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June 9, 2017

The Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex
P.O. Box 037
Trenton, N.J. 08625-0037

Re: Comments to Proposed Rule 3:26-9

Dear Judge Grant:

Please accept these comments on behalf of the Office of the Public Defender. They were prepared by John McMahon, Esq., one of our representatives on the Criminal Practice Committee. John has been actively involved in all of the OPD work and the CPC work on Criminal Justice Reform. The OPD objects to two provisions in proposed R. 3:26-9. Specifically, we object to subsections R. 3:26-9 (c)(3) and (d)(2). These two provisions allow "statement[s] or other disclosure[s], written or otherwise, made by a defendant to the Pretrial

Services Program [to] be used…in "any subsequent prosecution for…[c]ontempt of court [or]…[i]n and proceeding for the purpose of impeachment."

It is our position that these provisions are unnecessary, harmful to the relationship between defendants and Pretrial Services and likely to require the Public Defender's Office to expend additional resources.

Contempt proceedings can be advanced pursuant to R. 1:10-1 or prosecuted via N.J.S.A. 2C:29-9. R. 1:10-1 addresses contempt in the presence of the Court and thus is not applicable here. N.J.S.A. 2C:29-9 encompasses purposely or knowingly disobeying a judicial order. Disobeying a condition of release already has a remedy, revocation. See State v. Williams, 234 N.J. Super. 84, 91-93 (App. Div. 1989) wherein the Court ruled that a violation of probation, even though it involves a violation of a Court order, does not give rise to a separate prosecution for contempt of court. In so holding, Williams cited United States v. Hall. 198 F, 2d. 726, 731 (2d. Cir. 1952), cert den. 345 U.S. 905 (1953) which addressed an analogous situation involving a defendant's failure to obey a condition of bail. In each case, violation of a condition of bail or violation of condition of probation, the Williams court recognized that because each has its own internal remedy resort to contempt proceedings was redundant.

Addressing the proposed use of statements made by a defendant to Pretrial Services for purposes of impeachment is even more problematic. The Supreme Court has long recognized the dangers of utilizing a defendant's unrecorded custodial statement made to law enforcement. See State v. Cook, 179 N.J. 533 (2004) and R. 3:17. Statements made by a defendant to Pretrial Services bear close similarity to custodial statements to law enforcement. First, many defendants will be in custody when Pretrial Services initially interviews them to determine their eligibility for the services of the Public Defender's Office. Second, allowing this interview to be "mined"

by the prosecution in an effort to discover the existence of impeachment materials would, in effect, make Pretrial Services an arm of the prosecution. The practical effect of this would be devastating to the resources of my Office, because it would require that an attorney be present during these interviews. We simply do not have the staffing for this expansion of our attorneys' duties.

Further, when currently released on conditions, defendants have every reason to be candid with Pretrial Services. As Chief Justice Rabner recognized in his December 6, 2016 Order, "the Pretrial Services Program's success will in part rely on defendants' candor with Pretrial Services staff…To allow the files of Pretrial Services to be accessed by the prosecution to look for impeachment material will destroy the relationship of "candor" that the December 6, 2016 Order seek to achieve. Attorneys from my Office would have to advise our clients not to have any discussions with Pretrial Services, unless they were present.

Under the proposed Rule, if a defendant lies to obtain the services of the Public Defender or to obtain pretrial release he/she can be prosecuted for these offenses. Further, if a defendant lies while on pretrial release or to obtain pretrial release that information can be used to revoke his/her release. These are sufficient consequences.

Thank you for your consideration of these comments.

Respectfully submitted,

Joseph E. Krakora
Public Defender

cc John McMahon, Esq., Chief Trial Attorney