NOTICE TO THE BAR

SUPREME COURT CRIMINAL PRACTICE COMMITTEE REPORT ON RECOMMENDED COURT RULES TO IMPLEMENT THE BAIL REFORM LAW – PART 2, PRETRIAL DETENTION AND SPEEDY TRIAL – PUBLICATION FOR COMMENT

This notice publishes for written comment the May 12, 2016 **Report of the Supreme Court Criminal Practice Committee on Recommended Court Rules to Implement the Bail Reform Law – Part 2, Pretrial Detention and Speedy Trial**. The Practice Committee's Report Part 1 on Pretrial Release (dated May 9, 2016) was published for comment by notice dated May 10, 2016.

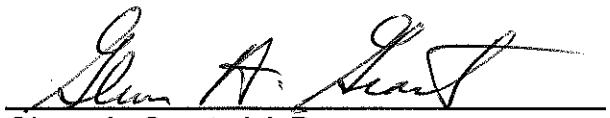
Please send any comments on this report and its rule recommendations in writing by **Monday, June 13, 2016** to:

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Pretrial Detention/Speedy Trial Rules (Criminal)
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Comments may also be submitted via Internet e-mail to the following address: Comments.Mailbox@judiciary.state.nj.us.

Please note that while the comment period on this report will not close until June 13, 2016, the **rules hearing** scheduled for **June 1, 2016** on the reports of the Civil Practice Committee, Special Civil Part Practice Committee, and Tax Court Committee (see the Notice dated April 21, 2016) will also include this report of the Criminal Practice Committee. Thus, anyone wishing to speak on this report at that June 1 hearing should so indicate in writing to the above address.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address (and those submitting comments by e-mail should include their name and e-mail address). Comments submitted are subject to public disclosure.



Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: May 13, 2016

REPORT OF THE SUPREME COURT COMMITTEE ON CRIMINAL PRACTICE ON RECOMMENDED COURT RULES TO IMPLEMENT THE BAIL REFORM LAW

Part 2

Pretrial Detention and Speedy Trial

May 12, 2016

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I. Pretrial Detention

The Committee considered four different proposals regarding pretrial detention. Two of the proposals were rejected by the Committee and two of the proposals received the endorsement of the Committee. The two recommendations that received the endorsement of the Committee are not mutually exclusive, as one is a recommendation for a rule change and the other is a recommendation for a statutory change. For the sake of completeness, the Committee is including all four proposals in this report and the vote on each proposal.

A. Proposal 1. Recommendation for Statutory Change

COMMENTARY

The proposal that received the most votes from the Committee members was the proposal for a statutory change. **The Committee endorsed this proposal by a vote of 18 for, 8 against, with 0 abstentions.**

As adopted, N.J.S.A. 2A:162-19b provides a rebuttable presumption that an eligible defendant be detained if the court finds probable cause that the eligible defendant: (1) committed murder pursuant to N.J.S.A. 2C:11-3, or (2) committed any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment. The Committee engaged in an extended debate over whether it should recommend a rule amendment that would make additional crimes subject to the presumption. Ultimately, the Committee decided not to do so for a few reasons. First, the bill as introduced contained no presumptions of detention. See S. 946, 216th leg. (N.J. 2014). That bill was amended to include two categories of crimes eligible for the presumption of detention. Thus, some members contend that since the Legislature considered and limited the crimes eligible for the presumption, the Court, should not

expand the list under its rule-making authority as a matter of comity. The second reason for not recommending a rule amendment that contained additional crimes was because there was great disagreement as to whether the addition of crimes subject to the presumption would be deemed as creating substantive law or whether it was merely procedural in nature. If it was deemed procedural, the Supreme Court could then include additional crimes if it so chose. See Winberry v. Salisbury, 5 N.J. 240 (1950). The Committee did not take a position on that issue. Rather, it is proposing statutory change to address the issue.

The Committee was also concerned that detention hearings could take a significant amount of time in cases where there is no presumption, and that expanding the list to include serious violent crimes would limit the amount of time necessary to hold such hearings in cases where most likely the result would be detention. Additionally, given the impending speedy trial requirements for detained persons, the Committee believes it would be a better use of scarce judicial resources to try the cases that need to be tried. Thus, the Committee believes that the list should be expanded and is recommending that legislative action be taken to include serious first and second degree violent crimes to the list of crimes for which there is a presumption for pretrial detention. Specifically, the Committee is recommending that N.J.S.A. 2A:162-19b be expanded to include the following additional first or second degree crimes: first degree aggravated manslaughter, second degree manslaughter, first degree aggravated sexual assault, second degree sexual assault, first degree robbery and first degree carjacking. With one exception, escape, these are generally the crimes for which the recommendation from the New Jersey Decision-Making Framework, developed by Dr. Marie VanNostrand working for the Laura and John Arnold Foundation, would caution that release is not

recommended or, if released, released on maximum conditions. The following statutory amendment is being recommended.

N.J.S.A. 2A:162-19 Pretrial detention for certain eligible defendants requested by prosecutor.

a. A prosecutor may file a motion with the court at any time, including any time before or after an eligible defendant's release pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17), seeking the pretrial detention of an eligible defendant for:

(1) any crime of the first or second degree enumerated under subsection d. of section 2 of P.L.1997, c.117 (C.2C:43-7.2);

(2) any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment;

(3) any crime if the eligible defendant has been convicted of two or more offenses under paragraph (1) or (2) of this subsection;

(4) any crime enumerated under paragraph (2) of subsection b. of section 2 of P.L.1994, c.133 (C.2C:7-2) or crime involving human trafficking pursuant to section 1 of P.L. 2005, c.77 (C.2C:13-8) or P.L. 2013, c.51 (C.52:17B-237 et al.) when the victim is a minor, or the crime of endangering the welfare of a child under N.J.S. 2C:24-4;

(5) any crime enumerated under subsection c. of N.J.S. 2C:43-6;

(6) any crime or offense involving domestic violence as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19); or

(7) any other crime for which the prosecutor believes there is a serious risk that:

(a) the eligible defendant will not appear in court as required;

(b) the eligible defendant will pose a danger to any other person or the community; or

(c) the eligible defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate, a prospective witness or juror.

b. When a motion for pretrial detention is filed pursuant to subsection a. of this section, there shall be a rebuttable presumption that the eligible defendant shall be detained pending trial because no amount of monetary bail, non-monetary condition or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, if the court finds probable cause that the eligible defendant:

(1) committed murder pursuant to N.J.S. 2C:11-3; [or]

(2) committed any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment[.];

(3) committed first degree aggravated manslaughter, N.J.S. 2C:11-4(a);

(4) committed second degree manslaughter, N.J.S. 2C:11-4(b);

(5) committed first degree aggravated sexual assault, N.J.S. 2C: 14-2(a);

(6) committed second degree sexual assault, N.J.S. 2C:14-2(c)(1);

(7) committed second degree sexual assault, N.J.S. 2C:14-2(b).

(8) committed first degree robbery, N.J.S. 2C:15-1; or

(9) committed first degree carjacking, N.J.S. 2C:15-2.

c. A court shall hold a hearing to determine whether any amount of monetary bail or non-monetary conditions or combination of monetary bail and conditions, including those set forth under subsection b. of section 3 of P.L. 2014, c.31 (C.2A:162-17) will reasonably assure the eligible defendant's appearance in court when required, the protection of the

safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

d. (1) Except as otherwise provided in this subsection, the pretrial detention hearing shall be held no later than the eligible defendant's first appearance unless the eligible defendant, or the prosecutor, seeks a continuance. If a prosecutor files a motion for pretrial detention after the eligible defendant's first appearance has taken place or if no first appearance is required, the court shall schedule the pretrial detention hearing to take place within three working days of the date on which the prosecutor's motion was filed, unless the prosecutor or the eligible defendant seeks a continuance. Except for good cause, a continuance on motion of the eligible defendant may not exceed five days, not including any intermediate Saturday, Sunday, or legal holiday. Except for good cause, a continuance on motion of the prosecutor may not exceed three days, not including any intermediate Saturday, Sunday, or legal holiday.

(2) Upon the filing of a motion by the prosecutor seeking the pretrial detention of the eligible defendant and during any continuance that may be granted by the court, the eligible defendant shall be detained in jail, unless the eligible defendant was previously released from custody before trial, in which case the court shall issue a notice to appear to compel the appearance of the eligible defendant at the detention hearing. The court, on motion of the prosecutor or sua sponte, may order that, while in custody, an eligible defendant who appears to be a drug dependent person receive an assessment to determine whether that eligible defendant is drug dependent.

e. (1) At the pretrial detention hearing, the eligible defendant has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The eligible defendant shall be afforded an opportunity to testify,

to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing.

(2) In pretrial detention proceedings for which there is no indictment, the prosecutor shall establish probable cause that the eligible defendant committed the predicate offense. A presumption of pretrial detention as provided in subsection b. of this section may be rebutted by proof provided by the eligible defendant, the prosecutor, or from other materials submitted to the court. The standard of proof for a rebuttal of the presumption of pretrial detention shall be a preponderance of the evidence. If proof cannot be established to rebut the presumption, the court may order the eligible defendant's pretrial detention. If the presumption is rebutted by sufficient proof, the prosecutor shall have the opportunity to establish that the grounds for pretrial detention exist pursuant to this section.

(3) Except when an eligible defendant has failed to rebut a presumption of pretrial detention pursuant to subsection b. of this section, the court's finding to support an order of pretrial detention pursuant to section 4 of P.L. 2014, c.31 (C.2A:162-18) that no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process shall be supported by clear and convincing evidence.

f. The hearing may be reopened, before or after a determination by the court, at any time before trial, if the court finds that information exists that was not known to the prosecutor

or the eligible defendant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

B. Proposal 2. New Rule 3:4A

Commentary

The Committee is also recommending adoption of a court rule on pretrial detention. This proposal received the second highest number of votes. **The Committee endorsed this proposal by a vote of 16 for, 10 against, and 0 abstentions.** This proposal should be considered by the Court irrespective of whether the proposal for statutory change is addressed by the Court.

1. Paragraph (a)

This proposed paragraph tracks N.J.S.A. 2A:162-19a by specifying that a prosecutor may file a motion for the pretrial detention of an eligible defendant at any time.

The Bail Reform Law defines an eligible defendant as "..a person for whom a complaint-warrant is issued for an initial charge involving an indictable offense or disorderly persons offense…." See N.J.S.A. 2A:162-15. Thus, the statute does not account for the fact that a defendant can be charged on an indictment without having been charged initially on a complaint-warrant or a complaint-summons. So, for example, a person charged on a direct indictment for murder would not be considered an eligible defendant under the literal terms of *The Bail Reform Law* but a person for whom an initial complaint-warrant was issued for murder would be considered an eligible defendant. The Committee believes that this could not have been an intentional choice by the Legislature but rather was an oversight. R. 3:7-8 addresses the direct indictment issue. The Rule directs that the criminal division manager, as designee of the deputy clerk of the Superior Court, issue either a summons or a warrant in accordance with R. 3:3-1 upon the return of an indictment. R. 3:3-1 governs the determination of whether to issue a summons or a warrant on a complaint.

The Committee, in its Part I Report, has recommended substantial changes to R. 3:3-1. Thus, the determination of whether to issue a summons-on-indictment or complaint-warrant on indictment would be guided by the same standards as those that would apply when the charges are on a complaint-warrant prior to indictment. In other words, the determination of whether the defendant is an "eligible defendant" would not depend on whether the defendant was charged on a complaint or a direct indictment but whether the standards for issuance of a warrant under R. 3:3-1 had been met. The Committee is therefore recommending that paragraph (a) include as an "eligible defendant" a defendant for whom a complaint-warrant on indictment was issued.

2. Paragraph (b)

This paragraph sets forth the time and details of a hearing on the motion for pretrial detention, including presumptions of detention and release.

3. Paragraph (b)(1)

Paragraph (b)(1) governs the timing of the detention hearing. It largely tracks the language of N.J.S.A. 2A:162-19d(1). However the statute is silent as to who should be responsible for presiding at detention hearings, i.e. Superior or Municipal Court Judges. The Committee believes detention hearings should be handled by Superior Court Judges. This paragraph would require that the detention hearing be held before a Superior Court judge.

4. Paragraph (b)(2)

Paragraph (b)(2) sets forth the defendant's rights with respect to the detention hearing: the right to counsel, the right to be present at the hearing, the right to participate in the hearing through providing testimony, the right to present and cross-examine

witnesses as well as the right to present information by proffer or otherwise. See N.J.S.A. 2A:162-19e(1).

The Committee also believes that while *The Bail Reform Law* was silent on the issue, the court rule should address the issue of the use of a defendant's detention hearing testimony in later proceedings and should adopt the approach used under the District of Columbia statute. Thus, the proposed rule would limit the admissibility of a defendant's testimony as follows: detention hearing testimony would not be admissible on the issue of guilt in any other judicial proceeding, but the testimony would be admissible in proceedings related to a defendant's subsequent failure to appear, proceedings related to any subsequent offenses committed during the defendant's release, proceedings related to a defendant's subsequent violation of any conditions of release, any subsequent perjury proceedings, and for the purpose of impeachment in any subsequent proceedings.

Paragraph (b)(2) also requires that the defendant be provided with all available discovery. The Committee recognized that the prosecutor would likely have very little discovery at the time of the detention hearing, but felt that whatever discovery was available to the prosecutor at that time, such as police reports, should be provided to the defendant. See also R. 3:4-2(c)(1)(b).

This paragraph also provides that the return of an indictment shall establish probable cause to believe that the defendant committed an offense alleged therein. While this provision is not explicitly included in the statute, it is implied by N.J.S.A. 2A:162-19e(2), which provides that where there is no indictment at the time of the detention hearing, the prosecutor shall establish probable cause that the eligible defendant

committed the predicate offense. Thus, the last sentence of paragraph (b)(2) tracks that statutory provision.

5. Paragraph (b)(3)

This paragraph addresses the reopening of detention hearings. Paragraph (b)(3) largely tracks the language of N.J.S.A. 2A:162-19f.

6. Paragraph (b)(4)

N.J.S.A. 2A:162-19b provides for a rebuttable presumption of detention for an eligible defendant if the court finds probable cause that the eligible defendant: (1) committed murder pursuant to N.J.S.A. 2C:11-3, or (2) committed any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment. This language largely tracks the language of N.J.S.A. 162:19b.

7. Paragraph (b)(5)

Paragraph (b)(5) addresses an eligible defendant's presumption of release. Specifically, it addresses the facts and circumstances the prosecutor would need to demonstrate to satisfy the clear and convincing evidence standard for detaining an eligible defendant who is entitled to a presumption of release under *The Bail Reform Law*. The proposed language in this paragraph, which is not contained in *The Bail Reform Law,* would permit the court to consider as prima facie evidence sufficient to overcome the presumption of release a recommendation made by the Pretrial Services Program that the defendant's release is not recommended or, if released, released on maximum conditions. As such, the trial court would take advantage of the objective, research-based risk assessment process and give substantial weight to the recommendation of the Pretrial Services Program that the defendant not be released or, if released, released on maximum conditions. The recommendation from the Pretrial Services Program would be

sufficient to overcome the presumption of release, thus authorizing, but not requiring, the court to order pretrial detention. The goal of this paragraph is to address the same concerns that prompted the Committee to recommend legislative changes regarding pretrial detention presumptions but to do so in a manner that did not raise the comity and legal concerns that would arise through the creation of additional presumptions by court rule.

8. Paragraph (c)

This paragraph largely tracks the language of N.J.S.A. 2A:162-21a, which requires that the court issue an order containing findings of fact and a written statement of reasons for detention when the defendant is ordered to be detained. The statute, and this paragraph, also require that the court's order shall direct that the defendant be afforded a reasonable opportunity for private consultation with counsel.

9. Paragraph (d)

This paragraph largely tracks the language of N.J.S.A. 2A:162-21b, which allows the court to issue an order releasing the defendant, subject to conditions, if the court determines that the release is necessary for the preparation of the defendant's defense or for other compelling reasons.

10. Paragraph (e)

The statute gives the defendant the right to appeal from a detention order and provides that the appeal is to be determined on an expedited basis. N.J.S.A. 2A:162-18c. This paragraph addresses the issue of a possible appeal by the State of the denial of pretrial detention motion and acknowledges that the State has a right, as with any adverse interlocutory trial court ruling, to seek an interlocutory appeal and provides that

such an application must be made within 48 hours of the trial court order denying a motion for pretrial detention.

Rule 3:4A. Pretrial Detention

(a) Timing of Motion. A prosecutor may file a motion at any time seeking the pretrial detention of a defendant for whom a complaint-warrant or complaint-warrant on indictment is issued for an initial charge involving an indictable offense, or a disorderly persons offense involving domestic violence, as provided in N.J.S.A. 2A:162-15 et seq.

(b) Hearing on Motion.

(1) A pretrial detention hearing shall be held before a Superior Court judge no later than the defendant's first appearance unless the defendant or the prosecutor seeks a continuance or the prosecutor files a motion at or after the defendant's first appearance. If the prosecutor files a motion at or subsequent to the defendant's first appearance the pretrial detention hearing shall be held within three working days of the date of the prosecutor's motion unless the defendant or prosecutor seek a continuance. Except for good cause, a continuance or motion of the defendant may not exceed five days, not including any intermediate Saturday, Sunday or holiday. Except for good cause, a continuance or motion of the prosecutor may not exceed three days, not including any intervening Saturday, Sunday or holiday.

(2) The defendant shall have a right to be represented by counsel and, if indigent, to have counsel appointed if he or she cannot afford counsel. The defendant shall be provided all available discovery. The defendant shall be afforded the right to testify, to present witnesses, to cross-examine witnesses who appear at the hearing and to present information by proffer or otherwise. Testimony of the defendant given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but the testimony shall be admissible in proceedings related to the defendant's subsequent failure to appear, proceedings related to any subsequent offenses committed during the

defendant's release, proceedings related to the defendant's subsequent violation of any conditions of release, any subsequent perjury proceedings, and for the purpose of impeachment in any subsequent proceedings. The defendant shall have the right to be present at the hearing. The rules governing admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing. The return of an indictment shall establish probable cause to believe that the defendant committed any offense alleged therein. Where there is no indictment at the point of the detention hearing, the prosecutor shall establish probable cause that the eligible defendant committed the predicate offense.

(3) A hearing may be reopened at any time before trial if the court finds that information exists that was not known by the prosecutor or defendant at the time of the hearing and that information has a material bearing on the issue of whether there are conditions of release that will reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process.

(4) Presumption of detention. When a motion for pretrial detention is filed pursuant to paragraph (a), there shall be a rebuttable presumption that the defendant shall be detained pending trial because no amount of monetary bail, non-monetary condition or combination of monetary bail and conditions would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process, if the court finds probable cause that the defendant:

(1) committed murder pursuant to N.J.S.A. 2C:11-3; or

(2) committed any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment.

(5) Presumption of release. Except when a presumption of detention is required pursuant to paragraph (b)(4), when a motion for pretrial detention is filed pursuant to paragraph (a), there shall be a rebuttable presumption that some amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process.

The standard of proof for the rebuttal of the presumption of pre-trial release shall be by clear and convincing evidence. The court may consider as prima facie evidence sufficient to overcome the presumption of release a recommendation by the Pretrial Services Program established pursuant to N.J.S.A. 2A:162-25 that the defendant's release is not recommended (i.e., a determination that "release not recommended or if released, maximum conditions"). Although such recommendation by the Pretrial Services Program may constitute sufficient evidence upon which the court may order pretrial detention, nothing herein shall preclude the court from considering other relevant information presented by the prosecutor or the defendant in determining whether no amount of monetary bail, non-monetary bail conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct the criminal justice process.

(c) Pretrial Detention Order. If the court determines that pretrial detention is necessary it shall issue an order containing written findings of fact and a written statement

of reasons for the detention. That order shall also direct that the defendant be afforded reasonable opportunity for private consultation with counsel.

(d) Temporary Release Order. The court may issue an order temporarily releasing the defendant, subject to conditions, to the extent that the court determines the release is necessary for the preparation of a defendant's defense or for another compelling reason.

(e) Nothing in this Rule shall be deemed to preclude the State's right to seek an interlocutory order from the Appellate Division within 48 hours.

Adopted _____ to be effective _____.

C. Proposal 3. New Rule 3:4A (Not recommended by the Committee)

COMMENTARY

The Committee is not recommending this proposal. This proposal was rejected by the Committee by a vote of 13 for, 14 against, and 0 abstentions.

Paragraph (a)

This proposed paragraph tracks N.J.S.A. 2A:162-19a by specifying that a prosecutor may file a motion for the pretrial detention of an eligible defendant at any time.

Paragraph (b)

This paragraph sets forth the time and details of a hearing on the motion for pretrial detention, including presumptions of detention and release.

Paragraph (b)(1)

Paragraph (b)(1) governs the timing of the detention hearing. It largely tracks the language of N.J.S.A. 2A:162-19d(1). However, while the statute is silent on the issue, this proposed paragraph would require that the detention hearing be held before a Superior Court judge.

Paragraph (b)(2)(a)

This paragraph sets forth the defendant's rights with respect to the detention hearing. It largely tracks the language of N.J.S.A. 2A:162-19e(1). While not contained in the statute, it also requires that the defendant be provided with all available discovery. The Committee recognized that the prosecutor would likely have very little discovery at the time of the detention hearing, but felt that whatever discovery was available to the prosecutor at that time, such as police reports, should be provided to the defendant.

Paragraph (b)(2)(b)

This paragraph is not contained in *The Bail Reform Law.* The text of this paragraph is identical to the text included in paragraph (b)(2) of the Committee-approved Proposal 2. See discussion at pages 10-12.

Paragraph (b)(2)(c)

Paragraph (b)(2)(c) provides that the return of an indictment shall establish probable cause to believe that the defendant committed any offense alleged therein. While this provision is not explicitly included in the bail reform statute, it is implied by N.J.S.A. 2A:162-19e(2), which provides that where there is no indictment at the time of the detention hearing, the prosecutor shall establish probable cause that the eligible defendant committed the predicate offense. The last sentence of paragraph (b)(2) tracks that statutory provision.

Paragraph (b)(3)

This paragraph addresses reopening of detention hearings. Paragraph (b)(3) largely tracks the language of N.J.S.A. 2A:162-19f.

Paragraph (b)(4)

N.J.S.A. 2A:162-19b provides for a rebuttable presumption that an eligible defendant be detained if the court finds probable cause that the eligible defendant: (1) committed murder pursuant to N.J.S.A. 2C:11-3, or (2) committed any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment. This paragraph largely tracks the language of N.J.S.A. 2A:162-19b.

Paragraph (b)(5)

This paragraph covers the flipside of paragraph (b)(4). Paragraph (b)(5) largely tracks the language of N.J.S.A. 2A:162-19b, which provides for a rebuttable presumption for release unless there is a presumption for detention.

Paragraph (c)

This paragraph largely tracks the language of N.J.S.A. 2A:162-21a, which requires that the court issue an order containing findings of fact and a written statement of reasons for detention when the defendant is ordered to be detained. The statute, and this paragraph, also require that the court's order shall direct that the defendant be afforded reasonable opportunity for private consultation with counsel.

Paragraph (d)

This paragraph largely tracks the language of N.J.S.A. 2A:162-21b, which allows the court to issue an order releasing the defendant, subject to conditions, if the court determines that the release is necessary for the preparation of the defendant's defense or for other compelling reasons.

Rule 3:4A. Pretrial Detention

(a) Timing of Motion. A prosecutor may file a motion at any time seeking the pretrial detention of a defendant for whom a complaint-warrant is issued for an initial charge involving an indictable offense, or a disorderly persons offense involving domestic violence, as provided in N.J.S.A. 2A:162-15 et seq.

(b) Hearing on Motion.

(1) A pretrial detention hearing shall be held before a Superior Court judge no later than the defendant's first appearance unless the defendant or the prosecutor seeks a continuance or the prosecutor files a motion at or after the defendant's first appearance. If the prosecutor files a motion at or subsequent to the defendant's first appearance the pretrial detention hearing shall be held within three working days of the date of the prosecutor's motion unless the defendant or prosecutor seek a continuance. Except for good cause, a continuance or motion of the defendant may not exceed five days, not including any intermediate Saturday, Sunday or holiday. Except for good cause, a continuance or motion of the prosecutor may not exceed three days, not including any intervening Saturday, Sunday or holiday.

(2) (a) The defendant shall have a right to be represented by counsel and, if indigent, to have counsel appointed if he or she cannot afford counsel. The defendant shall be provided with all available discovery. The defendant shall be afforded the right to testify, to present witnesses, to cross-examine witnesses who appear at the hearing and to present information by proffer or otherwise. The defendant shall have the right to be present at the hearing. The rules governing admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing.

(b) The defendant shall be afforded an opportunity to testify. Testimony of the defendant given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but the testimony shall be admissible in proceedings related to the defendant's subsequent failure to appear, proceedings related to any subsequent offenses committed during the defendant's release, proceedings related to the defendant's subsequent violation of any conditions of release, any subsequent perjury proceedings, and for the purpose of impeachment in any subsequent proceedings.

(c) The return of an indictment shall establish probable cause to believe that the defendant committed any offense alleged therein. Where there is no indictment at the point of the detention hearing, the prosecutor shall establish probable cause that the eligible defendant committed the predicate offense.

(3) A hearing may be reopened at any time before trial if the court finds that information exists that was not known by the prosecutor or defendant at the time of the hearing and that information has a material bearing on the issue of whether there are conditions of release that will reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process.

(4) Presumption of detention. When a motion for pretrial detention is filed pursuant to paragraph (a), there shall be a rebuttable presumption that the defendant shall be detained pending trial because no amount of monetary bail, non-monetary condition or combination of monetary bail and conditions would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process, if the court finds probable cause that the defendant:

(1) committed murder pursuant to N.J.S.A. 2C:11-3; or

(2) committed any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment.

The standard of proof for the rebuttal of the presumption of pretrial detention shall be a preponderance of the evidence.

(5) Presumption of release. Except when a presumption of detention is required pursuant to paragraph (b)(4), when a motion for pretrial detention is filed pursuant to paragraph (a), there shall be a rebuttable presumption that some amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process. The standard of proof for the rebuttal of the presumption of pre-trial release shall be by clear and convincing evidence.

(c) Pretrial Detention Order. If the court determines that pretrial detention is necessary it shall issue an order containing written findings of fact and a written statement of reasons for the detention. That order shall also direct that the defendant be afforded reasonable opportunity for private consultation with counsel.

(d) Temporary Release Order. The court may issue an order temporarily releasing the defendant, subject to conditions, to the extent that the court determines the release is necessary for the preparation of a defendant's defense or for another compelling reason.

Adopted _____ to be effective _____.

D. Proposal 4 New Rule 3:4A (Not recommended by the Committee)

COMMENTARY

The Committee is not recommending this proposal. This proposal was rejected by the Committee by a vote of 11 for, 14 against, and 1 abstention.

The fourth version of proposed R. 3:4A includes a number of provisions that are intended to lead to "workable" detention hearings for courts and practitioners by creating additional presumptions of detention.

Paragraph (a)

This first sentence of this proposed paragraph tracks N.J.S.A. 2A:162-19a by specifying that a prosecutor may file a motion for the pretrial detention of an eligible defendant at any time. The paragraph would also require that the prosecutor's detention motion identify the initial charge for which detention is sought. It also seeks to implement N.J.S.A. 2A:162-19a(7) by requiring the prosecutor to specify, in cases in which detention is sought for "any other crime" not listed under N.J.S.A. 2A:162a(1)-(6), the facts and circumstances that support the belief that the defendant presents a serious risk of not appearing for court, endangering any person or the community, or obstructing justice or threatening, injuring or intimidating, or attempting to threaten, injure or intimidate, a prospective witness or juror. The proponents of the latter two provisions felt that they would provide notice to the court and defense counsel of the specific reasons that the prosecutor is seeking detention and allow the defendant to fashion a more focused defense. Other members, however, noted that the prosecutor may not yet have sufficient information to support detention if the hearing was held at the defendant's first appearance, or within 48 hours of the defendant's commitment to the county jail. They added that the prosecutor would be struggling with the decision of whether to seek

detention, much less gathering the paperwork to support that decision. It was also noted that both provisions went beyond the requirements of the statute.

Paragraph (b)

This paragraph governs the procedures and requirements for detention hearings.

Paragraph (b)(1)

Paragraph (b)(1) governs the timing of the detention hearing. It largely tracks the language of N.J.S.A. 2A:162-19d(1). However, as the statute is silent on the issue, the paragraph also requires that the detention hearing be held before a Superior Court judge.

Paragraph (b)(2)

This paragraph sets forth the defendant's rights with respect to the detention hearing. It largely tracks the language of N.J.S.A. 2A:162-19e(1). It also requires that the defendant be provided with all available discovery. The Committee recognized that the prosecutor would likely have very little discovery at the time of the detention hearing, but felt that whatever discovery was available to the prosecutor at that time, such as police reports, should be provided to the defendant.

Paragraph (b)(2) also provides that the return of an indictment shall establish probable cause to believe that the defendant committed any offense alleged therein. While this provision is not explicitly included in the bail reform statute, it is implied by N.J.S.A. 2A:162-19e(2), which provides that where there is no indictment at the time of the detention hearing, the prosecutor shall establish probable cause that the eligible defendant committed the predicate offense. Thus, the last sentence of paragraph (b)(2) tracks that statutory provision.

Paragraph (b)(3)

Proposed paragraph (b)(3) sets forth the types of information that the court may consider in determining whether the defendant should be detained. This paragraph closely tracks N.J.S.A. 2A:162-20, with one exception: Subparagraph (b)(3)(f) would require that when the court enters a detention order that is contrary to the Pretrial Services Program's release recommendation, it must set forth its reasons for not accepting that recommendation in the pretrial detention order. That provision creates a parallel provision to N.J.S.A. 2A:162-23a(2), which requires the court to set forth its reasons in its release order when it enters an order contrary to the Pretrial Services Program's recommendations regarding the form or conditions of release.

Paragraph (b)(4)

This proposed paragraph allows detention hearings to be reopened if the court finds that there is new information that was previously not known to the prosecutor or eligible defendant, and that has a material bearing on the issue of whether the defendant can be released back into the community. It tracks the language in N.J.S.A. 2A:162-19f.

Paragraph (b)(5)

Proposed paragraph (b)(5) provides that there shall be a rebuttable presumption of pretrial detention in certain cases. The first sentence of the paragraph tracks the language contained in N.J.S.A. 2A:162-19b. It then expands the list of crimes for which there shall be rebuttable presumption of detention. Under N.J.S.A. 2A:162-19b(1) and (2), there is a rebuttable presumption of detention if the court finds probable cause that the defendant committed murder or a crime subject to an ordinary or extended term of life imprisonment. Proposed paragraph (b)(5) includes not only those crimes, but also first degree aggravated manslaughter, second degree manslaughter, first degree aggravated

sexual assault, second degree sexual assault, first degree robbery and first degree carjacking, as well as attempts and conspiracies to commit those crimes. With one exception, escape, these are generally the crimes for which the recommendation from the New Jersey Decision-Making Framework, developed by Dr. Marie VanNostrand working for the Laura and John Arnold Foundation, would caution that release is not recommended or, if released, released on maximum conditions.

The Committee extensively debated whether it could, and should, recommend the expansion by court rule of the list of crimes for which there was a rebuttable presumption of detention. The initial debate centered on whether presumptions were procedural in nature, and therefore within the Court's authority, or substantive and within the authority of the Legislature. The Committee was split on this issue. Those members who favored expansion felt that despite the Committee's inability to reach consensus on that issue, it was nonetheless the Committee's duty to set forth its position as practitioners, and to make a record of its views for the Court.

Those members who favored expansion also felt that it was necessary, given the heavy volume of cases, particularly in urban counties, to make the bail reform statute "workable" in practice. Otherwise, it was argued, the system would fail because the criminal justice system would be overwhelmed by the number of lengthy detention hearings. It was also argued that the Committee had the opportunity to engage in a principled expansion of the list of crimes for which the presumption of detention would apply, rather than relying on *ad hoc* additions from the Legislature. It was also noted that the list of proposed crimes included the types of offenses that triggered the presumption favoring detention in District of Columbia courts, which have been recognized as

favorable models for New Jersey's bail reform efforts. See D.C. Code § 23-1322(c) (2016).

In response, those members who were against expansion noted that earlier versions of the bail reform bill had included an expanded list of crimes for which the presumption of detention would apply, but the Legislature did not include those crimes in the final version of the bill. Those members felt that the Judiciary should not circumvent the Legislature by including provisions in its court rules that the Legislature had expressly rejected. It was noted that the Committee has been instructed to stay within the four corners of the bail reform statute. Finally, it was noted that many of the concerns of those members who favored expansion were addressed by the risk assessment tool, the Public Safety Assessment (PSA) and the Decision-Making Framework (DMF), which made certain crimes more likely to result in detention.

The Committee eventually initially voted in favor of a rule expanding the list of offenses for which there would be a presumption of pretrial detention but, after a successful motion to reconsider, the Committee voted against expansion of the list of offenses by rule.

The final section of paragraph (b)(5) tracks N.J.S.A. 2A:162-19e(2), but also includes that the presumption of detention may be rebutted by a preponderance of the evidence that establishes that there are monetary and or non-monetary conditions that will assure the defendant's appearance in court when required, the protection of the safety of any person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process. While that may be implied by the bail reform statute, it is not explicitly included in the statute.

Paragraph (b)(6)

This paragraph provides that there shall be a rebuttable presumption of pretrial release, except in cases involving the offenses listed in paragraph (b)(5). The first sentence of the paragraph tracks the language in N.J.S.A. 2A:162-18b. The second sentence of the paragraph clarifies that a presumption of pretrial release may be rebutted by clear and convincing evidence that there is no condition or combination of conditions that will assure the defendant's appearance in court when required, the protection of the safety of any person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process. *The Bail Reform Law*, in N.J.S.A. 2A:162-19b, includes a provision regarding the standard of proof for rebutting the presumption of pretrial detention, but it does not include a similar provision, at least not explicitly, regarding the standard of proof for rebutting the presumption of pretrial release. The second sentence of this paragraph is intended to fill that gap.

Paragraph (c)

Paragraph (c) requires the court's detention order to contain written findings of fact, a written statement of the reasons for detention, and that the defendant shall be afforded a reasonable opportunity for private consultation with counsel. It tracks the language in N.J.S.A. 2A:162-21a(1) and (2).

Paragraph (d)

This proposed paragraph permits the court to temporarily release the defendant, subject to certain conditions, if it is determined that release is necessary for the preparation of the defendant's defense or for another compelling reason. This paragraph tracks N.J.S.A. 2A:162-21b.

Rule 3:4A. Pretrial Detention

(a) Timing of Motion. A prosecutor may file a motion at any time seeking the pretrial detention of a defendant for whom a complaint-warrant is issued for an initial charge involving an indictable offense, or a disorderly persons offense involving domestic violence, as provided in N.J.S.A. 2A:162-15 et seq. This motion must identify the initial charge for which detention is sought. Unless the initial charge is cited in N.J.S.A. 2A:162-19 (a)(1-6), the prosecutor shall also set forth those facts and circumstances supporting the belief that the defendant poses a serious risk of not appearing in court as required, endangering any other person or the community, or obstructing justice, or threatening, injuring or intimidating or attempting to threaten, injure or intimidate a prospective witness or juror.

(b) Hearing on Motion.

(1) A pretrial detention hearing shall be held before a Superior Court judge no later than the defendant's first appearance unless the defendant or the prosecutor seeks a continuance or the prosecutor files a motion at or after the defendant's first appearance. If the prosecutor files a motion at or subsequent to the defendant's first appearance the pretrial detention hearing shall be held within three working days of the date of the prosecutor's motion unless the defendant or prosecutor seek a continuance. Except for good cause, a continuance or motion of the defendant may not exceed five days, not including any intermediate Saturday, Sunday or holiday. Except for good cause, a continuance or motion of the prosecutor may not exceed three days, not including any intervening Saturday, Sunday or holiday.

(2) The defendant shall have a right to be represented by counsel and, if indigent, to have counsel appointed if he or she cannot afford counsel. The defendant shall be

provided all available discovery. The defendant shall be afforded the right to testify, to present witnesses, to cross-examine witnesses who appear at the hearing and to present information by proffer or otherwise. The defendant shall have the right to be present at the hearing. The rules governing admissibility to evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing. The return of an indictment shall establish probable cause to believe that the defendant committed any offense alleged therein. Where there is no indictment at the point of the detention hearing, the prosecutor shall establish probable cause that the eligible defendant committed the predicate offense.

(3) In determining in a pretrial detention hearing whether no amount of monetary bail, non-monetary conditions or combination of monetary bail and non-monetary conditions would reasonably assure the eligible defendant's appearance in court when required the protection of the safety of any person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may take into account any information provided by the prosecutor or the eligible defendant, and:

(a) The nature and circumstances of the offense charged;

(b) the weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded;

(c) The history and characteristics of the eligible defendant, including:

(1) the eligible defendant's character, physical and mental condition, family ties, employment, financial resources; length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(2) whether at the time of the current offense or arrest, the eligible defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal law, or the law of this or any other state;

(d) The nature and seriousness of the danger to any other person or the community that would be posed by the eligible defendant's release, if applicable; and

(e) The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the eligible defendant's release, if applicable; and

(f) If the release recommendation of the Pretrial Services Program obtained using a risk assessment instrument. If the Court enters a detention order that is contrary to the release recommendation of the Pretrial Services Program obtained by using a risk assessment instrument, then the court shall set forth within that pretrial detention order its reasons for not accepting that release recommendation.

(4) A hearing may be reopened at any time before trial if the court finds that information exists that was not known by the prosecutor or defendant at the time of the hearing and that information has a material bearing on the issue of whether there are conditions of release that will reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process.

(5) Presumption of detention. When a motion for pretrial detention is filed pursuant to paragraph (a), there shall be a rebuttable presumption that the defendant shall be detained pending trial because no amount of monetary bail, non-monetary conditions or combination of monetary bail and non-monetary conditions would reasonably assure the

defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process, if the court finds probable cause that the defendant:

(1) committed, attempted to commit, or conspired to commit, any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment; or

(2) committed, attempted to commit, or conspire to commit, any one of the following crimes:

(a) First degree murder pursuant to N.J.S.A. 2C:11-3;

(b) any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment.

(c) First degree aggravated manslaughter, N.J.S.A. 2C: 11-4(a);

(d) Second degree manslaughter, N.J.S.A. 2C:11-4(b);

(e) First degree aggravated sexual assault, N.J.S.A. 2C:14-2(b)

(f) Second degree sexual assault, N.J.S.A. 2C:14-2(c)(1)

(g) Second degree sexual assault, N.J.S.A. 2C:14-2(b)

(h) First degree robbery, N.J.S.A. 2C:15-1;

(i) First degree carjacking, N.J.S.A. 2C:15-2;

A presumption of pretrial detention established under this sub-paragraph may be rebutted by a preponderance of the evidence establishing that, based on the information provided by the eligible defendant, [or] the prosecutor, or other materials submitted to the court and the information set forth in subparagraph (b)(3), there is some amount of monetary bail, non-monetary conditions or combination of monetary bail and non-monetary conditions that would reasonably assure the eligible defendant's appearance in

court when required, the protection of the safety of any other person or the community, and the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

(6) Presumption of release. Except when a presumption of detention is required pursuant to paragraph (b)(4), when a motion for pretrial detention is filed pursuant to paragraph (a), there shall be a rebuttable presumption that some amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process. A presumption of pretrial release established under this subsection may be rebutted by clear and convincing evidence establishing that, based upon information provided by the eligible defendant, [or] the prosecutor, or other materials submitted to the court and information set forth in sub- paragraph (b)(3) that there is no amount of monetary bail and non-monetary conditions would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process.

(c) Pretrial Detention Order. If the court determines that pretrial detention is necessary it shall issue an order containing written findings of fact and a written statement of reasons for the detention. That order shall also direct that the defendant be afforded reasonable opportunity for private consultation with counsel.

(d) Temporary Release Order. The court may issue an order temporarily releasing the defendant, subject to conditions, to the extent that the court determines the release

is necessary for the preparation of a defendant's defense or for another compelling reason.

Adopted _____to be effective_____.

E. R. 3:26-2

Commentary

A proposal to amend this rule was contained in the *Report of the Criminal Practice Committee on the Implementation of the Bail Reform Law - Part I Pretrial Release.* The Committee is proposing an additional change to this rule. That change is contained in paragraph (d)(1)(B).

The Bail Reform Law does not contain procedures to follow when there is an allegation that a condition of pretrial release has been violated. The Committee believes there should be procedures set forth in the court rules to address this gap. The Committee is proposing a rule, R. 3:4A that would set forth procedures that would be followed for detention hearings. *The Bail Reform Law*, in addition to allowing pretrial detention, also permits detention when there is a release revocation. See N.J.S.A. 2A:162-24. The absence of procedures to revoke release or otherwise enforce compliance with nonmonetary release conditions was a significant deficiency identified by the Joint Committee on Criminal Justice. (See Joint Committee on Criminal Justice 215 N.J.L.J. 809, 810 (March 24, 2014) (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf)). Since the defendant's interest in pretrial liberty is affected by both proceedings, the Committee is recommending that the procedures for pretrial detention hearings be applied in release revocation hearings as well. This is accomplished through the inclusion in paragraph (d)(1)(B) of this rule of the same language used in proposed Rule 3:4A(b)(2).

Rule 3:26-2. Authority to Set Conditions of Pretrial Release [Bail]

(a) Authority to Set Conditions of Pretrial Release [Initial Bail]. A Superior Court judge may set [bail] conditions of pretrial release for a person charged with any offense. [Bail] Conditions of pretrial release for any offense except homicide [murder, kidnapping, manslaughter, aggravated manslaughter, aggravated sexual assault, sexual assault, aggravated criminal sexual contact,] or a person arrested in any extradition proceeding [or a person arrested under N.J.S.A. 2C:29-9(b) for violating a restraining order] may be set by any other judge[, or in the absence of a judge, by a municipal court administrator or deputy court administrator] provided that judge is setting conditions of pretrial release as part of a first appearance pursuant to Rule 3:4-2(b).

(b) [Initial Bail Set] Conditions of Release. [Initial bail] Conditions of pretrial release shall be set pursuant to R. 3:4-1 (a) or (b) on indictable or non-indictable offenses.

(1) The court shall order the pretrial release of the eligible defendant on personal recognizance or on the execution of an unsecured appearance bond when, after considering all the circumstances, the Pretrial Services Program's risk assessment and recommendations on conditions of release prepared pursuant to section 11 of P.L.2014, c. 31 (c.2A:162-25), and any information that may be provided by a prosecutor or the eligible defendant, the court finds that the release would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process. When the court orders pretrial release pursuant to this subparagraph, the court shall, in the document authorizing the release, notify the defendant that the defendant must appear in court when required and that a failure to appear may result in the issuance of a warrant for the defendant's arrest.

(2) If the court does not find, after consideration, that the release described in subparagraph (1) of this paragraph will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may order the pretrial release of the eligible defendant subject to the following:

(a) the eligible defendant shall appear in court as required;

(b) the eligible defendant shall not commit any offense during the period of release;

(c) the eligible defendant shall avoid all contact with an alleged victim of the crime; and

(d) the eligible defendant shall avoid all contact with all witnesses who may testify concerning the offense that are named in the document authorizing the eligible defendant's release or in a subsequent court order.

The court may impose other non-monetary conditions of release as set forth in subparagraph (3).

(3) The non-monetary condition or conditions of a pretrial release ordered by the court pursuant to this paragraph shall be the least restrictive condition, or combination of conditions, that the court determines will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, which may include that the eligible defendant:

(a) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able to reasonably assure the court that the eligible defendant will appear in court when

required, will not pose a danger to the safety of any other person or the community, and will not obstruct or attempt to obstruct the criminal justice process;

(b) will maintain employment, or, if unemployed, actively seek employment;

(c) maintain or commence an educational program;

(d) abide by specified restrictions on personal associations, place of abode or travel;

(e) report on a regular basis to a designated law enforcement agency, or other agency, or Pretrial Services Program;

(f) comply with a specified curfew;

(g) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(h) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

(i) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(j) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(k) be placed in a pre-trial home supervision capacity with or without the use of an approved electronic monitoring device. The court may order the eligible defendant to pay all or a portion of the costs of the electronic monitoring, but the court may wave the payment for an eligible defendant who is indigent and who has demonstrated to the court an inability to pay all or a portion of the costs; or

(l) satisfy any other condition that is necessary to reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other

person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

If the court enters a release order that is contrary to the release recommendations, including release conditions, of the Pretrial Services Program obtained by using a risk assessment instrument, then the court shall set forth in the document authorizing the release its reasons for not accepting the release recommendations.

[(c) Review of Initial Set. Any person unable to post bail shall have his or her bail reviewed by a Superior Court judge no later than the next day which is neither a Saturday, Sunday nor a legal holiday.

Except in those indictable cases in which a Superior Court judge has set bail, a municipal court judge has the authority to make bail revisions up to and including the time of the defendant's first appearance before the court. A municipal court judge has the authority to make bail revisions on any non-indictable offense at any time during the course of the proceedings.]

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

(1) Monetary Bail Reductions. If a defendant is unable to post monetary bail, the defendant shall have that monetary bail reviewed promptly and may file an application with the court seeking a monetary bail reduction which shall be heard in an expedited manner.

(2) Review of Conditions of Release. Except as provided in paragraphs (d)(1) or (d)(2) a Superior Court Judge may review the conditions of pretrial release set pursuant to Rule 3:26-1 on its own motion, or upon motion by the prosecutor or the defendant alleging that there has been a material change in circumstance that justifies a change in conditions.

Any review of conditions pursuant to this rule shall be decided within 30 days of the filing of the motion. Upon a finding that there has been a material change in circumstance, the judge may set new conditions of release but may not order the defendant detained except as provided in Rule 3:4A.

(d) Violations of Conditions of Release

(1) (A) Violation of condition of release when eligible defendant released from jail. Upon the motion of the prosecutor, when a defendant for whom a complaint-warrant was issued is released from custody, the court, upon a finding, by a preponderance of the evidence, that the defendant while on release violated a restraining order or condition of release, or upon a finding of probable cause to believe that the defendant has committed a new crime while on release, may revoke the defendant's release and order that the defendant be detained pending trial where the court, after considering all relevant circumstances including but not limited to the nature and seriousness of the violation or criminal act committed, finds clear and convincing evidence that no monetary bail, non-monetary conditions of release or combination of monetary bail and conditions would reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process.

(B) Hearing on Violations of Conditions of Release. The defendant shall have a right to be represented by counsel and, if indigent, to have counsel appointed if he or she cannot afford counsel. The defendant shall be provided all available discovery. The defendant shall be afforded the right to testify, to present witnesses, to cross-examine witnesses who appear at the hearing and to present information by proffer or otherwise. Testimony of the defendant given during the hearing shall not be admissible on the issue of guilt in

any other judicial proceeding, but the testimony shall be admissible in proceedings related to the defendant's subsequent failure to appear, proceedings related to any subsequent offenses committed during the defendant's release, proceedings related to the defendant's subsequent violation of any conditions of release, any subsequent perjury proceedings, and for the purpose of impeachment in any subsequent proceedings. The defendant shall have the right to be present at the hearing. The rules governing admissibility to evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing.

(2) Person released on a complaint-summons who is thereafter arrested on a warrant for a failure to appear. If a defendant charged on a complaint-summons is subsequently arrested on a warrant for a failure to appear in court when required, that defendant shall be eligible for release on personal recognizance or release on monetary bail by sufficient sureties at the discretion of the court. If monetary bail was not set when an arrest warrant for the defendant was issued, the court shall set monetary bail without unnecessary delay, but in no case later than 12 hours after arrest.

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

II. Speedy Trial

A. R. 3:25-4

COMMENTARY

1. Background

Proposed new R. 3:25-4 entitled "Speedy Trial for Certain Defendants" is designed to implement the "speedy trial" time periods set forth in N.J.S.A. 2A:162-22, which govern when the prosecutor must indict and when a trial must commence for an eligible defendant who is detained. The proposed rule describes the procedures for compliance with the speedy trial deadlines as well as the factors to be applied to either extend those deadlines or order the defendant's release. The rule only applies to eligible defendants who are charged on a complaint- warrant or a complaint-warrant on indictment who are arrested on or after January 1, 2017, regardless of whether the crime or offense related to the arrest was allegedly committed before, on, or after January 1, 2017.

Under the new pretrial release procedures, when a judge or judicial officer issues a complaint-warrant for an indictable crime or a disorderly persons offense, the judge or judicial officer shall "order the defendant remanded to the county jail pending a determination of pretrial release or a determination regarding pretrial detention if a motion has been filed."[1] See proposed amendments to R. 3:4-1(a)(2) and (b) *Report of the Criminal Practice Committee on the Implementation of the Bail Reform Law - Part I Pretrial Release* at page 41. Following the issuance of the complaint-warrant, the eligible defendant "shall be temporarily detained to allow the Pretrial Services Program to prepare a risk assessment with recommendations on conditions of release pursuant to section 11

[1] R. 3:4-1(a)(2) retains the current process where a either a judge or judicial officer determines whether a warrant or summons will issue.

of P.L.2014, c.31 (C.2A:162-25) and for the court to issue a pretrial release decision." N.J.S.A. 2A:162-16a. The court shall make a pretrial release decision "without unnecessary delay, but in no case later than 48 hours after the eligible defendant's commitment to jail." N.J.S.A. 2A:162-16a. Within certain time parameters, the court may order conditions of pretrial release in accordance with the criteria specified in N.J.S.A. 2A:162-16 to -17 or may, upon motion by the prosecutor, order the defendant's pretrial detention in accordance with the criteria specified in N.J.S.A. 2A:162-18 to -21.

2. Eligible Defendants

The speedy trial time frames set forth in this rule are triggered for the following categories of eligible defendants.

> (1) an eligible defendant who remains detained in the county jail after the court has issued a pretrial detention order;
>
> (2) an eligible defendant who is released on conditions and is later detained as the result of the court's issuance of a pretrial detention order;
>
> (3) an eligible defendant who remains detained in county jail due to an inability to post the monetary bail set by the court, pursuant to N.J.S.A. 2A:162-17c or d; and
>
> (4) an eligible defendant who is released on conditions; subsequently violates those conditions; is arrested on an arrest (or bench) warrant; and is held in the county jail pending reevaluation of the conditions. See N.J.S.A. 2A:162-24.

As to defendants who are released on conditions, in category (4), according to N.J.S.A. 2A:162-23a(1)(b), the defendant must be advised that a penalty or consequence for violating a condition of release "may include the immediate issuance of a warrant for the eligible defendant's arrest." Upon a finding that the defendant violated a condition of release or committed a new crime while on release, the court "may not revoke the eligible defendant's release and order that the eligible defendant be detained pending trial" unless certain findings are made. N.J.S.A. 2A:162-24.

The proposed speedy trial time frames in this rule do not apply to all defendants, even those who may be committed to the county jail. In particular, the speedy trial rule does not apply to:

> (1) a defendant for whom either a complaint-summons or an arrest (or bench) warrant is issued for the initial offense, as that defendant does not fall within the definition of an eligible defendant under either the speedy trial statute or proposed rule R. 3:25-4. See N.J.S.A. 2A:162-15 and N.J.S.A. 2A:162-22;
>
> (2) a defendant for whom a complaint-summons is issued for the initial offense, even if the defendant is subsequently arrested on an arrest (or bench) warrant for failure to appear at a court event and the defendant is committed to the county jail for that failure to appear. A defendant for whom a complaint-summons is issued for the initial offense does not fall within the definition of an eligible defendant under either the speedy trial statute or proposed R. 3:25-4. See N.J.S.A. 2A:162-15 and N.J.S.A. 2A:162-22. Release for such a defendant is governed by N.J.S.A. 2A:162-16d (personal recognizance or monetary bail); and
>
> (3) an eligible defendant for whom a complaint-warrant is issued, and:
>
> > (a) the prosecutor does not file a pretrial detention motion and the defendant is released on conditions, because the speedy trial time frames do not apply to defendants who are not detained (N.J.S.A. 2A:162-22 defines an eligible defendant as being subject to a pretrial detention order or detained in jail due to an inability to post monetary bail pursuant to N.J.S.A. 2A:162-17c or d; or,
> >
> > (b) the prosecutor files a pretrial detention motion, the court denies that motion and the defendant is released on conditions, because the speedy trial time frames do not apply to defendants who are not detained.

3. Direct Indictments

It is unclear whether the speedy trial provisions of *The Bail Reform Law* apply if there is a direct indictment and the defendant is arrested on an arrest warrant or on a warrant on indictment. The law defines an eligible defendant as a person for whom a complaint-warrant (CDR-2) has been issued for the initial offense. When a direct indictment is returned as the charging document, although the defendant may be arrested, no complaint-warrant would have been issued. Thus, it is unclear whether *The*

Bail Reform Law (as to conditions of pretrial release and pretrial detention) or the speedy trial law (as to speedy trial time frames) apply to situations involving a direct indictment. The Criminal Practice Committee is taking the position that the law should apply and is making a recommendation that the new rule address that situation. See proposed R. 3:25-4(a) and the discussion at pages 49-50.

4. Disorderly Persons Offenses

Additionally, the extent to which the speedy trial statute and time frames apply to disorderly persons offenses is unclear. Pursuant to N.J.S.A. 2A:162-18 and 19, only defendants who are charged on a complaint-warrant for a disorderly persons offense involving domestic violence are eligible for pretrial detention. Defendants charged with other disorderly persons offenses on a complaint-warrant (CDR-2) are only eligible for pretrial release. The speedy trial time frames only apply to defendants who are detained.

Once a defendant is detained, N.J.S.A. 2A:162-22 links the speedy trial time frames to the return of an indictment and the time to commence trial after an indictment is returned or unsealed. The right to an indictment does not apply to disorderly persons offenses. N.J.S.A. 2C:1-4b. Therefore, the speedy trial time frames set forth in the statute seemingly do not apply to detained defendants who are charged with a disorderly persons offense involving domestic violence. However, the two-year time period to commence trial may apply to detained defendants who are charged with a disorderly persons offense involving domestic violence. The last sentence of N.J.S.A. 2A:162-22a(2)(a) provides that

> Notwithstanding any other provision of this section, an eligible defendant shall be released from jail pursuant to section 3 of P.L.2014, c.31 (*C.2A:162-17*) after a release hearing if, two years after the court's issuance of the pretrial detention order for the eligible defendant, excluding any delays attributable to

> the eligible defendant, the prosecutor is not ready to proceed to voir dire or to opening argument, or to the hearing of any motions that had been reserved for the time of trial.

While a defendant charged with a disorderly persons offense has no right to a jury trial, the matter may be tried by a municipal court judge. As such, this two-year limit to "commence trial" could be interpreted as an outer-limit of detention for a defendant who is charged with a disorderly persons offense involving domestic violence. It is important to note, however, that this two-year time frame is longer than the maximum 6-month jail sentence that may be imposed for a defendant who is convicted of a disorderly persons offense. See N.J.S.A. 2C:43-8 ("A person who has been convicted of a disorderly persons offense or a petty disorderly persons offense may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall not exceed 6 months in the case of a disorderly persons offense or 30 days in the case of a petty disorderly persons offense.")[2] The Criminal Practice Committee is taking the position that the law should apply. Also, while the Committee believes that instances where a defendant whose most serious charge is a disorderly persons offense involving domestic violence will be detained for any significant period of time will be exceedingly rare, the Committee is making a recommendation that the new rule address that situation. See proposed R. 3:25-4(c)(1) and 4(d). See also the discussion at page 60.

5. Eligible Defendants who are Charged with a Fourth-Degree Crime and Are Detained

The same issue discussed above regarding an outer limit for detention for disorderly persons offenses also arises for defendants whose most serious charge is a

[2] See also N.J.S.A. 2C:1-4a which states: "An offense defined by this code or by any other statute of this State, for which a sentence of imprisonment in excess of 6 months is authorized, constitutes a crime within the meaning of the Constitution of this State."

fourth-degree crime and who are detained. For a fourth-degree crime, if convicted, the defendant is subject to a maximum18-month prison sentence. N.J.S.A. 2C:43-6a(4). While the Committee believes that instances where a defendant whose most serious charge is a fourth-degree crime will be detained for any significant period of time will be exceedingly rare, the Committee is making a recommendation that the new rule address that situation. See proposed R. 3:25-4(d) and the discussion at page 60.

6. Rule Proposal – R. 3:25-4 – Speedy Trial for Certain Defendants

a. Paragraph (a) – Eligible Defendant - - Direct Indictments

The Bail Reform Law defines an eligible defendant as "…a person for whom a complaint-warrant is issued for an initial charge involving an indictable offense or disorderly persons offense…." See N.J.S.A. 2A:162-15. Thus, the statute does not account for the fact that a defendant can be charged on an indictment without having been charged initially on a complaint-warrant or a complaint-summons. So, for example, a person charged on a direct indictment for murder would not be considered an eligible defendant under *The Bail Reform Law* but a person for whom an initial complaint-warrant was issued for murder would be considered an eligible defendant. The Committee believes that this could not have been an intentional choice by the Legislature; but rather was an oversight. R. 3:7-8 addresses the direct indictment issue. The Rule directs that the criminal division manager, as designee of the deputy clerk of the Superior Court, issue either a summons or a warrant in accordance with R. 3:3-1 upon the return of an indictment. R. 3:3-1 governs the determination of whether to issue a summons or a warrant on a complaint.

The Committee, in its Part I Report, has recommended substantial changes to R. 3:3-1. Thus, the determination of whether to issue a summons-on-indictment or

complaint-warrant on indictment would be guided by the same standards as those that would apply when the charges are on a complaint-warrant prior to indictment. In other words, the determination of whether the defendant is an "eligible defendant" would not depend on whether the defendant was charged on a complaint or a direct indictment but whether the standards for issuance of a warrant under R. 3:3-1 had been met. The Committee is therefore recommending that paragraph (a) include as an "eligible defendant" a defendant for whom a complaint-warrant on indictment was issued. Thus, paragraph (a) of the proposed rule defines an eligible defendant as "a person for whom a complaint-warrant, *or a complaint-warrant on indictment*, was issued for an initial charge involving an indictable offense or disorderly persons offense, and who: (1) is detained pursuant to R. 3:4A, or (2) is detained in jail due to an inability to post monetary bail pursuant to R. 3:26." The proposed rule tracks language defining an eligible defendant in N.J.S.A. 2A:162-15 and N.J.S.A. 2A:162-22a with the exception of the inclusion of the term "complaint-warrant on indictment".

The rule also makes clear that it only applies to an eligible defendant who is arrested on or after January 1, 2017, regardless of whether the crime or offense related to the arrest was allegedly committed before, on, or after January 1, 2017.

b. Paragraph (b) – On Failure to Indict (Pre-Indictment Time Parameters)

Paragraph (b) of the proposed rule codifies the procedures contained in N.J.S.A. 2A:162-22a(1) and sets forth: (1) the time limit for the defendant to remain detained in jail prior to the return of the indictment, and (2) the procedures for the prosecutor to file a motion for an extension of time to indict the defendant, objections by the defendant to the prosecutor's motion, and the court's determination on the motion.

i. Paragraph (b)(1) – Time Period

The proposed language in paragraph (b)(1) of the rule addresses the time limits for an eligible defendant to remain detained in jail prior to the return of the indictment. Paragraph a(1)(a) of N.J.S.A. 2A:162-22 states that "[t]he eligible defendant shall not remain detained in jail for more than 90 days, not counting excludable time for reasonable delays as set forth . . . [in the statute] . . . prior to the return of an indictment."[3] It is unclear from the statute whether the pre-indictment time calculations begin when the defendant is temporarily detained following the issuance of a complaint-warrant (CDR-2), pursuant to N.J.S.A. 2A:162-16[4], or when the court issues a pretrial detention order, pursuant N.J.S.A. 2A:162-18 to -21.[5]

The rule proposal provides that "[p]rior to the return of an indictment, an eligible defendant shall not remain detained in jail for more than 90 days following the date of the defendant's commitment to the county jail pursuant to R. 3:4-1(a)(2) or (b) or R. 3:26-2(d)(1)(A), not counting excludable time as set forth in paragraph (i) of this rule, prior to

[3] If the eligible defendant is not indicted within the calculated period of time, the eligible defendant shall be released from jail, unless the prosecutor files a motion seeking to extend the time to file an indictment and the court makes certain findings as outlined in the proposed paragraphs (b)(2), (b)(3) and (b)(4) of this rule. See N.J.S.A. 2A:162-22a(1)(a).

[4] For purposes of temporary detention, N.J.S.A. 2A:162-16a states: "[a]n eligible defendant, following the issuance of a complaint-warrant pursuant to the conditions set forth under subsection c. of this section, shall be temporarily detained to allow the Pretrial Services Program to prepare a risk assessment with recommendations on conditions of release pursuant to section 11 of P.L.2014, c.31 (C.2A:162-25) and for the court to issue a pretrial release decision." Absent a motion for detention, the court shall make a pretrial release decision for an eligible defendant "without unnecessary delay, but in no case later than 48 hours after the eligible defendant's commitment to jail." N.J.S.A. 2A:162-17.

[5] Based upon the circumstances, a prosecutor may file a motion for pretrial detention pursuant to N.J.S.A. 2A:162-18 or N.J.S.A. 2A:162-19, before or after a defendant's release.

the return of an indictment."[6] By referencing R. 3:4-1(a)(2) or (b), the language in paragraph (b)(1) of the rule addresses the circumstance when a defendant has been continuously detained pending indictment and begins counting time from the date when the eligible defendant is temporarily detained in the county jail following issuance of the complaint-warrant. See N.J.S.A. 2A:162-16. The proposed language is designed to capture all of the time that a defendant remains "temporarily detained" in county jail while the Pretrial Services Program prepares a risk assessment, and until the court orders pretrial release or orders pretrial detention, as well as the actual pretrial detention itself. By referencing R. 3:26-2(d)(1)(A), which is the release-revocation provision, the language in paragraph (b)(1) of the rule addresses the circumstance when a defendant who was initially released is later detained following a release revocation hearing and begins counting time from the defendant's commitment to the county jail following the release revocation.

As described in N.J.S.A. 2A:162-18, N.J.S.A. 2A:162-19 and proposed R. 3:4A, the prosecutor can file a motion seeking pretrial detention of an eligible defendant either before or after a defendant's release. The speedy trial time frames only count toward the time that the eligible defendant is actually detained in the county jail for purposes of temporary detention, N.J.S.A. 2A:162-16a and for purposes of pretrial detention, N.J.S.A. 2A:162-18 to -21. Time when the eligible defendant either is released on conditions, or is arrested for a violation of a condition and committed to the county jail for a reassessment of conditions, does not count toward the speedy trial deadlines.

[6] Proposed amendments to R. 3:4-1(a)(2) or (b) provide that the judicial officer who issues a complaint-warrant "shall order the defendant remanded to the county jail pending a determination of conditions of pretrial release."

ii Paragraph (b)(2) - Motion by the Prosecutor

The proposed language in paragraph (b)(2) of the rule states that if the eligible defendant is not indicted within the time frame calculated pursuant to paragraph (b)(1) of the rule, the eligible defendant shall be released from jail unless the prosecutor files a motion to extend the time to return an indictment and the court makes certain findings. This language regarding the prosecutor's motion tracks N.J.S.A. 2A:162-22a(1)(a).

Although the statute does not specify a time frame or procedure for the prosecutor to file this motion, the Criminal Practice Committee believes that the rule should set forth a firm motion practice. As such, the rule reflects that the prosecutor must "file a notice of motion, accompanied by a brief with an explanation of the reasons for the delay that justify the extension of time for return of the indictment." The rule proposal also establishes a time frame and states that "[t]he motion shall be filed with the court and served upon the defendant and defense counsel by the prosecutor no later than 15 calendar days prior to the expiration of the 90 day time frame, adjusted for excludable time, calculated pursuant to paragraph (b)(1) of this rule." The rule proposal includes language from the statute that at the expiration of the calculated 90-day time frame, the defendant shall be released unless the prosecutor files a motion to extend the time to return an indictment.

iii. Paragraph (b)(3) – Objection by Defendant

The statute does not specify a time frame or procedure for the defendant to object to the prosecutor's motion to extend the time to return an indictment. The rule proposal establishes a procedure and states that "[w]ithin 5 calendar days of the receipt of the prosecutor's motion to extend the time to return an indictment, the defendant may file an objection to the prosecutor's motion." This language is designed to address due process concerns and to provide a defendant with notice and an opportunity to be heard on the

motion. The Committee discussed whether oral argument should be held only upon the defendant's request. The Committee decided that language should be included in the rule requiring the defendant to request oral argument. Otherwise, the motion would be deemed uncontested and could be decided on the papers. A defendant's request for oral argument is to be filed along with the objection. The Committee is also proposing that a time limit be set for when oral argument must be held if the court decided to hold it. The proposal is that it be held within 5 calendar days of the defendant's request.

iv. Paragraph (b)(4) – Court Determination

The speedy trial statute does not set forth a time period for the judge to decide the prosecutor's motion to extend the time to return an indictment. The proposed language in paragraph (b)(4)(A) establishes a procedure and provides that "the court shall consider and render a decision on the prosecutor's motion to extend the time to return an indictment and any objections filed by the defendant within 5 calendar days of the prosecutor's motion, the defendant's objection, or oral argument, whichever is later."

The Committee discussed whether this motion could be decided on the papers. Some members expressed that it is likely that in most cases a defendant will request oral argument. Paragraph (b)(4)(A) of the proposed rule contains a provision that allows the court, in its discretion, to decide the motion on the papers without the need for oral arguments.

Paragraphs (b)(4)(B) and (b)(4)(C) of the proposed rule track the statute as to the standard for the court to decide whether to grant or deny the prosecutor's motion and the requirements for the court's order. N.J.S.A. 2A:162-22a(1)(a). Proposed paragraph (b)(4)(B) tracks the statute wherein the court may allocate an additional period of time, not to exceed 45 days, for the State to return an indictment. The statute does not provide

that the 45-day extension is subject to excludable time. The proposed rule also does not attribute excludable time to the 45-day extension of time for the State to return an indictment. Paragraph (b)(4)(C) includes language from N.J.S.A. 2A:162-22a(1)(a) that the remedy for the prosecutor's failure to meet the deadline to return an indictment is the defendant's release. It also incorporates language aligned with the purpose of the statute that the court shall issue conditions of release if the defendant's maximum period of detention is reached.

There is no remedy in the statute that requires dismissal of the complaint. Procedures for the dismissal of a complaint are in R. 3:25-1(a)(dismissal by the prosecutor, pre-indictment) and R. 3:25-3 (dismissal for delay).

c. Paragraph (c) – On Failure to Commence Trial (Post-Indictment Time Parameters)

Similar to the proposed language in paragraph (b), which governs pre-indictment speedy trial time parameters, the proposed language in paragraph (c) governs post-indictment speedy trial time parameters. Specifically, paragraph (c) of the proposed rule sets forth: (1) the time limit for the defendant to remain detained in jail following the return or unsealing of an indictment and prior to the commencement of trial; and (2) the procedures for the prosecutor to file a motion to extend the time to commence trial; objections by the defendant to the prosecutor's motion; and the court's determination on the motion.

i. Paragraph (c)(1) – Time Period

N.J.S.A. 2A:162-22a(2)(a) states that unless the prosecutor files a motion to extend the commencement of trial, "[e]xcept as provided in paragraph (d), an eligible defendant who has been indicted shall not remain detained in jail for more than 180 days

on that charge following the return or unsealing of the indictment, whichever is later, not counting excludable time for reasonable delays as set forth in [the statute], before commencement of the trial."[7]

By using language "an eligible defendant who has been indicted," the statute appears to provide that the 180-day time period runs from the return or unsealing of an indictment to the commencement of trial. As such, the 180 days would be independent from and not include time calculated pre-indictment pursuant to proposed paragraph (b) of this rule (i.e., the time that the defendant remains detained after a complaint-warrant is issued and prior to the return of an indictment). Additionally, by stating that the eligible defendant "shall not remain detained" the speedy trial statute calculations only apply to those defendants who actually are detained in county jail, not those who have been released on conditions.

Aligned with this understanding, the language in proposed paragraph (c)(1) of the rule begins counting time from the date when an indictment is returned or unsealed for an eligible defendant who actually is detained in the county jail. It states: "[a]n eligible defendant who has been indicted shall not remain detained in jail for more than 180 days on that charge following the return or unsealing of the indictment, whichever is later, not counting excludable time as set forth in paragraph (i) of this rule, before commencement of the trial."

As described in N.J.S.A. 2A:162-18 to -21, the prosecutor can file a motion seeking pretrial detention of an eligible defendant at various times. Therefore, the speedy trial

[7] If the trial does not begin within the calculated period of time, the eligible defendant shall be released from jail, unless the prosecutor files a motion seeking to extend the time to commence trial and the court makes certain findings as outlined in the proposed language of paragraph (c)(2) of the rule.

time frames will only count toward the time that the eligible defendant is actually detained in the county jail for purposes of pretrial detention. If a defendant is detained after the indictment is returned or unsealed, the 180 day calculation begins upon the defendant's detention. In other words, the time that the defendant is released, post-indictment, does not count toward the speedy trial time frames. Time when the eligible defendant is released on conditions or is arrested for a violation of a condition and is committed to the county jail for a reassessment of conditions, also do not count toward the speedy trial deadlines.

The Committee is also proposing that a sentence be added to this paragraph to address the situation where there is an eligible defendant whose most serious charge is a disorderly persons offense involving domestic violence. In that instance the Committee is proposing that the time period begin to run with the defendant's initial detention.

ii. Paragraph (c)(2) - Motion by the Prosecutor

The proposed language in paragraph (c)(2) of the rule states that if the eligible defendant's trial does not commence within the time frame calculated pursuant subsection (c)(1) of this rule, the eligible defendant shall be released from jail unless the prosecutor files a motion to extend the time and the court makes certain findings. The language regarding the prosecutor's motion to extend the time for the trial to commence tracks N.J.S.A. 2A:162-22a(2)(a).

Although the statute does not specify a time frame or procedure for the prosecutor to file this motion, the Committee agreed that the rule should set forth a firm motion practice. As such, the rule reflects that the prosecutor "must file a notice of motion accompanied by a brief explaining the reasons for the delay that justify the extension of

time to commence trial." Further, paragraph (c)(2) of the rule proposal establishes a time frame and states:

> The motion to extend time to commence trial shall be filed with the court and served upon the defendant and defense counsel by the prosecutor no later than 15 calendar days prior to the date of the expiration of the 180 day time frame, adjusted for excludable time, calculated pursuant to paragraph (c)(1) of this rule.

The Committee is also proposing that this paragraph contain a provision that would allow the 15-day filing deadline for the motion to be relaxed for good cause. This provision is intended to address the situation where circumstances justifying a need for a delay in the commencement of the trial arise after the 15-day deadline has expired.

iii. Paragraph (c)(3) – Objection by Defendant

Although the statute does not specify a time frame or procedure for the defendant to object to the prosecutor's motion to extend the deadline for the trial to commence, the rule proposal creates a procedure and states that "[w]ithin 5 calendar days of the receipt of the prosecutor's motion to extend the time to commence trial, the defendant may file an objection to the prosecutor's motion." This language is designed to address due process concerns providing a defendant with notice and an opportunity to be heard on the motion. Similar to the proposed pre-indictment procedures, the Committee discussed whether oral argument should be held only upon the defendant's request. The Committee decided that language requiring the defendant to request oral argument should be included in the rule. Otherwise, the motion would be deemed uncontested and could be decided on the papers. The defendant's request for oral argument is to be filed along with the objection. The Committee is also proposing that a time limit be set for when oral argument must be held if the court decided to hold it. The proposal is that it be held within 5 calendar days of the defendant's request.

iv. Paragraph (c)(4) – Court Determination

The speedy trial statute does not set forth a time period for the judge to decide the prosecutor's motion to extend the time when the trial must commence. The proposed language in paragraph (c)(4)(A) states that "the court shall consider and render a decision on the prosecutor's motion to extend the time to commence trial and any objection filed by the defendant within 5 calendar days of the prosecutor's motion, the defendant's objection, or oral argument, whichever is later."

Paragraphs (c)(4)(B) and (c)(4)(C) track the statute, as to the standard for the court to decide whether to grant or deny the prosecutor's motion to extend the deadline to commence the trial and the conforming court order. Paragraph (c)(4)(B) tracks the statute wherein the court may allocate an additional period of time for the trial to commence. The statute is silent as to the amount of additional time that may be allocated. The proposed rule would direct that the amount of additional time be "reasonable." The statute does not provide that an extension of the deadline to commence trial is subject to excludable time. The rule proposal also does not provide that an extension of the deadline to commence trial is subject to excludable time. Paragraph (c)(4)(C) includes language from N.J.S.A. 2A:162-22a(b)(2) that the remedy for the prosecutor's failure to meet the deadline to commence trial is the defendant's release. It also incorporates language aligned with the purpose of the statute that the court shall issue conditions of release if the defendant's maximum period of detention is reached. The rule proposal therefore references R. 3:4A (pretrial detention) and R. 3:26 (pretrial release).

Similar to the pre-indictment procedures, the Committee discussed whether this motion could be decided on the papers. Some members expressed that it is likely that in most cases, a defendant will request oral argument. Paragraph (c)(4)(A) of the proposed

rule contains a provision that allows the court, in its discretion, to decide the motion on the papers without the need for oral argument.

There is no remedy in the statute that requires dismissal of the indictment. Procedures for the dismissal of an indictment are in R. 3:25-1(b) (dismissal upon motion of the prosecutor, post-indictment); R. 3:25-2 (order for trial); and R. 3:25-3 (dismissal for delay).

d. Paragraph (d) – Period to Readiness of Prosecutor for Trial

i. Paragraph (d)(1)

The Bail Reform Law requires that an eligible defendant be released from jail after a release hearing if, two years after the court's issuance of a pretrial detention order, excluding any delays attributable to the defendant, the prosecutor is not ready to proceed to voir dire or to opening arguments, or to the hearing of any motions that have been reserved for the time of trial. See N.J.S.A. 2A:162-22(b)(2)a. The first sentence of this proposed paragraph, with some non-substantive rewording, captures this requirement.

The Committee is proposing that two additional sentences be added to this paragraph to address the issue raised in an earlier part of this report regarding speedy trial requirements for eligible defendants whose most serious charge is a disorderly persons offense or a fourth-degree crime. See discussion at pages 47-49 supra. The sentences would read as follows:

> In the case of an eligible defendant whose most serious charge is a fourth-degree offense, the time period is 18 months. In the case of an eligible defendant whose most serious charge is a disorderly persons offense involving domestic violence, the time period shall be six months.

ii. Paragraph (d)(2)

The statute is silent as to which of the thirteen excludable time provisions are attributable to the defendant for purposes of determining when the two year time limit is tolled. The Committee decided, after debating the issue, that it should propose a paragraph in the Court's speedy trial rule to address this gap, and paragraph (d)(2) is being proposed for adoption to address this problem. The proposed paragraph would make the following excludable time provisions attributable to the defendant:

- The time resulting from an examination and hearing on competency and the period during which the defendant is incompetent to stand trial or incapacitated but only if the defendant maintains that he or she is not competent to stand trial or is incapacitated; See R. 3:25-4(d)(2)(A).
- The time resulting from the filing to the disposition of a defendant's application for supervisory treatment, special probation, drug or alcohol treatment as a condition of probation or other pretrial treatment or supervisory program; See R. 3:25-4(d)(2)(B).
- The time resulting from the filing of a motion but only if the defendant filed the motion unless the motion was filed in response to unreasonable actions of the prosecutor; See R. 3:25-4(d)(2)(C).
- The time resulting from a continuance granted by the court but only if the request for the continuance was made by the defendant unless the request was made in response to unreasonable actions by the prosecutor; See R. 3:25-4(d)(2)(D).
- The time resulting from the detention of the defendant in another jurisdiction, provided the prosecutor has been diligent and has made

reasonable efforts to obtain the defendant's presence but only if the defendant left the jurisdiction after receiving notice of a charge or charges in this jurisdiction; See R. 3:25-4(d)(2)(E).

- The time resulting from a defendant's failure to appear for a court proceeding; See R. 3:25-4(d)(2)(F).
- The time resulting from the failure by a defendant to provide timely and complete discovery; or See R. 3:25-4(d)(2)(G).
- The time for other periods of delay not specifically enumerated if the court finds good cause for the delay, but only if the delay resulted from unreasonable acts or omissions of the defendant. See R. 3:25-4(d)(2)(H).

iii Paragraph (d)(3)

Paragraph (d)(3) addresses the remedy for failure to meet the two-year time parameter - - release from jail. This proposed paragraph only addresses what is covered in the statute, i.e. release if the prosecutor is not ready to proceed to voir dire or to opening argument, or to a hearing of any motions that have been reserved for the date of trial. See N.J.S.A. 2A:162-22a(2)(a).

There was much discussion during Committee deliberations that the proposed paragraph did not address what happens if a prosecutor is ready to proceed but the court is not, e.g. there is no judge available to try the case. The Committee did not address this because *The Bail Reform Law* did not.

e. Paragraph (e) – Commencement of Trial – Defined

Proposed paragraph (e) defines "commencement of trial" as follows:

> For the purposes of this rule, a trial is considered to have commenced when the court determines that the parties are present and directs them to proceed to voir dire or to opening argument, or

to the hearing of any motions that had been reserved for the time of trial.

This proposed language tracks the statute at N.J.S.A. 2A:162-22a(2)(b)(i).

f. Paragraph (f) – Subsequent and Superseding Indictments

The Bail Reform Law provides that the return of a superseding indictment against the eligible defendant shall extend the time for the trial to commence. See N.J.S.A. 2A:162-22a(2)(b)(ii). The statute is silent as to procedures to follow in the case where a superseding indictment is returned.

The Committee believes that it is important in cases where there is a superseding indictment that the return of that indictment not unduly delay a defendant's right to a speedy trial. Thus, the Committee is proposing that paragraph (f) provide that where there is a superseding indictment, the court schedule the trial to commence as soon as reasonably practicable after the superseding indictment is returned. In determining when to schedule the trial the court would take certain factors into account. The factors would be the nature and extent of differences between the superseded and superseding indictments, including the degree to which the superseding indictment is based on information that was available at the time of the original indictment or that could have been obtained through reasonably diligent efforts at the time of the original indictment.

The last sentence of this paragraph, which addresses indictments dismissed without prejudice upon motion of the defendant for any reason where a subsequent indictment is returned, tracks the statutory provision. See N.J.S.A. 2A:162-22a(2)(b)(iii).

g. Paragraph (g) – New Trial

Proposed paragraph (g) describes the calculation of time when a trial is ordered after a mistrial, upon motion of a new trial and upon reversal by an appellate court. It tracks the language of N.J.S.A. 2A:162-22a(2)(b)(iv) and references relevant court rules.

h. Paragraph (h) – Charge or Indictment in Another Matter

Paragraph (h) tracks the language in N.J.S.A. 2A:162-22a(1)(b) and N.J.S.A. 2A:162-22a(2)(c) regarding independent time calculations if a defendant is charged or indicted in another matter.

i. Paragraph (i) – Excludable Time Criteria

Excludable time is time that shall be excluded in computing the time within which a case shall be indicted or tried. In other words, excludable time extends the date by which an indictment must be returned or a trial must be commenced. If the court finds that one of the categories of excludable time listed in paragraph (i) of this rule applies, then the period of time determined by the court to be attributable to that category will not be counted toward (i.e. will be excluded from) either the 90-day deadline to return an indictment or the 180-day post-indictment deadline to commence the trial. In practical effect, excludable time extends the time for which a court-ordered detained defendant will remain detained in jail pending the return of an indictment or the commencement of trial.

The proposed language in paragraphs (i)(1) – (i)(13) address the thirteen (13) categories of excludable time set forth in N.J.S.A. 2A:162-22b(1)(a) – (m). The last sentence of paragraph (i) codifies N.J.S.A. 2A:162-22b(2) and states: "[t]he failure by the prosecutor to provide timely and complete discovery shall not be considered excludable time unless the discovery only became available after the time established for discovery."

i. Paragraph (i)(1) – Competency

The first sentence of this paragraph tracks the statutory exclusion of time for an examination and hearing on competency and the period during which the defendant is incompetent to stand trial or is incapacitated. See N.J.S.A. 2A:162-22b(1)(a). The statute is silent as to when the excluded time begins. To fill this gap the Committee is proposing that a sentence be added to this paragraph to provide that the excluded time begin

> "…tolling once the judge signs an order for the examination of the defendant for competency…or once the defense serves the court with a report from its own expert stating that the defendant is not competent to proceed".

ii. Paragraph (i)(2) - Supervisory Treatment, Pretrial Intervention, Special Probation, Drug or Alcohol Treatment

This paragraph tracks the statute. See N.J.S.A. 2A:162-22b(1)(b).

iii. Paragraph (i)(3) – Motions

The Bail Reform Law provides that the time from the filing to the final disposition of a motion made before trial by the prosecutor or eligible defendant is excludable time in determining whether a case must be indicted or tried. See N.J.S.A. 2A:162-22b(1)(c). As with all of the other categories of excludable time, the statute sets no limit on the amount of time to be excluded for motions. Given the frequency of motion practice, the lack of a limit on the amount of excludable time attributable to motions could seriously undermine a defendant's right to a speedy trial because motions could remain open indefinitely. The Committee believes that this is a problem that should be addressed in the court rules.

The Committee was divided over how this problem should be addressed. Some members were concerned about setting limits on the amount of excludable time where the Legislature had clearly decided not to do so. Others were of the opinion that it was a

proper exercise of Court's authority in the area of practice and procedure to set guidelines when certain court events must occur and be completed.

The Committee reviewed how excludable time for motions was handled in other jurisdictions that have speedy trial provisions. Other than a time limit for when a judge must rule on the motion, the Committee could find no jurisdiction that had a specific time limit, e.g. 90 days, for "perfecting the record". The Committee agreed that, although no jurisdiction had such a time limit, that should not prohibit New Jersey from implementing one.

The Committee also reviewed data provided by the Administrative Office of the Courts that reflected the average (mean) and median number of days for the disposition of certain motions for selected months in 2014, 2015 and 2016. The data was as follows:

2014		**2015**		**2016**	
Mean	Median	Mean	Median	Mean	Median
109	73	142	82	132	77

Although the Committee agreed the information was useful, it also agreed that past history should not dictate what the practice should be under a speedy trial rule.

iv. Paragraph (i)(3)(A) - Time to Perfect the Record

Before ultimately deciding how to proceed, the Committee considered various options for dealing with excludable time for perfecting the record: (1) no cap on the number of days (mimic the statute); a "hard cap" on the number of days of excludable time, e.g. 30 days; or (3) a "soft cap" on the number of days. Despite the fact that no other jurisdiction has an established time period for "perfecting the record" the Committee was of the opinion that New Jersey should establish one. The belief was that in so doing New Jersey would be seeking to ensure that motion practice did not undercut a defendant's speedy trial rights. Thus, the Committee decided to set a time within which

the record must be completed. After a lengthy debate in which proposals for 60, 90 and 120-day time periods were discussed, a majority of the Committee voted to approve a "soft cap" of 90 days of excludable time. Thus, proposed paragraph(i)(3)(A) would provide that if briefing, argument, and any evidentiary hearings required to complete the record are not complete within 90 days of the filing of the notice of motion, or within any longer period of time authorized pursuant to R. 3:10-2(f), any additional time would not be excluded. A companion provision, contained in R. 3:10-2(f), would permit an extension of this 90 day time period if the court finds that good cause exists to extend the time within which to complete the record, and the court sets forth on the record, whether orally or in writing, those facts that support its finding of good cause.

v. Paragraph (i)(3)(B) -Time for Judge to Rule on Motion

The Committee is also proposing a limit on the amount of excludable time attributable to judicial decision-making on a motion. A number of states and the federal system have such provisions. See, for example, Alaska R. Crim Proc. 45(d); Ark. R. Crim. P. Rule 28.3; Conn. Practice Book § 43-40(1)(E); 18 U.S.C. § 3161(h)(1)(H); Mass. R. Crim. P. Rule 36(b)(2)(A)(vii). Proposed paragraph (i)(3)(B) provides that if the Court does not decide the motion within 30 days after the record is complete, any additional time during which the motion is under advisement by the Court would not be excluded, unless the court finds there are extraordinary circumstances affecting the court's ability to decide the motion, in which case no more than an additional 30 days would be excluded.

vi. Paragraph (i)(3)(C) – Reserved Decisions

Proposed paragraph (i)(3)(C) would provide that if the Court reserves its decision on a motion until the time of trial, the time from the reservation to disposition of that motion would not be excludable.

vii. Paragraph (i)(4) – Continuances

The Bail Reform Law provides that the time resulting from a continuance granted, in the court's discretion, at an eligible defendant's request or at the request of both the eligible defendant and the prosecutor is excludable time in determining whether a case must be indicted or tried. See N.J.S.A. 2A:162-22b(1)(d).

The language proposed in paragraph (i)(4) tracks the statute with one addition. Proposed paragraph (i)(4) would require that the request for a continuance specify the amount of time for which the continuance is sought. This provision is being added to prevent open-ended, or long, continuances which would seriously undermine a defendant's speedy trial rights.

viii. Paragraph (i)(5) – Detention of Defendant in Another Jurisdiction

This paragraph tracks the statute. See N.J.S.A. 2A:162-22b(1)(e).

ix. Paragraph (i)(6) –Exceptional Circumstances

This paragraph tracks the statute. See N.J.S.A. 2A:162-22b(1)(f).

x. Paragraph (i)(7) – Complex Cases

The Bail Reform Law provides that, on motion of the prosecutor, the delay resulting from the court finding that the case is complex due to the number of defendants or the nature of the prosecution is excludable time in determining whether a case must be indicted or tried. See N.J.S.A. 2A:162-22b(1)(g).

The Committee discussed whether there should be a cap on the amount of excludable time provided in a proposed court rule following a designation by a judge that the case was complex. Four different options were placed before the Committee by a subcommittee: (1) no cap on the number of days (mimic the statute); (2) a "hard cap" on the number of days of excludable time, e.g., 60 days; (3) no cap but requiring the prosecutor to specify the basis for the motion for complex-case designation; or (4) no cap but provisions based on the federal statute that define the showing that the prosecutor must make and the findings the court must make in order to designate a case as a "complex case."

Ultimately the Committee chose option (4) and proposes a paragraph (i)(7) to its proposed rule to address complex cases.

xi. Paragraph (i)(7)(A) – Motion for Complex Case Designation

Proposed paragraph (i)(7)(A) would require that the prosecutor make a motion that the case be considered complex. If the court finds that the case is complex due to the number of defendants or the nature of the prosecution the judge would be required to determine how much time is excludable. Proposed paragraph (i)(7)(A) would require that the prosecutor include in the motion the specific factual basis justifying the delay and the length of the delay sought. It would allow the defendant to file an objection within five calendar days of receipt of the prosecutor's motion. If the defendant objects the court would be permitted to decide the motion without oral argument.

xii. Paragraph (i)(7)(B) – Judicial Finding

Proposed paragraph (i)(7)(B) would require that the court make certain findings before granting the motion. The court would only be allowed to grant the motion only if:

(i) the prosecutor establishes that due to the complexity of the case it is unreasonable to expect adequate preparation for pretrial proceedings or the trial itself within the time periods set forth in this Rule and (ii) the court finds that the interests of justice served by granting the delay outweigh the best interests of the public and the defendant in a speedy trial.

xiii. Paragraph (i)(7)(C) – Criteria for Complex Case

Proposed paragraph (i)(7)(C) would provide that the court ordinarily should grant the motion only when the case involves more than two defendants, novel questions of fact or law, numerous witnesses who may be difficult to locate or produce, or voluminous or complicated evidence

xiv. Paragraph (i)(7)(D) – Specifying Length of Delay

Proposed paragraph (i)(7)(D) would require the court, if it grants the motion, to specify the period of delay and set forth on the record, either orally or in writing, its findings.

xv. Paragraph (i)(7)(E) – Approval of Criminal Presiding Judge

Proposed paragraph (i)(7)(E) would also only permit the court to grant the motion with the approval of the Criminal Presiding Judge.

xvi. Paragraph (i)(8) – Severance of Codefendants

The Bail Reform Law provides that the time resulting from a severance of codefendants when that severance permits only one trial to commence within the time period for trial set forth in the statute is excludable time in determining whether a case must be indicted or tried. See N.J.S.A. 2A:162-22b(1)(h).

This category of excludable time, as contained in the statute, does not provide any guidance as to when the trial for a severed defendant must begin. Without such guidance, it would be possible for the severed defendant's trial to be put off for months, or even years. The effect of this would be to deny this defendant his or her right to a speedy trial as provided for in *The Bail Reform Law*. The Committee believed that this was a problem that should be addressed in the court rules.

The Committee is proposing paragraph (i)(8)(A), which provides that the subsequent trial must commence within 60 days of the conclusion of the previous trial. Paragraph (i)(8)(B) would allow the court to extend the date for the commencement of the subsequent trial upon the request of the defendant, with the defendant's consent to a request by the prosecutor, or by a finding by the court upon motion of the prosecutor that there is good cause for the extension. Paragraph (i)(8)(C) would provide that if the subsequent trial does not commence within 60 days or, if applicable, within the extended period, any additional time shall not be excluded.

xvii. Paragraph (i)(9) – Failure to Appear for Court Proceeding

This paragraph tracks the statute. See N.J.S.A. 2A:162-22b(1)(i).

xviii. Paragraph (i)(10) – Recusal of Judge

While this paragraph largely tracks the statute, see N.J.S.A. 2A:162-22b(1)(j), the Committee was of the opinion that there should be a limit on the amount of excludable time for this factor. Thus, the Committee proposed that only the first 30 days be excludable.

xix. Paragraph (i)(11) – Failure by Defendant to Provide Timely and Complete Discovery

This paragraph tracks the statute. See N.J.S.A. 2A:162-22b(1)(k).

xx. Paragraph (i)(12) – Delay not Specifically Enumerated

While this paragraph largely tracks the statute, see N.J.S.A. 2A:162-22b(1)(l), the Committee was of the opinion that this provision should not be read so as to undercut speedy trial rights. Therefore, the Committee is recommending that the clause "…provided that this provision shall be narrowly construed" be added to this paragraph.

xxi. Paragraph (i)(13) – Any Other Time Required by Statute

This paragraph tracks the statute. See N.J.S.A. 2A:162-22b(1)(m).

j. Paragraph (j) – Excludable Time Calculations

The statute does not contain procedures for the recording, calculation, or tracking of excludable time. While proposed paragraph (j) places that responsibility on the Judiciary, it also requires that counsel keep track of excludable time and pending release dates. The proposed language for paragraph (j) states:

> The court shall keep track of each and every instance of excludable time calculated pursuant to this rule, including the number of days excluded as determined by the judge, and ensure that all excludable time is accurately reflected in an appropriate judiciary case management system. The court shall provide notice to the defendant and prosecutor of the impending release date for the defendant at least 20 days prior to that release date. Counsel shall also keep track of excludable time and the pending release dates for an eligible defendant.

The Administrative Office of the Courts envisions that the speedy trial calculations will be computerized via eCourts and thus will be available to counsel to review the defendant's status. The eCourts speedy trial feature will be used by court staff to record, calculate, and track excludable time as ordered by the court. The period of excludable time will be attributed to the appropriate deadline (90-day pre-indictment or 180-day post-indictment), and, if the court determines that the excludable time is attributable to the

defendant, the excludable time would also be applied to the two-year deadline for prosecutor readiness for trial. The proposed rule would also require that the court will notify the parties at least 20 days before the defendant's anticipated release date. These notices would be generated via eCourts.

Rule 3:25-4. Speedy Trial For Certain Defendants

(a) Eligible Defendant. For purposes of this rule, the term "defendant" or "eligible defendant" shall mean a person for whom a complaint-warrant or complaint-warrant on indictment was issued for an initial charge involving an indictable offense or a disorderly persons offense and who: (1) is detained pursuant to R. 3:4A, or (2) is detained in jail due to an inability to post monetary bail pursuant to R. 3:26. This rule only applies to an eligible defendant who is arrested on or after January 1, 2017, regardless of whether the crime or offense related to the arrest was allegedly committed before, on, or after January 1, 2017.

(b) On Failure to Indict.

(1) Time Period. Except as provided in paragraph (d), prior to the return of an indictment, an eligible defendant shall not remain detained in jail for more than 90 days following the date of the defendant's commitment to the county jail pursuant to R. 3:4-1(a)(2) or (b) or R. 3:26-2(d)(1)(A) not counting excludable time as set forth in paragraph (i) of this rule.

(2) Motion by the Prosecutor To Extend Time for Failure to Indict. If the eligible defendant is not indicted within the time frame calculated pursuant to subparagraph (b)(1) of this rule, the eligible defendant shall be released from jail unless on motion of the prosecutor, the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result from the defendant's release from custody, so that no appropriate conditions for the defendant's release could reasonably address that risk, and also finds that the failure to indict the defendant in accordance with the time requirement set forth in this rule was not due to unreasonable delay by the prosecutor. The prosecutor must file a notice of motion

accompanied by a brief with an explanation of the reasons for the delay that justify the extension of time for return of the indictment. The motion to extend the time to return an indictment shall be filed with the court and served upon the defendant and defense counsel by the prosecutor no later than 15 calendar days prior to the expiration of the 90 day time frame, adjusted for excludable time, calculated pursuant to paragraph (b)(1) of this rule.

(3) Objection by Defendant. Within 5 calendar days of the receipt of the prosecutor's motion to extend the time to return an indictment, the defendant may file an objection to the prosecutor's motion and request oral argument. If the court decides to hold oral argument the argument must be held within 5 calendar days of the defendant's request.

(4) Court Determination.

(A) The court shall consider and render a decision on the prosecutor's motion to extend the time to return an indictment and any objections filed by the defendant within 5 calendar days of the prosecutor's motion, defendant's objection, or oral argument, whichever is later. The court may, in its discretion, render a decision on the papers without the need for oral argument.

(B) Upon consideration of the motion, if the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result, and also finds that the failure to indict the eligible defendant in accordance with the time requirement calculated pursuant to paragraph (b)(1) of this rule was not due to unreasonable delay by the prosecutor, the court may allocate an additional period of time, not to exceed 45 days, in which the return of an indictment shall occur.

(C) If the court orders an eligible defendant detained pursuant to R. 3:4A and the maximum period of detention is reached or if the court currently does not find a substantial and unjustifiable risk or finds unreasonable delay by the prosecutor as described in this rule, the court shall establish conditions of pretrial release, pursuant to R. 3:26, and release the defendant.

(c) On Failure to Commence Trial.

(1) Time Period. Except as provided in paragraph (d), an eligible defendant who has been indicted shall not remain detained in jail for more than 180 days on that charge following the return or unsealing of the indictment, whichever is later, not counting excludable time as set forth in paragraph (i) of this rule, before commencement of the trial. For an eligible defendant whose most serious charge is a disorderly persons offense involving domestic violence, the time period shall begin with the defendant's initial detention.

(2) Motion by the Prosecutor. If the trial does not commence within the time frame calculated pursuant to paragraph (c)(1) of this rule, the eligible defendant shall be released from jail unless, on motion of the prosecutor, the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result from the defendant's release from custody, so that no appropriate conditions for the defendant's release could reasonably address that risk, and also finds that the failure to commence trial in accordance with the time requirement set forth in this rule was not due to unreasonable delay by the prosecutor. The prosecutor must file a notice of motion accompanied by a brief explaining the reasons for the delay that justify the extension of time to commence trial. The motion to extend time to commence trial shall be filed with the court and served upon the defendant and

defense counsel by the prosecutor no later than 15 calendar days prior to the date of the expiration of the 180 day time frame, adjusted for excludable time, calculated pursuant to subparagraph (c)(1) of this rule. Upon good cause shown this deadline may be relaxed.

(3) Objection by Defendant. Within 5 calendar days of the receipt of the prosecutor's motion to extend the time to commence trial, the defendant may file an objection to the prosecutor's motion and request oral argument. If the court decides to hold oral argument the argument must be held within 5 calendar days of the defendant's request.

(4) Court Determination.

(A) The court shall consider and render a decision on the prosecutor's motion to extend the time to commence trial and any objection filed by the defendant within 5 calendar days of the prosecutor's motion, the defendant's objection, or oral argument, whichever is later. The court may, in its discretion, render a decision on the papers without the need for oral argument.

(B) Upon consideration of the motion, if the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result, and also finds that the failure to commence trial in accordance with the time requirement calculated pursuant to paragraph (c)(1) of this rule was not due to unreasonable delay by the prosecutor, the court may allocate an additional reasonable period of time in which the defendant's trial shall commence. If the court allocates an additional reasonable period of time to commence trial, the court should specify its reasons for granting the extension and set forth a specific date for the trial.

(C) If the court orders an eligible defendant detained pursuant to R. 3:4A and the maximum period of detention is reached, or if the court currently does not find a

substantial and unjustifiable risk or finds unreasonable delay by the prosecutor as described in this rule, the court shall establish conditions of pretrial release, pursuant to R. 3:26, and release the defendant.

(d) Period to Readiness of Prosecutor for Trial. (1) An eligible defendant shall be released from jail upon conditions set by the court, after a release hearing if, excluding any delays attributable to the defendant, two years after the court's issuance of the pretrial detention order for the eligible defendant or after the detention of the eligible defendant in jail due to an inability to post monetary bail as a condition of release, the prosecutor is not ready to proceed to voir dire or to opening argument, or to proceed to the hearing of any motions that had been reserved for the time of trial. In the case of an eligible defendant whose most serious charge is a fourth-degree offense, the time period is 18 months. In the case of an eligible defendant whose most serious charge is a disorderly persons offense involving domestic violence, the time period shall be six months.

(2) A delay shall be considered attributable to the defendant if the delay constitutes excluded time pursuant to:

(A) subparagraph (1) of paragraph (i) of this rule, but only if the defendant maintains that he or she is not competent to stand trial or is incapacitated;

(B) subparagraph (2) of paragraph (i) of this rule;

(C) subparagraph (3) of paragraph (i) of this rule, but only if the defendant filed the motion unless the motion was filed in response to unreasonable actions of the prosecutor;

(D) subparagraph (4) of paragraph (i) of this rule, but only if the request for the continuance was made by the defendant unless the request was made in response to unreasonable actions by the prosecutor;

(E) subparagraph (5) of paragraph (i) of this rule, but only if the defendant left the jurisdiction after receiving notice of a charge or charges in this jurisdiction;

(F) subparagraph (9) of paragraph (i) of this rule;

(G) subparagraph (11) of paragraph (i) of this rule; or

(H) subparagraph (12) of paragraph (i) of this rule, but only if the delay resulted from unreasonable acts or omissions of the defendant.

(3) An eligible defendant shall not be released from jail pursuant to subparagraph (1) of this paragraph if, on or before the expiration of the applicable period of detention, the prosecutor has represented that the State is ready to proceed to voir dire or to opening arguments, or to proceed to the hearing of any motions that had been reserved for trial. The prosecutor's statement of readiness shall be made on the record in open court or in writing.

(e) Commencement of Trial. For the purposes of this rule, a trial is considered to have commenced when the court determines that the parties are present and directs them to proceed to voir dire or to opening argument, or to the hearing of any motions that had been reserved for the time of trial.

(f) Subsequent and Superseding Indictments. For purposes of calculating the time period pursuant to paragraph (c)(1) of this rule, the return of a superseding indictment against the defendant shall extend the time for the trial to commence. The court shall schedule the trial to commence as soon as reasonably practicable taking into consideration the nature and extent of differences between the superseded and superseding indictments, including the degree to which the superseding indictment is based on information that was available at the time of the original indictment or that could have been obtained through reasonably diligent efforts at the time of the original

indictment. If an indictment is dismissed without prejudice upon motion of the defendant for any reason, and a subsequent indictment is returned, the time for trial shall begin running from the date of the return of the subsequent indictment.

(g) New Trial. A trial ordered after a mistrial or upon a motion for a new trial, pursuant to R. 3:20-1, shall commence within 120 days of the entry of the order of the court. A trial ordered upon the reversal of a judgment by any appellate court shall commence within 120 days of the service of that court's trial mandate.

(h) Charge or Indictment in Another Matter. If the defendant is charged or indicted in another matter that results in the defendant's pretrial detention, the time calculations set forth in this rule shall run independently for each matter.

(i) Excludable Time Criteria. The following periods shall be excluded in computing the time in which a case shall be indicted or tried:

(1) The time resulting from an examination and hearing on competency and the period during which the defendant is incompetent to stand trial or incapacitated. Excluded time shall begin tolling once the judge signs an order for the examination of the defendant for competency pursuant to N.J.S. 2C:4-5, or once the defense serves the court with a report from its own expert stating that the defendant is not competent to proceed;

(2) The time from the filing to the disposition of a defendant's application for supervisory treatment pursuant to N.J.S. 2C:36A-1 or N.J.S. 2C:43-12 et seq., special probation pursuant to N.J.S. 2C:35-14, drug or alcohol treatment as a condition of probation pursuant to N.J.S. 2C:45-1, or other pretrial treatment or supervisory program;

(3) The time resulting from the filing of a motion by either the prosecution or defendant subject to the following:

(A) If briefing, argument, and any evidentiary hearings required to complete the record are not complete within 90 days of the filing of the notice of motion, or within any longer period of time authorized pursuant to R. 3:10-2(f), any additional time shall not be excluded.

(B) Unless the Court reserves its decision until the time of trial, if the Court does not decide the motion within 30 days after the record is complete, any additional time during which the motion is under advisement by the Court shall not be excluded unless the court finds there are extraordinary circumstances affecting the court's ability to decide the motion, in which case no more than an additional 30 days shall be excluded.

(C) If the Court reserves its decision on a motion until the time of trial, the time from the reservation to disposition of that motion shall not be excluded.

(4) The time resulting from a continuance granted at the defendant's request or at the request of both the defendant and the prosecutor; such request must specify the amount of time for which the continuance is sought;

(5) The time resulting from the detention of the defendant in another jurisdiction, provided the prosecutor has been diligent and has made reasonable efforts to obtain the defendant's presence;

(6) The time resulting from exceptional circumstances including, but not limited to, a natural disaster, the unavoidable unavailability of the defendant, material witness or other evidence, when there is a reasonable expectation that the defendant, witness or evidence will become available in the near future;

(7) On motion of the prosecutor, the delay resulting when the court finds that the case is complex due to the number of defendants or the nature of the prosecution subject to the following:

(A) the prosecutor shall include in the motion the specific factual basis justifying the delay and the length of the delay sought: the defendant may file an objection within five calendar days of receipt of the prosecutor's motion: and the court may decide the motion without oral argument;

(B) the court shall grant the motion only if (i) the prosecutor establishes that due to the complexity of the case it is unreasonable to expect adequate preparation for pretrial proceedings or the trial itself within the time periods set forth in this Rule and (ii) the court finds that the interests of justice served by granting the delay outweigh the best interests of the public and the defendant in a speedy trial;

(C) the court ordinarily should grant the motion only when the case involves more than two defendants, novel questions of fact or law, numerous witnesses who may be difficult to locate or produce, or voluminous or complicated evidence;

(D) if the court grants the motion, the court shall specify the period of delay and shall set forth on the record, either orally or in writing, its findings as required under subparagraph (7)(B)(ii); and

(E) the court may grant the motion only with the approval of the criminal presiding judge.

(8) The time resulting from a severance of codefendants when that severance permits only one trial to commence within the time period for trial set forth in this Rule, subject to the following:

(A) except as provided in subparagraph (8)(B), the subsequent trial shall commence within 60 days of the conclusion of the previous trial;

(B) the court may extend the date for the commencement of the subsequent trial upon the request of the defendant, the defendant’s consent to a request by the

prosecutor, or a finding by the court upon motion of the prosecutor that there is good cause for the extension; and

(C) if the subsequent trial does not commence within 60 days or, if applicable, within the extended period, any additional time shall not be excluded.

(9) The time resulting from a defendant's failure to appear for a court proceeding;

(10) The time resulting from a disqualification or recusal of a judge, provided that the amount of excluded time under this subparagraph shall not exceed 30 days;

(11) The time resulting from a failure by the defendant to provide timely and complete discovery;

(12) The time for other periods of delay not specifically enumerated if the court finds good cause for the delay, provided that this provision shall be narrowly construed; and

(13) Any other time otherwise required by statute.

The failure by the prosecutor to provide timely and complete discovery shall not be considered excludable time unless the discovery only became available after the time established for discovery.

(j) Excludable Time Calculations. The court shall keep track of each and every instance of excludable time calculated pursuant to this rule, including the number of days excluded as determined by the judge, and ensure that all excludable time is accurately reflected in an appropriate judiciary case management system. The court shall provide notice to the defendant and prosecutor of the impending release date for the defendant at least 20 days prior to that release date. Counsel shall also keep track of excludable time and the pending release dates for an eligible defendant.

Adopted to be effective .

B. R. 3:10-2

Commentary

This new paragraph would address motion practice in cases where an eligible defendant has been detained. Paragraph (f) would provide for a time period when briefing, arguments and evidentiary hearings must be completed in cases where a motion is made in a case where the defendant is being detained. This new paragraph would provide that in those cases the record is to be completed promptly, but in no event later than 90 days after the filing of the notice of motion. Because there may be circumstances where this time period may need to be extended, the Committee is recommending that if the court finds that good cause exists to extend the time within which to complete the record, the time may be extended provided that the court sets forth on the record, whether orally or in writing, those facts that support its finding of good cause.

3:10-2. Time and Manner of Making Motion; Hearing on Motion

(a) … no change

(b) … no change

(c) … no change

(d) … no change

(e) … no change

(f) Motions Subject to R. 3:25-4(i)(3). In cases where an eligible defendant has been ordered to be detained pending trial, all briefing, arguments, and evidentiary hearings required to complete the record on a pretrial motion shall be completed promptly but in no event later than 90 days after the filing of the notice of motion, unless the court finds that good cause exists to extend the time within which to complete the record, and the court sets forth on the record, whether orally or in writing, those facts that support its finding of good cause.

NOTE: Source-R.R. 3:5-5(b)(2)(3) and (4); caption amended, former Rules 3:10-2, -3, -4, -5 and -6 amended, redesignated and incorporated into *R. 3:10-2* as paragraphs (c), (d), (e), (a), and (b) July 13, 1994 to be effective January 1, 1995; paragraph (a) amended April 12, 2016 to be effective May 20, 2016[.]; paragraph (f) adopted to be effective .

DISSENTING AND CONCURRING STATEMENTS

A. CONCURRING AND DISSENTING STATEMENTS BY HONORABLE MARTIN G. CRONIN, J.S.C.

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION
ESSEX VICINAGE

Chambers of
Honorable Martin Cronin
Judge

Veterans Court House
50 West Market Street, 8th Fl.
Newark, New Jersey 07102

February 26, 2016

Hon. Harry G. Carroll, J.A.D.
Justice W. J. Brennan Courthouse
583 Newark Avenue
Jersey City, NJ 07306-2395

Re: Concurrence with the Criminal Practice Committee's legislative recommendations to include (1) Aggravated Manslaughter, Manslaughter, Aggravated Sexual Assault, Sexual Assault, Robbery, and Carjacking as predicate crimes supporting a rebuttable presumption of detention, (2) a rebuttable presumption supporting release revocation, and (3) an affirmative right to an affordable bail.

Dear Judge Carroll:

As you are aware, a majority of the Criminal Practice Committee ("CPC") supports my proposals to recommend that our Supreme Court suggest legislative amendments to include (1) Aggravated Manslaughter, Manslaughter, Aggravated Sexual Assault, Sexual Assault, Robbery, and Carjacking as predicate crimes supporting a rebuttable presumption of detention in N.J.S.A. 2A: 162-19(b), (2) a rebuttable presumption supporting release revocation in, N.J.S.A. 2A: 162- 24 and (3) an affirmative right to an affordable bail in N.J.S.A. 2A: 162-17(c)(1).[1]

[1] Report of the Supreme Court Committee on Criminal Practice on Court Rules Necessary to Implement the Bail Reform Law, Part I, Pretrial Release (hereinafter "CPC I"); Report of the Supreme Court Committee on Criminal Practice on Court Rules Necessary to Implement the Bail Reform Law, Part II, Pretrial Detention and Speedy Trial, (hereinafter "CPC II"). A majority of the CPC recommended legislation implementing proposal one (vote 18 for, 8 against), proposal two (vote 15 for, 9 against) and proposal three (CPC I at 91-92; vote 19 for, 0 opposed, 9 abstentions). A majority of the CPC did not recommend substantively identical Rules for proposal one (CPC II; vote 11 for, 14 against, 1 abstention), proposal two or proposal three (CPC I at 91-92; vote 5 for, 20 opposed). The CPC did recommend the Attorney General's alternative Rule 3:4A which seeks to address the subject matter of proposal one. (CPC II, vote 16 for, 8 against).

Please accept my concurrence with the CPC majority's legislative recommendations.[2] It is respectfully submitted that unless these proposals are implemented there is a strong probability that operation of the Bail Reform Statute ("BRS")[3] as enacted will have an adverse, and potentially debilitating impact upon a court's ability to manage the risk of pretrial misconduct posed by the most dangerous persons awaiting trial, thereby undermining a court's ability to protect the public and to safely release everybody else awaiting trial. Such adverse impact would frustrate and potentially derail the shift to a risk-based system of pretrial justice which our legislature envisioned through enactment of the BRS.

Cognizant of these probable dire consequences, we[4] urge our legislature to implement these proposals through amendment of the BRS. We further urge our legislature to act sufficiently in advance of January 1, 2017 so that all criminal justice system participants may be adequately prepared to implement any accepted proposals, together with all other BRS and Rule requirements, before the statute's effective date.

(A) Introduction.

(i) Paradigm Shift to Risk-Based System.

Through constitutional amendment[5] and legislation, our state has boldly chosen to replace our present money or resource-based bail system with a risk-based system of pretrial justice.

This systemic change to a risk-based system was undertaken to simultaneously promote

[2] The CPC has "the task of recommending to the Supreme Court (a) amendments and additions to the Rules of Court, (b) policy statements (with respect to the rules), (c) suggestions for new legislation and statutory amendments as related to practice before the courts, and (d) other related non-rule matters." Operational Guidelines for Supreme Court Committees at 2–3 (Jan. 10, 2006).

[3] See L. 2014, c. 31 (S-946), codified at, N.J.S.A. 2A:162-15 et. seq.; N.J.S.A. 2B:1-7 to -10; N.J.S.A. 2B:1-5; N.J.S.A. 2B:1-11 to -13; & N.J.S.A. 2A:162-26 (hereinafter "Bail Reform Statute" or "BRS").

[4] The undersigned presented the three aforementioned proposals to the CPC. In this document, unless otherwise indicated, the collective "we" and "our" refer to those CPC colleagues who voted to recommend the implementation of these proposals through rulemaking. The rationale supporting each of these rule proposals was generally discussed during CPC meetings and is contained within this document. However, the undersigned authored the specific language of this document. Once this document is circulated among my CPC colleagues, the collective "we" and "our" shall also refer to those CPC colleagues who also sign on to one or more of these legislative proposals.

[5] See N.J. Const. art. I, ¶ 11, implemented by, L. 2014, c. 31. codified at, N.J.S.A. 2A:162-15 et. seq.; N.J.S.A. 2B:1-7 to -10; N.J.S.A. 2B:1-5; N.J.S.A. 2B1-11 to -13; & N.J.S.A. 2A:162-26.

societal interests in both personal liberty and public safety.[6] Since all persons awaiting trial pose some risk of pretrial misconduct, the BRS imposes upon courts the enormous responsibility of managing these risks as presented by each person awaiting trial.[7] Our first two proposals seek to provide courts with the practical "tools" they need to effectively manage these risks. Our third proposal seeks to ensure that these "tools" are actually utilized to protect the public.

(ii) Protecting the Public: Theory and Practice.

Based upon public safety concerns, a majority of our CPC colleagues support the substance of our first two presumption proposals.[8] Theoretically, the BRS provides courts with the *authority* to protect the public through preventive detention (N.J.S.A. 2A:162-19) and release revocation (N.J.S.A. 2A:162-24). However, these public safety concerns arise from a recognition that this authority will be sparingly exercised, *due to considerations unrelated to the danger of pretrial recidivism which the defendant poses*.[9] These practical considerations[10] arise from the more complex and time consuming hearings which the BRS's present procedures require an already strained judiciary to conduct. Our proposals seek to modestly relax these procedures as applied to the most dangerous persons awaiting trial.

Appreciation of the practical difficulties presented by the BRS's present procedures and how our proposals are designed to ameliorate these difficulties requires a description of the BRS's procedural framework, a topic to which we now turn.

[6] See Report of the Joint Committee on Criminal Justice, 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 11-12) (Mar. 10, 2014) (hereinafter "JCCJ").

[7] See 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 14-15). The forms of pretrial misconduct are recidivism, nonappearance, and interference with the integrity of the judicial process. Id. at 14. Each are addressed in the N.J.S.A. 2A:162-17, N.J.S.A. 2A:162-19, N.J.S.A. 2A:162-24. This document shall focus primarily on the first form, pretrial recidivism.

[8] See supra note 1.

[9] See infra p. 29. If courts had unlimited time and resources, then these practical difficulties would dissipate. However, our court system presently operates under both time and resource constraints. Our proposals are designed to operate within these constraints.

[10] The undersigned is somewhat familiar with these considerations by virtue of participating in federal detention hearings from 1989 through 1999 as an Assistant United States Attorney; presiding over juvenile detention hearings from 2006 through 2010 as a Superior Court Judge assigned to the Chancery Division; and presiding over bail hearings from 2001 through 2005 and from 2011 to the present as a judge assigned to the Criminal Division. As a member of the JCCJ, the undersigned also had the opportunity to observe detention hearings conducted in the District of Columbia.

(iii) Procedural Framework of the Bail Reform Statute.

The BRS establishes a strong preference for pretrial release.[11] It also establishes procedures for courts to follow in determining whether it is appropriate to preventively detain a defendant or to revoke their release. These procedures include burdens of persuasion and presumptions which, in turn, operate to satisfy these burdens. More specifically, one of two competing presumptions always applies under the BRS. The presumption of pretrial release applies, unless the presumption of detention applies.[12] This release presumption continues even if a court finds probable cause to believe that the defendant committed yet another offense while awaiting trial on the initial charge.[13] The generally applicable presumption of pretrial release may be rebutted or overcome only through the presentation of clear and convincing evidence that no release conditions can reasonably assure the public's safety.[14] This clear and convincing evidence standard is a highly rigorous burden of persuasion, exceeded in our legal system only by the beyond a reasonable doubt standard.[15] Historically, countervailing presumptions supporting preventive detention and release revocation were developed to address practical difficulties arising from application satisfying this rigorous standard.[16] The far less rigorous preponderance of the evidence standard is sufficient to rebut the

[11] See N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-17(b)(2) (presumption of release on least restrictive conditions).

[12] Compare N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-17(b)(2), N.J.S.A. 2A:162-19(e)(3) (release presumption) with N.J.S.A. 2A:162-19(b) (preventive detention presumption).

[13] Compare N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-17(b)(2), & N.J.S.A. 162-19(e)(3) (release presumption) with N.J.S.A. 2A:162-24 (release modification).

[14] See N.J.S.A. 2A:162-19(e)(3). Thus, to rebut the BRS's presumption of pretrial release, the State must present sufficient evidence to the court that clearly convinces it that there are no release conditions that can reasonably assure the public's safety. Id. Significantly, the BRS provides courts with a continuum of such conditions and creates a Pretrial Services Program (hereinafter "PSP") to supervise defendant compliance with these conditions. N.J.S.A. 2A:162-17(b)(2), N.J.S.A. 2A:162-25(d).

[15] The Model Jury Charge provides that: "[c]lear and convincing evidence is evidence that produces in your minds a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing as to cause you to come to a clear [conclusion] of the truth of the precise facts in issue. The clear and convincing standard of proof requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes you to be convinced that the allegations sought to be proved are true." See Model Jury Charge 1.19. (2011). The commentary to this Rule clarifies that, "[c]lear and convincing establishes a standard of proof falling somewhere between the traditional standards of 'preponderance of the evidence' and 'beyond a reasonable doubt.'"

[16] See infra pp. 6, 18-19.

BRS's limited presumption supporting preventive detention.[17]

(iv) BRS Procedural Framework; Purposes and Practical Consequences.

Detention hearings procedures serve two distinct purposes – (1) to provide the procedural due process protections of the accused's liberty interests which our Constitution guarantees[18] and (2) to advance often related but independent policy objectives.[19]

Concerning the former, courts have consistently rejected due process challenges to detention procedures utilizing rebuttable presumptions of detention.[20] Similarly, courts have consistently rejected due process challenges to release revocation based upon a probable cause finding that a defendant subsequently committed another offense while awaiting trial on the first offense.[21] Our proposed N.J.S.A. 2A:162-19(b) and N.J.S.A. 2A:162-24 function within the BRS's existing framework. Since our proposals employ procedures which are indistinguishable from others that have repeatedly withstood constitutional challenge, it is submitted that our proposals fully advance the first purpose of detention procedures – full protection of the liberty interests of person awaiting trial.

The latter purpose is often expressed as a policy to eliminate the possibility of "excessive" pretrial detention, which, in turn, is often defined as detention in excess of that necessary to reasonably assure public safety.[22] Seeking to effectuate this legitimate policy concern, virtually all

[17] See N.J.S.A. 2A:162-19(b), (e)(2). See Model Jury Charge 1.12 H (1998) (preponderance standard; "more likely true than not true").

[18] See United States v. Salerno, 481 U.S. 739, 750-51 (1987) (1984 Federal Bail Reform Act); United States v. Edwards, 430 A.2d 1321, 1333-34 (D.C. 1981), cert. denied, Edwards v. United States, 455 U.S. 1022 (1982) (1970 D.C. Bail Act).

[19] See infra pp. 18-19.

[20] See e.g., United States v. Jessup, 757 F.2d 378, 384-87 (1st Cir. 1985), partially abrogated on other grounds by United States v. Brian, 895 F.2d 810, 814 (1st Cir. 1990). In both the Federal Bail Reform Act and the D.C. Bail Act, the predicate crimes supporting a rebuttable presumption of detention extended far beyond formerly capital crimes or crimes otherwise punishable by life imprisonment. See infra pp. 22-23.

[21] See e.g., Mello v. Superior Court, 117 R.I. 578, 586-87 (1977), Paquette v. Commonwealth, 440 Mass. 121, 131-33 (2003), cert. denied, Paquette v. Massachusetts, 540 U.S. 1150 (2004). The Paquette Court emphasized that the defendant's release on the initial charge is not an absolute right, but rather one conditioned upon compliance with certain nonmonetary conditions. 440 Mass. at 126. This court further recognized that "the concept of conditional release would be meaningless if courts lacked the power to rescind release after release conditions have been violated." Id. at 129, quoting 1989 ABA Standards for Criminal Justice, Pretrial Release Standards, § 10-5.8(a) commentary at 129. The most fundamental of these conditions is the prohibition against committing another offense while released on the initial charge. See N.J.S.A. 2A:162-17 (b)(1)(a); 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 14).

[22] See infra pp. 18-19.

jurisdictions which enacted preventive detention statutes have included certain "prophylactic" procedures which exceed what the Constitution requires. As applied to preventive detention, these "prophylactic" procedures include elevated burdens of persuasion, omission of any presumptions supporting detention, or narrowly defining those predicate crimes supporting such a presumption.[23] Similar "prophylactic" procedures have also been applied to release revocation.[24] However, these *"prophylactic" procedures exact a cost with significant adverse consequences upon a court's ability to detain the "truly dangerous" and to thereby protect the public and safely release everybody else awaiting trial*.[25]

Some advocates may contend that our proposals go "too far" to protect the accused's liberty interests, but not "far enough" to protect the public. Focusing upon public safety, they emphasize that our Constitution permits far broader presumptions supporting both preventive detention and release revocation. Furthermore, these advocates may accurately observe that our proposals are so narrowly tailored that their application may only moderately increase the percentage of persons subject to a presumption supporting preventive detention or release revocation.[26] Our response is straightforward. We do not seek to facilitate the detention of more persons awaiting trial. We seek to facilitate the detention of the right persons.[27] They are the limited group of "truly dangerous" persons who present unmanageable risks of pretrial misconduct.

To identify these "truly dangerous" persons, our proposals draw upon their conduct while on release (for revocation) and recent advances in social science (for preventive detention). As to these defendants, our proposals establish procedures that are sufficiently "workable" that they will be utilized to secure their detention, thereby protecting the public. Once the truly dangerous are detained, then everyone else awaiting trial can be safely released, thereby promoting their liberty

[23] See infra pp. 19, 20-21.
[24] See infra pp. 22-24.
[25] See infra pp. 21.
[26] See infra p. 9, estimating a 7.96 % increase in defendant cases eligible for preventive detention presumption and p. 13 infra, estimating that 5.36% increase in defendant cases eligible for our proposed release revocation presumption.
[27] See N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-19. As Chief Justice Rehnquist observed, "[i]n our society, liberty is the norm, and detention prior to trial is the carefully limited exception." Salerno, 481 U.S. at 755, cited in, 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 14 (guiding principle one)).

interests.[28]

We shall now define the narrow scope of our proposals.

(B) Narrowly-tailored scope of Rebuttable Presumption Proposals.

(i) The proposed amendment of *N.J.S.A.* 2A:162-19(b)(1) is narrowly tailored to only add aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery, and carjacking as predicate crimes supporting a presumption of preventive detention.

Preventive detention is the centerpiece of any risk-based system of pretrial justice. It empowers courts to detain the limited group of persons who are simply too dangerous to be released while awaiting trial. N.J.S.A. 2A:162-19(b) creates a rebuttable presumption supporting preventive detention upon a judicial finding of probable cause that the defendant committed any crime for which he would be subject to an ordinary[29] or extended[30] term of life imprisonment upon conviction (hereinafter "life imprisonment only" presumption).

Our proposal operates within the BRS's procedural framework designed to encourage pretrial release. To overcome the otherwise applicable "clear and convincing" evidence standard supporting pretrial release, this framework employs a countervailing rebuttable presumption supporting detention.[31] Upon a judicial finding of probable cause, our proposal would modestly expand the predicate offenses supporting this presumption to include:

[28] See infra note 103 (quoting Judge Morrison paraphrasing Salerno).

[29] N.J.S.A. 2A:162-19(b)(1). Ordinary terms of life imprisonment may be imposed upon conviction for the following offenses: Murder, N.J.S.A. 2C:11-3; Terrorism, N.J.S.A. 2C:38-2; Possession of Chemical Weapons or Nuclear Devices, N.J.S.A. 2C:28-3; Racketeering, N.J.S.A. 2C:41-2; Attempt or Conspiracy to Murder 5 or More Persons, N.J.S.A. 2C:5-4(a); Human Trafficking, N.J.S.A. 2C:13-8(d) and Leader of Narcotics Trafficking Network, N.J.S.A. 2C:35-3.

[30] N.J.S.A. 2A:162-19(b)(2). Extended terms of life imprisonment may be imposed on the following grounds: discretionary extended term (persistent offender) for a first degree offense, N.J.S.A. 2C 44-3(a); discretionary extended term (professional criminal) for a first degree offense, N.J.S.A. 2C:44-3(c); discretionary extended term (crime for payment) for a first degree offense, N.J.S.A. 2C:44-3(b); discretionary extended term (use of a stolen motor vehicle during commission of certain enumerated first degree offenses), N.J.S.A. 2C:44-3(f); mandatory extended term (repeat Graves Act offender for first degree Graves Act Offenses), N.J.S.A. 2C:43-6(c); mandatory extended term (repeat assault firearm) for first degree firearms offenses, N.J.S.A. 2C:43-6(g); mandatory extended term (three strikes for repeat violent offenders) for enumerated first degree crimes, N.J.S.A. 2C:43-7.1(b); mandatory extended terms for enumerated offense committed while released pretrial for another enumerated offense, N.J.S.A. 2C:44-5.1; and mandatory extended term (for repeat drug offender), N.J.S.A. 2C:43-6(f).

[31] See, N.J.S.A. 2A:162-17(b)(2), 5(e)(3) (release presumption), N.J.S.A. 2A:162-19(b) (preventive detention presumption).

1) First degree aggravated manslaughter, N.J.S.A. 2C:11-4(a);

2) Second degree manslaughter, N.J.S.A. 2C:11-4(b);

3) First degree aggravated sexual assault, N.J.S.A. 2C:14-2(a);

4) Second degree sexual assault, N.J.S.A. 2C:14-2(b),

5) Second degree sexual assault, N.J.S.A. 2C:14-2(c)(1);

6) First degree robbery, N.J.S.A. 2C:15-1; and

7) First degree carjacking, N.J.S.A. 2C:15-2.

As previously noted, a majority of the CPC agrees with this legislative recommendation.[32] The scope of this presumption was repeatedly scaled back during the Committee's deliberations.[33] The present proposal is squarely supported by "best practices" as disclosed to the CPC by our nation's leading expert in pretrial release decision-making, Dr. Marie Van Nostrand. Only after hearing Dr. Van Nostrand's presentation, did I modify this proposal to include only the seven violent crimes listed above. Significantly, these "best practices" were not available to the Legislature when it enacted the BRS in August of 2014.

After completing an unprecedented analysis of national and statewide data concerning the conduct of persons released pretrial, a team of researchers led by Dr. Van Nostrand designed an objective risk screening tool (the Public Safety Assessment ("PSA")).[34] Dr. Van Nostrand validated this PSA as predictive of recidivism, violent recidivism, and nonappearance. Among those objective factors identified as predictive of violent recidivism was "current violent offense."[35] Aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery and carjacking are "violent offenses" which this research identified as predictive of violent recidivism. To assist courts

[32] See CPC II reflecting the majority's approval of the substantively similar alternative *prima facie* rule and the substantively identical legislative recommendation.

[33] The CPC initially considered a proposed Rule 3:4A containing a broader presumption with predicate offenses extending to all nineteen (19) No Early Release Act offenses. See N.J.S.A. 2C:43-7.2 (hereinafter "NERA"). It also considered a subset of these NERA offenses (manslaughter, robbery carjacking, kidnapping) together with two offenses often charged together in nonfatal shootings (Aggravated Assault and Possession of a Weapon for an Unlawful Purpose). After hearing Dr. Van Nostrand's presentation, the undersigned scaled back our proposal to its present form.

[34] Marie Van Nostrand, Ph.D., "Public Safety Assessment Implementation in New Jersey" (hereinafter "PSA"). The PSA is designed to *measure* the risk of pretrial misconduct. This research team was selected and supported by the John and Laura Arnold Foundation as part of its Criminal Justice Initiative. This initiative aims to reduce crime, increase public safety, and ensure the criminal justice system operates as fairly and cost-effectively as possible.

in managing the risks of pretrial misconduct, Dr. Van Nostrand's research team also designed the New Jersey Decision Making Framework ("DMF").[36] Based upon an assessment of risk levels determined though analysis of objective factors, the DMF recommends pretrial release on nonmonetary conditions for 79.2% of all eligible defendants.[37]

The violent crimes of aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery and carjacking are among those for which the DMF would caution that "release is not recommended or, if released, released on maximum conditions." Alternatively stated, the DMF does not recommend pretrial release when there is probable cause to believe that the accused committed offenses including aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery and carjacking.[38] *Accordingly,* ***our proposal is limited to adding****, as predicate offenses supporting a rebuttable presumption of detention,* ***only those offenses which social science supports a recommendation of pretrial detention—aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery and carjacking***.[39]

In addition to this recent social science research, our proposal is consistent with societal conceptions of crimes with the most adverse effect upon public safety. These conceptions are amply reflected in Constitutional traditions. Under our state Constitution, capital crimes were defined as crimes punishable by death.[40] With repeal of the death penalty, formerly capital crimes became

[35] See PSA.

[36] Marie Van Nostrand, Ph.D., "Decision Making Framework" (hereinafter "DMF"). The DMF is designed to *manage* the risk of pretrial misconduct.

[37] The DMF estimates a 79.2% release rate. "Eligible defendant" is defined as a person charged in a complaint-warrant. See N.J.S.A. 2A:162-15. Dr. Van Nostrand calculated a 71.6% release rate under our present resource-based (money bail) system for persons arrested on a complaint-warrant. See PSA.

[38] See DMF.

[39] For those defendants posing the highest risk of pretrial misconduct, the DMF's most rigorous recommendation is "release not recommended; if released, maximum conditions." We interpret this to be the functional equivalent of a detention recommendation. The DMF also does not recommend release for escape (N.J.S.A. 2C:29-5(a)). Despite this inclusion within the DMF, a majority of our CPC colleagues did not substantively support including escape as a predicate offense supporting preventive detention. To preserve substantive majority support for legislation, escape is not included in our proposal. Although the DMF does not recommend release for second degree robbery (N.J.S.A. 2C:15-1), that offense was not submitted for Committee vote.

[40] See State v. Johnson, 61 N.J. 351, 364 (1972).

punishable by life imprisonment.[41] While the BRS's presumption is limited to crimes presently punishable by life imprisonment, it does not extend to the crimes of manslaughter, rape and robbery which were punishable by death when our 1844 Constitution was ratified.[42] Since carjacking is essentially the robbery of a motor vehicle,[43] it is reasonable to conclude that it would have also been a capital offense.

Seeking to quantify the scope of the "life imprisonment only" presumption and the presumption which we propose, the caseload of a representative New Jersey trial court was analyzed. This analysis revealed that 13 of 289 indicted defendant cases were charged with offenses punishable by an ordinary term of life imprisonment (4.15%) and that an additional twenty-eight defendant cases were charged with offenses punishable by an extended term of life imprisonment (9.69%). Hence, the "life imprisonment only" detention presumption would extend to only 13.84% of that caseload. Our proposal would extend this presumption to an additional 23 defendant cases or 7.96% of the caseload. Hence, it is estimated that acceptance of our proposal would extend a presumption supporting detention to 21.80% of the caseload. Significantly, this estimated rate is within 1% of the 20.8% of the eligible defendants for whom Dr. Van Nostrand's DMF cautions "release not recommended."[44] It is submitted that this caseload analysis reveals that our proposal is narrowly tailored to reflect the most recent social science and to include as predicate offenses only those crimes which have the most adverse effect upon public safety.

(ii) The proposed amendment of *N.J.S.A.* 2A:162-24 is narrowly tailored to create a rebuttable presumption of release revocation for persons; (a) who are released on any detainable offense and are charged with subsequently committing a NERA offense or; (b) are released on a NERA offense and are charged with subsequently committing a detainable

[41] Capital punishment was abolished on December 17, 2007. L. 2007, c. 204 codified in N.J.S.A. 2C:11-3; N.J.S.A. 2B:23-13; & N.J.S.A. 30:4-123.51.

[42] See Laws of the State of New Jersey, February 17, 1829 and March 7, 1839. These societal conceptions of danger are further reflected in legislative enactments which currently impose mandatory eighty-five percent parole ineligibility terms and post release supervision terms for persons convicted of NERA offenses, including manslaughter, rape, robbery and carjacking. See N.J.S.A. 2C:43-7.2. Our legislature has also imposed more restrictive bail conditions upon persons accused of these crimes, by rendering those persons ineligible to post 10% cash alternative to a secured bond. See N.J.S.A. 2C:162-12a.

[43] N.J.S.A. 2C:15-2.

offense.

Although N.J.S.A. 2A:162-24 authorizes release revocation for noncompliance with release conditions, this statute does not create any presumption supporting such revocation. Since no presumption supporting detention applies to that initial charge for which the defendant was initially released, the presumption of release continues on that charge for which release revocation is being considered.[45]

The language of N.J.S.A. 2A:162-24 reflects an acknowledgment that that all release conditions are not the same in terms of the severity of consequences arising from their violation. More specifically, the statute distinguishes between "violations," such as failure to abide by a curfew, and "criminal acts," such as committing a carjacking while awaiting trial.[46] However, *the same procedures apply to revocation proceedings based upon curfew violations and those based upon the commission of a carjacking while released pretrial*. Responding to the absence of any language within N.J.S.A. 2A:162-24 expressly authorizing a court to modify the conditions of release based upon defendant's compliance or non-compliance with release conditions, a majority of this committee appropriately recommended to fill that statutory "gap" through rule-making.[47] Our proposal responds to a similar "gap" in this statute by creating a rebuttable presumption supporting release revocation.

Our proposed presumption is dependent upon a judicial finding of probable cause to believe that:

> (a) while on pretrial release for any enumerated crime or offense for which preventive detention may be sought,[48] the defendant committed any NERA

[44] See DMF

[45] See N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-17(b)(2) (release presumption). Even if the N.J.S.A. 2A:162-19(b) preventive detention presumption applied to the initial charge, defendant's release on that charge reflects either that the State did not move for preventive detention or that the defendant rebutted that presumption.

[46] In determining whether to revoke pretrial release, N.J.S.A. 2A:162-24 directs courts to consider "all relevant circumstances including but not limited to *the nature and seriousness of the* violation or *criminal act committed*…."

[47] See CPC I at 75.

[48] N.J.S.A. 2A:162-19(a)(1-6) enumerates the predicate offenses for which preventive detention may be sought under the BRS. NERA offenses are included among these predicate crimes. N.J.S.A. 2A:162-19(a)(1). These enumerated predicate crimes do not extend to unspecified crimes which require a particularized demonstration of danger under N.J.S.A. 2A:162-19(a)(7).

offense[49] or a substantially equivalent crime or offense under federal law or the law of any other state; or

(b) while on pretrial release for any NERA offense, the defendant committed any offense for which preventive detention may be sought or a substantially equivalent crime or offense under federal law or the law of any other state.

A majority of the CPC agrees with this legislative proposal.[50] This CPC majority support reflects acknowledgment of the acute danger to the community posed by pretrial recidivism in New Jersey. The gravity of this danger is reflected in Essex County surveys reflecting pretrial recidivism rates of 34.8% in 2005 and 28.1% in 2010.[51] These surveys are summarized below by year and by involvement in the Criminal Justice System (hereinafter "CJS"):

	2005	**%**	**2010**	**%**
TOTAL	601	100%	580	100%
Pending Charges	212	**34.8%**	163	**28.1%**
Pending Sentencing	33	5.4%	18	3.1%
On Probation	103	16.9%	89	15.3%
On Parole	39	6.4%	42	7.2%
In CJS	301	49.3%	253	43.6%

These recidivism rates are consistent with the 32% rate which Dr. Van Nostrand calculated based on

[49] N.J.S.A. 2C:43-7.2(d) enumerates the nineteen (19) NERA offenses which are: murder, aggravated manslaughter/manslaughter, vehicular homicide, aggravated assault, disarming a police officer, kidnapping, aggravated sexual assault, sexual assault, robbery, carjacking, aggravated arson, burglary, extortion, booby traps, drug-induced deaths, terrorism, possession of chemical weapons, and racketeering.

[50] See supra note 1.

[51] McMahon, CJP Bail Data Analysis for 2005, and 2010 (Aug. 12, 2010). See also, Athanaspolus, Bail Research Project (Feb. 3, 2006). These Essex County recidivism rates were calculated for the 580 defendants who were arraigned at Central Judicial Processing ("CJP") Court in July of 2010 and for the 610 defendants who were arraigned there in July 2005. Id. The undersigned expresses his appreciation and gratitude to following individuals who have conducted legal research and data analysis which was utilized in this document: Jacqueline McMahon, Esq., Michael Mulanaphy, Esq., Rebecca Ryan, Esq., Israel Klein, Esq., Ioannis S. Athanasopoulos, Esq., Theresa Houthuysen, Marlene Jupinka, Al Restaino, and Michael Sheflin.

a sample size that was larger numerically (68,512), geographically (statewide), and temporally (2009–2010).[52] These New Jersey recidivism rates far exceed the "disturbing" rates of 13% to 21% which motivated Congress to embrace presumption supporting preventive detention and release revocation in the 1984 Bail Reform Act.[53]

The commission of another crime while on release is the form of pretrial misconduct which most directly disrupts public safety. The CPC initially considered a broader Rule revocation presumption which mirrored the federal statute by extending the presumption to all felonies committed while the defendant was awaiting trial.[54] Consistent with "best practices," the scope of this presumption was scaled back to focus only upon particularly "serious" crimes.[55] This limited scope is quantified by the caseload analysis reflecting that our proposed presumption would theoretically[56] apply to no more than approximately 55 defendant cases (or 19.20%) of the 289 defendant-cases.[57]

It has been suggested that there is no need for this presumption supporting release revocation in view of presumption supporting preventive detention. This suggestion ignores "lessons learned"

[52] See PSA.

[53] S. Rep. No. 225, 98th Cong., 1st Sess. 6 (1984). This federal statute was enacted in response to "a deep public concern" about the "growing problem of crimes committed by persons on [pretrial] release." Id. at 6. These rates also far exceed the 12% recidivism rate for adults in the District of Columbia. Pretrial Justice Institute, "The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth" at 2 (2010) (hereinafter "PJI"). They also exceed the 5% recidivism rate for juveniles in New Jersey. See 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 51-56); see also infra pp. 30-31 (discussing application of risk-based principles to New Jersey juveniles).

[54] See 18 U.S.C. 3148(b)(2) (any felony).

[55] Cf. D.C. Code § 23-1329 (b)(2) (dangerous crime or crime of violence). Accord 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 14 n.17 (recognizes District of Columbia procedures as "best practices")).

[56] This estimation assumes that all of these defendants were initially released on nonmonetary conditions. Since all of them were initially charged with offenses for which detention may be sought and some of them are subject to the "life imprisonment only" presumption supporting preventive detention, it is reasonable to conclude that some of these defendants would have been preventively detained and therefore not potentially subject to release revocation.

[57] Review of the 8/22/13 caseload reflected that 161 of the 286 defendant cases (56.29%) involve offenses that are not specifically enumerated in N.J.S.A. 2A:162-19(a)(1)–(6) as predicate offenses for preventive detention. More specifically, these 161 defendant cases involve allegations of CDS, eluding, failure to register as a sex offender, burglary, theft, receiving stolen property, forgery, fraud, and impersonating a law enforcement officer. Accordingly, the remaining 128 defendant cases (43.71%) involved predicate offenses for preventive detention. Since 34.94% of this caseload alleges NERA offenses, the 55.48 defendant cases was computed by multiplying the percentage of defendant cases eligible for preventive detention

from the evolution of release revocation presumptions in other jurisdictions.[58] More fundamentally, this suggestion is premised upon the conflation of two distinct forms of detention—one arising from a judicial decision not to initially release a defendant awaiting trial ("preventive detention"),[59] and another arising from a judicial decision to place a defendant back into detention for failure to comply with the initial release conditions ("release revocation").[60] The critical distinction between the two forms of detention have been drawn by several courts which have rejected constitutional challenges to the revocation of bail or pretrial release for failure to comply with conditions designed to protect the public.[61] As these courts emphasize, preventive detention addresses potential *future* misconduct; release revocation addresses demonstrated *past* misconduct.[62]

The N.J.S.A. 2A:162-19(b) presumption supporting preventive detention has limited application to persons charged with committing an additional offense while released pretrial. This limited application is amply demonstrated through analysis of the previously referenced Essex County surveys which reflected pretrial recidivism rates of 34.8% in 2005 and 28.1% in 2010.[63] Although this Essex County data reflects that 212 defendants were arrested in 2005 after being released on an earlier offense, the present "life imprisonment only" presumption supporting

(43.71%) by the percentage charged with NERA offenses (34.94%) and then applying the resulting percentage to the total of 289 defendant cases.

[58] See infra p. 23.

[59] N.J.S.A. 2A:162-19(b) and R. 3:4A.

[60] N.J.S.A. 2A:162-24.

[61] See, e.g., Mello v. Superior Court, 117 R.I. at 581-83; Paquette v. Commonwealth, 440 Mass. at 125-127; State v. Ayala, 222 Conn. 352-53, 349 (1992).

[62] Seizing upon this distinction between past and future acts, the Supreme Judicial Court of Massachusetts in Paquette v. Commonwealth emphasized that "the liberty interest of a person admitted to bail is conditional." 440 Mass. at 126. This court further observed that "the concept of conditional pretrial release would be meaningless if courts lacked the power to rescind release "after release conditions have been violated." Id. at 129, quoting, 1989 ABA Standard, Sec. 10-5.8(a), commentary at 129. Applying these principles, the Paquette Court concluded that "[a] defendant cannot be heard to complain that his constitutional right to liberty has been violated when continued freedom was entirely within his own control, and the deprivation thereof was an inevitable consequence of his alleged failure to conform his conduct… to the explicit conditions of his earlier release." Id. at 129. The Paquette Court further reasoned that through commission of this serious offense, the defendant "forfeited" his rights to pretrial release on his initial charge. Id. at 126. Cf. State v. Byrd, 198 N.J. 319, 340-41 (2009) (forfeiture of constitutional right to confrontation through pretrial misconduct). Accord, Edwards, 430 A.2d at 1332 (preventive detention is "forward looking"). This distinction further reveals that the PSA and DMF designed by Dr. Van Nostrand have less direct application to release revocation. The PSA is predictive of future misconduct. In contrast, release revocation responds to past misconduct. The DMF only focuses upon setting release conditions for the new offense. See PSA (lists pending charge as a factor predictive of future criminal activity). Release revocation focuses upon the old offense.

[63] See supra note 51.

preventive detention would apply to only twenty-nine (29) of these defendants. For the remaining 183 defendants, the presumption of pretrial release would apply, notwithstanding a judicial finding of probable cause to believe the defendant committed a second offense while on pretrial release for the initial offense. These 183 defendants could include a defendant for whom a court finds probable cause to believe committed Manslaughter while he was on pretrial release awaiting trial on another Manslaughter charge. Our proposed presumption would apply to this multiple manslaughter example.

In addition to this manslaughter example, it is submitted that the merit of our proposal is further illustrated by the following hypothetical:

> Assume that the defendant is charged with stabbing his estranged spouse in the arm with a knife and threatening to slit her throat. A judicial officer finds probable cause to believe that the defendant committed third degree aggravated assault, third degree possession of a weapon for an unlawful purpose, and third degree terroristic threats.[64] The court releases the defendant on nonmonetary conditions, including the standard condition that he not commit another crime or offense while released pretrial and the special condition of no contact with the victim. Three weeks later, the defendant is charged with kidnapping the victim of the earlier assault. A judicial officer finds probable cause to believe that the defendant committed first degree kidnapping.[65]

Since kidnapping is not a predicate offense triggering a presumption of detention,[66] the presumption of release would apply to this second offense committed while release on the initial assault charge. The presumption of release also continues to apply to this initial assault charge, notwithstanding a probable cause finding that the defendant subsequently kidnapped the same victim.

[64] See N.J.S.A. 2C:12-1(b)(2) (bodily injury with a deadly weapon); N.J.S.A. 2C:39-4(d) (knife); and N.J.S.A. 2C:12-3(b) (threat). Although these offenses are not specifically enumerated in N.J.S.A. 2A:162-19(a)(1)–(5), the domestic relationship between the defendant and alleged victim qualifies these offenses as detention motion predicates. See N.J.S.A. 2A:162-19(a)(6) (domestic violence). Assume that the probable cause finding was based upon evidence that police responded to a 911 call, arrested the defendant in the victim's apartment, and recovered a knife from his person. He was identified by the victim at the scene.

[65] See N.J.S.A. 2C: 13-1(b)(2). This is a N.E.R.A. offense. See N.J.S.A. 2C:43-7.2(d)(6). Assume that the probable cause finding was based upon evidence that neighbors observed defendant accosting the victim in front of her home and forcing her into a car which sped from the scene. Hours later, police officers from an adjoining town stopped this vehicle operated by the defendant with the victim bound and gagged in the back seat.

[66] Further assume that the defendant has no prior felony convictions and therefore would not be subject to an extended term of life imprisonment. See supra p. 7. Kidnapping is not a predicate offense supporting a presumption of preventive detention under N.J.S.A. 2A:162-19(b), the CPC's recommended R. 3:4A, or our proposed R. 3:4A.

To revoke release on the initial assault charge, N.J.S.A. 2A:162-24 requires a judicial finding of (1) probable cause to believe that the defendant committed the kidnapping offense and (2) clear and convincing evidence that there are no conditions of release on the assault charge that would reasonably assure safety of the public and the victim. The court has already found that there are such conditions, as the court previously ordered defendant's initial[67] release on this assault charge. Moreover, the availability of more rigorous release conditions (e.g., electronic monitoring) and of a Pretrial Services Program to supervise compliance with these conditions renders the "clear and convincing" evidence finding more nuanced and potentially time consuming at a revocation hearing.

Our proposal seeks to properly return the focus in release revocation proceedings to the defendant's demonstrated *past* conduct in those limited circumstances where that past conduct is supported by a probable cause finding that the defendant committed a "serious" offense while awaiting trial on another "serious" offense.[68] Our focus upon serious past conduct is supported by the express language of N.J.S.A. 2A:162-24 which requires courts during revocation proceedings, to consider "all relevant circumstances including but not limited to *the nature and seriousness of the* violation or *criminal act committed*…." Returning to the hypothetical, commission of the kidnapping is properly viewed as *past* conduct because it already occurred when the court is considering whether to revoke his release on the initial assault charge.

Significantly, when revocation is sought for the violation of a release condition other than the commission of another "serious" offense, our proposed presumption supporting release revocation does not apply. We contemplate that those violations, such as noncompliance with curfew restrictions, would be frequently addressed through progressive modification to more rigorous release conditions. If non-compliance continues, the release revocation proceedings could be initiated[69] subject to the otherwise application presumption of release. Even in those limited

[67] The new offense is a change in circumstances occurring after this initial release decision. Our proposed presumption fully responds to this change.

[68] These "serious" offenses under our proposal are those specifically enumerated offenses for which detention may be sought, N.J.S.A. 2A:162-19(a)(1)-(6), and N.E.R.A. offenses, N.J.SA. 2C:43-7.2, which, in turn, are first among those enumerated offenses, N.J.S.A. 2A:162-19(a)(1). They do not extent to the non-enumerated crimes which require an additional prosecutorial demonstration of "serious risk." N.J.S.A. 2A:162-19(a)(7).

[69] Emphasizing a court's inherent authority to enforce its own orders, the undersigned proposed to include in R. 3:26-2(d)(1) that the court "on its own motion" may initiate a release revocation proceeding . United States v. Fernandez, 81 S. Ct. 642,

occasions when our proposed presumption would apply, release revocation is not inevitable, as our proposed presumption is rebuttable.

It is submitted that this hypothetical and the multiple manslaughter example further illustrate that there is a gaping "gap" in N.J.S.A. 2A:162-24 which our proposed rebuttable presumption supporting release revocation would "fill."

(C) The Unintended Cost of "Prophylactic" Procedures and corresponding need for "Workable" Procedures: The District of Columbia and Federal Experience.

Our three interrelated proposals were modeled after the reforms implemented more than a decade ago in the District of Columbia and in our Federal District Courts.[70] Hence, analysis of their reforms place our proposals in context.

(i) Expanded Presumption Supporting Preventive Detention and Affordable Bail.

Seeking to address the adverse effect of money bail upon the poor, Congress enacted the District of Columbia Bail Agency Act of 1966 (hereinafter "1966 DC Bail Act").[71] This statute expressly provided that flight risk is the sole consideration in deciding whether to release a defendant pretrial and in setting the amount of money bail.[72] It expressly prohibited consideration of danger to the community in making these decisions.[73] However, this danger did not go away. To the contrary, the crime rate in the District of Columbia skyrocketed, nearly tripling in a four (4) year period.[74] Congress expressed particular concern regarding the rise in "common street crime" such as robbery

644 (1961). Accord Paquette, 440 Mass. at 128; D.C. Code § 23-1329(b)(1) (2001) (expressly authorizes court motion). This proposal is further supported by the express language N.J.S.A. 2A:162-15 (Notes: Effective Dates) which provides that "nothing shall be construed to affect the court's **existing** authority to revoke pretrial release prior to the effective date of [the BRS]" (emphasis added). For these reasons, the undersigned dissents from the CPC's decision not to adopt this proposal.

[70] Compare supra p. 1 (our proposals) with infra pp. 18-23 (District of Columbia and Federal reforms).

[71] Pub. L. No. 89-519, 80 Stat. 327 (1966), discussed in, 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 35).

[72] See S. Rep. No. 225, 98th Cong., 1st Sess. 4 (1984); 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 35 -36).

[73] See S. Rep. No. 225, 98th Cong., 1st Sess. 4-5 (1984); 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 36).

[74] See H.R. Rep. No. 907, 91st Cong., 2d Sess. 81 (1970) (chart reflects approximately 12,000 index crimes in June 1966 and approximately 35,500 in December 1969).

and rape.[75] The rate of reported robberies more than tripled and the rate of reported rapes more than doubled.[76] Particularly alarming was the recidivism rate for persons indicted for robbery – "nearly 70 percent of those released prior to trail were rearrested and charged with a subsequent offense."[77]

Since this danger persisted, the 1966 DC Bail Act imposed an "agonizing decision" upon courts before whom stood "an obviously dangerous defendant."[78] The court could either ignore this danger or address it through the *sub rosa* consideration of this danger in setting the amount and form of money bail.[79] District of Columbia officials later acknowledged that "notwithstanding the wording of the 1966 DC Bail Act," financial bond continued to be used as a means of detaining high risk accused."[80] In other words, since the 1966 DC Bail Act did not provide courts with any "tools" to address this community danger, it was addressed *sub rosa* through bail set so high that it resulted in pretrial detention.[81]

Responding to the failure of the 1966 DC Bail Act[82] to address the danger to the community posed by pretrial recidivism, Congress enacted our nation's first preventive detention statute four years later.[83] Congress faced several challenges in crafting the preventative detention provisions within the 1970 DC Bail Act. At that time, the social science mechanisms designed to predict future criminal activity were being developed and had not yet been validated.[84] Since court procedures

[75] See H.R. Rep. No. 907, 91st Cong., 2d Sess. 89 (1970).
[76] Id.
[77] Id. at 82-83.
[78] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 37). Accord S. Rep. No. 225, 98th Cong., 1st Sess. 10 (1984).
[79] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 37). See also S. Rep. No. 225, 98th Cong., 1st Sess. 5 (1984).
[80] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 37).
[81] See 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 39–43 (discusses evolution of "workable procedures")).
[82] Pub. L. No. 89-519, 80 Stat. 327 (1966), incorporating by reference Pub. L. No. 89-465, 80 Stat. 214 (1966).
[83] Pub. L. No. 91- 358, 84 Stat. 642 (1970).
[84] Despite this understandable concern, the United States Supreme Court has repeatedly observed that, "there is nothing inherently unattainable about a prediction of future criminal conduct." Shall v. Martin, 467 U.S. at 278, quoted in, Salerno, 481 U.S. at 571. Congress cited advancements in social science in support of the 1984 Federal Bail Reform Act. See S. Rep. No. 225, 98th Cong., 1st Sess. 9 (1984) ("The presence of certain combinations of offense and offender characteristics, such as the nature and seriousness of the offense charged, the extent of prior arrests and convictions,… have been shown in studies to have a strong positive relationship to predicting the probability that a defendant will commit a new offense while on release."). It is submitted that Dr. Van Nostrand's validated PSA is the culmination of these social science advancements.

designed to protect the accused's due process rights in a preventive detention context had not yet been implemented anywhere, Congress was unsure how these procedures would operate in the "real world." Accordingly, Congress was understandably concerned that this first preventive detention statue would result in "excessive" or "unjustified" detention—detention beyond that which reasonably assures the community's safety.[85] Accordingly, Congress included certain procedural safeguards which were "prophylactic" in the sense that they exceeded what the Constitution requires and were inserted for the policy reason of minimizing the potential of "excessive" detention.[86] For example, while the constitution requires "probable cause" to believe that the defendant committed a predicate offense for which detention is sought,[87] the 1970 DC Act imposed the higher "substantial probability" standard.[88] Moreover, this statute contained a presumption supporting pretrial release which could only be overcome by clear and convincing evidence.[89] These "prophylactic" procedures also extended to the omission of any presumption supporting preventive detention[90] or release revocation.[91] "Lessons learned" from evolution of pretrial release practices in the District of

[85] See 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 38). 2007 ABA Standard, comment at 127 (elevated burden of persuasion imposed "to emphasize the deliberately limited scope of using secure detention").

[86] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 38-39). Referring to these "prophylactic" procedural safeguards, Congress acknowledged "that this legislation incorporated standards far above the minimum necessary to avoid any possible conflict with the due process clause," quoted in, 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 39). See also Edwards, 430 A.2d at 1339.

[87] See United States v. Salerno, 481 U.S. 739, 749-50 (1987); Gerstein v. Pugh, 420 U.S. 103, 117-19 (1975); United States v. Edwards, 430 A.2d 1321, 1336-37, 1339 (D.C. Cir. 1981).

[88] Pub. L. No. 91- 358, 84 Stat. 644, 645 (1970) (codified as amended at D.C. Code 23-1322(b)(2)(c)). When Congress later discarded this standard, it observed that "while this "substantial probability" requirement might give some additional measure of protection against the possibility of allowing pretrial detention of defendants who are ultimately acquitted, the Committee is satisfied that the fact that the judicial officer has to find probable cause will assure the validity of the charges against the defendant, and that any additional assurance provided by a "substantial probability" test is outweighed by the *practical problems* in meeting this requirement at the stage at which the pretrial detention hearing is held." S. Rep. No. 225, 98th Cong., 1st Sess. 18 (1984) (emphasis added), quoted in 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 40-41).

[89] Pub. L. No. 91- 358, 84 Stat. 642, 642-43 (1970) (codified as amended at D.C. Code § 23-1321(a)); Pub. L. No. 91- 358, 84 Stat. 644 (codified as amended at D.C. Code § 23-1322).

[90] Pub. L. No. 91- 358, 84 Stat. 644 (1970) (codified as amended at D.C. Code § 23-1322(b)).

[91] Pub. L. No. 91- 358, 84 Stat. 649 (1970) (codified as amended at D.C. Code § 23-1329). This statute also required clear and convincing evidence that the accused violated a release condition. Id. Until 2001, this standard continued to apply for all release violations other that the commission of another crime. Since 2001, a probable cause standard applies to violations based upon these crimes. See 1999 D.C. Stat. 310 § 2(d). This 2001 amendment also included a rebuttable presumption in

Columbia establish that *these "prophylactic" procedures exacted an unintended, but debilitating, cost upon a court's ability to protect the public and safely release virtually everyone else awaiting trial.*

Because of these "fairly elaborate due process procedures," Congress later acknowledged that the 1970 DC Bail Act was "infrequently used."[92] The government moved to preventively detain less than 1% of all defendants who were charged with committing qualifying offenses.[93] In 1978, scholarly commentators observed that that "[t]he reason frequently suggested for the rare use and present dormant status of the preventive detention provision is the range of procedural guarantees, which prove to be a critical addition to an already overworked and understaffed court system. *The increase in manpower, time and space necessary to administer the pretrial detention hearings has made such hearings impractical in all but a few cases.…*"[94]

Since the danger of pretrial recidivism did not evaporate, how was danger addressed under the 1970 DC Bail Act? The unsettling answer, provided by these commentators, was that "the dormancy of preventive detention [was attributable] to the prosecutor's assumption that judges will use high financial bond to detain dangerous defendant unofficially, saving both the court and the prosecutor the burden of a preventive detention hearing."[95] Thus, inclusion of "prophylactic" procedures which rendered pretrial detention hearings "impractical in all but a few cases," had the unintended and profoundly undesirable effect of encouraging the use of high money bail to address public safety concerns.

This reliance upon high money bail to address danger continued for over two decades in the District of Columbia.[96] For example, detention hearings were held for only 5% of defendants charged in the District of Columbia local courts during 1990 and approximately 2% of these

favor of release revocation upon a probable cause finding that the accused committed a dangerous or violent crime while released. Id.

92 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 40) (citing Jeffery A. Roth, Paul B. Wrice, "Pretrial Release and Misconduct in the District of Columbia" at 3 – 4 (1980) (hereinafter "Inslaw Study")).

93 Inslaw Study at 4, 12 (1,500 eligible for detention, 40 moved for detention, 34 detained).

94 Inslaw Study at 4–5, (emphasis added).

95 Inslaw Study at 4–5.

96 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 40-41).

defendants were actually detained.[97] Money bond was set for approximately two-thirds of the defendants statutorily eligible for detention, resulting in "many of… these potentially dangerous defendants [being] able to purchase their release."[98] Violent crimes, including drive-by shootings, committed by some of these unsupervised defendants released on money bond, precipitated a reevaluation of the District of Columbia's pretrial release procedures.

This reevaluation resulted in two significant reforms. First, the 1992 D.C. Bail Act "expanded the scope of pretrial detention and included several rebuttable presumptions for detention."[99] Second, this statue authorized courts to set money bail in an amount "that does not result in the preventive detention of the person."[100] This latter provision was interpreted to mean that "you have a right to bail that you can meet."[101] While the first of the 1992 D.C. reforms resulted in an increase from 2% to 15% of defendants preventively detained, the second reform resulted in an increase to 80% of defendants released on nonmonetary conditions.[102] It is submitted that this analysis of interplay between "workable" preventive detention procedures and an affirmative right to affordable bail demonstrates that *a court's ability to detain the "truly dangerous" empowers it to safely release virtually everybody else*.[103]

(ii) Presumption Supporting Release Revocation

Almost a decade would pass before the D.C. Bail statute would be amended to fill another "gap" by introducing a presumption of release revocation for commission of a subsequent offense

[97] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 41) (citing, Pretrial Justice Institute, "The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth" at 4 (2010) (hereinafter "PJI")).

[98] PJI at 5.

[99] PJI at 4.

[100] PJI at 5, See DC Code § 23-1321(c)(3).

[101] PJI at 2.

[102] PJI at 2. The remaining 5% of defendants remained in custody on money bond.

[103] District of Columbia Senior Judge Truman Morrison identified "a critical linkage between a 'workable' preventive detention statute and a reduction upon *sub rosa* reliance upon money bail to address dangerousness…." 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 42). More specifically, Judge Morrison commented, with particular force and conviction, that "It is my conviction that judges here, like in the rest of America, need what I am blessed with as I grapple with pretrial decisions about bail: a fair, due process – laden, workable preventive detention scheme that everyone buys into. That scheme portends freedom for judges… once they have openly addressed the issue of community safety within their dockets, they can being to intellectually relax and with clearer eyes focus upon what

while on pretrial release.[104] Since 1970, District of Columbia's bail statute had included a procedure for revoking a defendant's pretrial release.[105] An order of release could only be revoked if a judicial officer found, by clear and convincing evidence, that (1) defendant had violated a condition of release and (2) that no condition or combination of conditions of release could reasonably assure that defendant's appearance or protect the safety of any person or the community.[106]

Drawing upon lessons learned in the District of Columbia, Congress enacted the federal Bail Reform Act of 1984 which included a rebuttable presumption of release revocation "[i]f there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony."[107] The Senate recognized that although this provision was new to federal bail law, the District of Columbia Code had a similar, albeit more limited, procedure in place.[108] It further supported this adoption by noting that release revocation "is based upon a betrayal of trust by the person released by the court on conditions that were to assure both his appearance and the safety of the community."[109] Although the Senate Committee on the Judiciary had been presented with an argument for automatic release revocation upon probable cause of a "serious" crime committed while on pretrial release, Congress opted for a rebuttable presumption with a broader trigger.[110]

No comparable change was made in the 1992 DC Bail Amendments.[111] In 2001, however, the District of Columbia statute was revised to include a rebuttable presumption of release revocation "[i]f there is probable cause to believe that while on release, the person committed a dangerous or violent crime… or a substantially similar offense under the laws of any other jurisdiction."[112]

Justice Rehnquist told us to do:… to figure out ways to release most everybody." 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 42) (paraphrasing, Salerno, 481 U.S. at 755).

[104] 1999 D.C. Stat. 310, § 2(d)).

[105] Pub. L. No. 91-358, 84 Stat. 649 (1970) (codified as amended at D.C. Code § 23-1329).

[106] Id.

[107] Pub. L. No. 98-473, 98 Stat. 1983, 1984 (1984) (codified as amended at 18 U.S.C. 3148).

[108] S. Rep. No. 225, 98th Cong., 1st Sess. 34-35 (1984) (https://www.fd.org/docs/select-topics---sentencing/SRA-Leg-History.pdf). This District of Columbia "procedure" did not include the federal presumption.

[109] Id. at 35.

[110] Id. at 35-36 ("[W]hile the Committee is of the view that commission of a felony during the period of release generally should result in the revocation of the person's release, it concluded that the defendant should not be foreclosed from the opportunity to present to the court evidence indicating that this sanction is not merited.")

[111] 1992 D.C. Stat. 125.

[112] 1999 D.C. Stat. 310 § 2d.

Dangerous or violent crime, as defined per the statute—including, *inter alia*, cruelty to children, prostitution, mayhem, and CDS offenses[113]—is broader than those offenses subject to NERA, though more narrow than those which trigger its federal counterpart, namely, all felonies.

The painful lessons learned in the District of Columbia from 1970 through 2001 establish that a court's ability to detain must be governed by procedures that are "sufficiently workable as a practical matter, that it will be utilized to any significant degree."[114] Only then will the public be protected from the risks of pretrial recidivism presented by those "truly dangerous" defendants whose pretrial detention is determined through "workable" procedures. Only then will the liberty interests of all other defendants awaiting trial be vindicated through their pretrial release on nonmonetary conditions as supervised by the Pretrial Services Program.

(D) The present BRS presumptions are not "workable."

(i) Scope of Detention Hearing without Proposed Presumption.

Applying "lessons learned" form the District of Columbia and Federal Courts, N.J.S.A. 2A:162-19(b) and N.J.S.A. 2A:162-24 are not "sufficiently workable" as a practical matter that they "will be utilized to any significant degree."[115] A "workable" determination is dependent upon the increase in manpower and time necessary to conduct preventive detention and release revocation hearings as viewed in context of the existing demands upon the court system.

In order to obtain a preventive detention order, N.J.S.A. 2A:162-19(e) requires the State to establish (i) probable cause to believe that the defendant committed a predicate offense;[116] and (ii) clear and convincing evidence that there are no conditions or combination of conditions which would reasonably assure the safety of the community.[117] At a preventive detention hearing, the defendant has a right to counsel and "defendant shall be afforded an opportunity to testify, to present witnesses,

[113] Compare D.C. Code § 23-1331, with 18 U.S.C. § 3148 (all felonies).
[114] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 40).
[115] S. Rep. No. 225, 98th Cong., 1st Sess. 7-8 (1984) (https://www.fd.org/docs/select-topics---sentencing/SRA-Leg-History.pdf).
[116] N.J.S.A. 2A:162-19(e)(2). The return of an indictment establishes probable cause. Id. In the absence of an indictment, the State must establish probable cause through a detention hearing.
[117] N.J.S.A. 2A:162-19(e)(3).

to cross examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing."[118]

Absent a presumption supporting detention, detention hearing will necessarily become more complex and time consuming as the State seeks to overcome the countervailing presumption of pretrial release. These hearings will likely involve detailed inquiry into "the nature and circumstances" of the charged offense and the strength of the State's case.[119] For example, even if application of the DMF supports the most rigorous PSP recommendation of "release not recommended," it is presently[120] unclear whether that functional equivalent of a detention recommendation would be sufficient information for a court to conclude, by clear and convincing evidence, that that there are no release conditions that would reasonably assure public protection. Until that issue is resolved through litigation (which may take years), cautious courts and litigants will probably seek to develop a more complete factual record during at the detention hearing. While this record would include objective information considered in the PSA/DMF (such as criminal history and bench warrant history), the focus would probably shift towards other factors listed in N.J.S.A. 2A:162-20. Those factors include "strength of case" and "facts and circumstances of the case."

The sufficiency of those factors as applied to District of Columbia detention statute's "clear and convincing" evidence standard was addressed in Pope v. United States. [121] In Pope, the District of Columbia Court of Appeals held that, "[i]n the absence of a statutory presumption… the government's burden to prove by clear and convincing evidence that the defendant is properly subject to preventive detention… cannot be satisfied simply by reference to the known facts regarding the crime which the defendant has been accused." Although there are substantial grounds

[118] N.J.S.A. 2A:162-19(e)(1).

[119] These are factors relevant to the detention determination but are not addressed in the PSA.

[120] The CPC seeks to address this uncertainty through its recommended R. 3:4A which provides that a "release not recommended" determination would support a *prima facie* finding that there are no such release conditions. While the CPC recommends this rule, the Court has not yet decided whether to accept that recommendation.

[121] 739 A.2d 819 (D.C. Cir. 1999). Although lacking precedential value, the Pope court interpreted the DC detention statute whose language is similar to N.J.S.A. 2A:162-19(c)(1).

to conclude that New Jersey courts would not find Pope persuasive,[122] prudent courts and litigants may seek to factually distinguish this decision. This would require the development of a more complete factual record during at the detention hearing, focusing upon other factors listed in N.J.S.A. 2A:162-20. Prominent among those factors may be "the weight of the evidence against the eligible defendant"' because the Pope court emphasized that evidence presented was "thin" and "barely sufficient" to constitute probable cause. This fact sensitive inquiry would probably increase the volume of evidence presented by the state.

(ii) Comparative Caseload Analysis.

Particularly in view of these elaborate hearings, a comparison of caseloads in New Jersey and in the District of Columbia reveals a strong probability that our court system will be overwhelmed by detention and revocation hearings conducted under N.J.S.A. 2A:162-19 and N.J.S.A. 2A:162-24. **In the District of Columbia, three full time judges and one full time magistrate are responsible for a caseload for which one New Jersey Superior Court Judge is presently responsible.**

In the District of Columbia, there are three separate criminal calendars—Felony I,[123] Accelerated Felony Trial Calendar (AFTC),[124] and Felony II.[125] Presently, the average caseload for

[122] When Pope was decided, preventive detention under the District of Columbia statute required (1) Substantial probability that defendant committed assault with the intent to kill and (2) CCE that no release conditions would reasonably assure public safety. In making the latter determination, DC Code § 23-1322(e) expressly lists the "seriousness of the offense" as a relevant factor. The Pope holding fails to give any effect to the "seriousness of the offense" in making that second determination. In New Jersey, it is a well-established rule of statutory construction that "a construction that will render any part of a statute inoperative, superfluous, or meaningless, is to be avoided." See Abbott Dairies, Inc. v. Armstrong, 14 N.J. 319, 327-28 (1954) (quoting Hoffman v. Hock, 8 N.J. 397, 406 (1952)). The Pope court's apparent divergence from this rule may detract from having any persuasive authority.

[123] "The most serious offenses (first-degree murder and serious sexual assaults) are on the Felony I calendars… These cases carry the maximum penalty under D.C. law, which is up to life imprisonment without parole." United States General Accounting Office Report to Congressional Committees, D.C. Criminal Justice System, Better Coordination Needed Among Participating Agencies (hereinafter "GAO Report") at 83.

[124] "The Accelerated Felony Trial Calendar (AFTC) is for case, other than first-degree murder and serious sexual assaults, in which the accused is held without bond. These offenses include those designated as 'Dangerous Crimes' or 'Crimes of Violence' such as assault with intent to kill, armed robbery, burglary, aggravated assault, kidnapping, and armed carjacking. The AFTC calendars were designed primarily to deal with preventive detention cases… Felony I and Accelerated Felony cases are assigned to a specific judge, who handles all subsequent matters in the case." GAO Report at 83.

[125] "The remaining felony cases fall in the Felony II category. The offenses that fall in this category consist of mostly drug distribution, assaults with weapons resulting in moderately serious injury, and firearms and property offenses. Felony II calendars were originally designed to carry the less serious cases where defendant were not being preventively detained…

judges assigned to F1 and ATFC is 58 and the average caseload for judges assigned to F2 is 280.[126] It is estimated that approximately 37% of these matters are pre-indictment and the remaining 63% are post-indictment.[127] In addition to these judges, a magistrate is available to perform detention hearings for cases listed on the F2 calendar.[128] This magistrates conducts approximately 90 detention hearings each month.[129] While this magistrate is authorized and available to conduct detention hearings in the District of Columbia, only New Jersey Superior Court Judges are authorized to conduct detention hearings.[130]

The representative New Jersey Superior Court calendar consists of 254 pre-indictment defendant cases and 283 post-indictment defendant cases. The average caseload for that vicinage consists of 194 pre-indictment defendant cases and 217 post-indictment defendant cases.[131] These stark disparities in judicial caseloads is graphically illustrated below:

Felony II case are assigned to individual calendars for all purposes except for the preliminary hearing/preventive detention hearing. These hearings are conducted by a commissioner sitting in the preliminary hearing courtroom." GAO Report at 84.

[126] Interview with Mr. Clifford Keenan, Director Pretrial Services Agency, District of Columbia.

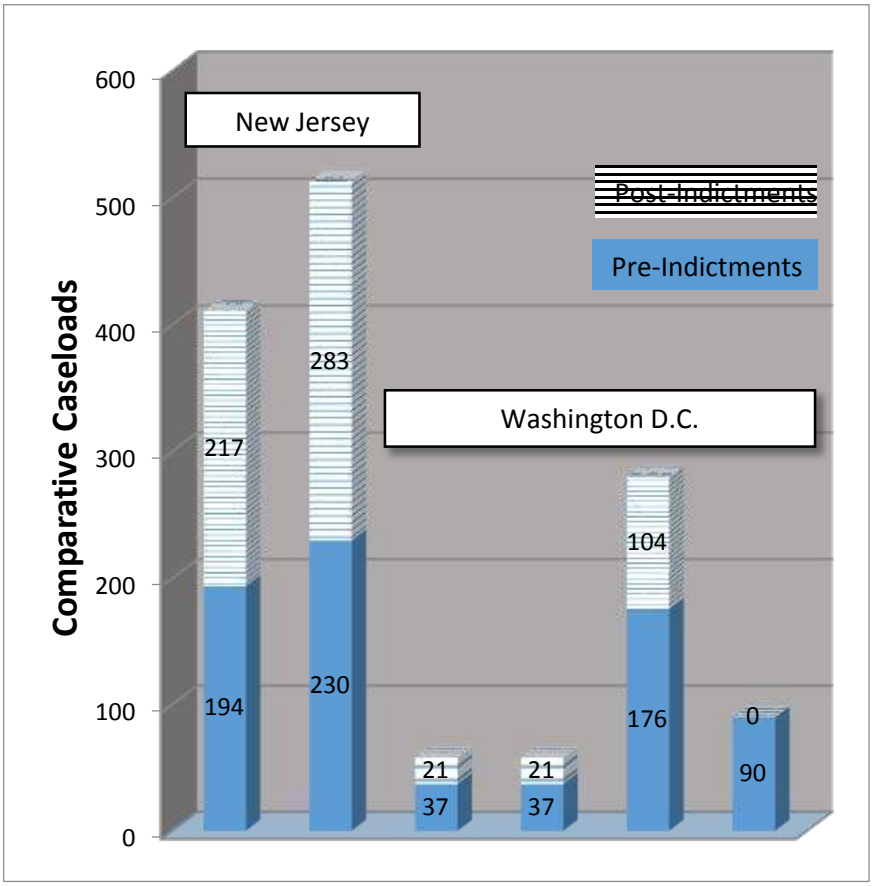
[127] Id.

[128] Interview with Mr. Clifford Keenan and Magistrate Joseph E. Beshouri. Significantly, proposed R. 3:4A provides that only New Jersey Superior Court Judges are authorized to conduct detention hearings. See CPC II at 8. The time required to present this evidence would be compounded with the time required by the defense to challenge it. This defense challenge may extend to the introduction of evidence.

[129] Interview with Magistrate Beshouri.

[130] See CPC proposed R. 3:4A.

[131] See Caseload Analysis, Essex Vicinage, Criminal Division (Aug. 2013) documenting the 217 post-indictment defendant cases. The 194 pre-indictment defendant cases was extrapolated from the distribution within the representative calendar.



Thus, this rudimentary analysis reflects that **four times as many District of Columbia judges and magistrates will be presiding over far less complex and time consuming preventive detention hearings and release revocation hearings than the number of judges who are presently available in New Jersey** to preside over the more time consuming hearings as recommended by our colleagues in the CPC majority.

The pressure exerted by these additional responsibilities upon an already strained judicial system is further acerbated by the simple fact that the pretrial recidivism rate in New Jersey, ranging between 28.1% and 34.8%,[132] is nearly three times higher than in the District of Columbia, calculated at 12%.[133] As previously noted, our release revocation proposal is specifically crafted to

[132] See supra pp.12-13.
[133] See supra p. 13.

address the dangers posed by this elevated pretrial recidivism rate.[134]

In view of this elevated recidivism rate, operation of the "life imprisonment only" presumption in N.J.S.A. 2A:162-19(b) raises significant public safety concerns. For example, if the State seeks to protect the public through pretrial detention, then prosecutors would be required to overcome the presumption of release by establishing through clear and convincing evidence that no amount of monetary bail, non-monetary condition or combination of conditions would protect the public. In order for the State to accomplish this or meet their high burden, there would likely need to be lengthy hearings which would consume significant bench time. In addition, the prospect of detailed or lengthy detention hearings conducted within days of arrest, may cause prosecutors to tactically not seek detention, where detention would otherwise be appropriate, in order to not compromise ongoing investigations. Therefore, operation of the "life imprisonment only" presumption may have the unintended effect of discouraging prosecutors from seeking to detain truly "dangerous" defendants, as identified through objective risk screening tools, *based upon considerations unrelated to the risks posed by those defendants*. Such discouragement conflicts with the central premise of our State's systemic shift to a risk-based approach for pretrial release decision-making[135] which our legislature sought to accomplish through the enactment of the BRS. Our presumption proposals respond to these legitimate public safety concerns.[136]

It is submitted that these public safety concerns will become even more acute when existing judicial resources will become further strained to comply with the Speedy Trial Act which becomes effective on January 1, 2017.[137]

For detained defendants, the Speedy Trial Act generally requires indictment within 90 days of

[134] See supra pp.11-12.

[135] This divergence from risk principles, arising from the operation of "prophylactic" procedures may be characterized as a "system error" in New Jersey's ongoing shift away from a money or resource based system of pretrial release decision-making. Cf. 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 26) (identifies "dual system errors" in resource based system).

[136] N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-17, N.J.S.A. 2A:162-19, N.J.S.A. 2A:162-24. Chief Justice Rehnquist identified as the "primary concern of every government—a concern for the safety and indeed the lives of its citizens…" Salerno, 481 U.S. at 755.

[137] See N.J.S.A. 2A:162-22.

arrest[138] and trial within 180 days of indictment.[139] These time periods are subject to extension through application of statutorily defined "excludable time."[140] This statute also generally requires that trials commence within 2 years of arrest.[141] The remedy for noncompliance with these time periods is release of the defendant from custody.[142] An exception to such remedy exists when the prosecution establishes that release would pose "a substantial and unjustifiable risk" to public safety and that noncompliance "was not due to unreasonable delay by the prosecutor."[143]

Administration of this statute will considerably increase the volume of motion practice, particularly in the pre-indictment stage. This pre-indictment motion practice is now generally limited to Rule 3:26-2(d) motions to reduce bail and Rule 3:25-3 motions to dismiss for failure to indict. Generally, the adjudication of these motions do not require the substantial expenditure of judicial resources. However, it is reasonable to predict that the Speedy Trial Act will demand such resources to track these time periods and to resolve disputes concerning "excludable time," the attribution of responsibility for delay upon the prosecution or the defense, and whether release poses "unjustifiable risk" to public safety.[144]

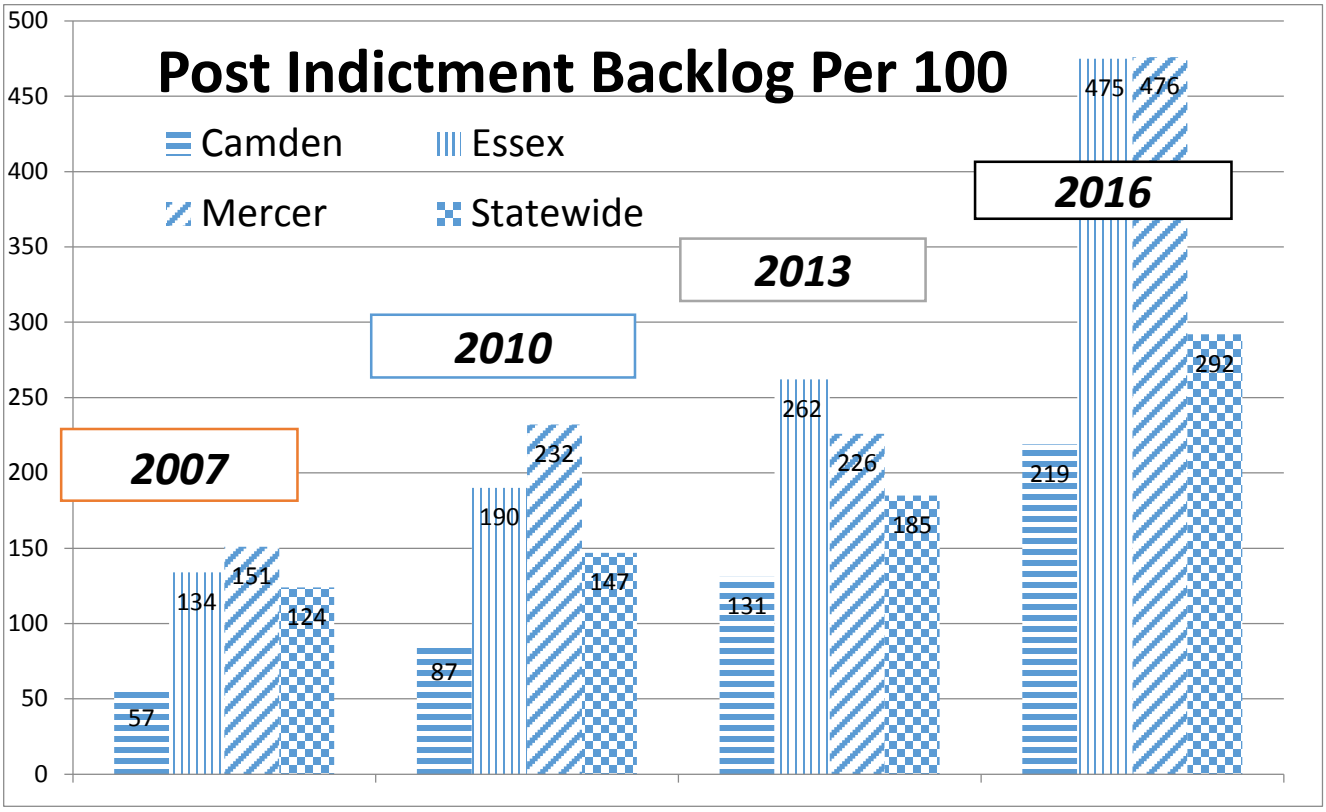
It is foreseeable that many of these disputes will be presented on an emergent basis, immediately before the applicable period expires and the defendant's release is statutorily mandated.

Significantly, this Speedy Trial Act will not be gradually "phased in" to courts with empty dockets. The expedited trial calendars mandated by the Speedy Trial Act will be added to existing trial calendars. Present AOC statistics reveal that 57% of the statewide post indictment caseload is currently in backlog status[145] and that 63% of the pre-indictment caseload is currently in backlog

[138] N.J.S.A. 2A:162-22(a)(1)(a).
[139] N.J.S.A. 2A:162-22(a)(2)(a).
[140] N.J.S.A. 2A:162-22(b).
[141] N.J.S.A. 2A:162-22(a)(2)(a).
[142] N.J.S.A. 2A:162-22(a). These defendants are those which the Court has detained because the pose "unimaginable" risks of pretrial misconduct. See supra p. 4.
[143] N.J.S.A. 2A:162-22(a). This release exception expressly applies to 90 day and 180 day requirements, but not to the 2 year requirement. Id.
[144] The 2 year trial rule excludes "any delays attributable to the eligible defendant." N.J.S.A. 2A:162-22(a)(2)(a).
[145] See Criminal Practice Division, Historical Key Indicator Trend Analysis, AOC Run date 1/15/16 (hereinafter "trend analysis"). Post-indictment backlog is defined as matters pending more than four months (120 days). See Administrative Office of the Courts, *What is Backlog?*, available at: http://www.judiciary.state.nj.us/pressrel/charts.pdf. Pre-indictment

status.[146]

While the pre-indictment backlog has consistently increased at a relatively modest rate over the past 9 years, the post indictment backlog has more than doubled statewide and has more than tripled in Essex and Mercer counties during this period.[147] This increase is graphically depicted below:



It is submitted that this significant and increasing inventory of backlogged cases, the comparatively limited available judicial resources, and the more complex and time consuming hearings necessitated by the Rules recommended by a majority of our CPC colleagues, amply supports the conclusion that those rules are simply not "workable."

backlog involving incarcerated defendants include 1,099 defendant cases which were indicted more than one year ago and 331 defendant cases which were indicted more than 2 years ago. Trend analysis at 1.

[146] Trend analysis at 1. Pre-indictment backlog is defined as matters pending more than two months (60 days). See *What is Backlog?*, supra note 145.

(F) New Jersey's successful application of risk-based principles to juveniles demonstrates that "unnecessary" detention can be avoided through application of our proposed presumption.

As previously noted, the BRS employs a procedural framework which establishes a strong preference for pretrial release. This preference is expressed through a presumption favoring pretrial release which may be rebutted or overcome only through the presentation of clear and convincing evidence that no release condition can reasonably assure the public's safety.[148] This presumption favoring pretrial release may also be overcome by application of the extremely limited countervailing presumption favoring detention.[149] This "limited" scope defined by the "life imprisonment only" crimes which qualify as predicates for this presumption in N.J.S.A. 2A:162-19(b). It is submitted that these crimes do not have to be so limited in order to promote the legitimate policy objective of minimizing "unnecessary" pretrial detention. We submit that this conclusion is amply demonstrated by New Jersey's success in reforming juvenile detention practices.

The centerpiece to these reforms has been New Jersey's successful application of risk-based principles to juveniles. Application of these principles over the past ten (10) years has resulted in dramatic reductions in the juvenile detention population and modest reductions in juvenile pre-adjudication misconduct. Although New Jersey courts are authorized to detain a juvenile awaiting disposition of his case, this authority is not conditioned upon any finding by "clear and convincing evidence." [150] Rather than relying upon an elevated burden of persuasion, New Jersey Juvenile

[147] "Backlog per 100" is defined as the number of backlog cases divided by total active pending caseload, expressed as a percentage. This measure relates to the absolute number of cases in backlog to the volume of cases coming in.

[148] See supra pp. 3-4.

[149] See supra p. 3. It is well established that the use of countervailing presumptions supporting preventive detention are constitutionally compliant. See, e.g., State v. Jessup, 757 F.2d 378, 384-87 (1st Cir. 1985). It is equally well-established that these countervailing presumptions maybe supported by predicate offenses beyond those that are presently punishable by death or life imprisonment. See id. at 386 (drug offenses).

[150] See N.J.S.A. 2A:4A-34(a). Since juvenile proceedings are not criminal cases, juveniles do not have a constitutional right to have a bail set. See State in the Interest of Carlo, 48 N.J. 224, 234 (1966). An order of juvenile detention must be supported by a finding that "[d]etention is necessary to secure the presence of the juvenile at the next hearing…" or that "[t]he physical safety of persons or property of the community would be seriously threatened if the juvenile were not detained…" N.J.S.A. 12A:4A-34(a). Under the doctrine of *parens patriae*, parental control of the juvenile delinquent is replaced by public control. See Ex Parte Newkosky, 94 N.J.L. 314, 316 (1920). Accordingly, New Jersey juvenile courts have traditionally sought to preserve and protect the welfare of the child. Id. Application of this doctrine resulted in focus upon the

courts avoid "unnecessary detention" through the exercise of their discretion, guided by risk-based principles, to broadly worded statutory criteria. More specifically, the statutory criteria consists of a preference for pre-adjudication release[151] and identification of relevant factors in determining whether pre-adjudication detention is appropriate.[152]

To assist courts in the exercise of their broad discretion in applying this statute, juvenile intake service officers ("JISO") gather objective data including the juvenile's age, juvenile record, and charged offense, and complete a juvenile detention screening tool (hereinafter "DST").[153] Significantly, this DST supports a recommendation of detention if the risk score is sixteen (16) or higher.[154] One of the several objective factors consider in determining this risk score is the severity of the offense.[155] A numerical point score is attributed to each offense. *Aggravated Manslaughter, Manslaughter, Aggravated Sexual Assault, Sexual Assault, Robbery, and Carjacking are each attributed a score of sixteen (16), resulting in a recommendation of juvenile detention.*[156]

Relying upon JISO recommendations, based upon the objective DST, New Jersey juvenile courts have dramatically reduced the juvenile detention population by 60 – 70% and have modestly reduced recidivism from 13.3% to 5.2%.[157] This simultaneous reduction in both detention population and pretrial misconduct was achieved through the prudent use of judicial discretion in applying the juvenile detention statute. The exercise of this judicial discretion was guided by JISO

rehabilitation of the juvenile and supported detention only to protect the juvenile from the consequences of his own delinquent conduct. Id.

[151] N.J.S.A. 2A:4A-34(a). There is a preference, but not a presumption, favoring pre-adjudication release for juveniles.

[152] N.J.S.A. 2A:4A-34(e) provides that "[i]n determining whether detention is appropriate for the juvenile, the following factors shall be considered: (1) The nature and circumstances of the offense charged; (2) The age of the juvenile; (3) The juvenile's ties to the community; (4) The juvenile's record of prior adjudications, if any; and (5) The juvenile's record of appearance or nonappearance at previous court proceedings."

[153] Superior Court of New Jersey, Chancery Division, Family Part, Detention Screening Tool (Jan. 2009).

[154] See DST, Severity of Offense Scale (Jan. 2009).

[155] DST, Section B (most severe current offense)

[156] DST, Severity of Offense Scale. These recommendations are subject to judicial override which occurs in approximately 10–15% of cases.

[157] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 54-55). These reductions in the juvenile detention population were achieved by providing courts with the "tools" they required to manage the risks of juvenile misconduct. In addition to the authority to detain the juvenile, these tools consisted of JISO recommendations based upon an objective DST, continuum of nonmonetary alternatives to detention, public officer (JISO) monitoring compliance, and a progressive enforcement system. The functional equivalent of each of these tools are provided for adult criminal defendants under the BRS.

recommendations for detention for juveniles accused of committing the same offenses for which we propose to expand the R. 3:4A presumption supporting preventive detention for adults – Aggravated Manslaughter, Manslaughter, Aggravated Sexual Assault, Sexual Assault, Robbery, and Carjacking.

(G) Our Proposed Amendment of *N.J.S.A.* 2A:162-17(c) to Provide an Affirmative Right to an Affordable Bail is Inextricably Intertwined With Our Proposals for "Workable" Preventive Detention and Release Revocation Procedures.

Although N.J.S.A. 2A:162-17(c) prohibits courts from setting bail "for the *purpose* of preventing" pretrial release, this statute did not eliminate money bail altogether. To the contrary, if a court determines that there is no nonmonetary release condition that will reasonably ensure the defendant's appearance as required, then N.J.S.A. 2A:162-17(c)(1) expressly authorizes a court to set a money bail. If a defendant cannot afford to post that bail, then his financial condition will effectively prevent his pretrial release. Drawing upon "lessons learned" from the 1992 District of Columbia reforms, we propose to affirmatively provide in N.J.S.A. 2A: 162-17(c) that "monetary bail may not be set in an amount or form that results in the pretrial detention of the defendant."[158] I submit that, through this proposal, the statutory proscription against the imposition of money bail "for the *purpose*" of preventing pretrial release would be implemented by eliminating the central fact from which the prohibited purpose could be inferred. This central fact would be the defendant's continued detention –the *result* expressly prohibited by the proposed Rule. A majority of the CPC agrees with the substance of this legislative proposal.[159] We concur with this legislative recommendation.

While there is reason to believe that money bail will be less frequently utilized under the BRS,[160] there are reasons to be concerned that this bail will not be "affordable" unless N.J.S.A. 2A:

[158] CPC I at 91-92. Cf. D.C. Code 23-1321(c)(3).

[159] CPC I at 91-92.

[160] N.J.S.A. 2A:16-17(c)(1) prohibits courts from setting bail "for the purpose of preventing the release of the eligible defendant." N.J.S.A. 2A:162-17(c) established a hierarchy for courts to follow in releasing defendants pretrial. Only upon a judicial finding that release upon the less restrictive alternatives of ROR, nonmonetary conditions, or unsecured bond are insufficient to reasonable assure the defendant's appearance as required does N.J.S.A. 2A:162-17(c)(1) authorize courts to condition a defendant's release upon obtaining a secured bond. Moreover, R. 3:26-1(a)(1) requires courts to consider the Pretrial Services Program's ("PSP") release recommendations. This Rule further requires that if a court sets a release

162-17(c) expressly requires such "affordability." This concern is based upon (1) the continued applicability of the Bail Schedules[161] and (2) the absence of "workable" procedures to detain the "truly dangerous" defendants awaiting trial.[162] These concerns will be addressed *seriatim*.

(i) Bail Schedules.

In setting the amount of money bail, our courts may rely upon these bail schedules which, by their express terms, were promulgated exclusively to assist courts in setting a bail which will reasonably ensure the defendant's appearance in court. For example, for the seven (7) violent crimes which I propose to include in R. 3:4A, the bail schedules provide:[163]

Statute	**Charge**	**Degree**	**Bail Range**	**10% Cash Option**
2C:11-4a	agg man	1st degree	$200,000 to 500, 000	No 10%
2C:11-4b	manslaughter	2nd degree	$100,000 to 200,000	No 10%
2C:14-2 (b)	sex asslt	2nd degree	$50,000 to 200,000	No 10%
2C:14-2(c)(1)	sex asslt	2nd degree	$50,000 to 200,000	No 10%
2C:14-2a	agg sex asslt	1st degree	$150,000 to 300,000	No 10%
2C:15-1	robbery	1st degree	$100,000 to 250,000	No 10%
2C:15-2	carjacking	1st degree	$100,000 to 250,000	No 10 %

condition other than that recommended by the PSP, then the court must document the reasons for its decision not to follow the PSP recommendation. N.J.S.A. 2A:162-17(a) further requires that these PSP recommendations, in turn, be based upon an objective risk assessment tool. This assessment tool (PSA), in turn, expressly considers the accused's bench warrant history, if any, in calculating nonappearance risk. Analysis of this tool and the corresponding DMF reveals that secured bond is never recommended as an initial release recommendation. Accordingly, as a practical matter, every time a court would seek to impose a money bond as a condition of release, the court would have to set forth the reasons why a PSP recommended release on nonmonetary conditions would be insufficient to support defendant's appearance as required. In view of the range of nonmonetary conditions available under N.J.S.A. 2A-162-17(b)(2) and the availability of PSP officers to supervise compliance with those nonmonetary alternatives, it is reasonable to predict that courts would infrequently conclude that monetary conditions should initially be imposed. Hence, under this new statutory and rulemaking framework, it is reasonable to predict that the frequency that courts will require secure bonds will decrease dramatically.

[161] Directive #9-05, Bail Schedules and Policies to Improve Bail Practices, issued May 12, 2005; Supplement to Directive #9-05, issued May 26, 2006.

[162] See infra at pp. 17-23.

Thus, if the present bail schedules remain in effect, courts are encouraged to refer to these bail ranges which, in turn, list a $200,000 surety bond as being within the range for each of one these seven (7) above listed crimes. Although the ten percent cash alternative to a full surety bond was a reform designed to address the adverse effect of money bail upon the poor,[164] the bail schedules accurately reflect that this alternative is statutorily unavailable to any person charged with any one of these seven (7) crimes.[165] Thus, if a truly indigent defendant is charged with one of these offense and a court sets a $200,000 surety bond to address the risk of nonappearance, then this surety bond will probably have the effect of preventing pretrial release.[166] Since application of the bail schedules would fully support a court's conclusion that this $200,000 surety bond is appropriate to address the risk of nonappearance, an indigent defendant who is financially incapable of posting that bond would be hard pressed to persuasively contend that the bail was set in that amount for the *purpose* of preventing his release. Hence, application of the present bail schedules may effectively undermine an indigent defendant's ability to benefit from any protections arising from the "purpose" prohibition of N.J.S.A. 2A:162-17(b).

In view of these unintended, but potentially adverse, consequences arising from continued reliance upon these bail schedules, the CPC recommends that the judiciary reassess the continued viability of the bail schedules.[167] This reassessment was necessitated by "[t]he Committee['s] [belief] that these schedules, in their present form, may perpetuate the current system of setting monetary bail and are inconsistent with the intent of [the BRS] which shifts to a risk-based system of pretrial release."[168] In our view, the need for this reassessment is particularly appropriate in view of the CPC majority's recommendation to delete consideration of the Johnson factors from Rule 3:26-1.[169] Deletion of these factors would leave trial courts with no guidance in our Court Rules

[163] See Directive #9-05, Bail Schedules and Policies to Improve Bail Practices, issued May 12, 2005; Supplement to Directive #9-05, issued May 26, 2006.
[164] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 31).
[165] See N.J.S.A. 2A:162-12 (bail restricted offenses), R. 3:26-4(g)(b).
[166] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 26-29).
[167] CPC I at 91 (vote 23 for, 0 against, 3 abstain).
[168] CPC I at 91.
[169] CPC I at 63-64, referring to, State v. Johnson, 61 N.J. 351 (1972). The undersigned dissents from the CPC's recommendation to delete the Johnson factors from R. 3:26-1. (CPC I at 63-64). As expressly recognized in AOC Directive

concerning the relevant factors to consider in determining the amount and form of money bail.[170] It is submitted that the absence of such guidance in any Court Rule increases the significance of the guidance presently provided by the bail schedules.

(ii) Absence of "workable" procedures to detain the "truly dangerous."

As previously noted, the right to an "affordable" bail is one of the two interrelated 1992 reforms implemented in District of Columbia to break the perceived link between danger to the community and money bail.[171] The other reform was "workable" detention procedures.[172] These reforms were extended to "workable" release revocation procedures.[173] It has been demonstrated that the detention and release revocation Rules as recommended by the majority of our CPC colleagues are simply not "workable."[174] The absence of "workable" procedures presents New Jersey courts with an "agonizing decision" similar to the one that previously confounded District of Columbia courts before whom stood an "obviously dangerous defendant."[175] The court can "either ignore this danger or address it through the *sub rosa* consideration of this danger in setting the amount and form of money bail."[176] From 1966 through 1970, District of Columbia courts did not address this danger through preventive detention, as the implementing statute had not yet been enacted. From 1970 through 1992, these courts infrequently addressed it through preventive detention because the statute's elaborate prophylactic procedures rendered it "unworkable." These Courts addressed this danger though continued *sub rosa* consideration of it in setting money bail.

9-05, our Supreme Court in Johnson elucidated these factors over 40 years ago. Accordingly, these factors have become the common law of this state as articulated by our highest Court. It is well established that statutes in derogation of the common law shall be strictly construed. Indeed, "[i]f a change is to be made in the common law, the legislative purposed to do so must be clearly and plainly expressed." Defazio v. Haven Savings and Loan Ass'n, 22 N.J. 511, 519 (1956), 3 Norman J. Singer, Sutherland Statutory Construction § 61.01 (5th ed. 1992). Accord State v. Young, 148 N.J. Super. 405, 409 (App. Div. 1997) (departs from common law rule), reversed, 77 N.J. 245, 252 (1978) (applies common law rule notwithstanding a constitutional amendment). The BRS is silent concerning the relevant factors that a trial court may consider in setting the amount and form of monetary bail. Hence, it is submitted that deletion of the Johnson factors is contrary to well established rules of statutory construction.

[170] See CPC I at 63.
[171] See supra p. 20.
[172] See supra pp. 20-22.
[173] See supra pp. 23-31.
[174] See supra pp. 20-30.
[175] See supra p. 17.
[176] See supra p. 17.

Seeking to minimize the possibility of such an unfortunate repeat of history here in New Jersey, we propose to essentially duplicate the District of Columbia reforms. To eliminate any incentive consider this danger *sub rosa* in setting money bail, we propose "workable" procedures to detain the truly dangerous in N.J.S.A. 2A:162-19(b) and N.J.S.A. 2A:162-24. To eliminate any other mechanism to address this danger *sub rosa* in setting money bail, we propose to provide the right to an "affordable bail" in N.J.S.A. 2A:162-17(c)(1).

(H) Legislative action before January 1, 2017 would promote a more effective transition to risk-based decision-making.

The legislature recognized the need to promulgate rules implementing the BRS before January 1, 2017. More specifically, the BRS provides that "[t]he Supreme Court may adopt Rules of Court and take any administrative action necessary to implement the provisions of this act, including the adoption of rules or anticipatory administrative action in advance of the effective date of [N.J.S.A. 2A:162-15 to -25, namely, January 1, 2017]."[177] This legislative authorization of timely rulemaking is supported by considerations including the need to ensure that all criminal justice system participants may be adequately prepared to implement any accepted proposals, together with all other BRS and Rule requirements, before the statute's effective date.[178]

Some of our CPC colleagues contend that relevant decision-makers should not act now, but rather wait until after January 1, 2017 and see how the "life imprisonment only" detention presumption and present release revocation procedures operate in practice. Contrary to this suggestion, experience from other jurisdictions clearly demonstrates that there is little to benefit from waiting. In the District of Columbia, it took four years before Congress responded to its failure to address community danger in the 1966 D.C. Bail Act.[179] The impact upon public safety

[177] See N.J.S.A. 2A:162-15 (Notes: Effective Dates). Our proposals pertained to N.J.S.A. 2A:162-17, N.J.S.A. 2A:162-19, & N.J.S.A. 2A:162-24 which become effective on January 1, 2017.

[178] See Pretrial Justice Institute "Promising practices in providing pretrial services within probation agencies, A Users Guide" at 21 (2011) (emphasizes adequate need for training of pretrial services officers).

[179] See supra p. 18. When it enacted the 1966 DC Bail Act, Congress was aware of the dangers posed by pretrial recidivism, but chose not to address these dangers at that time because it determined that "reform of the bail system to eliminate discrimination against the poor, resulting in unjust detention, demanded immediate attention."

was "disastrous."[180] After Congress sought to address these safety concerns in 1970, it took more than 20 years to fix the "unworkable" detention procedures in that statute and more than 30 years to fix the "unworkable" release revocation procedures in that statute.[181]

New Jersey's own experience cautions against delay. In 1972 our Supreme Court in State v. Johnson expressly recognized the discriminatory effect of money bail upon the poor.[182] Despite well intentioned, but ultimately unsuccessful reform efforts in 1984, 1994 and then again in 2002,[183] more than four decades passed before this issue was comprehensibly addressed in the BRS.

Unlike District of Columbia officials in 1970, we now have the benefit of over forty years of practical experience and data concerning implementation of risk-based systems in other jurisdictions. Based upon improved data collection, we now have accurate calculations of jail populations, release rates, and pretrial misconduct rates. Due in large part to the pioneering efforts of Dr. Van Nostrand, we now have benefit of unprecedented knowledge concerning factors which have been statistically validated as predictive of pretrial misconduct (see PSA) and strategies to manage that risk (see DMF). We know the extent of resources presently available. In other words, we have enough information right now to conclude that, our detention and release revocation procedures appearing in the BRS are simply not "workable." Accordingly, it is respectfully submit that the time to act is now.

(I) Conclusion.

Through enactment of the BRS, our legislature shifted away from a money based system to a risk based system of pretrial justice. This risk based system confers upon the judiciary the enormous

[180] See supra pp. 18-19. Congress later acknowledged these issues were interrelated and that its earlier decision to separately consider them led to "disastrous" public safety consequences. The prompt amendment of the District of Columbia statue in response to the Pope decision reflects a legislative recognition that the absence of a presumption supporting preventive detention *as applied to a single serious violent crime* has such a profound effect upon public safety that a timely response was in the public interest.

[181] A notable exception was the prompt legislative response to the Pope decision. Since the Pope holding severely restricted the prosecutor's ability to satisfy the rigorous clear and convincing standard, Pope was a watershed decision which provided the impetus for a "legislative fix" relatively soon thereafter.

[182] 61 N.J. at 353.

responsibility of managing the risk of pretrial misconduct posed by each person awaiting trial. Our society's interest in both the liberty of persons awaiting trial and in the safety of the larger community is directly affected by how courts manage this risk. Through ratification of an amendment to our Constitution, the people of New Jersey entrusted courts with a powerful and indispensable risk management tool—the authority to detain the most dangerous persons awaiting trial.

Our narrowly tailored presumption proposals seek to modestly relax the procedures associated with use of the preventive detention and release revocation tools. This relaxation is essential so that courts can actually use these tools, given the practical constraints imposed upon our already strained criminal justice system. Acceptance of these proposals will enable courts to detain the limited group of truly dangerous defendants, thereby facilitating the safe release of everyone else awaiting trial. Our affordable bail proposal seeks to ensure that courts will actually use these tools, by completely eliminating money bail as a mechanism to otherwise address community danger *sub rosa*.

Accordingly, we respectfully submit that implementation of our three (3) interrelated proposals is essential to complete our State's transition to a risk-based system of pretrial justice. Only then will the people of our State enjoy the benefits which our legislature sought through enactment of the BRS – the promotion of a society that is more free, more fair, and more safe.

Respectfully submitted,

MARTIN CRONIN, J.S.C.

MGC:tmh

[183] See 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 29-31).

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION
ESSEX VICINAGE

Chambers of
Honorable Martin Cronin
Judge

Veterans Court House
50 West Market Street, 8th Fl.
Newark, New Jersey 07102

February 26, 2016

Hon. Harry G. Carroll, J.A.D.
Justice W. J. Brennan Courthouse
583 Newark Avenue
Jersey City, NJ 07306-2395

Re: Dissent from the Criminal Practice Committee's Rule recommendations rejecting proposals to include (1) Aggravated Manslaughter, Manslaughter, Aggravated Sexual Assault, Sexual Assault, Robbery, and Carjacking as predicate crimes supporting a rebuttable presumption of detention, (2) any rebuttable presumption supporting release revocation, and (3) an affirmative right to an affordable bail.

Dear Judge Carroll:

As you are aware, a majority of the Criminal Practice Committee ("CPC") has decided not to recommend my proposals to promulgate Rules which include (1) Aggravated Manslaughter, Manslaughter, Aggravated Sexual Assault, Sexual Assault, Robbery, and Carjacking as predicate crimes supporting a rebuttable presumption of detention in R. 3:4A, (2) any rebuttable presumption supporting release revocation in R. 3:26-2, and (3) an affirmative right to an affordable bail in R. 3:26-1. Since a majority of the CPC recommends implementing each of these proposals through legislation, I conclude that a majority of the CPC supports the substance of these proposals.[1]

[1] Report of the Supreme Court Committee on Criminal Practice on Court Rules Necessary to Implement the Bail Reform Law, Part I, Pretrial Release (hereinafter "CPC I"); Report of the Supreme Court Committee on Criminal Practice on Court Rules Necessary to Implement the Bail Reform Law, Part II, Pretrial Detention and Speedy Trial, (hereinafter "CPC II"). A majority of the CPC recommended legislation implementing proposal one (vote 18 for, 8 against), proposal two (vote 15 for, 9 against) and proposal three (CPC I at 91-92; vote 19 for, 0 opposed, 9 abstentions). A majority of the CPC did not recommend substantively identical Rules for proposal one (CPC II; vote 11 for, 14 against, 1 abstention), proposal two or proposal three (CPC I at 91-92; vote 5 for, 20 opposed). The CPC did recommend the Attorney General's alternative Rule 3:4A which seeks to address the subject matter of proposal one. (CPC II, vote 16 for, 8 against).

Concerning these proposals, please accept my dissent from the CPC majority's Rule recommendations concerning these three interrelated proposals.[2] It is respectfully submitted that unless these proposals are implemented there is a strong probability that operation of the Bail Reform Statute ("BRS")[3] as enacted and the rules as the CPC majority has recommended will have an adverse, and potentially debilitating impact upon a court's ability to manage the risk of pretrial misconduct posed by the most dangerous persons awaiting trial, thereby undermining a court's ability to protect the public and to safely release everybody else awaiting trial. Such adverse impact would frustrate and potentially derail the shift to a risk-based system of pretrial justice which our legislature envisioned through enactment of the BRS.

Cognizant of these probable dire consequences, we[4] urge our Supreme Court to exercise the full extent of its Constitutional rulemaking authority[5] to implement our proposals. We further urge the Court to act sufficiently in advance of January 1, 2017 so that all criminal justice system

[2] The CPC has "the task of recommending to the Supreme Court (a) amendments and additions to the Rules of Court, (b) policy statements (with respect to the rules), (c) suggestions for new legislation and statutory amendments as related to practice before the courts, and (d) other related non-rule matters." Operational Guidelines for Supreme Court Committees at 2–3 (Jan. 10, 2006).

[3] See L. 2014, c. 31 (S-946), codified at, N.J.S.A. 2A:162-15 et. seq.; N.J.S.A. 2B:1-7 to -10; N.J.S.A. 2B:1-5; N.J.S.A. 2B:1-11 to -13; & N.J.S.A. 2A:162-26 (hereinafter "Bail Reform Statute" or "BRS").

[4] The undersigned presented the three aforementioned proposals to the CPC. In this document, unless otherwise indicated, the collective "we" and "our" refer to those CPC colleagues who voted to recommend the implementation of these proposals through rulemaking. The rationale supporting each of these rule proposals was generally discussed during CPC meetings and is contained within this document. However, the undersigned authored the specific language of this document. Once this document is circulated among my CPC colleagues, the collective "we" and "our" shall also refer to those CPC colleagues who also sign on to one or more of the three Rule proposals.

[5] The Supreme Court possesses authority to promulgate Rules under the rulemaking clause (1) on matters of procedure, See N.J. Const. art. VI, § II, ¶ 3, interpreted in, Winberry v. Salisbury, 5 N.J. 240, 245 (1950), cert. denied, Winberry v. Salisbury, 340 U.S. 877 (1950) and (2) read in conjunction with N.J. Const. art. VI, § VI, ¶ 1, interpreted in, Passaic County Probation Officer's Ass'n v. County of Passaic, 73 N.J. 247, 251-52 (1977), with regard to "all matters touching upon the administration of the court system." See also, In re. P.L 2001, Chapter 362, 186 N.J. 368, 381-82, 389 (2006) ("[a]dministration" involves the allocation of resources). The recent constitutional amendment authorizing preventive detention references legislative authority concerning procedures. See N.J. Const. art. I, ¶ 11. In the BRS, which implements this constitutional amendment, the legislature provided that "[t]he Supreme Court may adopt Rules of Court and take any administrative action necessary to implement the provisions of this act, including the adoption of rules or anticipatory administrative action in advance of the effective date of [N.J.S.A. 2A:162-15 to -25, namely, January 1, 2017]." See N.J.S.A. 2A:162-15 (Notes: Effective Dates). The CPC was informed that our Court leadership was not presently inclined to address these issues through rulemaking. See CPC II. While this expressed disinclination may have influenced the CPC majority's preference for legislation, the CPC did not take any formal position concerning the Court's rulemaking authority (See CPC II). The CPC recognized that such an inquiry was inappropriate as our Constitution vests the rulemaking authority exclusively with the Supreme Court. See supra note 4.

participants may be adequately prepared to implement any accepted proposals, together with all other BRS and Rule requirements, before the statute's effective date.

(A) Introduction.

(i) Paradigm Shift to Risk-Based System.

Through constitutional amendment[7] and legislation, our state has boldly chosen to replace our present money or resource-based bail system with a risk-based system of pretrial justice.

This systemic change to a risk-based system was undertaken to simultaneously promote societal interests in both personal liberty and public safety.[8] Since all persons awaiting trial pose some risk of pretrial misconduct, the BRS imposes upon courts the enormous responsibility of managing these risks as presented by each person awaiting trial.[9] Our first two proposals seek to provide courts with the practical "tools" they need to effectively manage these risks. Our third proposal seeks to ensure that these "tools" are actually utilized to protect the public.

(ii) Protecting the Public: Theory and Practice.

Based upon public safety concerns, a majority of our CPC colleagues support the substance of our first two presumption proposals.[10] Theoretically, the BRS provides courts with the *authority* to protect the public through preventive detention (N.J.S.A. 2A:162-19) and release revocation (N.J.S.A. 2A:162-24). However, these public safety concerns arise from a recognition that this authority will be sparingly exercised, *due to considerations unrelated to the danger of pretrial recidivism which the defendant poses*.[11] These practical considerations[12] arise from the more

[7] See N.J. Const. art. I, ¶ 11, implemented by, L. 2014, c. 31. codified at, N.J.S.A. 2A:162-15 et. seq.; N.J.S.A. 2B:1-7 to -10; N.J.S.A. 2B:1-5; N.J.S.A. 2B1-11 to -13; & N.J.S.A. 2A:162-26.

[8] See Report of the Joint Committee on Criminal Justice, 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 11-12) (Mar. 10, 2014) (hereinafter "JCCJ").

[9] See 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 14-15). The forms of pretrial misconduct are recidivism, nonappearance, and interference with the integrity of the judicial process. Id. at 14. Each are addressed in the N.J.S.A. 2A:162-17, N.J.S.A. 2A:162-19, N.J.S.A. 2A:162-24. This document shall focus primarily on the first form, pretrial recidivism.

[10] See supra note 1.

[11] See infra p. 29. If courts had unlimited time and resources, then these practical difficulties would dissipate. However, our court system presently operates under both time and resource constraints. Our proposals are designed to operate within these constraints.

complex and time consuming hearings which the BRS's present procedures require an already strained judiciary to conduct. Our proposals seek to modestly relax these procedures as applied to the most dangerous persons awaiting trial.

Appreciation of the practical difficulties presented by the BRS's present procedures and how our proposals are designed to ameliorate these difficulties requires a description of the BRS's procedural framework, a topic to which we now turn.

(iii) Procedural Framework of the Bail Reform Statute.

The BRS establishes a strong preference for pretrial release.[13] It also establishes procedures for courts to follow in determining whether it is appropriate to preventively detain a defendant or to revoke their release. These procedures include burdens of persuasion and presumptions which, in turn, operate to satisfy these burdens. More specifically, one of two competing presumptions always applies under the BRS. The presumption of pretrial release applies, unless the presumption of detention applies.[14] This release presumption continues even if a court finds probable cause to believe that the defendant committed yet another offense while awaiting trial on the initial charge.[15] The generally applicable presumption of pretrial release may be rebutted or overcome only through the presentation of clear and convincing evidence that no release conditions can reasonably assure the public's safety.[16] This clear and convincing evidence standard is a highly rigorous burden of

[12] The undersigned is somewhat familiar with these considerations by virtue of participating in federal detention hearings from 1989 through 1999 as an Assistant United States Attorney; presiding over juvenile detention hearings from 2006 through 2010 as a Superior Court Judge assigned to the Chancery Division; and presiding over bail hearings from 2001 through 2005 and from 2011 to the present as a judge assigned to the Criminal Division. As a member of the JCCJ, the undersigned also had the opportunity to observe detention hearings conducted in the District of Columbia.

[13] See N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-17(b)(2) (presumption of release on least restrictive conditions).

[14] Compare N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-17(b)(2), N.J.S.A. 2A:162-19(e)(3) (release presumption) with N.J.S.A. 2A:162-19(b) (preventive detention presumption).

[15] Compare N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-17(b)(2), & N.J.S.A. 162-19(e)(3) (release presumption) with N.J.S.A. 2A:162-24 (release modification).

[16] See N.J.S.A. 2A:162-19(e)(3). Thus, to rebut the BRS's presumption of pretrial release, the State must present sufficient evidence to the court that clearly convinces it that there are no release conditions that can reasonably assure the public's safety. Id. Significantly, the BRS provides courts with a continuum of such conditions and creates a Pretrial Services Program (hereinafter "PSP") to supervise defendant compliance with these conditions. N.J.S.A. 2A:162-17(b)(2), N.J.S.A. 2A:162-25(d).

persuasion, exceeded in our legal system only by the beyond a reasonable doubt standard.[17] Historically, countervailing presumptions supporting preventive detention and release revocation were developed to address practical difficulties arising from application satisfying this rigorous standard.[18] The far less rigorous preponderance of the evidence standard is sufficient to rebut the BRS's limited presumption supporting preventive detention.[19]

(iv) BRS Procedural Framework; Purposes and Practical Consequences.

Detention hearings procedures serve two distinct purposes – (1) to provide the procedural due process protections of the accused's liberty interests which our Constitution guarantees[20] and (2) to advance often related but independent policy objectives.[21]

Concerning the former, courts have consistently rejected due process challenges to detention procedures utilizing rebuttable presumptions of detention.[22] Similarly, courts have consistently rejected due process challenges to release revocation based upon a probable cause finding that a defendant subsequently committed another offense while awaiting trial on the first offense.[23] Our

[17] The Model Jury Charge provides that: "[c]lear and convincing evidence is evidence that produces in your minds a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing as to cause you to come to a clear [conclusion] of the truth of the precise facts in issue. The clear and convincing standard of proof requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes you to be convinced that the allegations sought to be proved are true." See Model Jury Charge 1.19. (2011). The commentary to this Rule clarifies that, "[c]lear and convincing establishes a standard of proof falling somewhere between the traditional standards of 'preponderance of the evidence' and 'beyond a reasonable doubt.'"

[18] See infra pp. 6, 18-19.

[19] See N.J.S.A. 2A:162-19(b), (e)(2). See Model Jury Charge 1.12 H (1998) (preponderance standard; "more likely true than not true").

[20] See United States v. Salerno, 481 U.S. 739, 750-51 (1987) (1984 Federal Bail Reform Act); United States v. Edwards, 430 A.2d 1321, 1333-34 (D.C. 1981), cert. denied, Edwards v. United States, 455 U.S. 1022 (1982) (1970 D.C. Bail Act).

[21] See infra pp. 18-19.

[22] See e.g., United States v. Jessup, 757 F.2d 378, 384-87 (1st Cir. 1985), partially abrogated on other grounds by United States v. Brian, 895 F.2d 810, 814 (1st Cir. 1990). In both the Federal Bail Reform Act and the D.C. Bail Act, the predicate crimes supporting a rebuttable presumption of detention extended far beyond formerly capital crimes or crimes otherwise punishable by life imprisonment. See infra pp. 22-23.

[23] See e.g., Mello v. Superior Court, 117 R.I. 578, 586-87 (1977), Paquette v. Commonwealth, 440 Mass. 121, 131-33 (2003), cert. denied, Paquette v. Massachusetts, 540 U.S. 1150 (2004). The Paquette Court emphasized that the defendant's release on the initial charge is not an absolute right, but rather one conditioned upon compliance with certain nonmonetary conditions. 440 Mass. at 126. This court further recognized that "the concept of conditional release would be meaningless if courts lacked the power to rescind release after release conditions have been violated." Id. at 129, quoting 1989 ABA Standards for Criminal Justice, Pretrial Release Standards, § 10-5.8(a) commentary at 129. The most fundamental of these

proposed Rule 3:4A and Rule 3:26-2(d)(2) function within the BRS's existing framework. Since our proposals employ procedures which are indistinguishable from others that have repeatedly withstood constitutional challenge, it is submitted that our proposals fully advance the first purpose of detention procedures – full protection of the liberty interests of person awaiting trial.

The latter purpose is often expressed as a policy to eliminate the possibility of "excessive" pretrial detention, which, in turn, is often defined as detention in excess of that necessary to reasonably assure public safety.[24] Seeking to effectuate this legitimate policy concern, virtually all jurisdictions which enacted preventive detention statutes have included certain "prophylactic" procedures which exceed what the Constitution requires. As applied to preventive detention, these "prophylactic" procedures include elevated burdens of persuasion, omission of any presumptions supporting detention, or narrowly defining those predicate crimes supporting such a presumption.[25] Similar "prophylactic" procedures have also been applied to release revocation.[26] However, these *"prophylactic" procedures exact a cost with significant adverse consequences upon a court's ability to detain the "truly dangerous" and to thereby protect the public and safely release everybody else awaiting trial*.[27]

Some advocates may contend that our proposals go "too far" to protect the accused's liberty interests, but not "far enough" to protect the public. Focusing upon public safety, they emphasize that our Constitution permits far broader presumptions supporting both preventive detention and release revocation. Furthermore, these advocates may accurately observe that our proposals are so narrowly tailored that their application may only moderately increase the percentage of persons subject to a presumption supporting preventive detention or release revocation.[28] Our response is straightforward. We do not seek to facilitate the detention of more persons awaiting trial. We seek to

conditions is the prohibition against committing another offense while released on the initial charge. See N.J.S.A. 2A:162-17 (b)(1)(a); 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 14).

[24] See infra pp. 18-19.

[25] See infra pp. 19, 20-21.

[26] See infra pp. 22-24.

[27] See infra pp. 21.

[28] See infra p. 9, estimating a 7.96 % increase in defendant cases eligible for preventive detention presumption and p. 13 infra, estimating that 5.36% increase in defendant cases eligible for our proposed release revocation presumption.

facilitate the detention of the right persons.[29] They are the limited group of "truly dangerous" persons who present unmanageable risks of pretrial misconduct.

To identify these "truly dangerous" persons, our proposals draw upon their conduct while on release (for revocation) and recent advances in social science (for preventive detention). As to these defendants, our proposals establish procedures that are sufficiently "workable" that they will be utilized to secure their detention, thereby protecting the public. Once the truly dangerous are detained, then everyone else awaiting trial can be safely released, thereby promoting their liberty interests.[30]

We shall now define the narrow scope of our proposals.

(B) Narrowly-tailored scope of Rebuttable Presumption Proposal.

(i) The proposed amendment of *Rule* 3:4A is narrowly tailored to only add aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery, and carjacking as predicate crimes supporting a presumption of preventive detention.

Preventive detention is the centerpiece of any risk-based system of pretrial justice. It empowers courts to detain the limited group of persons who are simply too dangerous to be released while awaiting trial. N.J.S.A. 2A:162-19(b) creates a rebuttable presumption supporting preventive detention upon a judicial finding of probable cause that the defendant committed any crime for which he would be subject to an ordinary[31] or extended[32] term of life imprisonment upon conviction

[29] See N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-19. As Chief Justice Rehnquist observed, "[i]n our society, liberty is the norm, and detention prior to trial is the carefully limited exception." Salerno, 481 U.S. at 755, cited in, 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 14 (guiding principle one)).

[30] See infra note 104 (quoting Judge Morrison paraphrasing Salerno).

[31] N.J.S.A. 2A:162-19(b)(1). Ordinary terms of life imprisonment may be imposed upon conviction for the following offenses: Murder, N.J.S.A. 2C:11-3; Terrorism, N.J.S.A. 2C:38-2; Possession of Chemical Weapons or Nuclear Devices, N.J.S.A. 2C:28-3; Racketeering, N.J.S.A. 2C:41-2; Attempt or Conspiracy to Murder 5 or More Persons, N.J.S.A. 2C:5-4(a); Human Trafficking, N.J.S.A. 2C:13-8(d) and Leader of Narcotics Trafficking Network, N.J.S.A. 2C:35-3.

[32] N.J.S.A. 2A:162-19(b)(2). Extended terms of life imprisonment may be imposed on the following grounds: discretionary extended term (persistent offender) for a first degree offense, N.J.S.A. 2C 44-3(a); discretionary extended term (professional criminal) for a first degree offense, N.J.S.A. 2C:44-3(c); discretionary extended term (crime for payment) for a first degree offense, N.J.S.A. 2C:44-3(b); discretionary extended term (use of a stolen motor vehicle during commission of certain enumerated first degree offenses), N.J.S.A. 2C:44-3(f); mandatory extended term (repeat Graves Act offender for first degree Graves Act Offenses), N.J.S.A. 2C:43-6(c); mandatory extended term (repeat assault firearm) for first degree firearms offenses, N.J.S.A. 2C:43-6(g); mandatory extended term (three strikes for repeat violent offenders) for enumerated first

(hereinafter "life imprisonment only" presumption).

Our proposal operates within the BRS's procedural framework designed to encourage pretrial release. To overcome the otherwise applicable "clear and convincing" evidence standard supporting pretrial release, this framework employs a countervailing rebuttable presumption supporting detention.[33] Upon a judicial finding of probable cause, our proposal would modestly expand the predicate offenses supporting this presumption to include:

1) First degree aggravated manslaughter, N.J.S.A. 2C:11-4(a);
2) Second degree manslaughter, N.J.S.A. 2C:11-4(b);
3) First degree aggravated sexual assault, N.J.S.A. 2C:14-2(a);
4) Second degree sexual assault, N.J.S.A. 2C:14-2(b),
5) Second degree sexual assault, N.J.S.A. 2C:14-2(c)(1);
6) First degree robbery, N.J.S.A. 2C:15-1; and
7) First degree carjacking, N.J.S.A. 2C:15-2.

As previously noted, a majority of the CPC agrees with the substance of this proposal as reflected by their legislative recommendations.[35] The scope of this presumption was repeatedly scaled back during the Committee's deliberations.[36] The present proposal is squarely supported by "best practices" as disclosed to the CPC by our nation's leading expert in pretrial release decision-making, Dr. Marie Van Nostrand. Only after hearing Dr. Van Nostrand's presentation, did I modify this proposal to include only the seven violent crimes listed above. Significantly, these "best practices" were not available to the Legislature when it enacted the BRS in August of 2014.

After completing an unprecedented analysis of national and statewide data concerning the

degree crimes, N.J.S.A. 2C:43-7.1(b); mandatory extended terms for enumerated offense committed while released pretrial for another enumerated offense, N.J.S.A. 2C:44-5.1; and mandatory extended term (for repeat drug offender), N.J.S.A. 2C:43-6(f).

[33] See, N.J.S.A. 2A:162-17(b)(2), 5(e)(3) (release presumption), N.J.S.A. 2A:162-19(b) (preventive detention presumption).

[35] See CPC II reflecting the majority's approval of the substantively similar alternative *prima facie* rule and the substantively identical legislative recommendation.

[36] The CPC initially considered a proposed Rule 3:4A containing a broader presumption with predicate offenses extending to all nineteen (19) No Early Release Act offenses. See N.J.S.A. 2C:43-7.2 (hereinafter "NERA"). It also considered a subset of these NERA offenses (manslaughter, robbery carjacking, kidnapping) together with two offenses often charged together in nonfatal shootings (Aggravated Assault and Possession of a Weapon for an Unlawful Purpose). After hearing Dr. Van Nostrand's presentation, the undersigned scaled back our proposal to its present form.

conduct of persons released pretrial, a team of researchers led by Dr. Van Nostrand designed an objective risk screening tool (the Public Safety Assessment ("PSA")).[37] Dr. Van Nostrand validated this PSA as predictive of recidivism, violent recidivism, and nonappearance. Among those objective factors identified as predictive of violent recidivism was "current violent offense."[38] Aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery and carjacking are "violent offenses" which this research identified as predictive of violent recidivism. To assist courts in managing the risks of pretrial misconduct, Dr. Van Nostrand's research team also designed the New Jersey Decision Making Framework ("DMF").[39] Based upon an assessment of risk levels determined though analysis of objective factors, the DMF recommends pretrial release on nonmonetary conditions for 79.2% of all eligible defendants.[40]

The violent crimes of aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery and carjacking are among those for which the DMF would caution that "release is not recommended or, if released, released on maximum conditions." Alternatively stated, the DMF does not recommend pretrial release when there is probable cause to believe that the accused committed offenses including aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery and carjacking.[41] *Accordingly,* ***our proposal is limited to adding****, as predicate offenses supporting a rebuttable presumption of detention,* ***only those offenses which social science supports a recommendation of pretrial detention—aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery and carjacking***.[42]

[37] Marie Van Nostrand, Ph.D., "Public Safety Assessment Implementation in New Jersey" (hereinafter "PSA"). The PSA is designed to *measure* the risk of pretrial misconduct. This research team was selected and supported by the John and Laura Arnold Foundation as part of its Criminal Justice Initiative. This initiative aims to reduce crime, increase public safety, and ensure the criminal justice system operates as fairly and cost-effectively as possible.

[38] See PSA.

[39] Marie Van Nostrand, Ph.D., "Decision Making Framework" (hereinafter "DMF"). The DMF is designed to *manage* the risk of pretrial misconduct.

[40] The DMF estimates a 79.2% release rate. "Eligible defendant" is defined as a person charged in a complaint-warrant. See N.J.S.A. 2A:162-15. Dr. Van Nostrand calculated a 71.6% release rate under our present resource-based (money bail) system for persons arrested on a complaint-warrant. See PSA.

[41] See DMF.

[42] For those defendants posing the highest risk of pretrial misconduct, the DMF's most rigorous recommendation is "release not recommended; if released, maximum conditions." We interpret this to be the functional equivalent of a detention recommendation. The DMF also does not recommend release for escape (N.J.S.A. 2C:29-5(a)). Despite this inclusion within

In addition to this recent social science research, our proposal is consistent with societal conceptions of crimes with the most adverse effect upon public safety. These conceptions are amply reflected in Constitutional traditions. Under our state Constitution, capital crimes were defined as crimes punishable by death.[43] With repeal of the death penalty, formerly capital crimes became punishable by life imprisonment.[44] While the BRS's presumption is limited to crimes presently punishable by life imprisonment, it does not extend to the crimes of manslaughter, rape and robbery which were punishable by death when our 1844 Constitution was ratified.[45] Since carjacking is essentially the robbery of a motor vehicle,[46] it is reasonable to conclude that it would have also been a capital offense.

Seeking to quantify the scope of the "life imprisonment only" presumption and the presumption which we propose, the caseload of a representative New Jersey trial court was analyzed. This analysis revealed that 13 of 289 indicted defendant cases were charged with offenses punishable by an ordinary term of life imprisonment (4.15%) and that an additional twenty-eight defendant cases were charged with offenses punishable by an extended term of life imprisonment (9.69%). Hence, the "life imprisonment only" detention presumption would extend to only 13.84% of that caseload. Our proposal would extend this presumption to an additional 23 defendant cases or 7.96% of the caseload. Hence, it is estimated that acceptance of our proposal would extend a presumption supporting detention to 21.80% of the caseload. Significantly, this estimated rate is within 1% of the 20.8% of the eligible defendants for whom Dr. Van Nostrand's DMF cautions

the DMF, a majority of our CPC colleagues did not substantively support including escape as a predicate offense supporting preventive detention. To preserve substantive majority support for legislation, escape is not included in our proposal. Although the DMF does not recommend release for second degree robbery (N.J.S.A. 2C:15-1), that offense was not submitted for Committee vote.

[43] See State v. Johnson, 61 N.J. 351, 364 (1972).

[44] Capital punishment was abolished on December 17, 2007. L. 2007, c. 204 codified in N.J.S.A. 2C:11-3; N.J.S.A. 2B:23-13; & N.J.S.A. 30:4-123.51.

[45] See Laws of the State of New Jersey, February 17, 1829 and March 7, 1839. These societal conceptions of danger are further reflected in legislative enactments which currently impose mandatory eighty-five percent parole ineligibility terms and post release supervision terms for persons convicted of NERA offenses, including manslaughter, rape, robbery and carjacking. See N.J.S.A. 2C:43-7.2. Our legislature has also imposed more restrictive bail conditions upon persons accused of these crimes, by rendering those persons ineligible to post 10% cash alternative to a secured bond. See N.J.S.A. 2C:162-12a.

[46] N.J.S.A. 2C:15-2.

"release not recommended."[47] It is submitted that this caseload analysis reveals that our proposal is narrowly tailored to reflect the most recent social science and to include as predicate offenses only those crimes which have the most adverse effect upon public safety.

(ii) The proposed amendment of *Rule* 3:26-2 is narrowly tailored to create a rebuttable presumption of release revocation for persons; (a) who are released on any detainable offense and are charged with subsequently committing a NERA offense or; (b) are released on a NERA offense and are charged with subsequently committing a detainable offense.

Although N.J.S.A. 2A:162-24 authorizes release revocation for noncompliance with release conditions, this statute does not create any presumption supporting such revocation. Since no presumption supporting detention applies to that initial charge for which the defendant was initially released, the presumption of release continues on that charge for which release revocation is being considered.[48]

The language of N.J.S.A. 2A:162-24 reflects an acknowledgment that that all release conditions are not the same in terms of the severity of consequences arising from their violation. More specifically, the statute distinguishes between "violations," such as failure to abide by a curfew, and "criminal acts," such as committing a carjacking while awaiting trial.[49] However, *the same procedures apply to revocation proceedings based upon curfew violations and those based upon the commission of a carjacking while released pretrial*. Responding to the absence of any language within N.J.S.A. 2A:162-24 expressly authorizing a court to modify the conditions of release based upon defendant's compliance or non-compliance with release conditions, a majority of this committee appropriately recommended to fill that statutory "gap" through rule-making.[50] Our proposal responds to a similar "gap" in this statute by creating a rebuttable presumption supporting release revocation.

[47] See DMF

[48] See N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-17(b)(2) (release presumption). Even if the N.J.S.A. 2A:162-19(b) preventive detention presumption applied to the initial charge, defendant's release on that charge reflects either that the State did not move for preventive detention or that the defendant rebutted that presumption.

[49] In determining whether to revoke pretrial release, N.J.S.A. 2A:162-24 directs courts to consider "all relevant circumstances including but not limited to *the nature and seriousness of the* violation or *criminal act committed*…."

[50] See CPC I at 75.

Our proposed presumption is dependent upon a judicial finding of probable cause to believe that:

> (a) while on pretrial release for any enumerated crime or offense for which preventive detention may be sought,[51] the defendant committed any NERA offense[52] or a substantially equivalent crime or offense under federal law or the law of any other state; or
>
> (b) while on pretrial release for any NERA offense, the defendant committed any offense for which preventive detention may be sought or a substantially equivalent crime or offense under federal law or the law of any other state.

Since a majority of the CPC recommends to implement this proposal through legislation, I conclude that a majority of the CPC supports the substance of this proposal.[53] This CPC majority support reflects acknowledgment of the acute danger to the community posed by pretrial recidivism in New Jersey. The gravity of this danger is reflected in Essex County surveys reflecting pretrial recidivism rates of 34.8% in 2005 and 28.1% in 2010.[54] These surveys are summarized below by year and by involvement in the Criminal Justice System (hereinafter "CJS"):

	2005	**%**	**2010**	**%**
TOTAL	601	100%	580	100%
Pending Charges	212	**34.8%**	163	**28.1%**
Pending	33	5.4%	18	3.1%

[51] N.J.S.A. 2A:162-19(a)(1-6) enumerates the predicate offenses for which preventive detention may be sought under the BRS. NERA offenses are included among these predicate crimes. N.J.S.A. 2A:162-19(a)(1). These enumerated predicate crimes do not extend to unspecified crimes which require a particularized demonstration of danger under N.J.S.A. 2A:162-19(a)(7).

[52] N.J.S.A. 2C:43-7.2(d) enumerates the nineteen (19) NERA offenses which are: murder, aggravated manslaughter/manslaughter, vehicular homicide, aggravated assault, disarming a police officer, kidnapping, aggravated sexual assault, sexual assault, robbery, carjacking, aggravated arson, burglary, extortion, booby traps, drug-induced deaths, terrorism, possession of chemical weapons, and racketeering.

[53] See supra note 1.

[54] McMahon, CJP Bail Data Analysis for 2005, and 2010 (Aug. 12, 2010). See also, Athanaspolus, Bail Research Project (Feb. 3, 2006). These Essex County recidivism rates were calculated for the 580 defendants who were arraigned at Central Judicial Processing ("CJP") Court in July of 2010 and for the 610 defendants who were arraigned there in July 2005. Id. The undersigned expresses his appreciation and gratitude to following individuals who have conducted legal research and data analysis which was utilized in this document: Jacqueline McMahon, Esq., Michael Mulanaphy, Esq., Rebecca Ryan, Esq., Israel Klein, Esq., Ioannis S. Athanasopoulos, Esq., Theresa Houthuysen, Marlene Jupinka, Al Restaino, and Michael Sheflin.

	2005	%	2010	%
Sentencing				
On Probation	103	16.9%	89	15.3%
On Parole	39	6.4%	42	7.2%
In CJS	301	49.3%	253	43.6%

These recidivism rates are consistent with the 32% rate which Dr. Van Nostrand calculated based on a sample size that was larger numerically (68,512), geographically (statewide), and temporally (2009–2010).[55] These New Jersey recidivism rates far exceed the "disturbing" rates of 13% to 21% which motivated Congress to embrace presumption supporting preventive detention and release revocation in the 1984 Bail Reform Act.[56]

The commission of another crime while on release is the form of pretrial misconduct which most directly disrupts public safety. The CPC initially considered a broader Rule revocation presumption which mirrored the federal statute by extending the presumption to all felonies committed while the defendant was awaiting trial.[57] Consistent with "best practices," the scope of this presumption was scaled back to focus only upon particularly "serious" crimes.[58] This limited scope is quantified by the caseload analysis reflecting that our proposed presumption would theoretically[59] apply to no more than approximately 55 defendant cases (or 19.20%) of the 289

[55] See PSA.

[56] S. Rep. No. 225, 98th Cong., 1st Sess. 6 (1984). This federal statute was enacted in response to "a deep public concern" about the "growing problem of crimes committed by persons on [pretrial] release." Id. at 6. These rates also far exceed the 12% recidivism rate for adults in the District of Columbia. Pretrial Justice Institute, "The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth" at 2 (2010) (hereinafter "PJI"). They also exceed the 5% recidivism rate for juveniles in New Jersey. See 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 51-56); see also infra pp. 30-31 (discussing application of risk-based principles to New Jersey juveniles).

[57] See 18 U.S.C. 3148(b)(2) (any felony).

[58] Cf. D.C. Code § 23-1329 (b)(2) (dangerous crime or crime of violence). Accord 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 14 n.17 (recognizes District of Columbia procedures as "best practices")).

[59] This estimation assumes that all of these defendants were initially released on nonmonetary conditions. Since all of them were initially charged with offenses for which detention may be sought and some of them are subject to the "life imprisonment only" presumption supporting preventive detention, it is reasonable to conclude that some of these defendants would have been preventively detained and therefore not potentially subject to release revocation.

defendant-cases.[60]

It has been suggested that there is no need for this presumption supporting release revocation in view of presumption supporting preventive detention. This suggestion ignores "lessons learned" from the evolution of release revocation presumptions in other jurisdictions.[61] More fundamentally, this suggestion is premised upon the conflation of two distinct forms of detention—one arising from a judicial decision not to initially release a defendant awaiting trial ("preventive detention"),[62] and another arising from a judicial decision to place a defendant back into detention for failure to comply with the initial release conditions ("release revocation").[63] The critical distinction between the two forms of detention have been drawn by several courts which have rejected constitutional challenges to the revocation of bail or pretrial release for failure to comply with conditions designed to protect the public.[64] As these courts emphasize, preventive detention addresses potential *future* misconduct; release revocation addresses demonstrated *past* misconduct.[65]

[60] Review of the 8/22/13 caseload reflected that 161 of the 286 defendant cases (56.29%) involve offenses that are not specifically enumerated in N.J.S.A. 2A:162-19(a)(1)–(6) as predicate offenses for preventive detention. More specifically, these 161 defendant cases involve allegations of CDS, eluding, failure to register as a sex offender, burglary, theft, receiving stolen property, forgery, fraud, and impersonating a law enforcement officer. Accordingly, the remaining 128 defendant cases (43.71%) involved predicate offenses for preventive detention. Since 34.94% of this caseload alleges NERA offenses, the 55.48 defendant cases was computed by multiplying the percentage of defendant cases eligible for preventive detention (43.71%) by the percentage charged with NERA offenses (34.94%) and then applying the resulting percentage to the total of 289 defendant cases.

[61] See infra p. 23.

[62] N.J.S.A. 2A:162-19(b) and R. 3:4A.

[63] N.J.S.A. 2A:162-24.

[64] See, e.g., Mello v. Superior Court, 117 R.I. at 581-83; Paquette v. Commonwealth, 440 Mass. at 125-127; State v. Ayala, 222 Conn. 352-53, 349 (1992).

[65] Seizing upon this distinction between past and future acts, the Supreme Judicial Court of Massachusetts in Paquette v. Commonwealth emphasized that "the liberty interest of a person admitted to bail is conditional." 440 Mass. at 126. This court further observed that "the concept of conditional pretrial release would be meaningless if courts lacked the power to rescind release "after release conditions have been violated." Id. at 129, quoting, 1989 ABA Standard, Sec. 10-5.8(a), commentary at 129. Applying these principles, the Paquette Court concluded that "[a] defendant cannot be heard to complain that his constitutional right to liberty has been violated when continued freedom was entirely within his own control, and the deprivation thereof was an inevitable consequence of his alleged failure to conform his conduct… to the explicit conditions of his earlier release." Id. at 129. The Paquette Court further reasoned that through commission of this serious offense, the defendant "forfeited" his rights to pretrial release on his initial charge. Id. at 126. Cf. State v. Byrd, 198 N.J. 319, 340-41 (2009) (forfeiture of constitutional right to confrontation through pretrial misconduct). Accord, Edwards, 430 A.2d at 1332 (preventive detention is "forward looking"). This distinction further reveals that the PSA and DMF designed by Dr. Van Nostrand have less direct application to release revocation. The PSA is predictive of future misconduct. In contrast, release revocation responds to past misconduct. The DMF only focuses upon setting release conditions for the new offense. See PSA (lists pending charge as a factor predictive of future criminal activity). Release revocation focuses upon the old offense.

The N.J.S.A. 2A:162-19(b) presumption supporting preventive detention, has limited application to persons charged with committing an additional offense while released pretrial. This limited application is amply demonstrated through analysis of the previously referenced Essex County surveys which reflected pretrial recidivism rates of 34.8% in 2005 and 28.1% in 2010.[66] Although this Essex County data reflects that 212 defendants were arrested in 2005 after being released on an earlier offense, the present "life imprisonment only" presumption supporting preventive detention would apply to only twenty-nine (29) of these defendants. For the remaining 183 defendants, the presumption of pretrial release would apply, notwithstanding a judicial finding of probable cause to believe the defendant committed a second offense while on pretrial release for the initial offense. These 183 defendants could include a defendant for whom a court finds probable cause to believe committed Manslaughter while he was on pretrial release awaiting trial on another Manslaughter charge. Our proposed presumption would apply to this multiple manslaughter example.

In addition to this manslaughter example, it is submitted that the merit of our proposal is further illustrated by the following hypothetical:

> Assume that the defendant is charged with stabbing his estranged spouse in the arm with a knife and threatening to slit her throat. A judicial officer finds probable cause to believe that the defendant committed third degree aggravated assault, third degree possession of a weapon for an unlawful purpose, and third degree terroristic threats.[67] The court releases the defendant on nonmonetary conditions, including the standard condition that he not commit another crime or offense while released pretrial and the special condition of no contact with the victim. Three weeks later, the defendant is charged with kidnapping the victim of the earlier assault. A judicial officer finds probable cause to believe that the defendant committed first degree kidnapping.[68]

[66] See supra note 52.

[67] See N.J.S.A. 2C:12-1(b)(2) (bodily injury with a deadly weapon); N.J.S.A. 2C:39-4(d) (knife); and N.J.S.A. 2C:12-3(b) (threat). Although these offenses are not specifically enumerated in N.J.S.A. 2A:162-19(a)(1)–(5), the domestic relationship between the defendant and alleged victim qualifies these offenses as detention motion predicates. See N.J.S.A. 2A:162-19(a)(6) (domestic violence). Assume that the probable cause finding was based upon evidence that police responded to a 911 call, arrested the defendant in the victim's apartment, and recovered a knife from his person. He was identified by the victim at the scene.

[68] See N.J.S.A. 2C: 13-1(b)(2). This is a N.E.R.A. offense. See N.J.S.A. 2C:43-7.2(d)(6). Assume that the probable cause finding was based upon evidence that neighbors observed defendant accosting the victim in front of her home and forcing her

Since kidnapping is not a predicate offense triggering a presumption of detention,[69] the presumption of release would apply to this second offense committed while release on the initial assault charge. The presumption of release also continues to apply to this initial assault charge, notwithstanding a probable cause finding that the defendant subsequently kidnapped the same victim.

To revoke release on the initial assault charge, N.J.S.A. 2A:162-24 requires a judicial finding of (1) probable cause to believe that the defendant committed the kidnapping offense and (2) clear and convincing evidence that there are no conditions of release on the assault charge that would reasonably assure safety of the public and the victim. The court has already found that there are such conditions, as the court previously ordered defendant's initial[70] release on this assault charge. Moreover, the availability of more rigorous release conditions (e.g., electronic monitoring) and of a Pretrial Services Program to supervise compliance with these conditions renders the "clear and convincing" evidence finding more nuanced and potentially time consuming at a revocation hearing.

Our proposal seeks to properly return the focus in release revocation proceedings to the defendant's demonstrated *past* conduct in those limited circumstances where that past conduct is supported by a probable cause finding that the defendant committed a "serious" offense while awaiting trial on another "serious" offense.[71] Our focus upon serious past conduct is supported by the express language of N.J.S.A. 2A:162-24 which requires courts during revocation proceedings, to consider "all relevant circumstances including but not limited to *the nature and seriousness of the* violation or *criminal act committed*…." Returning to the hypothetical, commission of the kidnapping is properly viewed as *past* conduct because it already occurred when the court is considering whether to revoke his release on the initial assault charge.

into a car which sped from the scene. Hours later, police officers from an adjoining town stopped this vehicle operated by the defendant with the victim bound and gagged in the back seat.

[69] Further assume that the defendant has no prior felony convictions and therefore would not be subject to an extended term of life imprisonment. See supra p. 7. Kidnapping is not a predicate offense supporting a presumption of preventive detention under N.J.S.A. 2A:162-19(b), the CPC's recommended R. 3:4A, or our proposed R. 3:4A.

[70] The new offense is a change in circumstances occurring after this initial release decision. Our proposed presumption fully responds to this change.

[71] These "serious" offenses under our proposal are those specifically enumerated offenses for which detention may be sought, N.J.S.A. 2A:162-19(a)(1)-(6), and N.E.R.A. offenses, N.J.SA. 2C:43-7.2, which, in turn, are first among those enumerated

Significantly, when revocation is sought for the violation of a release condition other than the commission of another "serious" offense, our proposed presumption supporting release revocation does not apply. We contemplate that those violations, such as noncompliance with curfew restrictions, would be frequently addressed through progressive modification to more rigorous release conditions. If non-compliance continues, the release revocation proceedings could be initiated[72] subject to the otherwise application presumption of release. Even in those limited occasions when our proposed presumption would apply, release revocation is not inevitable, as our proposed presumption is rebuttable.

It is submitted that this hypothetical and the multiple manslaughter example further illustrate that there is a gaping "gap" in N.J.S.A. 2A:162-24 which our proposed rebuttable presumption supporting release revocation would "fill."

(C) The Unintended Cost of "Prophylactic" Procedures and corresponding need for "Workable" Procedures: The District of Columbia and Federal Experience.

Our three interrelated proposals were modeled after the reforms implemented more than a decade ago in the District of Columbia and in our Federal District Courts.[73] Hence, analysis of their reforms place our proposals in context.

(i) Expanded Presumption Supporting Preventive Detention and Affordable Bail.

Seeking to address the adverse effect of money bail upon the poor, Congress enacted the District of Columbia Bail Agency Act of 1966 (hereinafter "1966 DC Bail Act").[74] This statute expressly provided that flight risk is the sole consideration in deciding whether to release a defendant

offenses, N.J.S.A. 2A:162-19(a)(1). They do not extent to the non-enumerated crimes which require an additional prosecutorial demonstration of "serious risk." N.J.S.A. 2A:162-19(a)(7).

[72] Emphasizing a court's inherent authority to enforce its own orders, the undersigned proposed to include in R. 3:26-2(d)(1) that the court "on its own motion" may initiate a release revocation proceeding . United States v. Fernandez, 81 S. Ct. 642, 644 (1961). Accord Paquette, 440 Mass. at 128; D.C. Code § 23-1329(b)(1) (2001) (expressly authorizes court motion). This proposal is further supported by the express language N.J.S.A. 2A:162-15 (Notes: Effective Dates) which provides that "nothing shall be construed to affect the court's **existing** authority to revoke pretrial release prior to the effective date of [the BRS]" (emphasis added). For these reasons, the undersigned dissents from the CPC's decision not to adopt this proposal.

[73] Compare supra p. 1 (our proposals) with infra pp. 18-23 (District of Columbia and Federal reforms).

[74] Pub. L. No. 89-519, 80 Stat. 327 (1966), discussed in, 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 35).

pretrial and in setting the amount of money bail.[75] It expressly prohibited consideration of danger to the community in making these decisions.[76] However, this danger did not go away. To the contrary, the crime rate in the District of Columbia skyrocketed, nearly tripling in a four (4) year period.[77] Congress expressed particular concern regarding the rise in "common street crime" such as robbery and rape.[78] The rate of reported robberies more than tripled and the rate of reported rapes more than doubled.[79] Particularly alarming was the recidivism rate for persons indicted for robbery – "nearly 70 percent of those released prior to trail were rearrested and charged with a subsequent offense."[80]

Since this danger persisted, the 1966 DC Bail Act imposed an "agonizing decision" upon courts before whom stood "an obviously dangerous defendant."[81] The court could either ignore this danger or address it through the *sub rosa* consideration of this danger in setting the amount and form of money bail.[82] District of Columbia officials later acknowledged that "notwithstanding the wording of the 1966 DC Bail Act," financial bond continued to be used as a means of detaining high risk accused."[83] In other words, since the 1966 DC Bail Act did not provide courts with any "tools" to address this community danger, it was addressed *sub rosa* through bail set so high that it resulted in pretrial detention.[84]

Responding to the failure of the 1966 DC Bail Act[85] to address the danger to the community posed by pretrial recidivism, Congress enacted our nation's first preventive detention statute four

[75] See S. Rep. No. 225, 98th Cong., 1st Sess. 4 (1984); 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 35 -36).
[76] See S. Rep. No. 225, 98th Cong., 1st Sess. 4-5 (1984); 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 36).
[77] See H.R. Rep. No. 907, 91st Cong., 2d Sess. 81 (1970) (chart reflects approximately 12,000 index crimes in June 1966 and approximately 35,500 in December 1969).
[78] See H.R. Rep. No. 907, 91st Cong., 2d Sess. 89 (1970).
[79] Id.
[80] Id. at 82-83.
[81] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 37). Accord S. Rep. No. 225, 98th Cong., 1st Sess. 10 (1984).
[82] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 37). See also S. Rep. No. 225, 98th Cong., 1st Sess. 5 (1984).
[83] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 37).
[84] See 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 39–43 (discusses evolution of "workable procedures")).
[85] Pub. L. No. 89-519, 80 Stat. 327 (1966), incorporating by reference Pub. L. No. 89-465, 80 Stat. 214 (1966).

years later.[86] Congress faced several challenges in crafting the preventative detention provisions within the 1970 DC Bail Act. At that time, the social science mechanisms designed to predict future criminal activity were being developed and had not yet been validated.[87] Since court procedures designed to protect the accused's due process rights in a preventive detention context had not yet been implemented anywhere, Congress was unsure how these procedures would operate in the "real world." Accordingly, Congress was understandably concerned that this first preventive detention statue would result in "excessive" or "unjustified" detention—detention beyond that which reasonably assures the community's safety.[88] Accordingly, Congress included certain procedural safeguards which were "prophylactic" in the sense that they exceeded what the Constitution requires and were inserted for the policy reason of minimizing the potential of "excessive" detention.[89] For example, while the constitution requires "probable cause" to believe that the defendant committed a predicate offense for which detention is sought,[90] the 1970 DC Act imposed the higher "substantial probability" standard.[91] Moreover, this statute contained a presumption supporting pretrial release

[86] Pub. L. No. 91- 358, 84 Stat. 642 (1970).

[87] Despite this understandable concern, the United States Supreme Court has repeatedly observed that, "there is nothing inherently unattainable about a prediction of future criminal conduct." Shall v. Martin, 467 U.S. at 278, quoted in, Salerno, 481 U.S. at 571. Congress cited advancements in social science in support of the 1984 Federal Bail Reform Act. See S. Rep. No. 225, 98th Cong., 1st Sess. 9 (1984) ("The presence of certain combinations of offense and offender characteristics, such as the nature and seriousness of the offense charged, the extent of prior arrests and convictions,… have been shown in studies to have a strong positive relationship to predicting the probability that a defendant will commit a new offense while on release."). It is submitted that Dr. Van Nostrand's validated PSA is the culmination of these social science advancements.

[88] See 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 38). 2007 ABA Standard, comment at 127 (elevated burden of persuasion imposed "to emphasize the deliberately limited scope of using secure detention").

[89] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 38-39). Referring to these "prophylactic" procedural safeguards, Congress acknowledged "that this legislation incorporated standards far above the minimum necessary to avoid any possible conflict with the due process clause," quoted in, 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 39). See also Edwards, 430 A.2d at 1339.

[90] See United States v. Salerno, 481 U.S. 739, 749-50 (1987); Gerstein v. Pugh, 420 U.S. 103, 117-19 (1975); United States v. Edwards, 430 A.2d 1321, 1336-37, 1339 (D.C. Cir. 1981).

[91] Pub. L. No. 91- 358, 84 Stat. 644, 645 (1970) (codified as amended at D.C. Code 23-1322(b)(2)(c)). When Congress later discarded this standard, it observed that "while this "substantial probability" requirement might give some additional measure of protection against the possibility of allowing pretrial detention of defendants who are ultimately acquitted, the Committee is satisfied that the fact that the judicial officer has to find probable cause will assure the validity of the charges against the defendant, and that any additional assurance provided by a "substantial probability" test is outweighed by the *practical problems* in meeting this requirement at the stage at which the pretrial detention hearing is held." S. Rep. No. 225, 98th Cong., 1st Sess. 18 (1984) (emphasis added), quoted in 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 40-41).

which could only be overcome by clear and convincing evidence.[92] These "prophylactic" procedures also extended to the omission of any presumption supporting preventive detention[93] or release revocation.[94] "Lessons learned" from evolution of pretrial release practices in the District of Columbia establish that *these "prophylactic" procedures exacted an unintended, but debilitating, cost upon a court's ability to protect the public and safely release virtually everyone else awaiting trial.*

Because of these "fairly elaborate due process procedures," Congress later acknowledged that the 1970 DC Bail Act was "infrequently used."[95] The government moved to preventively detain less than 1% of all defendants who were charged with committing qualifying offenses.[96] In 1978, scholarly commentators observed that that "[t]he reason frequently suggested for the rare use and present dormant status of the preventive detention provision is the range of procedural guarantees, which prove to be a critical addition to an already overworked and understaffed court system. *The increase in manpower, time and space necessary to administer the pretrial detention hearings has made such hearings impractical in all but a few cases*…."[97]

Since the danger of pretrial recidivism did not evaporate, how was danger addressed under the 1970 DC Bail Act? The unsettling answer, provided by these commentators, was that "the dormancy of preventive detention [was attributable] to the prosecutor's assumption that judges will use high financial bond to detain dangerous defendant unofficially, saving both the court and the

[92] Pub. L. No. 91- 358, 84 Stat. 642, 642-43 (1970) (codified as amended at D.C. Code § 23-1321(a)); Pub. L. No. 91- 358, 84 Stat. 644 (codified as amended at D.C. Code § 23-1322).

[93] Pub. L. No. 91- 358, 84 Stat. 644 (1970) (codified as amended at D.C. Code § 23-1322(b)).

[94] Pub. L. No. 91- 358, 84 Stat. 649 (1970) (codified as amended at D.C. Code § 23-1329). This statute also required clear and convincing evidence that the accused violated a release condition. Id. Until 2001, this standard continued to apply for all release violations other that the commission of another crime. Since 2001, a probable cause standard applies to violations based upon these crimes. See 1999 D.C. Stat. 310 § 2(d). This 2001 amendment also included a rebuttable presumption in favor of release revocation upon a probable cause finding that the accused committed a dangerous or violent crime while released. Id.

[95] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 40) (citing Jeffery A. Roth, Paul B. Wrice, "Pretrial Release and Misconduct in the District of Columbia" at 3 – 4 (1980) (hereinafter "Inslaw Study")).

[96] Inslaw Study at 4, 12 (1,500 eligible for detention, 40 moved for detention, 34 detained).

[97] Inslaw Study at 4–5, (emphasis added).

prosecutor the burden of a preventive detention hearing."[98] Thus, inclusion of "prophylactic" procedures which rendered pretrial detention hearings "impractical in all but a few cases," had the unintended and profoundly undesirable effect of encouraging the use of high money bail to address public safety concerns.

This reliance upon high money bail to address danger continued for over two decades in the District of Columbia.[99] For example, detention hearings were held for only 5% of defendants charged in the District of Columbia local courts during 1990 and approximately 2% of these defendants were actually detained.[100] Money bond was set for approximately two-thirds of the defendants statutorily eligible for detention, resulting in "many of… these potentially dangerous defendants [being] able to purchase their release."[101] Violent crimes, including drive-by shootings, committed by some of these unsupervised defendants released on money bond, precipitated a reevaluation of the District of Columbia's pretrial release procedures.

This reevaluation resulted in two significant reforms. First, the 1992 D.C. Bail Act "expanded the scope of pretrial detention and included several rebuttable presumptions for detention."[102] Second, this statue authorized courts to set money bail in an amount "that does not result in the preventive detention of the person."[103] This latter provision was interpreted to mean that "you have a right to bail that you can meet."[104] While the first of the 1992 D.C. reforms resulted in an increase from 2% to 15% of defendants preventively detained, the second reform resulted in an increase to 80% of defendants released on nonmonetary conditions.[105] It is submitted that this analysis of interplay between "workable" preventive detention procedures and an affirmative right to affordable bail demonstrates that *a court's ability to detain the "truly dangerous" empowers*

[98] Inslaw Study at 4–5.
[99] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 40-41).
[100] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 41) (citing, Pretrial Justice Institute, "The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth" at 4 (2010) (hereinafter "PJI")).
[101] PJI at 5.
[102] PJI at 4.
[103] PJI at 5, See DC Code § 23-1321(c)(3).
[104] PJI at 2.
[105] PJI at 2. The remaining 5% of defendants remained in custody on money bond.

it to safely release virtually everybody else.[106]

(ii) Presumption Supporting Release Revocation

Almost a decade would pass before the D.C. Bail statute would be amended to fill another "gap" by introducing a presumption of release revocation for commission of a subsequent offense while on pretrial release.[107] Since 1970, District of Columbia's bail statute had included a procedure for revoking a defendant's pretrial release.[108] An order of release could only be revoked if a judicial officer found, by clear and convincing evidence, that (1) defendant had violated a condition of release and (2) that no condition or combination of conditions of release could reasonably assure that defendant's appearance or protect the safety of any person or the community.[109]

Drawing upon lessons learned in the District of Columbia, Congress enacted the federal Bail Reform Act of 1984 which included a rebuttable presumption of release revocation "[i]f there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony."[110] The Senate recognized that although this provision was new to federal bail law, the District of Columbia Code had a similar, albeit more limited, procedure in place.[111] It further supported this adoption by noting that release revocation "is based upon a betrayal of trust by the person released by the court on conditions that were to assure both his appearance and the safety of the community."[112] Although the Senate Committee on the Judiciary had been presented with an argument for automatic release revocation upon probable cause of a "serious" crime committed while

[106] District of Columbia Senior Judge Truman Morrison identified "a critical linkage between a 'workable' preventive detention statute and a reduction upon *sub rosa* reliance upon money bail to address dangerousness…." 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 42). More specifically, Judge Morrison commented, with particular force and conviction, that "It is my conviction that judges here, like in the rest of America, need what I am blessed with as I grapple with pretrial decisions about bail: a fair, due process – laden, workable preventive detention scheme that everyone buys into. That scheme portends freedom for judges… once they have openly addressed the issue of community safety within their dockets, they can being to intellectually relax and with clearer eyes focus upon what Justice Rehnquist told us to do:… to figure out ways to release most everybody." 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 42) (paraphrasing, Salerno, 481 U.S. at 755).

[107] 1999 D.C. Stat. 310, § 2(d)).

[108] Pub. L. No. 91-358, 84 Stat. 649 (1970) (codified as amended at D.C. Code § 23-1329).

[109] Id.

[110] Pub. L. No. 98-473, 98 Stat. 1983, 1984 (1984) (codified as amended at 18 U.S.C. 3148).

[111] S. Rep. No. 225, 98th Cong., 1st Sess. 34-35 (1984) (https://www.fd.org/docs/select-topics---sentencing/SRA-Leg-History.pdf). This District of Columbia "procedure" did not include the federal presumption.

[112] Id. at 35.

on pretrial release, Congress opted for a rebuttable presumption with a broader trigger.[113]

No comparable change was made in the 1992 DC Bail Amendments.[114] In 2001, however, the District of Columbia statute was revised to include a rebuttable presumption of release revocation "[i]f there is probable cause to believe that while on release, the person committed a dangerous or violent crime… or a substantially similar offense under the laws of any other jurisdiction."[115] Dangerous or violent crime, as defined per the statute—including, *inter alia*, cruelty to children, prostitution, mayhem, and CDS offenses[116]—is broader than those offenses subject to NERA, though more narrow than those which trigger its federal counterpart, namely, all felonies.

The painful lessons learned in the District of Columbia from 1970 through 2001 establish that a court's ability to detain must be governed by procedures that are "sufficiently workable as a practical matter, that it will be utilized to any significant degree."[117] Only then will the public be protected from the risks of pretrial recidivism presented by those "truly dangerous" defendants whose pretrial detention is determined through "workable" procedures. Only then will the liberty interests of all other defendants awaiting trial be vindicated through their pretrial release on nonmonetary conditions as supervised by the Pretrial Services Program.

(D) The CPC recommended presumption Rules are not "workable."

(i) Scope of Detention Hearing without Proposed Presumption.

Applying "lessons learned" form the District of Columbia and Federal Courts, R. 3:4A and R. 3:26-2 as recommended by the CPC majority are not "sufficiently workable" as a practical matter that they "will be utilized to any significant degree."[118] A "workable" determination is dependent upon the increase in manpower and time necessary to conduct preventive detention and release

[113] Id. at 35-36 ("[W]hile the Committee is of the view that commission of a felony during the period of release generally should result in the revocation of the person's release, it concluded that the defendant should not be foreclosed from the opportunity to present to the court evidence indicating that this sanction is not merited.")
[114] 1992 D.C. Stat. 125.
[115] 1999 D.C. Stat. 310 § 2d.
[116] Compare D.C. Code § 23-1331, with 18 U.S.C. § 3148 (all felonies).
[117] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 40).
[118] S. Rep. No. 225, 98th Cong., 1st Sess. 7-8 (1984) (https://www.fd.org/docs/select-topics---sentencing/SRA-Leg-History.pdf).

revocation hearings as viewed in context of the existing demands upon the court system.

In order to obtain a preventive detention order, N.J.S.A. 2A:162-19(e) requires the State to establish (i) probable cause to believe that the defendant committed a predicate offense;[119] and (ii) clear and convincing evidence that there are no conditions or combination of conditions which would reasonably assure the safety of the community.[120] At a preventive detention hearing, the defendant has a right to counsel and "defendant shall be afforded an opportunity to testify, to present witnesses, to cross examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing."[121]

Absent a presumption supporting detention, detention hearing will necessarily become more complex and time consuming as the State seeks to overcome the countervailing presumption of pretrial release. These hearings will likely involve detailed inquiry into "the nature and circumstances" of the charged offense and the strength of the State's case.[122] For example, even if application of the DMF supports the most rigorous PSP recommendation of "release not recommended," it is presently[123] unclear whether that functional equivalent of a detention recommendation would be sufficient information for a court to conclude, by clear and convincing evidence, that that there are no release conditions that would reasonably assure public protection. Until that issue is resolved through litigation (which may take years), cautious courts and litigants will probably seek to develop a more complete factual record during at the detention hearing. While this record would include objective information considered in the PSA/DMF (such as criminal history and bench warrant history), the focus would probably shift towards other factors listed in N.J.S.A. 2A:162-20. Those factors include "strength of case" and "facts and circumstances of the case."

[119] N.J.S.A. 2A:162-19(e)(2). The return of an indictment establishes probable cause. Id. In the absence of an indictment, the State must establish probable cause through a detention hearing.
[120] N.J.S.A. 2A:162-19(e)(3).
[121] N.J.S.A. 2A:162-19(e)(1).
[122] These are factors relevant to the detention determination but are not addressed in the PSA.

The sufficiency of those factors as applied to District of Columbia detention statute's "clear and convincing" evidence standard was addressed in Pope v. United States.[124] In Pope, the District of Columbia Court of Appeals held that, "[i]n the absence of a statutory presumption… the government's burden to prove by clear and convincing evidence that the defendant is properly subject to preventive detention… cannot be satisfied simply by reference to the known facts regarding the crime which the defendant has been accused." Although there are substantial grounds to conclude that New Jersey courts would not find Pope persuasive,[125] prudent courts and litigants may seek to factually distinguish this decision. This would require the development of a more complete factual record during at the detention hearing, focusing upon other factors listed in N.J.S.A. 2A:162-20. Prominent among those factors may be "the weight of the evidence against the eligible defendant"' because the Pope court emphasized that evidence presented was "thin" and "barely sufficient" to constitute probable cause. This fact sensitive inquiry would probably increase the volume of evidence presented by the state.

(ii) Comparative Caseload Analysis.

Particularly in view of these elaborate hearings, a comparison of caseloads in New Jersey and in the District of Columbia reveals a strong probability that our court system will be overwhelmed by detention and revocation hearings conducted under the CPC majority's Rules 3:4A and 3:26-2(d). **In the District of Columbia, three full time judges and one full time magistrate are responsible for a caseload for which one New Jersey Superior Court Judge is presently responsible.**

[123] The CPC seeks to address this uncertainty through its recommended R. 3:4A which provides that a "release not recommended" determination would support a *prima facie* finding that there are no such release conditions. While the CPC recommends this rule, the Court has not yet decided whether to accept that recommendation.

[124] 739 A.2d 819 (D.C. Cir. 1999). Although lacking precedential value, the Pope court interpreted the DC detention statute whose language is similar to N.J.S.A. 2A:162-19(c)(1).

[125] When Pope was decided, preventive detention under the District of Columbia statute required (1) Substantial probability that defendant committed assault with the intent to kill and (2) CCE that no release conditions would reasonably assure public safety. In making the latter determination, DC Code § 23-1322(e) expressly lists the "seriousness of the offense" as a relevant factor. The Pope holding fails to give any effect to the "seriousness of the offense" in making that second determination. In New Jersey, it is a well-established rule of statutory construction that "a construction that will render any part of a statute inoperative, superfluous, or meaningless, is to be avoided." See Abbott Dairies, Inc. v. Armstrong, 14 N.J. 319, 327-28 (1954) (quoting Hoffman v. Hock, 8 N.J. 397, 406 (1952)). The Pope court's apparent divergence from this rule may detract from having any persuasive authority.

In the District of Columbia, there are three separate criminal calendars—Felony I,[126] Accelerated Felony Trial Calendar (AFTC),[127] and Felony II.[128] Presently, the average caseload for judges assigned to F1 and ATFC is 58 and the average caseload for judges assigned to F2 is 280.[129] It is estimated that approximately 37% of these matters are pre-indictment and the remaining 63% are post-indictment.[130] In addition to these judges, a magistrate is available to perform detention hearings for cases listed on the F2 calendar.[131] This magistrates conducts approximately 90 detention hearings each month.[132] While this magistrate is authorized and available to conduct detention hearings in the District of Columbia, only New Jersey Superior Court Judges are authorized to conduct detention hearings.[133]

The representative New Jersey Superior Court calendar consists of 254 pre-indictment defendant cases and 283 post-indictment defendant cases. The average caseload for that vicinage consists of 194 pre-indictment defendant cases and 217 post-indictment defendant cases.[134] These stark disparities in judicial caseloads is graphically illustrated below:

[126] "The most serious offenses (first-degree murder and serious sexual assaults) are on the Felony I calendars… These cases carry the maximum penalty under D.C. law, which is up to life imprisonment without parole." United States General Accounting Office Report to Congressional Committees, D.C. Criminal Justice System, Better Coordination Needed Among Participating Agencies (hereinafter "GAO Report") at 83.

[127] "The Accelerated Felony Trial Calendar (AFTC) is for case, other than first-degree murder and serious sexual assaults, in which the accused is held without bond. These offenses include those designated as 'Dangerous Crimes' or 'Crimes of Violence' such as assault with intent to kill, armed robbery, burglary, aggravated assault, kidnapping, and armed carjacking. The AFTC calendars were designed primarily to deal with preventive detention cases… Felony I and Accelerated Felony cases are assigned to a specific judge, who handles all subsequent matters in the case." GAO Report at 83.

[128] "The remaining felony cases fall in the Felony II category. The offenses that fall in this category consist of mostly drug distribution, assaults with weapons resulting in moderately serious injury, and firearms and property offenses. Felony II calendars were originally designed to carry the less serious cases where defendant were not being preventively detained… Felony II case are assigned to individual calendars for all purposes except for the preliminary hearing/preventive detention hearing. These hearings are conducted by a commissioner sitting in the preliminary hearing courtroom." GAO Report at 84.

[129] Interview with Mr. Clifford Keenan, Director Pretrial Services Agency, District of Columbia.

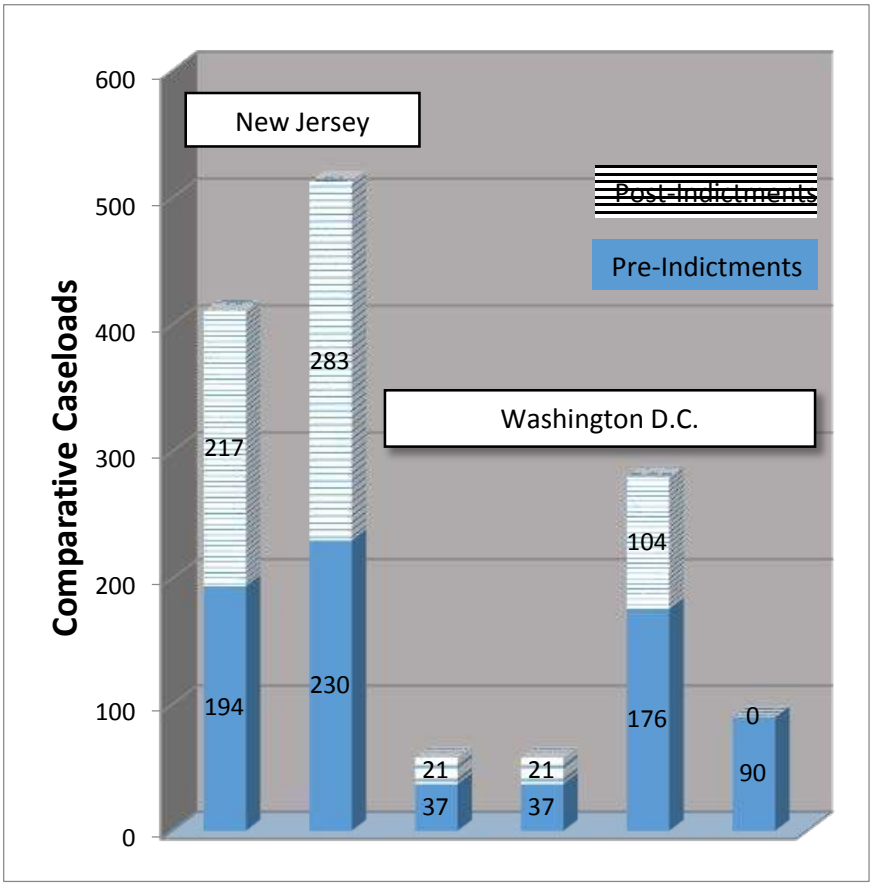
[130] Id.

[131] Interview with Mr. Clifford Keenan and Magistrate Joseph E. Beshouri. Significantly, proposed R. 3:4A provides that only New Jersey Superior Court Judges are authorized to conduct detention hearings. See CPC II at 8. The time required to present this evidence would be compounded with the time required by the defense to challenge it. This defense challenge may extend to the introduction of evidence.

[132] Interview with Magistrate Beshouri.

[133] See CPC proposed R. 3:4A.

[134] See Caseload Analysis, Essex Vicinage, Criminal Division (Aug. 2013) documenting the 217 post-indictment defendant cases. The 194 pre-indictment defendant cases was extrapolated from the distribution within the representative calendar.



Thus, this rudimentary analysis reflects that **four times as many District of Columbia judges and magistrates will be presiding over far less complex and time consuming preventive detention hearings and release revocation hearings than the number of judges who are presently available in New Jersey** to preside over the more time consuming hearings as recommended by our colleagues in the CPC majority.

The pressure exerted by these additional responsibilities upon an already strained judicial system is further acerbated by the simple fact that the pretrial recidivism rate in New Jersey, ranging between 28.1% and 34.8%,[135] is nearly three times higher than in the District of Columbia, calculated at 12%.[136] As previously noted, our release revocation proposal is specifically crafted to

[135] See supra pp.12-13.
[136] See supra p. 13.

address the dangers posed by this elevated pretrial recidivism rate.[137]

In view of this elevated recidivism rate, operation of the "life imprisonment only" presumption in R. 3:4A raises significant public safety concerns. For example, if the State seeks to protect the public through pretrial detention, then prosecutors would be required to overcome the presumption of release by establishing through clear and convincing evidence that no amount of monetary bail, non-monetary condition or combination of conditions would protect the public. In order for the State to accomplish this or meet their high burden, there would likely need to be lengthy hearings which would consume significant bench time. In addition, the prospect of detailed or lengthy detention hearings conducted within days of arrest, may cause prosecutors to tactically not seek detention, where detention would otherwise be appropriate, in order to not compromise ongoing investigations. Therefore, operation of the "life imprisonment only" presumption may have the unintended effect of discouraging prosecutors from seeking to detain truly "dangerous" defendants, as identified through objective risk screening tools, *based upon considerations unrelated to the risks posed by those defendants*. Such discouragement conflicts with the central premise of our State's systemic shift to a risk-based approach for pretrial release decision-making[138] which our legislature sought to accomplish through the enactment of the BRS. Our presumption proposals respond to these legitimate public safety concerns.[139]

It is submitted that these public safety concerns will become even more acute when existing judicial resources will become further strained to comply with the Speedy Trial Act which becomes effective on January 1, 2017.[140]

For detained defendants, the Speedy Trial Act generally requires indictment within 90 days of

[137] See supra pp.11-12.

[138] This divergence from risk principles, arising from the operation of "prophylactic" procedures may be characterized as a "system error" in New Jersey's ongoing shift away from a money or resource based system of pretrial release decision-making. Cf. 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 26) (identifies "dual system errors" in resource based system).

[139] N.J.S.A. 2A:162-15, N.J.S.A. 2A:162-17, N.J.S.A. 2A:162-19, N.J.S.A. 2A:162-24. Chief Justice Rehnquist identified as the "primary concern of every government—a concern for the safety and indeed the lives of its citizens…" Salerno, 481 U.S. at 755.

[140] See N.J.S.A. 2A:162-22.

arrest[141] and trial within 180 days of indictment.[142] These time periods are subject to extension through application of statutorily defined "excludable time."[143] This statute also generally requires that trials commence within 2 years of arrest.[144] The remedy for noncompliance with these time periods is release of the defendant from custody.[145] An exception to such remedy exists when the prosecution establishes that release would pose "a substantial and unjustifiable risk" to public safety and that noncompliance "was not due to unreasonable delay by the prosecutor."[146]

Administration of this statute will considerably increase the volume of motion practice, particularly in the pre-indictment stage. This pre-indictment motion practice is now generally limited to Rule 3:26-2(d) motions to reduce bail and Rule 3:25-3 motions to dismiss for failure to indict. Generally, the adjudication of these motions do not require the substantial expenditure of judicial resources. However, it is reasonable to predict that the Speedy Trial Act will demand such resources to track these time periods and to resolve disputes concerning "excludable time," the attribution of responsibility for delay upon the prosecution or the defense, and whether release poses "unjustifiable risk" to public safety.[147]

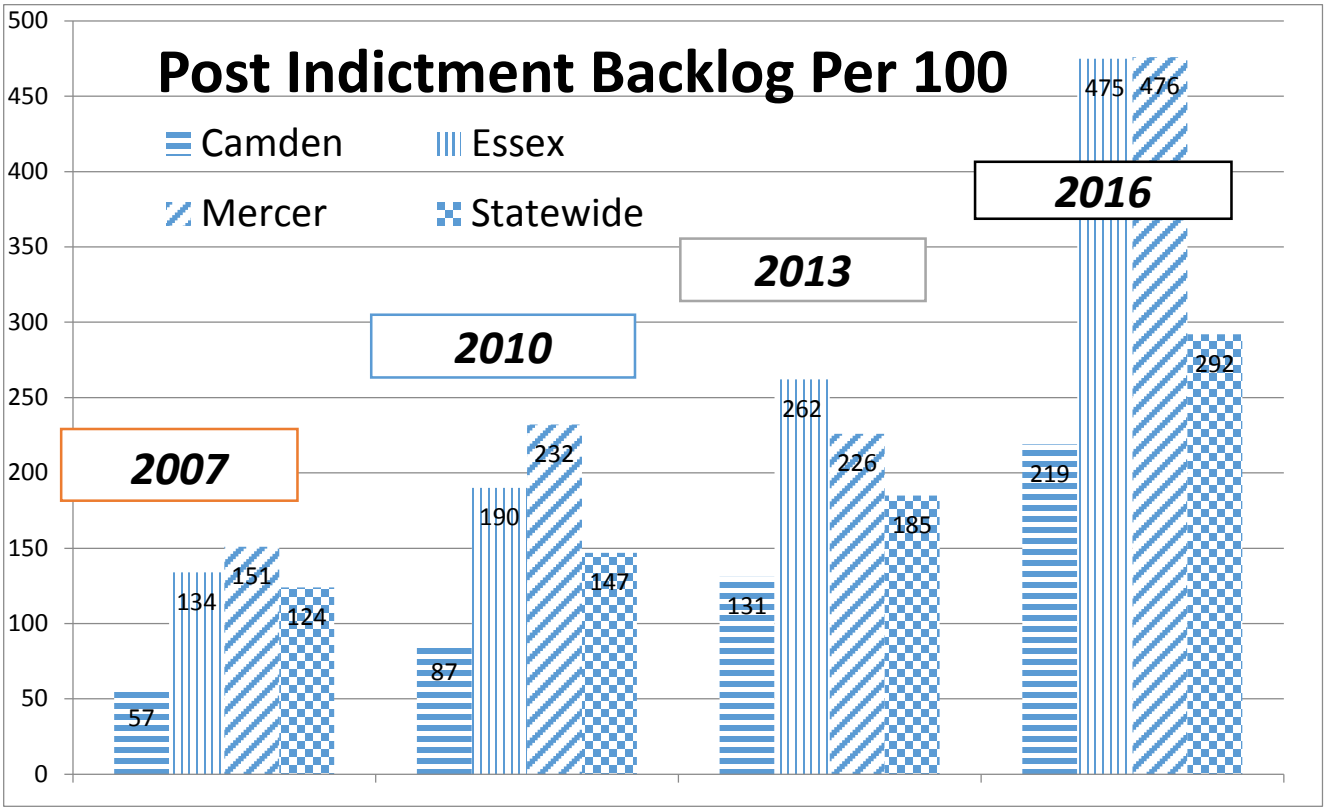
It is foreseeable that many of these disputes will be presented on an emergent basis, immediately before the applicable period expires and the defendant's release is statutorily mandated.

Significantly, this Speedy Trial Act will not be gradually "phased in" to courts with empty dockets. The expedited trial calendars mandated by the Speedy Trial Act will be added to existing trial calendars. Present AOC statistics reveal that 57% of the statewide post indictment caseload is currently in backlog status[148] and that 63% of the pre-indictment caseload is currently in backlog

[141] N.J.S.A. 2A:162-22(a)(1)(a).
[142] N.J.S.A. 2A:162-22(a)(2)(a).
[143] N.J.S.A. 2A:162-22(b).
[144] N.J.S.A. 2A:162-22(a)(2)(a).
[145] N.J.S.A. 2A:162-22(a). These defendants are those which the Court has detained because the pose "unimaginable" risks of pretrial misconduct. See supra p. 4.
[146] N.J.S.A. 2A:162-22(a). This release exception expressly applies to 90 day and 180 day requirements, but not to the 2 year requirement. Id.
[147] The 2 year trial rule excludes "any delays attributable to the eligible defendant." N.J.S.A. 2A:162-22(a)(2)(a).
[148] See Criminal Practice Division, Historical Key Indicator Trend Analysis, AOC Run date 1/15/16 (hereinafter "trend analysis"). Post-indictment backlog is defined as matters pending more than four months (120 days). See Administrative Office of the Courts, *What is Backlog?*, available at: http://www.judiciary.state.nj.us/pressrel/charts.pdf. Pre-indictment

status.[149]

While the pre-indictment backlog has consistently increased at a relatively modest rate over the past 9 years, the post indictment backlog has more than doubled statewide and has more than tripled in Essex and Mercer counties during this period.[150] This increase is graphically depicted below:



It is submitted that this significant and increasing inventory of backlogged cases, the comparatively limited available judicial resources, and the more complex and time consuming hearings necessitated by the Rules recommended by a majority of our CPC colleagues, amply supports the conclusion that those rules are simply not "workable."

backlog involving incarcerated defendants include 1,099 defendant cases which were indicted more than one year ago and 331 defendant cases which were indicted more than 2 years ago. Trend analysis at 1.

[149] Trend analysis at 1. Pre-indictment backlog is defined as matters pending more than two months (60 days). See *What is Backlog?*, supra note 146.

(F) New Jersey's successful application of risk-based principles to juveniles demonstrates that "unnecessary" detention can be avoided through application of our proposed presumption rules.

As previously noted, the BRS employs a procedural framework which establishes a strong preference for pretrial release. This preference is expressed through a presumption favoring pretrial release which may be rebutted or overcome only through the presentation of clear and convincing evidence that no release condition can reasonably assure the public's safety.[151] This presumption favoring pretrial release may also be overcome by application of the extremely limited countervailing presumption favoring detention.[152] This "limited" scope defined by the "life imprisonment only" crimes which qualify as predicates for this presumption in N.J.S.A. 2A:162-19(b). It is submitted that these crimes do not have to be so limited in order to promote the legitimate policy objective of minimizing "unnecessary" pretrial detention. We submit that this conclusion is amply demonstrated by New Jersey's success in reforming juvenile detention practices.

The centerpiece to these reforms has been New Jersey's successful application of risk-based principles to juveniles. Application of these principles over the past ten (10) years has resulted in dramatic reductions in the juvenile detention population and modest reductions in juvenile pre-adjudication misconduct. Although New Jersey courts are authorized to detain a juvenile awaiting disposition of his case, this authority is not conditioned upon any finding by "clear and convincing evidence." [153] Rather than relying upon an elevated burden of persuasion, New Jersey Juvenile

[150] "Backlog per 100" is defined as the number of backlog cases divided by total active pending caseload, expressed as a percentage. This measure relates to the absolute number of cases in backlog to the volume of cases coming in.

[151] See supra pp. 3-4.

[152] See supra p. 3. It is well established that the use of countervailing presumptions supporting preventive detention are constitutionally compliant. See, e.g., State v. Jessup, 757 F.2d 378, 384-87 (1st Cir. 1985). It is equally well-established that these countervailing presumptions maybe supported by predicate offenses beyond those that are presently punishable by death or life imprisonment. See id. at 386 (drug offenses).

[153] See N.J.S.A. 2A:4A-34(a). Since juvenile proceedings are not criminal cases, juveniles do not have a constitutional right to have a bail set. See State in the Interest of Carlo, 48 N.J. 224, 234 (1966). An order of juvenile detention must be supported by a finding that "[d]etention is necessary to secure the presence of the juvenile at the next hearing…" or that "[t]he physical safety of persons or property of the community would be seriously threatened if the juvenile were not detained…" N.J.S.A. 12A:4A-34(a). Under the doctrine of *parens patriae*, parental control of the juvenile delinquent is replaced by public control. See Ex Parte Newkosky, 94 N.J.L. 314, 316 (1920). Accordingly, New Jersey juvenile courts have traditionally sought to preserve and protect the welfare of the child. Id. Application of this doctrine resulted in focus upon the

courts avoid "unnecessary detention" through the exercise of their discretion, guided by risk-based principles, to broadly worded statutory criteria. More specifically, the statutory criteria consists of a preference for pre-adjudication release[154] and identification of relevant factors in determining whether pre-adjudication detention is appropriate.[155]

To assist courts in the exercise of their broad discretion in applying this statute, juvenile intake service officers ("JISO") gather objective data including the juvenile's age, juvenile record, and charged offense, and complete a juvenile detention screening tool (hereinafter "DST").[156] Significantly, this DST supports a recommendation of detention if the risk score is sixteen (16) or higher.[157] One of the several objective factors consider in determining this risk score is the severity of the offense.[158] A numerical point score is attributed to each offense. *Aggravated Manslaughter, Manslaughter, Aggravated Sexual Assault, Sexual Assault, Robbery, and Carjacking are each attributed a score of sixteen (16), resulting in a recommendation of juvenile detention.*[159]

Relying upon JISO recommendations, based upon the objective DST, New Jersey juvenile courts have dramatically reduced the juvenile detention population by 60 – 70% and have modestly reduced recidivism from 13.3% to 5.2%.[160] This simultaneous reduction in both detention population and pretrial misconduct was achieved through the prudent use of judicial discretion in applying the juvenile detention statute. The exercise of this judicial discretion was guided by JISO

rehabilitation of the juvenile and supported detention only to protect the juvenile from the consequences of his own delinquent conduct. Id.

[154] N.J.S.A. 2A:4A-34(a). There is a preference, but not a presumption, favoring pre-adjudication release for juveniles.

[155] N.J.S.A. 2A:4A-34(e) provides that "[i]n determining whether detention is appropriate for the juvenile, the following factors shall be considered: (1) The nature and circumstances of the offense charged; (2) The age of the juvenile; (3) The juvenile's ties to the community; (4) The juvenile's record of prior adjudications, if any; and (5) The juvenile's record of appearance or nonappearance at previous court proceedings."

[156] Superior Court of New Jersey, Chancery Division, Family Part, Detention Screening Tool (Jan. 2009).

[157] See DST, Severity of Offense Scale (Jan. 2009).

[158] DST, Section B (most severe current offense)

[159] DST, Severity of Offense Scale. These recommendations are subject to judicial override which occurs in approximately 10–15% of cases.

[160] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 54-55). These reductions in the juvenile detention population were achieved by providing courts with the "tools" they required to manage the risks of juvenile misconduct. In addition to the authority to detain the juvenile, these tools consisted of JISO recommendations based upon an objective DST, continuum of nonmonetary alternatives to detention, public officer (JISO) monitoring compliance, and a progressive enforcement system. The functional equivalent of each of these tools are provided for adult criminal defendants under the BRS.

recommendations for detention for juveniles accused of committing the same offenses for which we propose to expand the R. 3:4A presumption supporting preventive detention for adults – Aggravated Manslaughter, Manslaughter, Aggravated Sexual Assault, Sexual Assault, Robbery, and Carjacking.

(G) Our Proposed Amendment of *R.* 3:26-1 to Provide an Affirmative Right to an Affordable Bail is Inextricably Intertwined With Our Proposals for "Workable" Preventive Detention and Release Revocation Procedures.

Although N.J.S.A. 2A:162-17(c) prohibits courts from setting bail "for the *purpose* of preventing" pretrial release, this statute did not eliminate money bail altogether. To the contrary, if a court determines that there is no nonmonetary release condition that will reasonably ensure the defendant's appearance as required, then N.J.S.A. 2A:162-17(c)(1) expressly authorizes a court to set a money bail. If a defendant cannot afford to post that bail, then his financial condition will effectively prevent his pretrial release. Drawing upon "lessons learned" from the 1992 District of Columbia reforms, we propose to affirmatively provide in Rule 3:26-1 that "monetary bail may not be set in an amount or form that results in the pretrial detention of the defendant."[161] I submit that, through this proposal, the statutory proscription against the imposition of money bail "for the *purpose*" of preventing pretrial release would be implemented by eliminating the central fact from which the prohibited purpose could be inferred. This central fact would be the defendant's continued detention –the *result* expressly prohibited by the proposed Rule. Since a majority of the CPC recommends to implement this proposal through legislation, I conclude that a majority of the CPC supports the substance of this proposal.[162]

While there is reason to believe that money bail will be less frequently utilized under the BRS,[163] there are reasons to be concerned that this bail will not be "affordable" unless Rule 3:26-1

[161] CPC I at 91-92. Cf. D.C. Code 23-1321(c)(3).

[162] CPC I at 91-92.

[163] N.J.S.A. 2A:16-17(c)(1) prohibits courts from setting bail "for the purpose of preventing the release of the eligible defendant." N.J.S.A. 2A:162-17(c) established a hierarchy for courts to follow in releasing defendants pretrial. Only upon a judicial finding that release upon the less restrictive alternatives of ROR, nonmonetary conditions, or unsecured bond are insufficient to reasonable assure the defendant's appearance as required does N.J.S.A. 2A:162-17(c)(1) authorize courts to condition a defendant's release upon obtaining a secured bond. Moreover, R. 3:26-1(a)(1) requires courts to consider the Pretrial Services Program's ("PSP") release recommendations. This Rule further requires that if a court sets a release

expressly requires such "affordability." This concern is based upon (1) the continued applicability of the Bail Schedules[164] and (2) the absence of "workable" procedures to detain the "truly dangerous" defendants awaiting trial.[165] These concerns will be addressed *seriatim*.

(i) Bail Schedules.

In setting the amount of money bail, our courts may rely upon these bail schedules which, by their express terms, were promulgated exclusively to assist courts in setting a bail which will reasonably ensure the defendant's appearance in court. For example, for the seven (7) violent crimes which I propose to include in R. 3:4A, the bail schedules provide:[166]

Statute	**Charge**	**Degree**	**Bail Range**	**10% Cash Option**
2C:11-4a	agg man	1st degree	$200,000 to 500, 000	No 10%
2C:11-4b	manslaughter	2nd degree	$100,000 to 200,000	No 10%
2C:14-2 (b)	sex asslt	2nd degree	$50,000 to 200,000	No 10%
2C:14-2(c)(1)	sex asslt	2nd degree	$50,000 to 200,000	No 10%
2C:14-2a	agg sex asslt	1st degree	$150,000 to 300,000	No 10%
2C:15-1	robbery	1st degree	$100,000 to 250,000	No 10%
2C:15-2	carjacking	1st degree	$100,000 to 250,000	No 10 %

condition other than that recommended by the PSP, then the court must document the reasons for its decision not to follow the PSP recommendation. N.J.S.A. 2A:162-17(a) further requires that these PSP recommendations, in turn, be based upon an objective risk assessment tool. This assessment tool (PSA), in turn, expressly considers the accused's bench warrant history, if any, in calculating nonappearance risk. Analysis of this tool and the corresponding DMF reveals that secured bond is never recommended as an initial release recommendation. Accordingly, as a practical matter, every time a court would seek to impose a money bond as a condition of release, the court would have to set forth the reasons why a PSP recommended release on nonmonetary conditions would be insufficient to support defendant's appearance as required. In view of the range of nonmonetary conditions available under N.J.S.A. 2A-162-17(b)(2) and the availability of PSP officers to supervise compliance with those nonmonetary alternatives, it is reasonable to predict that courts would infrequently conclude that monetary conditions should initially be imposed. Hence, under this new statutory and rulemaking framework, it is reasonable to predict that the frequency that courts will require secure bonds will decrease dramatically.

[164] Directive #9-05, Bail Schedules and Policies to Improve Bail Practices, issued May 12, 2005; Supplement to Directive #9-05, issued May 26, 2006.

[165] See infra at pp. 17-23.

Thus, if the present bail schedules remain in effect, courts are encouraged to refer to these bail ranges which, in turn, list a $200,000 surety bond as being within the range for each of one these seven (7) above listed crimes. Although the ten percent cash alternative to a full surety bond was a reform designed to address the adverse effect of money bail upon the poor,[167] the bail schedules accurately reflect that this alternative is statutorily unavailable to any person charged with any one of these seven (7) crimes.[168] Thus, if a truly indigent defendant is charged with one of these offense and a court sets a $200,000 surety bond to address the risk of nonappearance, then this surety bond will probably have the effect of preventing pretrial release.[169] Since application of the bail schedules would fully support a court's conclusion that this $200,000 surety bond is appropriate to address the risk of nonappearance, an indigent defendant who is financially incapable of posting that bond would be hard pressed to persuasively contend that the bail was set in that amount for the *purpose* of preventing his release. Hence, application of the present bail schedules may effectively undermine an indigent defendant's ability to benefit from any protections arising from the "purpose" prohibition of N.J.S.A. 2A:162-17(b).

In view of these unintended, but potentially adverse, consequences arising from continued reliance upon these bail schedules, the CPC recommends that the judiciary reassess the continued viability of the bail schedules.[170] This reassessment was necessitated by "[t]he Committee['s] [belief] that these schedules, in their present form, may perpetuate the current system of setting monetary bail and are inconsistent with the intent of [the BRS] which shifts to a risk-based system of pretrial release."[171] In our view, the need for this reassessment is particularly appropriate in view of the CPC majority's recommendation to delete consideration of the Johnson factors from Rule 3:26-1.[172] Deletion of these factors would leave trial courts with no guidance in our Court Rules

[166] See Directive #9-05, Bail Schedules and Policies to Improve Bail Practices, issued May 12, 2005; Supplement to Directive #9-05, issued May 26, 2006.
[167] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 31).
[168] See N.J.S.A. 2A:162-12 (bail restricted offenses), R. 3:26-4(g)(b).
[169] 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 26-29).
[170] CPC I at 91 (vote 23 for, 0 against, 3 abstain).
[171] CPC I at 91.
[172] CPC I at 63-64, referring to, State v. Johnson, 61 N.J. 351 (1972). The undersigned dissents from the CPC's recommendation to delete the Johnson factors from R. 3:26-1. (CPC I at 63-64). As expressly recognized in AOC Directive

concerning the relevant factors to consider in determining the amount and form of money bail.[173] It is submitted that the absence of such guidance in any Court Rule increases the significance of the guidance presently provided by the bail schedules.

(ii) Absence of "workable" procedures to detain the "truly dangerous."

As previously noted, the right to an "affordable" bail is one of the two interrelated 1992 reforms implemented in District of Columbia to break the perceived link between danger to the community and money bail.[174] The other reform was "workable" detention procedures.[175] These reforms were extended to "workable" release revocation procedures.[176] It has been demonstrated that the detention and release revocation Rules as recommended by the majority of our CPC colleagues are simply not "workable."[177] The absence of "workable" procedures presents New Jersey courts with an "agonizing decision" similar to the one that previously confounded District of Columbia courts before whom stood an "obviously dangerous defendant."[178] The court can "either ignore this danger or address it through the *sub rosa* consideration of this danger in setting the amount and form of money bail."[179] From 1966 through 1970, District of Columbia courts did not address this danger through preventive detention, as the implementing statute had not yet been enacted. From 1970 through 1992, these courts infrequently addressed it through preventive detention because the statute's elaborate prophylactic procedures rendered it "unworkable." These Courts addressed this danger though continued *sub rosa* consideration of it in setting money bail.

9-05, our Supreme Court in Johnson elucidated these factors over 40 years ago. Accordingly, these factors have become the common law of this state as articulated by our highest Court. It is well established that statutes in derogation of the common law shall be strictly construed. Indeed, "[i]f a change is to be made in the common law, the legislative purposed to do so must be clearly and plainly expressed." Defazio v. Haven Savings and Loan Ass'n, 22 N.J. 511, 519 (1956), 3 Norman J. Singer, Sutherland Statutory Construction § 61.01 (5th ed. 1992). Accord State v. Young, 148 N.J. Super. 405, 409 (App. Div. 1997) (departs from common law rule), reversed, 77 N.J. 245, 252 (1978) (applies common law rule notwithstanding a constitutional amendment). The BRS is silent concerning the relevant factors that a trial court may consider in setting the amount and form of monetary bail. Hence, it is submitted that deletion of the Johnson factors is contrary to well established rules of statutory construction.

[173] See CPC I at 63.
[174] See supra p. 20.
[175] See supra pp. 20-22.
[176] See supra pp. 23-31.
[177] See supra pp. 20-30.
[178] See supra p. 17.
[179] See supra p. 17.

Seeking to minimize the possibility of such an unfortunate repeat of history here in New Jersey, we propose to essentially duplicate the District of Columbia reforms. To eliminate any incentive consider this danger *sub rosa* in setting money bail, we propose "workable" procedures to detain the truly dangerous in N.J.S.A. 2A:162-19(b), N.J.S.A. 2A:162-24, R. 3:4A and R. 3:26-2. To eliminate any other mechanism to address this danger *sub rosa* in setting money bail, we propose to provide the right to an "affordable bail" in N.J.S.A. 2A:162-17(c)(1) and R. 3:26-1.

(H) Promulgation of Rule Amendments before January 1, 2017 would promote a more effective transition to risk-based decision-making.

The legislature recognized the need to promulgate rules implementing the BRS before January 1, 2017. More specifically, the BRS provides that "[t]he Supreme Court may adopt Rules of Court and take any administrative action necessary to implement the provisions of this act, including the adoption of rules or anticipatory administrative action in advance of the effective date of [N.J.S.A. 2A:162-15 to -25, namely, January 1, 2017]."[180] This legislative authorization of timely rulemaking is supported by considerations including the need to ensure that all criminal justice system participants may be adequately prepared to implement any accepted proposals, together with all other BRS and Rule requirements, before the statute's effective date.[181]

Some of our CPC colleagues contend that relevant decision-makers should not act now, but rather wait until after January 1, 2017 and see how the "life imprisonment only" detention presumption and present release revocation procedures operate in practice. Contrary to this suggestion, experience from other jurisdictions clearly demonstrates that there is little to benefit from waiting. In the District of Columbia, it took four years before Congress responded to its failure to address community danger in the 1966 D.C. Bail Act.[182] The impact upon public safety

[180] See N.J.S.A. 2A:162-15 (Notes: Effective Dates). Our proposals pertained to N.J.S.A. 2A:162-17, N.J.S.A. 2A:162-19, & N.J.S.A. 2A:162-24 which become effective on January 1, 2017.

[181] See Pretrial Justice Institute "Promising practices in providing pretrial services within probation agencies, A Users Guide" at 21 (2011) (emphasizes adequate need for training of pretrial services officers).

[182] See supra p. 18. When it enacted the 1966 DC Bail Act, Congress was aware of the dangers posed by pretrial recidivism, but chose not to address these dangers at that time because it determined that "reform of the bail system to eliminate discrimination against the poor, resulting in unjust detention, demanded immediate attention."

was "disastrous."[183] After Congress sought to address these safety concerns in 1970, it took more than 20 years to fix the "unworkable" detention procedures in that statute and more than 30 years to fix the "unworkable" release revocation procedures in that statute.[184]

New Jersey's own experience cautions against delay. In 1972 our Supreme Court in State v. Johnson expressly recognized the discriminatory effect of money bail upon the poor.[185] Despite well intentioned, but ultimately unsuccessful reform efforts in 1984, 1994 and then again in 2002,[186] more than four decades passed before this issue was comprehensibly addressed in the BRS.

Unlike District of Columbia officials in 1970, we now have the benefit of over forty years of practical experience and data concerning implementation of risk-based systems in other jurisdictions. Based upon improved data collection, we now have accurate calculations of jail populations, release rates, and pretrial misconduct rates. Due in large part to the pioneering efforts of Dr. Van Nostrand, we now have benefit of unprecedented knowledge concerning factors which have been statistically validated as predictive of pretrial misconduct (see PSA) and strategies to manage that risk (see DMF). We know the extent of resources presently available. In other words, we have enough information right now to conclude that, our detention and release revocation procedures appearing in the BRS and as recommended by the CPC majority are simply not "workable." Accordingly, it is respectfully submit that the time to act is now.

(I) Conclusion.

Through enactment of the BRS, our legislature shifted away from a money based system to a risk based system of pretrial justice. This risk based system confers upon the judiciary the enormous

[183] See supra pp. 18-19. Congress later acknowledged these issues were interrelated and that its earlier decision to separately consider them led to "disastrous" public safety consequences. The prompt amendment of the District of Columbia statue in response to the Pope decision reflects a legislative recognition that the absence of a presumption supporting preventive detention *as applied to a single serious violent crime* has such a profound effect upon public safety that a timely response was in the public interest.

[184] A notable exception was the prompt legislative response to the Pope decision. Since the Pope holding severely restricted the prosecutor's ability to satisfy the rigorous clear and convincing standard, Pope was a watershed decision which provided the impetus for a "legislative fix" relatively soon thereafter.

[185] 61 N.J. at 353.

responsibility of managing the risk of pretrial misconduct posed by each person awaiting trial. Our society's interest in both the liberty of persons awaiting trial and in the safety of the larger community is directly affected by how courts manage this risk. Through ratification of an amendment to our Constitution, the people of New Jersey entrusted courts with a powerful and indispensable risk management tool—the authority to detain the most dangerous persons awaiting trial.

Our narrowly tailored presumption proposals seek to modestly relax the procedures associated with use of the preventive detention and release revocation tools. This relaxation is essential so that courts can actually use these tools, given the practical constraints imposed upon our already strained criminal justice system. Acceptance of these proposals will enable courts to detain the limited group of truly dangerous defendants, thereby facilitating the safe release of everyone else awaiting trial. Our affordable bail proposal seeks to ensure that courts will actually use these tools, by completely eliminating money bail as a mechanism to otherwise address community danger *sub rosa*.

Accordingly, we respectfully submit that implementation of our three (3) interrelated proposals is essential to complete our State's transition to a risk-based system of pretrial justice. Only then will the people of our State enjoy the benefits which our legislature sought through enactment of the BRS – the promotion of a society that is more free, more fair, and more safe.

Respectfully submitted,

MARTIN CRONIN, J.S.C.

MGC:tmh

[186] See 215 N.J.L.J. 809, 810 (https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf at 29-31).

The following were included in the Honorable Martin G. Cronin, J.S.C's dissent from the Committee's recommended proposals:

1- Expand the predicate crimes supporting a rebuttable presumption favoring preventive detention.
2- Create a rebuttable presumption favoring release revocation.
3- Creating an affirmative right to affordable bail.
4- Maintain the Johnson factors within R. 3:26-1.
5- Expressly provide within R. 3:26-2 that release revocation proceedings may be initiated by the court.

The following members have joined in all or part of the dissent.

Hon. Adam Jacobs, J.S.C.

Hon. Edward McBride, P.J.Cr. (4 & 5)

Hon. Stuart Minkowitz, A.J.S.C. (4 & 5)

Hon. Siobhan Teare, J.S.C.

Hon. Patricia Wild, J.S.C.

Mr. Eric Breslin, Esq.

Ms. Hilary Brunell, Esq. (1, 2, 3, & 5)

Mr. Ehsan Chowdhry, Assistant Prosecutor, Ocean County Prosecutor's Office

Mr. Robert Honecker, Esq. (4 & 5)

Ms. Priya Ramrup-Jarosz, Assistant Prosecutor, Hudson County Prosecutor's Office

Hon. Christine Allen-Jackson, J.S.C. (5)

Hon. Alberto Rivas, P.J.Cr. (2, 3, & 4)

Ronald Susswein, Assistant Attorney General, Division of Criminal Justice
(The Attorney General and Division of Criminal Justice concur in the Criminal Practice Committee recommendation for legislation to specify additional serious crimes to which a rebuttable presumption of pretrial detention would apply. The Attorney General and Division of Criminal Justice also fundamentally agree with many of the arguments presented by the Honorable Martin Cronin, J.S.C., in his dissenting statement concerning the practical benefits in having a rebuttable presumption of pretrial detention pursuant to N.J.S.A. 2A:162-19 when a defendant is charged initially with a serious violent crime, and a comparable presumption of revocation of release pursuant to N.J.S.A. 2A:162-19 when a defendant commits such a crime while on release for another offense.)

Fredric M. Knapp, Morris County Prosecutor
(I am in agreement with the DCJ and Attorney General as to joining in Judge Cronin's dissent as stated by Ron Susswein).

Michael J. Williams, Assistant Attorney General, Division of Criminal Justice
(I am in agreement with the DCJ and Attorney General as to joining in Judge Cronin's dissent as stated by Ron Susswein).

Francis A. Koch, Sussex County Prosecutor
(I am in agreement with the DCJ and Attorney General as to joining in Judge Cronin's dissent as stated by Ron Susswein).

Paul H. Heinzel, Senior Litigation Counsel, Monmouth County Prosecutor’s Office
(I am in agreement with the DCJ and Attorney General as to joining in Judge Cronin's dissent as stated by Ron Susswein).

B. DISSENTING STATEMENT BY JOHN MCMAHON, ESQ. ON BEHALF OF PUBLIC DEFENDER JOSEPH E. KRAKORA

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MEMORANDUM

To: Hon. Harry G. Carroll, J.A.D.

From: Joseph E. Krakora, Public Defender

Re: Dissents and Comments on Part 2 Rules

Date: May 12, 2016

I am submitting dissents and comments on the proposed rules on Pretrial Detention and Speedy Trial. These represent the views of the Office of the Public Defender and, presumably, other committee members who voted in favor of the rules we proposed but which were not approved by a majority vote. I will address Pretrial Detention and Speedy Trial separately consistent with the format of the Report of the Supreme Court Committee on Criminal Practice on Recommended Court Rules to Implement the Bail Reform Law. To the extent we are dissenting from rules which were approved by a majority vote of the committee. I have attached proposed alternate language for those rules. That language is highlighted in yellow.

Introduction

We want to highlight two proposed rules that in our view are critical to implementation of the new law. The first is the rule in the Part 1 rules concerning the State's discovery obligation at the First Appearance in cases in which the State is seeking detention. I addressed this issue in my dissent to the Part 1 rules so I will not belabor the points made in that dissent. Many members of the committee primarily from law enforcement are in disagreement with the rule approved by a majority of the committee. They want to limit the discovery obligation in a way that would make it difficult if not impossible for a defendant to know the real strength of the State's case at the detention

hearing. A major concern of those holding that view is that detention hearings will become so-called mini-trials. Although there may very well be litigation on the scope of detention hearings, the discovery issue is a separate one. The discovery rule adopted by the committee is needed so that defendants have some opportunity to argue the weight of the evidence as required under the statute. Trial judges will of course be called upon to exercise discretion in determining the scope of the hearings but it is important to note that the probable cause standard is met rather easily in most criminal cases. We therefore urge the Court to adopt the rule approved by the committee.

The second issue that is a priority for us is the rule pertaining to excludable time when motions are filed. As articulated below, we believe that the rule approved by the committee would go a long way towards eviscerating the speedy trial right under the new statute.

We also want to emphasize a crucial point that seems to get lost in the discussion on speedy trial and excludable time. The remedy for failure to meet the statutory deadline for indictment or commencement of trial is not dismissal but release – and that release can be with the most restrictive conditions available to the court.

Pretrial Detention

We want to address two issues pertinent to this section of the report. First is the recommendation approved by the committee for legislative action to increase the number of offenses for which a presumption of detention would apply. Although the committee was advised that Chief Justice Rabner has expressed the view the Court would not approve such a rule because to do so would go beyond the statute in a substantive way, some members of the committee persisted in raising the issue. The committee ultimately approved a rule that did not add additional offenses to the presumption of detention provision. At some point, the proposal was made to take a vote on a recommendation for legislative change. In our view, it is inappropriate to make such a recommendation before the law has even gone into effect. The concern that somehow it will be too difficult for a judge to justify pretrial detention unless there are presumptions of detention for all serious crimes is based on pure speculation. It would be one thing if the law had been in effect for a number of years and, based on empirical evidence, it appeared that the legislation needed to be changed. That, however, is simply not the case and any recommendation for legislative change is premature.

The second issue is the proposed language in R. 3:4A(b)(5) pertaining to prima facie evidence sufficient to overcome the presumption of release. Under the proposed rule, a recommendation by Pretrial Services that the defendant not be released or released on maximum conditions would constitute a prima facie case sufficient to overcome the presumption of release. This rule was also a result of the fear of law enforcement and the judiciary that it will be somehow too difficult to justify pretrial detention for certain defendants. In that sense, this issue is similar to the presumption issue. It is based on speculation and adoption of such a rule is premature. Perhaps more importantly, this proposed rule would in essence be a substantive addition to the statute. The Court should

not adopt this rule for the same reason it should not add a list of crimes for which there would be a presumption of detention. The legislature did not include such a provision in the statute. To do so would constitute improper rule-making.

Speedy Trial

In our view, the rules implementing the speedy trial provisions in the statute are the most important ones to be considered by the Court. Unless appropriate rules are implemented, the excludable time provisions will render meaningless the speedy trial protections for defendants held without bail under the new law. The proposed rules to which we object are ones that are inadequate to protect a meaningful right to a speedy trial either because they fail to impose a limit on the amount of time that can be excluded or because the amount of time is excessive and unreasonable. We will address the specific rules below.

R. 3:25-4(c)(4)(B)

This rule governs the situation in which the court grants a motion by the prosecutor to extend the 180 day time frame for commencement of the trial. The proposed rule only requires that the amount of additional time be reasonable. We propose a rule that would only permit the court to grant an additional 30 days unless extraordinary circumstances exist. Such a rule would allow sufficient additional time without leaving it to individual judges to determine what amount of time is reasonable.

R.: 3:25-4(d)

This is the rule that is designed to put an overall two year limit on the amount of time a defendant can be held in jail without a trial. Our concern with this portion of the law is the language that excludes delays attributable to the defendant. We object specifically to the proposed (d)(2). Instead, we propose a provision that simply says that delays attributable to the defendant shall refer only to unreasonable actions of the defendant that prevent the timely commencement of the trial. It cannot mean all excludable time that is the result of appropriate action by a defendant. That simply cannot be the legislature's intent in including this portion of the statute. Finally, we object to the language in the proposed (d)(3) as superfluous.

R.: 3-25-4(f)

This rule is based on the provision in the new law that extends the time for commencement of trial when a superseding indictment is returned. We are particularly concerned about the potential for abuse of this provision by prosecutors who are otherwise not ready to proceed within the 180 day time frame. By simply going back to the grand jury for a superseding indictment a prosecutor can obtain additional time to prepare for trial. We proposed a rule accordingly which is included in the list of proposed rules attached to this memorandum. We urge the Court to consider our proposal. The key factor for us is the extent to which the superseding indictment is based on information available at the time of the original indictment or that could have been obtained through reasonably diligent efforts at the time of the original indictment. Thus,

we propose specific language on that point. The time for commencement of trial should not be extended in that circumstance. It should not simply be a factor.

R.: 3-25-4(i)

These are the excludable time provisions. Before addressing the specific proposed rules from which we dissent, we want to emphasize the importance of these rules for implementation of the speedy trial provisions of the new statute. Absent limitations on the amount of time that can be excluded under these provisions, the right to a speedy trial will be rendered meaningless.

R.: 3-25-4(i)(2)

The committee voted against putting a 45 day limit on the time excluded under this section. There will probably not be very many defendants held without bail under the new system who will be eligible for these programs. Nevertheless, there is absolutely no good reason why those applications cannot be processed within 45 days when the defendant is incarcerated.

R.: 3-25-4(i)(3)

This proposed rule addresses the excludable time attributable to the filing of motions and is, in our view, the single most important rule to be determined. This issue was the subject of subcommittee work in addition to the work of the full committee. There was, in the end, consensus that some time frames be set in a rule limiting the amount of time that can be excluded for the filing and disposition of motions. We obviously agree.

Nevertheless, the rule proposed by the committee is totally inadequate to protect a defendant's right to a speedy trial. In essence, it turns 270 days into 390 days in almost every case. This is so because defendants held without bail are facing serious charges in cases in which motion practice is practically inevitable. To automatically give judges 90 days to hear a motion and another 30 to decide it would eviscerate the speedy trial law. The new law requires that the trial begin within 180 days of indictment. Adoption of the proposed rule would increase that time by 66% in every case in which motions are filed. Some argued that judges would not be required to use the entire 120 days and that is true. Nevertheless, by adopting such a rule the Court would be making that period of time acceptable in a system that already tolerates unreasonable delay in the resolution of pretrial motions.

The truth is that there is no good reason why judges need such an extensive amount of time to schedule, hear and decide the overwhelming majority of pretrial motions in criminal cases. The long delay in deciding motions in the current system is one of the main reasons why pretrial delay is such a problem. We proposed a rule that would give judges 30 days to decide motions. Our proposal also includes a provision allowing the court to allocate an additional 30 days of excludable time for particularly complex motions. In addition, there is, in our view, no reason why separate periods of time have to be set for the perfection of the motion and the time during which the judge has to decide the motion.

Some members of the committee claimed that there are relatively few jurisdictions that even have time frames for the judge to rule on motions. As I pointed out during the various discussions, however, absent information on whether those States actually have a meaningful speedy trial right the mere fact that they do not have specific time frames is not helpful. Our anecdotal research reveals that the failure to have such time frames for the disposition of motions goes a long way towards nullifying the right to a speedy trial. The fact that other jurisdictions do not have such time frames simply does not lead to the conclusion that New Jersey should not have meaningful ones. In addition, we cannot help but note that our own Rules of Court contain strict time frames for the filing and disposition of motions in civil cases so that it would be incongruous to have an elastic standard on the criminal side where the constitutional right to a speedy trial is at stake.

Finally, a defendant should not have to choose between his right to raise appropriate issues through pretrial motions and his right to a speedy trial. He should also be able in most cases to reserve the hearing of motions for the time of trial so that no excludable time is allotted. By way of example, when a defendant files a motion seeking a hearing on the admissibility of an out of court identification, the court can easily decide in a short period of time whether that defendant has made the threshold showing required for a full hearing. If so, the hearing itself could be conducted at the time of trial.

R.: 3-25-4(i)(7)

This proposed rule deals with so-called complex cases. Our proposed rule would put a 60 day limit on the amount of time that can be excluded pursuant to a complex case designation and recommends slightly different factors for making that designation. A specific limitation on the amount that can be excluded is critical especially given that judges will have a great deal of discretion in determining whether a particular case is in fact complex for the purpose of excludable time. There is a very real risk that prosecutors will seek and judges will grant complex case designations and thereby extend the deadline for commencement of trial. We urge the Court to adopt a rule consistent with our position.

Proposed Speedy Trial Rule Amendments

Rule 3:25-4. Speedy trial For Certain Defendants

* * *

(c) On Failure to Commence Trial.

(1) Time Period. Except as provided in paragraph (d), an eligible defendant who has been indicted shall not remain detained in jail for more than 180 days on that charge following the return or unsealing of the indictment, whichever is later, not counting excludable time as set forth in paragraph (i) of this rule, before commencement of the trial. For an eligible defendant whose most serious charge is a disorderly persons offense involving domestic violence, the time period shall begin with the defendant's initial detention.

(2) Motion by the Prosecutor. If the trial does not commence within the time frame calculated pursuant to paragraph (c)(1) of this rule, the eligible defendant shall be released from jail unless, on motion of the prosecutor, the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result from the defendant's release from custody, so that no appropriate conditions for the defendant's release could reasonably address that risk, and also finds that the failure to commence trial in accordance with the time requirement set forth in this rule was not due to unreasonable delay by the prosecutor. The prosecutor must file a notice of motion accompanied by a brief explaining the reasons for the delay that justify the extension of time to commence trial. The motion to extend time to commence trial shall be filed with the court and served upon the defendant and defense counsel by the prosecutor no later than 15

calendar days prior to the date of the expiration of the 180 day time frame, adjusted for excludable time, calculated pursuant to subparagraph (c)(1) of this rule. Upon good cause shown this deadline may be relaxed.

(3) Objection by Defendant. Within 5 calendar days of the receipt of the prosecutor's motion to extend the time to commence trial, the defendant may file an objection to the prosecutor's motion and request oral argument. If the court decides to hold oral argument the argument must be held within 5 calendar days of the defendant's request.

(4) Court Determination.

(A) The court shall consider and render a decision on the prosecutor's motion to extend the time to commence trial and any objection filed by the defendant within 5 calendar days of the prosecutor's motion, the defendant's objection, or oral argument, whichever is later. The court may, in its discretion, render a decision on the papers without the need for oral arguments.

(B) Upon consideration of the motion, if the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result, and also finds that the failure to commence trial in accordance with the time requirement calculated pursuant to paragraph (c)(1) of this rule was not due to unreasonable delay by the prosecutor, the court may allocate an additional ~~reasonable~~ period of time, not to exceed 30 days unless extraordinary circumstances exist, in which the defendant's trial shall commence. If the court allocates an additional ~~reasonable~~ period of time to commence trial, the

court should specify its reasons for granting the extension and set forth a specific date for the trial.

(C) If the court orders an eligible defendant detained pursuant to R. 3:4A and the maximum period of detention is reached, or if the court currently does not find a substantial and unjustifiable risk or finds unreasonable delay by the prosecutor as described in this rule, the court shall establish conditions of pretrial release, pursuant to R. 3:26, and release the defendant.

(d) Period to Readiness of Prosecutor for Trial. (1) An eligible defendant shall be released from jail upon conditions set by the court, after a release hearing if, excluding any delays attributable to the defendant, two years after the court's issuance of the pretrial detention order for the eligible defendant or after the detention of the eligible defendant in jail due to an inability to post monetary bail as a condition of release, the prosecutor is not ready to proceed to voir dire or to opening argument, or to proceed to the hearing of any motions that had been reserved for the time of trial. In the case of an eligible defendant whose most serious charge is a fourth-degree offense, the time period is 18 months. In the case of an eligible defendant whose most serious charge is a disorderly persons offense involving domestic violence, the time period shall be six months.

(2) A delay shall be considered attributable to the defendant only if the delay is the result of unreasonable actions by the defendant that prevent the timely commencement of trial. ~~constitutes excluded time pursuant to:~~

~~(A) subparagraph (1) of paragraph (i) of this rule, but only if the defendant maintains that he or she is not competent to stand trial or is incapacitated;~~

~~(B) subparagraph (2) of paragraph (i) of this rule;~~

~~(C) subparagraph (3) of paragraph (i) of this rule, but only if the defendant filed the motion unless the motion was filed in response to unreasonable actions of the prosecutor;~~

~~(D) subparagraph (4) of paragraph (i) of this rule, but only if the request for the continuance was made by the defendant unless the request was made in response to unreasonable actions by the prosecutor;~~

~~(E) subparagraph (5) of paragraph (i) of this rule, but only if the defendant left the jurisdiction after receiving notice of a charge or charges in this jurisdiction;~~

~~(F) subparagraph (9) of paragraph (i) of this rule;~~

~~(G) subparagraph (11) of paragraph (i) of this rule; or~~

~~(H) subparagraph (12) of paragraph (i) of this rule, but only if the delay resulted from unreasonable acts or omissions of the defendant.~~

~~(3) An eligible defendant shall not be released from jail pursuant to subparagraph (1) of this paragraph if, on or before the expiration of the applicable period of detention, the prosecutor has represented that the State is ready to proceed to voir dire or to opening arguments, or to proceed to the hearing of any motions that had been reserved for trial. The prosecutor's statement of readiness shall be made on the record in open court or in writing.~~

* * *

(f) Subsequent and Superseding Indictments. For purposes of calculating the time period pursuant to paragraph (c)(1) of this rule, the return of a superseding indictment against the defendant shall extend the time for the trial to commence. The court shall

schedule the trial to commence as soon as reasonably practicable taking into consideration the nature and extent of differences between the superseded and superseding indictments~~, including the degree to which the superseding indictment is based on information that was available at the time of the original indictment or that could have been obtained through reasonably diligent efforts at the time of the original indictment~~. However, no extensions shall be granted if the information supporting the superseding indictment was available or could have been obtained through reasonable diligence at the time of the original indictment. If an indictment is dismissed without prejudice upon motion of the defendant for any reason, and a subsequent indictment is returned, the time for trial shall begin running from the date of the return of the subsequent indictment.

* * *

(i) Excludable Time Criteria. The following periods shall be excluded in computing the time in which a case shall be indicted or tried:

(1) The time resulting from an examination and hearing on competency and the period during which the defendant is incompetent to stand trial or incapacitated. Excluded time shall begin tolling once the judge signs an order for the examination of the defendant for competency pursuant to N.J.S. 2C:4-5, or once the defense serves the court with a report from its own expert stating that the defendant is not competent to proceed;

(2) The time from the filing to the disposition of a defendant's application for supervisory treatment pursuant to N.J.S. 2C:36A-1 or N.J.S. 2C:43-12 et seq., special probation pursuant to N.J.S. 2C:35-14, drug or alcohol treatment as a condition of

probation pursuant to N.J.S. 2C:45-1, or other pretrial treatment or supervisory program provided that the amount of excludable time under this subsection shall not exceed 45 days;

(3) The time ~~resulting~~ from the filing to the final disposition of a motion made before trial by ~~either~~ the prosecution or defendant ~~subject to the following:~~, provided that the amount of excludable time under this subsection shall not exceed 30 days absent a determination by the court that the motion is particularly complex and limited additional time is required for its disposition. Such additional time shall not exceed 30 days;

(A) ~~If briefing, argument, and any evidentiary hearings required to complete the record are not complete within 90 days of the filing of the notice of motion, or within any longer period of time authorized pursuant to R. 3:10-2(f), any additional time shall not be excluded~~ If the defense does not file its motions by the deadline set by the court pursuant to R. 3:9-1(b)(3), the time from the filing of the out of time motions until disposition shall also be excluded, provided that the amount of excludable time shall not exceed 30 days.

(B) ~~Unless the Court reserves its decision until the time of trial, if the Court does not decide the motion within 30 days after the record is complete, any additional time during which the motion is under advisement by the Court shall not be excluded unless the court finds there are extraordinary circumstances affecting the court's ability to decide the motion, in which case no more than an additional 30 days shall be excluded~~ No additional time shall be excluded if the prosecution fails to file its motions by the deadline set by the court pursuant to R. 3:9-1(b)(3), unless the delay in filing the motion is the result of the prosecution having obtained information that was not available nor

could not have been obtained through reasonable diligence at the time the motion was originally due, in which case additional time, not to exceed 30 days, shall be excluded.

(C) If the Court ~~reserves its decision on a motion until the time of trial~~ determines, upon request of the movant, that disposition of the motion shall be reserved for the time of trial, the time from the ~~reservation~~ filing to disposition of that motion shall not be excluded.

(4) The time resulting from a continuance granted at the defendant's request or at the request of both the defendant and the prosecutor; such request must specify the amount of time for which the continuance is sought;

(5) The time resulting from the detention of the defendant in another jurisdiction, provided the prosecutor has been diligent and has made reasonable efforts to obtain the defendant's presence;

(6) The time resulting from exceptional circumstances including, but not limited to, a natural disaster, the unavoidable unavailability of the defendant, material witness or other evidence, when there is a reasonable expectation that the defendant, witness or evidence will become available in the near future;

(7) On motion of the prosecutor, the delay resulting when the court finds that the case is complex due to the number of defendants or the nature of the prosecution, provided that the amount of excludable time under this subsection shall not exceed 60 days, subject to the following:

(A) the prosecutor shall include in the motion the specific factual basis justifying the delay and the length of the delay sought: the defendant may file an objection within

five calendar days of receipt of the prosecutor's motion: and the court may decide the motion without oral argument;

(B) the court shall grant the motion only if (i) the prosecutor establishes that due to the complexity of the case it is unreasonable to expect adequate preparation for pretrial proceedings or the trial itself within the time periods set forth in this Rule and (ii) the court finds that the interests of justice served by granting the delay outweigh the best interests of the public and the defendant in a speedy trial;

(C) the court ordinarily should grant the motion only when the case involves more than ~~two~~ three defendants, novel questions of fact or law, numerous witnesses who may be difficult to locate or produce, ~~or~~ voluminous or complicated evidence, requires an unusually lengthy trial, or involves charges of the first or second degree;

(D) if the court grants the motion, the court shall specify the period of delay and shall set forth on the record, either orally or in writing, its findings as required under subparagraph (7)(B)(ii); and

(E) the court may grant the motion only with the approval of the criminal presiding judge.

* * *

C. DISSENTING STATEMENT BY LOUIS DE JULIO, ESQ. (ON BEHALF OF THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY)

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May 12, 2016

The Honorable Harry G. Carroll, J.A.D.
Chair, Criminal Practice Committee
Brennan Courthouse
583 Newark Avenue
Jersey City, NJ 07306-2395

Re: Part 2 Rules - Dissent

Dear Judge Carroll:

I have spoken with Joseph Krakora regarding the position of the Office of the Public Defender on Parts 1 and 2 of the proposed rules on Pretrial Detention and Speedy Trial. I have also had the opportunity to review the comments and the dissents which he has prepared on behalf of the Public Defender representatives to the Criminal Practice Committee.

On behalf of the Association of Criminal Defense Lawyers of New Jersey, I wish to support the positions taken and join in the comments and the dissents.

Respectfully,

Lois De Julio

Lois De Julio