL OFFENSES

These additional questions need to be answered if you are pleading guilty to the offense of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(3), (4) or (5)(a), luring or enticing a child pursuant to 2C:13-6, criminal sexual contact pursuant to 2C:14-3b if the victim is a minor; kidnapping pursuant to 2C:13-1, criminal restraint pursuant to 2C:13-2 or false imprisonment pursuant to 2C:13-3 if the victim is a minor and the offender is not the parent, promoting child prostitution pursuant to 2C:34-1b(3), (4), or any attempt to commit any such offense. Note also that Question 7 includes the offense of felony murder if the underlying crime is sexual assault, as well as any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the offense should be considered a sexually violent offense, or an attempt to commit these offenses.

1. Registration

   a) Do you understand that you must register with certain public agencies? [YES] [NO]

   b) Do you understand that if you change residence you must notify the law enforcement agency where you are registered, and must re-register with the chief law enforcement officer of the municipality in which you will reside, or the Superintendent of State Police if the municipality does not have a chief law enforcement officer, no less than 10 days before you intend to reside at the new address? [YES] [NO]

   c) Do you understand that if you fail to register or re-register you may be charged with a fourth degree crime and receive a sentence of imprisonment of up to 18 months? [YES] [NO]

2. Address Verification

   a) Do you understand that if you are pleading guilty to aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to 2C:13-1c(2) or any attempt to commit any of these crimes and at sentencing the court finds that your conduct was characterized by a pattern of repetitive, compulsive behavior you must verify your address with the appropriate law enforcement agency every 90 days or if the court finds your conduct is not characterized by a pattern of repetitive and compulsive behavior, you must verify your address annually? [YES] [NO]

b) Do you understand that if you fail to verify your address you may be charged with a fourth degree crime and receive a sentence of imprisonment of up to 18 months? [YES] [NO]

3. Notification

Do you understand that the requirement of registration may result in notification to law enforcement, community organizations, or the public at large, of your release from incarceration or presence in the community? [YES] [NO]

4a. Community Supervision for Life **(only complete if the offense occurred before January 14, 2004)**. **(If the offense occurred on or after January 14, 2004, the defendant should complete Question 4b Parole Supervision for Life).**

(1) Do you understand that if you are pleading guilty to the crime of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to 2C:24-4a, luring, or an attempt to commit any such offense, the court, in addition to any other sentence, will impose a special sentence of community supervision for life? [YES] [NO] [N/A]

(2) Do you understand that being sentenced to community supervision for life means that: you will be supervised for at least 15 years as if on parole, and subject to conditions appropriate to protect the public and foster rehabilitation, including, but not limited to counseling; and other restrictions, which may include restrictions on where you can live, work or travel? [YES] [NO] [N/A]

4b. Parole Supervision for Life **(only complete if the offense occurred on or after January 14, 2004).**

(1) Do you understand that if you are pleading guilty to the crime of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of a child pursuant to 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(3), luring or an attempt to commit any of these offenses and the offense occurred on or after January 14, 2004, the court, in addition to any other sentence, will impose a special sentence of parole supervision for life? [YES] [NO] [N/A]

(2) Do you understand that being sentenced to parole supervision for life means that upon release from incarceration or immediately upon imposition of a suspended sentence you will be supervised by the Division of Parole for at least 15 years and will be subject to provisions and conditions of parole, including conditions appropriate to protect the public and foster rehabilitation, such as, but not limited to, counseling, and other restrictions which may include restrictions on where you can live, work, travel or persons you can contact? [YES] [NO] [N/A]

(3) Do you understand that if you violate a condition of parole supervision for life, your parole may be revoked and you can be sent to prison for 12 to 18 months for each revocation that occurs while you are being supervised and that the prison term you receive cannot be reduced by commutation or work credits? [YES] [NO] [N/A]

(4) Do you understand that if you violate a condition of parole supervision for life and you are indicted and convicted for that violation, you will receive a sentence of imprisonment of up to 18 months and that the sentence you receive could be in addition to any prison term you may receive from the Parole Board for a violation of parole supervision for life? [YES] [NO] [N/A]

5. Internet Posting

Do you understand that as a result of your conviction your name, age, race, sex, date of birth, height, weight, eye color, any distinguishing scars or tattoos you have, your photograph, the make, model, color, year and license plate number of any vehicle you operate, the street address, zip code, municipality and county in which you reside and a description of the offense for which you are pleading guilty, may be publicly available on the internet? [YES] [NO]

6. Statewide Sexual Assault Nurse Examiner Program Penalty

Do you understand that if the crime occurred on or after May 4, 2001 as a result of your guilty plea you will be required to pay a penalty of $800 for each offense for which you are pleading guilty? [YES] [NO]

7. Civil Commitment

Do you understand that if you are convicted of a sexually violent offense, such as aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2)(b), criminal sexual contact, felony murder if the underlying crime is sexual assault, an attempt to commit any of these offenses, or any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the offense should be considered a sexually violent offense, you may upon completion of your term of incarceration, be civilly committed to another facility if the court finds, after a hearing, that you are in need of involuntary civil commitment? [YES] [NO]

8. Sex Crime Victim Treatment Fund Penalty (S.C.V.T.F.)

Do you understand that if the crime occurred on or after April 26, 2005, as a result of your guilty plea you will be required to pay a mandatory Sex Crime Victim Treatment Fund (S.C.V.T.F.) penalty as listed below for each offense for which you pled guilty? [YES] [NO]

The mandatory penalties are as follows:

(1) Up to $2,000 in the case of a 1st degree crime
(2) Up to $1,000 in the case of a 2nd degree crime
(3) Up to $ 750 in the case of a 3rd degree crime
(4) Up to $ 500 in the case of a 4th degree crime

TOTAL S.C.V.T.F. Penalty: _____

Date: _____ Defendant: _____

Defense Attorney _____ Prosecutor: _____

## 2. Amendments to the Additional Questions for Certain Sexual Offenses (*Megan's Law)* Plea Form

The Committee considered whether to amend the *Additional Questions for Certain Sexual Offenses* (*Megan's Law*) *Plea Form* to: (1) add questions 1c and 2b addressing the consequences for the failure to register; (2) add a question 2c addressing the consequences for the failure to verify, pursuant to the Appellate Division's opinion in State v. Gyori, 373 N.J. Super. 559 (App. Div. 2004), rev'd, 185 N.J. 422 (2005); and (3) adding questions regarding Parole Supervision for Life (Questions 4b(1) thru (4)) after the questions regarding Community Supervision for Life (Questions 4a(1) and (2)). The questions addressing Parole Supervision for Life are currently set forth on a separate form.

In Gyori, the Appellate Division held that a Megan's Law registrant's failure to annually verify his address constituted the fourth-degree crime of failing to register under N.J.S.A. 2C:7-2a(2). Although Gyori contained a dissenting opinion and would therefore be automatically reviewed by the Supreme Court, the Committee initially agreed, out of caution, to add a question 2c regarding the potential consequences for failing to verify an address. Later, however, the New Jersey Supreme Court held that a failure to verify was not a separate crime. See State v. Gyori, 185 N.J. 422 (2005). In light of that opinion, the Committee then agreed that a question addressing the potential consequences for failure to verify should *not* be included on the form. The Committee, however, recommended that questions 1c and 2b, addressing the consequences for the failure to register, and questions 4b(1) thru (4), regarding Parole Supervision for Life, be included on the form. See pages 41-44 supra. The revised *Additional Questions for Certain*

*Sexual Offenses (Megan's Law) Plea Form* was promulgated via Directive #13-05 on September 19, 2005.

### 3. Amendments to Plea Form – Plea Waiver

The Committee considered amending the *Plea Form* to include a question regarding whether the defendant understood that by pleading guilty, he/she was waiving review of the denial of any and all pretrial motions, except those preserved by court rule or otherwise specifically reserved for appellate review. A Subcommittee was created to further research the issue.

In State v. Knight, 183 N.J. 449 (2005), the New Jersey Supreme Court reiterated that a defendant who enters into an unconditional guilty plea waives any right to contest the admissibility of his or her statements on appeal. When a conditional plea is taken, however, any decisions reserved for appeal are generally reflected on the plea form as well as the plea colloquy. The problem arises when the issue is addressed, and the defendant may not realize the scope of the waiver. Some members of the Committee were of the view that a question addressing waiver of motions should be added to the *Plea Form* because sometimes the plea colloquy is very brief, and in certain situations, such as those involving Miranda issues, defendants may not fully understand that by entering a guilty plea they are waiving review of those matters on appeal. Other members felt that including the question on the plea form would encourage uniformity across the state with respect to presentation of issues for appeal, and would highlight the impact of the plea as a waiver, particularly for attorneys who do not routinely practice criminal law. In any event, a specific question in the form focuses attention, for the benefit

of both parties, as to whether any issues are preserved for appeal, and if so the specific issues raised.

Ultimately, the Committee determined that there was no need to amend the court rules. However, the Committee agreed to amend the *Plea Form* to include (1) a question addressing the defendant's understanding that he/she is waiving review of the denial of any pretrial motions, except those specifically reserved for appellate review; and (2) language designed to set forth those matters that are preserved for appeal, based upon the court rules, notwithstanding a guilty plea.

The Committee recommends that the following questions be included on the *Plea Form*:

> (4d) Do you understand that by pleading guilty you are not waiving your right to appeal (1) the denial of a motion to suppress physical evidence (R. 3:5-7(d)) or (2) the denial of acceptance into a pretrial intervention program (PTI) (R. 3:28(g))
>
> (4e) Do you further understand that by pleading guilty you are waiving your right to appeal the denial of all other pretrial motions except the following:_____.

In the blank space, the defendant would list any motions preserved for appellate review.

The Committee briefly considered changing "pretrial motions" to "pretrial issues," but determined that that language was too broad.

# Plea Form

County _____

Prosecutor File Number _____

**Defendant's Name:**

before Judge:

**1.** List the charges to which you are pleading guilty:

| Ind./Acc./Comp.# | Count | Nature of Offense | Degree | **Statutory Maximum** | Time | Fine | VCCB Assmt* |
|---|---|---|---|---|---|---|---|
| | | | | **Max** | | | |
| | | | | **Max** | | | |
| | | | | **Max** | | | |
| | | | | **Max** | | | |
| | | | | **Max** | | | |
| Your total exposure as the result of this plea is: ..... | | | | **Total** | | | |

**Please Circle Appropriate Answer**

**2.** **a.** Did you commit the offense(s) to which you are pleading guilty? **[Yes]** **[No]**

**b.** Do you understand that before the judge can find you guilty, you will have to tell the judge what you did that makes you guilty of the particular offense(s)? **[Yes]** **[No]**

**3.** Do you understand what the charges mean? **[Yes]** **[No]**

**4.** Do you understand that by pleading guilty you are giving up certain rights? Among them are:

**a.** The right to a jury trial in which the State must prove you guilty beyond a reasonable doubt? **[Yes]** **[No]**

**b.** The right to remain silent? **[Yes]** **[No]**

**c.** The right to confront the witnesses against you? **[Yes]** **[No]**

**d.** Do you understand that by pleading **you are not waiving** your right to appeal (1) the denial of a motion to suppress physical evidence (*R.* 3:5-7(d)) or (2) the denial of acceptance into a pretrial intervention program (PTI) (*R.* 3:28(g))? **[Yes]** **[No]**

**e.** Do you further understand that by pleading guilty **you are waiving** your right to appeal the denial of all other pretrial motions except the following: **[Yes]** **[No]**

_____

_____

_____

**5.** Do you understand that if you plead guilty:

**a.** You will have a criminal record? **[Yes]** **[No]**

**b.** Unless the plea agreement provides otherwise, you could be sentenced to serve the maximum time in confinement, to pay the maximum fine and to pay the maximum Victims of Crime Compensation Board Assessment? **[Yes]** **[No]**

* VICTIMS OF CRIME COMPENSATION BOARD ASSESSMENT

**5.** **c.** You must pay a minimum Victims of Crime Compensation Board assessment of $50 ($100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty? (Penalty is $30 if offense occurred between January 9, 1986 and December 22, 1991 inclusive. $25 if offense occurred before January 1, 1986.) [**Yes**] [**No**]

**d.** If the offense occurred on or after February 1, 1993 but was before March 13, 1995, and you are being sentenced to probation or a State correctional facility, you must pay a transaction fee of up to $1.00 for each occasion when a payment or installment payment is made? If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, you must pay a transaction fee of up to $2.00 for each occasion when a payment or installment payment is made? [**Yes**] [**No**]

**e.** If the offense occurred on or after August 2, 1993 you must pay a $75 Safe Neighborhood Services Fund assessment for each conviction? [**Yes**] [**No**]

**f.** If the offense occurred on or after January 5, 1994 and you are being sentenced to probation, you must pay a fee of up to $25 per month for the term of probation? [**Yes**] [**No**]

**g.** If the crime occurred on or after January 9, 1997 you must pay a Law Enforcement Officers Training and Equipment Fund penalty of $30? [**Yes**] [**No**]

**h.** You will be required to provide a DNA sample, which could be used by law enforcement for the investigation of criminal activity, and pay for the cost of testing? [**Yes**] [**No**]

**6.** Do you understand that **the court could**, in its discretion, impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentenced imposed? [**Yes**] [**No**]

**7.** Did you enter a plea of guilty to any charges **that require** a mandatory period of parole ineligibility or a mandatory extended term? [**Yes**] [**No**]

**a.** If you are pleading guilty to such a charge, the minimum mandatory period of parole ineligibility is _____ years and _____ months (fill in the number of years/months) and the maximum period of parole ineligibility can be _____ years and _____ months (fill in the number of years/months) and this period cannot be reduced by good time, work, or minimum custody credits.

**8.** Are you pleading guilty to a crime that contains a presumption of imprisonment which means that it is almost certain that you will go to state prison? [**Yes**] [**No**]

**9.** Are you presently on probation or parole? [**Yes**] [**No**]

**a.** Do you realize that a guilty plea may result in a violation of your probation or parole? [**Yes**] [**No**] [**N/A**]

**10.** Are you presently serving a custodial sentence on another charge? [**Yes**] [**No**]

**a.** Do you understand that a guilty plea may affect your parole eligibility? [**Yes**] [**No**] [**N/A**]

**11.** Do you understand that if you have plead guilty to, or have been found guilty on other charges, or are presently serving a custodial term and the plea agreement is silent on the issue, the court may require that all sentences be made to run consecutively? [**Yes**] [**No**] [**N/A**]

**12.** List any charges the prosecutor has agreed to recommend for dismissal:

| Ind./Acc./Compl.# | Count | Nature of Offense and Degree |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

**13.** Specify any sentence the prosecutor has agreed to recommend:

**14.** Has the prosecutor promised that he or she will **NOT**:

a. Speak at sentencing? [**Yes**] [**No**]

b. Seek an extended term of confinement? [**Yes**] [**No**]

c. Seek a stipulation of parole ineligibility? [**Yes**] [**No**]

**15.** Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution? [**Yes**] [**No**] [**N/A**]

**16.** Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty? [**Yes**] [**No**] [**N/A**]

**17.** Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty? [**Yes**] [**No**] [**N/A**]

**18.** Have you discussed with your attorney the legal doctrine of merger? [**Yes**] [**No**] [**N/A**]

**19.** Are you giving up your right at sentence to argue that there are charges you pleaded guilty to for which you cannot be given a separate sentence? [**Yes**] [**No**] [**N/A**]

**20.** List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as a part of this plea of guilty:

_____

_____

_____

_____

_____

_____

**21.** Have any promises other than those mentioned on this form, or any threats, been made in order to cause you to plead guilty? **[Yes]** **[No]**

**22.** **a.** Do you understand that the judge is not bound by any promises or recommendations of the prosecutor and that the judge has the right to reject the plea before sentencing you and the right to impose a more severe sentence? **[Yes]** **[No]**

**b.** Do you understand that if the judge decides to impose a more severe sentence than recommended by the prosecutor, that you may take back your plea? **[Yes]** **[No]**

**c.** Do you understand that if you are permitted to take back your plea of guilty because of the judge's sentence, that anything you say in furtherance of the guilty plea cannot be used against you at trial? **[Yes]** **[No]**

**23.** Are you satisfied with the advice you have received from your lawyer? **[Yes]** **[No]**

**24.** Do you have any questions concerning this plea? **[Yes]** **[No]**

Date _____ Defendant _____

Defense Attorney _____

Prosecutor _____

[ ] This plea is the result of the judge's conditional indications of the maximum sentence he or she would impose independent of the prosecutor's recommendation. Accordingly, the "Supplemental Plea Form for Non-Negotiated Pleas" has been completed.

## 4. Amendments to Supplemental Plea Form for Drug Offenses – Driver's License Suspension Statute – N.J.S.A. 2C:35-16

On January 12, 2006, the Governor signed S-2517 into law as P.L. 2005, c. 343. That law amends N.J.S.A. 2C:35-16 by making a driver's license suspension discretionary upon a finding of compelling circumstances by the court. Pursuant to the statute, "compelling circumstances" exist if the forfeiture of a person's driver's license "will result in extreme hardship and alternate means of transportation are not available." Previously, a driver's license suspension was mandatory under certain circumstances.

Currently, the *Supplemental Plea Form for Drug Offenses* contains a question addressing mandatory driver's license suspensions. The Committee is recommending that the form be amended to reflect that a driver's license suspension is now discretionary under certain circumstances.

## SUPPLEMENTAL PLEA FORM FOR DRUG OFFENSES

The following additional questions need to be answered only if you are pleading guilty pursuant to an offense under N.J.S.A. 2C:35-1 et seq. or N.J.S.A. 2C:36-1 et seq.

25. Have you and the Prosecutor entered into any agreement to provide for a lesser sentence or period of parole ineligibility than would otherwise be required? (If yes, be sure to include in questions 12 and 13 above). [YES] [NO]

26. Do you understand that if you plead guilty:

a. You will be required to forfeit your driver's license for a period of time from 6 to 24 months, unless the court finds compelling circumstances warranting an exception? [YES] [NO]

b. You will be required to pay a forensic laboratory fee of $50 for each offense for which you plead guilty? [YES] [NO]

c. You will be required to pay a mandatory drug enforcement and demand reduction (D.E.D.R.) penalty as listed below for each offense for which you plead guilty? [YES] [NO]

The mandatory penalties are as follows:

(1) $3,000 in the case of a 1st degree crime
(2) $2,000 in the case of a 2nd degree crime
(3) $1,000 in the case of a 3rd degree crime
(4) $ 750 in the case of a 4th degree crime
(5) $ 500 in the case of a disorderly persons or petty disorderly persons offense

TOTAL D.E.D.R. Penalty _____

DATE: _____

DEFENSE ATTORNEY: _____

DEFENDANT: _____

PROSECUTOR:_____

Administrative Office of the Courts
Reissued _____

## 5. Jury Trial Waiver Form

In an unpublished decision, State v. Tyrone Henry, App. Div. Dkt. No. A-3427-04T4 (May 15, 2006), the defendant, who was convicted of aggravated assault after a bench trial, argued that the trial court did not conduct a sufficient inquiry in granting his request to waive a jury trial. The Appellate Division remanded the matter to the Law Division for further proceedings to determine whether the defendant voluntarily waived his right to a jury trial. Slip op. at 17.

R. 1:8-1(a) requires that a jury trial is to be held in criminal matters, unless the defendant executes a written waiver. The defendant did not submit or sign a waiver in Henry. The issue of whether there should be a standard written waiver form was initially sent to the Conference of Criminal Presiding Judges for consideration. The conference decided that there should be a standard statewide form and developed one for consideration by the Committee. The Committee made two revisions to the form proposed by the Presiding Judges. First, the Committee added the following sentence to the end of the first paragraph:

> I understand that if I waive the right to a trial by jury, the State will only have to persuade one person, the judge, that I am guilty beyond a reasonable doubt.

The Committee also added the following sentence to the end of the second paragraph:

> I have discussed with my attorney the advantages and disadvantages of waiving my right to a trial by a jury.

The Committee approved the form as revised. It is recommending that the Jury Trial Waiver Form be approved for statewide use.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION, _____ COUNTY

INDICTMENT NO. _____

STATE OF NEW JERSEY

V.

_____

**WAIVER OF CRIMINAL JURY TRIAL PURSUANT TO RULE 1:8-1(a)**

I, _____, the defendant in the above-entitled cause(s) charged with_____

_____

acknowledge that I am entitled to a jury trial and that I further understand that a jury consists of twelve people chosen to determine whether I am guilty or not guilty of the criminal charges brought against me in this matter. I understand that if I waive the right to a trial by jury, the State will only have to persuade one person, the judge, that I am guilty beyond a reasonable doubt.

Having had an opportunity to consult with counsel, I knowingly and voluntarily waive my right to a jury trial and request to be tried by the Court. I have discussed with my attorney the advantages and disadvantages of waiving my right to a trial by a jury.

I understand that by waiving my right to a jury trial any verdict or judgment entered by the Court will have the same force and effect as a jury verdict.

I acknowledge that this waiver is being made freely and voluntarily and that I have not been subject to any threats, pressure or coercion to induce this waiver nor have I been assured of any leniency or expectations of reward in consideration of this waiver.

I have provided notice to the prosecution that I have waived my right to a jury trial.

Dated: _____ _____

Defendant

Dated: _____ _____

Defense Counsel

Dated: _____ _____

Prosecutor

APPROVED BY: _____

J.S.C.

## 6. Joint Ad Hoc Committee on Civil and Criminal Child Abuse Cases

The Joint Ad Hoc Committee on Civil and Criminal Child Abuse Cases was created by the Chairs of the Criminal Practice and Family Practice Committees in an effort to resolve two issues that arise when the Division of Youth and Family Services (DYFS) brings an action against a parent or guardian in the Family Part based upon allegations of child abuse, and the parent or guardian is also the subject of a concurrent criminal prosecution in the Law Division based upon the same incidents of child abuse. The first issue concerns the nature and extent of parental contact with the child, pending disposition of the criminal case. Given the need to protect the child from further abuse and neglect, and the possibility that the parent or guardian may attempt to pressure the child to recant, one of the typical conditions of bail in the criminal case is that the defendant have no contact with the child. DYFS, however, is statutorily required, under N.J.S.A. 30:4C-11.1, to exercise reasonable efforts to reunify the family. Consequently, issues concerning the nature and extent of parental or guardian contact with the child are simultaneously before the Law Division and the Family Part, different parts of the Superior Court that have different, and sometimes conflicting, objectives.

The second issue that often arises in concurrent civil and criminal child abuse cases concerns the sharing of information between DYFS and the county prosecutor during the pre-indictment stage of the criminal investigation. Both

Federal and State statutes require that the child abuse fact-finding hearing, in which it is determined whether the child is an abused or neglected child, be scheduled expeditiously and without undue delay. Consequently, the fact-finding hearing is typically held before the parent or guardian is indicted in the criminal matter, and often while the criminal investigation is still underway. While DYFS must release its confidential records and reports to law enforcement agencies investigating child abuse, the county prosecutor is under no obligation to provide DYFS with any information regarding an ongoing criminal investigation. Prosecutors are understandably reluctant to part with that information, as any information given to DYFS would also have to be provided to the attorney representing the parent or guardian in the Family Part case, and could be used to compromise the ongoing criminal investigation.

That reluctance to turn over information, however, could result in the situation that occurred in DYFS v. Robert M., 347 N.J. Super. 44 (App. Div.), certif.. denied, 174 N.J. 39 (2002). In that case, the county prosecutor's refusal to turn over the pre-indictment discovery, including statements of the victim's siblings and autopsy-related materials, to the Deputy Attorney General representing DYFS in the Family Court fact-finding hearing led the Family Part judge to find that DYFS had failed to prove its case regarding the victim and the three surviving children.

The Ad Hoc Committee proposed the following to address these two issues:

1. Where a civil child abuse complaint initiated by DYFS against the parents or guardians is pending in the Family Part, and there is a no-contact bail condition as the result of a criminal complaint filed against parents or guardians, arising out of the same incident(s), a hearing shall be held in the Family Part to determine the nature and scope of parental or guardian contact, if any, with the child. The hearing shall be on notice to the County Prosecutor, the Public Defender(s) or other counsel representing the parents or guardians in the criminal prosecution, the Deputy Attorney General representing DYFS in the civil Family Part matter, the attorney from the Public Defender's Office, designated counsel, or other counsel representing the parents or guardians in the civil Family Part matter, and the designated Law Guardian for the child in the Family Part matter. Prior to commencement of such a hearing, an appropriate protective order should issue governing disclosure of confidential DYFS records. See N.J.S.A. 9:6-8.10a. No bail condition except contact will be entertained in the Family Part. Upon considering the evidence and proofs and weighing the competing considerations, the Family Part shall determine the nature and scope of parental or guardian contact with the child, and an order memorializing that decision shall be issued. A copy of the resulting order shall be transmitted to the Law Division (Criminal Part) and shall constitute a condition of the bail ordered in the Law Division. Any applications for modification of that order shall be made to the Family Part, upon notice to the same parties and counsel as required in the first instance.

2. Where there are concurrent civil and criminal prosecutions arising from investigations being conducted by DYFS and the county prosecutor concerning an alleged incident of child abuse or neglect, and there is no consensus concerning the sharing of pre-indictment information, a conference should be conducted on an informal application to the Assignment Judge, who shall either hear the matter or assign it to an appropriate judge in the Family Part or Law Division, Criminal Part. The purpose of the conference is to determine what information, if any, contained in the investigation conducted by the county prosecutor shall be released to DYFS. In making this determination, the presiding court may wish to view the records in camera. This conference should take place expeditiously, bearing in mind that for cases of children in DYFS placement, fact-finding hearings must occur within four (4) months of out-of-home placement. Notice of the conference shall be given to the county prosecutor and all counsel in the Family Part case. Any agreements reached shall be placed on the record and memorialized by an order issued by the Family Part.

Some members of the Committee wondered if it might be better to let one judge handle the entire case, noting that under the procedures proposed by the Ad Hoc Committee, there could be three judges involved in the two cases. The Ad Hoc Committee felt that the Family Part judge was best equipped to handle contact issues, but that it was better for the Criminal Division judge to handle discovery issues. It is fairly common for the two cases to "bump up against each other," although not to the degree that occurred in Robert M, and that when there was disagreement, it was best for the Assignment Judge to decide the matter.

The Committee also discussed whether it might set a bad precedent to allow one judge to dismiss the order of another judge of equal stature. The intent of the Ad Hoc Committee was to encourage communication between the two courts, and to avoid conflict by having them work together. It was also noted that the proposed procedures were an improvement over the current practice, in which it was fairly common to have competing orders, with the Criminal Division judge ordering "no contact," but the Family Part judge allowing visitation. It was suggested that an alternative would be to give the Family Part more jurisdiction over the criminal matter until the jury trial began, but the Committee did not agree with that suggestion.

The Committee agreed with the proposed procedures contained in the Ad Hoc Committee's report, but felt that the report might be better received if it were accompanied by draft rules. Consequently, the Ad Hoc Committee's report is included here as a policy statement. The Ad Hoc Committee has been

reconvened, and is in the process of drafting rules to implement the proposed procedures. We hope they will be received by the Committee and Family Practice Committee for recommended adoption with the other proposals in this report.

# SUPREME COURT CRIMINAL AND FAMILY PRACTICE COMMITTEES

## Joint Ad Hoc Committee on Civil and Criminal Child Abuse Cases

## *REPORT*

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The Joint Ad Hoc Committee was created by the Supreme Court Criminal Practice Committee, chaired by the Honorable Edwin H. Stern, P.J.A.D., and the Supreme Court Family Practice Committee, chaired by the Honorable Eugene D. Serpentelli, A.J.S.C., to review and make recommendations concerning two key issues that arise as the result of an action instituted against a parent or guardian in the Family Part by the New Jersey Division of Youth and Family Services (DYFS) based upon allegations of child abuse, pursuant to N.J.S.A. 9:6-8.21 to -8.73 and N.J.S.A. 30:4C-11 to -12.2, and the concurrent criminal prosecution of that parent or guardian in the Law Division based upon the same incidents of child abuse. These two issues are:

1. The nature and extent of parental contact with the child, pending criminal disposition, given the need to protect the child from further abuse or neglect, the prosecutorial objective of preventing against unwarranted recantation, and the statutory requirement contained in N.J.S.A. 30:4C-11.1 that DYFS exercise reasonable efforts to effect family reunification, unless otherwise excused by the exceptions set forth in N.J.S.A. 30:4C-11.3;

2. The extent of sharing of information between DYFS and the prosecutor at the pre-indictment stage of a criminal investigation concerning the act or acts of child abuse in light of the statutory requirements contained in the Federal Adoption and Safe Families Act of 1997 (ASFA), Pub.L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.), and in Title 30 and Title 9 of N.J.S.A., that mandate the need to secure permanency and stability for children subject to abuse or neglect without undue delay, see In re

Guardianship of DMH, 161 N.J. 365, 385 (1999), thereby dictating the expeditious scheduling of a child abuse fact-finding hearing.

Although there may be dual criminal and civil prosecutions of the child's parent or guardian, the timing sequence of those prosecutions is rarely parallel. More often than not, the fact-finding hearing pursuant to N.J.S.A. 9:6-8.44, conducted in the Family Part to determine whether the child is an abused or neglected child, is held prior to the criminal indictment of the parent or guardian, and often while the criminal investigation is still pending.

I.

The first issue to be addressed concerns parental contact with a child-victim or witnesses. N.J.S.A. 9:6-8.36a requires DYFS to immediately report all instances of suspected child abuse and neglect to the County Prosecutor. See also N.J.A.C. 10:129-1.1 to -1.5. At or about that time, if DYFS determines that the child is in need of protection, DYFS may effect an emergency removal of the child from the home without a court order pursuant to N.J.S.A. 9:6-8.29, and then is required to file a verified complaint against the parent or guardian in the Family Part, alleging that the parent or guardian has subjected the child to abuse or neglect, within two court days after such removal takes place. N.J.S.A. 9:6-8.30b.

Obviously, the Family Part complaint may name one or both parents or guardians as defendants, depending upon the circumstances as revealed by the initial investigation by DYFS. In some instances, it is alleged that both parents or guardians have subjected the child to abuse or neglect. In others, although one parent is the apparent perpetrator, the child must be removed from the home because the other parent denies the allegations and supports the denial position of the other parent, leading to circumstances where the non-abusive parent fails or has failed to protect the child from the actual abuse or the danger of continued or further abuse.

If the circumstances warrant continued removal, the Family Part often issues an order to show cause directing continued out-of-home placement by DYFS and no parental contact or such supervised parental contact as DYFS permits, pending further order. Issues of parental representation, discovery, parental contact, evaluations and others are then routinely addressed by the Family Part on the return date of the order to show cause. See N.J.S.A. 9:6-8.31; Rule 5:12.

By the time of the return date of the order to show cause, if not before, a criminal complaint may have been filed against one or both parents or guardians. The criminal complaint may charge the commission of one or more indictable offenses, ranging in severity from first-degree aggravated sexual assault, contrary to N.J.S.A. 2C:14-2a, to second- or third-degree aggravated

assault, contrary to N.J.S.A. 2C:12-1b(1) or -1b(7), to second- or third-degree child endangerment, contrary to N.J.S.A. 2C:24-4a, to fourth-degree child abuse, contrary to N.J.S.A. 9:6-2, or any other number of criminal offenses.

Upon issuance of the complaint(s) and arrest with or without a warrant, "without unnecessary delay, and no later than 12 hours after arrest, the matter shall be presented to a judge," Rule 3:4-1, who shall set bail. Routinely, where the victim is a child, a condition of bail is that the defendant have no contact with the child. The issue of bail pursuant to Rule 3:26 is revisited at the first appearance conducted in accordance with Rule 3:4-2. Generally, the no-contact condition of bail is continued.

The dilemma created by these parallel proceedings is that the issue of the nature and extent of parental or guardian contact with the child-victim is essentially simultaneously before both the Family Part and the Law Division (Criminal Part).

Both DYFS and the County Prosecutor have the responsibility to investigate and to safeguard abused children. However, there are competing considerations. DYFS is subject to a statutory requirement to exert reasonable efforts to effect family reunification. The primary interest of the County Prosecutor is the criminal culpability of those accused of child abuse and neglect, DYFS v. Robert M., 347 N.J. Super. 44, 63 (App. Div.), certif. denied, 174 N.J. 39 (2002), and to protect the child-witness from direct or subtle pressure that may lead to recantation, presenting special proof problems. See State v. J.Q., 252 N.J. Super. 11 (App. Div. 1991), aff'd, 130 N.J. 554 (1993) (approving use of Child Sexual Abuse Accommodation Syndrome (CSAAS) expert evidence to explain why a child recants or delays in reporting the act of abuse). Then, of course, there is the right of the parents to participate in child-rearing of their children, a right of constitutional dimension. See In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999) (citing Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 12087, 31 L. Ed. 2d 551 (1972)).

The delicate balancing of these considerations requires a coordinated and comprehensive approach rather than separate adjudications in different parts of the Superior Court that are based on different objectives.

Accordingly, it is proposed that where a civil child abuse complaint initiated by DYFS against the parents or guardians is pending in the Family Part, and there is a no-contact bail condition as the result of a criminal complaint filed against parents or guardians, arising out of the same incident(s), a hearing shall be held in the Family Part to determine the nature and scope of parental or guardian contact, if any, with the child. The hearing shall be on notice to the County Prosecutor, the Public Defender(s) or other counsel representing the parents or guardians in the criminal prosecution, the Deputy Attorney General representing DYFS in the civil Family Part matter, the attorney from the Public Defender's Office, designated counsel,

or other counsel representing the parents or guardians in the civil Family Part matter, and the designated Law Guardian for the child in the Family Part matter.

Prior to commencement of such a hearing, an appropriate protective order should issue governing disclosure of confidential DYFS records. See N.J.S.A. 9:6-8.10a. No bail condition except contact will be entertained in the Family Part.

Upon considering the evidence and proofs and weighing the competing considerations, the Family Part shall determine the nature and scope of parental or guardian contact with the child, and an order memorializing that decision shall be issued. A copy of the resulting order shall be transmitted to the Law Division (Criminal Part) and shall constitute a condition of the bail ordered in the Law Division. Any applications for modification of that order shall be made to the Family Part, upon notice to the same parties and counsel as required in the first instance.

II.

The second issue pertains to the dilemma created that is best illustrated by the circumstances in DYFS v. Robert M., supra. In that case, the court reversed an order entered in the Family Part that had dismissed the Title 9 child abuse and neglect complaint initiated against Robert M. and Brenda M. on that grounds that DYFS had failed to prove abuse or neglect of their four children under N.J.S.A. 9:6-8.21. Id. at 47.

The parties' age seven male child was hospitalized on an emergency basis in critical condition when he was unable to breathe, had no pulse, and was in septic shock. DYFS became involved when hospital personnel reported "suspicious injuries consisting of cuts and extensive bruising on his legs, knees, arms, hands and forehead." Id. at 50. When asked, the parents attributed those conditions to self-inflicted injuries; the child died three days later. Ibid.

An autopsy report noted the bruising and listed the cause of death as undetermined pending further studies. Ibid. A medical and fatality report prepared by the Child Protection Center of the New Jersey Central Abuse Center issued about eight days after the child's death set forth physical findings suggestive of physical abuse, and cast doubt on the parents' explanation of the injuries as being self-inflicted. Id. at 50-51. The report considered medical neglect to be a contributing factor to the child's death. Id. at 51.

On the date of issuance of that report, the parents were arrested and criminally charged with endangering the welfare of a child. They were released on bail with the specific condition they have no contact with their remaining children. Id. at 52.

On that same date, the three remaining children were interviewed at the county prosecutor's office in the presence of the DYFS caseworkers. Ibid. (Best Practices in concurrent

criminal and DYFS investigations calls for joint interviews to minimize repeated interviews of children).

DYFS effected an emergency removal of the children from the parents' care and placed them in foster care overnight. Ibid. On the next day, DYFS filed a Title 9 child abuse and neglect complaint in the Family Part against the parents, seeking custody and protective services. Ibid. DYFS was given custody of the children by the Family Part and the children were placed into the care of their grandparents. Ibid.

The Family Part case proceeded and DYFS continued its investigation. About two months after the child's death, the medical examiner amended the death certificate to state the cause of death as cardiac arrhythmia due to hypothermia and the manner of death as homicide. Id. at 53.

The required fact-finding hearing in the Family Part Title 9 action began less than three months after the child's death. At that time, the investigation by the county prosecutor's office was still on-going and the transcripts of the children interviews conducted by the prosecutor's office were not released and hence not given in the discovery packet to the parents' counsel in the Title 9 Family Part action. Id. at 55.

The Family Part judge ruled that, notwithstanding N.J.S.A. 9:6-8.46a(4), because the transcript of the children's statements had not been provided to the parents, the DYFS workers——although present during the interviews——would not be permitted to testify to the content of the statements of the children. Additionally, the reports of examining psychologists, presented by DYFS, were redacted to exclude any references to the interviews of the children at the prosecutor's office. Ibid.

The fact-finding hearing was delayed after receipt of the amended death certificate of the medical examiner. Counsel for the parents in the Family Part action filed a motion seeking discovery of all autopsy photographs; autopsy body diagrams; all photographs of seized items by the prosecutor's office; all post-mortem x-rays; the complete forensic death medical investigation; interim toxicology reports; and a complete copy of the statements of the children given to the prosecutor's office. Id. at 56. The DAG representing DYFS responded that she did not have those items that were in the exclusive control of the prosecutor's office. The prosecutor responded to the DAG's discovery request by stating "that criminal charges were pending presentation to the Hunterdon Grand Jury and that 'my office will not provide any material obtained in the course of our criminal investigation other than through the appropriate criminal discovery process outlined in R. 3:13-3. That means, as we have said repeatedly, no pre-indictment discovery will be provided either directly to the defendants or through your office.'" Id. at 56-57.

The prosecutor then obtained a protective order from the assignment judge directing that no member of the prosecutor's office would be required to testify in the Family Court case. Id. at 57. A motion by the DAG in the Law Division (Criminal

Part), seeking release of the transcripts of the children's statements was rendered moot when, about five months after the child's death, an indictment was returned against the parents, charging them with aggravated manslaughter and endangering offenses. Ibid. Following the indictment, the statements were released to the parents' counsel in both cases. Id. at 57-58.

However, apparently the children's statements were not released by the time that the fact-finding hearing continued and discovery issues persisted concerning autopsy materials sought by defendants for review by an expert pathologist. Ultimately, the judge excluded all evidence concerning the children's interviews and the results of the autopsy report. After conducting the redacted hearing, the judge found that DYFS had failed to prove its case as to four of the children and dismissed. Id. at 63. The Appellate Division reversed and remanded for further proceedings, concluding that the children's statements and autopsy report had been wrongfully excluded. Ibid.

Judge Collester then focused on the discovery issues, stating in pertinent part:

> This case presents an unfortunate and extreme instance of conflicts and problems in Title 9 and Title 30 proceedings which can arise from the relationship between the Division and law enforcement agencies when parallel investigations are pursued. . . . The Division is required to investigate allegations of abuse and neglect, . . . to ascertain their veracity, to take action to safeguard abused children from further harm, either by seeking ways to remediate such conduct or, in a proper instance. by lacing the child in protective custody of the State. . . . The interest of law enforcement is different since the focus is the criminal culpability of those accused of child abuse and neglect under N.J.S.A. 2C:24-4a. . . .
>
> * * * *
>
> The statutory scheme and administrative regulations envisage cooperation between the agency and law enforcement. . . . The Division is obliged to immediately report to the county prosecutor all instances of suspected criminal activity including child abuse or neglect. . . . If the Division initiates a child abuse complaint in the Family Court, a copy must be sent to the county prosecutor. . . . Alternatively, if the prosecutor decides to bring a criminal case, the caseworker must be so advised. . . .

> While the Division must maintain strict confidentiality of records and reports of child abuse, an exception requires release of such information to law enforcement agencies investigating child abuse. . . . However, no statute or rule requires the county prosecutor to disclose information of an ongoing criminal investigation to the Division. While Title 9 contemplates that actions brought by the Division will continue after referral to the county prosecutor, . . . the prosecutor is not restrained from continuing its investigation while the Title 9 action proceeds to trial.
>
> Parallel investigations and proceedings by the Division and the county prosecutor have resulted in thorny constitutional issues. . . . Defendants may face the Hobson's choice of deciding whether to testify and risk incrimination or remain silent in the face of testimony that could deprive them of custody of their children. Judges must be mindful of the potential for abuse of defendant's civil or criminal procedural rights. However, the fact of parallel proceedings does not invest a defendant with any additional procedural safeguards beyond those provided by constitution, statute procedural rules. . . .
>
> [Id. at 63-64 (citations omitted).]

This case illustrates the proof problems that may result when there are dual, but not parallel, civil and criminal prosecutions and investigations of the same incident(s). Indeed, it is conceivable that the deprivation of certain information within the control of the County Prosecutor may lead to DYFS being unable prove in the Family Part, by a preponderance of the credible evidence, that the defendant parents or guardians subjected the child to abuse or neglect. It is equally conceivable that the withholding of exculpatory evidence could result in an unjust finding of abuse or neglect.

However, there are also dangers associated with the release of pre-indictment investigatory materials. First, ongoing investigations are incomplete. There is a very real danger that information that might be seen in a different light upon completion of the investigation will be misleading if viewed piecemeal. Further, prosecutors live in a real world where desperate and unscrupulous defendants, possibly facing substantial jail time, will go to great lengths to sabotage a criminal prosecution. Absent a protective order, defense attorneys must disclose any discovery information provided in the Title 9 case to their clients, but have no power to prevent those clients from misusing the information. Therefore, it is also

likely that premature disclosure of the substance of an ongoing investigation will enable defendants to conceal evidence, tamper with witnesses and compromise law enforcement's ability to successfully conclude the investigation.

Certainly, it is well-recognized that there is no pre-indictment discovery concerning the investigation of the county prosecutor. However, there is an equally well-recognized function of the county prosecutor to assure that victims—— particularly children——are protected from continued abuse.

This was explicitly recognized in DYFS v. H.B. and L.M.B., 375 N.J. Super. 148 (App. Div. 2005). There, in discussing the release of information from a closed Megan's Law file, the court ruled that

> . . . absent compelling reasons grounded in preserving the integrity of pending or ongoing criminal cases, prosecutors should view their relationship with DYFS as a collaborative enterprise, designed and intended to promote the overarching public policy running through both Title 9 and Megan's Law: protecting our children from those who would do them harm.
>
> The norm, in this collaborative environment, is for information to be liberally shared between these two public agencies. In this context, the need for judicial resolution of disputes arising as a result of an application filed by one agency against the other seeking injunctive relief, either to protect or to disclose information, should be a rare occurrence. In such a case, the party bringing the action would have the burden to establish, as a threshold matter, that (1) all other means fro amicable resolution have been exhausted; and (2) judicial intervention is required to protect the integrity of an ongoing investigation or, in the case of a disclosure order, to establish an element of proof in an abuse or neglect case.
>
> [Id. at 179-80.]

Thus, in order to balance these competing, and sometimes conflicting, interests and to assure the fair administration of justice, we believe that where there are concurrent civil and criminal prosecutions arising from investigations being conducted by DYFS and the county prosecutor concerning an alleged incident of child abuse or neglect, and there is no consensus concerning the sharing of pre-indictment information, a conference should be conducted on an informal application to the Assignment Judge, who

shall either hear the matter or assign it to an appropriate judge in the Family Part or Law Division, Criminal Part.

The purpose of the conference is to determine what information, if any, contained in the investigation conducted by the county prosecutor shall be released to DYFS. In making this determination, the presiding court may wish to view the records in camera. This conference should take place expeditiously, bearing in mind that for cases of children in DYFS placement, fact-finding hearings must occur within four (4) months of out-of-home placement.

Notice of the conference shall be given to the county prosecutor and all counsel in the Family Part case. Any agreements reached shall be placed on the record and memorialized by an order issued by the Superior Court judge presiding over the conference.

No order shall issue as a result of the conference requiring the release of pre-indictment information from the prosecutor's office without the prosecutor's consent. Any party to the conference may file a formal motion seeking an order governing discovery.

## 7. Natale Remands

The Committee discussed the sentencing remand orders that have been issued in light of State v. Natale, 184 N.J. 458 (2005). The remand orders are intended to only apply to the pipeline cases discussed in Natale. Because the Appellate Division retains jurisdiction in the case, no new notice of appeal must be filed after the remand. Rather, upon appeal, the defendant would file an amended notice of appeal and provide a copy of the remand transcript.

The Committee noted that a new judgment should be prepared for these cases, because there is a new sentence. In addition, the new judgments should ensure the defendant's entitlement to all institutional credits following the original sentencing date. The Committee referred this matter to the Conference of Criminal Presiding Judges to consider a uniform way to handle these matters, including ensuring that a defendant receives appropriate jail credits. The Natale remand practice has been completed with respect to cases reviewed following guilty pleas.

## 8. Out-of-Court Identifications

In State v. Herrera, 187 N.J. 493 (2006), the defendant approached the victim, who was sitting in his car, and asked for money. When the victim replied that he had no money, the defendant knocked him unconscious and took his car. Approximately an hour later, the defendant was involved in an automobile accident and brought to the hospital. The police made a number of comments to the victim that his car had been found and that they were going to bring him to the hospital to identify the person found in the car. At the hospital, the victim immediately identified the defendant as the man who had attacked him. The only other people in the room were police officers and nurses. The New Jersey Supreme Court found that the suggestiveness inherent in the showup, combined with the police officers comments, "rendered the showup procedures in the out-of-court identification of defendant impermissibly suggestive." Id at 506. However, because the victim's identification was reliable, the Court found that it was properly admitted at trial. Id. at 509. The Court requested that the Criminal Practice and Model Criminal Jury Charge Committees consider whether the model jury charge addressing "Out-of-Court Identification" "should expressly include a reference to suggestibility as well as any other factors the Committees deem appropriate." Id. at 510.

In accordance with the Court's request, the Model Criminal Jury Charge Committee revised the "Out-of-Court Identification" model charge by (1) adding several factors, and corresponding footnotes, relating to the possible suggestiveness of the identification procedure; and (2) adding several factors related to the witness's degree of certainty in making the identification. The Model Criminal Jury Charge Committee then forwarded the revised charge to the Committee for its consideration. The Committee

made just a few minor changes before recommending that the Model Criminal Jury Charge Committee distribute the revised "Out-of-Court Identification" model charge.

## IDENTIFICATION: OUT-OF-COURT IDENTIFICATION ONLY

(Defendant), as part of [his/her] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find (defendant) guilty, the State must prove beyond a reasonable doubt that this person is the person who committed the crime. (Defendant) has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that (this defendant) is the person who committed it.

The State has presented testimony that on a prior occasion before this trial, [insert name of witness who identified defendant] identified (defendant) as the person who committed [insert the offense(s) charged]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the identification of (defendant) is reliable and believable or whether it is based on a mistake or for any reason is not worthy of belief.[1] You must decide whether it is sufficiently reliable evidence upon which to conclude that (this defendant) is the person who committed the offense[s] charged. You should consider the observations and perceptions on which the identification was based, and the circumstances under which the identification was made. In deciding what weight, if any, to give to the identification testimony, you may consider the following factors [cite appropriate factors]:[2]

**[If necessary or appropriate for purposes of clarity, the judge may comment on any evidence relevant to any of the following factors][3]**

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[1] United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967); State v. Green, 86 N.J. 281, 291-293 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-119 (App. Div. 1996).

[2] The first five factors listed below were enumerated in Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382 (1972), and United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940, as the factors to be considered in evaluating the likelihood of misidentification. New Jersey courts employ the same analysis. State v. Madison, 109 N.J. 223, 239-240 (1988). See also State v. Cherry, 289 N.J. Super. 503, 520 (App. Div. 1995).

[3] See State v. Cromedy, 158 N.J. 112, 128 (1999) ("when identification is a critical issue in the case, the trial court is

(1) The witness's opportunity to view the person who committed the offense at the time of the offense.[4]

(2) The witness's degree of attention to the perpetrator at the time of the offense.[5]

(3) The accuracy of any description the witness gave prior to identifying the perpetrator.[6]

(4) The degree of certainty expressed by the witness in making the identification.[7]

(5) The length of time between the witness's observation of the perpetrator during the offense and the identification.[8]

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obligated to give the jury discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification"); State v. Green, 86 N.J. at 292, 293 (noting that model charge could have been used as a guide, court holds that "the defendant had a right to expect that the appropriate guidelines would be given, focusing the jury's attention on how to analyze and consider the factual issues with regard to the trustworthiness of [the witness's] in-court identification"); but see State v. Robinson, 165 N.J. 32, 42-45 (2000) (reaffirming obligation under Green to explain abstract identification factors in factual context of case, but holding that court need not necessarily summarize weaknesses of State's evidence); see generally, State v. Gartland, 149 N.J. 456, 475 (1997) (holding that jury charges must relate the law to the specific facts in a case); State v. A. Gross, 121 N.J. 1 (1990) (same); State v. Concepcion, 111 N.J. 373 (1988) (same).

[4] Facts that may be relevant to this factor include the witness's ability to observe what he/she said he/she saw, the amount of time during which the witness saw the perpetrator, the distance from which the witness saw the perpetrator, and the lighting conditions at the time. See Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977); Neil v. Biggers, 409 U.S. at 200-201, 93 S.Ct. at 382; State v. Madison, 109 N.J. at 239.

Where supported by evidence that the victim might have difficulty perceiving, recalling, or relating the events, it may be appropriate to add the following to factor (1): ". . . including the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly." State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

[5] Facts that may be relevant to this factor include whether the witness was merely a passing or casual observer or one who would be expected to pay scrupulous attention to detail, whether the witness was involved in a direct confrontation with the perpetrator, whether the witness was nervous, shocked or scared as a result of any confrontation with the perpetrator, and whether the witness's attention was focused on or away from the perpetrator's features. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 382-383; State v. Madison, 109 N.J. at 240.

[6] Facts that may be relevant to this factor include whether any description the witness gave of the perpetrator after observing the incident but before making the identification was accurate or inaccurate, whether the prior description provided details or was just general in nature, whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v.Biggers, 409 U.S. at 200, 93 S.Ct. at 383; United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 240-241; State v. Edmonds, 293 N.J. Super. 113 (App. Div. 1996).

[7] Facts that may be relevant to this factor include whether witnesses making the identification received inadvertent or intentional confirmation, whether certainty was expressed at the time of the identification or some time later, whether intervening events following the identification affected the witness's certainty, and whether the identification was made spontaneously and remained consistent thereafter. See N.J. Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures, April 18, 2001, at 2 (quoted in Herrera, 187 N.J. at 190); National Institute of Justice, Convicted by Juries, Exonerated by Science, June 1996, at 24 (available at https://www.ndjrs.gov/pdffiles/dnaevid.pdf); Gary Wells & Amy Bradfield, "Good, You Identified the Suspect," 83 J. Applied Psychol. 360 (1998); Ramirez, 817 P.2d at 781. Whether the witness made an identification quickly upon viewing the suspect, or whether the witness hesitated, may also be a relevant fact. See S. Sporer, Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups, 78 J. Applied Psychol. 22, 23 (1993).

Other relevant facts include whether, at a time prior to making the identification of this defendant, the witness either failed to identify the defendant or identified another person as the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 201, 93 S.Ct. at 383; Foster v. California, 394 U.S. 440, 442-443 & n.2, 89 S.Ct. 1127, 1128-1129 & n.2 (1969); United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 241. Madison cautions, with respect to an identification witness's "demonstrated certainty in his testimony," that "a witness's feeling of confidence in the details of memory generally do not validly measure the accuracy of the recollection," and that "[i]n fact, witnesses 'frequently become more confident of the correctness of their memory over time while the actual memory trace is probably decaying.'" Id. at 241-242 (quoting W.LaFave and J.Israel, Criminal Procedure).

(6) The circumstances under which the identification was made, including whether or not it was the product of a suggestive procedure.[9] In making this determination you may consider the following circumstances:

**[REFER TO CIRCUMSTANCES OF THE IDENTIFICATION PROCEDURE AS NECESSARY FOR CLARITY, CHOOSING AS APPROPRIATE ANY OF THE FOLLOWING FACTORS, OR ANY OTHER FACTORS RELATING TO SUGGESTIVENESS, THAT ARE SUPPORTED BY THE EVIDENCE:]**

- whether anything was said to the witness prior to viewing a photo array, line-up or showup;[10]
- whether a photo array shown to the witness contained multiple photographs of the defendant;[11]
- whether "all in the lineup but the [defendant] were known to the identifying witness";[12]
- whether "the other participants in a lineup were grossly dissimilar in appearance to the [defendant]";[13]
- whether "only the [defendant] was required to wear distinctive clothing which the culprit allegedly wore";[14]
- whether "the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail";[15]
- whether "the [defendant] is pointed out before or during a lineup";[16]
- whether the witness's identification was made spontaneously and remained consistent thereafter;[17]

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[8] See Manson v. Brathwaite, 432 U.S. at 115-116, 97 S.Ct. at 2253-2254; Neil v. Biggers, 409 U.S. at 201, 93 S.Ct. at 383; State v. Madison, 109 N.J. at 242.

[9] See State v. Herrera, 187 N.J. 493 (2006), in which the New Jersey Supreme Court addressed the propriety of a "show-up" identification; the majority opinion concluded that, while such a procedure is inherently suggestive, the identification procedure employed there was reliable and did not result in a substantial likelihood of misidentification.

[10] See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

[11] Id.

[12] United States v. Wade, 388 U.S. at 233, 87 S.Ct. at 1935.

[13] Id.

[14] Id.

[15] Id.

[16] Id., 87 S.Ct. at 1935-1936.

[17] See Herrera, 187 N.J. at 509 (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

- whether the individual conducting the lineup either indicated to the witness that a suspect was present or failed to warn the witness that the perpetrator may or may not be in the procedure;[18]
- whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his/her identification.[19]

**[CHARGE IN ALL CASES:]**

(7) Any other factor based on the evidence or lack of evidence in the case which you consider relevant to your determination of whether the out-of-court identification was reliable.

[(8) Jury should be charged on any other relevant factor present in the case[20]]

**[IN THE APPROPRIATE CASE,[21] CHARGE THE FOLLOWING FACTOR:]**

(9) The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness's original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.[22]

**[CHARGE IN ALL CASES:]**

Unless the out-of-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, rather than being the

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[18] See N.J. Attorney General's Guidelines, supra, Guideline I.B. (requiring administrator to instruct witness that perpetrator may not be present); State v. Ledbetter, 881 A.2d 290 (Ct. 2005) (requiring jury instruction to that effect).

[19] See Herrera, 187 N.J. at 509 (quoting Ramirez, 817 P.2d at 781 n. 2 (citing State v. Long, 721 P.2d 483, 494 n. 8 (Utah 1986)).

[20] The list of factors enumerated in Biggers and Madison is not exhaustive. See State v. White, 158 N.J. 230, (1999) (in declining to find plain error in identification charge, court notes that instruction went beyond model charge, "noting the discrepancy ... between identifications made by different witnesses"). Additional relevant factors that should be brought to jury's attention include the witness's inability to make an in-court identification if asked to do so while on the witness stand, any failure on the part of the State to record a line-up or preserve a photo array, as bearing upon the probative value of the out-of-court identification, see State v. Delgado, 188 N.J. 48, 63 (2006); State v. Earle, 60 N.J. 550, 552 (1972); State v. Peterkin, 226 N.J. Super. 25, 46 (App. Div. 1988),and any discrepancies between identifications made by different witnesses, State v. White, 158 N.J. 230, 248.

[21] An instruction that cross-racial identification is a factor to be considered "should be given only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." State v. Cromedy, 158 N.J. at 132; see also State v. Romero, 186 N.J. 604 (2006) (granting certification to consider whether failure to give cross-racial identification charge was reversible error in factual circumstances of that case).

[22] Cromedy holds that in order for the jury to determine the reliability of a cross-racial identification not corroborated by independent evidence, the jury must be informed "of the potential risks associated with such identifications," that the jury must be instructed "about the possible significance of the cross-racial identification factor...." 158 N.J. at 132-33.

product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after considering all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.

## C. Matters Previously Sent to the Supreme Court

### 1. Web-Enabled Criminal Complaint System (E-CDR) Electronic Signature of Law Enforcement Officers on Complaint-Summons Forms.

At the request of the Municipal Court Services Division of the Administrative Office of the Courts, the Committee considered whether R. 3:2-2 should be amended to permit electronic signatures by law enforcement officers on Complaint-Summons forms (CDR-1). The New Jersey Judiciary, along with a number of outside agencies, is in the process of implementing a number of new technologies that enables law enforcement officers and other authorized personnel to issue process electronically. One project involved the development of an Internet-based or web-enabled criminal complaint (CDR) system to allow law enforcement officers to file complaints. This statewide system, which is called the E-CDR Project, is accessible to all of the state's law enforcement agencies through the Internet.

The system provides officers with a web-based form upon which to enter and print the CDR-1 (Complaint-Summons) form. These complaint forms print on plain paper at local law enforcement offices, and replace the existing CDR-1 preprinted forms that are currently used in New Jersey. Over time, implementation of the E-CDR project will replace the current ACS Complaint Generation system, and will eliminate the typewritten complaints that are still routinely filed in the state's municipal courts. The hard copy forms will, however, be available where necessary. At this stage of the project, the system is able to create electronic signatures of law enforcement officers on Complaint-Summons (CDR-1) forms. The system prints the name of the officer on the Complaint-Summons, as opposed to requiring an original signature of the law enforcement officer.

In the previous rules cycle, the Supreme Court amended R. 7:2-1 effective September 1, 2004, that applies to Municipal Courts, to allow the Municipal Courts to use an electronic signature in lieu of an original signature on various forms of process. The rule amendment gives an electronic signature the same force and effect as an original, handwritten signature, and thus eliminates the need for a law enforcement officer to sign a paper copy of a Complaint-Summons (CDR-1) form for non-indictable matters in Municipal Court.

More recently, the Criminal Practice Committee and the Conference of Criminal Presiding Judges recommended use of the web-based Complaint-Summons (CDR-1) form, and the use of electronic signatures by law enforcement officers on all Complaint-Summons (CDR-1) forms, including indictable complaints. To ensure a consistent process to issue a Complaint-Summons for indictable offenses and non-indictable offenses, the Committee proposed an amendment to R. 3:2-2 that would give an electronic signature of a law enforcement officer the same force and effect as an original, handwritten signature.

The targeted operational date for the E-CDR project was August 2005. By Order dated July 20, 2005, the Supreme Court approved the Committee's proposal for the relaxation of R. 3:2-2 "so as to permit the use of an electronically affixed signature of a law enforcement officer on a Complaint-Summons (CDR-1) form rather than an original signature, with such electronically affixed signature being equivalent to and having the same force and effect as an original signature." The Court approved the proposed rule change to implement the E-CDR system during the 2004-2006 rules cycle. The amendments to R. 3:2-2 were effective September 1, 2006.

## 2. Recordation of Custodial Interrogations Reporting Form

Following the New Jersey Supreme Court's opinion in State v. Thomahl Cook, 179 N.J. 533 (2004), the Chief Justice appointed the Special Committee on the Recordation of Custodial Interrogations to make recommendations on the use of electronic recordation of custodial interrogations. In April 2005, the Special Committee submitted its report to the Court. The report, as posted at http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf, included a recommendation that "the Supreme Court…periodically review the implementation of the recording requirement." (Recommendation 9).

On October 14, 2005, the Supreme Court issued its Administrative Determination on the Report of the Special Committee, *inter alia* giving "the Administrative Director of the Courts and the Criminal Practice Committee . . . the responsibility to work with the Office of the Attorney General and the County Prosecutors to review the implementation of the recordation requirement." The Court requested a status report by June 1, 2007, or sooner if the circumstances warranted it.

In order to meet this requirement, the Criminal Practice Committee and the Conference of Criminal Presiding Judges recommended the use of the Recordation of Custodial Interrogations Reporting Form. The form is to be completed by judges and forwarded to the Administrative Office of the Courts, Criminal Practice Division, in cases where: (1) the defendant was charged with murder, aggravated manslaughter or manslaughter; and (2) the offense occurred on or after January 1, 2006; and, (3) the defendant was tried or the State filed a notice of intent to rely on an unrecorded statement claiming an exception to the recording requirement, and the court made a ruling thereon.

The original form was promulgated on July 18, 2006 by Directive #11-06. It was subsequently revised to mirror R. 3:17, which required the electronic recordation of custodial interrogations for several additional offenses beginning on January 1, 2007. See R. 3:17(a). In addition, the Division of Criminal Justice has created a separate form for completion by Prosecutors to capture data involving recordation of custodial interrogations from that perspective. The revised form was promulgated via Directive #22-06 on December 19, 2006.

# ADMINISTRATIVE OFFICE OF THE COURTS
# STATE OF NEW JERSEY

**PHILIP S. CARCHMAN, J.A.D.**
**ACTING ADMINISTRATIVE DIRECTOR OF THE COURTS**

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**TRENTON, NEW JERSEY 08625-0037**

**[Questions or comments may be directed to 609-292-4638.]**

## Directive # 22-06

**[Supersedes Directive #11-06]**

**TO:** **ASSIGNMENT JUDGES**
**CRIMINAL DIVISION JUDGES**

**FROM:** **PHILIP S. CARCHMAN**

**SUBJ:** **NEW CRIMINAL FORM – RECORDATION OF CUSTODIAL INTERROGATIONS REPORTING FORM**

**DATE:** **DECEMBER 19, 2006**

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This supersedes Directive #11-06, which was issued July 18, 2006. That earlier Directive promulgated a *Recordation of Custodial Interrogations Reporting Form,* intended to capture data regarding the custodial interrogations recording requirement for a limited category of cases -- murder, aggravated manslaughter, and manslaughter crimes -- occurring on or after January 1, 2006. This Directive promulgates a revised *Recordation of Custodial Interrogations Reporting Form* for use in an expanded category of cases, specifically, custodial interrogations conducted in any offense enumerated in Rule 3:17(a). The remainder of this Directive essentially restates the substance of superseded Directive #11-06.

Following State v. Thomahl Cook, 179 N.J. 533 (2004), the Chief Justice appointed the Special Committee on the Recordation of Custodial Interrogations to make recommendations on the use of electronic recordation of custodial interrogations. In April 2005, the Special Committee submitted its report to the Supreme Court. The report, as posted at http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf, included a recommendation that "the Supreme Court…periodically review the implementation of the recording requirement" (Recommendation 9).

On October 14, 2005, the Supreme Court issued its Administrative Determination on the Report of the Special Committee. That document provided that the recordation requirement would become effective January 1, 2006 for homicide offenses and January 1, 2007 for all other offenses specified in Rule 3:17(a). The Administrative Determination also gave "the Administrative Director of the Courts and the Criminal Practice Committee…the responsibility to work with the Office of the Attorney General and the County Prosecutors to review the implementation of the recordation

requirement." The Court requested a status report by June 1, 2007, or sooner if the circumstances warrant it.

To meet this requirement, the Criminal Practice Committee and the Conference of Criminal Presiding Judges recommended use of the Recordation of Custodial Interrogations Reporting Form promulgated by Directive #11-06 for homicide cases. That Directive thus advised judges to complete and submit the form in cases where: (1) the defendant was charged with murder, aggravated manslaughter or manslaughter; and (2) the offense occurred on or after January 1, 2006; and, (3) the defendant was tried or the State filed a notice of intent to rely on an unrecorded statement claiming an exception to the recording requirement, and the court made a ruling thereon.

In light of the Court's direction for a status report on implementation of the recordation requirement, in order to collect data in the expanded category of cases that the recordation requirement will apply to as of January 1, 2007 – that is, all case types enumerated in Rule 3:17(a) – the Criminal Practice Committee has developed a revised version of the previously promulgated Recordation of Custodial Interrogations Reporting Form.

Criminal judges thus should use this Revised Recordation of Custodial Interrogations Reporting Form – including for those cases that were covered by the initial version of the form – beginning January 1, 2007. The Division of Criminal Justice has created a separate form for completion by Prosecutors to capture data involving recordation of custodial interrogations from that perspective.

Any questions or comments regarding this Directive, or the appended revised form, may be directed to Assistant Director Joseph J. Barraco by e-mail or by telephone (609-292-4638).

P.S.C.

Attachment

cc: Chief Justice James R. Zazzali
Attorney General Stuart Rabner
Public Defender Yvonne Smith Segars
County Prosecutors
Gregory Paw, DCJ Director
AOC Directors and Assistant Directors
Regional Deputy Public Defenders
Trial Court Administrators
Criminal Division Managers
Francis W. Hoeber, Special Assistant
Steven D. Bonville, Special Assistant
Vance D. Hagins, Criminal Practice
John Wieck, Criminal Practice
Melaney S. Payne, Criminal Practice

# RECORDATION OF CUSTODIAL INTERROGATIONS REPORTING FORM

**This form is to be filled out by the trial judge in cases where:**

**A. The defendant was charged with a murder, aggravated manslaughter or manslaughter,**

**AND**

**B. The offense occurred on or after January 1, 2006,**

**AND**

**C. The defendant was tried OR the State filed a notice of intent to rely on an unrecorded statement claiming an exception to the recording requirement, and the Court made a ruling thereon.**

1. Defendant's Name: _____

2. County: _____

3. Charge at Indictment:

☐ Murder ☐ Aggravated Manslaughter ☐ Manslaughter

4. Charge that the defendant pled guilty to, was convicted of, or acquitted of:

☐ Murder ☐ Aggravated Manslaughter

☐ Manslaughter ☐ Other: Please list _____

5. The defendant:

☐ Pled guilty ☐ Was convicted at trial ☐ Acquitted at trial

6. Was there a recorded or unrecorded statement made by the defendant during a custodial interrogation made in a place of detention? (See R. 3:17)

☐ No statement ☐ Yes. Recorded statement

☐ Yes. Unrecorded statement. If yes, answer question 8.

7. What method of electronic recording was used? (check one)

☐ Audio ☐ Video ☐ Both

8. Did the State file a notice of intent to rely on an unrecorded statement?

☐ No. If no, answer question 12.

☐ Yes. If yes, answer questions 9 through 12.

Promulgated by
Directive #11-06
(July 18, 2006)
CN 10779

9. The exception to the recording requirement that the State claimed was present was that:

- ☐ Electronic recordation was not feasible
- ☐ The statement was a spontaneous statement made outside the course of the interrogation.
- ☐ The statement was made in response to questioning that is routinely asked during the processing of the arrest of a suspect.
- ☐ The statement was made by a suspect who indicated, prior to the statement that he or she would participate in the interrogation only if it were not recorded.
- ☐ The statement was made during a custodial interrogation that was conducted out-of-state.
- ☐ The statement was given at a time when the accused was not a suspect for the crime to which that statement relates while the accused was being interrogated for a different crime that does not require recordation.
- ☐ The interrogation during which the statement was given occurs at a time when the interrogators have no knowledge that a crime for which recording is required has been committed.
- ☐ Other: Explain _____

_____

10. Did the judge find that the exception claimed by the State was present?

- ☐ No. The issue was never decided by the trial judge.
- ☐ No, the judge found that another exception applied. If no, answer question 11.
- ☐ Yes

11. Exception found by judge:

- ☐ Electronic recordation was not feasible.
- ☐ The statement was a spontaneous statement made outside the course of the interrogation.
- ☐ The statement was made in response to questioning that is routinely asked during the processing of the arrest of a suspect.
- ☐ The statement was made by a suspect who indicated, prior to the statement that he or she would participate in the interrogation only if it were not recorded.
- ☐ The statement was made during a custodial interrogation that was conducted out-of-state.
- ☐ The statement was given at a time when the accused was not a suspect for the crime to which that statement relates while the accused was being interrogated for a different crime that does not require recordation.
- ☐ The interrogation during which the statement was given occurs at a time when the interrogators have no knowledge that a crime for which recording is required has been committed.
- ☐ Other: Explain _____

_____

12. Name of Judge: _____

**Completed original forms should be mailed to:**

Administrative Office of the Courts
Criminal Practice Division
P.O. Box 982
Trenton, New Jersey 08625

### 3. Appeal Rights Form & Appeal Rights Colloquy

In State v. Molina, 187 N.J. 531 (2006), the New Jersey Supreme Court held that a defendant's right to appeal must be communicated to him in writing and in a manner that insures meaningful discussion with counsel. The Court also required that before imposing sentence, trial courts provide defendants with a form that explains their right to appeal. The Court attached a sample form in the Appendix of the opinion, and the referred the development of an Appeals Rights Form and a suggested Colloquy to the Criminal Practice Committee.

On July 13, 2006 and July 17, 2006, an English version and English-Spanish translation of the Appeal Rights Form were promulgated on an interim basis by Administrative Office of the Courts Directive #10-06 and Supplemental Directive #10-06. That form was to be used until the Criminal Practice Committee had an opportunity to consider the matter.

The Committee made three additions to the Appeal Rights Form: (1) a sentence certifying that the defendant was appearing for sentencing and specifying the name of the judge; (2) a sentence in which the defendant's attorney certifies that the defendant signed the form knowingly and voluntarily; and (3) a sentence in which private counsel agrees to contact the Office of the Public Defender within 45 days if the defendant decides to appeal and cannot afford to retain private counsel. The Committee also approved a new Appeal Rights Colloquy. On November 15, 2006, an English version and English-Spanish translation of the

Appeal Rights Form, and an English version of the Appeal Rights Colloquy, were promulgated by Administrative Office of the Courts Directive #20-06. These forms superseded the forms promulgated by Directive #10-06 and Supplemental Directive #10-06.

Note: At its January 17, 2007 meeting, the Committee endorsed further revisions to the Appeal Rights Form as promulgated by Directive #20-06. Specifically, the Committee recommends that the address of the Office of the Public Defender, Appellate Section, be included on the form as a convenience to that office's clients. The Committee also recommends that rather than having counsel for defendant certify that the defendant signed the form knowingly and voluntarily, the second paragraph under item number 4 should be changed as follows:

> I have reviewed this Appeal Rights Form with defendant and I am satisfied that he/she has been fully advised of the rights it describes.

The Committee will be forwarding these recommended revisions to the Administrative Director for consideration and action on an emergent basis.

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY

PHILIP S. CARCHMAN, J.A.D.
ACTING ADMINISTRATIVE DIRECTOR
OF THE COURTS

RICHARD J. HUGHES
JUSTICE COMPLEX
P.O. BOX 037
TRENTON, NEW JERSEY 08625-0037

**[Questions or comments may be directed to 609-292-4638.]**

**Directive # 20-06**

**[Supersedes Directive #10-06]**

**To:** **Assignment Judges**
**Criminal Division Judges**

**From:** **Philip S. Carchman**

**Subj:** **Criminal -- Appeal Rights Form and Appeal Rights Colloquy**

**Date:** **November 15, 2006**

Directive #10-06 (July 13, 2006) promulgated on an interim basis an Appeal Rights Form for use in Criminal cases as directed by the Supreme Court in State v. Molina, 187 N.J. 531, 536 (2006). The Spanish-language version of that interim form was promulgated by a July 17, 2006 supplement to Directive #10-06. As required by Molina, those interim versions of the form were to be used pending development of a permanent Appeal Rights Form and an accompanying standard Appeal Rights Colloquy. The Criminal Practice Committee recently submitted to the Court the proposed Appeal Rights Form and Appeal Rights Colloquy. The Court at its November 13, 2006 Administrative Conference approved the Criminal form and colloquy.

This Directive thus promulgates the permanent version of the Appeal Rights Form for use in Criminal cases (English-language and Spanish-language) and the standard Appeal Rights Colloquy to be used by the judge during sentencing to ensure that "defendant understands his or her appeal rights and has executed the appeal rights and has executed the appeal rights form knowingly and intelligently." 187 N.J. at 544. As such, this supersedes Directive #10-06 and the supplement thereto.

In State v. Molina, 187 N.J. 531, 541 (2006), the Supreme Court addressed "when, and under what circumstances, leave to appeal as within time should be granted in criminal cases." As part of its decision, the Court held that a defendant's right to appeal must be communicated to defendant in writing and in a manner that ensures a meaningful discussion with counsel. 187 N.J. at 543.

To implement that aspect of its ruling, the Court stated that "[i]n the future, before imposing sentence, trial courts are to provide defendants with a form, to be generated and executed in duplicate," with a sample form attached as an appendix to the opinion. 187 N.J. at 543.

The Court also set out in detail the procedure for defense counsel to follow to explain the appeals process to defendant at the time of sentencing. "Much as with guilty plea forms, defense counsel is required to review the appeal rights form with the defendant, and to explain the nature of an appeal, that the defendant has a right to appeal both [the] conviction and/or sentence, and that counsel will be appointed to prosecute the appeal if the defendant is unable to afford counsel." 187 N.J. at 544. Defense counsel is to ensure that defendant understands his or her appeal rights, with both defendant and counsel required to sign the form as evidence thereof. A fully executed copy of the appeal rights form then is to be delivered to the trial court for retention in the court file, and another fully executed copy retained by the defendant. Further, as noted above, "[t]he trial court, as part of the sentencing colloquy, is to review the appeal rights form with the defendant, satisfy itself that the defendant understands his or her appeal rights and has executed the appeal rights form knowingly and intelligently, and place that conclusion on the record." 187 N.J. at 544.

Accordingly, attached for use in Criminal cases are (1) the Appeal Rights Form, English-language version, (2) the Appeal Rights Form, Spanish-language version, and (3) the Appeal Rights Colloquy. Any questions or comments regarding the form and colloquy may be directed to Assistant Director Joseph Barraco at 609-292-4658.

P.S.C.

Attachments: (1) "Appeal Rights Form" – English-language version
(2) "Appeal Rights Form" – Spanish-language version
(3) "Appeal Rights Colloquy"

cc: Chief Justice James R. Zazzali
Attorney General Stuart J. Rabner
Public Defender Yvonne Smith Segars
Hon. Edwin H. Stern, Chair, Criminal Practice Committee
Gregory Paw, Director, Division of Criminal Justice
County Prosecutors
Regional Deputy Public Defenders
AOC Directors and Assistant Directors
Trial Court Administrators
John Wieck, Chief, Criminal Practice Division
Criminal Division Managers
Vance D. Hagins, Criminal Practice Division
Melaney S. Payne, Criminal Practice Division
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant

# DIRECTIVE #20-06

# ATTACHMENT 1

# APPEAL RIGHTS FORM
# (ENGLISH-LANGUAGE VERSION)

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

STATE OF NEW JERSEY

- v. -

**APPEAL RIGHTS FORM**

_____
Defendant.

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 Appeal Rights Form with me.

3. 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. 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 Appeal Rights Form with defendant and I am satisfied that he/she clearly and fully understands the rights it describes. I certify that defendant has signed this form knowingly and voluntarily.**

DATED: _____ _____
Counsel for Defendant

*(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.**

DATED: _____ _____
Counsel for Defendant

**(Complete in duplicate: one fully executed copy to be delivered to the trial judge and one to be given to the defendant.)**

# DIRECTIVE #20-06

# ATTACHMENT 2

# APPEAL RIGHTS FORM
# (SPANISH-LANGUAGE VERSION)

TRIBUNAL SUPERIOR DE NUEVA JERSEY
SUPERIOR COURT OF NEW JERSEY

DIVISIÓN DE DERECHO – CONDADO DE _____
LAW DIVISION - COUNTY

NO. DE LA ACUSACIÓN FORMAL _____
INDICTMENT NO.

ESTADO DE NUEVA JERSEY
STATE OF NEW JERSEY

contra
v.

_____,
Acusado
Defendant

**FORMULARIO SOBRE**
**LOS DERECHOS DE APELACIÓN**
**APPEAL RIGHTS FORM**

El suscrito, _____, por la presente certifica lo siguiente:
I, _____, hereby certify as follows:

1. Es el acusado en la causa citada arriba.
   I am the defendant in the above referenced case.

2. _____ lo está representando en esta imposición de sentencia, y él/ella ha revisado con el acusado este Formulario sobre los Derechos de Apelación.
   I am being represented in this sentencing by _____ and he/she has reviewed this Appeal Rights Form with me.

3. Entiende que:
   I understand that:

   (a) una apelación significa hacer que un tribunal más alto revise su causa,
   (a) An appeal means having my case reviewed by a higher court,

   (b) tiene el derecho de apelar su(s) condena(s) y sentencia(s),
   (b) I have a right to appeal my conviction(s) and sentence(s),

   (c) tiene el derecho de que lo represente un abogado en dicha apelación,
   (c) I have the right to be represented by counsel for that appeal,

   (d) si no puede contratar a un abogado privado para su apelación, la Oficina del Abogado de Oficio lo representará o hará arreglos para la representación, y
   (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) si no presenta un aviso de apelación ante la División de Apelaciones dentro de los **45 días** subsiguientes a la fecha de hoy, y a menos que obtenga una prórroga de treinta días al demostrar motivo suficiente y la ausencia de perjuicio**,** perderá su derecho de apelar.
   (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. Comparece hoy ante el juez _____ para la imposición de la sentencia.
   I am appearing before Judge _____ for sentencing today.

**Certifica que las declaraciones que anteceden hechas por él son veraces. Sabe que si cualquiera de las declaraciones que anteceden hechas por él es intencionalmente falsa, estará sujeto a un castigo.**

**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.**

FECHADO/ Dated: _____ _____

Acusado / Defendant

**He revisado este Formulario sobre los Derechos de Apelación con el acusado, y estoy satisfecho de que entiende los derechos que se describen. Certifico que el acusado ha firmado este formulario a sabiendas y voluntariamente.**

**I have reviewed this Appeal Rights Form with defendant and I am satisfied that he/she clearly and fully understands the rights it describes. I certify that defendant has signed this form knowingly and voluntarily.**

FECHADO/ Dated: _____ _____

Abogado del acusado / Counsel for Defendant

*(Para ser llenado solamente por un abogado privado / To Be Filled Out By Private Counsel Only)*

**Si el acusado decide apelar y no puede seguir pagando a un abogado privado, notificaré a la Oficina del Abogado de Oficio dentro de los 45 días subsiguientes a la fecha de hoy.**

**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.**

FECHADO/ Dated: _____ _____

Abogado del acusado / Counsel for Defendant

**(Llénelo por duplicado; una copia debidamente firmada se ha de entregar al juez del juicio, y el acusado ha de quedarse con la otra copia).**

**(Complete in duplicate: one fully executed copy to be delivered to the trial judge and one to be given to the defendant.)**

# DIRECTIVE #20-06

# ATTACHMENT 3

# APPEAL RIGHTS COLLOQUY

# APPEAL RIGHTS COLLOQUY

You have 45 days from today to appeal your conviction and sentence.

If you cannot afford counsel the Public Defender's Office will continue to represent you.

If you miss the 45 day deadline you can ask for a 30 day extension to file your appeal if you can show a good reason for missing the deadline.

If you miss the extended deadline you may lose your right to appeal.

Do you have any questions about your right to appeal?

Did you discuss the Appeal Rights Form with your attorney?

Did you sign the Appeal Rights Form?

Based on what you have said, I am satisfied that you have knowingly and intelligently executed the Appeal Rights Form and clearly understand your appeal rights.

Published 11/2006, CN 10778-English

## D. Rule Proposals and Other Issues Considered and Rejected

### 1. Appeal Request Form

As part of its consideration of an Appeal Rights Form following the Molina decision, the Committee discussed whether the rules should allow for the filing of an automatic or immediate notice of appeal. It was noted that in federal court, defendants are advised of the right to appeal and that if they choose, the clerk of the federal court will file a notice of appeal on their behalf. However, it was reported that in New Jersey, the Public Defender's Office did not favor the filing an automatic or immediate notice of appeal, because that would require the Public Defender's Office to order transcripts in many more cases then it currently does, and that an appeal is not always warranted. Automatic appeals could create a financial burden for the Public Defender's Office, because appeals would then be routinely filed in many cases that involved probationary or noncustodial sentences. The Committee also felt that filing an automatic or immediate notice of appeal could dramatically increase the number of meritless appeals. Consequently, the Committee did not believe that a rule change was necessary at this time to either lengthen or shorten the 45-day period to appeal, or to include language regarding an automatic right to appeal.

The Committee also discussed the best time for the defendant to state whether he or she intended to appeal. Some members of the Committee felt that the most convenient time was during, or immediately following, the sentencing. Other members disagreed, noting that there was not enough time on a busy

sentencing day for a defense attorney to adequately discuss an appeal with his client, and that in any event, defendants were typically not in the proper frame of mind to hold a meaningful discussion. The Committee decided that it was best to let defense attorneys decide when to hold the meaningful discussion with their clients.

As a second option, the Committee considered creating an Appeal Request Form that would be available to defendant at the time of sentencing. There was a general sentiment that the use of this form would generate more appeals, especially if it were presented to the defendant at sentencing. It was also noted that the Office of the Public Defender already had a similar form in use. Consequently, the Committee unanimously voted against the Appeal Request Form, provided that counsel conducts timely discussion with defendant after sentencing to consider whether to file an appeal.

## 2. Judicial Involvement in Plea Negotiations

In its 1988 Report, the Criminal Practice Committee recommended amendments to Rule 3:9-3 that would permit judges, at the request of one or both of the parties, to conduct a conference with both parties present, and indicate what the defendant's maximum exposure would be if he or she were to plead guilty and the material in the presentence report confirmed the information conveyed to the judge at the conference. See Report of the Supreme Court Committee on Criminal Practice 1988 Term, 122 N.J.L.J., 97, 112 (1988). A dissent to that report, filed on behalf of the prosecutor members of the Committee, proposed an amendment to the rule that only allowed judges to participate where there was an agreement between both the defendant and the State to conduct the conference. See Report of the Supreme Court Committee on Criminal Practice, 122 N.J.L.J. at page 178. The Court ultimately adopted an amendment to the Rule patterned after the dissent.

In the 2002 *Report of the Conferences of Criminal Presiding Judges and Criminal Division Managers on Backlog Reduction*, it was recommended that Rule 3:9-3 "be reviewed and modified to permit judge involvement in plea negotiations when it appears that the parties are at a stalemate." See Recommendation 8 at page 28. The *Backlog Report* stated, in support of the change to Rule 3:9-3, that:

> The practice of requesting judicial involvement in plea negotiations is determined locally by the county prosecutor. There are counties where the prosecutor

> steadfastly opposes any judicial involvement in plea negotiations or does not allow involvement by certain judges. Since sentencing authority is vested in the Judiciary, judges should be able to use that authority to arrive at the most appropriate sentence. Id. at page 28.

The *Backlog Report* was approved by the Judicial Council at its October 31, 2002 meeting. The Conference of Criminal Presiding Judges subsequently proposed an amendment to Rule 3:9-3(c) and forwarded that recommendation to the Committee.

Consistent with its 1988 recommendation, the proposed amendment to Rule 3:9-3(c) would have allowed judicial involvement in plea negotiations upon the request of either the prosecutor or defense counsel. Currently, judicial involvement is prohibited unless both parties request it. As a result, the county prosecutor essentially has the power to determine whether or not a judge can be involved in plea negotiations. In at least two counties, the prosecutor opposes any judicial involvement at all, and will not let his assistant prosecutors "invite" the judge into the process. It was also reported that approximately five years ago, one prosecutor actually had a *written* policy that permitted the conference only with select judges. Nothing would prevent any prosecutor now, or in the future, from adopting such a policy.

The Committee was sharply split on this proposed amendment. Several members of the Committee felt that it could be used to cut a prosecutor "out of the loop," or to coerce a prosecutor into accepting a "deal" that he or she did not want.

In addition, it was reported that the Prosecutors Association was unanimously opposed to the proposed amendment. The Prosecutors Association reportedly felt that the amendment would allow the judge to undercut what the prosecutor considered to be a fair offer. In addition, a defense attorney would then have less incentive to deal with the prosecutor, especially if the judge had a reputation for leaning toward the defense.

In response, those in favor of the proposed amendment noted that the intent was simply to give judges the ability to bring the parties together, not to authorize ex parte communications or undercut prosecutors. It was noted that the judge would impose whatever sentence he or she considered to be fair, and that there was no harm in the parties receiving advance notice of what that sentence would likely be, and in reaching the ultimate result more expeditiously, even though the prosecutor would adhere to his or her recommendation on the record. In fact, in the one county where the prosecutor refused to allow judges to participate, judges very often tried cases and imposed lesser sentences then those offered by the prosecutor. In other words, cases were being tried unnecessarily merely because the prosecutor was willing to make a negotiated recommendation for a sentence substantially higher than the judge would impose. If the prosecutor was not in a position to veto judicial involvement, a significant number of cases being tried in that county would not need to be tried. The majority also noted that the Rule did not permit the judge to dismiss or downgrade any count without consent of the prosecutor.

By a vote of 9-7, the Committee recommended during the 2002-2004 term that Rule 3:9-3(c) be amended. The County Prosecutors Association of New Jersey filed a dissent to the proposed amendment. The Court chose not to adopt the proposed amendment to Rule 3:9-3(c).

The Committee thereafter considered whether to propose one of the options contained in the County Prosecutors Association's dissent: that if the Court felt that the rule should be amended to allow for judicial involvement in plea negotiations at the request of either party, the hearing should be convened in open court. The Committee asked that the opinion of the Conference of Criminal Presiding Judges be obtained regarding this proposal. The Criminal Presiding Judges chose to stand by the position set forth in their March 17, 2004 letter to Administrative Director Richard J. Williams, in which they unanimously endorsed amending Rule 3:9-3(c) to allow judicial involvement in plea negotiations at the request of either party. The Committee decided not to further pursue a rule recommendation at this time.

**3. Appeals from Motions to Suppress/Pretrial Motions**

R 3:5-7(d) permits a defendant to appeal from the denial of a motion to suppress physical evidence notwithstanding a guilty plea. In some situations, a defendant may want to appeal only from the denial of the motion to suppress following the plea or trial, and not raise any other issues.

> R 2:5-3(b) states that "Except if abbreviated pursuant to R. 2:5-3(c), the transcript shall include the entire proceedings in the court or agency from which the appeal is taken, including the reasons given by the trial judge in determining a motion for a new trial, unless a written statement of such reasons was filed by the judge. The transcript shall not, however, include opening and closing statements to the jury or voir dire examinations or legal arguments by counsel unless a question with respect thereto is raised on appeal, in which case the appellant shall specifically order the same in the request for transcript."

The Committee considered amending the language of the rule to permit the production of just a motion to suppress transcript when a defendant appeals only from the denial of a motion to suppress, and makes clear that this is the only issue being raised on appeal.

The Committee discussed whether the rule amendment should be broader to include any discrete pretrial motion raised on appeal, instead of just limiting the amendment to motions to suppress. The Committee also discussed whether the rule should require that the notice of appeal or case information statement indicate that the appeal from the denial of a pretrial motion is the sole issue being raised on appeal.

The Committee decided to recommend an amendment to Rule 2:5-3(b) to

permit the production of only the transcript of a discrete pretrial motion when a defendant makes clear that the denial of the pretrial motion is the only issue being raised on appeal.

By letter dated January 31, 2006, Judge Stern forwarded the rule proposal to the Civil Practice Committee for its consideration. The Civil Practice Committee determined that there was no need for the proposed rule change. The Civil Practice Committee felt that "the rules already provide for the abbreviation of a transcript on appeal and that the proposed rule amendment may create more problems that it would solve." See 2006 Supplemental Report of the Supreme Court Civil Practice Committee (March 7, 2006). Consequently, the Criminal Practice Committee decided to take no further action.

## 4. Discovery of Unrecorded Statements of Witnesses

In an unpublished decision, State v. Bilal Mallah, App. Div. Dkt. No. A-3006-03T4 (July 14, 2005), the Appellate Division noted in footnote 3 that the Committee previously examined the obligation to record or reduce an oral statement to writing and to produce it in discovery. See Report of the Supreme Court's Criminal Practice Committee, 111 N.J.Ll.J. 665, 666 (June 16, 1983). Presently, R. 3:13-3(a) provides for discovery of unrecorded statements of a defendant, but not of witnesses. The Committee considered whether parties should record an oral statement taken directly from a witness or memorialize a conversation with a witness for purposes of discovery. Several Committee members noted that the practice in some courts is to require summaries of conversations with witnesses, although there is no requirement in the court rules to do so.

The Committee considered amendments to R. 3:13-3 (c) and (d) to provide that when a witness's statements are not written or otherwise memorialized in writing, both the State and the defense would be required to provide written memoranda setting forth a fair summary of the oral statements, including changes in prior statements. The proposal further would have provided that a defendant would not have to provide the State with a summary of a witness's oral statement that is contrary to the defendant's interests, unless the individual was going to be a defense witness. The proposal also would have provided that the defense could be

foreclosed from calling a witness to testify at trial if it failed to provide a summary of a witness's oral statement.

Some members felt that the rules should be clarified to affirmatively state that if a witness takes part in a formal or informal verbal conversation, interview or statement that is not recorded, the party interviewing the witness must provide its adversary with a written summary of the witness's statement and/or anticipated testimony.

Others suggested that instead of amending the rules, the appropriate remedy would be to enforce the State's duty to disclose exculpatory evidence, pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 218 (1963). Frequently, prosecutors assume the responsibility of providing their adversaries with notice of prior inconsistent statements made by witnesses.

It was also noted that new witnesses often surfaced on the eve of trial, and that it may therefore be difficult for parties to follow the proposed rule. However, it was suggested that in this situation, the opposing party could request an offer of proof. Some judges added that they could adjourn the case to allow time for opposing counsel to interview the witness.

The Committee also discussed what would constitute "a fair written summary" under the proposed rule. Several members were of the view that the adequacy of the summary might be an issue for debate during a pretrial hearing, or might present an issue for cross-examination at trial.

Ultimately, the Committee agreed that R. 3:13-3 should not be revised, and

that issues relating to calling witnesses who gave unrecorded statements can be developed by case law in individual circumstances.

**5. <u>Appeals to the Appellate Division</u>.**

The Committee was asked to consider whether the court rules should be amended to clarify whether the reversal of a Municipal Court conviction on grounds unrelated to guilt or innocence, or to the merits of the case, and a remand for a new trial in the Municipal Court is a final judgment appealable to the Appellate Division as of right.

The Committee discussed whether a remand to the Municipal Court from a trial *de novo* in the Law Division is final for purposes of appeal to the Appellate Division. One member explained that if the matter is not considered final, the parties could file an interlocutory appeal to the Appellate Division. If the Appellate Division felt that there was a problem with the remand, the Appellate Division could grant leave to appeal. Another member did not think that a remand from the Law Division to the Municipal Court should be considered final. Rather, the remand issue should be raised on appeal to the Appellate Division once the conviction is finalized and the record is complete. The Committee reached a consensus that a remand from a trial *de novo* in the Law Division should not be treated as a final judgment and that there was no need for a rule change.

## 6. Plea Waiver Forms

In Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), the United States Supreme Court held, by a 5-4 vote, that the "exceptional sentence" imposed by the judge violated the defendant's Sixth Amendment right to a jury trial, because the supporting facts were not admitted by the defendant or found by a jury. In reaching this conclusion, the Court stated that "when a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." Id. at 304, 124 S.Ct. at 2537.

In finding that the sentence violated the Constitution, the Supreme Court applied the rule pronounced in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) where it held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Blakely, 542 U.S. at 301, 124 S.Ct. at 2536. For Apprendi purposes, the statutory maximum "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" Blakely, 542 U.S. at 303, 124 S.Ct. at 2537. (Emphasis in original). To be sure, the Court stated: "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Ibid.

In Blakely, the defendant was sentenced to more than 3 years above the 53-month statutory maximum of the standard range because the court found that he had acted with "deliberate cruelty." Because the facts supporting that finding were not admitted by the defendant or submitted to a jury, the Supreme Court concluded that the judge exceeded his proper authority.

The majority in Blakely stated that defendants can waive their Blakely/Apprendi rights in a plea agreement or consent to judicial factfinding of aggravating factors if they proceed to trial. With regard to plea agreements, the majority stated that when a defendant pleads guilty: "nothing prevents a defendant from waiving his *Apprendi* rights. . . . When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consent to judicial fact finding." Blakely, 542 U.S. at 310, 124 S.Ct. at 2541. Thus, the Court concluded that "[i]f appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." Ibid.

With respect to trials, the Court stated: "Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial." Ibid.

The Criminal Practice Committee's Forms Subcommittee met to discuss development of a Blakely waiver form. Although the Public Defender's representative declined to participate in the development of the waiver forms due to that office's litigation strategy, the Forms Subcommittee developed a form that

addressed cases where the option to sentence above the presumptive term was left to the discretion of the court. After further consideration, however, the Subcommittee also developed a form that covered extended terms, so that waivers on "above the presumptive" cases could be discussed separately from waivers on extended term cases.

The Forms Subcommittee presented the two Blakely waiver forms to the Conference of Criminal Presiding Judges, which voted to defer recommending the forms until the New Jersey Supreme Court decided two pending state cases with Blakely issues, State v. Natale and State v. Abdullah. The Criminal Practice Committee also decided not to promulgate the Blakely waiver forms at that time, but decided to revisit the issue after the Court decided State v. Natale and State v. Abdullah.

On August 2, 2005, the New Jersey Supreme Court decided State v. Natale, 184 N.J. 458 (2005); State v. Abdullah, 184 N.J. 497 (2005); and a third case, State v. Franklin, 184 N.J. 516 (2005). After reviewing the holdings in these cases the Committee decided that there was no need to promulgate the two proposed Blakely plea waiver forms.

## 7. Charging Extended Terms in the Indictment

The Committee considered whether to recommend a rule amendment in light of State v. Franklin, 184 N.J. 516 (2005), in which the Court held that "if the State intends to seek an extended term under the *Graves* Act, it must obtain an indictment charging possession or use of the gun in the commission of one of the designated crimes and then submit the charge to the jury."

The Committee discussed whether it was sufficient to have a separate count in the indictment that included the facts relating to the extended term, or if the extended term facts must be contained in the count for the underlying offense. Some members were of the view that facts supporting an extended term could not be included in the count of the indictment for the underlying offense, because to do so, prosecutors would be "creating" new crimes. For example, there was no offense in the Criminal Code called "manslaughter while armed," and prosecutors could not now create that crime by adding additional elements to a manslaughter charge in the indictment.

Another member suggested that how to proceed under Franklin might be a more appropriate issue for the New Jersey County Prosecutors' Association, rather than the Criminal Practice Committee. It was also suggested that the Committee should not propose a rule amendment at this time, because this is an area of developing law.

The Committee reached the consensus that it should not recommend amendments to the court rules at this time, but that it might revisit the issue at a later time, if necessary.

## 8. Motions for Reconsideration

In a letter to the Committee a private attorney requested that the Criminal Practice Committee consider whether a reconsideration motion procedure, similar to that employed in the Civil Part pursuant to R. 4:49-2, should be included in the criminal rules. The Committee noted that in civil cases, motions for reconsideration provided a way to toll time. [which was not necessary in criminal cases]. Several members also noted that it was very rare for a party to file a motion for reconsideration in a criminal case. The Committee therefore agreed that because they rarely occur, it was not necessary to have a rule addressing motions for reconsideration in criminal cases.

## 9. Post Conviction DNA Testing - State v. Richard Jefferson

In an unpublished decision, State v. Richard Jefferson, App. Div. Dkt. No. A-5696-03T2 (Dec. 29, 2004), the Appellate Division upheld an order directing that the Office of the Public Defender (OPD) represent a defendant in his motions for post-conviction DNA testing pursuant to N.J.S.A. 2A:84A-32a and a new trial. The Appellate Division noted that the DNA statute authorized the Supreme Court to adopt rules to implement the statute. The Committee therefore considered whether it should recommend a rule amendment to address post-conviction DNA testing.

In a letter dated January 28, 2005, Assistant Public Defender Dale Jones set forth the OPD's position regarding Jefferson. The letter advised that the OPD was then in the process of appealing the Appellate Division's opinion to the New Jersey Supreme Court. In addition, following the decision in Jefferson, the OPD (insofar as Jefferson was an unpublished decision) declined to provide representation based on the same grounds that it argued before the Appellate Division: that the OPD had "neither the statutory obligation, authority, nor appropriation to do so." As a result, the OPD felt that the Committee should not recommend a rule amendment before the issuance of an opinion with precedential value. The OPD subsequently indicated that it had decided not to appeal Jefferson to the New Jersey Supreme Court.

The Committee was also advised that there were very few cases involving motions for post-conviction DNA testing, largely because there were generally no

DNA samples to test in older cases. Currently, in appropriate cases, the prosecution or OPD conducts DNA testing at the trial level. In addition, many judges on the Committee believed that post-conviction DNA testing had not been an issue that required a rule amendment.

Based upon this discussion, the Committee concluded that it was not necessary to recommend a rule amendment at the present time.

## 10. Probable Cause Hearings

In State v. J.M., 182 N.J. 402 (2005), the Supreme Court modified R. 5:22-2 to permit a juvenile to testify and present evidence at the probable cause portion of a juvenile waiver hearing. The Court referred the matter to the Family Practice Committee, and suggested it could, if necessary, coordinate with the Criminal Practice Committee in drafting the appropriate amendments. Id. at 416-417.

The Committee considered whether any rule amendments were necessary at the present time. Because J.M. did not require an amendment to the Part III rules, the Committee decided that there was no need to recommend a rule amendment at this time. The Committee will revisit this matter upon request of the Family Practice Committee.

## 11. Notice Under Specific Criminal Code Provisions.

As a Matter Held for Future Consideration from the 2002-2004 term, the Committee considered whether R. 3:12-1 should be amended to expand the time limit for a defendant to serve written notice on the prosecutor if the defendant intended to rely on certain defenses contained in the Criminal Code. In practice, most counties do not follow the rule, largely because the 7-day time limit is not realistic. It was suggested that there might be a need to reevaluate the arraignment rule, R. 3:9-1(c), if the time frame for a defendant to provide notice to claim certain defenses changed. Another member stated that the rule became problematic only if the judge precluded a defendant from raising a defense, which rarely occurred. The Committee agreed that it was not necessary to amend the rule at the present time, and that the issue should be dealt with on a case-by-case basis.

## 12. No Early Release Act Plea Form

In State v. Kaa'Wone Johnson, 182 N.J. 232 (2005), the Supreme Court held that a mandatory period of parole supervision imposed pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, constituted both a direct and penal consequence that a defendant should be informed of at the time of the plea. In Johnson, the defendant was not informed of the NERA parole supervision period either during the plea colloquy or on the plea form. In footnote 1 of the opinion, the Court noted:

> "The State informed the Court at oral argument that after defendant entered his plea, the standard plea form was revised to include a specific question in respect of the applicability of the period of parole supervision required by NERA."

In an abundance of caution, before this issue reached the Supreme Court, the Committee recommended *Supplemental Plea Forms for No Early Release Act Cases,* which were promulgated by Directive #4-98 (Oct. 8, 1998) and Directive #4-02 (Aug. 21, 2002).

The Committee considered whether, in light of Johnson, the NERA questions should remain on the Supplemental Plea Forms or be incorporated into the *Plea Form*. The Committee decided that the *Supplemental Plea Forms for No Early Release Act Cas*es were working well, and that there was no need to include this information on the *Plea Form*.

## 13. Amendments to the Plea Form

The Committee was asked to consider the following amendments to the *Plea Form*: (1) advising the defendant that the court may impose as a condition of the sentence that the defendant refrain from using drugs or alcohol; (2) advising the defendant that if he/she was sentenced to probation and violated a condition of probation, he/she can be sentenced to the maximum term permissible for the violation of probation; (3) adding a certification to the form above the defendant's name indicating that information provided was true.

First, the Committee considered the suggestion to add a question regarding a condition requiring defendants to refrain from the use of drugs and alcohol. After discussion, the Committee determined not to include this condition on the *Plea Form*, as this could be one of many conditions imposed during sentencing, and it made no sense to add one condition without adding them all.

Second, the Committee considered whether to add a question that advised defendants about the consequences of a violation of probation. In a previous rules cycle, the Committee considered this issue and discussed amending the *Plea Form*, but instead recommended adoption of R. 3:21-4(c). See Report of the Supreme Court Committee on Criminal Practice 1989-1990 Term, 125 N.J.L.J., 385, 411-412 (1990). That rule requires that the court inform defendants at the time they are placed on probation of the penalties that "might be imposed on revocation should they not adhere to the conditions of their probation."

Finally, the Committee discussed whether to add certification language to the *Plea Form.* The Committee decided that this language was unnecessary, because defendants are now placed under oath for the plea colloquy. See R. 3:9-2. Additionally, neither the other supplemental plea forms, such as the *Supplemental Plea Form For Non-Negotiated Pleas, Additional Questions for Certain Sexual Offenses, Supplemental Plea Form for Drug Offenses,* nor many other forms used by the courts presently contain certification language.

## E. No Action Necessary

### 1. Death Penalty Moratorium Statute

On January 12, 2006, the Governor signed S-709 into law as P.L. 2005, c. 321, which created a commission to study the death penalty and imposed a moratorium on death penalty executions. The Committee discussed whether there was anything it needed to do in light of this legislation and concluded that there was no need to be involved in the matter.

## F. Matters Held for Future Consideration

### 1. Post-Conviction Relief Issues

During the 2002-2004 term, the Committee discussed ways in which to alleviate the statewide delays in getting post-conviction relief petitions scheduled and heard. The Committee also discussed State v. Rue, 175 N.J. 1 (2002), in which the New Jersey Supreme Court held that PCR counsel must advance even those arguments that he or she believes to be without merit. It was suggested that the volume of PCR petitions affected the ability of the Public Defender's Office to choose the cases that truly warranted representation. It was also suggested that some of the Criminal Division Manager's Offices were slow to forward cases to the Public Defender, that the Public Defender's Office was slow to assign counsel, and that counsel, once assigned, were slow to receive the transcripts for such cases. Another issue discussed was whether Rule 3:22-10 should be amended to expressly allow oral argument by defense counsel on a first petition for post-conviction relief. See State v. Mayron, 344 N.J. Super. 382 (App. Div. 2001).

As both the Public Defender's Office and the Conference of Criminal Presiding Judges were reportedly in the process of drafting proposals to address the backlog of post-conviction relief cases, the Committee held off on recommending any possible solutions during the 2002-2004 term.

The Committee revisited the topic of PCR issues during the beginning of the 2004-2007 term. At that time, the Committee considered whether to create a subcommittee to look into the possibility of revising the PCR rules in light of Rue

to limit, expand or clarify the rules regarding the scope of issues that assigned counsel must raise. The Public Defender, however, agreed with Rue and its interpretation, and did not support a change in the rules, especially one that would narrow the constitutional claims that a defendant could raise.

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

After a lengthy discussion, the Committee reached an impasse regarding how to proceed. It agreed to revisit the issue at a later time, when the Conference of Criminal Presiding Judges issued its backlog report.

On June 22, 2005, the Conference of Criminal Presiding Judges sent its *Report of the Conference of Criminal Presiding Judges on Revisions to The Rules Governing Post Conviction Relief (PCR) and Establishment of PCR Time Goal* to the Acting Administrative Director of the Courts for discussion by the Judicial Council.

On July 12, 2006, the New Jersey Supreme Court decided State v. Webster, 187 N.J. 254 (2006). In Webster, the Court considered "whether PCR counsel violated Rule 3:22-6(d) by failing to advance all of the issues raised by defendant." Id. at 257. The Court held that "the brief must advance the arguments that can be made in support of the petition and include defendant's remaining

claims, either by listing them or incorporating them by reference so that the judge may consider them." The Court referred the matter to the Criminal Practice Committee, asking that it propose a revision to Rule 3:22-6(d) to reflect the views expressed in the opinion. Id. at 258. Consequently, the Committee created a subcommittee to draft a rule amendment. Additionally, since the current rules governing the handling of PCRs were not being followed, largely because of the backlog situation, the subcommittee was also charged with reviewing the entire PCR process. That subcommittee has met and is preparing a report. The Committee will continue its deliberations of this matter during the next term.

## 2. Ex Parte Post-Trial Communications between Judges and Jurors

In a letter dated August 18, 2006, a private attorney requested that the Acting Administrative Director enact a rule or policy prohibiting all ex parte, post-trial communications between judges and jurors. Consequently, the Acting Administrative Director asked the Civil and Criminal Practice Committees to consider this matter.

The Committee initially discussed whether it was appropriate to create a Joint Subcommittee with the Civil Practice Committee. The Committee felt that because of the difference between criminal and civil matters, the Committee should explore this matter separately from the Civil Practice Committee.

The Committee was somewhat divided regarding the practice of ex parte, post-trial communications between judges and jurors. Some members were in favor of the practice, noting that the exit interviews benefited the parties by providing insight into the jury's thoughts about the case, and also provided an avenue to answer questions that jurors might have about the criminal justice system. Although these discussions were typically informal and unrecorded, judges usually began by advising the juries of inappropriate areas of discussion, such as their deliberations, in order to avoid generating issues that could create reversible error on appeal. Other members were strongly opposed to any ex parte, post-verdict communications between judges and juries, largely because the discussions were unrecorded and had the potential to generate issues on appeal regarding the interpretation of statements made by a judge or juror.

The Committee eventually voted 10-9 in favor of a per se prohibition against all ex parte, post-verdict communications between judges and juries when the interviews are unrecorded. The Committee also voted that ex parte, post-verdict communications between judges and juries should be permitted when the interviews are conducted on the record. A Subcommittee was formed to survey how exit interviews with judges and juries are handled throughout the state, and how these issues are addressed in other jurisdictions. The Subcommittee was also asked to explore whether any verdicts had been compromised due to post-trial communications between judges and jurors.

The Committee later revisited the issue of ex parte, post-verdict communications between judges and juries due to the Appellate Division's opinion in State v. Walkings, 388 N.J. Super. 149 (App. Div. 2006). In that opinion, the court stated that it saw "no principled reason for permitting ex parte communications concerning the jury's deliberations once a verdict has been rendered and the jury discharged." Id. at 158-159. The court added that "no communication should have taken place without the defendant having been given notice of and an opportunity to be heard and to be present at any such communication between the judge and juror." Id. at 159. In light of Walkings, the Committee considered whether there was still a need for a Subcommittee to examine ex parte communications. It was noted, however, that the private attorney had requested a prohibition against *all* ex parte, post-verdict communications between judges and jurors, and that no case, including Walkings,

supported that position. The Committee decided that the Subcommittee should continue examining ex parte communications. The Committee will consider any recommendation that the subcommittee may have during the next term.

### 3. Comprehensive Review of Existing Plea Forms

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

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

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

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

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

**4. Bail Source/Sufficiency Hearings; Implementation of N.J.S.A. 2A:162-13**

On January 9, 2004, the Governor signed S-1322 into law as P.L. 2003, c. 213, which permits the court to inquire into the source of bail. The law is codified at N.J.S.A. 2A:162-13 and N.J.S.A. 2A:162-14. The law went into effect on January 9, 2004.

N.J.S.A. 2A:162-13 permits the Court, upon request of the prosecutor to examine the reliability of the obligor or person posting cash bail; the value and sufficiency of any security offered; the relationship between the obligor and the defendant, along with the defendant's interest in ensuring bail is not forfeited; and whether the funds used to post bail or secure the bond were lawfully acquired.

N.J.S.A. 2A:162-14 states that "[t]he procedure to determine the sufficiency of bail shall be governed by rules adopted by the Supreme Court." To meet this statutory directive, the Committee formed a Subcommittee to recommend a rule that set forth procedures to implement the law. The Subcommittee submitted several rule proposals, which were the subject of extensive debate by a sharply divided Committee. Some of the areas of disagreement included: whether there was an initial burden on prosecutors when requesting a hearing; whether, and for how long, a defendant could be detained while a prosecutor decides whether to request a hearing; how long a defendant could be held awaiting a hearing; and who had the burden of proof at any hearing. The Committee eventually agreed, by a 9-8 vote, to recommend a rule proposal without prejudice to any constitutional challenges that might be raised and

developed through case law. The proposal was forwarded to the Acting Administrative Director of the Courts. Shortly thereafter, however, the Committee learned of pending legislation, Assembly Bill No. 2987 and Senate Bill No. 2012, that is likely to be enacted into law in the near future. If passed into law, the Committee's proposal would need to be extensively revised. Therefore, the Committee intends to revisit the proposal once the legislation is enacted.

## 5. Presentence Report Subcommittee

These related matters were held over for future consideration from the 2002-2004 term. During the 2002-2004 term, the Committee considered various issues regarding presentence reports. A Deputy Public Defender from Camden County appeared before the Committee and asserted that the court often accepted changes to the presentence report proposed by defense counsel, or decided not to consider items for purposes of sentencing when defense counsel objected. The presentence report, however, was not then officially amended, so the changes made at sentencing did not reach the Department of Corrections or the Parole Board. Consequently, when the Parole Board later considered whether to parole a particular defendant, it often relied on the original, uncorrected presentence report, rather than on the corrected report. That, in turn, could have an impact on whether the defendant was paroled.

The Committee also considered which version of the offense should be included in the "Offense Circumstances" portion of the report. In some counties, this section is a verbatim recitation of what is contained in police reports. In others, it is a recitation of what is contained in the indictment. In still others, it is a distillation of the circumstances from all sources. The Committee observed that presentence reports were initially intended only to aid the court during sentencing, but are now used by the Parole Board and the Department of Corrections for far different purposes.

Several members of the Committee claimed that the version of the offense contained in the presentence report often included facts stated in police reports contained in the discovery package, or facts that were vastly different from what the defendant admitted when pleading guilty or from the evidence adduced at trial. It was suggested that perhaps providing Parole and Corrections with a transcript of the plea hearing might be helpful, because it reflected the crime for which the defendant was convicted. However, there would be a cost involved in doing so, at least with respect to the cases which are not appealed. The Appellate Division has offered to provide the Department of Corrections and Parole Board with transcripts after appeals are concluded. It was also noted that what the defendant admitted at the plea hearing might not be helpful to the Parole Board, because defendants often plead guilty to far less than what is indicated by their behavior.

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

reports were a verbatim description of how the victim described the offense, and that this was not necessarily what the State alleged.

The Committee also discussed how to ensure that the defendant's version of the offense was included in the presentence report. One member of the Committee noted that defendants were asked for their version of the offense, but their attorneys typically advised them to remain silent. It was suggested that attorneys should encourage their clients to speak freely when asked for their version of the offense.

It was also noted that some counties included police reports in their presentence reports, a practice that is not acceptable. See *Manual for Preparation of the Presentence Investigation Report*, Section VI, page 1 (October 10, 1997). In response, it was suggested that the sentencing judge is not always the judge who took the plea, and the police report is necessary when a judge is sentencing blindly. However, a summary of the facts and charges should suffice in this regard.

The Committee created a subcommittee during the 2002-2004 term to examine these issues. Due to changes in the Committee's roster, the subcommittee was reconvened with new members during the 2004-2007 term.

After meeting to discuss the various issues, the subcommittee informed the Committee that it was considering the following: (1) developing a uniform statewide policy for indicating in the presentence report whether a prior conviction or arrest was verified by fingerprint comparisons; (2) requesting that the

Conference of Criminal Division Managers consider developing a uniform form and/or protocol to memorialize challenges made to the presentence report, and to incorporate the court's findings regarding any corrections that were made; (3) developing a protocol to include the State's version *and* the defendant's version of the offense in the presentence report, and to recommend that the Public Defender's Office advise the defendant that if he or she did not provide a statement, the Department of Corrections and Parole Board would rely on the State's version; (4) asking the Conference of Criminal Division Managers to consider developing a protocol for forwarding any corrections to the presentence reports to the Division Managers before the reports were disseminated; and (5) requesting that the Conference of Criminal Division Managers and the Conference of Criminal Presiding Judges consider what is (or should be) the "official version" of the offense in the presentence report: the police report version, the State's version, the defendant's version or the factual basis provided at the plea, and the best way to incorporate the factual basis provided at the plea into the presentence report

The Committee suggested that the subcommittee also consider the following issues:

- Recommending a rule amendment to include language that a defendant's statements or admissions to a probation officer regarding his version of an offense for purposes of completing a Presentence Report cannot be used against him if the plea is later rejected.

- Whether the "State's Version" should really be entitled the "Police Version," whether the State's version should be the facts that were

elicited at the plea, and whether there should be an "Official Version" of the case.

- Developing a procedure to memorialize the plea in the presentence report.

- Whether, in order to estimate the costs involved for transcribing pleas, there should be a pilot project that isolated certain serious crimes or certain offenses by the length of sentence and then determined how much it would cost to get transcripts made for those offenses.

- Instituting a procedure in which the judge would take notes and then paraphrase on the record the facts that were admitted at the plea and upon which all parties agreed. The notes would then be incorporated into the presentence report. The subcommittee should also consider whether a rule amendment would be necessary to indicate that individuals would be bound by that version of the offense.

- Whether an audiotape of the plea hearing should be provided to the Department of Corrections or the Parole Board, rather than a transcript of the plea.

The Committee will continue its deliberations of these issues during the next term.

## 6. Nunc Pro Tunc - Pro Se Post-Conviction Relief Appeals

The Committee was informed of a fairly widespread problem regarding late filings in post-conviction relief (PCR) appeals. The Appellate Division has noticed that PCR appeals are being filed out-of-time even when an attorney is assigned on the first PCR, and also after second and subsequent petitions handled pro se. In many late pro se filings, defendants have argued that they were not aware of the time limits.

The Committee was asked to consider whether the court rules should be amended to address this situation, or if orders for final post-judgment dispositions should include language stating that any appeal must be filed within 45 days. A member of the Committee agreed to draft a proposal for presentation to the Committee at a future meeting. This issue will be revisited during the next term.

## 7. Recording Requirements for Out-Of-Court Identifications

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

The Committee will consider this issue during the next term.

## 8. Hypnotically Refreshed Testimony

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

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

The Committee discussed this matter only briefly, and will continue its deliberations during the next term.

**9. State v. McAllister**

In State v. McAllister, 184 N.J. 17 (2005), the New Jersey Supreme Court held that under the New Jersey Constitution, citizens had a reasonable expectation of privacy in their bank records, and that the existing grand jury subpoena procedures sufficiently protected that expectation of privacy. The Court rejected the application of a probable cause standard to grand jury subpoenas and the imposition of a notice requirement to bank account holders. Id. at 19. The Court recognized that although notice to bank account holders was not constitutionally required, additional protections might be desirable as a matter of policy. Ibid. It requested that the Committee study grand jury procedures and recommend whether the Court should consider additional safeguards for bank account holders.

The Committee briefly discussed McAllister before determining that a Subcommittee should be formed. The Committee will continue its deliberations on this matter during the next term.

## 10. Pretrial Intervention Guidelines

In light of a recent opinion, 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 was asked to consider whether the PTI Guidelines should be updated. The Committee briefly considered this issue. Members of the Committee were asked to forward any proposed changes to the Committee staff at the Administrative Office of the Courts. This issue will be considered during the next term.

## 11. Municipal Appeals

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

`Respectfully Submitted,

Hon. Edwin H. Stern, Chairman
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Peter D. Manahan, Esquire
Michael Marucci, Deputy Public Defender
Boris Moczula, Deputy Director
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