

Comment #005

**RESPONSE OF THE SUPREME COURT
CRIMINAL PRACTICE COMMITTEE
TO PROPOSED RULE 3:5B
“EXTREME RISK PROTECTIVE ORDERS”**

MAY 28, 2019

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I. Rule 3:5B. Extreme Risk Protective Orders

The Criminal Practice Committee reviewed the proposed R. 3:5B “Extreme Risk Protective Orders” in response to the Supreme Court’s request for comments in the Notice to the Bar issued on March 13, 2019. Because the Committee identified significant substantive and procedural concerns with the “Extreme Risk Protective Order Act of 2018” (hereafter the Act), effective September 1, 2019, as well as language in the proposed rule, a subcommittee was formed to propose recommendations on rule amendments.

The subcommittee reviewed the legislative history, research on the social science related to mental health, and similar laws that temporarily remove firearms from persons who pose a risk of violence, also known as “red flag laws.”¹ During the legislative hearings before the New Jersey Senate Law and Public Safety Committee (April 16, 2018), the Act was described as a “red flag” bill designed to “provide a kind of early warning system to keep mentally imbalanced individuals from becoming the next mass shooter.” The legislative history also indicates that the Act was loosely modeled on the civil process for a victim of domestic violence to obtain a restraining order under the “Prevention of Domestic Violence Act of 1991” (N.J.S.A. 2C:25-17 et seq.), and similar laws in other states.

The proposed rules were developed in accordance with the Act (N.J.S.A. 2C:58-20 to -32), which creates a process through which a family or household member or law

¹ Fifteen states and the District of Columbia have similar laws: California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington.

enforcement officer may apply for an extreme risk protective order against a person who presents a significant danger of bodily injury to self or others by possessing or purchasing a firearm. Additionally, the subcommittee was cognizant of the need for the rules to reflect the anticipated practical realities in implementing this new process while also promoting the societal interests in both public safety and the preservation of individual rights.

For the reasons set forth in this report, the Committee is recommending that the Court adopt proposed new rules, R. 3:5B-1 through R. 3:5B-7. Comparisons between proposed R. 3:5B and the rules proposed by the Committee are also briefly noted in this report. See Appendix A for a “Comparison Chart” on the rules and Appendix B for R. 3:5B.

A. Rules Recommended for Adoption

1. R. 3:5B-1 -- Definitions

This proposed rule includes the statutory definitions for certain terms defined in N.J.S.A. 2C:58-21. For example, the rule defines a “petitioner” as a “family or household member or law enforcement officer who seeks an order.” However, because the statute does not define a “respondent,” a definition has been added to define a “respondent” as “a person against whom an order is sought.”

While R. 3:5B referenced most of these terms, it did not include the definitions.

The Committee recommends adoption of proposed R. 3:5B-1, which follows.

Rule 3:5B. Extreme Risk Protective Orders

R. 3:5B-1. Definitions

“Ammunition” means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm, but does not include any shotgun shot or pellet not designed for use as the single, complete projectile load for one shotgun hull or casing or any unloaded, non-metallic shotgun hull or casing not having a primer.

“Deadly weapon” shall have the same meaning as in subsection c. of N.J.S.A. 2C:11-1.

“Family or Household Member” means a spouse, domestic partner, partner in a civil union couple, or former spouse, former domestic partner, or former partner in a civil union couple, or any other person who is a present household member or was at any time a household member; a person with whom the respondent has a child in common, or with whom the respondent anticipates having a child in common if one of the parties is pregnant; or a current or former dating partner.

“Firearm” shall have the same meaning as in N.J.S.A. 2C:39-1.

“Law Enforcement Officer” means a person whose public duties include the power to act as an officer for the detection apprehension, arrest, and conviction of offenders against the laws of this State.

“Law Enforcement Agency” means a department, division, bureau, commission, board or other authority of the State or of any political subdivision thereof which employs law enforcement officers.

“Petitioner” means a family or household member or law enforcement officer who seeks an order.

“Recent” means within six months prior to the date the petition was filed.

“Respondent” means a person against whom an order is sought.

Note: Adopted _____ to be effective _____.

2. R. 3:5B-2 -- Petition for Temporary Extreme Risk Protective Order

This proposed rule sets forth the information that must be included in the petition for a temporary extreme risk protective order. These civil petitions can be filed in the Superior Court or any other location designated by the Administrative Director of the Courts.

It is important to note that these proposed rules, similar to proposed R. 3:5B, only address petitions against respondents who are not law enforcement officers because the Act creates a separate process for petitions against law enforcement officer respondents. Specifically, N.J.S.A. 2C:58-23(l) requires that such petitions be filed in the law enforcement agency where the law enforcement officer is employed rather than with the court. However, the Committee is recommending that the Legislature revisit these procedures for the reasons set forth in section II. of this Report.

Consistent with the statutory findings for issuance of a temporary extreme risk protective order, proposed R. 3:5B-2 provides that the petition must contain an allegation that the respondent poses an “immediate and present danger of bodily injury to self or others by possessing, purchasing, owning, or receiving a firearm.” See N.J.S.A. 2C:58-23(e).

Additionally, proposed R. 3:5B-2 requires that the affidavit provide the facts to “establish that the respondent poses an immediate and present danger of bodily injury to self or others by possessing, purchasing, owning, or receiving a firearm and the number, types, physical description, and locations of any firearms and ammunition that the

petitioner believes to be currently possessed by the respondent.” See N.J.S.A. 2C:58-23(b). Proposed R. 3:5B(a)(3) also sets forth the information that must be included in the affidavit.

Proposed R. 3:5B-2 also provides that the affidavit must set forth the affiant’s basis of knowledge for the alleged facts. Additionally, the Committee felt that it was important to require that the affidavit be “sworn and under oath, subject to the penalty for perjury” to lessen petitions being filed on unsubstantiated information.

The Committee recommends adoption of proposed R. 3:5B-2, which follows.

R. 3:5B-2. Petition for Temporary Extreme Risk Protective Order

Except for petitions filed against a law enforcement officer respondent which must be filed as provided in N.J.S.A. 2C:58-23(1), a petitioner may file a petition for a temporary extreme risk protective order in the Superior Court or any other location designated by the Administrative Director of the Courts. This petition shall contain an allegation that the respondent poses an immediate and present danger of bodily injury to self or others by possessing, purchasing, owning, or receiving a firearm; and an affidavit setting forth the facts tending to establish that the respondent poses an immediate and present danger of bodily injury to self or others by possessing, purchasing, owning, or receiving a firearm and the number, types, physical description, and locations of any firearms and ammunition that the petitioner believes to be currently possessed by the respondent. This affidavit shall set forth the affiant's basis of knowledge for these alleged facts and may reference or attach documents relevant to the petition. This affidavit shall be sworn and under oath, subject to the penalty for perjury.

Note: Adopted ____ to be effective ____.

3. R. 3:5B-3 -- Hearing on Petition for Temporary Extreme Risk Protective Order and Amendment to R. 1:38-3 (“Court Records Excluded from Public Access”)

Proposed R. 3:5B-3 sets forth the procedures for the hearing for a temporary extreme risk protective order.

Paragraph (a) “Timing”

This paragraph tracks the statutory requirement that the temporary petition must be heard by the court in an “expedited manner.” See N.J.S.A. 2C:58-23(a). Proposed R. 3:5B(a)(1) “Timing of Hearing,” also includes this language.

Paragraph (b) “Venue”

Proposed R. 3:5B(a)(2) “Venue in Temporary Extreme Risk Protective Order Act Proceedings” was based upon the venue provision for domestic violence proceedings in the Family Part in R. 5:7A(f). Specifically, R. 3:5B(a)(2) states, “Venue in these actions shall be in the county where either the petitioner or the respondent resides or, if applicable, in the county where the offense occurred.”

The Committee, however, recommends that the venue for a temporary extreme risk protective order “shall be in the county where the respondent resides” because that county’s prosecutor would be in the best position to provide reliable information to the court as required by the Act and within the Act’s expedited timeframe. Other states also establish venue in the county of the respondent’s residence, such as Connecticut and Rhode Island.²

² See Conn. Gen. Stat. § 29-38c(d) and 8 R.I. Gen. Laws § 8-8.3-2.

To address respondents who reside in another state, but who may have a second residence (vacation home) in this State, alternative language has also been included in paragraph (b) for venue in such cases to be “in the county where the petitioner resides.”

Paragraph (c) “Evidence”

This proposed paragraph provides that the court may examine under oath the petitioner and any witnesses the petitioner may produce. This language is also included in R. 3:5B(a)(4) “Petitioner’s Appearance Before the Court.”

Paragraph (c) also permits the court to consider sworn oral testimony of the petitioner or a witness who is not present in court by telephone, radio or other means of electronic communication. This language was modeled after R. 5:7A(b), which governs issuance of temporary restraining orders by electronic communication in domestic violence proceedings. This language is also included in proposed R. 3:5(B)(b) “Issuance of Temporary Extreme Risk Protective Order by Electronic Communication.”

Consistent with N.J.S.A. 2C:58-23(d), the court can also rely on an affidavit submitted in support of the petition, in lieu of examining the petitioner or any witnesses in court or by electronic communication. Additionally, the court can consider any information provided by the county prosecutor pursuant to paragraph (e) of this rule.

Proposed R. 3:5B(b) “Issuance of Temporary Extreme Risk Protection Order by Electronic Communication” requires the court to also “make long hand notes summarizing the sworn oral testimony.” However, the Committee thought this was unnecessary in light of the requirement that the “court officer or law enforcement officer assisting the petitioner shall contemporaneously record such sworn oral testimony.”

Paragraph (d) “Factors”

Pursuant to N.J.S.A. 2C:58-23(f), the county prosecutor or designee of the county prosecutor is required to produce “any available evidence including, but not limited to, available evidence related” to the enumerated eight factors. Accordingly, the first eight factors that the court is required to consider in proposed paragraph (d) mirror the statutory factors. Similarly, proposed R. 3:5B(5) “Evidence Supporting Issuance of Temporary Extreme Risk Protective Order” also includes these eight factors.

Specifically, paragraph (d) states:

(d) Factors. In determining whether to issue a temporary extreme risk protective order, the court shall consider all relevant evidence including whether the respondent:

- (1) has any history of threats or acts of violence by the respondent directed toward self or others;
- (2) has any history of use, attempted use, or threatened use of physical force by the respondent against another person;
- (3) is the subject of a temporary or final restraining order or has violated a temporary or final restraining order issued pursuant to the “Prevention of Domestic Violence Act of 1991,” (N.J.S.A. 2C:25-17 et seq.);
- (4) is the subject of a temporary or final protective order or has violated a temporary or final protective order issued pursuant to the “Sexual Assault Survivor Protection Act of 2015,” (N.J.S.A. 2C:14-13 et al.);
- (5) has any prior arrests, pending charges, or convictions for a violent indictable crime or disorderly persons offense, stalking offense pursuant to N.J.S.A. 2C:12-10, or domestic violence offense enumerated in N.J.S.A. 2C:25-19;

- (6) has any prior arrests, pending charges, or convictions for any offense involving cruelty to animals or any history of acts involving cruelty to animals;
- (7) has any history of drug or alcohol abuse and recovery from this abuse; or
- (8) has recently acquired a firearm, ammunition, or other deadly weapon.

The Committee is also proposing additional factors because N.J.S.A. 2C:58-23(f) contains non-exclusive language for the information submitted to the court for this determination (“including but not limited to...”). Additionally, the Act further requires the court to consider these factors and “any other relevant evidence” in the determination for the final order (N.J.S.A. 2C:58-24). As such, the Committee thought the factors should list the information that should be considered by the court rather than leaving it open-ended. Doing so will also provide guidance for prosecutors and law enforcement when providing this information to the court.

The additional factors in paragraph (d) address whether the respondent:

- (9) has recklessly used, displayed, or brandished a firearm³;
- (10) has an existing or previous extreme risk protective order issued against him or her⁴; and
- (11) has previously violated an extreme risk protective order issued against him or her.⁵

³ See Fla. Stat. Ann. § 790.401(3)(c)(9). See also, Conn. Gen. Stat. § 29-38c(b)(A).

⁴ See Fla. Stat. Ann. § 790.401(3)(c)(5).

⁵ See Fla. Stat. Ann. § 790.401(3)(c)(6).

As noted in the beginning of this Report, the Act was designed to “provide a kind of early warning system to keep mentally imbalanced individuals from becoming the next mass shooter.” Although not exclusively focusing upon mental health, the research of the Consortium for Risk-Based Firearm Policy⁶ identifies mental health as a factor associated with the risk of committing firearm violence. See Consortium for Risk-Based Firearm Policy (State Policy) at 7. The Act expressly authorizes courts to consider “whether the respondent has received, or is receiving mental health treatment” in relation to a petition to terminate a final extreme risk protective order. See N.J.S.A. 2C:58-25. Consequently, the Committee believes that inclusion of factors pertaining to the respondent’s mental health is consistent with the legislative intent.

The Committee was also cognizant of the research by behavioral scientists that supported enactment of extreme risk protective order laws, and also expressed concern that exclusive focus upon persons with mental illness “could further stigmatize those with mental illness and potentially create barriers to mental health treatment seeking.” See Consortium for Risk –Based Firearm Policy (State Policy) at 6. Accordingly, the proposed language seeks to strike a balance between the public policy in preventing firearm-related violence and the policy in promoting mental health treatment. To this end, under the Committee’s proposal, the court may consider mental health factors only after the court is presented with sufficient evidence of dangerous behavior as reflected in the other 11 factors. Although extreme risk protective order laws in other states seek to strike a similar

⁶ The Consortium consists of the nation’s leading researchers, practitioners, and advocates in gun violence prevention and mental health.

balance with this information, their laws do not contain similar language limiting consideration of this information.

Specifically, the proposed language for consideration of the respondent's mental health is as follows:

If the court finds one or more of the factors listed in (d)(1) to (11) of this rule, then the court may consider factors including whether the respondent:

(12) has any prior involuntary commitment in a hospital or treatment facility for persons with psychiatric disabilities;⁷

(13) has received or is receiving mental health treatment;⁸

(14) has complied or has failed to comply with any mental health treatment;⁹ and

(15) has received a diagnosis of a mental health disorder.¹⁰

The subcommittee recognized that the confidential nature of the mental health information covered by these factors requires that the rules address an issue on which the Act is silent – the extent to which confidential information which the court is required to consider, and which the prosecutor is required to provide to the court if available, should be shared with the respondent or the petitioner. A majority of the subcommittee

⁷ Conn. Gen. Stat. § 29-38c(b)(C).

⁸ See 8 R.I. Gen. Laws § 8-8.3-5(b)(3).

⁹ Ibid.

¹⁰ American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM), 20 (5th ed. 2013). Factor 15 is limited to a “mental health disorder” as defined in the DSM and as diagnosed by a mental health professional. See DSM-5 at 20 (defining “mental disorder”). This limitation is intended to discourage courts from placing undue weight upon lay witness perceptions of mental health instability.

recommended that this information be provided to both the household member petitioner and the respondent.

As to the respondent, the subcommittee unanimously agreed that due process and fundamental fairness support providing this information to the respondent since a successful application would result in suspension of the respondent's Second Amendment right to bear arms. As to the petitioner, a bare majority of the subcommittee recommended that the household petitioner also receive this information.

Opposing members argued that the Act only requires disclosure to the court, that other statutes limit dissemination to non-law enforcement recipients, and that this information may be used by household member petitioners for purposes unrelated to the Act, such as harassment or use in unrelated litigation. The subcommittee majority noted that the first two arguments apply equally to both respondent and petitioner disclosures. The subcommittee majority also emphasized that petitioners are litigants in a contested hearing and therefore should have access to the same information provided by the county prosecutor to their adversary (i.e., the respondent) and the court. Such equal access would avoid any due process concern arising from a court denying a petition based upon information which was not disclosed to the petitioner before the court's decision. It would also avoid any dispute concerning what information should be included in the record on appeal. Legitimate concerns regarding unauthorized use could be assuaged by a confidentiality provision enforceable through the contempt sanction, the subcommittee majority maintained.

As recommended by the subcommittee, the rigorous “good cause” standard would be applicable to third parties seeking disclosure of confidential information obtained to assist the litigants and the court in adjudicating the emergent application. It would not apply to the litigants, because both respondent and petitioner initially would have received this information from the county prosecutor under the subcommittee’s recommended rule.

The full Committee discussed these issues at length and agreed with the unanimous recommendation of the subcommittee that due process and fundamental fairness concerns dictate that the respondent receive the information regarding the mental health factors as well as the 11 other factors. However, the Committee did not agree that the petitioner should be treated the same as the respondent with regard to access to confidential information about the respondent. The Committee majority concluded that the fair conduct of the proceedings would not require that the petitioner be provided with confidential information about the respondent. These members noted the unique nature of the litigation envisioned by the Act, litigation in which the court is required to consider information even if the information is not known by and therefore cannot be presented by the petitioner who is seeking relief from the court. Also, while the respondent’s access to certain law enforcement records might be as equally limited as the petitioner’s would be outside the context of litigation (for example, rap sheets), nearly all of the other information relating to the factors would be information to which the respondent, but not the petitioner, would have access outside the context of litigation (for example, restraining or protective orders entered against the respondent or the respondent’s own substance abuse treatment or mental health records).

With regard to the issue of the completeness of the record for purposes of any appeal, the Committee majority noted that the proposed rules require the court to place its reasons for granting or denying a petition on the record. R. 3:5B-4 and R. 3:5B-6.

Most significantly, however, the Committee majority had grave concerns about the potential for public dissemination by a petitioner of highly confidential mental health information about the respondent. In addition, there was concern that the information covered by the other factors also is, for the most part, confidential. Finally, some members noted that some of the law enforcement records covered by those factors could include information about unrelated parties. For these reasons, the Committee majority concluded that any information relating to any of the factors that is provided to the court should be considered confidential and that the petitioner should not receive such information unless the petitioner satisfies the “good cause” standard applicable to third parties. It is recommended that “good cause” be narrowly interpreted to permit disclosure only when necessary to prevent physical injury or harm to others and should not extend to disclosure which may facilitate the acquisition or protection of property. Additionally, disclosure shall not be permitted when the information is available from another source. Cf. State v. Cusick, 219 N.J. Super. 452, 457 (App. Div. 1987).

With regard to the issue of public access to confidential information provided to the court in connection with proceedings under the Act, the Committee also recommends including an exemption in the court rule governing access to court records, R. 1:38 (“Public Access to Court Records and Administrative Records”). Specifically, R. 1:38-3 “Court Records Excluded from Public Access” should exclude from public access “any

information provided to the court related to any of the factors in R. 3:5B-3(d) for proceedings involving extreme risk protective orders.”

While the Judiciary is not subject to the Open Public Records Act (N.J.S.A. 47:1A-1 et seq.), public agencies, such as the county prosecutors offices are subject to its provisions. In relevant part, the Open Public Records Act provides that “all government records shall be subject to public access unless exempt from such access by ... Rules of Court...” N.J.S.A. 47:1A-1. Additionally, the Open Public Records Act provides that [“t]he New Jersey Supreme Court may adopt such court rules as it deems necessary to effectuate the purposes” of the Open Public Records Act. N.J.S.A. 47:1A-12. Accordingly, the Committee recommends also including the Open Public Records Act exemption to preclude persons from circumventing the confidentiality provisions through a request to the prosecutor’s office or a law enforcement agency.

Specifically, the proposed provision on the confidentiality of this information in paragraph (d) is as follows:

Any information disclosed to the court concerning any of the factors listed in paragraph (d) of this rule is confidential and may not be disclosed, by subpoena or otherwise, to anyone other than the respondent for use in the extreme risk protective order proceeding, except by order of the court on good cause shown. Records containing such information shall be exempt from public access under R. 1:38-3 and the Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

The Committee also considered adding a provision on the potential consequences for violating the confidentiality provision by including that the person is “subject to a charge of contempt” for such conduct. However, the consensus was that the manner of

addressing any violation of a confidentiality order is a subject of a separate body of law and should not be specified in the rule.

Paragraph (e) “Information From Prosecutor”

Proposed R. 3:5B(a)(5) would require that the county prosecutor or designee produce for the court’s consideration “any available evidence,” including but not limited to the information set forth in the factors. While the use of the phrase “any available evidence” conforms to the language in N.J.S.A. 2C:58-23(f), the Committee was concerned that it could be interpreted to impose an obligation on the prosecutor to “dig” for information or records that are not in their control.

Therefore, the proposed language in paragraph (e) would require the county prosecutor or designee to provide “readily available information or evidence” to the court, which means information or evidence to which the prosecutor or designee has reasonable, ready access. This language also reconciles the statutory requirement for this information to be provided to the court in an “expedited manner” pursuant to N.J.S.A. 2C:58-2(f). This expediency requirement would appear to preclude any obligation to search for records not in the prosecutor’s possession or control.

Additionally, the statute is silent as to whether certain information provided to the court could be restricted from disclosure by a protective order. As noted in the discussion of the confidentiality provision in paragraph (d), the Committee had strong concerns about disclosure of such sensitive information. Accordingly, paragraph (e) recognizes that a protective order may be warranted in some instances.

This paragraph also distinguishes the evidentiary obligations depending upon the status of the petitioner. Specifically if a family or household member petitioner is involved, then the “readily available” information or evidence is sufficient because law enforcement is not the petitioner. However, if the petitioner is a law enforcement officer, then the county prosecutor or designee would also be required to produce for the court’s consideration the statements or reports for the factors which are being relied upon for the petition. See State v. Robinson, 229 N.J. 44, 70-71 (2017).

The Committee recommends adoption of proposed R. 3:5B-3 and the proposed amendments to R. 1:38-3, which follow.

R. 3:5B-3. Hearing on Petition for Temporary Extreme Risk Protective Order

(a) Timing. The court shall hear the petition in an expedited manner.

(b) Venue. Venue shall be in the county where the respondent resides, unless the respondent resides out of state then venue shall be in the county where the petitioner resides.

(c) Evidence. In determining whether to issue a temporary extreme risk protective order, the court may examine under oath the petitioner and any witnesses the petitioner may produce. The court may consider the sworn oral testimony of a petitioner or witness who, although not physically present in court, identifies himself or herself, specifies the purpose of the request, and disclose the basis of the petition. Such sworn oral testimony may be communicated to the court by telephone, radio or other means of electronic communication. The court officer or law enforcement officer assisting the petitioner shall contemporaneously record such sworn oral testimony. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of an order. In lieu of examining the petitioner or any witnesses in court or by electronic communication, the court may rely on an affidavit submitted pursuant to R. 3:5B-2 in support of the petition and may also rely upon any information provided by the county prosecutor pursuant to paragraph (e) of this rule.

(d) Factors. In determining whether to issue a temporary extreme risk protective order, the court shall consider all relevant evidence including whether the respondent:

(1) has any history of threats or acts of violence by the respondent directed toward self or others;

(2) has any history of use, attempted use, or threatened use of physical force by the respondent against another person;

(3) is the subject of a temporary or final restraining order or has violated a temporary or final restraining order issued pursuant to the “Prevention of Domestic Violence Act of 1991,” (N.J.S.A. 2C:25-17 et seq.);

(4) is the subject of a temporary or final protective order or has violated a temporary or final protective order issued pursuant to the “Sexual Assault Survivor Protection Act of 2015,” (N.J.S.A. 2C:14-13 et al.);

(5) has any prior arrests, pending charges, or convictions for a violent indictable crime or disorderly persons offense, stalking offense pursuant to N.J.S.A. 2C:12-10, or domestic violence offense enumerated in N.J.S.A. 2C:25-19;

(6) has any prior arrests, pending charges, or convictions for any offense involving cruelty to animals or any history of acts involving cruelty to animals;

(7) has any history of drug or alcohol abuse and recovery from this abuse;

(8) has recently acquired a firearm, ammunition, or other deadly weapon;

(9) has recklessly used, displayed, or brandished a firearm;

(10) has an existing or previous extreme risk protective order issued against him or her; and

(11) has previously violated an extreme risk protective order issued against him or her.

If the court finds one or more of the factors listed in paragraph (d)(1) to (11) of this rule, then the court may consider factors including whether the respondent:

(12) has any prior involuntary commitment in a hospital or treatment facility for persons with psychiatric disabilities;

(13) has received or is receiving mental health treatment;

(14) has complied or has failed to comply with any mental health treatment;

and

(15) has received a diagnosis of a mental health disorder.

Any information disclosed to the court concerning any of the factors listed in paragraph (d) of this rule is confidential and may not be disclosed, by subpoena or otherwise, to anyone other than the respondent for use in the extreme risk protective order proceeding, except by order of the court on good cause shown. Records containing such information shall be exempt from public access under R. 1:38-3 and the Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

(e) Information From Prosecutor. If the petitioner is a family or household member, the county prosecutor or designee shall produce for the court's consideration, subject to a protective order where appropriate, any readily available information or evidence pertaining to the factors listed in paragraph (d) of this rule. If the petitioner is a law enforcement officer, then the county prosecutor or designee shall produce for the court's

consideration, subject to a protective order where appropriate, any statements or reports pertaining to the factors listed in paragraph (d) of this rule upon which the officer relies upon in the petition.

Note: Adopted ____ to be effective ____.

Rule 1:38-3. Court Records Excluded from Public Access

The following court records are excluded from public access:

(a) ... no change.

(b) ... no change.

(c) Records of Criminal and Municipal Court Proceedings.

(1) ... no change.

(2) ... no change.

(3) ... no change.

(4) ... no change.

(5) ... no change.

(6) ... no change.

(7) ... no change.

(8) ... no change.

(9) ... no change.

(10) ... no change.

(11) ... no change.

(12) ... no change.

(13) ... no change.

(14) ... no change.

(15) any information provided to the court related to any of the factors in R. 3:5B-3(d) for proceedings involving extreme risk protective orders.

(d) ... no change.

(e) ... no change.

(f) ... no change.

Note: New Rule 1:38-3 adopted July 16, 2009 to be effective September 1, 2009; subparagraph (b)(1) amended December 9, 2009 to be effective immediately; paragraphs (e) and (f) amended January 5, 2010 to be effective immediately; subparagraph (c)(11) amended, subparagraph (c)(12) adopted, and subparagraph (d)(10) amended February 16, 2010 to be effective immediately; subparagraph (d)(1) amended June 23, 2010 to be effective July 1, 2010; paragraph (e) amended October 26, 2010 to be effective immediately; paragraph (e) amended February 28, 2013 to be effective immediately; subparagraph (d)(12) amended July 9, 2013 to be effective September 1, 2013; subparagraphs (f)(2) and (f)(5) amended, and new subparagraph (f)(9) added December 9, 2014 to be effective immediately; subparagraph (d)(2) amended July 27, 2015 to be effective September 1, 2015; subparagraph (b)(1) amended May 30, 2017 to be effective immediately; paragraph (a) and subparagraphs (d)(1) and (d)(13) amended July 28, 2017 to be effective September 1, 2017, subparagraphs (c)(1), (d)(1), (d)(2), (d)(5), (d)(6), (d)(9), and (f)(6) amended May 15, 2018 to be effective immediately; new subparagraph (c)(13) adopted July 27, 2018 to be effective September 1, 2018; new subparagraph (c)(14) adopted and subparagraph (f)(5) amended September 12, 2018 to be effective immediately; new subparagraph (f)(10) adopted April 23, 2019 to be effective May 1, 2019; new subparagraph (c)(15) adopted _____ to be effective _____.

4. R. 3:5B-4 -- Emergent Relief

The introductory paragraph of proposed R. 3:5B-4 provides the standard for the court to issue the temporary order pursuant to N.J.S.A. 2C:58-23(e); specifically, that the court shall issue the temporary extreme risk protective order if the petitioner established “good cause to believe that the respondent poses an immediate and present danger of bodily injury to self or others by possessing, purchasing, owning, or receiving a firearm.” This language is also included in proposed R. 3:5B(d)(2) (“Standard for Issuance of Temporary Extreme Risk Protective Order”).¹¹

The last sentence expressly requires courts to memorialize their reasons for granting or denying a temporary extreme risk protective order on the record to facilitate appellate review of these applications. The denial of a temporary extreme risk protective order is an appealable final order.

Paragraph (a) “Contents of Order”

Pursuant to the statutory language, this proposed paragraph provides that the temporary extreme risk protective order will prohibit the respondent from possessing, purchasing, owning or receiving firearms or ammunition, or from securing or holding a firearms purchaser identification card or permit to purchase a handgun, or a permit to carry a handgun during the period the order is in effect. Additionally, the respondent will be ordered to surrender to law enforcement any firearms and any ammunition, which the

¹¹ But note that R. 3:5B(a)(6) “Emergent Relief” states that the court shall order the temporary extreme risk protective order if it appears that the respondent poses a “significant danger,” which is not the standard for issuance of this order.

respondent possesses or owns, and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent. See N.J.S.A. 2C:58-23(g). This language is also contained in R. 3:5B(d)(2).

Additionally, the temporary order will include the time, date, and place of the hearing for a final extreme risk protective order.

Paragraph (b) “Service of Order”

This proposed paragraph conforms to the requirements for service of the petition and temporary extreme risk protective order in N.J.S.A. 2C:58-23(i). Following issuance of the temporary extreme risk protective order, the court will immediately forward a copy of the order and the petition to the county prosecutor in the county in which the respondent resides for service by the appropriate law enforcement agency upon the respondent.

This paragraph also includes the statutory prohibition against asking the family or household member petitioner to serve the temporary order on the respondent. See N.J.S.A. 2C:58-23(i). Consistent with the statutory guidance, service of the petition and order by the county prosecutor or law enforcement petitioner upon the respondent shall be “immediate or as soon as practicable.” Ibid. Service of the order is also included in proposed R. 3:5B(d)(3).

Paragraph (c) “Duration of Order”

Consistent with N.J.S.A. 2C:58-23(h), this proposed paragraph provides that the temporary order will remain in effect until the court issues a further order. This language is also included in proposed R. 3:5B(d)(2).

Paragraph (d) “Search Warrant”

Pursuant to N.J.S.A. 2C:58-26(b), “If the petition for the temporary or extreme risk protective order indicates that the respondent owns or possesses any firearms or ammunition, the court shall issue a search warrant with the temporary or final extreme risk protective order.” (emphasis added). As such, R. 3:5B(d)(4) and (e)(8) “Issuance of Search Warrant” tracks this statutory language and requires issuance of the search warrant in conjunction with issuance of the temporary or final extreme risk protective order.

However, the Committee expressed strong concerns with the mandatory statutory language and saw the need for the rule to separate the requirements for issuance of the search warrant from the standards for issuance of the temporary and final extreme risk protective orders to avoid potential constitutional issues. Specifically, the Act provides that a court shall issue a temporary order if it finds “good cause” to believe that the respondent poses an immediate and present danger of causing bodily injury to the respondent or others” by owning or possessing a firearm. N.J.S.A. 2C:58-23(e) (hereinafter “dangerousness finding”). If the court orders the temporary order and the petition “indicates” that the respondent owns or possesses any firearms, then the Act provides that the court shall issue a search warrant. N.J.S.A. 2C:58-26(b).

Consequently, the Act can be interpreted to require the court to issue a search warrant in conjunction with issuance of every temporary order whenever there is an “indication” that the respondent possesses a firearm. The court would then be required to issue the search warrant even though there has been no factual showing or legal determination that there is cause to believe that the firearms will be found at a specified

location (hereinafter “location finding”). Accordingly, the court could be presented with sufficient evidence to support a “dangerousness finding,” arising from the respondent’s possession of a firearm, but insufficient evidence to find “cause” to believe that the firearms are at a specified location. Under this scenario, the court could properly issue a temporary order, granting “prospective relief,” namely temporary suspension of firearms possession. However, a requirement that a court issue a search warrant based only upon this dangerousness finding raises significant constitutional concerns.

Both the federal and New Jersey constitutions require that any search warrant must describe with “particularity” the place to be searched and items to be seized. See N.J. Const. art. I, ¶ 7, U.S. Const. amend. IV, interpreted in, Marron v. United States, 275 U.S. 192, 196 (1927). These Constitutions entrust the “neutral and detached magistrate” of the judicial branch with the authority to issue search warrants. Id. See Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971). The exercise of this constitutional authority requires the court to examine the search warrant application and then determine whether the particularity requirement has been satisfied. More importantly, if the court authorizes a search warrant, this particularity of location requirement limits the discretion of the law enforcement officer executing the search warrant. See Marron, 275 U.S. at 196; State v. Marshall, 398 N.J. Super. 92, 103-04 (App. Div. 2008). Thus, a judicial determination of this particularity of location finding is an indispensable element to the issuance of a valid search warrant. Id. See also State v. Horton, 207 NJ Super 555, 558 (Law Div. 1985).

To the extent that the mandatory language (N.J.S.A. 2C:58-23(e) and 2C:58-26(b)) may be interpreted to require a court to issue a search warrant based only upon a

“dangerousness finding” and without a “location finding,” the Act may violate constitutional provisions applicable to both search warrants and the separation of powers. In order to preserve the constitutionality of a statute, courts have determined that mandatory statutory language (e.g., “shall”) yields to constitutional mandates. See, e.g., H.E.S. v. J.C.S., 175 N.J. 309, 323 (2003) (due process).

Similarly, to avoid constitutional infirmity, the proposed search warrant provisions for the temporary and final extreme risk protective orders in proposed R. 3:5B-4(d) and R. 3:5B-6(c) depart from the mandatory statutory language and require courts to make the separate “dangerousness finding” or “location findings.” To order the temporary or final orders, the court must make the “dangerousness finding” specified in N.J.S.A. 2C:58-23(e) for the temporary order or N.J.S.A. 2C:58-24(b) for the final order. To issue a search warrant, the court must find “good cause” to believe that firearms are “presently at a specifically described location.”

These two rules retain the Act’s “good cause” language, rather than “probable cause” or “reasonable cause” standards applied under Fourth Amendment analysis because the constitutionality of search warrant language in the context of the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-28(j)) is currently being litigated before the Supreme Court in State v. James Hemenway, A-19-18 (2019). For issuance of a search warrant under the Prevention of Domestic Violence Act, the Appellate court in Hemenway states “a plaintiff must establish: (1) probable cause to believe the defendant has committed an act of domestic violence; (2) reasonable cause to believe the place identified in the warrant contains a qualifying weapon under N.J.S.A. 2C:39-1(r); and (3) reason to believe

a defendant's access to the weapon poses a “heightened risk of injury.” See N.J.S.A. 2C:25-28(j); State v. Dispoto, 189 N.J. 108, 120–21 (2007)...” State v. Hemenway, 454 N.J. Super. 303, 325-26 (App. Div. 2018). Reasonable cause under the Prevention of Domestic Violence Act has been found to be “akin to ‘reasonable suspicion[.]’” State v. Perkins, 358 N.J. Super. 151, 159 (App. Div. 2003) (citing State v. Arthur, 149 N.J. 1, 8 (1997)).

Because the Hemenway decision has the potential to resolve the constitutional issues arising from the conflation of standards for prospective relief and search warrant issuance under the Extreme Risk Protective Order Act, the proposed language separates prospective relief from search warrant issuance.

Specifically, the search warrant provisions provide that if the court determines that good cause exists to believe that the respondent owns or possesses any firearms or ammunition and that such firearms or ammunition are “presently at a specifically described location,” then the court, in conjunction with the temporary or final order, shall issue a search warrant for any firearms and ammunition for “that specified location.” See R. 3:5B-4(d) and R. 3:5B-6(c).

This separation of prospective relief from search warrant issuance is designed to achieve four interrelated objectives. First, it assuages separation of powers concerns. Second, it assists the litigants in developing the factual record relevant to the separate court determinations. Third, it encourages courts to articulate the reasons on the record to support these separate determinations. Fourth, it may minimize the impact of any Hemenway remands. If the Hemenway court finds a constitutional defect in the Prevention of Domestic Violence Act’s search warrant standard, then this may affect the viability of the

Act's "good cause" standard as applied to search warrants. By separating search warrant issuance from prospective relief, the proposed rule may reduce the potential impact of Hemenway upon the prospective relief ordered pursuant to R. 3:5B-4 and R. 3:5B-6.

The Committee recommends adoption of proposed R. 3:5B-4, which follows.

R. 3:5B-4. Emergent Relief

If the court determines that the petitioner established good cause to believe that the respondent poses an immediate and present danger of bodily injury to self or others by possessing, purchasing, owning, or receiving a firearm, the court shall order ex parte emergency relief in the form of a temporary extreme risk protective order. The court shall place on the record the reasons supporting its decision to grant or deny the order.

(a) Contents of Order. If ordered by the court, a temporary extreme risk protective order (1) shall prohibit the respondent from possessing, purchasing, owning, or receiving firearms or ammunition, or from securing or holding a firearms purchaser identification card or permit to purchase a handgun pursuant to N.J.S.A. 2C:58-3, or a permit to carry a handgun pursuant to N.J.S.A. 2C:58-4 during the period the order is in effect, and (2) shall order the respondent to surrender to law enforcement any firearms and any ammunition which the respondent possesses or owns, and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent. Any such card or permit issued to the respondent shall be immediately revoked pursuant to N.J.S.A. 2C:58-3(f). The order shall state the time, date, and place of the hearing for a final extreme risk protective order.

(b) Service of Order. The court issuing the temporary extreme risk protective order shall immediately forward a copy of the order and the petition to the county prosecutor in the county in which the respondent resides for service by the appropriate law enforcement agency upon the respondent. At no time shall the family or household member petitioner be asked to serve any temporary extreme risk protective order on the

respondent. Service by the county prosecutor or law enforcement petitioner upon the respondent shall be immediate or as soon as practicable.

(c) Duration of Order. The temporary extreme risk protective order shall remain in effect until a court issues a further order.

(d) Search Warrant. If the court determines, based upon consideration of information provided in the temporary extreme risk protective order petition, and during the temporary extreme risk protective order hearing, that good cause exists to believe that the respondent owns or possesses any firearms or ammunition and that such firearms or ammunition are presently at a specifically described location, then the court, in conjunction with the temporary extreme risk protective order, shall issue a search warrant for any firearms and ammunition which the respondent possesses or owns at that specified location.

Note: Adopted ____ to be effective ____.

5. R. 3:5B-5 -- Final Extreme Risk Protective Order Hearing

This proposed rule addresses the hearing for the final extreme risk protective order.

Paragraph (a) “Timing”

N.J.S.A. 2C:58-24(a) provides that “[a] hearing for a final extreme risk protective order shall be held in the Superior Court in accordance with the Rules of Court within 10 days of the filing of a petition ...” This language was modeled after the Prevention of Domestic Violence Act, which requires the hearing for the final restraining order to be held in the Family Part “within 10 days of the filing of the complaint.” See N.J.S.A. 2C:25-29(a). Accordingly, proposed R. 3:5B(e)(1) “Timing of Hearing” tracks the statutory language.

However, the mandatory requirement for the final hearing to be held within 10 days of the petition may violate due process. See H.E.S. v. J.C.S., 175 N.J. 309, 323 (2003), interpreting N.J.S.A. 2C:25-29(a). As written, N.J.S.A. 2C:25-29(a) requires the final hearing for a domestic violence restraining order to be held within 10 days even though the respondent may not have been served with the petition. This 10-day period applies regardless of whether the respondent requires additional time to produce evidence or otherwise prepare for the final hearing. In order to avoid these constitutional infirmities, the appellate court in H.E.S. v. J.C.S interpreted this mandatory language to require that the hearing be “scheduled no more than 10 days” after the respondent was notified of the hearing. 349 N.J. Super. 332, 342-43 (App. Div. 2002), rev’d on other grounds, 175 N.J. 309, 332 (2003).

Additionally, N.J.S.A. 2C:58-24(a) further provides that the final extreme risk protective hearing shall be held “in accordance with the Rules of Court ...” As such, the Committee is recommending that the final hearing “shall be scheduled to be held in the Superior Court within 10 days after the petition is filed.” The Committee believes that this proposed language reflects the Court’s interpretation of a similar statute in a manner which preserved its constitutionality.

Paragraph (b) “Venue”

Proposed paragraph (b) provides that “venue shall be in the county where the temporary extreme risk protective order was issued, unless good cause is shown for the hearing to be held elsewhere.” This language is similar to the language governing venue in domestic violence proceedings in R. 5:7A(f). Proposed R. 3:5B(e)(2) “Venue in Final Extreme Risk Protective Order Proceedings” also tracks this language.

Paragraph (c) “Evidence”

This proposed paragraph addresses information that the court may consider when determining whether to issue a final extreme risk protective order. The first sentence of paragraph (c) is similar to the language used in R. 3:5B-3(c) concerning the court examining under oath any witnesses the petitioner may produce. Additionally, this paragraph provides that the court may consider any information submitted by the county prosecutor pursuant to R. 3:5-3(e) and paragraph (e) of this rule. R. 3:5B(e)(4) “Evidence Supporting Issuance of Final Extreme Risk Protective Order” also addresses the submission of this information by county prosecutors.

Although the Act is silent as to the respondent's rights, paragraph (c) expressly confers the respondent with the right to testify, to present witnesses, cross-examine any witnesses who appear at the hearing, as well as submit and present information. Cf. H.E.S., 175 N.J. at 321-23 (due process requires notice and an opportunity to defend). A respondent, like any civil litigant, has a right to retain counsel for representation but would not be entitled to appointed counsel as would a defendant in a criminal proceeding. This paragraph also provides that the rules governing admissibility of evidence at trial do not apply to the presentation and consideration of information at the final hearing. The rights of the respondent are also contained in proposed R. 3:5B(e)(5) "Rights of Respondent at Hearing on Final Extreme Risk Protective Order."

Paragraph (d) "Factors"

This proposed paragraph requires the court to consider "all relevant evidence," as well as the factors enumerated in R. 3:5-3(d) at the final hearing. Consistent with the findings for the temporary order in R. 3:5-3(d), the court must first find one or more of the factors in (d)(1) to (11), and if so found, may consider the factors pertaining to the respondent's mental health in (d)(12) to (15). This paragraph also includes the confidentiality provisions for this information as set forth in R. 3:5B-3(d).

Paragraph (e) "Information From Prosecutor"

Similar to proposed R. 3:5B-3(e), this paragraph requires the county prosecutor or designee to submit for the court's consideration "information obtained through sources including the execution of any search warrant and any additional information obtained through the performance of its responsibilities under N.J.S.A. 2C:58-20 et seq."

The Committee recommends adoption of proposed R. 3:5B-5, which follows.

R. 3:5B-5. Final Extreme Risk Protective Order Hearing

(a) Timing. A final extreme risk protective order hearing shall be scheduled to be held in the Superior Court within 10 days after the petition is filed pursuant to R. 3:5B-2.

(b) Venue. Venue shall be in the county where the temporary extreme risk protective order was issued, unless good cause is shown for the hearing to be held elsewhere.

(c) Evidence. In determining whether to issue a final extreme risk protective order, the court may examine under oath the petitioner and any witnesses the petitioner may produce, may consider an affidavit and documents submitted in support of the petition, and may consider any information provided by the county prosecutor pursuant to R. 3:5B-3(e) and paragraph (e) of this rule. The respondent shall be afforded the right to testify, to present witnesses, to submit documents, to cross-examine any witnesses who may appear at the hearing, and to otherwise present information. The respondent shall have the right to be present at the hearing. The rules governing admissibility of evidence at trial shall not apply to the presentation and consideration of information at the hearing.

(d) Factors. In determining whether to issue a final extreme risk protective order, the court shall consider all relevant evidence, including the factors referenced in R. 3:5B-3(d)(1) to (11). If the court finds one or more of those factors, then the court may consider the factors referenced in R. 3:5B-3(d)(12) to (15). Records containing such information shall be subject to the confidentiality provision and R. 1:38-3 and the Open Public Records Act exemptions as set forth in that Rule.

(e) Information From Prosecutor. In addition to information referenced in R. 3:5B-3(e), the county prosecutor or designee shall produce for the court's consideration information obtained through sources including the execution of any search warrant and any additional information obtained through the performance of its responsibilities under N.J.S.A. 2C:58-20 et seq.

Note: Adopted ____ to be effective ____.

6. R. 3:5B-6 -- Final Relief

The first sentence of this proposed rule provides the standard for issuance of a final extreme risk protective order pursuant to N.J.S.A. 2C:58-24(b); specifically, that the court must find by a preponderance of the evidence that the respondent poses a significant danger of bodily injury to self or others by owning, possessing, purchasing, or receiving a firearm. This language is also included in proposed R. 3:5B(e)(6) “Standard for Issuance of Final Extreme Risk Protective Order.”

Similar to R. 3:5B-4, the second sentence requires the court to “place on the record the reasons supporting its decision to grant or deny” the final order.

Paragraph (a) “Contents of Order”

Proposed paragraph (a) tracks the statutory language for the respondents to be prohibited from “owning, purchasing, possessing, or receiving firearms or ammunition, or from securing or holding a firearms purchaser identification card or permit to purchase a handgun pursuant to N.J.S.A. 2C:58-3, or a permit to carry a handgun pursuant to N.J.S.A. 2C:58-4 during the period that the order is in effect.” See N.J.S.A. 2C:58-24(d) and 2C:58-26(a).

Additionally, the respondent will be ordered to surrender to law enforcement any firearms or ammunition, which the respondent possesses or owns, and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent” in accordance with N.J.S.A. 2C:58-26(a). Any such card or permit issued to the respondent shall be immediately revoked pursuant to N.J.S.A. 2C:58-3(f). See N.J.S.A. 2C:58-23(g).

Proposed R. 3:5B(e)(7) “Nature of Final Extreme Risk Protective Order” also mirrors the statutory language for the contents of the final order.

Paragraph (b) “Duration of Order”

This proposed paragraph provides that the final order “shall remain in effect until a court issues a further order.” Proposed R. 3:5B(e)(7) also includes this language.

Paragraph (c) “Search Warrant”

For the same reasons discussed in R. 3:5B-4(d) as to the potential constitutional issues concerning the Act’s mandatory issuance of a search warrant with the issuance of a final extreme risk protective order, this paragraph also separates the findings for a search warrant from those for issuance of a final extreme risk protective order.

Specifically, paragraph (c) provides that if the court determines based upon consideration of all information submitted pursuant to the Act that good cause exists to believe that the respondent owns or possesses any firearms or ammunition and that such firearms or ammunition are presently at a specifically described location, then the court, in conjunction with the final extreme risk protective order, shall issue a search warrant for any firearms and ammunition which the respondent possesses or owns at that specified location.

Proposed R. 3:5B(e)(8) “Issuance of Search Warrant” tracks the statutory language for issuance of a search warrant in conjunction with a final extreme risk protective order. See N.J.S.A. 2C:58-26(b).

The Committee recommends adoption of proposed R. 3:5B-6, which follows.

R. 3:5B-6. Final Relief. The court shall issue a final extreme risk protective order if it finds by a preponderance of evidence at the hearing that the respondent poses a significant danger of bodily injury to self or others by owning, possessing, purchasing, or receiving a firearm. The court shall place on the record the reasons supporting its decision to grant or deny the order.

(a) Contents of Order. If ordered by the court, the final extreme risk protective order (1) shall prohibit the respondent from owning, purchasing, possessing, or receiving firearms or ammunition, or from securing or holding a firearms purchaser identification card or permit to purchase a handgun pursuant to N.J.S.A. 2C:58-3, or a permit to carry a handgun pursuant to N.J.S.A. 2C:58-4 during the period that the order is in effect, and (2) shall order the respondent to surrender to law enforcement any firearms or ammunition which the respondent possesses or owns, and any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent. Any such card or permit issued to the respondent shall be immediately revoked pursuant to N.J.S.A. 2C:58-3(f).

(b) Duration of Order. The final extreme risk protective order shall remain in effect until a court issues a further order.

(c) Search Warrant. If the court determines, based upon consideration of all information pursuant to N.J.S.A. 2C:58-20 et seq., such as the petition filed pursuant to R. 3:5B-2, information presented during the hearings conducted pursuant to R. 3:5B-3 and R. 3:5B-5, and any other information presented that good cause exists to believe that the respondent owns or possesses any firearms or ammunition and that such firearms or

ammunition are presently at a specifically described location, then the court, in conjunction with the final extreme risk protective order, shall issue a search warrant for any firearms and ammunition which the respondent possesses or owns at that specified location.

Note: Adopted ____ to be effective ____.

7. R. 3:5B-7 -- Termination of Final Extreme Risk Protective Order

The first paragraph of this proposed rule tracks the procedures for termination of a final extreme risk protective order in N.J.S.A. 2C:58-25. Similarly, R. 3:5B(f) “Termination of Final Extreme Risk Protective Order” contains the statutory language.

Specifically, the petitioner or respondent may file a petition for termination of the extreme risk protective order at any time following issuance of the order. Notice will be provided to the petitioner, respondent, the appropriate law enforcement agency, and the county prosecutor. The court will consider the factors in R. 3:5B-3(d), as well as any other relevant evidence, including but not limited to, “whether the respondent has received, or is receiving, mental health treatment.” Consideration of the respondent’s receipt of mental health treatment is expressly required at termination proceedings under N.J.S.A. 2C:58-25.

In accordance with the statute, the rule provides that if the respondent petitions for termination, he or she bears the burden of proving by a preponderance of the evidence that he or she no longer poses a significant danger of causing bodily injury to self or to other persons by owning, possessing, purchasing, or receiving a firearm.

During the discussion of this rule, members raised practical concerns over the lack of an expiration period for an extreme risk protective order under the Act, in contrast to other states that set a finite period for an extreme risk protective order. For example, Washington and Maryland limit their final extreme risk protective orders to a one-year period, which can be extended upon application to the court. See Wash. Rev. Code Ann. § 7.94.040(d)(2) and § 7.94.080(3); Md. Public Safety Code Ann. § 5-605(f) and § 5-606(a)(3).

The open-ended timeframe for an extreme risk protective order under the Act creates unique challenges for law enforcement who could potentially be required to store weapons indefinitely. To require law enforcement to store seized firearms indefinitely pending the court's decision to terminate the extreme risk protective order, or to limit the ability of law enforcement to file a forfeiture action, seems inconsistent with the intent of the Act. Consequently, a person subject to an extreme risk protective order would have more protection over their firearm property interest than a person who is not subject to an extreme risk protective order. Specifically, a prosecutor may file a civil action to revoke a firearms purchaser identification card or gun permit, or seize and forfeit a firearm for a resident not subject to an extreme risk protective order pursuant to N.J.S.A. 2C:58-3(f).

To address these concerns, the proposed rule provides that it would not affect the ability of the State to file an action to forfeit a respondent's firearm, or the respondent to enter into an approved agreement, prior to issuance of the extreme risk protective order, to sell that firearm to a licensed dealer or transfer the firearm to an authorized third party.

The Committee recommends adoption of proposed R. 3:5B-7, which follows.

R. 3:5B-7. Termination of Final Extreme Risk Protective Order The petitioner or respondent may file a petition for termination of a final extreme risk protective order at any time following issuance of the order. The court, on notice to the petitioner and the respondent, the appropriate law enforcement agency, and the county prosecutor, may terminate the final extreme risk protective order after a hearing. During the termination hearing, the court shall consider the factors enumerated in R. 3:5B-3(d), as well as any other relevant evidence, including, but not limited to, whether the respondent has received, or is receiving, mental health treatment. If the respondent petitioned for termination, the respondent shall bear the burden at the hearing of proving by a preponderance of the evidence that the respondent no longer poses a significant danger of causing bodily injury to self or to other persons by owning, possessing, purchasing, or receiving a firearm.

Nothing in this Rule shall either affect the authority of the Attorney General or the County Prosecutor to file an action to forfeit a respondent's firearm as authorized by law or prevent a respondent that owned a firearm prior to the issuance of an extreme risk protective order from entering into an agreement, as approved by the Attorney General or County Prosecutor, to sell that firearm to a licensed dealer or transfer the firearm to a third party authorized to own or possess a firearm.

Note: Adopted ___ to be effective _____.

II. Non-Rule Recommendation

The Act allows family or household members to file petitions against respondents who are not law enforcement officers directly with the courts. In contrast, when the respondent is a law enforcement officer, the Act provides an alternative procedure.

Specifically, N.J.S.A. 2C:58-23(1) provides:

- (1) A petition for a temporary extreme risk protective order filed against a law enforcement officer shall be filed in the law enforcement agency in which the officer is employed. The law enforcement officer or employee receiving the petition shall advise the petitioner of the procedure for completing and signing a petition.
- (2) Upon receipt of the petition, the law enforcement officer's employer shall immediately initiate an internal affairs investigation.
- (3) The disposition of the internal affairs investigation shall immediately be served upon the county prosecutor who shall make a determination whether to refer the matter to the courts.

The Committee had strong concerns with these separate procedures for law enforcement officers. No other state statute of this type contains a separate filing process for petitions applicable to law enforcement officer respondents.

This separate process could potentially deny a petitioner access to the courts because of the requirement for the petition to be filed in the law enforcement agency where the officer is employed. More importantly, if the court is the only forum to obtain relief, then due process arguably requires that all applicants have equal access to the courts in order to obtain that relief. See Boddie v. Connecticut, 401 U.S. 371, 382-383 (1971). In Boddie, female welfare recipients seeking divorce alleged that a state statute requiring payment of court fees and costs created a condition precedent to court access, which violated the Due

Process Clause of the Fourteenth Amendment. Id. at 372. The Court agreed, “concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce” Id. at 382. Only through the courts can one obtain a divorce, the Boddie Court emphasized. Id. Hence, the Court concluded that “[t]he requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.” Id. at 382-83.

Under the Act, the court is the only avenue to obtain an extreme risk protective order. However, for family or household members filing against law enforcement officers, the Act does not permit these petitioners to file directly with the court. To the contrary, N.J.S.A. 2C:58-23(l) requires the petition to be filed in the law enforcement agency in which the respondent is actually employed. That agency must then initiate an internal affairs investigation with the results of that investigation being forwarded to the county prosecutor who, in turn, decides whether to refer the petition to the court. Should the county prosecutor decide not to refer the petition, the Act does not provide any other avenue for that family or household member. Moreover, the Act does not expressly provide any mechanism for court review of the prosecutor’s exercise of discretion not to refer the petition. Thus, unless a viable procedure for court access is provided to these petitioners, this statutory provision may violate the due process clause as interpreted in Boddie.

In an attempt to avoid a potential due process violation, the Committee drafted a separate rule pertaining to law enforcement officer respondents that departs from the mandatory statutory language by permitting the petition to be filed “at any court location otherwise permitted in R. 3:5B-2.” The court would then forward the petition to the appropriate law enforcement employer and the statutory process would then ensue, i.e., the internal affairs investigation.

Additionally, the draft rule also would have conferred the aggrieved family or household member petitioner the right to appeal an adverse determination by the county prosecutor to the Superior Court. Cf. N.J.S.A. 2C:58-4 (appeal from denial of gun permit application). The draft rule also would have set the standard of review for the prosecutor’s denial as an abuse of discretion standard.

Cognizant of limitations upon the Supreme Court’s rulemaking authority and comity concerns, the draft rule expressly would have required that the internal affairs investigation by the law enforcement agency “shall be done in accordance with the Attorney General Directive or Guidelines ...” However, whether the statutory alternative filing procedure comports with due process may turn upon the content of the Directive or Guidelines. For example, a reviewing court may interpret Boddie to require inquiry whether the Attorney General Directive or Guidelines provide for the prospective relief available under a temporary extreme risk protective order – temporary suspension of firearm possession – in the “expedited” manner contemplated by N.J.S.A. 2C:58-23(1).

The Committee ultimately expressed reluctance to recommend a new rule addressing this separate process before it had an opportunity to review any Directive or

Guidelines issued by the Attorney General. As a result, the Committee decided to withdraw the draft rule, and instead recommend a “legislative fix” to the due process issues raised under the Act. Therefore, the Committee recommends that the Legislature consider an amendment to N.J.S.A. 2C:58-23(1) to permit family or household members filing against law enforcement officers to file the petition with the court, which is functionally equivalent to the relief afforded to all other family or household member petitioners.

To provide a more comprehensive understanding of the issues that the Committee struggled with and its efforts, the draft rule has been included for illustrative purposes.

(This draft rule is not recommended by the Committee)

R. 3:5B-8. Law Enforcement Officer Respondent

A petition for a temporary extreme risk protective order against a law enforcement respondent shall be in the form specified in R. 3:5B-2, and may be filed in the law enforcement agency in which the officer is employed or at any court location otherwise permitted in R. 3:5B-2. If filed at a location other than the law enforcement officer's employer, then the petition shall be forwarded by the court immediately to that employer which shall immediately initiate an internal affairs investigation, which shall be conducted in accordance with any applicable Attorney General Directive or Guidelines and in an expedited manner as contemplated by N.J.S.A. 2C:58-20 et seq. The employer agency shall immediately serve the disposition of this internal affairs investigation upon the county prosecutor who shall make a determination whether to file a petition for a temporary extreme risk protective order as a law enforcement petitioner pursuant to R. 3:5B-2. If the prosecutor determines not to file a petition, then the reasons for this determination shall be set forth in writing, served upon the referring family or household member and the Superior Court in that county, and accompanied by notification to the family or household member of the right to appeal this determination to that court. The court shall review any appeal from the prosecutor's determination under an abuse of discretion standard.

III. APPENDICES

Appendix A - R. 3:5B – Comparison Chart

	CRIMINAL PRACTICE COMMITTEE PROPOSED RULES	ORIGINAL <u>R.</u> 3:5B
Definitions	3:5B-1	N/A
Petition for Temporary Order	3:5B-2	3:5B(a)
Affidavit	3:5B-2	3:5B(a)(3)
Hearing for Temporary Order	3:5B-3	3:5B(a)
Timing	3:5B-3(a)	3:5B(a)(1)
Venue	3:5B-3(b)	3:5B(a)(2)
Evidence	3:5B-3(c)	3:5B(a)(4), 3:5B(b)
Factors	3:5B-3(d)	3:5B(a)(5)
Information from Prosecutor	3:5B-3(e)	3:5B(a)(5)
Emergent Relief	3:5B-4	3:5B(a)(6)
Standard	3:5B-4	3:5B(d)(1)
Contents of Order	3:5B-4(a)	3:5B(d)(2), 3:5B(e)(3)
Service of Order	3:5B-4(b)	3:5B(d)(3)
Duration of Order	3:5B-4(c)	3:5B(d)(2)
Search Warrant		
Temporary	3:5B-4(d)	3:5B(d)(4)
Final	3:5B-6(c)	3:5B(e)(8)
Hearing for Final Order	3:5B-5	3:5B(e)
Timing	3:5B-5(a)	3:5B(e)1)
Venue	3:5B-5(b)	3:5B(e)(2)
Evidence	3:5B-5(c)	3:5B(e)(5)
Factors	3:5B-5(d)	3:5B(e)(4)
Information from Prosecutor	3:5B-5(e)	3:5B(e)(4)
Final Relief	3:5B-6	3:5B(e)(6)
Contents of Order	3:5B-6(a)	3:5B(e)(7)
Duration of Order	3:5B-6(b)	3:5B(e)(7)
Termination	3:5B-7	3:5B(f)

Appendix B – R. 3:5B as published in the Notice to the Bar (March 13, 2019)

Rule 3:5B. Extreme Risk Protective Orders

(a) Filing a Petition for Temporary Extreme Risk Protective Order; General. A petitioner may file a petition, on a form prescribed by the Administrative Director of the Courts, for a temporary extreme risk protective order alleging that the respondent poses a significant danger of bodily injury to self or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm. For purposes of this rule, a “petitioner” is defined pursuant to N.J.S.A. 2C:58-21.

(1) Timing of Hearing. The court shall hear the petition in an expedited manner.

(2) Venue in Temporary Extreme Risk Protective Order Act Proceedings. Venue in these actions shall be in the county where either the petitioner or the respondent resides or, if applicable, in the county where the offense occurred.

(3) Affidavit Required. A petition for a temporary extreme risk protective order shall include an affidavit setting forth the facts tending to establish the grounds of the petition, or the reason for believing that they exist, and, to the extent available, the number, types, physical description, and locations of any firearms and ammunition that the petitioner believes to be currently controlled or possessed by the respondent.

(4) Petitioner’s Appearance Before the Court. Except as provided in paragraph (b) of this rule, a petitioner for a temporary extreme risk protective order

shall appear before a judge to personally testify on the record or by sworn complaint submitted pursuant to N.J.S.A. 2C:58-23. The court shall examine under oath the petitioner and any witnesses the petitioner may produce. In lieu of examining the petitioner and any witnesses, the court may rely on an affidavit submitted in support of the petition.

- (5) Evidence Supporting Issuance of Temporary Extreme Risk Protective Order. The county prosecutor or designee shall produce for the court's consideration any available evidence, including, but not limited to, whether the respondent: (a) has any history of threats or acts of violence directed toward self or others; (b) has any history of use, attempted use, or threatened use of physical force against another person; (c) is the subject of a temporary or final restraining order or has violated a temporary or final restraining order issued pursuant to the "Prevention of Domestic Violence Act of 1991"; (d) is the subject of a temporary or final protective order or has violated a temporary or final protective order issued pursuant to the "Sexual Assault Survivor Protection Act of 2015"; (e) has any prior arrests, pending charges, or convictions for a violent indictable crime or disorderly persons offense, stalking offense pursuant to N.J.S.A. 2C:12-10, or domestic violence enumerated in N.J.S.A. 2C:25-19; (f) has any prior arrests, pending charges, or convictions for any offense involving cruelty to animals or any history of acts involving cruelty to animals; (g) has any

history of drug or alcohol abuse and/or recovery from this abuse; or (h) has recently acquired a firearm, ammunition, or other deadly weapon.

(6) Emergent Relief. If it appears that the respondent poses a significant danger of bodily injury to self or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm, the court shall, upon consideration of the petitioner's affidavit, complaint or testimony, order emergency relief, including ex parte relief, in the nature of a temporary extreme risk protective order as authorized by N.J.S.A. 2C:58-20 et seq.

(b) Issuance of Temporary Extreme Risk Protection Order by Electronic Communication. A court may issue a temporary extreme risk protective order upon sworn oral testimony of a petitioner who is not physically present. After taking the oath, the petitioner must identify himself or herself, specify the purpose of the request, and disclose the basis of the petition. Such sworn oral testimony may be communicated to the court by telephone, radio or other means of electronic communication. The court or law enforcement officer assisting the petitioner shall contemporaneously record such sworn oral testimony. The court shall also make long hand notes summarizing the sworn oral testimony. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a temporary extreme risk protective order.

(c) Use of Electronic Form of Order Where Available. In vicinages having an approved electronic form of temporary extreme risk protective order, the temporary extreme risk protective order may be prepared electronically by the court on a computer

or other device and transmitted electronically. In all other respects, the method of issuance and contents of the order shall be that required by paragraph (a) of this rule.

(d) Issuance of Temporary Extreme Risk Protective Order.

(1) Standard for Issuance of Temporary Extreme Risk Protective Order. The court shall issue a temporary extreme risk protective order if it finds good cause to believe that the respondent poses an immediate and present danger of causing bodily injury to the petitioner, to the respondent, or to others by having custody or control of, owning, possessing, purchasing or receiving a firearm.

(2) Nature of Temporary Extreme Risk Protective Order. The temporary extreme risk protective order (A) shall prohibit the respondent from having custody or control of, owning, purchasing, possessing, or receiving firearms or ammunition, or from securing or holding a firearms purchaser identification card or permit to purchase a handgun pursuant to N.J.S.A. 2C:58-3, or a permit to carry a handgun pursuant to N.J.S.A. 2C:58-4 during the period the protective order is in effect, and (B) shall order the respondent to surrender to law enforcement (i) any firearms and any ammunition respondent's custody or control, or which the respondent possesses or owns, and (ii) any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent. Any such card or permit issued to the respondent shall be immediately revoked pursuant to N.J.S.A. 2C:58-3(f). The temporary

extreme risk protective order shall be in effect statewide and shall remain in effect until a court issues a further order.

(3) Forwarding and Service of Temporary Extreme Risk Protective Order. The court issuing the temporary extreme risk protective order shall immediately forward a copy of the order and the petition to the appropriate law enforcement agency for service on the respondent and to the police of the municipality in which the petitioner resides. The temporary extreme risk protective order shall immediately be served on the respondent by the police, except that an order issued during regular court hours may be forwarded to the sheriff for immediate service on the respondent in accordance with the Rules of Court. If personal service cannot be effected on the respondent, the court may order appropriate substituted service. Unless the petitioner is a law enforcement officer, at no time shall the petitioner be asked or required to themselves serve any such order on the respondent.

(4) Issuance of Search Warrant. If the petition for the temporary extreme risk protective order indicates that the respondent owns or possesses any firearms and/or ammunition, the court, in conjunction with the temporary extreme risk protective order, shall issue a search warrant for any firearms and ammunition in the respondent's custody or control, or which he or she possesses or owns.

(e) Final Extreme Risk Protective Order.

- (1) Timing of Hearing. A hearing for a final extreme risk protective order shall be held in the Superior Court within 10 days after the filing of a petition pursuant to N.J.S.A. 2C:58-23(a).
- (2) Venue in Final Extreme Risk Protective Order Proceedings. The hearing on the final extreme risk protective order is to be held in the county where the temporary ex parte restraints were ordered, unless good cause is shown for the hearing to be held elsewhere.
- (3) Notice to Respondent. The court shall notify the respondent of the date, time and place of the hearing on the final extreme risk protective order. A copy of the petition shall be served on the respondent.
- (4) Evidence Supporting Issuance of Final Extreme Risk Protective Order. The county prosecutor at the hearing shall produce any and all available evidence, including, but not limited to, evidence related to the factors enumerated in subparagraph (a)(5) of this rule.
- (5) Rights of Respondent at Hearing on Final Extreme Risk Protective Order. The respondent shall be provided all available discovery. The respondent shall be afforded the right to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to otherwise present information. The respondent 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.

- (6) Standard for Issuance of Final Extreme Risk Protective Order. The court shall issue a final extreme risk protective order if it finds by a preponderance of evidence at the hearing that the respondent poses a significant danger of bodily injury to self or others by having custody or control of, owning, possessing, purchasing, or receiving a firearm.
- (7) Nature of Final Extreme Risk Protective Order. The final extreme risk protective order (A) shall prohibit the respondent from having custody or control of, owning, purchasing, possessing, or receiving firearms or ammunition, or from securing or holding a firearms purchaser identification card or permit to purchase a handgun pursuant to N.J.S.A. 2C:58-3, or a permit to carry a handgun pursuant to N.J.S.A. 2C:58-4 during the period the protective order is in effect, and (B) shall order the respondent to surrender to law enforcement (i) any firearms and/or ammunition in respondent's custody or control, or which the respondent possesses or owns, and (ii) any firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun held by the respondent. Any such card or permit issued to the respondent shall be immediately revoked pursuant to N.J.S.A. 2C:58-3(f). The final extreme risk protective order shall be in effect statewide and shall remain in effect until a court issues a further order.

(8) Issuance of Search Warrant. If the petition for the temporary extreme risk protective order indicates that the respondent owns or possesses any firearms or ammunition, the court, in conjunction with the final extreme risk protective order, shall issue a search warrant for any firearms and/or ammunition in the respondent's custody or control, or which he or she possesses or owns.

(f) Termination of Final Extreme Risk Protective Order. The petitioner or respondent may file a petition for termination of a final extreme risk protective order at any time following issuance of the order. The court, on notice (1) to the petitioner and the respondent, (2) to the appropriate law enforcement agency, and (3) to the county prosecutor, may terminate the final extreme risk protective order after a hearing. During the termination hearing, the court shall consider the factors enumerated in subparagraph (a)(5) of this rule, as well as any other relevant evidence, including, but not limited to, whether the respondent has received, or is receiving, mental health treatment. If the respondent petitioned for termination, respondent shall bear the burden at the hearing of proving by a preponderance of the evidence that he or she no longer poses a significant danger of causing bodily injury to self or to other persons by having custody or control of, owning, possessing, purchasing, or receiving a firearm.

Note: Adopted , 2019 to be effective September 1, 2019.

Respectfully submitted,

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