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TO: ASSIGNMENT JUDGES

FROM: PHILIP S. CARCHMAN, P.J.A.D.

DATE: OCTOBER 9, 2007

SUBJ: BAIL – REVISED REMITTITUR GUIDELINES

SUPPLEMENT TO
DIRECTIVE #13-04

Directive #13-04 (dated November 17, 2004) promulgated various revised documents and procedures related to bail processing and bail forfeitures and judgments. That material included a set of guidelines for the handling of requests for remission of bail forfeitures in Superior Court or in the Municipal Courts. "Remittitur Guidelines for Superior and Municipal Courts" (Attachment F to that Directive). This memo promulgates a revised version of those Remittitur Guidelines.

The revisions to the Guidelines were necessitated by the following six post-2004 Appellate Division decisions: (a) State v. Ramirez, 378 N.J. Super. 335 (App. Div. 2005); (b) State v. Harris, 382 N.J. Super. 67 (App. Div. 2005), certif. denied, 186 N.J. 365 (2006); (c) State v. Hawkins, 382 N.J. Super. 458 (App. Div. 2006); (d) State v. Ruccatano, 388 N.J. Super. 620 (App. Div. 2006); (e) State v. Toscano, 389 N.J. Super. 366 (App. Div. 2007); and State v. Wilson, 395 N.J. Super. 221 (App. Div. 2007). The attached revised Remittitur Guidelines, updated to reflect these six Appellate Division decisions, have been endorsed by the Conference of Criminal Presiding Judges and by the Bail Forfeiture Judges.

Accordingly, the Remittitur Guidelines distributed with Directive #13-04 as Attachment F are superseded, effective immediately, by the attached revised Remittitur Guidelines.

Attachment

cc: Chief Justice Stuart Rabner
Superior Court Judges
Municipal Court Judges
Theodore J. Fetter, Dep. Admin. Dir.
AOC Directors and Ass't Directors
Trial Court Administrators
Civil Division Managers
Criminal Division Managers
Finance Division Managers

Family Division Managers
Municipal Division Managers
Municipal Court Administrators and Directors
William McDonald, Finance Division
John Podeszwa, Municipal Court Services
John J. Wieck, Criminal Practice Division
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant

REMISSION OF A FORFEITURE

A party seeking to set aside or remit a forfeiture bears the burden of proving that “it would be inequitable to insist upon forfeiture and that forfeiture is not required in the public interest.” State v. Childs, 208 N.J. Super. 61, 64 (App. Div.), *certif. denied*, 104 N.J. 430 (1986); State v. Mercado, 329 N.J. Super. 265, 269-270 (App. Div. 2000).

The court may direct that a forfeiture be set aside if its enforcement is not required in the interests of justice. R. 3:26-6(b). Remission, in whole or in part, may be ordered even after the entry of a judgment of default in the interest of justice. R. 3:26-6(c). The decision to remit bail, as well as the amount of bail to remit, are matters within the sound discretion of the trial judge to be exercised in the public interest. State v. Peace, 63 N.J. 127, 129 (1973); State v. Mercado, 329 N.J. Super. at 270; State v. de la Hoya, 359 N.J. Super. 194, 198 (App. Div. 2003); State v. Harmon, 361 N.J. Super. 250, 254 (App. Div. 2003); State v. Ramirez, 378 N.J. Super. 355, 365-66 (App. Div. 2005). The exercise of that discretion must be consistent with the policy concerns expressed in State v. de la Hoya, 359 N.J. Super. at 198, informed by the standards articulated in State v. Hyers, 122 N.J. Super. 177, 180 (App. Div. 1973), and have sound factual and legal underpinnings. State v. Hawkins, 382 N.J. Super. 458, 467 (App. Div. 2006).

POLICY CONCERNS TO CONSIDER IN DETERMINING REMISSION

The following are “overarching” policy concerns that the Appellate Division has said should be considered in informing the exercise of discretion as to whether to remit and the amount to be remitted. State v. Mercado, 329 N.J. Super. at 199.

1. The necessity of providing an incentive to the surety to take active and reasonable steps to recapture a fugitive defendant. State v. de la Hoya, 359 N.J. Super. at 199; State v. Ramirez, 378 N.J. Super. at 365.
2. The fact that if remission were unreasonably withheld, corporate sureties might be overcautious in their willingness to post bail, resulting in an impairment of an accused’s constitutional right to pretrial bail. State v. de la Hoya, 359 N.J. Super. at 199; State v. Ramirez, 378 N.J. Super. at 365.

FACTORS TO WEIGH IN DETERMINING REMISSION

The following factors need to be weighed, within the framework of the policy concerns, in determining whether to remit bail and the amount to be remitted. Double counting of remission factors is impermissible. State v. Ruccatano, 388 N.J. Super. 620, 626 (App. Div. 2006); State v. Toscano, 389 N.J. Super. 366, 372-373 n. 2 & 3 (App. Div. 2007).

1. Whether the surety has made a reasonable effort under the circumstances to effect the recapture of the fugitive defendant. State v. Mercado, 329 N.J. Super. at 271; State v. Harmon, 361 N.J. Super. at 255. A reasonable effort under the

circumstances means an “effective” effort. State v. Ruccatano, 388 N.J. Super. at 628. When there is nothing to be done because the defendant surrendered or was recaptured before the surety had notice, doing nothing is “reasonable.” State v. Toscano, 389 N.J. Super. at 375.

2. Whether the applicant is a commercial bondsman. State v. Hyers, 122 N.J. Super. at 180; State v. Harmon, 361 N.J. Super. at 255.
3. The degree of surety’s supervision of the defendant while he or she was released on bail. State v. Hyers, 122 N.J. Super. at 180; State v. Harmon, 361 N.J. Super. at 255; State v. Ramirez, 378 N.J. Super. at 365-366.
4. The length of time the defendant is a fugitive. State v. Hyers, 122 N.J. Super. at 180; State v. Harmon, 361 N.J. Super. at 255.
5. The prejudice to the State, and the expense incurred by the State, as a result of the fugitive’s non-appearance, recapture and enforcement of the forfeiture. State v. Hyers, 122 N.J. Super. at 180; State v. Harmon, 361 N.J. Super. at 255.
6. Whether the reimbursement of the State’s expenses will adequately satisfy the interests of justice. State v. Harmon, 361 N.J. Super. at 255. The detriment to the State also includes the intangible element of injury to the public interest where a defendant deliberately fails to make an appearance in a criminal case. State v. Peace, 63 N.J. 127, 129 (1973).
7. The defendant’s commission of another crime while a fugitive. State v. de la Hoya, 359 N.J. Super. at 200; State v. Harmon, 361 N.J. Super. at 255; State v. Ramirez, 378 N.J. Super. at 365.
8. The amount of the posted bail. In determining the amount of a partial remission, the court should take into account not only an appropriate percentage of the bail but also its amount. State v. de la Hoya, 359 N.J. Super. at 199.

BALANCING OF FACTORS

The court’s primary focus, especially when the defendant has remained a fugitive for a significant period of time, should be upon the surety’s efforts to secure the defendant’s return, rather than upon the expenses incurred by the State as a result of the defendant’s failure to appear or prejudice to the State’s case caused by the defendant’s absence. State v. Mercado, 359 N.J. Super. at 271; State v. de la Hoya, 359 N.J. Super. at 199; State v. Harmon, 361 N.J. Super. at 255.

Degree of Supervision

Another important consideration is the degree of the surety’s supervision of the defendant while he or she is free on bail. State v. Ramirez, 378 N.J. Super. at 365-366.

Immediate Substantial Efforts to Recapture the Defendant

To determine the amount of remission the court may have to consider if the surety undertook “immediate substantial efforts to recapture the defendant.” The immediacy of the surety's efforts to recapture a defendant should ordinarily be measured from the time the surety is informed of the warrant/forfeiture, without reference to when it would or should have learned of that fact if there had been proper supervision. However, a surety is not excused if the surety is informed of the warrant some time after the defendant's failure to appear and then fails to act on that information. Such failure would constitute a lack of immediacy. State v. Ruccatano, 388 N.J. Super. at 626. To be “substantial”, the efforts must be reasonable under the circumstances of the case and “effective.” State v. Toscano, 389 N.J. Super. at 374.

Where the surety's efforts approach but do not meet the standard of "immediate" and "substantial," the trial court should consider whether it is appropriate to select a "starting point" between those for minimal and partial remission. State v. Toscano, 389 N.J. Super. at 375.

Length of Time the Defendant is a Fugitive

The remission schedules recommend three ranges (substantial, partial or minimal remission) for the percentage of remission that vary with and account for the length of time a defendant is a fugitive (Remission Factor 4). To avoid “double counting” an increase or decrease based solely on the duration that a defendant is a fugitive should be consistent with the ranges in the remission schedules. State v. Toscano, 389 N.J. Super. at 373 n.3.

Amount of the Bond

The court should also consider the dollar amount of the bond (Remission Factor 8). The dollar amount is a significant factor as relative to the remission policy concerns and the public's interest in compensation for expense and harm. (Remission Factors 5 & 6). State v. Toscano, 389 N.J. Super. at 376.

Non-Appearing Defendants Imprisoned Out-of-State

The fact that non-appearing defendants were found in custody out-of-state and had not been returned to New Jersey when remission or exoneration was sought is a factor that the court should balance when considering a remission amount. The trial court should consider whether bail should be remitted when defendants were located in out-of-state custody and a detainer was lodged, or whether such relief should await their return to New Jersey. State v. Wilson, 395 N.J. Super. at 228-29 (App. Div. 2007). For purposes of exoneration or remittance of bail, the distinction between non-appearing defendants found to be in custody out-of-state and in state, as set forth in State v. Erickson, 154 N.J. Super. 201 (App. Div. 1977) is no longer decisive in light of the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15. State v. Wilson, 395 N.J. Super. at 228 (App. Div. 2007).

State's Knowledge of a Defendant's Imprisonment

The court may consider the failure of the State to notify the surety or the court of the fact that a defendant has been found and securely incarcerated when the State has resources, such as use of a NCIC database, to locate defendants that are not available to the surety. State v. Wilson, 395 N.J. Super. at 229 (App. Div. 2007). The absence of such notification may increase the surety's costs in attempting to locate a defendant and deprive the surety of an early opportunity to avoid bail forfeiture. State v. Wilson, 395 N.J. Super. at 229 (App. Div. 2007).

GUIDELINES

The following are a broad set of guidelines that have been developed to provide judges with a **starting point** when determining whether to grant a remission for applications made either before or after judgment is enforced, and, if granted, the amount to remit. State v. Harris, 382 N.J. Super. 67, 72 n.5 (App. Div. 2005), certif. denied, 186 N.J. 365 (2006); R. 3:26-6(b). Obviously, the judge should consider the particular facts in an individual case, along with subsequent case law to determine whether the amount to remit is increased or decreased. The motion judge should make a record, including an explanation of what factors were considered under these guidelines, and if none were considered, a statement of the ways that the surety failed to present a prima facie basis for relief. State v. Ramirez, 378 N.J. Super. at 370. The genesis for developing some of the guidelines was derived from Appellate Division decisions. State v. Harris, 382 N.J. Super. at 71; State v. Hawkins, 382 N.J. Super. at 465 n.6. Based on the particular facts of the case, the remission amount indicated by the schedules set forth below should be increased or decreased after balancing the factors that have been weighed in accordance with the policy concerns. State v. Toscano, 389 N.J. Super. at 371.

REMISSION SCHEDULES

The appropriate remission schedule should be selected based upon the defendant's status as a fugitive and his or her new criminal conduct while at large. Remission Schedule 1 addresses when a defendant is a fugitive when the remission motion is made. Remission Schedule 2 and Remission Schedule 3 provide different "starting points" based upon whether the defendant committed a new crime while at large (Remission Factor 7). By selecting between the second and third schedules, the court accounts for Remission Factor 7. To avoid double counting, absent a special reason based on the facts of the case, Remission Factor 7 should not be used as a basis to increase or decrease the remitted amount when applying Remission Schedule 2 or 3. State v. Toscano, 389 N.J. Super. at 372 n.2.

REMISSION SCHEDULE 1

WHERE DEFENDANT IS A FUGITIVE WHEN REMISSION MOTION IS MADE

No Remission

Where the defendant remains a fugitive when the remission motion is made, the essential undertaking of the surety remains unsatisfied, and the denial of any remission is entirely appropriate. State v. Harmon, 361 N.J. Super at 255.

Exception: In determining the remission amount, the court can consider the fact that non-appearing defendants were found in custody out-of-state and had not been returned to New Jersey. The trial court should consider whether bail should be remitted when defendants were located in out-of-state custody and a detainer was lodged, or whether such relief should await their return to New Jersey. State v. Wilson, 395 N.J. Super. at 228-229 (App. Div. 2007).

REMISSION SCHEDULE 2

WHERE DEFENDANT IS NOT A FUGITIVE WHEN REMISSION MOTION IS MADE

AND

DEFENDANT DID NOT COMMIT A NEW CRIME WHILE A FUGITIVE

Minimal Remission

Where the surety provided minimal or no supervision while the defendant was out on bail and failed to engage in immediate substantial efforts to recapture the defendant, minimal remission is warranted subject to the weighing of the factors previously identified.

REMISSION GUIDELINE:

State is reimbursed its costs.

If time at large 6 months or less	20% of the balance remitted
If time at large between 6-48 months	5% to 20% of the balance remitted
If time at large over 48 months	0% to 5% of the balance remitted

Partial Remission

Where the surety provided minimal or no supervision while the defendant was out on bail but did engage in immediate substantial efforts to recapture the defendant;

or

Where the surety provided close supervision while the defendant was out on bail but did not engage in immediate substantial efforts to recapture the defendant;

Partial remission is warranted subject to the weighing of the factors previously identified.

REMISSION GUIDELINE:

State is reimbursed for its costs.

If time at large 6 months or less	75% of the balance remitted
If time at large between 6-48 months	20% to 75% of the balance remitted
If time at large over 48 months	0% to 20% of the balance remitted

Substantial Remission

Where the surety provided close ongoing supervision while the defendant was out on bail and made immediate substantial efforts to recapture the defendant, substantial remission is warranted subject to the weighing of the factors previously identified.

REMISSION GUIDELINE:

Surety is reimbursed for its costs.

State is reimbursed for its costs.

If time at large 6 months or less	95% of the balance remitted
If time at large between 6-48 months	75% to 95% of the balance remitted
If time at large is over 48 months	0% to 75% of the balance remitted

REMISSION SCHEDULE 3

**WHERE DEFENDANT NOT A FUGITIVE WHEN REMISSION MOTION MADE
AND**

DEFENDANT DID COMMIT A NEW CRIME WHILE A FUGITIVE

Minimal Remission

Where the surety provided minimal or no supervision while the defendant was out on bail and failed to engage in immediate substantial efforts to recapture the defendant, minimal remission is warranted subject to the weighing of the factors previously identified.

REMISSION GUIDELINE:

State is reimbursed its costs.

If time at large 12 months or less	10% of the balance remitted
If time at large over 12 months	10% to no remission

Partial Remission

Where the surety provided minimal or no supervision while the defendant was out on bail but did engage in immediate substantial efforts to recapture the defendant;

or

Where the surety provided close supervision while the defendant was out on bail but did not engage in immediate substantial efforts to recapture the defendant;

Partial remission is warranted subject to the weighing of the factors previously identified.

REMISSION GUIDELINE:

State is reimbursed for its costs.

If time at large 6 months or less	40% of the balance remitted
If time at large between 6-48 months	10% to 40% of the balance remitted
If time at large over 48 months	0% to 10% of the balance remitted

Substantial Remission

Where the surety provided close ongoing supervision while the defendant was out on bail and made immediate substantial efforts to recapture the defendant, substantial remission is warranted subject to the weighing of the factors previously identified.

REMISSION GUIDELINE:

Surety is reimbursed for its costs.
State is reimbursed for its costs.

If time at large 6 months or less	60% of the balance remitted
If time at large between 6-48 months	40% to 60% of the balance remitted
If time at large is over 48 months	0% to 40% of the balance remitted