SUPPLEMENTAL REPORT OF THE

SUPREME COURT COMMITTEE

ON

CRIMINAL PRACTICE

2011 – 2013 TERM

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A. Proposed Amendments to Rule 3:3-1 - Telephonic Issuance of Drug Offender Restraining Orders and Nicole's Law Restraining Orders

The Committee is recommending that the Court adopt revisions to Rule 3:3-1 (governing the issuance of complaints and summonses), which would provide authority for the court to consider and grant applications for the issuance of DOROA and Nicole's law orders, as a condition of release, by telephone, radio or other means of electronic communication (hereafter referred to as "telephonic procedures" or "electronic communication") in situations when the law enforcement officer or prosecuting attorney (hereafter referred to as "law enforcement officer") seeking the order is not physically present in the same location as the court. The Drug Offender Restraining Order Act of 1999 ("DOROA"), N.J.S.A. 2C:35-5.7 and Nicole's Law, N.J.S.A. 2C:14-12, provide authority for the court to issue restraining orders when a person is charged with eligible drug and sex crimes or disorderly persons offenses as set forth in the respective statutes. While both DOROA and Nicole's law orders can be issued when a person is convicted of an applicable offense, the DOROA statute specifically permits the issuance of orders by electronic means, as a condition of release, when a defendant is charged with an eligible offense on a warrant. Therefore, the proposed amendments to Rule 3:3-1 are limited to the context of DOROA and Nicole's Law orders that are issued, telephonically, as a condition of release. The proposed rule revisions do not address procedures for orders issued upon conviction.

1. Drug Offender Restraining Order Act of 1999 ("DOROA") N.J.S.A. 2C:35-5.4 – 5.10

In relevant part, DOROA provides authority for the court to issue an order, as a condition of release, prohibiting a person charged with certain drug offenses from entering specified locations enumerated in the statute.[1] Procedures to implement DOROA, when the applicant appears in-person before the court and the current DOROA restraining order, were issued to the Criminal, Family and Municipal Courts by then-Acting Administrative Director of the Courts Richard Williams as set forth in the Assignment Judges Memorandum dated May 3, 2002. Effective April 6, 2011, N.J.S.A. 2C:35-5.7(a) of DOROA was amended to incorporate expedited procedures for the court to consider and grant the issuance of a restraining order pursuant to DOROA, as a condition of release, when a defendant is charged with an eligible offense on a warrant and the applicant (the law enforcement officer or the prosecuting attorney) is not physically present at the same location as the court when the application is made. Under the amended law, an application for a DOROA order may be made telephone, radio or other means of electronic communication and the procedures for handling such applications shall be in accordance with the rules of the court. As set forth in N.J.S.A.

[1] A DOROA order can be issued for any of the following applicable offenses: N.J.S.A. 2C:35-3; N.J.S.A. 2C:35-4; N.J.S.A. 2C:35-5; N.J.S.A. 2C:35-6; N.J.S.A. 2C:35-8; N.J.S.A. 2C:35-9; N.J.S.A. 2C:35-4.1; N.J.S.A. 2C:35-5.2; N.J.S.A. 2C:35-5.3; N.J.S.A. 2C:35-7; or N.J.S.A. 2C:35-7.1; or (2) the unlawful possession or use of an assault firearm as defined in N.J.S.A. 2C:39-1w. See N.J.S.A. 2C:35-5.6c. The order can restrict a person from any premise, residence, business establishment, location or specified area including all buildings and all appurtenant land, in which or at which a criminal offense occurred or is alleged to have occurred or is affected by the criminal offense with which the person is charged. As defined, the term "place" does not include public rail, bus or air transportation lines or limited access highways which do not allow pedestrian access. N.J.S.A. 2C:35-5.6b.

2C:35-5.7(a), this expedited process only applies when a person is charged with an eligible offense on a warrant. The telephonic procedures are not available when a person is charged with an eligible offense on a summons. Rather, when a summons is issued, pursuant to N.J.S.A. 2C:35-5.7(b), upon application of a law enforcement officer, the court shall issue a DOROA order at the time of the defendant's first appearance.[2] As part of the application for a DOROA order, the law enforcement officer must submit a certification describing the location of the offense. N.J.S.A. 2C:35-5.9. The 2011 law clarifies that when the applicant is not physically present at the same location as the court, the applicant must provide an oral statement describing the location of the offense, followed by submission, within a reasonable time, of a certification describing the offense location in accordance with the court rules.

The 2011 amendments to DOROA are the legislative counterpart to the March 8, 2011 order of the Supreme Court relaxing certain criminal and municipal court rules to permit the court to issue restraining orders pursuant to DOROA and Nicole's Law, by telephone, radio, or other electronic communication upon the sworn oral testimony of a law enforcement officer or prosecuting attorney communicated electronically to the issuing judge. Upon entering the rule relaxation order the Court also referred this matter to the Criminal Practice Committee and the Municipal Court Practice Committee to draft

[2] As introduced in 2010, A-2416 contained language that would authorize the telephonic issuance of DOROA orders when a defendant is released on a summons, however, that language was not incorporated in the law as enacted. See A-2416 (Introduced March 4, 2010). As enacted, the law provides that if a defendant is released on a summons, upon request of the law enforcement officer or prosecuting attorney, the court shall issue the DOROA order at the first appearance.

appropriate rule revisions, for its consideration, that would comport with the rule relaxation and the DOROA legislation, should it be enacted.

By memorandum dated March 17, 2011 Acting Administrative Director of the Courts Glenn Grant issued interim guidance regarding the telephonic issuance of restraining orders pursuant to DOROA and Nicole's law, which were based on the language of Assembly Bill No. 2416 that was then-pending with the legislature. The procedures were made available pending the evaluation of this issue by Criminal and Municipal Court Practice Committees. The March 17, 2011 memorandum supplemented the Assignment Judges Memorandum, dated May 3, 2002, which implemented DORA and AOC Directive #1-10, which implemented Nicole's Law. The DOROA amendments went into effect on April 6, 2011.

2. Nicole's Law - N.J.S.A. 2C:14-12

In relevant part, Nicole's Law, N.J.S.A. 2C:14-12, permits the court to issue an order, as a condition of release, prohibiting a defendant charged with a sex offense from having any contact with a victim, including restraining the defendant from entering a victim's residence, place of employment, business or school and from harassing or stalking the victim or victim's relatives. The law defines "sex offense" by referencing Megan's Law, N.J.S.A. 2C:7-2. Nicole's Law orders are similar to domestic violence restraining orders, except that there need not be a domestic relationship between the defendant and the victim for a Nicole's Law order to be issued, so long as the person is charged with an eligible sex offense. By Directive #1-10, dated March 2, 2010, the

Nicole's Law order and procedures to implement Nicole's Law were issued to the Criminal, Family and Municipal Courts.

Nicole's law differs from DOROA in several respects. First, unlike DOROA where an order must be entered upon request by a law enforcement officer, pursuant to Nicole's Law, the court has discretion to issue an order when the defendant is charged with an eligible offense. Specifically, N.J.S.A. 2C:14-12 provides that "[w]hen a defendant charged with a sex offense is released from custody before trial on bail or personal recognizance, the court authorizing the release may, as a condition of release issue an order prohibiting the defendant from having contact with the victim . . . ."

Second, Nicole's Law does not require that an application be submitted by a law enforcement officer before the court can enter an order. Rather, the statute, as cited above, authorizes the court to enter a Nicole's law order on its own initiative. Thus, different from DOROA, Nicole's law does not contain a reference to telephonic procedures for the issuance an order when an applicant is not physically present with the court when the application is made. Although Nicole's Law does not contain a statutory reference to telephonic procedures for the issuance of the orders, it was reported by the Municipal Court Presiding Judges that, in practice, Nicole's Law orders often are either requested by law enforcement or issued by the court on its own initiative, at the time when a complaint is filed and as a condition of release when bail is set. Often bail is set in the middle of the night and by telephone. To ensure that the orders are promptly issued in appropriate cases, and as directed in the March 8, 2011 Supreme Court rule relaxation order and the March 17, 2011 memorandum from the Administrative Director

of the Courts, the proposed amendments to Rule 3:3-1 cover the issuance of Nicole's law orders by electronic communication.

3. Revisions to Rule 3:3-1

Acknowledging that DOROA and Nicole's Law orders will likely be issued when a complaint is filed and bail is set, the Committee drafted revisions to Rule 3:3-1, which governs the issuance of an arrest warrant or summons. The proposed amendments add a new paragraph (g) to Rule 3:3-1, which contains three components: (1) paragraph (g)(1) acknowledges the separate procedures in Rule 5:7A(b), which authorize the issuance of temporary domestic violence restraining orders by electronic communication, as well as, the court's authority to impose certain conditions of bail, such as, restricting contact with a victim when a defendant is charged in a criminal case with an offense or crime involving domestic violence; (2) paragraph (g)(2) sets forth the procedural requirements for the issuance of DOROA and Nicole's law orders by electronic communication; and (3) paragraph (g)(3) sets forth the procedural requirements for the applicant to provide the court with a certification of the offense location when a DOROA order is issued by electronic communication.

a. Paragraph (g)(1) – Acknowledging Separate Procedures for Domestic Violence Restraining Orders

Paragraph (g)(1) of the proposed rule revisions references Rule 5:7A(b), which governs the issuance of temporary domestic violence restraining orders, and N.J.S.A. 2C:25-26, which governs the imposition of conditions of bail for a person criminally charged with a crime that involves domestic violence. To avoid any confusion between

the issuance of domestic violence restraining orders, conditions of bail for crimes or offenses involving domestic violence, and the issuance of DOROA or Nicole's law orders, the text of paragraph (g)(1) acknowledges the separate procedures in Rule 5:7A(b) authorizing the issuance of temporary domestic violence restraining orders, in the civil context, by electronic communication. The rule also acknowledges that separate from a civil domestic violence restraining order issued pursuant to N.J.S.A. 2C:25-29 the court may, in a criminal case charging an offense or crime of domestic violence, impose conditions of bail restricting contact and other conditions pursuant to N.J.S.A. 2C:25-26.

b. Paragraph (g)(2) – Procedures for the Issuance of DOROA and Nicole's Law Orders by Electronic Communication

Paragraph (g)(2) sets forth the procedural requirements for the issuance of DOROA and Nicole's law orders by electronic communication. As discussed below, the procedures being recommended for the telephonic issuance of DOROA and Nicole's law orders are similar to practices that are currently in place for the issuance of other judicial orders and warrants by municipal and superior court judges when the applicant is not physically present in the same location as the court when an application is made. See Rule 3:2-3 (telephonic issuance of arrest warrants); Rule 3:5-3(b) (telephonic issuance of search warrants); Rule 5:7A(b) (telephonic issuance of temporary domestic violence restraining orders). Thus, much of the language in the proposed revisions to Rule 3:3-1 is derived from and mirrors the language in the respective court rules governing those practices.

(1) Emergent Circumstances are Not Required

As introduced in the legislature Assembly Bill No. 2416 contained language, which would have permitted the issuance of DOROA orders by electronic communication in "emergent circumstances." This particular language was not adopted in the amendments to DOROA, as enacted. Therefore, the proposed amendments to Rule 3:3-1 do not require that the law enforcement officer make a prerequisite showing of an emergency before seeking an order by electronic or telephonic means, as opposed to seeking an order in-person.

(2) Issuance by Electronic Communication for Pretrial Orders Only

Both DOROA and Nicole's Law orders can be issued pretrial when a person is charged with an eligible offense or at sentencing when a person is convicted of an eligible offense. The 2011 amendments to DOROA allow for the telephonic issuance of DOROA orders as a condition of release on bail, when a defendant is charged with an eligible offense on a warrant. As such, the proposed rule amendments are limited to applications sought by electronic means for DOROA and Nicole's law orders that are issued as a condition of release. Although the DOROA and Nicole's Law statutes permit the issuance of orders when a defendant has been convicted of applicable charges, the proposed amendments in this report do not address procedures for the telephonic issuance of the orders outside of the context of pretrial release.

(3) Issuance by Electronic Communication – Discretionary with the Court

It is clear on the face of the DOROA statute that if an in-person application is made by a law enforcement officer, the order must be entered by the court. Nonetheless, the statute is equally clear that the decision to issue a DOROA order by electronic means is discretionary with the court. Specifically, N.J.S.A. 2C:35-5.7(a) of the DOROA statute provides that the law enforcement officer or prosecuting attorney may file an application for the issuance of the order by telephonic or electronic means. When an application is filed telephonically, the court has discretion to consider and grant the application in accordance with the rules of the court. Thus, for telephonic applications, the court has discretion either to follow procedures to issue the order by electronic communication or to deny the telephonic application and require that the law enforcement officer appear before the court, in-person. As such, for applications made telephonically, there is leeway for the issuing judge to require that the applicant personally appear before the court. Pursuant to Nicole's law, a decision to enter an order by electronic communication or based upon a request made in-person rests within the discretion of the court. N.J.S.A. 2C:14-12. Consistent with these statutes, the proposed rule revision provides that a "judge may as a condition of release issue a restraining order pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law") upon sworn oral testimony of a law enforcement officer or prosecuting attorney who is not physically present." (emphasis added).

(4) Sworn Oral Testimony by the Applicant and Contemporaneous Recording by the Judge

The proposed revisions to Rule 3:3-1 requiring sworn oral testimony from the applicant and contemporaneous recording by the court are similar to the current procedures in place that govern the issuance of arrest warrants, search warrants and temporary domestic violence restraining orders by electronic communication. See Rule 3:2-3 (telephonic issuance of arrest warrants); Rule 3:5-3(b) (telephonic issuance of search warrants); Rule 5:7A(b) (telephonic issuance of temporary domestic violence restraining orders). The proposed rule revisions require that: (1) the applicant must provide sworn oral testimony; (2) the judge shall contemporaneously record the sworn oral testimony; (3) after taking the oath the law enforcement officer or prosecuting attorney must identify himself or herself, specify the purpose of the request and disclose the basis of the application; and (4) the sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a restraining order.

(5) Memorialization of the Order

The proposed rule revisions set forth specific requirements to memorialize the order that is being issued by electronic means. The proposed revisions state that once the court determines that an order will be issued, the judge must memorialize the specific terms of the order by either a tape recording or longhand notes. The judge shall then direct the law enforcement officer to memorialize the specific terms on the order, as authorized by the judge. This document shall be deemed a restraining order for the purpose of DOROA or Nicole's Law. The judge shall also direct the law enforcement

officer to print the judge's name on the restraining order. These procedures are similar to other practices that have been in place for the issuance of court orders and warrants by municipal and superior court judges when the applicant is not physically present in the same location as the court when the application is made. See Rule 3:2-3 (telephonic issuance of arrest warrants); Rule 3:5-3(b) (telephonic issuance of search warrants); Rule 5:7A(b) (telephonic issuance of temporary domestic violence restraining orders).

(6) Service Upon the Defendant and Delivery of Signed Restraining Order to the Court

The rule proposal next sets forth the requirements for service upon a defendant and the process for the law enforcement officer to deliver the signed order to the court. The proposed language provides that once the restraining order is entered by the judge, a copy of the order shall be served upon the defendant by any officer authorized by law. Within 48 hours, the law enforcement officer must provide the court with: (1) the signed restraining order, and (2) a certification of service of the order upon the defendant. The law enforcement officer can deliver the order and certification of service to the judge either in-person, by facsimile transmission or by other means of electronic communications, such as email.

Both DOROA and Nicole's law restraining orders have a place for the defendant to sign the order, acknowledging receipt. The Committee discussed whether the defendant should be required to sign a DOROA or Nicole's law restraining order, as well as a mechanism to ensure service of the order upon a defendant who is not present when an order is issued. One option that the Committee considered was to add language to the

rule explaining that the restraining order shall include the defendant's signature and the date and time that it was served upon the defendant. The Committee discussed, however, that some defendants are not present with the law enforcement officer when the order is issued. Furthermore, in some circumstances a defendant may refuse or decline to sign a restraining order when it is issued. It was suggested that if the rule makes it mandatory that the defendant sign the restraining order, it should also include language that the failure of the defendant to sign the restraining does not affect the validity of the order. After a discussion, the Committee agreed that the requirement that a defendant sign the restraining order need not be included in the rule; however, the defendant should be given an opportunity to sign the restraining order, to acknowledge receipt.

With respect to service of the order upon the defendant, the Committee agreed that a copy of the restraining order shall be served upon the defendant by any officer authorized by law. Additionally, a certification of service upon the defendant must be provided to the court. The Committee recognized that domestic violence restraining orders include language, in the order itself, for the law enforcement officer to indicate how service upon a defendant was carried out. However, at this time, the Committee is not recommending revisions to DOROA and Nicole's Law orders to mirror the language in the domestic violence restraining orders. Rather, the Committee is recommending that the certification of service shall include the date and time that service was made or attempted to be made upon the defendant. The Committee recommends that the Administrative Director of the Courts develop guidance, consistent with this recommendation, setting forth the necessary requirements for the certification of service

that must be provided to the court to ensure that proper notice and due process requirements are satisfied.

Finally, the Committee determined that within 48 hours of the telephonic issuance of the order, the law enforcement officer shall deliver to the court the signed restraining order and certification of service upon the defendant. The Committee discussed several methods of delivery, including delivery in-person or by facsimile. Additionally, the Committee agreed that once the order is signed it can be scanned and submitted to the court by email. As such, the proposed amendments to the rule provide an option for a law enforcement officer to submit the signed restraining order to the court by electronic means. The proposed rule revisions to address options for the delivery of the signed restraining order and the certification of service upon the defendant to the court are as follows:

> Within 48 hours the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, the signed restraining order along with a certification of service upon the defendant.

c. Paragraph (g)(3) - Delivery of Certification of Offense Location for DORA Orders to the Court

DOROA provides that "[t]he court shall issue a restraining order . . . only upon request by a law enforcement officer or prosecuting attorney and either: (1) submission of a certification describing the location of the offense; or (2) in matters where the applicant is not physically present at the same location as the court, an oral statement describing the

location of the offense followed by submission within a reasonable time of a certification describing the location of the offense in accordance with the Rules of Court." N.J.S.A. 2C:35-5.9. The Committee considered an appropriate timeframe for a law enforcement officer to submit a certification describing the location of the offense to the court when a DOROA order is issued telephonically. The Committee agreed that the certification shall be submitted to the court within 48 hours; the same timeframe that is being proposed in paragraph (g)(2) for the applicant to deliver to the court the copy of the signed restraining order and certification of service upon the defendant. Consistent with the method of delivery being proposed in paragraph (g)(2), proposed paragraph (g)(3) includes the option for law enforcement to submit the certification of the offense location for DORA orders to the court by email.

The Committee is proposing the following language in new paragraph (g)(3) to govern the delivery of the certification of the offense location to the court:

> (g) Issuance of Restraining Orders By Electronic Communication . . . .
>
> (3) Certification of Offense Location for Drug Offender Restraining Orders. When a restraining order is issued by electronic communication pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") where the law enforcement officer or prosecuting attorney is not physically present at the same location as the court, the law enforcement officer or prosecuting attorney must provide an oral statement describing the location of the offense. Within 48 hours the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, a certification describing the location of the offense.

4. Procedures Governing Violations of Monetary and Non-Monetary Bail Conditions

The Committee began exploring whether to revise Rule 3:26-1 to develop procedures for the enforcement of non-monetary conditions of release including, but not limited to, conditions imposed pursuant to DOROA or Nicole's Law. The Committee recognized the need to examine this issue; however, it was cognizant that developing enforcement procedures goes beyond the Court's referral to the Criminal Practice Committee and the Municipal Court Practice Committee to revise the court rules in accordance with its March 8, 2011 order. The Committee will seek clarification that the Supreme Court's referral extends to developing procedures to handle the enforcement of violations of monetary and non-monetary conditions of pretrial release.

In conclusion, the Criminal Practice Committee is recommending revisions to Rule 3:3-1 to codify procedures to allow the court to issue DOROA and Nicole's Law restraining orders prior to trial when the applicant is not physically present before the court at the time that an application is made.

The proposed revisions to Rule 3:3-1 follow.

3:3-1. Issuance of an Arrest Warrant or Summons; Issuance of Restraining Orders by Electronic Communication

(a) Issuance of a Warrant. . . . no change.

(b) Issuance of a summons. . . . no change.

(c) Determination of Whether to Issue a Summons or Warrant. . . . no change.

(d) Finding of No Probable Cause. . . . no change.

(e) Additional warrants or summonses. . . no change.

(f) Process Against Corporations. . . . no change.

(g) Issuance of Restraining Orders By Electronic Communication.

(1) Temporary Domestic Violence Restraining Orders. Procedures authorizing the issuance of temporary domestic violence restraining orders by electronic communication are governed by R.5:7A (b). When a defendant is charged with a crime or offense involving domestic violence, the court authorizing the release may, as a condition of release prohibit the defendant from having any contact with the victim. The court may impose any additional limitations upon contact as otherwise authorized by N.J.S.A. 2C: 25-26 and R. 3:26-1a.

(2) N.J.S.A. 2C:35-5.7 and N.J.S.A. 2C:14-12 Restraining Orders. A judge may as a condition of release issue a restraining order pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law") upon sworn oral testimony of a law enforcement officer or prosecuting attorney who is not physically present. Such sworn oral testimony may be communicated to the judge by

telephone, radio or other means of electronic communication. The judge shall contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise, adequate long hand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the law enforcement officer or prosecuting attorney must identify himself or herself, specify the purpose of the request and disclose the basis of the application. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a restraining order. Upon issuance of the restraining order, the judge shall memorialize the specific terms of the order. That memorialization shall be either by means of a tape-recording device, stenographic machine, or by adequate longhand notes. Thereafter, the judge shall direct the law enforcement officer or prosecuting attorney to memorialize the specific terms authorized by the judge on a form, or other appropriate paper, designated as the restraining order. This order shall be deemed a restraining order for the purpose of N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law"). The judge shall direct the law enforcement officer or prosecuting attorney to print the judge's name on the restraining order. A copy of the restraining order shall be served upon the defendant by any officer authorized by law. Within 48 hours, the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, the signed restraining order along with a certification of service upon the defendant. The certification of service shall include the date and time that service upon the defendant was made or attempted to be made in a form approved by the

Administrative Director of the Courts. The judge shall verify the accuracy of these documents by affixing his or her signature to the restraining order.

(3) Certification of Offense Location for Drug Offender Restraining Orders. When a restraining order is issued by electronic communication pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") where the law enforcement officer or prosecuting attorney is not physically present at the same location as the court, the law enforcement officer or prosecuting attorney must provide an oral statement describing the location of the offense. Within 48 hours the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, a certification describing the location of the offense.

HISTORY: Source-R.R. 3:2-2(a)(1)(2)(3) and (4); paragraph (a) amended, new paragraph (b) adopted and former paragraphs (b) and (c) redesignated as (c) and (d) respectively July 21, 1980 to be effective September 8, 1980; paragraph (b) amended and paragraph (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (b) amended July 22, 1983 to be effective September 12, 1983; caption and paragraph (a) amended and paragraph (f) adopted July 26, 1984 to be effective September 10, 1984; paragraph (b) amended January 5, 1988 to be effective February 1, 1988; captions and text amended to paragraphs (a), (b), (c), (e) and (f), paragraph (g) adopted July 13, 1994, text of paragraph (a) amended December 9, 1994, to be effective January 1, 1995; paragraphs (a), (c), (e), (f), and (g) deleted, paragraph (b) amended and redesignated as paragraph (c), paragraph (d) amended and redesignated as paragraph (e), new paragraphs (a), (b), (d), and (f) adopted July 5, 2000 to be effective September 5, 2000[.]; new paragraph (g) adopted to be effective .

B. Proposed Amendments to Rule 3:23-8 – Municipal Appeals

The Committee is recommending amendments to Rule 3:23-8, which would clarify the authority of the reviewing court (Law Division) that is handling a municipal appeal to remand the matter or permit the record to be supplemented to correct an error or deficiency in the municipal court proceedings. As presently drafted Rule 3:23-8 provides that the municipal appeal shall be heard *de novo* on the record, unless it shall appear that: (1) "the rights of either party may be prejudiced by a substantially unintelligible record," or (2) "the rights of defendant were prejudiced below." In these two circumstances, the reviewing court may either reverse or remand for a new trial or conduct a plenary trial *de novo* on the record below. The rule further provides that the reviewing court may supplement the record and admit additional testimony whenever: (1) the municipal court erred in excluding evidence offered by the defendant, (2) the state offers rebuttal evidence to discredit supplementary evidence that was admitted, or (3) the record being reviewed is partially unintelligible or defective.

Presently, when a defendant appeals from a conviction in the municipal court and raises a legal error, Rule 3:23-8 has been construed to allow the reviewing court to remand the case or supplement the record only if the defendant's exculpatory proofs were improperly excluded. As drafted, the rule does not provide authority for the reviewing court to remand the matter or supplement the record to allow the State to correct a legal error in the proceedings below. See State v. McLendon, 331 N.J. Super. 104, 108 (App. Div. 2000) (stating that "[a] remand is inappropriate in order to afford the State the

opportunity to provide proofs it should have provided in the initial trial which were necessary to support a conviction"). The proposed revisions to Rule 3:23-8 will fill this gap in the rule and align the remand procedures for municipal appeals more closely with the procedures utilized in the appellate courts.

The Committee voted in favor of the rule amendments after reviewing a line of Appellate Division decisions that have interpreted Rule 3:23-8 in its current form to sharply limit the authority of the reviewing court to correct errors on appeal. These limitations are based on the language of the rule itself, not on state and federal double jeopardy concerns. See State v. Dohme, 223 N.J. Super. 485, 490 n.3 (App. Div. 1988) (noting that Rule 3:23-8 sets jurisdictional limits on appellate review). For example, in State v. Hardy, 211 N.J. Super. 630 (App. Div. 1986), the defendant was convicted in municipal court of driving while intoxicated, N.J.S.A. 39:4-50. On appeal, the defendant argued that the serial numbers on one of the breathalyzer inspection certificates admitted at his municipal drunk driving trial did not correspond to the breathalyzer machine used to test his blood alcohol level. The Law Division *sua sponte* remanded the matter for the limited purpose of allowing the State to introduce the correct certificate. Id. at 633. In finding that the remand procedure was improper, the Appellate Division interpreted Rule 3:23-8 to bar a remand for such purpose and instructed the Law Division to decide the matter on the remaining proofs in the record, independent of the breathalyzer results. Id. at 633-36.

In State v. Sparks, 261 N.J. Super. 458 (App. Div. 1993) the defendant was convicted of the disorderly persons offense of possession of marijuana. Over defense

counsel's objections, the municipal judge admitted a laboratory report that was belatedly provided to the defense in violation of time parameters for discovery in N.J.S.A. 2C:35-19c. Without the lab report, the State did not have proof necessary to sustain a drug possession conviction. On *de novo* review, the Law Division held that the lab report was improperly admitted however, the Superior Court judge did not acquit the defendant of the charges. Instead, the judge remanded the matter to the municipal court for retrial to allow the State an opportunity to submit the lab report to the defendant prior to trial and to give the defendant the opportunity to object. In reaching this conclusion, the Law Division judge did not make any final rulings of the merits of the case or determine whether the laboratory report should be permanently barred from evidence. Rather, the judge remanded the matter for the municipal court to conduct a full hearing to adjudicate the case on its merits. Id. at 460.

On appeal, the Appellate Division held that the remand procedure violated the language in Rule 3:23-8(a), which provides that the appeal from the municipal court must be heard *de novo* on the record below. The Sparks panel construed the remand procedures in Rule 3:23-8 "to apply in such instances as where the municipal court erred in excluding evidence offered by the defendant . . . or where defendant was entitled to but was not represented by counsel in the municipal court." Id. at 461. The Sparks panel explained that Rule 3:23-8 was "not intended to provide the State with a second opportunity to plug holes in a case deficient of proof beyond a reasonable doubt." Id. at 462. Thus, in Sparks, the Law Division was required to exclude the lab certificate and consider whether the defendant's conviction could be sustained solely on the remaining

evidence. Id. at 461 (citing State v. Hardy, 211 N.J. Super. 630 (App. Div. 1986); State v. Musgrave, 171 N.J. Super. 477 (App. Div. 1979)). See also State v. Heisler, 422 N.J. Super. 399 (App. Div. 2011) (where the defendant prevailed on his appellate claim that the State improperly introduced a lab report over his hearsay objection during trial for marijuana possession. A remand for the purposes of correcting the evidential deficiency was not permitted); State v. McLendon, 331 N.J. Super. 104, 108 (App. Div. 2000) (permitting a remand to municipal court, for the benefit of the defendant, to determine the legality of the roadblock that led to defendant's arrest for drunk driving); State v. Musgrave, 171 N.J. Super. 477 (App. Div. 1979) (holding that the Law Division improperly considered the results of a K-55 speed measurement device after supplementing the record with foundational proofs that had been omitted in municipal court).

As demonstrated by these opinions, Rule 3:23-8 is currently read to allow the reviewing court to remand a matter if "the rights of defendant were prejudiced below," for instance, where the defendant's exculpatory proofs were improperly excluded by the municipal court judge. If an error occurs in the proceedings involving the admission of inculpatory proofs, no means are available for the reviewing court to reverse and remand the matter to allow an opportunity for the deficiency to be corrected. Under the current language of Rule 3:23-8, the reviewing court has no recourse other than to exclude the improperly admitted evidence and to consider whether the remaining proofs are sufficient to sustain the conviction. State v. Sparks, 261 N.J. Super. at 461; State v. Hardy, 211 N.J. Super. at 636. The reviewing court cannot supplement the record to correct errors of

law and may not remand the matter to the municipal court to correct erroneous legal rulings. Therefore, the Committee is proposing revisions to Rule 3:23-8(a) to extend the authority of the reviewing court to remand a matter or permit the record to be supplemented in the limited circumstances where a defendant appeals from a conviction in municipal court and on *de novo* review, the Law Division finds that the error alleged involves a trial error or a defect in the proceedings, such as, incorrect receipt or rejection of evidence, that could be corrected.

Finally, the Committee is satisfied that the rule proposal does not raise double jeopardy concerns. In Burks v. United States, 437 U.S. 1 (1978), the United States Supreme Court recognized the distinction between two types of reversals in a double jeopardy analysis: reversals when the State has failed to produce sufficient evidence to prove its case and reversals due to a trial error in the proceedings. It is clear that the double jeopardy clause forbids a second trial where the conviction has been overturned due to a failure of proof at trial. Burks v. United States, 437 U.S. at 11. However, as explained in Burks, different from a reversal for insufficient evidence, a reversal for trial error does not constitute a decision with respect to guilt or innocence or whether the government has failed to prove its case. Rather, a reversal for an error in the proceedings "is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct." Burks v. United States, 437 U.S. at 15. For that reason, defendants may be retried when their conviction is set aside because of an error in the proceedings that led to the conviction. Double jeopardy considerations

only preclude a retrial where a reviewing court bases its decision on "'a failure of proof at trial'" rather than on "trial error. State v. Millett, 272 N.J. Super. 68, 97 (App. Div. 1994).

As the rule revisions being proposed will only allow the reviewing court to remand the matter or permit the record to be supplemented in those limited circumstances, the Committee is satisfied that the rule recommendation does not run afoul of double jeopardy clauses in the Fifth Amendment of the United States Constitution, and Art. I, ¶11 of the New Jersey Constitution. By a vote of 18 in favor and 1 opposed, the Committee is recommending amendments to Rule 3:23-8, which will maintain the authority for the Law Division to conduct a trial *de novo* on the record below and will clarify the authority of the reviewing court to reverse and remand a matter or permit the record to be supplemented to address an error in the proceedings or an erroneous ruling of law. The proposed amendments are not designed to provide authority for the court to remand the matter or to permit the record to be supplemented when the court finds that the State has produced insufficient evidence to prove its case.

The revisions to Rule 3:23-8 follow.

3:23-8. Hearing on Appeal

(a) Plenary Hearing; Hearing on Record; Correction or Supplementation of Record; Transcript for Indigents. If a verbatim record or sound recording was made pursuant to *R. 7:8-8* in the court from which the appeal is taken, the original transcript thereof duly certified as correct shall be filed by the clerk of the court below with the criminal division manager's office, and a certified copy served on the prosecuting attorney by the clerk of the court below within 20 days after the filing of the notice of appeal or within such extension of time as the court permits. [In such cases the trial of the appeal shall be heard de novo on the record unless it shall appear that the rights of either party may be prejudiced by a]

(1) If it appears that the record is partially unintelligible, the court to which the appeal is taken may supplement the record or may remand the matter to the municipal court to reconstruct that portion of the record which is defective. If the record below is substantially unintelligible, the matter shall be remanded to the municipal court to reconstruct the entire record or, if the record cannot be reconstructed, for a new trial or hearing.[record or that the rights of defendant were prejudiced below in which event the court to which the appeal has been taken may either reverse and remand for a new trial or conduct a plenary trial de novo without a jury.]

(2) The court to which the appeal has been taken may reverse and remand for a new trial or may conduct a trial de novo on the record below. The court shall provide the municipal court and the parties with reasons for a reversal or the remand. [The] If the court to which the appeal is taken decides the matter de novo on the record, the court may

[also] permit the record to be supplemented [the record] to rectify an erroneous ruling of law. [and admit additional testimony whenever (1) the municipal court erred in excluding evidence offered by the defendant, (2) the state offers rebuttal evidence to discredit supplementary evidence admitted hereunder, or (3) the record being reviewed is partially unintelligible or defective.]

(3) If the appellant, upon application to the court appealed to, is found to be indigent, the court may order the transcript of the proceedings below furnished at the county's expense if the appeal involves violation of a statute and at the municipality's expense if the appeal involves violation of an ordinance. [If no such record was made in the court from which the appeal is taken, the appeal shall operate as an application for a plenary trial de novo without a jury in the court to which the appeal is taken.]

(b) Briefs. . . . no change.

(c) Waiver; Exception. . . . no change.

(d) Defenses Which Must be Raised Before Trial. . . . no change.

(e) Disposition by Superior Court, Law Division. . . . no change.

(f) Appearance by Prosecuting Attorney. . . . no change.

HISTORY: Source-R.R. 3:10-13. Paragraph (b) amended by order of September 5, 1969 effective September 8, 1969; paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraphs (a), (b) and (e) amended November 22, 1978 to be effective December 7, 1978; paragraphs (a), (b) and (e) amended July 11, 1979 to be effective September 10, 1979; paragraph (a) amended February, 1983 to be effective immediately; paragraph (a) amended January 5, 1998 to be effective February 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended July 16, 2009 to be effective September 1, 2009[.]; paragraph (a) amended to be effective .

Respectfully submitted,

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