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# APPENDIX 1

SUPREME COURT OF NEW JERSEY

STUART RABNER
CHIEF JUSTICE

RICHARD J. HUGHES JUSTICE COMPLEX
POST OFFICE BOX 023
TRENTON, N.J. 08625-0023

June 19, 2017

Hon. Philip S. Carchman, Chair
Presiding Judge Appellate Division, Ret., Recall
Mercer County Civil Courthouse
175 South Broad Street
Trenton, NJ 08650

Re: Supreme Court Working Group on Private Citizen Complaints in the Municipal Courts

Dear Judge Carchman:

Thank you for agreeing to chair the **Supreme Court Working Group on Private Citizen Complaints in the Municipal Courts**. The roster of the full Working Group is enclosed.

New Jersey's Part III and Part VII Rules of Court have long provided private citizens the ability to file criminal and lesser complaints directly with a municipal court. The rules specifically require that municipal courts accept for filing all private citizen complaints and then determine whether probable cause exists to issue these complaints. Under our current rules, private citizens may file a complaint against anyone, including their neighbor, spouse or a family member, against a police officer, or, as we have seen recently, against elected government officials. The rules provide no limitations regarding what types of charges can be levied or against what individuals. In contrast to the law enforcement process for filing complaints, for citizen complaints no independent law enforcement investigation is conducted, nor is there a mechanism for prosecutor screening. The result is that the probable cause decision rendered by the judicial official is based solely on the limited information provided by and the credibility of the citizen complainant.

I am asking that the Working Group undertake a comprehensive review of the current rules and procedures involved in filing and issuing private citizen complaints. The Working Group's review should include, but need not be limited to, the following specific questions: (1) whether private citizen complaints should continue to be

accepted by our municipal courts; (2) whether limitations should be placed on the types of matters for which a private citizen complaint can be filed and/or against whom; (3) whether some form of screening, either by law enforcement or some other form, should be required prior to a judicial official making a probable cause determination.

My hope is that the Working Group will be able to prepare and provide me with a report on its findings and recommendations within four months. Pearl Ann Hendrix, Esq., from the AOC's Municipal Court Services Division, will serve as staff to the Working Group. Either Judge Carchman or Ms. Hendrix will be in touch with you very soon to schedule an organizational meeting.

Thank you again for agreeing to participate on this important initiative.

Very truly yours,

Stuart Rabner

Enclosure: (roster)
cc. Hon. Glenn A. Grant, Acting Administrative Director
Steven D. Bonville, Chief of Staff
Jennifer M. Perez, Director, Trial Court Services
Steven Somogyi, Assistant Director, Municipal Court Services Division
Ann Marie Fleury, Special Assistant
Melaney S. Payne, Special Assistant
Pearl Ann E. Hendrix, Committee Staff

# APPENDIX 2

## TAKING COMPLAINTS

The Supreme Court has indicated that when a private citizen wishes to file a formal criminal complaint the complaint should be accepted in every instance. A summons rather than a warrant should be issued when there is no necessity for an arrest and there is reason to believe the defendant will appear in response to a summons, R.3:3-1(a). This policy should be followed by the judge as well as the court clerk and police officers authorized by N.J.5.2A:8-27 to take complaints. If the complaint is frivolous or the facts alleged do not constitute a violation of the law, the judge may dismiss the complaint on motion or after hearing the matter in open court.

If the offense charged may constitute a neighborhood or domestic dispute, but may not violate a statute or ordinance, a notice in lieu of complaint may be issued in accordance with R.7:3-2.

* * * * * *

## DISPOSITION OF UNCLAIMED CASH BAIL

If a case has been finally concluded and refund of bail is in order and the court cannot locate the person who posted the bail in order to refund the bail to him, the court should pay the bail to the municipal treasurer by a separate check with an accompanying letter of explanation, keeping a copy of the letter in the court file. If the person who posted the bail is subsequently located, the court may then order the municipality to make refund.

* * * * * *

## EXTENSION FOR CERTAIN PENNSYLVANIA REGISTRATIONS

Notice has been received that Pennsylvania license plates scheduled to expire March 31, 1970, have been extended to midnight May 31, 1970. The extension applies to the following class of vehicles:

1. Passenger
2. Suburban
3. Motorcycle
4. Farm and Industrial Tractor
5. Motor Vehicle, Motorcycle, Tractor Dealers and Miscellaneous Motor Vehicle Business

Enforcement agencies have received notice of this extension. The foregoing is for your information in the event a complaint is filed in your court involving an expired Pennsylvania registration.

* * * * * *

**STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. MARIE D. ROSS, DEFENDANT-APPELLANT**

**A-3049-80-T4**

**Superior Court of New Jersey, Appellate Division**

***189 N.J. Super. 67*; *458 A.2d 1299*; *1983 N.J. Super. LEXIS 815***

**March 1, 1983, Submitted**
**March 14, 1983, Decided**

**SUBSEQUENT HISTORY:** Certification denied by *State v. Ross, 95 N.J. 197, 470 A.2d 419, 1983 N.J. LEXIS 3337 (1983)*

**PRIOR HISTORY:** [***1] On appeal from the Superior Court, Law Division, Essex County.

**COUNSEL:** Appellant filed a *pro se* brief.

*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney for the respondent (*George L. Schneider*, Essex County Prosecutor, of counsel; *Olivia Belfatto*, Assistant Essex County Prosecutor, on the letter brief).

**JUDGES:** Michels, Pressler and Trautwein. The opinion of the court was delivered by Pressler, J.A.D.

**OPINION BY:** PRESSLER

**OPINION**

[*69] [**1300] Defendant Marie D. Ross appeals from her conviction by the Law Division on a trial *de novo* of two violations of the noise [*70] control ordinance of the Town of Belleville. [1] We reverse the convictions because of the egregious irregularities attending the municipal court process.

> 1 Apparently because of a disqualification by the municipal court judge of Belleville, the matter was heard by the municipal court judge of Bloomfield. Although appellant's *pro se* appendix includes the text of the provision of the Belleville ordinance which she was charged with violating, the State's appendix provides the text of the Bloomfield noise ordinance, the significance of which we fail to perceive. Presenting the court with an ordinance of the wrong municipality did not facilitate our review of this matter and is only the last of the procedural anomalies in a proceeding fraught with procedural anomalies from the moment the complaint was taken.

[***2] Defendant Ross and her family are next door neighbors of the Montagna family. It appears that a considerable degree of hostility had developed between the families for some months prior to the episode here in question because of the Ross' ownership of several German Shepherd dogs who were regularly let outdoors in the late night and early morning hours and who, by their loud and persistent barking, disturbed the peace of the neighborhood and frequently awoke sleeping members of the Montagna family. On the night of July 27, 1980 these hostilities apparently exploded when, so it was variously alleged, the adult Montagnas again complained to defendant's husband, who was outdoors with the dogs. Apparently some sort of fracas, at least verbal and perhaps physical, ensued, and ultimately various members of the two families signed complaints against each other in the Belleville municipal court charging each other with a variety of minor offenses.

[**1301] Among the plethora of complaints then filed, and apparently thereafter filed as the interfamily enmities escalated, are the two here in issue charging defendant with violations of the Belleville noise control ordinance prohibiting [***3] "the keeping of any animal or bird which by causing frequent or long continued noise shall disturb the comfort or repose of any person in the vicinity." One complaint was sworn to by Frank Montagna and the other by his wife Rita Montagna. Each charged defendant [*71] with the identical conduct allegedly constituting a violation of the ordinance, namely, "allowing her dogs to continually bark disturbing the entire Montagna family" on July 27, 1980 at

11:15 P.M. Each was captioned in the name of the respective complainant versus defendant. A summons was issued on each of the complaints. Inexplicably, both summonses were issued over the signature of the respective complaining witness. Neither was signed or issued by a judicial officer, court clerk, deputy court clerk or even a police officer.

Ultimately a trial was conducted in the Bloomfield Municipal Court, and defendant was convicted on both complaints. Sentence, although not specifically pronounced, was suspended. Defendant then appealed to the Law Division *de novo* and on the record pursuant to *R. 3:23-8*. After hearing oral argument from defendant, who appeared *pro se*, and from the prosecutor, the Law Division [***4] judge affirmed the convictions on the ground that

> I find there's proof upon which the [municipal] judge could have based his and did base his decision to find you guilty. It's not for me to find you guilty. It's not for me to substitute my judgment for that of [the municipal judge].

On her appeal to this court defendant argues first that she was denied a fair and impartial trial by reason of "ex-parte communications" between the municipal court judge and the complaining witness. It appears, however, that the communications to which she refers consisted of a colloquy on the record between the judge and the complaining witness on a scheduled trial date on which no member of the Ross family appeared despite proper notification. The colloquy did not materially concern the merits of the pending complaints and was altogether unexceptionable. There is no merit either in this issue or in the second issue raised by defendant, namely, the claim that she was denied the right to present witnesses in her behalf. That claim apparently derives from the municipal court judge's witness sequestration order. Our review of the record persuades us, however, that there was no impingement [***5] on defendant's right to fully present her defense.

[*72] The last of the issues defendant raises does, however, have substantial merit and the prosecutor so concedes. The issuance of two separate complaints and the separate convictions on each constituted an obvious violation of the constitutional guarantee against double jeopardy. There was clearly only one offense here involved and only a single violation of the ordinance, to wit, permitting the dogs to bark at 11:15 P.M. on July 27, 1980. That single offense is not multipliable by the number of people disturbed by the barking dogs. That is fundamental, and the State accordingly urges the dismissal of one of the complaints.

We cannot, however, sustain either of the convictions because of an even more basic defect in the proceedings, not raised by the parties. In our view, the issuance of the summonses here by the complaining witnesses constitutes so egregious a violation of the underlying principles of proper practice as to require the reversal of both convictions.

To begin with, we are constrained to point out that the proceedings here were *quasi*-criminal in nature. That fundamental predicate of these proceedings [***6] appears to have been entirely overlooked in its institution, [**1302] first in the improper captioning of the complaints and summonses in the names of the respective complaining witnesses as plaintiffs and then, even more appallingly, in the issuance of the summonses on the authority of the complaining witnesses. [2]

> 2 At the foot of the form of complaint is the following printed statement: "The undersigned states that he has just and reasonable grounds to believe and does believe that the person named above committed the offense(s) herein set forth contrary to law." Immediately below this legend is a signature line under which this instruction is printed: "Signature and identification of Officer (to be signed when issuing summons)" The signature line was signed by the complaining witness who thereafter also signed as the complaining witness. The accompanying form of summons bears at its foot this legend "You are notified that the undersigned will file a complaint in this court charging you with the offense(s) set forth above. The instruction under the signature line thereafter provided also reads "Signature and identification of Officer." The complaining witness signed on this line as well.

[***7]

[*73] Because of the nature of the proceedings here, process was required generally to conform to the requirements applicable to indictable offenses. See *R. 7:3-1*. Among those requirements is the mandate that process issue only by a judge or clerk or deputy clerk of his court and only if the official issuing process is satisfied from the complaint that there is probable cause to believe that defendant has committed an offense. *R. 3:3-1(a)*, *3:3-2*. In lieu of the primary process of a warrant, a summons may issue if the official is satisfied that the accused will appear in response thereto and none of the other warrant-mandating criteria of *R. 3:3-1(b)* is present. The only modification in this procedure in respect of nonindictable criminal offenses within the mu-

nicipal court jurisdiction is the authorization of *R. 7:3-1(b)*, permitting a summons to be issued by a law enforcement officer where the Administrative Director of the Courts has prescribed the form of summons and complaint.

The limitation of the issuing authority to a judicial officer in the case of a warrant is a matter of constitutional imperative imposed by the Fourth Amendment, which prohibits [***8] either the arrest of the person or the seizure of property except on probable cause supported by oath or affirmation. It is also well-settled constitutional doctrine that the prerequisite probable cause determination must be made by an impartial and neutral judicial officer, including the court clerk or deputy clerk but excluding, obviously, a person who, because of his status, has an interest or bias in the matter. *See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)*; *State v. Ruotolo, 52 N.J. 508 (1968)*. Accordingly, a warrant issued by, for example, a police officer is constitutionally defective.

The matter is somewhat different in the case of a summons because of its qualitatively different consequence *vis-a-vis* deprivation of freedom. A summons in lieu of warrant is [*74] not, however, without consequence since it initiates the criminal process, compels appearance to answer the complaint, and may lead to the routine issuance of an arrest warrant upon the failure of appearance. [3] *R. 3:3-1*. While it is evidently the lesser consequential significance of a summons and the lesser consequence of matters within municipal [***9] court dispositional jurisdiction which justify the law enforcement officer exception of *R. 7:3-1(b)*, it is the nevertheless grave import of the summons, in the structure of the criminal justice process, which requires that a probable cause determination be made as the prerequisite for its issuance as well and which also requires a strict construction of *R. 7:3-1(b)* to the end that an appropriate neutral official make that determination. For the determination to be made by the complaining witness and for the summons to be issued over his signature is fundamentally offensive [**1303] to the most elementary notions of due process, violates the spirit if not the letter of the Fourth Amendment, and is a blatant and intolerable violation of our rules of practice. The criminal and quasi-criminal system is neither designed nor intended to provide a vehicle for the raising and settlement of purely private disputes. The process here, therefore, constituted a subversion of the basic distinction between criminal and civil justice.

> 3 We note that upon defendant's failure to appear at the scheduled hearing, heretofore adverted to, a bench warrant for her arrest was in fact issued.

[***10] We are not unaware of the provision of *R. 3:23-8(c)*, which provides that the taking of a *de novo* appeal to the Law Division "shall operate as a waiver of all defects in the record including any defect in, or the absence of, any process . . . ." It is also well settled, however, that the waiver does not apply in respect of defects of a constitutional or jurisdictional nature. *See, e.g., State v. Barnes, 84 N.J. 362 (1980)*; *State v. Gillespie, 100 N.J. Super. 71, 85 (App.Div.1968)*, certif. den. *51 N.J. 274 (1968)*; *State v. O'Keefe, 135 N.J. Super. 430 (Cty.Ct.1975)*; *Cranford Tp. v. Errico, 94 N.J. Super. 395 (Cty.Ct.1967)*. We [*75] regard the nature of the defect here as one of such substantial magnitude as to compel the inapplicability of the waiver rule.

Although we reverse the convictions on the foregoing ground, we deem ourselves obliged to comment on another serious error in these proceedings stemming from the Law Division judge's fundamental misapprehension of his function. A trial *de novo* by definition requires the trier to make his own findings of fact. He need, furthermore, give only due, although not necessarily controlling, [***11] regard to the opportunity of the municipal court judge to judge the credibility of the witnesses. His is not the appellate function governed by the substantial evidence rule but rather an independent fact-finding function in respect of defendant's guilt or innocence. See, *e.g., State v. States, 44 N.J. 285, 293 (1965)*; *State v. Johnson, 42 N.J. 146, 157 (1964)*.

The convictions appealed from are reversed, the complaints against defendant dismissed and the summonses quashed.

# REPORT OF THE SUPREME COURT'S COMMITTEE ON CRIMINAL PRACTICE

MAY 1984

interest of justice requires. The action taken may include refusing to allow the party in default to present witnesses at the trial or the granting of an adjournment.

## 4. Complaints, Summons and Warrants

The Committee was asked to consider an apparent conflict between State v. Ross, 189 N.J. Super. 67 (1983), and a Supreme Court directive which was published in the Municipal Court bulletin (No. 170) in May 1970. The directive is as follows:

> **TAKING COMPLAINTS**
>
> The Supreme Court has indicated that when a private citizen wishes to file a formal criminal complaint the complaint should be accepted in every instance. A summons rather than a warrant should be issued when there is no necessity for an arrest and there is reason to believe the defendant will appear in response to a summons, R. 3:3-1(a). This policy should be followed by the judge as well as the court clerk and police officers authorized by N.J.S. 2A:8-27 to take complaints. If the complaint is frivolous or the facts alleged do not constitute a violation of the law, the judge may dismiss the complaint on motion or after hearing the matter in open court. If the offense charged may constitute a neighborhood or domestic dispute, but may not violate a statute or ordinance, a notice in lieu of complaint may be issued in accordance with R. 7:3-2.

The above-mentioned directive is also quoted in the most recent version of the New Jersey Municipal Court Manual published in January 1983. The manual says:

> The Supreme Court has indicated that when a private citizen wishes to file a formal criminal complaint, the complaint should be accepted in every instance. A summons rather than a warrant should be issued except when a warrant is required by the Rules of Court. R. 3:3-1, R. 3:4-1. This policy should be followed by the judge as well as the court clerk and police officers authorized by N.J.S. 2A:8-27 to take complaints. If the

complaint is frivolous or the facts alleged do not constitute a violation of the law, the judge may dismiss the complaint on motion. All dismissals should be made on the record in open court.[11]

Under the Directive, Municipal Court personnel were instructed to accept criminal complaints from private citizens in every instance. According to R. 3:3-1 a warrant must issue when a complaint is filed alleging that certain serious crimes have been committed. Thus, if a private citizen came in off the streets and alleged aggravated assault against a police officer without giving any facts, the clerk would have to take the complaint and then, according to the rule, make out an arrest warrant. In State v. Ross supra, the Appellate Division said that there must be probable cause for either a summons or warrant to be issued.

The conflict involves two problems. The first problem is whether or not a warrant must issue if the circumstances set forth in R. 3:3-1(b) are present. The second problem is the apparent conflict between Ross, requiring probable cause, and the Directive, requiring acceptance of complaints from private citizens in all instances. As to the first problem it was pointed out that some judges read the rule to require a warrant if the conditions set forth in R. 3:3-1(b) exist. Other judges read R.3:3-1(a) as giving them discretion as to

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[11] New Jersey Municipal Court Manual, January 1983, Section 111, Page 1.

whether to issue a warrant or not even if the conditions mentioned in R. 3:3-1(b) are present. As to the second problem, it was pointed out that in Ross, the problem was that the summons that was issued had the signature of the complaining witness who had no authority to issue a summons. While the Directive says that complaints must be accepted in all instances and that summons shall issue, this is not inconsistent with the present rule or Ross which requires an independent finding of probable cause by a judicial authority.

During the course of discussion on these issues, another issue was raised: Whether or not municipal court judges should be allowed to admit to bail for certain serious offenses. It was pointed out that in certain urban counties they do set bail because the rule has been waived. Since the Committee felt there was a need for a broader look at the problem, a subcommittee was set up to address these issues.

The subcommittee presented the Committee with recommended changes to three rules to deal with these problems, the change to R. 3:2 clarifies the apparent confusion over whether any individual could file a complaint. R. 3:3-1 was changed to: (1) make it clear that neither a summons nor a warrant should issue without probable cause and (2) provide for a procedure to be followed when neither a warrant nor a summons is justified on the basis of facts alleged in the

complaint. The proposed revision to R. 3:26-2 would allow municipal court judges to admit to bail in certain circumstances, upon approval of the Assignment Judge.

The Committee voted on the three recommended revisions separately and approved them. The Committee recommends adoption of the following rule revisions:

RULE 3:3. [Warrant or] Summons or Warrant Upon Complaint

3:3-1. Issuance

(a) [Warrant or] Summons or Warrant. A summons or [an] arrest warrant [may] shall be issued by a judge of a court having jurisdiction in the municipality in which the offense is alleged to have been committed or in which the defendant may be found, or by the clerk or a deputy clerk of that court, only if it appears to such judge, clerk or deputy clerk from the complaint, or from an affidavit or deposition taken under oath, that there is probable cause to believe that an offense has been committed and that the defendant has committed it. [The warrant may issue to any officer authorized by law to execute it.] A summons may issue instead of a warrant, as provided in subsection (b), or if the defendant is a corporation. A warrant may issue to any officer authorized by law to execute it. Instead of detaining a person arrested without a warrant, the officer may give such person a summons as provided in Rule 3:4-1(b).

(b) No change.

(c) No change.

(d) No change.

(e) No change.

(f) Procedure where no warrant or summons is issued. Where pursuant to subsection (a) of this Rule, neither a warrant nor summons is issued on a complaint, the judge shall, after notice to the defendant, complainant, and appropriate prosecuting agency, determine whether there is probable cause for the issuance of a summons or warrant. If no such probable cause is found, the complaint shall be dismissed.

RULE 3:2. COMPLAINT: CONTENTS, SERVICE

The complaint shall be a written statement of the essential facts constituting the offense charged made upon oath before a judge or other person empowered by law to take complaints. Whenever practicable a copy thereof shall be served on the defendant at the time of service of the summons or execution of the warrant. The clerk or deputy clerk shall accept for filing any complaint made by any person.

3:26-2. Authority to Admit to Bail

A judge of the Superior Court in the county in which the offense was committed or the arrest made may admit to bail. Any other judge may admit to bail any person charged with any offense except murder, kidnapping, manslaughter, aggravated manslaughter, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, robbery, aggravated assault if it constitutes a crime of the second or third degree as defined by N.J.S.A. 2C:12-1b, or a person arrested in any extradition proceeding.

When a person charged with an offense shall have been committed to jail after hearing by reason of bail having been denied, only a judge of the Superior Court may thereafter admit him to bail. Notwithstanding the restriction in this rule, an assignment judge may authorize a municipal court judge to admit to bail persons charged with any crime within the municipality, if that assignment judge determines that the municipal court judge has access to sufficient information on which to base such bail determinations.

5. Relief from Prejudicial Joinder (R. 3:15-2(c)

The Committee considered a proposal that R. 3:15-2 be amended to provide that a motion for severance be made within 30 days of initial plea to the indictment or accusation.

A problem can arise when, on the day of trial, the defendant makes a motion for severance under R. 3:15 and the judge entertains it on the merits, despite objections that the motion was not timely because brought more than 30 days after the plea to the indictment, as required by R 3:10-5. If the motion is denied, defense counsel then may move for a stay of trial in order to appeal the denial. This can lead to undue delay and inconvenience for all, including witnesses who are summoned on the trial date and must be sent home.

# Report of the

# Supreme Court

# Criminal Practice Committee

# 1999 - 2000 Term

January 18, 2000

**4. Procedure Regarding Filing of a Complaint:**

Amendment of *R.* 3:3-1. Issuance of An Arrest Warrant or Summons
*R.* 3:4-1. Procedure After Arrest
*R.* 3:4-2. First Appearance after Filing Complaint
Proposed new *R.* 3:8-3. Representation by Public Defender

The Committee proposes one substantive amendment to *R.* 3:3-1 which would eliminate the notice requirement concerning the determination of probable cause on citizens complaints set forth in paragraph (f). Additionally, the Committee proposes extensive non-substantive revisions of *R.* 3:3-1, 3:4-1 and 3:4-2 to eliminate duplicative language and to shorten and simply the rules. As a result a new rule, *R.* 3:8-3, regarding representation by the public defender, is also proposed.

**Substantive Amendment of *R.* 3:3-1(f).**
**Review of Initial Probable Cause Finding; Dismissal**

In regard to the filing of citizen complaints, *R.* 3:3-1 now provides that if the court administrator determines that there is no probable cause to issue a summons or warrant, the determination shall be reviewed by the judge with notice to the complainant, defendant and the prosecutor. The Committee recommends that paragraph (f) of the rule be amended to remove the notice requirement for two reasons: first, because it has been misinterpreted by some courts to require a plenary hearing before the complaint can be dismissed; and second, because many municipal court staff are ignoring the notice requirements. It is the opinion of the Committee that the Court Rules are made to be followed; if this one is not being complied with, it should be appropriately amended.

The Committee was asked to review this provision of the rule because an assignment judge advised that the municipal court judges in his county insisted that they were required to hold plenary hearings to determine probable cause and did not have the discretion to dismiss a complaint "on the papers." In this county, unhappy litigants in family cases were filing complaints against family staff and county sheriff officers for a variety of frivolous claims. As a result, court staff were repeatedly required to go to court to appear for probable cause hearings. Even though the complaints were routinely dismissed they were burdensome to staff who were subjected to them. Moreover, county inmates were also filing complaints which resulted in requiring inmates to be transported to various municipal courts for plenary hearings which put a strain on county jail staff and resources.

The Committee notes that the judicial policy behind this rule is that it allows anyone to file a complaint; and therefore, there is a process needed to dispose of these complaints. The problem is that the rule is being misinterpreted and is having an unintended result. A review of the history of this issue reveals this:

A May 1970 directive provided that all citizen complaints are to be accepted. A summons is to be issued when the complaint is filed. (An arrest warrant should be issued if the requirements of *R.* 3:3-1 are met.) If the complaint is frivolous or the facts alleged do not constitute a violation of the law, the judge may dismiss the complaint on motion or after a hearing in open court. (Municipal Court bulletin (No. 170)) In 1983, the Appellate Division held that there must be probable cause for either a summons or warrant to be issued. (*State v. Ross*, 189 *N.J. Super.* 67 (App. Div. 1983)) *R.* 3:3-1 was amended to deal with this conflict. The amendments were designed to (1) make clear that neither a summons or warrant should issue without probable cause and (2) provide for a procedure to be followed when neither a warrant nor a summons is justified on the basis of acts alleged in the complaint. (1984 report, pp. 21-25; 116 *N.J.L.J.* 143) The rule was amended in 1994 by the addition of paragraph (f) requiring judges to review decisions of administrators when the administrators made the initial determination that probable cause did not exist. The comment states: "While unstated in this paragraph there is no intent to require that the judge hold a hearing on these complaints before dismissing them." (1994 Supplemental Report, pp. 18-19; 136 *N.J.L.J.* 1118, 1119)

When the Committee began to review this issue it also looked at other issues regarding citizen complaints. (There is a discussion of these issues in the section B.) As a result, a subcommittee met with municipal staff, a police representative and a municipal court judge. The subcommittee learned that contrary to one county's interpretation of the rule, plenary hearings with notice to all the parties involved were rare in many counties. However, where they did occur litigants were unhappy to be required to appear in court twice, once for the hearing and then for the trial if one was held necessary. Consequently, there are some jurisdictions where there are *ex parte* plenary hearings where the complainant appears before the judge without notice to the defendant. The subcommittee also discovered that municipal staff either were not aware of the requirements of the rule, or ignored them because they thought notice requirements were unfair. As a result, many municipal court staff do not notify defendants that a complaint was filed, nor do they notify them if it is dismissed. In other jurisdictions, municipal judges make the probable cause determination based on the paper work or complaint before them. In many of these cases the defendant is not notified either.

Municipal court judges have discretion to determine procedures for review of probable cause. The review can be done on the papers or by requiring a hearing. To eliminate the misinterpretation of the rule regarding citizens complaints, the Committee considered several different amendments. One suggestion was that the notice requirement be eliminated and the rule amended to provide that a written statement be submitted for review by the judge. Additionally, pursuant to an amendment to *R.* 1:38, the complaint and written statement would remain confidential prior to a finding of probable cause, or if the complaint was dismissed. The requirement of submitting a written statement was challenged as being too burdensome and a barrier to court access to those complainants who did not have good reading or writing skills. Others felt that a written statement was not needed and that the review of probable cause should be based on either the probable cause (or lack of one) determination of the court administrator or on the complaint itself.

Many members felt that the notice requirement as set forth in the rule was not necessary. It was noted that complaints filed by the police do not require a probable cause determination and notice is not given to the defendant. (*R.* 3:3-1(a)) One suggestion was that only the complainant should be provided with notice and that he or she would be entitled to an *ex parte* hearing in front of the judge. However, it was recognized that it would be unseemly to permit complainants to make unanswered and possibly baseless charges against another in open court on the record. If the complainant had a right to address the court then the alleged defendant should be advised that this was occurring.

The Committee decided to remove the notice requirement and to recommended that the comment state that the municipal court judges have discretion to determine procedures for review of probable cause which can be done on the papers or by requiring a hearing.

The Committee on Municipal Courts endorsed the rule amendment.

**Amendment of R. 3:3-1, 3:4-1, 3:4-2 and Proposed New R. 3:8-3**

The Committee recognizes that these rules are important because they deal with the beginning of the process and effect everyone who has a complaint filed against him or her. One of the issues brought to the Committee's attention was the claim that there is an inconsistency between *R.* 3:3-1(b) and *R.* 3:4-1(b)(2). The question raised is whether a warrant can issue under *R.* 3:4-1(b)(2) if the judicial officer (judge, clerk or deputy clerk, municipal court administrator or deputy court administrator) has

reason to believe the defendant is a danger to himself or others. Because of this issue and the fact that there are separate Part VII rules for the municipal courts and the Part III rules now just deal with indictable offenses and Superior Court matters, the Committee appointed a subcommittee to throughly review the rules. The result was a complete revision of Rules 3:3-1, 3:4-1 and 3:4-2 and the proposed creation of a rule, R. 3:8-3, that deals with representation by the public defender. The proposed rules are the culmination of over 20 years of effort to simplify and clarify these subjects. See 1977 report.

A chart after the text of this section sets forth a side by side comparison of the changes in the rules.

**R. 3:3-1. Issuance of An Arrest Warrant or Summons (Cases Commenced by Complaint)**

Paragraph (a), Authorization of Process is redesignated to two paragraphs: (a), Issuance of a Warrant and (b), Issuance of a Summons.

Paragraph (b), Determination Whether to Issue a Summons or Warrant, is redesignated to new paragraph (c), Determination of Whether to Issue a Summons or Warrant.

Paragraph (c), Failure To Appear After Summons, is eliminated and this information is listed in paragraphs (b)(2), (b)(6) and (f).

Paragraph (d), Additional Warrants or Summons, is redesignated as new paragraph (e), Additional Warrants or Summons.

Paragraph (e), Identification Procedures if Summons Issued, is eliminated and this information is listed in new paragraph (c) of amended *R.* 3:4-1.

Paragraph (f), Review of Initial Probable Cause Finding, is redesignated paragraph (d), Finding of No Probable Cause. As discussed above, there is a substantive change in this paragraph in that the notice requirement has been eliminated.

Paragraph (g), First Appearance, is eliminated. The issue of "first appearance" has been moved to new paragraph (a) of amended *R.* 3:4-2.

New Paragraph (e), Additional Warrants or Summons, is the resdesignation of

paragraph (d)

New Paragraph (f), Process Against Corporations, is from the last sentence of paragraph (c).

**R. 3:4-1. Procedure After Arrest**
**(Cases Commenced by Arrest)**

Paragraph (a), Arrest on Warrant, is redesignated as paragraph (b).

Paragraph (b), Arrest Without Warrant is redesignated as paragraph (a).

Paragraph (1), Preparation of a Complaint and Summons or Warrant, is redesignated to two paragraphs: (1) Preparation of Complaint and (2) Issuance of Process. Additionally, to eliminated the conflict between the rule on when a summons or warrant issues, the rule now refers to *R.* 3:3-1. Therefore, subparagraph s (a) through (f) have been eliminated:
subparagraph (a) is covered by amended R. 3:3-1(c)(2)
subparagraph (b) is covered by amended R. 3:3-1(c)(3)
subparagraph (c) is covered by amended R. 3:3-1(c)(4)
subparagraph (d) information is listed in amended R. 3:4-1(a)(1)
subparagraph (e) is covered by amended R. 3:3-1(c)(5)
subparagraph (f) is covered by amended R. 3:3-1(c)(6)

Paragraph(2), Probable Cause; Issuance of Process; Bail, is eliminated and the information is listed in other paragraphs of the amended rule: The first sentence is covered by paragraph (a)(1) and the bail issue is covered by redesignated paragraph (b).

Paragraph (3), Summons, is eliminated. Post-arrest identification procedures are covered by new paragraph (c).

Paragraph(c), First Appearance, is eliminated. First appearance is now listed in new paragraph (a) of amended R. 3:4-2.

New paragraph (b), Arrest on a Warrant, is resignation of paragraph (a)

New paragraph (c), Identification procedures, covers information listed in new paragraph (e) of *R.* 3:3-1 and new paragraph (b)(3) of *R.* 3:4-1.

## 3:3-1. Issuance of an Arrest Warrant or Summons

(a) Issuance of a Warrant. An arrest warrant may be issued on a complaint only if:

(1) a judge, clerk, deputy clerk, municipal court administrator or deputy municipal court administrator finds from the complaint or an accompanying affidavit or deposition, that there is probable cause to believe that an offense was committed and that the defendant committed it and notes that finding on the warrant; and

(2) a judge, clerk, deputy clerk, municipal court administrator or deputy municipal court administrator finds that subsection (c) of this rule allows a warrant rather than a summons to be issued.

(b) Issuance of a summons. A summons may be issued on a complaint only if:

(1) a judge, clerk, deputy clerk, municipal court administrator or deputy municipal court administrator finds from the complaint or an accompanying affidavit or deposition, that there is probable cause to believe that an offense was committed and that the defendant committed it and notes that finding on the summons; or

(2) the law enforcement officer who made the complaint, issues the summons.

(c) Determination of Whether to Issue a Summons or Warrant. A summons rather than an arrest warrant shall be issued unless:

(1) the defendant is charged with murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes;

(2) the defendant has been served with a summons and has failed to appear;

(3) there is reason to believe that the defendant is dangerous to self, other persons or property;

(4) there is an outstanding warrant for the defendant;

(5) the defendant's identity or address is not known and a warrant is necessary to subject the defendant to the jurisdiction of the court; or
(6) there is reason to believe that the defendant will not appear in response to a summons.

(d) Finding of No Probable Cause. If a judicial officer finds that there is no probable cause to believe that an offense was committed or that the defendant committed it, the officer shall not issue a warrant or summons on the complaint. If the finding is made by an officer other than a judge, the finding shall be reviewed by a judge. If the judge finds no probable cause, the judge shall dismiss the complaint.

(e) Additional warrants or summonses. More than one warrant or summons may issue on the same complaint.

(f) Process Against Corporations. A summons rather than an arrest warrant shall issue if the defendant is a corporation. If a corporation fails to appear in response to a summons, the court shall proceed as if the corporation appeared and entered a plea of not guilty.

Note: 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; paragraph (a) redesignated as paragraphs (a) and (b), paragraph (b) redesignated as paragraph (c), paragraph (c) rescinded and information listed in paragraphs (b)(2), (b)(6) and (f), paragraph (d) redesignated as paragraph (e), paragraph (f) amended and redesignated as paragraph (e), paragraph (g) rescinded and information listed in paragraph (a) of R. 3:4-2, new paragraphs (e) and (f) adopted _____ to be effective _____.

## B. Rule Amendments Considered and Rejected

### 1. Filing of Citizen Complaints

The Committee considered a number of issues regarding the filing of citizen complaints: determination of probable cause, confidentiality of citizen complaints prior to determination of probable cause, requiring filing fees for citizen complaints, and imposing sanctions for filing frivolous or bad faith complaints. The determination of probable cause issue was resolved with a recommendation for an amendment of *R.* 3:3-1. The Committee reserved on a decision regarding the confidentiality of citizens complaints. For the latter two issues, the Committee decided not to recommend any proposed rule amendments.

#### (a) Requiring Filing Fees for Citizen Complaints

The Committee considered the issue of requiring filing fees for citizen complaints. It decided that no fees should be charged for complaints heard in the Superior Court because this would be a deterrent for citizens to file complaints. This would be of a particular concern in regard to domestic violence cases. Additionally, it was noted that no costs are charged for any proceedings in the Criminal Division. In regard to municipal court, the state statute, *N.J.S.A.* 22A:3-4, provides that there is a limit of $30 which can be charged for municipal court costs.

#### (b) Imposing Sanctions for Filing Frivolous or Bad Faith Complaints

The Committee considered the issue of imposing sanctions for filing frivolous or bad faith complaints. In regard to complaints heard in municipal court, the state statute, *N.J.S.A.* 2B:12-24, provides that a sanction of payment of court costs by complainant is permitted. Specifically, the statute provides that if the judge "dismisses the complaint or acquits the defendant and finds that the charge was false and not made in good faith, the judge may order that the complaining witness pay the costs of court established by law." Since the statute already provides for an appropriate sanction, the Committee did not recommend that additional sanctions be imposed.

In regard to complaints heard in the Superior Court, the Committee felt that civil remedies were adequate to protect against frivolous and bad faith complaints and recommended against imposing sanctions.

# *Report of the*

# *Supreme Court*

# *Criminal Practice Committee*

# *2000-2002 Term*

## 7. Confidentiality of Citizen Complaint Prior to a Determination of Probable Cause.

This matter was listed in the 1998-2000 Committee report as a matter held for future consideration. As part of its review of filing of citizen complaints, the Committee considered whether R. 1:38 should be amended to provide that a citizen complaint is to remain confidential to protect the defendant prior to a finding of probable cause.

Some members were concerned that frivolous, unfounded complaints are being made public before a judicial determination is made that probable cause exists. The Committee decided that the rule should not be amended at this time, essentially because courts must act in public session and on the record. In a related matter, as a result of a recommendation during the last rules cycle R. 3:3-1 was amended to eliminate the notice requirement concerning dismissal of citizen complaints. Members of the Committee believed that the amendment to R. 3:3-1 has had a positive impact on the municipal courts by eliminating unnecessary probable cause hearings generated by the interpretation of the former rule which required hearings because complainants had the right to object to the disposition.

# REPORT OF THE SUPREME COURT

# COMMITTEE ON CRIMINAL PRACTICE

# 1992-1994 TERM

A. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

**1. Post Arrest Procedures**

Introduction

In State v. Gonzalez, 114 N.J. 592 (1989), the Supreme Court found no requirement for an independent determination of probable cause for a complaint charging the commission of a traffic offense. Although the Court specifically limited its holding to traffic offenses, it noted that two Appellate Division decisions have required probable cause determinations on non-traffic offenses. See State v. Ross, 189 N.J. Super. 67 (App. Div. 1983) holding a summons may not issue when a private citizen files a complaint unless there is a finding of probable cause by a judicial officer and State v. Salzman, 228 N.J. Super. 109 (App. Div. 1987) holding that a probable cause hearing is necessary on a complaint signed by a police officer after the issuance of a summons. Since these decisions identify a need for clarification of court rules, the Court asked for a review by both the Criminal Practice Committee and the Municipal Practice Committee. The Committees decided to form a joint subcommittee to explore the Court's request. That subcommittee's report provides the basis for the recommendations being made by the Committee.

The Committee viewed its mandate broadly. In that vein it has reviewed not only the Rules governing probable cause but the entire post-arrest process including the determination of bail. This furthers a decision made by the Criminal Practice Committee, in its 1988 Annual Report, to review all post-arrest procedures. See

N.J.L.J. 97 (1988). What follows are the Rule recommendations made by the Committee, after extensive deliberation and consultation with the Municipal Court Practice Committee to present the consensus views of both committees.

Some of the changes are technical; many to achieve clarity. The comment to each Rule explains the changes in that Rule. As a whole the package is designed to simplify and clarify the practice and to make it fairer, particularly to those unduly detained. This is accomplished by clarifying the preference for release on summons, except for crimes involving injury to persons and other serious crimes, and by generally assuring that both bail and probable cause shall be determined within 12 hours of an arrest warrant and that, in any event, bail shall be reviewed by a judge by the next court day following arrest (if not previously done) with bail reduction applications to be heard within seven days of filing.

Subsequent to the Committee's approval of the proposed Post Arrest Procedures new legislation was adopted affecting the municipal courts. See L. 1993, c. 293 effective February 15, 1994. That legislation will require some technical changes to the rules presented in this section of the Report. Specifically, statutory references to titles of court officials will have to be revised. The Committee will submit technical revisions to the Court in the near future.

RULE 3:2. CONTENTS OF COMPLAINT, ARREST WARRANT AND SUMMONS; [:CONTENTS, SERVICE]

(a) Complaint. The complaint shall be a written statement of the essential facts constituting the offense charged made on a form approved by the Administrative Director of the Courts, All complaints except complaints for traffic offenses, as defined in R. 7:6-1 where made on Uniform Traffic Tickets and complaints for non-indictable offenses made on the Special Form of Complaint and Summons, shall be [up]on oath or by certification before a judge or other person authorized by N.J.S.A. 2A:8-27 [empowered by law] to take complaints. [Whenever practicable a copy thereof shall be served on the defendant at the time of service of the summons or execution of the warrant.] The municipal court administrator [clerk] or deputy court clerk shall accept for filing any complaint made by any person.

(b) Summons. A summons shall be made on a Complaint-Summons (CDR-1) form, a Uniform Traffic Ticket, or a Special Form of Complaint and Summons. The summons shall be directed to the person named in the complaint, requiring that person to appear before the court in which the complaint is made at a stated time and place and shall inform the person that an arrest warrant will be issued for failure to appear. The summons shall be signed by the judicial or law enforcement officer issuing it.

(c) Arrest Warrant. An arrest warrant shall be made on a Complaint-Warrant (CDR-2) form. The warrant shall contain the defendant's name or if that is unknown, any name or description

which identifies the defendant with reasonable certainty, and shall be directed to any officer authorized to execute it, ordering that the defendant be arrested and brought before the court that issued the warrant. The warrant shall be signed by the judge, municipal court administrator, or deputy court clerk.

Note: Source--R.R. 3:2-1(a)(b); amended July 26, 1984 to be effective September 10, 1984[.]; text of rule amended and redesignated paragraph (a) and paragraph (b) adopted to be effective .

## COMMENTARY

A number of amendments are being recommended to this rule. The first combines it with R. 3:3-2. This is being done to avoid overlap. The Rule, as amended, will govern the contents of complaints but not the service thereof. Service is governed by Rules 3:3-1 and 3:4-1. In that regard the title has been changed and a sentence has been deleted from the text of the rule. What was contained in R. 3:3-2 is now contained in new paragraphs (b) and (c).

The rule has also been amended to make clear that, except for traffic offenses which includes parking offenses, for which the Uniform Traffic Ticket is being used, and offenses where the Special Form of Complaint and Summons is used, complaints must be made upon oath before a judge or other person empowered by law to take complaints pursuant to N.J.S.A. 2A:8-27. The Rule would also, for the first time, permit complaints to be made by a certification. This recommendation is similar to the one made by the Committee in its 1977 Report. See Supreme Court Committee on Criminal Practice 1977 Report, 100 N.J.L.J. 441, 442 (May 19, 1977). However, while the amendment is silent on the issue, it is our intent not to disturb present practice on when oaths, or under the proposal affirmations, must be taken. As we understand it on non-indictables, in many cases, oaths are taken after the summons is issued. This is desirable as it assures defendants are not delayed unnecessarily by being brought back to the station house to

have the oath administered only to be subsequently released. On indictables the oath is administered prior to issuance of a summons or warrant. The Committee believes that is the better practice. New paragraph (b), which was largely derived from R. 3:3-2, directs on what form the summons must be made; specifies what must be included in the summons and includes a requirement that it be signed by the judicial, or law enforcement officer issuing it. The provision allowing a law enforcement officer to sign the summons is new. It is necessary in light of a revision being proposed to R. 3:3-1(a) which would allow law enforcement officers to issue a summons for all offenses, indictable and non-indictable. See Commentary to R. 3:3-1(a) at pages 13-15. This change recognizes present practioe and acknowledges that it is preferable to allow the law enforcement officer to issue the summons rather than having to possibly delay a defendant's release by bringing him or her back to the station house.

New paragraph (c), which was largely derived from R. 3:3-2, directs that an arrest warrant be on the complaint-warrant form; specifies what must be on the warrant, and includes a requirement that the warrant be signed by the judge, municipal court administrator or deputy court clerk.

## RULE 3:3 SUMMONS OR WARRANT UPON COMPLAINT

### 3:3-1. Issuance of an Arrest Warrant or Summons

(a) Authorization of Process. [Summons or Warrant.] An [summons or] arrest warrant on any complaint or on a complaint charging any offense made by a private citizen [shall] may be issued only by a judge, municipal court administrator or deputy court clerk of a court [having] with jurisdiction in the municipality [in which] where the offense is alleged to have been committed, [or in which the defendant may be found, or by the clerk or a deputy clerk of that court,] That arrest warrant or summons may be issued only if it appears to [such] the judge, municipal court administrator [olerk] or deputy court clerk from the complaint [,] or [from] an affidavit or deposition [taken under oath,]that there is probable cause to believe that an offense [has been] was committed and that the defendant has committed it. The judge, municipal court administrator or deputy court clerk who finds probable cause shall note that finding on the face of the summons or warrant. A summons on a complaint charging any offense may be issued by a law enforcement officer without a finding by a judicial officer of probable cause for issuance. [A summons may issue instead of a warrant, as provided in subsection (b), or if the defendant is a corporation. A warrant may issue to any officer authorized by law to execute it. Instead of detaining a person arrested without a warrant, the officer may give such person a summons as provided in Rule 3:4-1(b).]

(b) [Guidance on Issuance] Determination Whether to Issue a Summons or Warrant. [Whenever application for a warrant or summons is made before a judge or clerk authorized to issue a warrant, either under this Rule upon filing of a complaint or an indictment, or pursuant to R. 3:4-1 after an arrest without warrant, a] A summons rather than [a] an arrest warrant shall issue [rather than a warrant] unless the judge, [or] municipal court administrator [clerk], or deputy court clerk finds: [that any of the following conditions exists:]

(1) The [accused] defendant is charged with murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, arson, burglary, violations of Chapter 35 of Title 2C that constitute first or second degree crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes;

(2) The [accused] defendant has [previously] failed to respond to a summons;

(3) The judge, [or] municipal court administrator [clerk] or deputy court clerk has reason to believe that the [accused] defendant is dangerous to himself, [to] others or [to] property;

(4) There [are one or more outstanding arrest] is an outstanding arrest warrant[s] for the [accused] defendant;

(5) The [whereabouts of the accused] address of the defendant is not known [are unknown] and an arrest warrant is necessary to

subject [him] the defendant to the jurisdiction of the court; or

(6) The judge, [or] municipal court administrator [clerk] or deputy court clerk has reason to believe that the [accused] defendant will not appear in response to a summons.

A summons rather than an arrest warrant shall issue if the defendant is a corporation.

(c) Failure [of Defendant] to Appear After Summons. If a defendant [who] has been [duly summoned] served with a summons and has failed [fails] to appear [,] or [if] there is reason[able cause] to believe that [he] the defendant will fail to appear, an arrest warrant may [shall] be issued. If a [defendant] corporation has been served with a summons and has failed [fails] to appear the court shall proceed as if the corporation appeared and entered a plea of not guilty. [after having been duly summoned, a plea of not guilty shall be entered by the court if it is empowered to try the offense for which the summons was issued, and it may proceed to trial and judgment without further process; if the court is not so empowered it shall proceed as though the defendant had appeared.]

(d) ... No change

(e) Identification Procedures if [Upon Issuance of] Summons Issued. [In cases where] If a summons has been issued [in lieu of warrant pursuant to this rule] on a complaint charging a crime or the offense of shoplifting, the defendant shall undergo [all post arrest] the identification procedures[, which are] required [by law upon an] after arrest by N.J.S.A. 53:1-15 [,] on the return date of the summons. [In the event that] If the defendant [does not appear

on the return date or] refuses to submit to the [post arrest] identification procedures required by law, the court shall [may on its own, or at the request of the proseoutor, order the issuance of] issue an arrest warrant.

(f) Review of Initial Probable Cause Finding; Dismissal. [Procedure When No Warrant or Summons is Issued] If a municipal court administrator or deputy court clerk finds that no probable cause exists to issue an arrest warrant or summons, that finding shall be reviewed by the judge after notice to the complainant, defendant, and appropriate prosecuting agency. If the judge finds no probable cause, the judge shall dismiss the complaint. [When pursuant to subsection (a) of this rule, neither a warrant nor summons is issued on a complaint, the judge shall, after notice to the defendant, complainant, and appropriate prosecuting agency, determine whether there is probable cause for the issuance of a summons or warrant. If no such probable cause is found, the complaint shall be dismissed].

(g) First Appearance. Following the filing of a complaint and the service of process a first appearance shall be conducted pursuant to Rule 3:4-2 without unnecessary delay. If a defendant remains in custody, the first appearance shall be conducted within 72 hours after arrest by a judge with authority to set bail for the charges in the complaint.

Note: 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 to paragraph (a), (b), (c), (e) and (f) revised, paragraphs (a), (b), (c), (e) and (f) amended and new paragraph (g) added to be effective .

**COMMENTARY**

Paragraph (a)

The first suggested change to this rule involves probable cause determinations in non-arrest situations. There is no federal constitutional requirement that a judicial officer determine probable cause when a citizen is not subject to arrest or detention. A determination of probable cause is required when a warrant is issued for a person's arrest, Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958), or after an arrest without a warrant. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Absent a risk of detention, as in the case of a summons, there is no constitutional requirement that a judicial officer determine probable cause. Gerstein, supra, 420 U.S. at 119, 125 n. 26, 95 S.Ct. at 865, 869 n. 26, 43 L.Ed.2d at 68, 72 n. 26.

In interpreting constitutional requirements in New Jersey our Supreme Court held in State v. Gonzalez, 114 N.J. 592 (1989) that there was no constitutional requirement for a judicial officer to make an independent probable cause determination for a complaint charging the commission of a traffic offense. The Court limited its decision, however, to traffic offenses and did not address whether an independent determination of probable cause is required for violations of other municipal ordinances. As noted, two Appellate Division cases that have addressed the issue of when a probable cause determination is required have found that under our rules, a probable cause determination is required before a summons

is issued after a complaint from a private citizen, State v. Ross, 189 N.J. Super. 67 (App. Div. 1983) and where a complaint was signed by a police officer after the issuance of a summons. State v. Salzman, 228 N.J. Super. 109 (App. Div. 1987).

Given that probable cause is not a constitutional prerequisite to the issuance of a summons the Committee proposes an amendment to allow the issuance of a summons pursuant to a complaint made by a law enforcement officer without a prior determination of probable cause by a judicial officer where the complaint alleges any offense, indictable or non-indictable. We believe this practice will accelerate release without prejudice to the defendant. In a recent decision the Appellate Division held that the practice of police officers issuing summonses is permissible, at least in the context of an arrest without a warrant on a disorderly persons offense followed by the issuance of a complaint-summons by the police officer in charge of the station-house. See State v. Kenison, 248 N.J. Super 189 (App. Div. 1990). The Committee believes there should be no difference between the arrest without a warrant situation and the issuance of a summons on the spot situation. This amendment seeks to assure that defendants get released as soon as possible. Allowing police officers to issue a summons will assure that defendants, who would otherwise be released immediately by the police officer, are not brought to the station-house and made to wait while a judicial officer determines probable cause. This change will, in fact, comport to what is the present practice in many municipalities that a police officer

issues the summons which is then signed at a later point by a judicial officer. Adoption of this change would result in a "bright line" distinction which could be easily implemented and understood by all in the criminal justice system and would hopefully put to rest some of the confusion in this area resulting from the various rule amendments and court decisions interpreting these amendments over the last ten years.

Another amendment would distinguish between citizen and police complaints. Prooess on citizen complaints could not be issued without a prior judicial determination of probable cause. While there was much discussion as to whether it was proper to distinguish how police complaints versus citizen complaints are handled, the Committee believes there are sound reasons for doing so. Police officers receive special training and are expected to perform their duty according to the dictates of law. There are penalties if they abuse their discretion. See N.J.S.A. 2C:30-2. Indeed the Court, in State v. Gonzalez, 114 N.J. 592 (1989) has acknowledged the duty of police in regard to making complaints saying:

> Citizens are not without protection in the absence of a formal probable cause hearing. We assume that most police officers perform their duties honestly, conscientiously, and well. [Id. at 601]

The second change to the rule recommends that the finding of probable cause, where required, must be noted on the face of the summons or warrant. This will provide a "track record" to assure that these determinations are being made and will facilitate

review, if appropriate.

In addition to these changes a number of clauses or sentences have been deleted or moved:

(1) The first sentence of paragraph (a) authorizes the judge, municipal court administrator or deputy court clerk in the municipality where the offense occurs to issue a summons or warrant. An additional clause provides jurisdiction to these judicial officers in the jurisdiction "... in which the defendant may be found ..." . This language is viewed as unnecessary and must be deleted. Presumably the language deals with a chase situation or a situation where a defendant is found in another municipality. In the former situation the police can arrest without a warrant. In the latter a summons or arrest warrant should be issued from the jurisdiction requesting the defendant's presence.

(2) The language requiring that an affidavit or deposition be "taken under oath" is unnecessary. Affidavits and depositions are always taken under oath.

(3) The language contained regarding corporations is being moved to paragraph (b) for clarity sake.

(4) The last two sentences of paragraph (a) are being dropped. Both sentences merely state the obvious and thus are deemed surplus verbiage.

Paragraph (b)

To simplify the rule, a large portion of the first sentence of this paragraph has been eliminated. The sentence is intended to

convey that a summons is the preferred way of issuing process. As rewritten, the rule conveys this message but does so without vaguely referencing other rules or including unnecessary surplusage.

Another change to this paragraph is the substitution of the words "municipal court administrator" for the word "clerk" wherever it appears. This change is being made to bring the title of court clerk in line with recent statutory changes. See N.J.S.A. 2A:8-13a. The deputy court clerk is also being added to the list of persons authorized to issue a summons under this rule. This change makes the list of persons authorized the same as those listed under Rule 3:4-1. The Committee sees no reason to differentiate between the two Rules.

The category of aggravated assault has been limited. As proposed, warrants would be presumptive only for the more serious assaults, i.e. second degree aggravated assaults. In addition to these changes a number of other minor changes are being made to simplify how the Rule reads or to change terms, e.g. accused changed to defendant, to make them consistent throughout.

Paragraph (c)

The Committee is proposing revisions to this paragraph to make the issuance of an arrest warrant on a failure to appear permissible rather than mandatory. This provision would apply to both indictable and non-indictable offenses. In this regard the proposal goes further than suggested by the Court In the Matter of Dominick C. Santini, 126 N.J. 291 (1991). In Santini the Court

asked the Committee to consider the requirement that a warrant issue on a failure to appear in response to a summons on a non-indictable. The Committee does not believe the Rule should tie the hands of the judge and require him or her to automatically issue a warrant. The decision should be discretionary with the judge based on the facts surrounding the failure to appear.

Another change to this Rule is in regard to how corporate defendants are treated. The language has been simplified. The clause, presently contained in the Rule, concerning proceeding to trial is viewed by the Committee as unnecessary as this action is included in the concept of proceeding as if the corporation appeared. In the case of a corporate defendant, the court is empowered to enter a not guilty plea and proceed to trial.

Paragraph (e)

The amendments to this paragraph are intended to make it clear that identification procedures upon the issuance of a summons only occur with respect to crimes or charges of shoplifting where they are required by statute and not in other cases involving non-indictable offenses. The previously undefined term post arrest identification procedures has been tied to the fingerprinting requirements contained in N.J.S.A. 53:1-15.

Paragraph (f)

This paragraph has been reworded to read in plain English. As rewritten this paragraph requires judges to review decisions of municipal court administrators and deputy court clerks where the administrator or clerk made the initial determination that probable

cause did not exist. The review is after notice to the defendant, the complaintant and the prosecuting attorney. While unstated in this paragraph there is no intent to require that the judge hold a hearing on these complaints before dismissing them. A judge would be permitted to dismiss the complaint on the papers as submitted.

Paragraph (g)

A new paragraph has been added to create a link with R. 3:4-2. R. 3:4-2 presently sets forth what must occur at a defendant's first appearance before a court after the filing of a complaint. However, neither that Rule nor the preceding paragraphs of this Rule delineate when the hearing must occur. The Committee recommends that the hearing occur within 72 hours after arrest where the defendant remains in custody.

The Rules don't require that an arrested person see a judge anytime before arraignment on indictment. While it is true that probable cause determinations and bail decisions are normally made within days of arrest, these decisions are not necessarily made with the defendant present. The Committee was concerned, and was told of instances where defendants sat in jail for weeks, without ever having seen a judge. The Committee is recommending that the Rules require that all defendants held in custody see a judge within days of being arrested. If the defendant is not in custody this appearance could occur at some future time.

One effect of the change recommended to paragraph (g) will be that municipal court judges will no longer be conducting first appearances on persons being held for the crimes for which they

cannot set bail. The change will require that Superior Court judges hold first appearances on these cases.

*** This section is current through New Jersey 217th Second Annual Session, L. 2017, ***
c. 87, and J.R. 6

Title 2B. Court Organization and Civil Code
Chapter 12. Municipal Courts

**GO TO THE NEW JERSEY ANNOTATED STATUTES ARCHIVE DIRECTORY**

*N.J. Stat. § 2B:12-24* (2017)

**§ 2B:12-24. Costs charged to complainant in certain cases**

In cases where the judge of a municipal court dismisses the complaint or acquits the defendant and finds that the charge was false and not made in good faith, the judge may order that the complaining witness pay the costs of court established by law.

**HISTORY:** L. 1993, c. 293, § 1.

## RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY
## RULE 3:2. CONTENTS OF COMPLAINT, ARREST WARRANT AND SUMMONS

### Rule 3:2-1. Contents of Complaint; Forwarding of Indictable Complaints to Prosecutor and Criminal Division Manager; Forwarding of Investigative Reports to Prosecutor

**(a) Complaint.** The complaint shall be a written statement of the essential facts constituting the offense charged made on a form approved by the Administrative Director of the Courts. All complaints except complaints for traffic offenses, as defined in R. 7:2-1 where made on Uniform Traffic Tickets and complaints for non-indictable offenses made on the Special Form of Complaint and Summons, shall be by certification or on oath before a judge or other person authorized by N.J.S.A. 2B:12-21 to take complaints. The clerk or deputy clerk, municipal court administrator or deputy court administrator shall accept for filing any complaint made by any person.

**(b) Forwarding of Indictable Complaints to Prosecutor and Criminal Division Manager.** Where a Complaint-Summons (CDR-1) or Complaint-Warrant (CDR-2) alleges an indictable offense, the complaint shall be forwarded through the Judiciary's computerized system used to generate complaints to the prosecutor and the criminal division manager's office immediately upon issuance. When the Judiciary's computerized system used to generate complaints is not available, complaints shall be forwarded pursuant to procedures prescribed by the Administrative Director of the Courts.

**(c) Forwarding of Investigative Reports to Prosecutor.** For a Complaint-Summons (CDR-1), all available investigative reports shall be forwarded by law enforcement to the prosecutor within 48 hours. For a Complaint-Warrant (CDR-2), all available investigative reports shall be forwarded by law enforcement to the prosecutor immediately upon issuance of the complaint.

**Note:** Source-R.R. 3:2-1(a)(b); amended July 26, 1984 to be effective September 10, 1984; main caption amended, caption added, former text amended and redesignated paragraph 3:2-1**(**a), paragraph (b) adopted July 13, 1994 to be effective January 1, 1995; paragraph (a) amended January 5, 1998 to be effective February 1, 1998; caption amended, paragraph (b) amended, and new paragraph (c) adopted August 30, 2016 to be effective January 1, 2017.

### Rule 3:2-2. Summons

A summons shall be made on a Complaint-Summons (CDR-1) form, a Uniform Traffic Ticket, a Special Form of Complaint and Summons, or such other form as may be approved by the Administrative Director of the Courts. The summons shall be directed to the person named in the complaint, requiring that person to appear before the court in which the complaint is made at a stated time and place, and shall indicate that there will be consequences for failure to appear at the scheduled first appearance. If the individual fails to appear at that first appearance, a notice shall issue advising the individual of the rescheduled first appearance and that a failure to appear at that

rescheduled first appearance will result in the issuance of a bench warrant. The summons shall be signed by the judicial or law enforcement officer issuing it. An electronic entry of the signature of the law enforcement officer shall be equivalent to and have the same force and effect as an original signature.

**Note:** Adopted July 13, 1994 to be effective January 1, 1995; amended July 27, 2006 to be effective September 1, 2006; amended August 30, 2016 to be effective January 1, 2017.

## Rule 3:2-3. Arrest Warrant

**(a) Issuance of an Arrest Warrant When Law Enforcement Applicant is Physically Before the Judicial Officer.** An arrest warrant for an initial charge shall be made on a Complaint-Warrant (CDR-2) form. The warrant shall contain the defendant's name or if that is unknown, any name or description that identifies the defendant with reasonable certainty, and shall be directed to any officer authorized to execute it, ordering that the defendant be arrested and remanded to the county jail pending a determination of conditions of pretrial release. The warrant shall be signed by a judicial officer, which for these purposes shall be defined as the judge, clerk, deputy clerk, authorized municipal court administrator, or authorized deputy municipal court administrator.

**(b) Issuance of and Procedures for an Arrest Warrant When Law Enforcement Applicant is Not Physically Before the Judicial Officer.** A judicial officer may issue an arrest warrant on sworn oral testimony of a law enforcement applicant who is not physically present. Such sworn oral testimony may be communicated by the applicant to the judicial officer by telephone, radio or other means of electronic communication.

The judicial officer shall administer the oath to the applicant. Subsequent to taking the oath, the applicant must identify himself or herself, and read verbatim the Complaint-Warrant (CDR-2) and any supplemental affidavit that establishes probable cause for the issuance of an arrest warrant. If the facts necessary to establish probable cause are contained entirely on the Complaint-Warrant (CDR-2) and/or supplemental affidavit, the judicial officer need not make a contemporaneous written or electronic recordation of the facts in support of probable cause. If the law enforcement officer provides additional sworn oral testimony in support of probable cause, the judicial officer shall contemporaneously record such sworn oral testimony by means of a recording device, if available; otherwise, adequate notes summarizing the contents of the law enforcement applicant's testimony shall be made by the judicial officer. This sworn testimony shall be deemed to be an affidavit, or a supplemental affidavit, for the purposes of issuance of an arrest warrant.

An arrest warrant may issue if the judicial officer is satisfied that probable cause exists for issuing the warrant. On approval, the judicial officer shall memorialize the date, time, defendant's name, complaint number, the basis for the probable cause determination and any other specific terms of the authorization. That memorialization shall be either by means of a recording device, or by adequate notes.

If the judicial officer has determined that a warrant shall issue and has the ability to promptly access the Judiciary's computer system, the judicial officer shall electronically issue the Complaint-Warrant (CDR-2) in the computer system.

If the judicial officer has determined that a warrant shall issue and does not have the ability to promptly access the Judiciary's computer system, the judicial officer shall direct the applicant, pursuant to procedures prescribed by the Administrative Director of the Courts, to enter into the Judiciary computer system, for inclusion on the electronic complaint, the date and time of the probable cause and warrant determinations. The judicial officer shall also direct the applicant to complete the required certification and activate the complaint.

The court shall verify, as soon as practicable, any warrant authorized under this subsection and activated by law enforcement. Remand to the county jail and a pretrial release decision are not contingent upon completion of this verification.

Procedures authorizing issuance of restraining orders 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") by electronic communication are governed by R. 3:26-1(e).

**Note:** Adopted July 13, 1994 to be effective January 1, 1995; original text of rule amended and designated as paragraph (a) and new paragraph (b) added July 28, 2004 to be effective September 1, 2004; paragraph (b) amended July 9, 2013 to be effective September 1, 2013; paragraphs (a) and (b) captions added and text amended August 30, 2016 to be effective January 1, 2017.

## RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY
## R. 3:3 SUMMONS OR WARRANT UPON COMPLAINT

### Rule 3:3-1. Issuance of an Arrest Warrant or Summons

**(a) Issuance of an Arrest Warrant.** An arrest warrant may be issued on a complaint only if: (1) a judicial officer finds from the complaint or an accompanying affidavit or deposition, that there is probable cause to believe that an offense was committed and that the defendant committed it and notes that finding on the warrant; and (2) a judicial officer finds that paragraphs (d), (e), or (f) of this rule allow a warrant rather than a summons to be issued.

**(b) Issuance of a Summons.** A summons may be issued on a complaint only if: (1) a judicial officer finds from the complaint or an accompanying affidavit or deposition, that there is probable cause to believe that an offense was committed and that the defendant committed it and notes that finding on the summons; or
(2) the law enforcement officer who made the complaint, issues the summons.

**(c) Offenses Where Issuance of a Summons is Presumed.** Unless issuance of an arrest warrant is authorized pursuant to paragraph (d) of this rule, a summons rather than an arrest warrant shall be issued when a defendant is charged with an offense other than one set forth in paragraphs (e) or (f) of this rule.

**(d) Grounds for Overcoming the Presumption of Issuance of a Complaint-Summons.** Notwithstanding the presumption that a summons shall be issued when a defendant is charged with an offense other than one set forth in paragraphs (e) or (f) of this rule, when a law enforcement officer prepares a complaint-warrant rather than a complaint-summons in accordance with guidelines issued by the Attorney General pursuant to N.J.S.A. 2A:162-16, the judicial officer may issue an arrest warrant when the judicial officer finds pursuant to paragraph (a) of this rule that there is probable cause to believe that the defendant committed the offense, and has reason to believe, based on one or more of the following factors, that a complaint-warrant is needed to reasonably assure a defendant's appearance in court when required, to protect the safety of any other person or the community, or to assure that the defendant will not obstruct or attempt to obstruct the criminal justice process:

(1) the defendant has been served with a summons for any prior indictable offense and has failed to appear;

(2) there is reason to believe that the defendant is dangerous to self, or will pose a danger to the safety of any other person or the community if released on a summons;

(3) there are one or more outstanding warrants for the defendant;

(4) the defendant's identity or address is not known and a warrant is necessary to subject the defendant to the jurisdiction of the court;

(5) there is reason to believe that the defendant will obstruct or attempt to obstruct the criminal justice process if released on a summons;

(6) there is reason to believe that the defendant will not appear in response to a summons; or

(7) there is reason to believe that the monitoring of pretrial release conditions by the pretrial services program established pursuant to N.J.S.A. 2A:162-25 is necessary to protect any victim, witness, other specified person, or the community.

When the application for an arrest warrant is based on reason to believe that the defendant will not appear in response to a summons, will pose a danger to the safety of any other person or the community, or will obstruct or attempt to obstruct the criminal justice process if released on a summons, the judicial officer shall consider the results of any available preliminary public safety assessment using a risk assessment instrument approved by the Administrative Director of the Courts pursuant to N.J.S.A. 2A:162-25, and shall also consider, when such information is available, whether within the preceding ten years the defendant as a juvenile was adjudicated delinquent for escape, a crime involving a firearm, or a crime that if committed by an adult would be subject to the No Early Release Act (N.J.S.A. 2C:43-7.2), or an attempt to commit any of the foregoing offenses. The judicial officer shall also consider any additional relevant information provided by the law enforcement officer or prosecutor applying for an arrest warrant.

**(e) Offenses Where Issuance of an Arrest Warrant Is Required.** An arrest warrant shall be issued when a judicial officer finds pursuant to R. 3:3-1(a) that there is probable cause to believe that the defendant committed murder, aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery, carjacking, or escape, or attempted to commit any of the foregoing crimes, or where the defendant has been extradited from another state for the current charge.

**(f) Offenses Where Issuance of an Arrest Warrant is Presumed.** Unless issuance of a summons rather than an arrest warrant is authorized pursuant to paragraph (g) of this rule, an arrest warrant shall be issued when a judicial officer finds pursuant to paragraph (a) of this rule that there is probable cause to believe that the defendant committed a violation of Chapter 35 of Title 2C that constitutes a first or second degree crime, a crime involving the possession or use of a firearm, or the following first or second degree crimes subject to the No Early Release Act (N.J.S.A. 2C:43-7.2), vehicular homicide (N.J.S.A. 2C:11-5), aggravated assault (N.J.S.A. 2C:12-1(b)), disarming a law enforcement officer (N.J.S.A. 2C:12-11), kidnapping (N.J.S.A. 2C:13-1), aggravated arson (N.J.S.A. 2C:17-1(a)(1)), burglary (N.J.S.A. 2C:18-2), extortion (N.J.S.A. 2C:20-5), booby traps in manufacturing or distribution facilities (N.J.S.A. 2C:35-4.1(b)), strict liability for drug induced deaths (N.J.S.A. 2C:35-9), terrorism (N.J.S.A. 2C:38-2), producing or possessing chemical weapons, biological agents or nuclear or radiological devices (N.J.S.A. 2C:38-3), racketeering (N.J.S.A. 2C:41-2), firearms trafficking (N.J.S.A. 2C:39-9(i)), causing or permitting a child to engage in a prohibited sexual act knowing that the act may be reproduced or

reconstructed in any manner, or be part of an exhibition or performance (N.J.S.A. 2C:24-4(b)(3)) or finds that there is probable cause to believe that the defendant attempted to commit any of the foregoing crimes.

**(g) Grounds for Overcoming the Presumption of Issuance of an Arrest Warrant.** Notwithstanding the presumption that an arrest warrant shall be issued when a defendant is charged with an offense set forth in paragraph (f) of this rule: (1) a judicial officer may authorize issuance of a summons rather than an arrest warrant if the judicial officer finds that were the defendant to be released without imposing or monitoring any conditions authorized under N.J.S.A. 2A:162-17, there are reasonable assurances that the defendant will appear in court when required, the safety of any other person or the community will be protected, and the defendant will not obstruct or attempt to obstruct the criminal justice process. The judicial officer shall not make such finding without considering the results of a preliminary public safety assessment using a risk assessment instrument approved by the Administrative Director of the Courts pursuant to N.J.S.A. 2A:162-25, and without also considering whether within the preceding ten years the defendant as a juvenile was adjudicated delinquent for escape, a crime involving a firearm, or a crime that if committed by an adult would be subject to the No Early Release Act (N.J.S.A. 2C:43-7.2), or an attempt to commit any of the foregoing offenses. The judicial officer shall also consider any additional information provided by a law enforcement officer or the prosecutor relevant to the pretrial release decision; or (2) a law enforcement officer may issue a summons in accordance with guidelines issued by the Attorney General pursuant to N.J.S.A. 2A:162-16.

**(h) Finding of No Probable Cause.** If a judicial officer finds that there is no probable cause to believe that an offense was committed or that the defendant committed it, the officer shall not issue a warrant or summons on the complaint. If the finding is made by an officer other than a judge, the finding shall be reviewed by a judge. If the judge finds no probable cause, the judge shall dismiss the complaint.

**(i) Additional Warrants or Summonses.** More than one warrant or summons may issue on the same complaint.

**(j) Process Against Corporations.** A summons rather than an arrest warrant shall issue if the defendant is a corporation. If a corporation fails to appear in response to a summons, the court shall proceed as if the corporation appeared and entered a plea of not guilty.

**Note:** 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; paragraph (a) caption and text amended, paragraph (b) amended, former paragraph (c) deleted, new paragraphs (c), (d), (e), (f), and (g) adopted, and former paragraphs (d), (e) and (f) redesignated as (h), (i) and (j) August 30, 2016 to be effective January 1, 2017.

## Rule 3:3-2. (Reserved)

**Note:** Source -- R.R. 3:2-2(b); deleted July 13, 1994 to be effective January 1, 1995.

## Rule 3:3-3. Execution or Service; Return

**(a) By Whom.** The warrant shall be executed and the summons served by any officer authorized by law.

**(b) Territorial Limits.** The warrant may be executed and the summons served at any place within this State. An officer arresting a defendant in a county other than the one in which the warrant was issued shall take the defendant, without unnecessary delay, before the nearest available committing judge authorized to set conditions of pretrial release in accordance with R. 3:26-2. Nothing in this rule shall affect the provisions of N.J.S. 2A:156-1 to 2A:156-4 (Uniform Act on Intrastate Fresh Pursuit).

**(c) Execution of Warrant.** The warrant shall be executed by the arrest of the defendant. The warrant need not be in the possession of the officer at the time of the arrest, but upon request, the officer shall show the warrant to the defendant as soon as possible. If the warrant is not in the possession of the officer at the time of the arrest, the officer shall inform the defendant of the offense charged and of the fact that a warrant has been issued.

**(d) Service of Summons.** The summons shall be served in accordance with R. 4:4-4.

**(e) Return.** The officer executing a warrant shall make prompt return thereof to the court which issued the warrant. The officer serving a summons shall make return thereof to the court before whom the summons is returnable on or before the return day.

**Note:** Source -- R.R. 3:2-2(c); paragraphs (b) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended August 30, 2016 to be effective January 1, 2017.

## Rule 3:3-4. Defective Warrant or Summons

**(a) Amendment.** No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any technical insufficiency or irregularity in the warrant or summons, but the warrant or summons may be amended to remedy any such technical defect.

**(b) Issuance of New Warrant or Summons.** If prior to or during the hearing as to probable cause, it appears that the warrant executed or summons issued does not properly name or describe the defendant, or the offense with which the defendant is charged, or that although not guilty of the offense specified in the warrant or summons there is reasonable ground to believe that the defendant is guilty of some other offense, the court shall not discharge or dismiss the defendant but shall forthwith cause a new complaint to be filed and thereupon issue a new warrant or summons.

**Note:** Source -- R.R. 3:2-2(d); paragraph (b) amended July 13, 1994 to be effective September 1, 1994.

# RULE GOVERNING THE COURTS OF THE STATE OF NEW JERSEY
# RULE 3:4 PROCEEDINGS BEFORE THE COMMITTING JUDGE; PRETRIAL RELEASE

## Rule 3:4-1. Procedure After Arrest

**(a) Arrest without an Arrest Warrant.**

(1) Preparation of Complaint. A law enforcement officer shall take a person who was arrested without a warrant to a police station where a complaint shall be prepared immediately. If it appears that issuance of a warrant is authorized by Rule 3:3-1(d), (e) or (f), the complaint may be prepared on a Complaint-Warrant (CDR-2) form. Otherwise, the complaint shall be prepared on a Complaint-Summons (CDR-1) form.

(2) Issuance of Process. If a Complaint-Summons (CDR-1) has been prepared, the law enforcement officer may serve the summons and release the defendant. If a Complaint-Warrant (CDR-2) has been prepared, without unnecessary delay, and no later than 12 hours after arrest, the matter shall be presented to a judge, or, in the absence of a judge, to a judicial officer who has the authority to determine whether a warrant or summons will issue. The judicial officer shall determine whether to issue a warrant or summons as provided in Rule 3:3-1, and if a warrant is issued, shall order the defendant remanded to the county jail pending a determination of conditions of pretrial release or a determination regarding pretrial detention if a motion has been filed by the prosecutor.

**(b) Arrest on an Arrest Warrant.** The person who is arrested on that warrant shall be remanded to the county jail pending a determination of conditions of pretrial release or a determination regarding pretrial detention if a motion has been filed by the prosecutor.

**(c) Identification procedures.** If the defendant has been released on a summons, any post-arrest identification procedures required by N.J.S.A 53:1-15 or otherwise required by law, shall be completed on the return date of the summons.

**Note:** Source - R.R. 3:2-3(a), 8:3-3(a). Amended July 7, 1971 to be effective September 13, 1971; caption amended, former rule redesignated as paragraph (a) and paragraphs (b) and (c) adopted July 21, 1980 to be effective September 8, 1980; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (b) amended, new paragraph (c) adopted and former paragraph (c) redesignated paragraph (d) and paragraph (d)(7) deleted November 5, 1986 to be effective January 1, 1987; paragraphs (b) and (c) amended April 10, 1987 to be effective immediately; paragraph (b) amended January 5, 1988 to be effective February 1, 1988; captions added to paragraphs (a)(b) and (c), new paragraph (c) adopted, paragraph (d) introductory text deleted and paragraphs (d)(1)(2)(3)(4)(5) and (6) redesignated as paragraphs (b)(1)(a)(b)(c)(d) and (f) and paragraph (1)(e) amended and paragraphs (b)(2) and (3) adopted, July 13, 1994 to be effective January 1, 1995; paragraph (a) amended and redesignated as paragraph (b), paragraph (b) amended and redesignated as paragraph (a), paragraph (c) deleted, and new paragraph (c) adopted July 5, 2000 to be effective September 5, 2000; paragraph (a)

caption amended, paragraphs (a)(1) and (a)(2) amended, and paragraph (b) caption and text amended August 30, 2016 to be effective January 1, 2017.

## Rule 3:4-2. First Appearance After Filing Complaint

**(a) Time of First Appearance.** Following the filing of a complaint the defendant shall be brought before a judge for a first appearance as provided in this Rule.

(1) If the defendant remains in custody, the first appearance shall occur within 48 hours of a defendant's commitment to the county jail, and shall be before a judge with authority to set conditions of release for the offenses charged. However, if a motion for pretrial detention is filed at or prior to the first appearance for a person charged with homicide, the judge designated to preside over the centralized first appearance may conduct that proceeding in accordance with this Rule, except that conditions of pretrial release shall not be set.

(2) If a defendant is released on a complaint-summons, the first appearance shall be held no more than 60 days after the issuance of the complaint-summons or the defendant's arrest.

**(b) First Appearance; Where Held.** All first appearances for indictable offenses shall occur at a centralized location and before a judge designated by the Chief Justice. If the defendant is unrepresented at the first appearance, the court is authorized to assign the Office of the Public Defender to represent the defendant for purposes of the first appearance.

**(c) Procedure in Indictable Offenses.** At the defendant's first appearance before a judge, if the defendant is charged with an indictable offense, the judge shall:

(1) give the defendant a copy of the complaint, discovery as provided in subsections (A) and (B) below, and inform the defendant of the charge;

(A) if the prosecutor is not seeking pretrial detention, the prosecutor shall provide the defendant with a copy of any available preliminary law enforcement incident report concerning the offense and any material used to establish probable cause;

(B) if the prosecutor is seeking pretrial detention, the prosecutor shall provide the defendant with all statements or reports in its possession relating to the pretrial detention application. All exculpatory evidence must be disclosed.

(2) inform the defendant of the right to remain silent and that any statement may be used against the defendant;

(3) inform the defendant of the right to retain counsel and, if indigent, the right to be represented by the public defender;

(4) ask the defendant specifically whether he or she wants counsel and record the defendant's answer on the complaint;

(5) provide the defendant who asserts indigence with an application for public defender services, which the defendant shall complete and submit at that time for

immediate processing by the court, unless the defendant affirmatively and knowingly waives the right to counsel;

(6) inform the defendant that there is a pretrial intervention program and where and how an application to it may be made;

(7) inform the defendant that there is a drug court program and where and how to make an application to that program;

(8) inform the defendant of his or her right to have a hearing as to probable cause and of his or her right to indictment by the grand jury and trial by jury, and if the offense charged may be tried by the court upon waiver of indictment and trial by jury, the court shall so inform the defendant. All such waivers shall be in writing, signed by the defendant, and shall be filed and entered on the docket. If the complaint charges an indictable offense which cannot be tried by the court on waiver, it shall not ask for or accept a plea to the offense; and,

(9) set conditions of pretrial release, when appropriate as provided in Rule 3:26;

(10) schedule a pre-indictment disposition conference to occur no later than 45 days after the date of the first appearance; and

(11) in those cases in which the prosecutor has filed a motion for an order of pretrial detention pursuant to R. 3:4A, set the date and time for the required hearing and inform the defendant of his or her right to seek a continuance of such hearing.

**(d) Procedure in Non-Indictable Offenses.** At the defendant's first appearance before a judge, if the defendant is charged with a non-indictable offense, the judge shall:

(1) give the defendant a copy of the complaint and inform the defendant of the charge;

(2) inform the defendant of the right to remain silent and that any statement may be used against the defendant;

(3) inform the defendant of the right to retain counsel and, if indigent and entitled by law to the appointment of counsel, the right to be represented by a public defender or assigned counsel;

(4) assign counsel, if the defendant is indigent and entitled by law to the appointment of counsel, and does not affirmatively, and with understanding, waive the right to counsel; and

(5) set conditions of pretrial release as provided in Rule 3:26 if the defendant has been committed to the county jail.

**(e) Trial of Indictable Offenses in Municipal Court.** If a defendant who is charged with an indictable offense that may be tried in Municipal Court is brought before a Municipal Court, that court may try the matter provided that the defendant waives the

rights to indictment and trial by jury. The waivers shall be in writing, signed by the defendant, and approved by the county prosecutor, and retained by the Municipal Court.

**(f) Waiver of First Appearance By Written Statement.** Unless otherwise ordered by the court, a defendant who is represented by an attorney and is not incarcerated may waive the first appearance by filing, at or before the time fixed for the first appearance, a written statement in a form prescribed by the Administrative Director of the Courts, signed by the attorney, certifying that the defendant has:

(1) received a copy of the complaint and has read it or the attorney has read it and explained it to the defendant;

(2) understands the substance of the charge;

(3) been informed of the right to remain silent and that any statement may be used against the defendant;

(4) been informed that there is a pretrial intervention program and where and how an application to it may be made; and

(5) been informed of the right to have a hearing as to probable cause, the right to indictment by the grand jury and trial by jury, and if applicable, that the offense charged may be tried by the court upon waiver of indictment and trial by jury, if in writing and signed by the defendant.

At the time the written statement waiving the first appearance is filed with the court, a copy of that written statement shall be provided to the Criminal Division Manager's office and to the County Prosecutor or the Attorney General, if the Attorney General is the prosecuting attorney. The court shall also notify counsel of the date of the pre-indictment disposition conference, which shall occur no later than 45 days after the date of the first appearance.

**Note:** Source – R.R. 3:2-3(b), 8:4-2 (second sentence). Amended July 7, 1971 effective September 13, 1971; amended April 1, 1974 effective immediately; text of former Rule 3:4-2 amended and redesignated paragraphs (a) and (b) and text of former Rules 3:27-1 and -2 amended and incorporated into Rule 3:4-2, July 13, 1994 to be effective January 1, 1995; paragraphs (a) and (b) amended June 28, 1996 to be effective September 1, 1996; paragraph (b) amended January 5, 1998 to be effective February 1, 1998; caption amended, paragraphs (a) and (b) deleted, new paragraphs (a), (b), (c), and (d) adopted July 5, 2000 to be effective September 5, 2000; new paragraph (e) adopted July 21, 2011 to be effective September 1, 2011; paragraph (a) amended, new paragraph (b) added, former paragraphs (b), (c), and (e) amended and redesignated as paragraphs (c), (d), and (f), and former paragraph (d) redesignated as paragraph (e) April 12, 2016 to be effective September 1, 2016; paragraphs (a) and (b) amended, subparagraph (c)(1) amended, new subparagraphs (c)(1)(A) and (c)(1)(B) adopted, subparagraphs (c)(9) and (c)(10) amended, new subparagraph (c)(11) adopted, subparagraphs (d)(3) and (d)(4) amended, and new subparagraph (d)(5) adopted August 30, 2016 to be effective January 1, 2017; paragraph (a) amended December 6, 2016 to be effective January 1, 2017.

## Rule 3:4-3. Hearing as to Probable Cause on Indictable Offenses

(a) If the defendant does not waive indictment and trial by jury but does waive a hearing as to probable cause, the court shall forthwith bind the defendant over to await

final determination of the cause. If the defendant does not waive a hearing as to probable cause and if before the hearing an indictment has not been returned against the defendant with respect to the offense charged, after notice to the county prosecutor a judge of the Superior Court shall hear the evidence offered by the State within a reasonable time and the defendant may cross-examine witnesses offered by the State. If, from the evidence, it appears to the court that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind the defendant over to await final determination of the cause; otherwise, the court shall discharge the defendant from custody if the defendant is detained. Notice to the county prosecutor may be oral or in writing. An entry shall be made on the docket as to when and how such notice was given.

(b) After concluding the proceeding the court shall transmit, forthwith, to the county prosecutor all papers in the cause. Whether or not the court finds probable cause, it shall continue in effect any monetary bail previously posted in accordance with R. 3:26 or any other condition of pretrial release not involving restraints on liberty; and any monetary bail taken by the court shall be transmitted to the financial division manager's office. If the defendant is discharged for lack of probable cause and an indictment is not returned within 120 days, the bail shall thereafter be returned and conditions of pretrial release, if any, terminated.

**Note:** Source-R.R. 3:2-3(c). Paragraph designations added and paragraphs (a) and (b) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended June 15, 2007 to be effective September 1, 2007; paragraph (b) amended August 30, 2016 to be effective January 1, 2017.

### Rule 3:4-4. Proceedings in Arrest Under Uniform Fresh Pursuit Law

If an arrest is made in this State by an officer of another state in accordance with the provisions of N.J.S. 2A:155-1 to N.J.S. 2A:155-7, inclusive (Uniform Law on Fresh Pursuit), the officer shall take the arrested person, without unnecessary delay, before the nearest available judge who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the judge determines that the arrest was lawful, the judge shall commit the person to await, for a reasonable time, the issuance of an extradition warrant by the Governor of this State, or admit the person to monetary bail for such purpose. If the court determines that the arrest was unlawful it shall discharge the person arrested.

**Note:** Source -- R.R. 3:2-3(d), 8:3-3(d); amended July 13, 1994 to be effective September 1, 1994; amended August 30, 2016 to be effective January 1, 2017.

### Rule 3:4-5. Effect of Technical Insufficiency or Irregularity in the Proceedings

A defendant held in custody under a commitment after a hearing as to probable cause shall not be discharged nor shall such hearing be deemed invalid because of any technical insufficiency or irregularity in the commitment or prior proceedings not

prejudicial to the defendant, or because the offense for which the defendant is held to answer is other than that stated in the complaint or arrest warrant.

**Note:** Source__R.R. 3:2-3(e), 8:3-3(e).

### Rule 3:4-6. Pre-Indictment Disposition Conference

The court shall conduct a conference for the purpose of discussing and/or finalizing any pre-indictment dispositions. The conference shall be conducted on the record, in open court in the presence of the prosecutor, the defendant and defense counsel.

**Note:** Adopted April 12, 2016 to be effective September 1, 2016.

# APPENDIX 3

# REPORT OF THE SUPREME COURT'S COMMITTEE ON THE MUNICIPAL COURTS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of New Jersey:

The Supreme Court Committee on Municipal Courts herewith respectfully files its 1988 report.

Court Clerk (who is really the court administrator) and the Municipal Court Judge. Management of the individual Municipal Courts is a partnership or team venture requiring the participation of both the Court Clerk and the Municipal Court Judge.

An example of this is the establishment and implementation of a postponement policy by the Municipal Court. In each instance of postponement there is an exercise of discretion. Routine matters can be handled by administrative personnel headed by the Court Clerk. However, there are frequently instances requiring involvement of the Municipal Court Judge. Hence, implementation of the Task Force positions requires recognition of the roles played by these two components of Municipal Court management.

C. The Committee was asked by the Administrative Director to consider certain issues relating to the manner in which citizen complaints are filed. Judge Chester A. Morrison submitted a Report which raises these issues, responds to them, and concludes with his recommendations. The Committee adopted the Report of Judge Morrison which reads as follows:

> By R.3:2 the Supreme Court of New Jersey makes it very clear that when private citizens wish to file formal criminal complaints, the Municipal Courts of New Jersey should accept them without exception. The above appears to apply even when the prosecutor does not wish to pursue and/or prosecute the matter.
>
> N.J.S.A. 2A:158-4 gives the Attorney General and the County Prosecutor exclusive jurisdiction over the criminal business of the

State. In effect, the statute confers upon them the right to decide what should or should not be prosecuted. However, under R. 7:4-4(b) where the prosecutor does not appear, any attorney may appear on behalf of any complaining witness and prosecute the action in the name of the State or Municipality.

The following are inquiries made by the Administrative Office of the Courts together with responses thereto:

1. In the absence of a complaint filed by a law enforcement officer, is it the current practice in the municipal courts that there must be a civilian complaining witness (a person who alleges facts and signs a complaint under oath)without whom there will be no charge against a defendant?

RESPONSE:

With the exception of R. 7:3-2 (Notice in Lieu of Complaint), there must be a Civilian complaining witness in the absence of a complaint filed by a law enforcement officer. Otherwise, there is no formal complaint before the court.

2. If complaining witness refuses to sign a complaint after bringing facts to the attention of the police, prosecutor, or court clerk, can there still be a complaint filed in the name of the State?

RESPONSE:

Yes. But only with the consent or approval of the prosecutor. However, without other facts and evidence or a sworn statement by the complaining witness to pursue the complaint would appear futile.

3. If a complaint is signed in the name of the State, should it be signed by a policeman who hears the facts presented by the complaining witness?

RESPONSE:

Yes. Only with the consent or approval of the prosecutor. Since 2A:158-4 confers exclusive jurisdiction over criminal business to the prosecutor, the prosecutor may not be obligated to pursue the matter and the complaining witness is not obliged to obtain an attorney. Indictments are signed by the prosecutor without first-hand knowledge.

4. If that complaint can be filed in the name of the State, can we eliminate complaining witnesses as such?

RESPONSE:

Yes. The complaining party is always the State in a criminal action. The individual victim and/or complaining witness are those who may be called as witnesses.

5. Should the policeman have discretion to sign a complaint or not sign it based on his assessment of the facts regardless of the

desires (to proceed or drop the charges) of the "complaining witness?"

RESPONSE:

The police should never have the authority to unilaterally decide whether a citizens complaint should be filed. Such authority resides in the prosecutor pursuant to N.J.S.A. 2A:158-4 and to a lesser extent to the courts pursuant to R. 3:3-1.

6. Does the present system require revision to make clear to the public that all criminal offenses are against the State rather than against an aggrieved or "complaining witness," so that once the State (through the policeman) knows of the facts, a complaint goes forward regardless of the desires of a "complaining witness?"

RESPONSE:

Yes. However, this would eliminate the filing of formal criminal complaints by private citizens. The last sentence of R.3:2 needs to be deleted and legislation needs to be enacted requiring all municipal courts to have municipal prosecutors trained and/or under the direction of the State Attorney General's Office.

## RECOMMENDATIONS

The Supreme Court Committee on Municipal Courts has considered, at the request of the

Administrative Office of the Courts, the feasibility of discontinuing the current practice of accepting and filing of citizens' complaints as well as the steps necessary to implement the change.

The Committee respectfully and strongly recommends that the present practice remain in full force and effect until, at least, there are municipal prosecutors assigned to all municipal courts and trained by and/or under the direction of the State Attorney General's Office.

Annually at the New Jersey Conference for Municipal Court Judges, the Chief Justice of the New Jersey Supreme Court, or his representative, in very eloquent terms, has expressed the need for an effective municipal court system inasmuch as it is the most visible part of the judicial network. To change the current practice would in effect deny the citizen ready access and prompt resolution of problems which may be deemed to be very minor by others, but which are very real and burdensome to the citizens involved.

Very often, the citizen only wants and needs a forum to air and resolve problems quickly. To be able to appear before a court clothed with judicial responsibility and authority lends credibility and efficacy to, and general

acceptance by the citizen of, the outcome. There is no doubt by this Committee that the municipal court is that forum which should remain readily accessible to continue to accomplish that end.

D. Judge H. Robert Switzer submitted a written report for the Committee's consideration regarding the lack of sanctions in the "refusal" statute, N.J.S.A. 39:4-50.2, for failure to comply with IDRC requirements and proposed that this information be communicated to municipal court judges through the Municipal Court Bulletin Letter so that they may be aware of it before imposing sanctions for non-compliance on a defendant who has been convicted of the "refusal" statute only. Judge Switzer's proposal was adopted by the Committee and reads as follows:

> Persons convicted under the refusal statute only, N.J.S. 39:4-50.2a, and not convicted of an accompanying DWI charge, N.J.S. 39:4-50, are still obligated to attend the Intoxicated Driver Resource Center (hereinafter referred to I.D.R.C.).
>
> The following language, found in N.J.S. 39:4-50.4a, provides that:
>
> "In addition to any other requirements provided by law, a person whose operator's license is revoked for refusing to submit to a chemical test shall satisfy the requirements of a program of alcohol education or rehabilitation pursuant to the provisions of R.S. 39:4-50."

# REPORT OF THE SUPREME COURT

# COMMITTEE ON MUNICIPAL COURTS

# 1992 -1994 TERM

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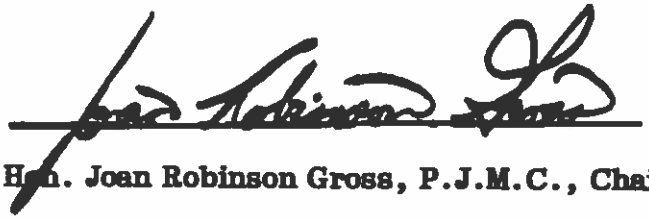
# INTRODUCTION

What follows is the Biennial Report to the Supreme Court for the 1992 -1994 Term. This report includes recommendations of this Committee for the Supreme Court's consideration.

The portion of the Report recommending a complete revision of Part VII of the Rules is the culmination of a four year effort that was initiated by the 1990-1992 Committee, Chaired by the Hon. Evan William Jahos, J.M.C. The Committee wishes to thank those members and staff who dedicated their skills and generously gave their time, including past members of Subcommittee on the Revision of Rule VII: Hon. Linda R. Feinberg, J.S.C., Hon. Samuel Serata, J.M.C., Hon. Fred J. Levin, J.M.C., and Mr. Francis X. Moore, Esq. Special thanks go to the Hon. H. Robert Switzer, J.M.C. who shepherded the developmental process during the entire four years with skill and dedication. The Committee also wishes to express its appreciation to the excellent staff support received from the Administrative Office of the Courts during the past four years, especially to Mr. Ira Scheff, Esq. who staffed the Committee during the 1990-1992 term and Mr. Lawrence E. Walton, Esq. who served as staff from 1992 to the present.

The Committee makes special mention of the late Mr. Alan Sant'Angelo, Esq. who generously contributed his considerable skills and expertise to the work of the Committee up until his untimely death last year.

Respectfully submitted,



Hon. Joan Robinson Gross, P.J.M.C., Chair

## A. REVISIONS TO RULE VII RECOMMENDED FOR ADOPTION

### Introduction

In State v. Gonzalez, 114 N.J. 592 (1989), the Supreme Court found that an independent probable cause determination for complaints charging the commission of traffic offenses was not required. The Court specifically limited its holding to traffic offenses but noted that two Appellate Division decisions required a probable cause determination in non-traffic offenses. (See State v. Ross, 189 N.J. Super. 67 (App. Div. 1983) which held that a summons may not issue where a private citizen files a complaint unless there is a finding of probable cause by an independent judicial official, and State v. Salzman, 228 N.J. Super. 109 (App. Div. 1987) which held that a probable cause determination is required on a complaint signed by a police officer after the issuance of a summons).

In Gonzalez, supra, the Court held that Rule VII of the Court Rules applied to Municipal Court traffic cases, but noted that in certain non-traffic cases, Rule VII requires a probable cause determination before process is issued. Rule VII references Rule III and makes it applicable to non-indictable offenses (non-traffic) in Municipal Court. The Court suggested that the cross reference in Rule VII to Rule III could be subject to interpretation and stated that, "[f]aced with a disparate interpretation of the Rules ... we must conclude that despite our confidence in our reading of them, they are in need of clarification. Accordingly, we ask the Committee on Criminal Practice and the Committee on Municipal Courts jointly to inform us of any revisions in the Rules necessary in light of this decision. We leave

it to those Committees to determine whether any further advantage may be achieved through the clarification of the Rules on related issues....".

Based upon the Court's mandate in Gonzalez, the Criminal Practice Committee and the Municipal Court Practice Committee formed a joint subcommittee to review Rules III and VII. That subcommittee's report provided the basis for the recommendations made by this Committee.

The Municipal Practice Committee viewed the Court's mandate broadly; the entire part VII was reviewed. Necessary revisions were identified and made. The proposed revision of Part VII is in keeping with the goal of the Supreme Court set out in the 1985 Task Force on Municipal Courts to improve the quality of municipal courts.

One problem identified dealt with reliance in the rules with cross references. Part VII's reference to part III leads to different interpretations such as discussed in Gonzalez, supra. While it is true that the Municipal Court must be viewed as an integral part of the court system with the Superior Court, especially in the criminal area, many of the Part III rules make little or no sense when used in Municipal Court practice. The Committee's revision of Part VII reflects the efficacy of an independent set of rules without reference, with a few minor exceptions, to any other part of the court rules.

It should be noted that subsequent to the Committee's approval of the revision to Part VII new legislation was adopted affecting the Municipal Courts See L. 1993, c. 293 effective February 15, 1994. The legislation may require some technical

changes to the Rules presented in this section of the Report. The Committee will submit technical revisions to the Court if it is required after review of the statute.

What follows is the Committee's recommended complete revision of Part VII of the Rules of Court made after extensive deliberation and some consultation with the Criminal Practice Committee. Some of the changes are technical, others are substantive, all of them have been made to achieve clarity in the rules. The comment to each of the rules explain the changes in that rule. Some rules have been repeated verbatim from Part III of the Rules because they are equally applicable to Superior as well as Municipal Court practice. As a whole the package is designed to simplify and clarify the procedures and to tailor them to the practical aspects of Municipal Court practice.

**RULE 7:1 SCOPE**

The rules in Part VII [together with the rules in Part III, insofar as applicable and unless otherwise expressly provided by law or these rules] shall govern the practice and procedure in all criminal, quasi-criminal, [and] penal and civil penalty actions in the [municipal courts] Municipal Courts and [all] any such actions transferred from a [municipal court] Municipal Court to the Superior Court [, Chancery Division, Family Part pursuant to R. 5:1-2(c) and R. 5:1-3(b)(2). Whenever approval is given for the exercise of such jurisdiction by the Special Civil Part in a particular county, the court may be divided by the Chief Justice into sections for separate hearings of civil and criminal matters] for trial as Municipal Court actions. In addition those sections of Part I, R. 3:23, R. 3:24, R. 5:7A, and any other rule relevant to Municipal Court practice shall be applicable.

[Note: Source -- R.R. 8:1-1, 8:12-1. Amended June 29, 1973 to be effective September 10, 1973; amended July 21, 1978 to be effective immediately; amended December 20, 1983 to be effective December 31, 1983; amended November 7, 1988 to be effective January 2, 1989.]

**COMMENTARY**

The 1994 Revision to the Rules in Part VII is the most comprehensive revision to Part VII yet promulgated by the Supreme Court. This revision was engendered by the Superior Court and Supreme Court decisions in State v. Gonzalez, 114 N.J. 592 (1989) and a perception among veterans of the Municipal Court bench and bar that the constant cross-referencing between Part III and Part VII was causing, at

the very least, a fair degree of confusion in the interpretation of Part VII as the Rules applied to Municipal Court practice. Intended to eliminate this cross-referencing of both Part III and Part IV to Part VII, the Part VII Rules, with a few minor exceptions, can now stand alone in providing procedural guidance for municipal court practice to the Municipal Court bench, bar and pro se litigants.

The latest revision has been written in a style that will be equally understood by the practitioner and pro se litigant. In addition to eliminating all cross-references to other parts of the Rules, the revision makes several other changes to the existing Rules, designed to make the Municipal Courts even more responsive to the people they serve.

[RULE 7:2. INDICTABLE OFFENSES; PROCEEDINGS UNDER UNIFORM FRESH PURSUIT LAW

The provisions of R. 3:2 (complaint), R. 3:3 (warrant or summons upon complaint) and R. 3:4-1, 3:4-2, 3:4-3 and 3:4-5 (proceedings before the committing judge) are applicable to the municipal courts in respect of indictable offenses; the provision of R. 3:4-4 are applicable to such courts in proceedings under the Uniform Fresh Pursuit Law.

Note: Source -- R.R. 8:3-1(a) (first four sentences), 8:3-2(a)(1), 8:3-2(a)(2) (first, second, fifth sixth sentences), 8:3-2(b)(1) (first, second, third sentences), 8:3-2(b)(2) (first, second sentences), 8:3-2(c)(1), 8:3-2(c)(2), 8:3-2(c)(3)(i)(ii)(iii) (first sentence, first clause), 8:3-2(c)(4), 8:3-2(d)(1)(2), 8:3-3; amended July 26, 1984 to be effective September 10, 1984.]

RULE 7:2. COMPLAINT: CONTENTS, FORM, OATH OR CERTIFICATION, FILING, SERVICE

7:2-1 Contents of Complaint [;], Arrest Warrant [or] and Summons; [Preliminary Hearing]

(a) Complaint. The complaint shall be a written statement of the essential facts constituting the offense charged made on a form approved by the Administrative Director of the Courts. All complaints except complaints for traffic offenses, as defined in subsection (d) and (e) of this rule where made on Uniform Traffic Tickets and complaints for non-indictable offenses made on the Special Form of Complaint and Summons, shall be on oath or by certification before a judge or other person authorized by N.J.S.A. 2A:8-27 to take complaints. The municipal court administrator or deputy court administrator shall accept for filing any complaint made by any person.

(b) Summons. A summons shall be made on a Complaint-Summons form, a Uniform Traffic Ticket, or a Special Form of Complaint and Summons. The summons shall be directed to the person named in the complaint, requiring that person to appear before the court in which the complaint is made at a stated time and place and shall inform the person that an arrest warrant will be issued for failure to appear. The summons shall be signed by the judicial or law enforcement officer issuing it.

(c) Arrest warrant. An arrest warrant shall be made on a Complaint-Warrant form. The warrant shall contain the defendant's name or if that is unknown, any name or description which identifies the defendant with reasonable certainty, and shall be directed to any officer authorized to execute it, ordering that the defendant be arrested and brought before the court that issued the warrant. The warrant

shall be signed by the judge, municipal court administrator, or deputy court administrator.

(d) (1) **Traffic Offenses.** The Administrative Director of the Courts shall prescribe the form of a complaint with summons to be used for all traffic offenses. On a complaint and summons for a non-moving traffic offense, in lieu of the name of the defendant, it shall be sufficient to set forth the license number of the vehicle involved, and it shall be presumed that the owner of the vehicle is the defendant charged with the violation.

(2) **Issuance.** The complaint may be made and signed by a law enforcement officer, or by any other person, but the summons shall be signed and issued only by such officer, or the judge, administrator or deputy administrator of the court in which the complaint is, or is to be filed.

(3) **Records and Reports.** Each court shall be responsible for all uniform traffic tickets printed and distributed to law enforcement officers or others in his municipality, and for their proper disposition, and shall prepare or cause to be prepared such records and reports relating to such uniform traffic tickets as the Administrative Director of the Courts prescribes. The provisions of this paragraph shall also apply to the Director of the Division of Motor Vehicles and the Superintendent of State Police, in the Department of Law and Public Safety and to the responsible official of any other agency authorized by the Administrative Director of the Courts to print and distribute the uniform traffic ticket to its law enforcement personnel.

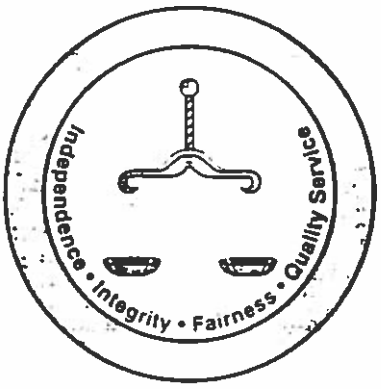
# 1998-2000 REPORT

# OF

# THE SUPREME COURT COMMITTEE

# ON

# MUNICIPAL COURTS




**Submitted January 18, 2000**

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## I. PROPOSED RULE AMENDMENTS RECOMMENDED

### A. Proposed Amendment to R. 7:2-2(a)(1) - Issuance of Arrest Warrant or Summons

The Supreme Court Committee on Criminal Practice (the Criminal Practice Committee) recommended that R. 3:3-1(f) be amended to eliminate the requirement that notice be given to the complainant, the defendant and the prosecutor when the court administrator does not find probable cause to issue process and refers the matter to the judge. The Criminal Practice Committee opined that this provision of the rule is being misconstrued or ignored. In some instances, municipal courts are interpreting the provision to mean that a plenary hearing is required to determine if sufficient probable cause exists to issue process. In other instances, municipal courts are ignoring the notice requirement and neglecting to send out notices regarding a probable cause determination. The Criminal Practice Committee made it clear that this amendment would only apply in cases where a probable cause determination is being made on an indictable offense heard in municipal court, or in the determination of all cases (indictable and non-indictable offenses) in Superior Court.

The Supreme Court Committee on Municipal Courts (the Committee) agreed with the Criminal Practice Committee's reasons for amending R. 3:3-1(f). Further, the Committee recommends amending the analogous Part VII rule, R. 7:2-2(a)(1), to eliminate the requirement that the complainant, defendant and prosecutor be given notice of probable cause hearings. This will conform the Municipal Court Practice rule to the Criminal Practice rule. It should also eliminate the need for the municipal court to use two procedures when making a probable cause determination, i.e., not giving notice where the charges being reviewed are indictable offenses and providing notice where the charges are non-indictable.

The proposed amendment to R. 7:2-2(a)(1) follows.

**STATE OF NEW JERSEY, Plaintiff, v. WILLIAM KINDER, Defendant**

**Criminal No. 88-306**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

***701 F. Supp. 486; 1988 U.S. Dist. LEXIS 14330***

**December 15, 1988, Decided**
**December 15, 1988, Filed**

**DISPOSITION:** [**1] Defendant's motion to dismiss will be denied.

**COUNSEL:** Samuel A. Alito, Jr., Esq., United States Attorney, By: James C. Woods, Assistant United States Attorney, Newark, New Jersey, Attorney for Defendant.

Deborah Hadley, Pro Se, New Brunswick, New Jersey.

**JUDGES:** Dickinson R. Debevoise, United States District Judge.

**OPINION BY:** DEBEVOISE

**OPINION**

[*487] DICKINSON R. DEBEVOISE, UNITED STATES DISTRICT JUDGE

NATURE OF THE CASE

This is a criminal case instituted by a private complainant, Deborah Hadley, who charged defendant William Kinder with simple assault and battery in violation of N.J. Stat. Ann. 2C:12-1a. The Municipal prosecutor is not prosecuting this action. Until after argument of the motion addressed in this opinion, Ms. Hadley represented herself, but at trial she will prosecute the action through her private attorney pursuant to New Jersey Municipal Court Rule 7:4-4(b). This case was removed by defendant from the Municipal Court of New Brunswick, New Jersey, to this court pursuant to *28 U.S.C. § 1442(a)*. Defendant's motion to dismiss pursuant to *Fed. R. Crim. P. 12(b)* is presently before the court. Defendant contends, *inter alia*, that the authorization in Rule 7:4-4(b) for the use of a private prosecutor is unconstitutional. Despite certification by this court pursuant to *28 U.S.C.* [**2] *§ 2403(b)*, the New Jersey Attorney General's Office has declined to exercise its right to intervene.

FACTS

Defendant has related the following facts in an affidavit. Ms. Hadley works as a letter carrier in the New Brunswick Section of the United States Post Office in New Brunswick, New Jersey. On June 30, 1988, defendant was the acting supervisor of the North Brunswick Section of that office. It was his responsibility to assure that the letter carriers who serve North Brunswick picked up mail at the post office and delivered it to the residents of North Brunswick.

On June 30, Ms. Hadley was on "partial disability" which restricted her from actually delivering the mail. Instead, she was responsible for casing the mail for delivery. Defendant contends that on numerous occasions on the day in question he observed that Ms. Hadley was not doing her job, but was conducting non-work related conversations with other postal employees. Defendant claims that Ms. Hadley twice refused to obey defendant's order to leave the work floor so that he could reprimand her in private. Ms. Hadley charges that sometime after these refusals defendant committed an assault and battery by pushing her with [**3] his body.

A summons was issued to the defendant by the New Jersey Municipal Court on July 7, 1988. The summons and complaint charge defendant with simple assault and battery in violation of N.J. Stat.Ann. 2C:12-1a. The maximum penalty for such an offense is six months in prison and a fine of $ 1,000. *N.J. Stat. Ann. 2C:43-3*, 43-8. [1]

1 The statute provides:

a. **Simple assault.** A person is guilty of assault if he:

(1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(2) Negligently causes bodily injury to another with a deadly weapon; or

(3) Attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a disorderly persons offense . . .

The New Jersey Code of Criminal Justice provides that disorderly persons offenses are not considered crimes under the New Jersey Constitution and thus do not entail the right to indictment by grand jury or trial by jury. *N.J. Stat. Ann. 2C:1-4.* The Code further provides that "conviction of such offenses shall not give rise to any disability or legal disadvantage based on the conviction of a crime." *Id*.

On July 29, 1988, defendant removed the Municipal [**4] Court action to this court pursuant to *28 U.S.C. § 1442(a)*. In a letter to defense counsel after the case was removed, the Municipal Prosecutor declined [*488] to prosecute stating that his "prosecutorial powers are limited to the Municipal Court, City of New Brunswick" and therefore it is "inappropriate" for him to prosecute matters in any other court. The prosecutor also stated that "Citizen Complaints" like the one involved in this matter "are not prosecuted by the Municipal Prosecutor."

DISCUSSION

A threshold issue to be resolved in this case is whether New Jersey Municipal Court Rule 7:4-4(b) must be applied, despite the fact that this former Municipal Court action was removed to federal court. It is firmly established that when a criminal case is removed from state to federal court, the federal court must conduct the trial under federal rules of procedure, while applying the criminal law of the state. *Arizona v. Manypenny, 451 U.S. 232, 241, 68 L. Ed. 2d 58, 101 S. Ct. 1657 (1981) rehearing denied, 452 U.S. 955, 69 L. Ed. 2d 965, 101 S. Ct. 3100* (citing *Tennessee v. Davis, 100 U.S. 257, 271-72, 25 L. Ed. 648 (1880))*. There is, however, sound authority which requires that Rule 7:4-4(b) be applied in this case.

New Jersey Municipal Court Rule 7:4-4(b) [**5] provides:

Appearance of Prosecution. Whenever in his judgment the interests of justice so require, or upon the request of the court, the Attorney General, county prosecutor, municipal court prosecutor, or municipal attorney, as the case may be, may appear in any court on behalf of the state, or of the municipality, and conduct the prosecution of any action, but if the Attorney General, county or municipal court prosecutor or municipal attorney does not appear, **any attorney may appear on behalf of any complaining witness and prosecute the action on behalf of the state or the municipality.**

(emphasis added). [2] This Rule contains both procedural and substantive rights, allowing a complaining witness who is the victim of a disorderly persons offense to enforce the criminal law in cases where the state or municipality lacks the resources to do so. [3] The importance of the Rule becomes evident when one realizes that absent its use, disorderly persons offenses would go unprosecuted, harming not only the state's interest in enforcing its laws, but also the victim's (if not society's) interest in obtaining satisfaction for wrongs committed. Beyond the importance of this rule, it [**6] is significant that there is no provision of the Federal Rules of Criminal Procedure which conflicts with its provisions. Thus, the instant case does not present circumstances previously addressed by the Supreme Court in the context of civil removal cases. Those civil cases involved circumstances where a state procedural rule conflicted with a federal rule; in such circumstances the Court required that federal courts exclusively apply the federal rule. *See e.g., Burlington Northern R. Co. v. Woods, 480 U.S. 1, 94 L. Ed. 2d 1, 107 S. Ct. 967 (1987)*; *Hanna v. Plumer, 380 U.S. 460, 469-74, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965)*.

2 This Rule is part of the New Jersey Court Rules promulgated by the Supreme Court of New Jersey under the authority of *Article VI, Section II, paragraph 3 of the New Jersey Constitution* of 1947 which provides in part: "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts."

3 In *Voytko v. Ramada Inn of Atlantic City, 445 F. Supp. 315, 328 n.21 (D.N.J. 1978)*, Judge Gerry (now Chief Judge) discussed Rule 7:4-4(b) as follows:

> . . . it is common for disorderly persons offenses to be tried before the magistrate by private counsel on behalf of the complaining witness because many localities lack prosecutorial resources; the prosecution of such offenses by appointed counsel fills a public need and advances the criminal process.

> While I share in the observations of Chief Judge Gerry, the failure of the New Jersey Attorney General's Office to intervene in this matter has made it difficult to make additional findings of fact with respect to the use of Rule 7:4-4(b) in New Jersey municipal courts.

[**7] The present case presents issues similar to those discussed by the Supreme Court in *Arizona v. Manypenny, 451 U.S. 232, 68 L. Ed. 2d 58, 101 S. Ct. 1657 (1981)*, a criminal removal case. In *Manypenny*, the Court confronted the delicate balance between state and federal law which is involved in [*489] criminal cases removed from state to federal court under *28 U.S.C. § 1442(a)*. The defendant in *Manypenny* was a Border Patrol Agent with the Immigration and Naturalization Service ("INS"), who was charged in state court with the state offense of assault with a deadly weapon. The state court action was removed to federal district court because the defendant committed the alleged assault while on duty with the INS. After the defendant was found guilty by a jury, the district court, acting *sua sponte*, granted a motion for acquittal based on federal immunity, despite the fact that immunity was not raised as a defense at trial. The state timely filed an appeal with the Court of Appeals, but that appeal was dismissed based on a lack of jurisdiction. The Court of Appeals held that a criminal proceeding removed under *28 U.S.C. § 1442(a)(1)* was governed by federal law which did not provide a right for a state to appeal a [**8] criminal case in federal court. Thus, the Court of Appeals held that the state could not appeal the district court's decision.

Reversing the Court of Appeals, the Supreme Court held that Arizona could rely on appellate authorization under state law as a basis for its right to appeal. [4] The *Manypenny* Court held that it "would be anomalous to conclude that the State's appellate rights were diminished solely because of removal." *451 U.S. at 243*. The Court further held:

> . . . the invocation of removal jurisdiction by a federal officer does not revise or alter the underlying law to be applied. In this respect, it is purely a derivative form of jurisdiction, neither enlarging nor contracting the rights of the parties.

*451 U.S. at 242*. The *Manypenny* Court also recognized a "'strong judicial policy against federal interference with state criminal proceedings.'" *Id. at 243* (citing *Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975))*. Moreover, the Court stressed that the purpose of *section 1442(a)(1)* is to ensure a neutral forum for federal employees who might be subject to prejudice in state courts and not to alter the rights of parties provided by state law. *Id. 451 U.S. at 242*. [**9]

> 4 Since *Manypenny* involved federal appellate jurisdiction it was necessary for the Court to determine not only whether Arizona had the right to appeal, but also whether the federal courts had appellate jurisdiction to hear such an appeal. The Court found that *28 U.S.C. 1291* permits a state to appeal to the Court of Appeals if the state is authorized to do so by state law. *Manypenny, 451 U.S. at 249*. This issue of appellate jurisdiction is not relevant to the instant matter.

In the instant matter, as in *Manypenny*, it would be anomalous to conclude that the state's right to prosecute the defendant through the use of a private attorney was diminished solely because of removal. *See Manypenny, 451 U.S. at 253*. If this case were tried in New Brunswick Municipal Court where it originated, it is beyond question that a private attorney could prosecute the disorderly persons charge initiated by Ms. Hadley. It would therefore be unjust for this court to dismiss this prosecution merely because it was removed to federal court. As noted above, the inadequate resources of municipal prosecutors necessitates the use of private attorneys. To refuse to permit private attorneys to [**10] appear in federal court would create an undesirable double standard wherein federal employees who commit a disorderly persons offense would not be prosecuted, while all other citizens of New Jersey would be. Such a result ignores both the limited purpose of federal removal provisions and the strong judicial policy against federal interference with state criminal proceedings recognized in *Manypenny* and *Huffman, supra.* For these reasons, I find that New Jersey Municipal Court Rule must be applied in this case.

Having found that Rule 7:4-4(b) is applicable to this case, it is necessary to consider defendant's contention that the Rule violates his constitutional right to due process, including his right to a fair trial. *See e.g., Strickland v. Washington, 466 U.S. 668, 684-85, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)* (discussing the right [*490] to

a fair trial as an element of the Due Process Clause and the *Sixth Amendment*). The defense contends that permitting Ms. Hadley's attorney to prosecute defendant would be unconstitutional because there is an impermissible conflict of interest between Ms. Hadley's attorney's role as private counsel and his role as the prosecutor in this case. More specifically, defendant [**11] argues that there is an inherent conflict which exists when a prosecutor has a pecuniary or other interest in the outcome of a criminal prosecution. Such a conflict was acknowledged in *United States v. Heldt, 215 U.S. App. D.C. 206, 668 F.2d 1238, 1277 (D.C. Cir. 1981) cert. denied, 456 U.S. 926, 72 L. Ed. 2d 440, 102 S. Ct. 1971 (1982)*, where the Court stated:

> . . . a public prosecutor, as the representative of the sovereign, must "seek justice -- to protect the innocent as well as to convict the guilty." . . .
>
> Our system of justice accords the prosecutor wide discretion in choosing which cases should be prosecuted and which should not. If the prosecutor's personal interest as the defendant in a civil case will be furthered by a successful criminal prosecution, the criminal defendant may be denied the impartial objective exercise of that discretion to which he is entitled.

*Id. at 1275-76*. The defense in this case contends that this type of conflict renders Ms. Hadley's private attorney incapable of both faithfully representing Ms. Hadley's interests and simultaneously exercising the duties of a prosecutor. Those prosecutorial duties include the duty to disclose evidence favorable to the accused, *see Brady v. Maryland*, [**12] *373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*; *State v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)* (discussing the various duties of a criminal prosecutor), and the duties imposed by the New Jersey Rules of Professional Conduct which impose additional disclosure requirements and require that a prosecutor refrain from prosecuting a charge which is not supported by probable cause. [5]

> 5 Rule 3.8 of the New Jersey Rules of Professional Conduct provides, in part:
>
> The prosecutor in a criminal case shall:
>
> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
>
> * * * *
>
> (d) make timely disclosure to the defense of all evidence known to the prosecutor that supports innocence or mitigates the offense . . .

Defendant urges that the holding in *Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 95 L. Ed. 2d 740, 107 S. Ct. 2124 (1987)* requires that this court forbid the prosecution of defendant by a private attorney. In *Vuitton*, the Supreme Court reversed the criminal contempt convictions of five defendants who allegedly violated a preliminary injunction prohibiting them from further infringing on a leather-goods manufacturer's trademark. The Court reversed the convictions because [**13] defendants were prosecuted by private attorneys who had represented the leather-goods manufacturer in the underlying trade mark litigation. *Vuitton*, however, is distinguishable in two important respects from the issue presented here. First, *Vuitton* involved a criminal contempt proceeding in the federal courts which was disposed of not on constitutional grounds, but rather on the Supreme Court's use of its supervisory power. [6] Second, the defendants in *Vuitton* were given sentences ranging up to five years, far exceeding the maximum exposure for a disorderly persons offense which is the subject of the present case.

> 6 The *Vuitton* Court stated: "we rely on our supervisory authority to avoid the necessity of reaching any constitutional issues." *481 U.S. at 809 n.21, 107 S. Ct. at 2138 n.21, 95 L. Ed. 2d at 760 n.21*.

Despite the fact that *Vuitton* is not controlling here, it is useful in identifying areas of concern which arise when a private attorney is allowed to conduct a criminal prosecution. These concerns are present even in a case like the present one involving a disorderly persons offense. They are not, however, of the same magnitude in such cases. The *Vuitton* Court noted the intolerable ethical tension [**14] which resulted when a private litigator, who had "an interest in obtaining the benefits of the court's [*491] order," acted as the criminal prosecutor, who is supposed to be "appointed solely to pursue the public interest in vindication of the court's authority." *481 U.S. at 804, 107 S. Ct. at 2136, 95 L. Ed. 2d at 757*. To be sure, this ethical tension is also present in the instant matter, where a private attorney is hired by the complaining witness to prosecute a disorderly persons

offense. It cannot be denied that Ms. Hadley's attorney may have an interest, albeit speculative, in fees resulting from a civil suit which may follow this action if the defendant is convicted. Similarly, her attorney has duties owing to her as a paying client which may conflict with the duties of a criminal prosecutor. However, any conflict of interest arising out of the situation presented here does not constitute a violation of due process under the circumstances of this case. [7]

7 Absent a violation of defendant's constitutional rights, there is no basis for invalidating the use of a private prosecutor in this case. Unlike the Court in *Vuitton*, this court may not use its supervisory power to invalidate this practice because it is authorized by state law and is not a product of the federal courts' inherent power.

[**15] State courts which have invalidated criminal prosecutions by private attorneys have done so in cases involving serious crimes and those involving situations where a public prosecutor has expressly refused to prosecute the defendant. [8] There is, however, a dearth of cases which discuss private prosecutions of disorderly persons charges or other petty offenses. One lower New York court considering this issue noted: "the right of the complainant to prosecute the case by himself or to hire an attorney to assist him has never been doubted." *People v. Wyner, 207 Misc. 673, 142 N.Y.S.2d 393* (County Court, Westchester County, 1955); *see also, People on Complaint of Allen v. Citadel Management Co., Inc., 78 Misc. 2d 626, 631, 355 N.Y.S.2d 976* (Criminal Court, City of New York 1974), *rev'd. on other grounds, 80 Misc. 2d 668, 365 N.Y.S.2d 121 (1975).*

8 *See e.g., State v. Harton, 163 Ga. App. 773, 296 S.E.2d 112 (1982)* (prohibiting private prosecution for vehicular homicide absent consent and oversight of the district attorney); *State ex rel. Wild v. Otis, 257 N.W.2d 361 (Minn. 1977), appeal dismissed, 434 U.S. 1003, 54 L. Ed. 2d 746, 98 S. Ct. 707 (1978)* (where county attorney refused to prosecute and grand jury refused to indict on charges of perjury conspiracy and corruptly influencing a legislator, private citizen could not prosecute and maintain such charges; dicta suggesting this might be permissible with legislative approval and court appointed private attorney as prosecutor); *see also, Commonwealth v. Eisemann, 308 Pa. Super. 16, 453 A.2d 1045 (1982)* (Pennsylvania Rules of Civil Procedure require that a person who is not a police officer must get the district attorney's approval to file felony or misdemeanor charges which do not involve a clear and present danger to the community); *People ex rel. Luceno v. Cuozzo, 97 Misc. 2d 871, 412 N.Y.S.2d 748* (City Court, White Plains 1978) ("exercising its discretion," court prohibits private criminal prosecution against police officer where complainant was charged with a criminal offense arising out of same occurrence).

[**16] I am mindful that the issue here concerns a widespread practice in the municipal courts of New Jersey and embodied in Rule 7:4-4(b) which allows citizens to enforce the laws of the state in instances where the municipal prosecutor routinely does not prosecute because of a lack of resources. [9] As I noted earlier, it is apparent that the practicalities of the situation are such that absent this practice the sanctions of the disorderly persons statutes would be unavailable in large numbers of cases throughout New Jersey. Moreover, the possible intrusions which the practice under Rule 7:4-4(b) may impose on the liberty interests of an accused is minimal, since the Rule only applies to cases before the Municipal Court which has jurisdiction over a limited number of criminal offenses which are accompanied by jail terms not exceeding six months and fines not exceeding $ 1,000. *N.J. Stat. Ann. 2A:8-21*; 2C:43-3, 43-8. The United States Supreme Court has itself recognized that the full panoply of procedural protections is not required where lesser charges are involved and minimal punishment is authorized. *See e.g., Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88* [*492] *S. Ct. 1444 (1968)* (right to trial by jury provided [**17] in *Bill of Rights* does not apply to crimes with possible penalties of six months or less, if such crimes otherwise qualify as petty offenses). This rationale would seem to apply with full force in the present situation.

9 The practice of using private attorneys to prosecute criminal offenses is apparently derived from English common law. Until the late nineteenth century English criminal procedure relied heavily on a system of private prosecution even for serious offenses. PLOSCOWE, 48 Harv. L. Rev. 433, 469-71 (1935).

There are several compelling reasons to uphold New Jersey's Municipal Court Rule. The Rule facilitates a kind of peoples' court wherein citizens may bring their disputes and uphold the laws of the community through the uncomplicated procedures of the municipal court. While there is the possibility of frivolous suits and vindictive behavior by some complainants, abuses are checked and deterred by the court's discretion and by the various other remedies available for malicious prosecution. The possibility for prosecutorial abuses under this system is not fantasy, but in the present case there is little chance that the defendant will suffer even the slightest injustice, [**18] especially considering the quality of

his defense. It is indeed a rare instance where, as here, a defendant charged with a disorderly persons offense has the Office of the United States Attorney and all of its resources at his disposal to defend against the charge.

It is important to emphasize that this is not a case involving an offense arising under federal law subject to prosecution by federal authorities. Nor is this a prosecution for a felony or misdemeanor which can result in a criminal record, a lengthy jail term and a loss of certain privileges of citizenship. This is not a prosecution for criminal contempt which also involves the possibility of a lengthy jail term in addition to the more concrete conflicts of interest which exist when an attorney prosecutes a person in a criminal matter while simultaneously representing that person's opponent in an underlying civil matter. *See, e.g., Vuitton, supra*. This is also not a case where the public prosecutor has declined to prosecute the defendant after expressly finding that there is no probable cause for such action. In all of those cases, I have no doubt that a private attorney would be precluded by the United States Constitution, [**19] the federal courts' supervisory power and/or federal statutes and rules from conducting a criminal prosecution. The instant case, however, is decided in the context of a state disorderly persons charge where the term of imprisonment does not exceed six months.

For the reasons set forth above, defendants' motion to dismiss will be denied. [10]

10 After the denial of this motion, but before issuance of this opinion, a trial was held and the defendant William Kinder was found not guilty.

**STATE OF NEW JERSEY, PLAINTIFF-APPELLANT, v. RICHARD STORM, DEFENDANT-RESPONDENT.**

**A-150 September Term 1994**

**SUPREME COURT OF NEW JERSEY**

***141 N.J. 245*; *661 A.2d 790*; *1995 N.J. LEXIS 326***

**May 1, 1995, Argued**
**July 17, 1995, Decided**

**PRIOR HISTORY:** [***1] On appeal from the Superior Court, Appellate Division, whose opinion is reported at *278 N.J. Super. 287, 650 A.2d 1031 (1994).*

**SYLLABUS**

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

*STATE OF NEW JERSEY V. RICHARD STORM* (A-150-94)

Argued May 1, 1995 -- Decided July 17, 1995

POLLOCK, J., writing for a unanimous Court.

The issue on appeal is whether *Rule 7:7-4(b)* permits private counsel for a complainant to prosecute a complaint in the municipal court. Under *Rule 7:7-4(b)*, at the request of the prosecutor, or if the prosecutor does not appear, any attorney may appear on behalf of any complaining witness and prosecute the action for and on behalf of the State or the municipality.

The Woodbridge Municipal Court permitted Robert Hedesh, Esq., private counsel for complainant, Pamela Young, to prosecute Young's complaints against Richard Storm for stalking and harassment. Woodbridge does employ a prosecutor, [***2] but he or she does not prosecute private complaints.

While the municipal court charges were pending against him, Storm filed a civil complaint against Young. The complaint alleged that Young intentionally had issued to Storm a bad check for vacation expenses. Hedesh represented Young in defending that complaint.

In the municipal court, Storm's attorney, Richard Lehrich, Esq., moved to disqualify Hedesh as a prosecutor. Lehrich argued that Hedesh's representation of Young in the civil action prevented him from acting as an impartial prosecutor. The municipal court denied the motion and permitted Hedesh to prosecute the municipal court complaint. The Law Division denied Storm's motion for leave to appeal.

The Appellate Division granted leave to appeal and reversed, finding that Hedesh had a conflict of interest that impinged on Storm's right to a fair trial. The Appellate Division directed the municipal court to order the municipal prosecutor to prosecute the complaints.

The Supreme Court granted the Middlesex County Prosecutor's motion for leave to appeal.

HELD: Whenever an attorney for a private party applies to prosecute a complaint in the municipal court, the court should [***3] determine whether to permit the attorney to proceed. Because Hedesh's obligations to Young as her private attorney creates at least the appearance that he could not act as a private prosecutor with impartiality, Hedesh should not be allowed to prosecute Storm.

1. *Rule 7:4-4(b)* perpetuates the practice of private prosecution, which has its origins in ancient England. Both this Court and the Legislature continue to recognize the role of private prosecutors. Because of the heavy caseload, municipal prosecutors cannot prosecute every complaint. By permitting private citizens, acting either on their own or through private counsel, to appear in municipal court *Rule 7:4-4(b)* facilitates access to municipal courts. Of course, the defendant has a right to a fair trial before an impartial judge and that need for impartiality extends beyond the judge to the prosecutor. (pp. 4-10)

2. To assist municipal courts in the exercise of their discretion, it is requested that the Committee on Municipal Courts to recommend guidelines governing the appointment of private prosecutors in municipal courts. Until then, an attorney wishing to appear as a private prosecutor should notify the [***4] municipal prosecutor and the court. If the municipal prosecutor insists on proceeding with the prosecution, that decision should be final. In all other cases, the private attorney should disclose in a written certification all facts that foreseeably may affect the fairness of the proceeding. The propriety of appointing a private prosecutor will vary from case-to-case, depending on the facts of each case. (pp. 10-13)

3. The burden on Storm's right to a fair trial and on the public interest in an impartial proceeding outweighs any benefit that would accrue from permitting Hedesh to proceed as the prosecutor. (pp. 13-14)

Judgment of the Appellate Division is AFFIRMED.

CHIEF JUSTICE WILENTZ and JUSTICES HANDLER, O'HERN, GARIBALDI, STEIN and COLEMAN join in JUSTICE POLLOCK's opinion.

**COUNSEL:** *Simon Louis Rosenbach*, Assistant Prosecutor, argued the cause for appellant (*Robert W. Gluck*, Middlesex County Prosecutor, attorney).

*Richard S. Lehrich* argued the cause for respondent.

*Anne C. Paskow*, Assistant Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*Deborah T. Poritz*, Attorney General, attorney).

*James A. Carey* argued the cause for *amicus* [***5] *curiae* The Monmouth County Municipal Prosecutors Association (*Carey and Graham*, attorneys).

*Carl J. Herman* argued the cause for *amicus curiae* Association of Criminal Defense Lawyers.

*Edward G. Sponzilli* submitted a brief on behalf of *amicus curiae* Rutgers, The State University of New Jersey (*Dunn, Pashman, Sponzilli & Finnerty*, attorneys).

**JUDGES:** The opinion of the Court was delivered by POLLOCK, J. Chief Justice WILENTZ, and Justices POLLOCK, O'HERN, GARIBALDI, STEIN and COLEMAN.

**OPINION BY:** POLLOCK

**OPINION**

[*248] [**792] The opinion of the Court was delivered by

POLLOCK, J.

At issue is whether *Rule 7:4-4(b)* permits private counsel for a complainant to prosecute a complaint in the municipal court. The Woodbridge Municipal Court permitted Robert Hedesh, Esq., private counsel for complainant, Pamela Young, to prosecute complaints against defendant, Richard Storm, for stalking, contrary to *N.J.S.A. 2C:12-10b*, and harassment, contrary to *N.J.S.A. 2C:33-4*. After the Law Division denied Storm's motion for leave to appeal, the Appellate Division granted leave and reversed. It held that Hedesh had a conflict of interest that impinged on Storm's right to a fair trial. *278 N.J. Super. 287, 650 A.2d 1031 (1994)*. [***6]

We granted the Middlesex County Prosecutor's motion for leave to appeal, *139 N.J. 437, 655 A.2d 440 (1995)*, and affirm. We hold that whenever an attorney for a private party applies to prosecute a complaint in the municipal court, the court should determine whether to permit the attorney to proceed. We hold further that Hedesh should not be allowed to prosecute Storm.

I

This case arises from the volatile relationship between Young and Storm. The record, although sparse, reveals the following facts. Young filed three complaints in the Woodbridge Municipal Court against Storm: two for stalking and one for harassment. After downgrading the stalking charges to harassment and disorderly-persons offenses, the Middlesex County Prosecutor remanded the charges to the municipal court. The maximum sentence for each offense is six months, *N.J.S.A. 2C:43-8*, and a fine of $ 1,000, *N.J.S.A. 2C:43-3*.

[*249] Since the occurrence of the events that gave rise to this appeal, the hostility between Storm and Young has spread to the Law Division. At the time of oral argument in the Appellate Division, Storm had been indicted for stalking Young. 278 N.J. Super. at 290, 650 A.2d 1031. Since then, the Law Division has dismissed [***7] the indictment on the motion of the Middlesex County Prosecutor. More recently, a Morris County Grand Jury has indicted Young for attempting to murder and conspiring to murder Storm.

Like virtually all other municipalities, Woodbridge employs a prosecutor. The Woodbridge prosecutor does not prosecute private complaints. Here, for example, the prosecutor requested Hedesh to prosecute the complaints against Storm.

While the Municipal Court charges were pending against him, Storm filed a complaint against Young in the Special Civil Part of the Superior Court. The com-

plaint alleged that Young intentionally had issued to Storm a bad check for vacation expenses. Hedesh represented Young in defending the complaint.

In the municipal court, Storm's attorney, Richard Lehrich, moved to disqualify Hedesh as prosecutor. Lehrich argued that Hedesh's representation of Young in the civil action prevented him from acting as an impartial prosecutor. The municipal court denied the motion and ordered that Hedesh could prosecute the municipal court complaints.

The Appellate Division reversed and directed the municipal court to order the municipal prosecutor to prosecute the complaints. The court held: [***8]

> *R. 7:4-4(b)* is to be utilized to permit private counsel to prosecute only as a last resort and only in those circumstances where a full disclosure of possible conflicts does not disclose so direct and serious a conflict as to violate due process or otherwise preclude the defendant from receiving a fair trial.
>
> [*278 N.J. Super. at 294-95, 650 A.2d 1031*.]

[**793] II

*Rule 7:4-4(b)* states:

> Appearance of Prosecution. Whenever in his or her judgment the interests of justice so require, or upon the request of the court, the Attorney General, county [*250] prosecutor, municipal court prosecutor, or municipal attorney, as the case may be, may appear in any court on behalf of the State, or of the municipality, and conduct the prosecution of any action, but if the Attorney General, county or municipal court prosecutor or municipal attorney does not appear, *any attorney may appear on behalf of any complaining witness and prosecute the action for and on behalf of the State or the municipality.*
>
> [Emphasis added.]

The rule perpetuates the practice of private prosecution, which traces its origins to ancient England. Private prosecution derives from the practice of trial by combat, which [***9] evolved into the prosecution of criminal charges by private parties. Sir James Stephen, *A History of the Criminal Law of England* 245 (1883). By the early nineteenth century, Britain's system of private prosecution was in retreat. *See* Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 Am.U.L.Rev. 754, 760 (1976); Judson Hand, Note, *Primitive Justice: Private Prosecutions in Municipal Court Under New Jersey Rule 7:4-4(b)*, 44 Rutgers L.Rev. 205, 212 (1991). In 1879, Parliament created the Office of Public Prosecutions, which prosecuted serious crimes. Twenty-nine years later, Parliament enacted the Prosecution of Offenses Act, which allows the Director of Public Prosecutions to supersede a private prosecution. *Hand, supra*, 44 Rutgers L.Rev. at 212. Although uncommon in England today, private prosecution survives. *Id.*

English justice became the dominant influence in the development of New Jersey's criminal justice system. See Newman & Doty, *Bench and Bar*, in I *The Story of New Jersey* 363 (William Starr Meyers ed.1945) (relating history of judicial development in New Jersey). By the eighteenth century, New Jersey had [***10] established an extensive system of public prosecution. Even so, in the last century, the former New Jersey Supreme Court described private prosecution as "the settled practice in this State. . . ." *Gardiner v. State, 55 N.J.L. 17, 33, 26 A. 30 (1892)*. Notwithstanding the reforms of the judicial and criminal justice systems in the 1947 Constitution, the practice of private prosecution has survived.

Both this Court and the Legislature continue to recognize the role of private prosecutors. In addition to the recognition of [*251] private prosecutors in municipal courts contained in *Rule 7:4-4(b)*, *Rule 3:23-9(d)* of the Rules Governing Criminal Practice defines a prosecuting attorney: "With the consent of the court, the attorney for a complaining witness or other person interested in the prosecution may be permitted to act for the prosecuting attorney."

In addition, *N.J.S.A. 19:34-63*, relating to election law, provides in part: "Any citizen may employ an attorney to assist the prosecutor of the pleas to perform his duties under this title, and such attorney shall be recognized by the prosecutor of the pleas and the court as associate counsel in the proceedings."

[***11] III

Our evaluation of private prosecutions begins with the role of municipal courts. As the late Chief Justice Vanderbilt once wrote:

> On them rests the primary responsibility for the maintenance of peace in the various communities of the state, for safety on our streets and highways, and most important of all, for the development

> of respect for law on the part of our citizenry, on which in the last analysis all of our democratic institutions depend.
>
> [Arthur T. Vanderbilt, *The Municipal Court--The Most Important Court in New Jersey*, 10 Rutgers L.Rev. 647, 650 (1956).]

Apart from cases involving motor vehicles, municipal courts decide such matters as violations of health or zoning ordinances, disorderly-persons offenses, and various quasi-criminal cases. The volume is high. In 1994, for example, municipal courts disposed of 5.6 million cases. Because of the heavy caseload, municipal prosecutors cannot prosecute [**794] every complaint. "The general rule is that the prosecutor's involvement is limited to those complaints signed by police officers." Supreme Court Task Force on the Improvement of Municipal Courts, *Report to the 1985 Judicial Conference* 112-13 (1985) [***12] (hereinafter "Report").

By permitting private citizens, acting either *pro se* or through private counsel, to appear in municipal court, *Rule 7:4-4(b)* facilitates access to municipal courts. Although the practice of private prosecution in municipal courts remains useful, the [*252] question is whether the benefits of the practice outweigh its burdens.

Over the centuries, perceptions of justice have evolved. Trial by combat has yielded to trial in court. Central to a judicial proceeding is the right to a fair trial before an impartial judge. In criminal or quasi-criminal cases, the need for impartiality extends beyond the judge to the prosecutor.

The challenge is to respect the defendant's right to a fair trial while preserving the contribution of private prosecutors to the disposition of complaints in the municipal courts. See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, *47 Ark.L.Rev. 511, 594-601 (1994)* (concluding that private prosecution is unethical and violates defendant's constitutional rights); Joan Meier, *The Right to a Disinterested Prosecutor of Criminal Contempt*, 70 Wash.U.L.Q. 85, 128 (1992) (arguing that states [***13] should be free to adopt their own policies on whether disinterested prosecutor of contempt is required); *Sidman, supra*, 25 Am.U.L.Rev. 754 (evaluating various issues raised by system of private prosecution and arguing practice is outdated, unnecessary, unethical, and perhaps unconstitutional). Without private prosecutors, some cases, such as disorderly-persons offenses, would not be prosecuted, *see State v. Kinder, 701 F. Supp. 486, 491 (D.N.J.1988)*; *Voytko v. Ramada Inn of Atlantic City, 445 F. Supp. 315, 328 n.21 (D.N.J.1978)*; *see also State v. Imperiale, 773 F. Supp. 747, 748 (D.N.J.1991)* (stating that in many instances prosecutor, "because of the nature of the complaint combined with limited resources, chooses not to prosecute a particular complaint or category of complaints ...). The best argument for continuing private prosecutions is one of necessity: without private prosecutions some wrongs would not be set right.

The overarching argument against private prosecutors is the risk they pose to a defendant's right to a fair trial. *Kinder, supra, 701 F. Supp. at 489*. A private prosecutor's dual responsibilities to the complaining [***14] witness and to the State breed numerous problems. Representation of the complainant in a related civil [*253] action could invest the prosecutor with a monetary interest in the outcome of the matter. That risk is particularly high if the prosecutor has agreed to receive a contingent fee in the civil action. *Imperiale, supra, 773 F.Supp. at 750*; *Kinder, supra, 701 F. Supp. at 490-91*. Even in the absence of actual conflict, the appointment as prosecutor of an attorney for an interested party creates the appearance of impropriety. *Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 805-06, 107 S.Ct. 2124, 2136-37, 95 L.Ed.2d 740, 757 (1987)*; *Imperiale, supra, 773 F.Supp. at 751-52*.

Conflicting interests, moreover, can undermine a prosecutor's impartiality. The loss of impartiality can affect the prosecutor's assessment of probable cause to proceed; the disclosure of exculpatory evidence, *see State v. Cantor, 221 N.J. Super. 219, 534 A.2d 83 (App.Div.1987)* (reversing conviction because private prosecutor failed to provide exculpatory information), *cert. denied, 110 N.J. 291, 540 A.2d 1274 (1988)*; and the willingness [***15] to plea bargain, *Imperiale, supra, 773 F.Supp. at 751-52*. Also implicated are the prosecutor's ethical obligation "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." *Model Rules of Professional Responsibility* 3.8, cmt. (1994). In addition, private prosecutions pose the risk that the complainant will use the municipal court proceeding to harass the defendant or to obtain an advantage in a related civil action. *Imperiale, supra, 773 F. Supp. at 748*; *see also State v. Long, 266 N.J. Super. 716, 726-27, 630 A.2d 430 (Law Div.1993)* (noting reasons for *Rule 7:4-4(b)* and risks of [**795] applying *Rule*); *State v. Harris, 262 N.J. Super. 294, 620 A.2d 1083 (Law Div.1992)* (holding that private prosecution could proceed because no potential for unfair conflict of interest existed).

Ten years ago, the Supreme Court Task Force on the Improvement of Municipal Courts concluded that the

burdens of private prosecutions outweighed their benefits. It recommended "that every municipal court have a prosecutor, charged with the responsibility of prosecuting *every* complaint--whether it is filed [***16] by a [*254] police officer, a private citizen or even if it results in a civilian cross-complaint situation." *Report, supra*, at 113-14. Based in part on the Report, the New Jersey Law Revision Commission submitted a *Report and Recommendations* that "modernizes and clarifies the law on municipalities." New Jersey Law Revision Commission, *Report and Recommendations on the Municipal Courts* (1991). Included in the Law Revision Report was a section requiring every municipality to appoint a prosecutor. *Id.* at 13. The section was included in Senate Bill 875, but eliminated in committee. Consequently, the section was omitted from *N.J.S.A. 2B:12-1* to -31, *L.* 1993, c. 293. More recently, the Senate passed Senate Bill 967, which requires a municipal prosecutor in every municipal court. S-967, 206th Leg. 1st Sess. (1994). Section 5(b) of the bill, however, permits the continuation of private prosecutors, providing in relevant part: "A municipal prosecutor may, with the approval of the court, authorize private attorneys to prosecute citizen complaints filed in the municipal court." On September 19, 1994, that bill was referred to the Assembly Judiciary, Law and Public Safety Committee, [***17] where it awaits action.

A mere list of the arguments for and against private prosecutors fails to capture the valuable, if troublesome, role of municipal courts in resolving private disputes. A municipal court is "the people's court." Municipal courts remain a place in which people, sometimes on the verge of violence, can seek relief. In effect, municipal courts provide a safety valve for society. By providing access to impartial judges, municipal courts forestall violence and encourage the peaceful resolution of disputes.

For a municipal court to provide an effective forum, both the complainant and the defendant must trust the impartiality of the proceedings. To earn that trust, the prosecutor, like the judge, must be impartial. Inevitably, private prosecutions undermine confidence in the integrity of the proceedings.

Confronted with an imperfect practice, the judicial task is to preserve the integrity of municipal courts, protect the rights [*255] of defendants, and to make the system work. Ultimately, the discharge of those responsibilities rests with municipal court judges. To assist municipal courts in the exercise of their discretion, we request the Committee on Municipal Courts [***18] to recommend guidelines governing the appointment of private prosecutors in those courts. Until we adopt such guidelines, an attorney wishing to appear as a private prosecutor should notify the municipal prosecutor and the court. If the municipal prosecutor insists on proceeding with the prosecution, the prosecutor's decision should be final. In all other cases, the private attorney should disclose in a written certification all facts that foreseeably may affect the fairness of the proceedings. The propriety of appointing a private prosecutor will vary from case-to-case, depending on the facts of each case. *Harris, supra, 262 N.J. Super. at 302, 620 A.2d 1083.*

The relevant facts include the identity of the complainant, indicating (1) whether the complainant is an individual, a business (such as a department store), or an entity with its own police department (such as Rutgers University); (2) any actual conflict of interest arising from the attorney's representation of, and fee arrangement with, the complainant; (3) any civil litigation, existing or anticipated, between the complainant and the defendant; (4) whether the defendant is, or is expected to be, represented by counsel; and (5) any [***19] other facts that reasonably could affect the impartiality of the prosecutor and the fairness of the proceedings or otherwise create the appearance of impropriety.

We recognize that in certain cases, disqualification of private counsel as prosecutor will result in a complainant proceeding *pro se.* [**796] Pursuant to *Rule 1:40-7*, municipal court judges can refer many such cases, particularly those involving minor family or neighborhood disputes, to mediation.

Given the acrimonious relationship between Storm and Young, including their lengthy litigious history, we find that Hedesh's obligations to Young as her private attorney creates at least the appearance that he could not act as a private prosecutor [*256] with impartiality. The burden on defendant's right to a fair trial and on the public interest in impartial proceedings outweighs any benefit that would accrue from permitting Hedish to proceed as the prosecutor.

The judgment of the Appellate Division is affirmed.

**RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY**
**RULE 7:2. PROCESS**

## 7:2-1. Contents of Complaint, Complaint-Warrant (CDR-2) and Summons

**(a) Complaint: General.** The complaint shall be a written statement of the essential facts constituting the offense charged made on a form approved by the Administrative Director of the Courts. Except as otherwise provided by paragraphs (f) (Traffic Offenses), (g) (Special Form of Complaint and Summons), and (h) (Use of Special Form of Complaint and Summons in Penalty Enforcement Proceedings), the complaining witness shall attest to the facts contained in the complaint by signing a certification or signing an oath before a judge or other person so authorized by N.J.S.A. 2B:12-21.

If the complaining witness is a law enforcement officer, the complaint may be signed by an electronic entry secured by a Personal Identification Number (hereinafter referred to as an electronic signature) on the certification, which shall be equivalent to and have the same force and effect as an original signature.

**(b) Acceptance of Complaint.** The municipal court administrator or deputy court administrator shall accept for filing every complaint made by any person.

**(c) Summons: General.** The summons shall be on a Complaint-Summons form (CDR-1) or other form prescribed by the Administrative Director of the Courts and shall be signed by the officer issuing it. An electronic signature of any law enforcement officer or any other person authorized by law to issue a Complaint-Summons shall be equivalent to and have the same force and effect as an original signature. The summons shall be directed to the defendant named in the complaint, shall require defendant's appearance at a stated time and place before the court in which the complaint is made, and shall inform defendant that an arrest a bench warrant may be issued for a failure to appear.

**(d) Complaint-Warrant (CDR-2)**

(1) Complaint-Warrant (CDR-2): General. The arrest warrant for an initial charge shall be made on a Complaint-Warrant (CDR-2) or other form prescribed by the Administrative Director of the Courts and shall be signed by a judicial officer after a determination of probable cause that an offense was committed and that the defendant committed it. A judicial officer, for purposes of the Part VII rules, is defined as a judge, authorized municipal court administrator or deputy court administrator. An electronic signature by the judicial officer shall be equivalent to and have the same force and effect as an original signature. The warrant shall contain the defendant's name or, if unknown, any name or description that identifies the defendant with reasonable certainty. It shall be directed to any officer authorized to execute it.

(2) Complaint-Warrant (CDR-2) -- Disorderly Persons Offenses. When a Complaint-Warrant (CDR-2) is issued and the most serious charge is a disorderly persons offense, the court shall order that the defendant be arrested and remanded to the county jail pending a determination of conditions of pretrial release. Complaints in which the most serious charge is an indictable offense are governed by R. 3:2-1.

(3) Complaint-Warrant (CDR-2) -- Petty Disorderly Persons Offense or Other Matters within the Jurisdiction of the Municipal Court. When a Complaint-Warrant (CDR-2) is issued and the most serious charge is a petty disorderly persons offense or other non-disorderly persons offense within the jurisdiction of the Municipal Court, the court shall order that the defendant be arrested and brought before the court issuing the warrant. The judicial officer issuing a warrant may specify therein the amount and conditions of bail or release on personal recognizance, consistent with R. 7:4, required for defendant's release.

**(e) Issuance of a Complaint-Warrant (CDR-2) When Law Enforcement Applicant is Not Physically Before a Judicial Officer.** A judicial officer may issue a Complaint-Warrant (CDR-2) upon sworn oral testimony of a law enforcement applicant who is not physically present. Such sworn oral testimony may be communicated by the applicant to the judicial officer by telephone, radio, or other means of electronic communication.

The judicial officer shall administer the oath to the applicant. After taking the oath, the applicant must identify himself or herself and read verbatim the Complaint-Warrant (CDR-2) and any supplemental affidavit that establishes probable cause for the issuance of a Complaint-Warrant (CDR-2). If the facts necessary to establish probable cause are contained entirely on the Complaint-Warrant (CDR-2) and/or supplemental affidavit, the judicial officer need not make a contemporaneous written or electronic recordation of the facts in support of probable cause. If the law enforcement applicant provides additional sworn oral testimony in support of probable cause, the judicial officer shall contemporaneously record such sworn oral testimony by means of a recording device if available; otherwise, adequate notes summarizing the contents of the law enforcement applicant's testimony shall be made by the judicial officer. This sworn testimony shall be deemed to be an affidavit or a supplemental affidavit for the purposes of issuance of a Complaint-Warrant (CDR-2).

A Complaint-Warrant (CDR-2) may issue if the judicial officer finds that probable cause exists and that there is also justification for the issuance of a Complaint-Warrant (CDR-2) pursuant to the factors identified in Rule 7:2-2(b). If a judicial officer does not find justification for a warrant under Rule 7:2-2(b), the judicial officer shall issue a summons.

If the judicial officer has determined that a warrant shall issue and has the ability to promptly access the Judiciary’s computerized system used to generate complaints, the judicial officer shall electronically issue the Complaint-Warrant (CDR-2) in that computer system. If the judicial officer has determined that a warrant shall issue and

does not have the ability to promptly access the Judiciary's computerized system used to generate complaints, the judicial officer shall direct the applicant to complete the required certification and activate the complaint pursuant to procedures prescribed by the Administrative Director of the Courts.

Upon approval of a Complaint-Warrant (CDR-2), the judicial officer shall memorialize the date, time, defendant's name, complaint number, the basis for the probable cause determination, and any other specific terms of the authorization. That memorialization shall be either by means of a recording device or by adequate notes.

A judicial officer authorized for that court shall verify, as soon as practicable, any warrant authorized under this subsection and activated by law enforcement. Remand to the county jail for defendants charged with a disorderly persons offense and a pretrial release decision are not contingent upon completion of this verification.

Procedures authorizing issuance of restraining orders 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") by electronic communications are governed by R. 7:4-1(d).

**(f) Traffic Offenses**

(1) Form of Complaint and Process. The Administrative Director of the Courts shall prescribe the form of Uniform Traffic Ticket to serve as the complaint, summons or other process to be used for all parking and other traffic offenses. On a complaint and summons for a parking or other non-moving traffic offense, the defendant need not be named. It shall be sufficient to set forth the license plate number of the vehicle, and its owner or operator shall be charged with the violation.

(2) Issuance. The complaint may be made and signed by any person, but the summons shall be signed and issued only by a law enforcement officer or other person authorized by law to issue a Complaint-Summons, the municipal court judge, municipal court administrator or deputy court administrator of the court having territorial jurisdiction. An electronic signature of any law enforcement officer or other person authorized by law to issue a Complaint-Summons shall be equivalent to and have the same force and effect as an original signature.

(3) Records and Reports. Each court shall be responsible for all Uniform Traffic Tickets printed and distributed to law enforcement officers or others in its territorial jurisdiction, for the proper disposition of Uniform Traffic Tickets, and for the preparation of such records and reports as the Administrative Director of the Courts prescribes. The provisions of this subparagraph shall apply to the Chief Administrator of the Motor Vehicle Commission, the Superintendent of State Police in the Department of Law and Public Safety, and to the responsible official of any other agency authorized by the Administrative Director of the Courts to print and distribute the Uniform Traffic Ticket to its law enforcement personnel.

**(g) Special Form of Complaint and Summons.** A special form of complaint and summons for any action, as prescribed by the Administrative Director of the Courts, shall be used in the manner prescribed in place of any other form of complaint and process.

**(h) Use of Special Form of Complaint and Summons in Penalty Enforcement Proceedings.** The Special Form of Complaint and Summons, as prescribed by the Administrative Director of the Courts, shall be used for all penalty enforcement proceedings in the municipal court, including those that may involve the confiscation and/or forfeiture of chattels. If the Special Form of Complaint and Summons is made by a governmental body or officer, it may be certified or verified on information and belief by any person duly authorized to act on its or the State's behalf.

**Note:** Source – Paragraph (a): R. (1969) 7:2, 7:3-1, 3:2-1; paragraph (b): R. (1969) 7:2, 7:3-1, 7:6-1, 3:2-2; paragraph (c): R. (1969) 7:2, 7:3-1, 7:6-1, 3:2-3; paragraph (d): R. (1969) 7:6-1; paragraph (e): R. (1969) 4:70-3(a); paragraph (f): new. Adopted October 6, 1997 to be effective February 1, 1998; paragraph (a) caption added, former paragraph (a) amended and redesignated as paragraph (a)(1), former paragraph (b) amended and redesignated as paragraph (a)(2), former paragraph (c) redesignated as paragraph (a)(3), former paragraph (d) redesignated as paragraph (b), former paragraph (e) caption and text amended and redesignated as paragraph (c), and former paragraph (f) redesignated as paragraph (d) July 12, 2002 to be effective September 3, 2002; caption for paragraph (a) deleted, former paragraphs (a)(1) and (a)(2) amended and redesignated as paragraphs (a) and (b), former paragraph (a)(3) redesignated as paragraph (c), new paragraph (d) adopted, former paragraph (b) amended and redesignated as paragraph (e), former paragraph (c) deleted, former paragraph (d) amended and redesignated as paragraph (f), and new paragraph (g) adopted July 28, 2004 to be effective September 1, 2004; paragraph (a) amended, new paragraph (b) adopted, former paragraphs (b), (c), (d), and (e) amended and redesignated as paragraphs (c), (d), (e), and (f), former paragraphs (f) and (g) redesignated as paragraphs (g) and (h) July 16, 2009 to be effective September 1, 2009; paragraph (e) caption and text amended July 9, 2013 to be effective September 1, 2013; caption amended, and paragraphs (d) and (e) caption and text amended August 30, 2016 to be effective January 1, 2017; paragraph (d) reallocated as paragraphs (d)(1) and (d)(2), new paragraph (d)(3) added, new paragraph (d) caption added, and paragraph (e) amended November 14, 2016 to be effective January 1, 2017.

## 7:2-2. Issuance of Complaint-Warrant (CDR-2) or Summons

### (a) Authorization for Process

(1) Citizen Complaint. A Complaint-Warrant (CDR-2) or a summons charging any offense made by a private citizen may be issued only by a judge or, if authorized by the judge, by a municipal court administrator or deputy court administrator of a court with jurisdiction in the municipality where the offense is alleged to have been committed within the statutory time limitation. The complaint-warrant (CDR-2) or summons may be issued only if it appears to the judicial officer from the complaint, affidavit, certification or testimony that there is probable cause to believe that an offense was committed, the defendant committed it, and a Complaint-Warrant (CDR-2) or summons can be issued. The judicial officer's finding of probable cause shall be noted on the face of the summons or warrant and shall be confirmed by the judicial officer's signature issuing the Complaint-Warrant (CDR-2) or summons. If, however, the municipal court administrator or deputy court administrator finds that no probable cause

exists to issue a Complaint-Warrant (CDR-2) or summons, or that the applicable statutory time limitation to issue the Complaint-Warrant (CDR-2) or summons has expired, that finding shall be reviewed by the judge. A judge finding no probable cause to believe that an offense occurred or that the statutory time limitation to issue a Complaint-Warrant (CDR-2) or summons has expired shall dismiss the complaint.

(2) Complaint by Law Enforcement Officer or Other Statutorily Authorized Person. A summons on a complaint made by a law enforcement officer charging any offense may be issued by a law enforcement officer or by any person authorized to do so by statute without a finding by a judicial officer of probable cause for issuance. A law enforcement officer may personally serve the summons on the defendant without making a custodial arrest.

(3) Complaint by Code Enforcement Officer. A summons on a complaint made by a Code Enforcement Officer charging any offense within the scope of the Code Enforcement Officer's authority and territorial jurisdiction may be issued without a finding by a judicial officer of probable cause for issuance. A Code Enforcement Officer may personally serve the summons on the defendant. Otherwise, service shall be in accordance with these rules. For purposes of this rule, a "Code Enforcement Officer" is a public employee who is responsible for enforcing the provisions of any state, county or municipal law, ordinance or regulation which the public employee is empowered to enforce.

**(b) Issuance of a Complaint-Warrant (CDR-2) or Summons**

(1) Issuance of a summons. A summons may be issued on a complaint only if:

(i) a judge, authorized municipal court administrator or authorized deputy municipal court administrator (judicial officer) finds from the complaint or an accompanying affidavit or deposition, that there is probable cause to believe that an offense was committed and that the defendant committed it and notes that finding on the summons; or

(ii) the law enforcement officer or code enforcement officer who made the complaint, issues the summons.

(2) Issuance of a Warrant. A Complaint-Warrant (CDR-2) may be issued only if:

(i) a judicial officer finds from the complaint or an accompanying affidavit or deposition, that there is probable cause to believe that an offense was committed and that the defendant committed it and notes that finding on the Complaint-Warrant (CDR-2); and

(ii) a judicial officer finds that subsection (e), (f), or (g) of this rule allows a Complaint-Warrant (CDR-2) rather than a summons to be issued.

**(c) Indictable Offenses.** Complaints involving indictable offenses are governed by the Part III Rules, which address mandatory and presumed warrants for certain indictable offenses in Rule 3:3-1(e), (f).

**(d) Offenses Where Issuance of a Summons is Presumed.** A summons rather than a Complaint-Warrant (CDR-2) shall be issued unless issuance of a Complaint-Warrant (CDR-2) is authorized pursuant to subsection (e) of this rule.

**(e) Grounds for Overcoming the Presumption of Issuance of Complaint-Summons.** Regarding a defendant charged on matters in which a summons is presumed, when a law enforcement officer requests, in accordance with guidelines issued by the Attorney General pursuant to N.J.S.A. 2A:162-16, the issuance of a Complaint-Warrant (CDR-2) rather than issues a complaint-summons, the judicial officer may issue a Complaint-Warrant (CDR-2) when the judicial officer finds that there is probable cause to believe that the defendant committed the offense, and the judicial officer has reason to believe, based on one or more of the following factors, that a Complaint-Warrant (CDR-2) is needed to reasonably assure a defendant's appearance in court when required, to protect the safety of any other person or the community, or to assure that the defendant will not obstruct or attempt to obstruct the criminal justice process:

(1) the defendant has been served with a summons for any prior indictable offense and has failed to appear;

(2) there is reason to believe that the defendant is dangerous to self or will pose a danger to the safety of any other person or the community if released on a summons;

(3) there is one or more outstanding warrants for the defendant;

(4) the defendant's identity or address is not known and a warrant is necessary to subject the defendant to the jurisdiction of the court;

(5) there is reason to believe that the defendant will obstruct or attempt to obstruct the criminal justice process if released on a summons;

(6) there is reason to believe that the defendant will not appear in response to a summons;

(7) there is reason to believe that the monitoring of pretrial release conditions by the pretrial services program established pursuant to N.J.S.A. 2A:162-25 is necessary to protect any victim, witness, other specified person, or the community.

The judicial officer shall consider the results of any available preliminary public safety assessment using a risk assessment instrument approved by the Administrative Director of the Courts pursuant to N.J.S.A. 2A:162-25, and shall also consider, when such information is available, whether within the preceding ten years the defendant as a juvenile was adjudicated delinquent for a crime involving a firearm, or a crime that if committed by an adult would be subject to the No Early Release Act (N.J.S.A. 2C:43-7.2), or an attempt to commit any of the foregoing offenses. The judicial officer shall also consider any additional relevant information provided by the law enforcement officer or prosecutor applying for a Complaint-Warrant (CDR-2).

**(f) Charges Against Corporations, Partnerships, Unincorporated Associations.** A summons rather than a Complaint-Warrant (CDR-2) shall issue if the defendant is a corporation, partnership, or unincorporated association.

**(g) Failure to Appear After Summons.** If a defendant who has been served with a summons fails to appear on the return date, a bench warrant may issue pursuant to law and Rule 7:8-9 (Procedures on Failure to Appear). If a corporation, partnership or unincorporated association has been served with a summons and has failed to appear on the return date, the court shall proceed as if the entity had appeared and entered a plea of not guilty.

**(h) Additional Complaint-Warrants (CDR-2) or Summonses.** More than one Complaint-Warrant (CDR-2) or summons may issue on the same complaint.

**(i) Identification Procedures.** If a summons has been issued or a Complaint-Warrant (CDR-2) executed on a complaint charging either the offense of shoplifting or prostitution or on a complaint charging any non-indictable offense where the identity of the person charged is in question, the defendant shall submit to the identification procedures prescribed by N.J.S.A. 53:1-15. Upon the defendant's refusal to submit to any required identification procedures, the court may issue a Complaint-Warrant (CDR-2).

**Note:** Source - R. (1969) 7:2, 7:3-1, 3:3-1. Adopted October 6, 1997 to be effective February 1, 1998; paragraphs (b) and (c) amended July 10, 1998 to be effective September 1, 1998; paragraph (a)(1) amended July 5, 2000 to be effective September 5, 2000; paragraph (a)(1) amended, new paragraph (b)(5) added, and former paragraph (b)(5) redesignated as paragraph (b)(6) July 12, 2002 to be effective September 3, 2002; paragraph (a)(1) amended, and paragraph (a)(2) caption and text amended July 28, 2004 to be effective September 1, 2004; paragraph (a)(1) amended and new paragraph (a)(3) adopted July 16, 2009 to be effective September 1, 2009; caption amended, paragraph (a)(1) amended, former paragraph (b) deleted, new paragraphs (b), (c), (d), (e), (f) adopted, former paragraph (c) amended and redesignated as paragraph (g), former paragraph (d) caption and text amended and redesignated as paragraph (h), and former paragraph (e) amended and redesignated as paragraph (i) August 30, 2016 to be effective January 1, 2017.

## 7:2-3. Warrants; Execution and Service: Return

**(a) By Whom Executed; Territorial Limits.** A warrant shall be executed by any officer authorized by law. The warrant may be executed at any place within this State. This applies to all warrants issued by the municipal court, including Complaint-Warrants (CDR-2) and bench warrants that may be issued after the initial filing of the complaint. A bench warrant is any warrant, other than a Complaint-Warrant (CDR-2), that is issued by the court that orders a law enforcement officer to take the defendant into custody.

**(b) How Executed.** The warrant shall be executed by the arrest of the defendant. The law enforcement officer need not possess the warrant at the time of the arrest, but upon request, the officer shall show the warrant or a copy of an Automated Traffic System/Automated Complaint System (ATS/ACS) electronic record evidencing its issuance to the defendant as soon as possible. If the law enforcement officer does not have the actual warrant to show or does not have access to an ATS/ACS printer to

produce a copy of the electronic record at the time of the arrest, the officer shall inform the defendant of the offense charged and that a warrant has been issued. Defendants arrested on a Complaint-Warrant (CDR-2) charging an indictable or disorderly persons offense shall be remanded to the county jail pending a determination regarding conditions of pretrial release. Defendants arrested on a Complaint-Warrant (CDR-2) charging any other matter shall be brought before the court issuing the warrant, pursuant to Rule 7:2-1(d)(3).

**(c) Return.** The law enforcement officer executing a warrant shall make prompt return of the warrant to the court that issued the warrant. The arresting officer shall promptly notify the court issuing the warrant by electronic communication through the appropriate Judiciary computer system of the date and time of the arrest. If the defendant is incarcerated, the law enforcement officer shall promptly notify the court of the place of the defendant's incarceration.

**Note:** Source -- Paragraph (a): R. (1969) 7:2; 7:3-1, 3:3-3(a), (b), (c), (e); Paragraphs (b)(1), (2), (3): R. (1969) 7:3-1: Paragraph (b)(4): R. (1969) 7:2, 7:3-1, 3:3-3(e). Adopted October 6, 1997 to be effective February 1, 1998; caption amended, caption of former paragraph (a) deleted, caption and text of former paragraph (b) deleted and relocated to new Rule 7:2-4, former paragraphs (a)(1), (a)(2), and (a)(3) redesignated as paragraphs (a), (b), and (c) July 28, 2004 to be effective September 1, 2004; caption amended, paragraphs (a), (b), (c) amended August 30, 2016 to be effective January 1, 2017; paragraph (b) amended November 14, 2016 to be effective January 1, 2017.

## 7:2-4. Summons: Execution and Service; Return

### (a) Summons; Personal Service Under R. 4:4-4 or By Ordinary Mail.

(1) The Complaint-Summons shall be served personally in accordance with R. 4:4-4(a), by ordinary mail or by simultaneous mailing in accordance with paragraph (b) of this rule. Service of the Complaint-Summons by ordinary mail may be attempted by the court, by the law enforcement agency that prepared the complaint or by an agency or individual authorized by law to serve process.

(2) Service by ordinary mail shall have the same effect as personal service if the defendant contacts the court orally or in writing in response to or in acknowledgment of the service of the Complaint-Summons. Service by ordinary mail shall not be attempted until a court date for the first appearance has been set by the municipal court administrator, deputy court administrator, or other authorized court employee.

(3) If the court is provided with a different, updated address for the defendant, along with a postal verification or other proof satisfactory to the court that the defendant receives mail at that address, service of the Complaint-Summons may be re-attempted.

**(b) Simultaneous Service by Mail.**

(1) If service is attempted by ordinary mail and the defendant does not appear in court on the first appearance date or does not contact the court orally or in writing by that date, the court subsequently shall send the Complaint-Summons simultaneously by ordinary mail and certified mail with return receipt requested to the defendant's last known mailing address. Service by simultaneous mailing shall not be attempted until a new court date for the first appearance has been set by the municipal court administrator, deputy court administrator, or other authorized court employee.

(2) When the Complaint-Summons is addressed and mailed to the defendant at a place of business or employment with postal instructions to deliver to addressee only, service will be deemed effective only if the signature on the return receipt appears to be that of the defendant to whom the Complaint-Summons was mailed.

(3) Consistent with due process of law, service by simultaneous mailing, as provided in Section (b)(1) of this rule, shall constitute effective service unless the mail is returned to the court by the postal service marked "Moved, Left No Address", "Attempted - Not Known", "No Such Number", "No Such Street", "Insufficient Address", "Not Deliverable as Addressed--Unable to Forward" or the court has other reason to believe that service was not effected. However, if the certified mail is returned to the court marked "Refused" or "Unclaimed," service is effective providing that the ordinary mail has not been returned.

(4) Process served by ordinary or certified mail with return receipt requested may be addressed to a post office box.

**(c) Notice to Prosecuting Attorney and Complaining Witness; Dismissal of Complaint.**

(1) If the court has not obtained effective service over the defendant after attempting service by simultaneous mailing under section (b)(1) of this rule, the court shall provide written notice of that fact to the prosecuting attorney and the complaining witness.

(2) The case shall be eligible for dismissal unless within 45 days of the receipt of the written notice, the prosecuting attorney or the complaining witness provides the court with a different, updated address for the defendant, along with a postal verification or other proof satisfactory to the court that the defendant receives mail at that address.

(3) Notwithstanding the provisions of this rule, nothing shall preclude the prosecuting attorney or other authorized person from attempting service in any lawful manner.

(4) If the prosecuting attorney and complaining witness do not respond to the court's written notice within 45 days or if the defendant is not otherwise served, the court may dismiss the case pursuant to R. 7:8-5.

**(d) Parking Offenses.** A copy of the Uniform Traffic Ticket prepared and issued out of the presence of the defendant charging a parking offense may be served by affixing it to the vehicle involved in the violation.

**(e) Corporations, Partnerships and Unincorporated Associations.** A copy of the Uniform Traffic Ticket charging a corporation, partnership or unincorporated association with a violation of a statute or ordinance relating to motor vehicles may be served on the operator of the vehicle.

**(f) Return.** The law enforcement officer serving a summons shall make return of the summons on or before the return date to the court before whom the summons is returnable.

**Note:** Former Rule 7:2-4 redesignated as Rule 7:2-5 and new Rule 7:2-4 (incorporating portions of former Rule 7:2-3) adopted July 28, 2004 to be effective September 1, 2004.

## 7:2-5. Defective Warrant or Summons; Amendment

No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any technical insufficiency or irregularity in the warrant or summons, but the warrant or summons may be amended to remedy any such technical defect.

**Note:** Source-R. (1969) 7:2, 7:3-1, 3:3-4(a). Adopted October 6, 1997 as Rule 7:2-4 to be effective February 1, 1998; redesignated as Rule 7:2-5 July 28, 2004 to be effective September 1, 2004.

## 7:2-6. [Deleted]

**Note:** Adopted July 28, 2004 to be effective September 1, 2004; rule deleted August 30, 2016 to be effective January 1, 2017.

**RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY**
**RULE 7:4. BAIL**

## 7:4-1. Right to Pretrial Release

**(a) Defendants Charged on Complaint-Warrant (CDR-2) with Disorderly Persons Offenses.** Except as otherwise provided by R. 3:4A (pertaining to preventative detention), defendants charged with a disorderly persons offense on an initial Complaint-Warrant (CDR-2) shall be released before conviction on the least restrictive non-monetary conditions that, in the judgment of the court, will reasonably ensure their presence in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, pursuant to R. 3:26-1(a)(1). In accordance with Part III, monetary bail may be set for a defendant arrested on a disorderly persons offense on an initial Complaint-Warrant (CDR-2) only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required. For these defendants the court shall make a pretrial release determination no later than 48 hours after a defendant's commitment to the county jail; the court shall consider the Pretrial Services Program's risk assessment and recommendations on conditions of release before making a release decision.

**(b) All Other Defendants.** All defendants other than those set forth in paragraph (a) shall have a right to bail before conviction on such terms as, in the judgment of court, will insure the defendant's presence when required, having regard for the defendant's background, residence, employment and family status and, particularly, the general policy against unnecessary sureties and detention; in its discretion, the court may order defendant's release on defendant's own recognizance and may impose terms or conditions appropriate to such release. All other defendants include: (i) those charged on an initial Complaint-Warrant (CDR-2) with a petty disorderly persons offense or other non-disorderly persons offense within the jurisdiction of the municipal court, and (ii) all defendants brought before the court on a bench warrant for failure to appear or other violation, including defendants initially charged on a Complaint-Warrant (CDR-2) and those initially charged on a summons. Defendants issued a bench warrant who were charged with a disorderly persons offense on an initial Complaint-Warrant (CDR-2) may also be subject to reconsideration of conditions of release pursuant to Rule 7:4-9.

**(c) Domestic Violence; Conditions of Release.** 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.

**(d) 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).

(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”) or 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 the judge shall make adequate longhand notes summarizing what is said. 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 on 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 on the defendant. The certification of service shall be in a form approved by the Administrative Director of the Courts and shall include the date and time that service on the defendant was made or attempted to be made. 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 thereafter 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.

**Note:** Source-R. (1969) 7:5-1, 3:26-1(a). Adopted October 6, 1997 to be effective February 1, 1998.; text designated as paragraph (a), paragraph (a) caption adopted, new paragraphs (b) and (c) adopted July 9, 2013 to be effective September 1, 2013; caption amended, new paragraph (a) adopted, former paragraph (a) redesignated as paragraph (b) and caption and text amended, and former paragraphs (b) and (c) redesignated as paragraphs (c) and (d) August 30, 2016 to be effective January 1, 2017; paragraphs (a) and (b) caption and text amended November 14, 2016 to be effective January 1, 2017.

## 7:4-2. Authority to Set Bail or Conditions of Pretrial Release

**(a) Authority to Set Initial Conditions of Pretrial Release on Complaint-Warrants (CDR-2) – Disorderly Persons Offenses.** Initial conditions of pretrial release on an initial disorderly persons charge on a Complaint-Warrant (CDR-2) may be set by a judge designated by the Chief Justice, pursuant to R. 3:26 as part of a first appearance at a centralized location, pursuant to R. 3:4-2.

**(b) Authority to Set Bail for Bench Warrants and All Other Matters within the Jurisdiction of the Municipal Court.** Setting bail for bench warrants or for a Complaint-Warrant (CDR-2) in which the most serious charge is a petty disorderly persons offense or other non-disorderly persons offense within the jurisdiction of the Municipal Court may be done by a judge sitting regularly in or as acting or temporary judge of the jurisdiction in which the offense was committed, or by a vicinage Presiding Judge of the Municipal Courts, or as authorized by any other rule of court. In the absence of the judge, and to the extent consistent with N.J.S.A. 2B:12-21 and R. 1:41-3(f), a duly authorized municipal court administrator or deputy court administrator may set bail on defendants issued a bench warrant or a Complaint-Warrant (CDR-2) in which the most serious charge is a petty disorderly persons offense or other non-disorderly persons offense within the jurisdiction of the Municipal Court. The authority of the municipal court administrator, deputy court administrator or other authorized persons shall, however, be exercised only in accordance with bail schedules promulgated by the Administrative Office of the Courts or the municipal court judge.

**(c) Authority to Take a Recognizance.** Any judge who has set bail and/or conditions of pretrial release may designate the taking of the recognizance by the municipal court administrator or any other person authorized by law to take recognizances, other than the law enforcement arresting officer.

**(d) Revisions of Bail or Conditions of Pretrial Release.** A municipal court judge may modify bail or any other condition of pretrial release on any non-indictable offense at any time during the course of the municipal court proceedings, consistent with R. 7:4-9, except as provided by law.

**Note:** Source-Paragraph (a): R. (1969) 7:5-3; paragraph (b): R. (1969) 7:5-1, 3:26-2(c). Adopted October 6, 1997 to be effective February 1, 1998; paragraphs (a) and (b) amended July 10, 1998, to be effective September 1, 1998; caption amended, paragraph (a) caption and text amended and portion redesignated as paragraphs (b) and (c), paragraph (b) redesignated and amended as paragraph (d) August 8, 2016 to be effective January 1, 2017; paragraphs (a) and (b) captions and text amended November 14, 2016 effective January 1, 2017.

## 7:4-3. Form and Place of Deposit; Location of Real Estate; Record of Recognizances, Discharge and Forfeiture

**(a) Deposit of Bail; Execution of Recognizance.** A defendant admitted to bail, shall, together with the sureties, if any, sign and execute a recognizance before the person authorized to take monetary bail or, if the defendant is in custody, the person in charge of the place of confinement. The recognizance shall contain the terms set forth in R. 1:13-3(b) and shall be conditioned upon the defendant's appearance at all stages of the proceedings until the final determination of the matter, unless otherwise ordered by the court. The total recognizance may be satisfied by more than one surety, if necessary. Cash may be accepted, and in proper cases, within the court's discretion, the posting of security may be waived. A corporate surety shall be one approved by the Commissioner of Insurance. A corporate surety shall execute the recognizance under its duly acknowledged corporate seal, and shall attach to its bond written proof of the corporate authority and qualifications of the officers or agents executing the recognizance. Real estate offered as security for bail for non-indictable offenses shall be approved by and deposited with the clerk of the county in which the offense occurred and not with the municipal court administrator. A defendant charged on an initial Complaint-Warrant (CDR-2) with a disorderly persons offense and released on non-monetary conditions shall be released pursuant to the release order prepared by the judge and need not complete a recognizance form.

**(b) Limitation on Individual Surety.** Unless the court for good cause otherwise permits, no surety, other than an approved corporate surety, shall enter into a recognizance if there remains any previous undischarged recognizance or bail that was undertaken by that surety.

**(c) Real Estate in Other Counties.** Real estate owned by a surety located in a county other than the one in which the bail is taken may be accepted, in which case the municipal court administrator of the court in which the bail is taken shall certify and transmit a copy of the recognizance to the clerk of the county in which the real estate is situated, and it shall be there recorded in the same manner as if taken in that county.

**(d) Record of Recognizance.** In municipal court proceedings, the record of the recognizance shall be entered by the municipal court administrator or designee in the manner required by the Administrative Director of the Courts to be maintained for that purpose.

**(e) Record of Discharge; Forfeiture.** When any recognizance shall be discharged by court order on proof of compliance with the conditions thereof or by reason of the judgment in any matter, the municipal court administrator or deputy court administrator shall enter the word "discharged" and the date of discharge at the end of the record of such recognizance. When any recognizance is forfeited, the municipal court administrator or deputy court administrator shall enter the word "forfeited" and the

date of forfeiture at the end of the record of such recognizance and shall give notice of such forfeiture by ordinary mail to the municipal attorney, the defendant and any surety or insurer, bail agent or agency whose names appear in the bail recognizance. Notice to any insurer, bail agent or agency shall be sent to the address recorded in the Bail Registry maintained by the Clerk of the Superior Court pursuant to R. 1:13-3. When real estate of the surety located in a county other than the one in which the bail was taken is affected, the municipal court administrator or deputy court administrator in which such recognizance is given shall immediately send notice of the discharge or forfeiture and the date thereof to the clerk of the county where such real estate is situated, who shall make the appropriate entry at the end of the record of such recognizance.

**(f) Cash Deposit.** When a person other than the defendant deposits cash in lieu of bond, the person making the deposit shall file an affidavit or certification explaining the lawful ownership thereof, and on discharge, such cash shall be returned to the owner named in the affidavit or certification, unless otherwise ordered by the court.

**(g) Ten Percent Cash Bail.** Unless otherwise specified in the order setting the bail, bail may be satisfied by the deposit in court of cash in the amount of ten percent of the amount of bail fixed together with defendant's executed recognizance for the remaining ninety percent. No surety shall be required, unless specifically ordered by the court. If a ten percent bail is made by cash owned by one other than the defendant, the owner shall charge no fee for the cash deposited, other than lawful interest, and shall submit an affidavit or certification with the deposit detailing the rate of interest, confirming that no other fee is being charged, and listing the names of any other persons for whom the owner has deposited bail. A person making the ten percent deposit who is not the owner, shall file an affidavit or certification identifying the lawful owner of the cash, and, on discharge, the cash deposit shall be returned to the owner named in the affidavit or certification, unless otherwise ordered by the court.

**Note:** Source - R. (1969) 7:5-1, 3:26-4. Adopted October 6, 1997 to be effective February 1, 1998; subsection (e) amended December 8, 1998 to be effective January 15, 1999; caption amended, and paragraphs (e), (f), and (g) amended July 28, 2004 to be effective September 1, 2004; paragraph (a) caption and text amended August 30, 2016 to be effective January 1, 2017; paragraph (a) amended November 14, 2016 to be effective January 1, 2017.

## 7:4-4. Justification of Sureties

Every surety, except an approved corporate surety, shall justify the proposed property by affidavit, which shall include a description of the property, any encumbrances, the number and amount of other recognizances and undertakings for bail entered into by the surety and remaining undischarged, if any, and all of the surety's other liabilities. No recognizance shall be approved unless the surety thereon shall be qualified.

**Note:** Source-R. (1969) 7:5-1, 3:26-5. Adopted October 6, 1997 to be effective February 1, 1998.

**7:4-5. Forfeiture**

**(a) Declaration; Notice.** On breach of a condition of a recognizance, the court may forfeit the bail on its own or on the prosecuting attorney's motion. If the court orders bail to be forfeited, the municipal court administrator or deputy court administrator shall immediately forfeit the bail pursuant to R. 7:4-3(e) and shall send notice of the forfeiture by ordinary mail to the municipal attorney, the defendant, and any non-corporate surety or insurer, bail agent, or bail agency whose names appear on the bail recognizance. Notice to any insurer, bail agent, or bail agency shall be sent to the address recorded in the Bail Registry maintained by the Clerk of the Superior Court pursuant to R. 1:13-3. The notice shall direct that judgment will be entered as to any outstanding bail absent a written objection seeking to set aside the forfeiture, which must be filed within 75 days of the date of the notice. The notice shall also advise the insurer that if it fails to satisfy a judgment entered pursuant to paragraph (c) of this rule, and until satisfaction is made, it shall be removed from the Bail Registry and its bail agents and agencies, guarantors, and other persons or entities authorized to administer or manage its bail bond business in this State will have no further authority to act for it, and their names, as acting for the insurer, will be removed from the Bail Registry. In addition, the bail agent or agency, guarantor, or other person or entity authorized by the insurer to administer or manage its bail bond business in this State who acted in such capacity with respect to the forfeited bond will be precluded, by removal from the Bail Registry, from so acting for any other insurer until the judgment has been satisfied. The court shall not enter judgment until the merits of any objection are determined either on the papers filed or, if the court so orders, for good cause, at a hearing. In the absence of a written objection, judgment shall be entered as provided in paragraph (c) of this rule, but the court may thereafter remit it, in whole or part, in the interest of justice.

**(b) Setting Aside.** The court may, upon such conditions as it imposes, direct that an order of forfeiture or judgment be set aside in whole or in part, if required in the interest of justice.

**(c) Enforcement; Remission.** If a forfeiture is not set aside, the court shall, on motion, enter a judgment of default for any outstanding bail, and execution may issue on the judgment. After entry of the judgment, the court may remit the forfeiture in whole or in part in the interest of justice. If, following the court's decision on an objection pursuant to paragraph (a) of this rule, the forfeiture is not set aside or satisfied in whole or in part, the court shall enter judgment for any outstanding bail and, in the absence of satisfaction thereof, execution may issue thereon.

Judgments entered pursuant to this rule shall also advise the insurer that if it fails to satisfy a judgment, and until satisfaction is made, it shall be removed from the Bail Registry and its bail agents and agencies, guarantors, and other persons or entities authorized to administer or manage its bail bond business in this State will have no further authority to act for it, and their names, as acting for the insurer, will be removed from the Bail Registry as provided in paragraph (a) of this rule. A copy of the judgment

entered pursuant to this rule is to be served by ordinary mail on the municipal attorney, and on any surety or any insurer, bail agent, or bail agency named in the judgment. Notice to any surety or insurer, bail agent, or bail agency shall be sent to the address recorded in the Bail Registry. In any contested proceeding, the municipal attorney shall appear on behalf of the government. The municipal attorney shall be responsible for the collection of forfeited amounts.

**Note:** Source-R. (1969) 7:5-1, 3:26-6. Adopted October 6, 1997 to be effective February 1, 1998; paragraph (a) caption and text amended, and paragraphs (b) and (c) amended July 28, 2004 to be effective September 1, 2004.

### 7:4-6. Exoneration

When the condition of the recognizance has been satisfied or its forfeiture has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the recognizance or by a timely surrender of the defendant into custody.

**Note:** Source-R. (1969) 7:5-1, 3:26-7. Adopted October 6, 1997 to be effective February 1, 1998.

### 7:4-7. Place of Deposit

Bail in nonindictable matters given in the municipal court shall be deposited with the municipal court administrator or deputy court administrator. At the surety's discretion, bail may also be deposited with the person in charge of the place of confinement where the defendant is in custody, and that person shall then transmit the bail to the appropriate municipal court administrator or deputy court administrator for deposit in accordance with this rule.

**Note:** Source-R. (1969) 7:5-2. Adopted October 6, 1997 to be effective February 1, 1998.

### 7:4-8. Bail after Conviction

When a sentence has been imposed and an appeal from the judgment of conviction has been taken, the trial judge may admit the appellant to bail within 20 days from the date of conviction or sentence, whichever occurs later. Bail after conviction may be imposed only if the trial judge has significant reservations about the appellant's willingness to appear before the appellate court. The bail or other recognizance shall be of sufficient surety to guarantee the appellant's appearance before the appellate court and compliance with the court's judgment. Once the appellant has placed bail or filed a recognizance, if the appellant is in custody, the trial court shall immediately discharge the appellant from custody. The court shall transmit to the vicinage Criminal Division Manager any cash deposit and any recognizance submitted.

**Note:** Source-R. (1969) 7:5-4. Adopted October 6, 1997 to be effective February 1, 1998; amended July 5, 2000 to be effective September 5, 2000.

## 7:4-9. Changes in Conditions of Release for Defendants Charged on an Initial Complaint-Warrant (CDR-2) on Disorderly Persons Offenses

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

**(b) Review of Conditions of Release.** For defendants charged with a disorderly persons offense on an initial Complaint-Warrant (CDR-2) and released pretrial, a judge with jurisdiction over the matter may review the conditions of release on his or her own motion, or upon motion by the prosecutor or the defendant, alleging that there has been a material change in circumstance that necessitates a change in conditions. Upon a finding that there has been a material change in circumstance that necessitates a change in conditions, the judge may set new conditions of release.

**(c) Violations of Conditions of Release.** A judge may impose new conditions of release, including monetary bail, when a defendant charged with a disorderly persons offense and released on an initial Complaint-Warrant (CDR-2) violates a restraining order or condition of release. These conditions should be the least restrictive condition or combination of conditions that the court determines will reasonably assure the eligible defendant's appearance in court when required, protect the safety of any other person or the community, or reasonably assure that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

**(d) Motions for Pretrial Detention.** All prosecutor motions for pretrial detention must be made in Superior Court, in accordance with Rule 3:4A.

**Note:** Adopted August 30, 2016 to be effective January 1, 2017; caption amended and paragraphs (b) and (c) amended November 14, 2016 to be effective January 1, 2017.

## 7:8-6. Transfer to the Chancery Division, Family Part

An action pending in a municipal court may be transferred to the Superior Court, Chancery Division, Family Part pursuant to R. 5:1-2(c)(3) and R. 5:1-3(b)(2).

**Note:** Source-R. (1969) 7:4-2(j). Adopted October 5, 1998 to be effective February 1, 1998.

## 7:8-7. Appearances; Exclusion of the Public

**(a) Presence of Defendant.** Except as otherwise provided by Rules 7:6-1(b), 7:6-3, or 7:12-3, the defendant shall be present, either in person, or by means of a video link as approved by the Administrative Office of the Courts, at every stage of the proceeding and at the imposition of sentence. If, however, defendant is voluntarily absent after the proceeding has begun in the defendant's presence or the defendant fails to appear at the proceeding after having been informed in open court of the time and place of the proceeding, the proceeding may continue to and including entry of judgment. A corporation, partnership or unincorporated association shall appear by its attorney unless an appearance on its behalf by an officer or agent has been permitted pursuant to R. 7:6-2(a)(2). The defendant's presence is not, however, required at a hearing on a motion for reduction of sentence.

**(b) Appearance for the Prosecution.** The municipal prosecutor, municipal attorney, Attorney General, county prosecutor, or county counsel, as the case may be, may appear in any municipal court in any action on behalf of the State and conduct the prosecution either on the court's request or on the request of the respective public official. The court may also, in its discretion and in the interest of justice, direct the municipal prosecutor to represent the State. The court may permit an attorney to appear as a private prosecutor to represent the State in cases involving cross-complaints. Such private prosecutors may be permitted to appear on behalf of the State only if the court has first reviewed the private prosecutor's motion to so appear and an accompanying certification submitted on a form approved by the Administrative Director of the Courts. The court may grant the private prosecutor's application to appear if it is satisfied that a potential for conflict exists for the municipal prosecutor due to the nature of the charges set forth in the cross-complaints. The court shall place such a finding on the record.

**(c) Exclusion of the Public.** In matters involving domestic relations, sex offenses, school truancy, parental neglect, and as may be otherwise provided by law, the court, in its discretion and with defendant's consent, may exclude from the courtroom any person not directly interested in the matter during the conduct of the trial or hearing.

**Note:** Source-R. (1969) 7:4-4(a),(b),(c). Adopted October 6, 1997 to be effective February 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a) and (b) amended June 15, 2007 to be effective September 1, 2007.

# APPENDIX 4

PROGRAM: CITZCOMP-1 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF COMPLAINTANTS/CASES FROM INDATA FILE
TRANSFERRED TO CRIMINAL IN SPECIFIED CALENDAR YEAR
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2016

| CTY | COCASEDEF COUNT |
|---|---|
| ATL | 1260 |
| BER | 992 |
| BUR | 279 |
| CAM | 1308 |
| CPM | 62 |
| CUM | 294 |
| ESX | 787 |
| GLO | 634 |
| HNT | 12 |
| HUD | 641 |
| MER | 370 |
| MID | 862 |
| MON | 514 |
| MRS | 206 |
| OCN | 384 |
| PAS | 492 |
| SLM | 68 |
| SOM | 2 |
| SSX | 55 |
| UNN | 13 |
| WRN | 89 |
| TOTAL | 9324 |

PROGRAM: CITZCOMP-2 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF CASES FROM FINAL OUTPUT FILE
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2016

| | COMP_TYPE | | |
|---|---|---|---|
| CTY | SUMM | WARR | TOTAL |
| ATL | 958 | 302 | 1260 |
| BER | 776 | 216 | 992 |
| BUR | 181 | 98 | 279 |
| CAM | 852 | 456 | 1308 |
| CPM | 58 | 4 | 62 |
| CUM | 288 | 6 | 294 |
| ESX | 313 | 474 | 787 |
| GLO | 545 | 89 | 634 |
| HNT | 12 | 0 | 12 |
| HUD | 379 | 262 | 641 |
| MER | 308 | 62 | 370 |
| MID | 587 | 275 | 862 |
| MON | 470 | 44 | 514 |
| MRS | 195 | 11 | 206 |
| OCN | 357 | 27 | 384 |
| PAS | 440 | 52 | 492 |
| SLM | 64 | 4 | 68 |
| SOM | 0 | 2 | 2 |
| SSX | 54 | 1 | 55 |
| UNN | 2 | 11 | 13 |
| WRN | 82 | 7 | 89 |
| TOTAL | 6921 | 2403 | 9324 |

PROGRAM: CITZCOMP-3 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF CASES FROM FINAL OUTPUT FILE
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2016
COMP-TYPE:SUMM

| CTY | DISP_TYPE NO-BILL | DISMISSED | DWGR-RMND | TRNF-OTH* | PLEA-DP | PLEA-AC | TRUE-BILL | PTI-ADD | PENDING | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|
| ATL | 4 | 198 | 525 | 0 | 0 | 10 | 182 | 28 | 11 | 958 |
| BER | 0 | 12 | 730 | 0 | 0 | 4 | 20 | 6 | 4 | 776 |
| BUR | 0 | 6 | 155 | 1 | 0 | 3 | 9 | 4 | 3 | 181 |
| CAM | 1 | 31 | 726 | 0 | 0 | 6 | 69 | 15 | 4 | 852 |
| CPM | 0 | 19 | 38 | 0 | 0 | 0 | 1 | 0 | 0 | 58 |
| CUM | 0 | 46 | 209 | 0 | 0 | 0 | 31 | 2 | 0 | 288 |
| ESX | 6 | 16 | 265 | 0 | 0 | 2 | 21 | 3 | 0 | 313 |
| GLO | 1 | 23 | 484 | 0 | 0 | 4 | 13 | 6 | 14 | 545 |
| HNT | 1 | 3 | 6 | 0 | 0 | 0 | 2 | 0 | 0 | 12 |
| HUD | 8 | 12 | 319 | 0 | 2 | 4 | 25 | 9 | 0 | 379 |
| MER | 1 | 13 | 234 | 0 | 0 | 3 | 30 | 13 | 14 | 308 |
| MID | 1 | 1 | 560 | 0 | 0 | 5 | 14 | 3 | 3 | 587 |
| MON | 8 | 36 | 410 | 0 | 0 | 3 | 4 | 3 | 6 | 470 |
| MRS | 0 | 29 | 152 | 0 | 0 | 4 | 7 | 3 | 0 | 195 |
| OCN | 0 | 5 | 340 | 0 | 0 | 1 | 5 | 0 | 6 | 357 |
| PAS | 8 | 7 | 386 | 0 | 0 | 4 | 14 | 12 | 9 | 440 |
| SLM | 2 | 13 | 24 | 0 | 0 | 0 | 20 | 1 | 4 | 64 |
| SSX | 0 | 19 | 28 | 0 | 0 | 0 | 4 | 3 | 0 | 54 |
| UNN | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 2 |
| WRN | 1 | 24 | 37 | 0 | 0 | 1 | 14 | 5 | 0 | 82 |
| *TOTAL SUMM | 42 | 514 | 5628 | 1 | 2 | 55 | 485 | 116 | 78 | 6921 |

TRNF-OTH* - CASES TRANSFERRED TO OTHER JURISDICTION, TO FAMILY COURT, TO ATTY-GENL OR CASINO PROSECUTION.

PROGRAM: CITZCOMP-3 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF CASES FROM FINAL OUTPUT FILE
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2016
COMP-TYPE:WARR

| CTY | DISP_TYPE NO-BILL | DISMISSED | DWGR-RMND | TRNF-OTH* | PLEA-DP | PLEA-AC | TRUE-BILL | PTI-ADD | PENDING | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|
| ATL | 3 | 38 | 108 | 0 | 0 | 13 | 129 | 5 | 6 | 302 |
| BER | 0 | 3 | 170 | 0 | 0 | 23 | 17 | 1 | 2 | 216 |
| BUR | 0 | 2 | 72 | 0 | 0 | 3 | 19 | 2 | 0 | 98 |
| CAM | 5 | 23 | 230 | 0 | 0 | 39 | 151 | 7 | 1 | 456 |
| CPM | 0 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 4 |
| CUM | 0 | 2 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 6 |
| ESX | 46 | 8 | 258 | 0 | 0 | 14 | 139 | 8 | 1 | 474 |
| GLO | 3 | 3 | 53 | 0 | 0 | 5 | 17 | 1 | 7 | 89 |
| HUD | 18 | 17 | 166 | 0 | 0 | 7 | 41 | 10 | 3 | 262 |
| MER | 0 | 0 | 34 | 0 | 0 | 3 | 19 | 1 | 5 | 62 |
| MID | 0 | 7 | 211 | 0 | 0 | 12 | 38 | 2 | 5 | 275 |
| MON | 1 | 1 | 34 | 0 | 0 | 3 | 4 | 1 | 0 | 44 |
| MRS | 0 | 1 | 6 | 0 | 0 | 0 | 2 | 2 | 0 | 11 |
| OCN | 0 | 3 | 11 | 0 | 0 | 0 | 8 | 0 | 5 | 27 |
| PAS | 1 | 3 | 30 | 0 | 0 | 2 | 11 | 4 | 1 | 52 |
| SLM | 0 | 0 | 1 | 0 | 0 | 0 | 3 | 0 | 0 | 4 |
| SOM | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 2 |
| SSX | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 |
| UNN | 1 | 1 | 1 | 0 | 0 | 1 | 7 | 0 | 0 | 11 |
| WRN | 0 | 0 | 6 | 0 | 0 | 0 | 1 | 0 | 0 | 7 |
| *TOTAL WARR | 78 | 112 | 1395 | 0 | 0 | 127 | 611 | 44 | 36 | 2403 |

TRNF-OTH* - CASES TRANSFERRED TO OTHER JURISDICTION, TO FAMILY COURT, TO ATTY-GENL OR CASINO PROSECUTION.

PROGRAM: CITZCOMP-3 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF CASES FROM FINAL OUTPUT FILE
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2016

COMP-TYPE:SUMMONS & WARRANTS

| CTY | DISP_TYPE NO-BILL | DISMISSED | DWGR-RMND | TRNF-OTH* | PLEA-DP | PLEA-AC | TRUE-BILL | PTI-ADD | PENDING | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|
| TOTAL | 120 | 626 | 7023 | 1 | 2 | 182 | 1096 | 160 | 114 | 9324 |

TRNF-OTH* - CASES TRANSFERRED TO OTHER JURISDICTION, TO FAMILY COURT, TO ATTY-GENL OR CASINO PROSECUTION.

PROGRAM: CITZCOMP-3 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF CASES FROM FINAL OUTPUT FILE
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2016

FOR WARRANTS AND SUMMONS

| | DISP_TYPE | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| CTY | NO-BILL | DISMISSED | DWGR-RMND | TRNF-OTH* | PLEA-DP | PLEA-AC | TRUE-BILL | PTI-ADD | PENDING | TOTAL |
| ATL | 7 | 236 | 633 | 0 | 0 | 23 | 311 | 33 | 17 | 1260 |
| BER | 0 | 15 | 900 | 0 | 0 | 27 | 37 | 7 | 6 | 992 |
| BUR | 0 | 8 | 227 | 1 | 0 | 6 | 28 | 6 | 3 | 279 |
| CAM | 6 | 54 | 956 | 0 | 0 | 45 | 220 | 22 | 5 | 1308 |
| CPM | 0 | 19 | 40 | 0 | 0 | 0 | 3 | 0 | 0 | 62 |
| CUM | 0 | 48 | 211 | 0 | 0 | 0 | 33 | 2 | 0 | 294 |
| ESX | 52 | 24 | 523 | 0 | 0 | 16 | 160 | 11 | 1 | 787 |
| GLO | 4 | 26 | 537 | 0 | 0 | 9 | 30 | 7 | 21 | 634 |
| HNT | 1 | 3 | 6 | 0 | 0 | 0 | 2 | 0 | 0 | 12 |
| HUD | 26 | 29 | 485 | 0 | 2 | 11 | 66 | 19 | 3 | 641 |
| MER | 1 | 13 | 268 | 0 | 0 | 6 | 49 | 14 | 19 | 370 |
| MID | 1 | 8 | 771 | 0 | 0 | 17 | 52 | 5 | 8 | 862 |
| MON | 9 | 37 | 444 | 0 | 0 | 6 | 8 | 4 | 6 | 514 |
| MRS | 0 | 30 | 158 | 0 | 0 | 4 | 9 | 5 | 0 | 206 |
| OCN | 0 | 8 | 351 | 0 | 0 | 1 | 13 | 0 | 11 | 384 |
| PAS | 9 | 10 | 416 | 0 | 0 | 6 | 25 | 16 | 10 | 492 |
| SLM | 2 | 13 | 25 | 0 | 0 | 0 | 23 | 1 | 4 | 68 |
| SOM | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 2 |
| SSX | 0 | 19 | 28 | 0 | 0 | 1 | 4 | 3 | 0 | 55 |
| UNN | 1 | 2 | 1 | 0 | 0 | 2 | 7 | 0 | 0 | 13 |
| WRN | 1 | 24 | 43 | 0 | 0 | 1 | 15 | 5 | 0 | 89 |
| TOTAL | 120 | 626 | 7023 | 1 | 2 | 182 | 1096 | 160 | 114 | 9324 |

TRNF-OTH* - CASES TRANSFERRED TO OTHER JURISDICTION, TO FAMILY COURT, TO ATTY-GENL OR CASINO PROSECUTION.

PROGRAM: CITZCOMP-1 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF COMPLAINTANTS/CASES FROM INDATA FILE
TRANSFERRED TO CRIMINAL IN SPECIFIED CALENDAR YEAR
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2015

| CTY | COCASEDEF COUNT |
|---|---|
| ATL | 1413 |
| BER | 1013 |
| BUR | 297 |
| CAM | 1366 |
| CPM | 86 |
| CUM | 321 |
| ESX | 952 |
| GLO | 682 |
| HNT | 25 |
| HUD | 641 |
| MER | 388 |
| MID | 952 |
| MON | 496 |
| MRS | 254 |
| OCN | 388 |
| PAS | 539 |
| SLM | 88 |
| SOM | 3 |
| SSX | 53 |
| UNN | 13 |
| WRN | 93 |
| TOTAL | 10063 |

PROGRAM: CITZCOMP-2 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF CASES FROM FINAL OUTPUT FILE
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2015

| CTY | COMP_TYPE SUMM | WARR | TOTAL |
|---|---|---|---|
| ATL | 980 | 433 | 1413 |
| BER | 734 | 279 | 1013 |
| BUR | 183 | 114 | 297 |
| CAM | 818 | 548 | 1366 |
| CPM | 83 | 3 | 86 |
| CUM | 306 | 15 | 321 |
| ESX | 364 | 588 | 952 |
| GLO | 574 | 108 | 682 |
| HNT | 24 | 1 | 25 |
| HUD | 332 | 309 | 641 |
| MER | 289 | 99 | 388 |
| MID | 610 | 342 | 952 |
| MON | 422 | 74 | 496 |
| MRS | 236 | 18 | 254 |
| OCN | 365 | 23 | 388 |
| PAS | 440 | 99 | 539 |
| SLM | 84 | 4 | 88 |
| SOM | 2 | 1 | 3 |
| SSX | 51 | 2 | 53 |
| UNN | 2 | 11 | 13 |
| WRN | 81 | 12 | 93 |
| TOTAL | 6980 | 3083 | 10063 |

PROGRAM: CITZCOMP-3 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF CASES FROM FINAL OUTPUT FILE
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2015

COMP-TYPE:SUMM

| CTY | DISP_TYPE NO-BILL | DISMISSED | DWGR-RMND | TRNF-OTH* | PLEA-DP | PLEA-AC | TRUE-BILL | PTI-ADD | PENDING | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|
| ATL | 2 | 185 | 568 | 1 | 0 | 21 | 175 | 28 | 0 | 980 |
| BER | 1 | 16 | 685 | 0 | 0 | 2 | 23 | 7 | 0 | 734 |
| BUR | 0 | 2 | 162 | 0 | 0 | 2 | 15 | 1 | 1 | 183 |
| CAM | 2 | 42 | 693 | 0 | 1 | 5 | 59 | 15 | 1 | 818 |
| CPM | 0 | 38 | 28 | 0 | 0 | 1 | 13 | 3 | 0 | 83 |
| CUM | 0 | 39 | 231 | 0 | 1 | 0 | 31 | 4 | 0 | 306 |
| ESX | 17 | 15 | 296 | 0 | 0 | 1 | 29 | 6 | 0 | 364 |
| GLO | 2 | 46 | 496 | 0 | 0 | 3 | 19 | 8 | 0 | 574 |
| HNT | 0 | 3 | 20 | 0 | 0 | 0 | 1 | 0 | 0 | 24 |
| HUD | 17 | 13 | 243 | 0 | 0 | 7 | 32 | 20 | 0 | 332 |
| MER | 2 | 19 | 227 | 0 | 0 | 6 | 20 | 14 | 1 | 289 |
| MID | 0 | 15 | 574 | 0 | 0 | 5 | 14 | 2 | 0 | 610 |
| MON | 10 | 25 | 366 | 0 | 0 | 2 | 7 | 12 | 0 | 422 |
| MRS | 0 | 39 | 158 | 0 | 0 | 14 | 14 | 11 | 0 | 236 |
| OCN | 0 | 6 | 351 | 0 | 0 | 0 | 6 | 1 | 1 | 365 |
| PAS | 14 | 2 | 392 | 0 | 0 | 1 | 19 | 12 | 0 | 440 |
| SLM | 7 | 32 | 31 | 0 | 0 | 0 | 11 | 3 | 0 | 84 |
| SOM | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 2 |
| SSX | 0 | 16 | 30 | 0 | 0 | 1 | 3 | 1 | 0 | 51 |
| UNN | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| WRN | 2 | 28 | 31 | 0 | 0 | 2 | 17 | 1 | 0 | 81 |
| *TOTAL SUMM | 76 | 582 | 5583 | 1 | 2 | 73 | 510 | 149 | 4 | 6980 |

TRNF-OTH* - CASES TRANSFERRED TO OTHER JURISDICTION, TO FAMILY COURT, TO ATTY-GENL OR CASINO PROSECUTION.

PROGRAM: CITZCOMP-3 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF CASES FROM FINAL OUTPUT FILE
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2015

COMP-TYPE:WARR

| CTY | DISP_TYPE NO-BILL | DISMISSED | DWGR-RMND | TRNF-OTH* | PLEA-DP | PLEA-AC | TRUE-BILL | PTI-ADD | PENDING | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|
| ATL | 3 | 43 | 175 | 0 | 0 | 33 | 167 | 12 | 0 | 433 |
| BER | 3 | 6 | 204 | 0 | 1 | 16 | 41 | 8 | 0 | 279 |
| BUR | 0 | 4 | 77 | 0 | 0 | 4 | 24 | 4 | 1 | 114 |
| CAM | 1 | 15 | 262 | 0 | 2 | 52 | 208 | 5 | 3 | 548 |
| CPM | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 1 | 0 | 3 |
| CUM | 0 | 2 | 8 | 0 | 0 | 0 | 5 | 0 | 0 | 15 |
| ESX | 47 | 15 | 258 | 0 | 0 | 40 | 224 | 4 | 0 | 588 |
| GLO | 1 | 4 | 80 | 0 | 1 | 1 | 16 | 2 | 3 | 108 |
| HNT | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 1 |
| HUD | 37 | 19 | 144 | 4 | 5 | 16 | 74 | 10 | 0 | 309 |
| MER | 4 | 4 | 57 | 0 | 0 | 3 | 29 | 2 | 0 | 99 |
| MID | 5 | 3 | 268 | 0 | 0 | 9 | 49 | 8 | 0 | 342 |
| MON | 0 | 0 | 56 | 0 | 0 | 4 | 13 | 1 | 0 | 74 |
| MRS | 0 | 2 | 9 | 0 | 0 | 3 | 3 | 1 | 0 | 18 |
| OCN | 0 | 3 | 13 | 0 | 0 | 0 | 6 | 0 | 1 | 23 |
| PAS | 7 | 0 | 65 | 0 | 0 | 5 | 18 | 4 | 0 | 99 |
| SLM | 0 | 3 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 4 |
| SOM | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 1 |
| SSX | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 2 |
| UNN | 1 | 1 | 3 | 0 | 0 | 1 | 5 | 0 | 0 | 11 |
| WRN | 0 | 1 | 8 | 0 | 0 | 1 | 2 | 0 | 0 | 12 |
| *TOTAL WARR | 109 | 125 | 1690 | 4 | 9 | 188 | 888 | 62 | 8 | 3083 |

TRNF-OTH* - CASES TRANSFERRED TO OTHER JURISDICTION, TO FAMILY COURT, TO ATTY-GENL OR CASINO PROSECUTION.

PROGRAM: CITZCOMP-3 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF CASES FROM FINAL OUTPUT FILE
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2015

COMP-TYPE:SUMMONS & WARRANTS

| CTY | DISP_TYPE NO-BILL | DISMISSED | DWGR-RMND | TRNF-OTH* | PLEA-DP | PLEA-AC | TRUE-BILL | PTI-ADD | PENDING | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|
| TOTAL | 185 | 707 | 7273 | 5 | 11 | 261 | 1398 | 211 | 12 | 10063 |

TRNF-OTH* - CASES TRANSFERRED TO OTHER JURISDICTION, TO FAMILY COURT, TO ATTY-GENL OR CASINO PROSECUTION.

PROGRAM: CITZCOMP-3 PROMIS EXTRACT OF MUNICIPAL GENERATED CASES
RUNDATE: 06/23/17 NUMBER OF CASES FROM FINAL OUTPUT FILE
THOSE FROM MUNICIPAL DATA WITH CDR ISSUED IN CALENDAR 2015

FOR WARRANTS AND SUMMONS

| | DISP_TYPE | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | NO-BILL | DISMISSED | DWGR-RMND | TRNF-OTH* | PLEA-DP | PLEA-AC | TRUE-BILL | PTI-ADD | PENDING | TOTAL |
| CTY | | | | | | | | | | |
| ATL | 5 | 228 | 743 | 1 | 0 | 54 | 342 | 40 | 0 | 1413 |
| BER | 4 | 22 | 889 | 0 | 1 | 18 | 64 | 15 | 0 | 1013 |
| BUR | 0 | 6 | 239 | 0 | 0 | 6 | 39 | 5 | 2 | 297 |
| CAM | 3 | 57 | 955 | 0 | 3 | 57 | 267 | 20 | 4 | 1366 |
| CPM | 0 | 38 | 29 | 0 | 0 | 1 | 14 | 4 | 0 | 86 |
| CUM | 0 | 41 | 239 | 0 | 1 | 0 | 36 | 4 | 0 | 321 |
| ESX | 64 | 30 | 554 | 0 | 0 | 41 | 253 | 10 | 0 | 952 |
| GLO | 3 | 50 | 576 | 0 | 1 | 4 | 35 | 10 | 3 | 682 |
| HNT | 0 | 3 | 20 | 0 | 0 | 0 | 2 | 0 | 0 | 25 |
| HUD | 54 | 32 | 387 | 4 | 5 | 23 | 106 | 30 | 0 | 641 |
| MER | 6 | 23 | 284 | 0 | 0 | 9 | 49 | 16 | 1 | 388 |
| MID | 5 | 18 | 842 | 0 | 0 | 14 | 63 | 10 | 0 | 952 |
| MON | 10 | 25 | 422 | 0 | 0 | 6 | 20 | 13 | 0 | 496 |
| MRS | 0 | 41 | 167 | 0 | 0 | 17 | 17 | 12 | 0 | 254 |
| OCN | 0 | 9 | 364 | 0 | 0 | 0 | 12 | 1 | 2 | 388 |
| PAS | 21 | 2 | 457 | 0 | 0 | 6 | 37 | 16 | 0 | 539 |
| SLM | 7 | 35 | 32 | 0 | 0 | 0 | 11 | 3 | 0 | 88 |
| SOM | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 0 | 3 |
| SSX | 0 | 16 | 31 | 0 | 0 | 1 | 4 | 1 | 0 | 53 |
| UNN | 1 | 2 | 4 | 0 | 0 | 1 | 5 | 0 | 0 | 13 |
| WRN | 2 | 29 | 39 | 0 | 0 | 3 | 19 | 1 | 0 | 93 |
| TOTAL | 185 | 707 | 7273 | 5 | 11 | 261 | 1398 | 211 | 12 | 10063 |

TRNF-OTH* - CASES TRANSFERRED TO OTHER JURISDICTION, TO FAMILY COURT, TO ATTY-GENL OR CASINO PROSECUTION.

**ACS**

**CITIZEN COMPLAINT TICKETS**

| COUNTY | 2015 | 2016 |
|---|---|---|
| ATLANTIC | 6,844 | 6,574 |
| BERGEN | 3,816 | 3,808 |
| BURLINGTON | 2,360 | 2,079 |
| CAMDEN | 6,593 | 5,954 |
| CAPE MAY | 851 | 796 |
| CUMBERLAND | 2,075 | 1,931 |
| ESSEX | 11,195 | 8,923 |
| GLOUCESTER | 3,150 | 2,760 |
| HUDSON | 4,390 | 4,160 |
| HUNTERDON | 255 | 234 |
| MERCER | 2,339 | 2,289 |
| MIDDLESEX | 6,346 | 5,783 |
| MONMOUTH | 2,730 | 2,345 |
| MORRIS | 1,318 | 1,164 |
| OCEAN | 1,868 | 1,568 |
| PASSAIC | 4,354 | 3,414 |
| SALEM | 651 | 559 |
| SOMERSET | 1,229 | 1,517 |
| SUSSEX | 500 | 574 |
| UNION | 2,883 | 2,492 |
| WARREN | 511 | 521 |
| **TOTAL** | **66,258** | **59,445** |

**ATS**

**CITIZEN COMPLAINT TICKETS**

| COUNTY | 2015 | 2016 |
|---|---|---|
| ATLANTIC | 200 | 229 |
| BERGEN | 1,391 | 1,189 |
| BURLINGTON | 187 | 219 |
| CAMDEN | 355 | 341 |
| CAPE MAY | 170 | 180 |
| CUMBERLAND | 150 | 128 |
| ESSEX | 655 | 842 |
| GLOUCESTER | 411 | 484 |
| HUDSON | 393 | 559 |
| HUNTERDON | 22 | 39 |
| MERCER | 337 | 266 |
| MIDDLESEX | 332 | 256 |
| MONMOUTH | 230 | 293 |
| MORRIS | 132 | 123 |
| OCEAN | 221 | 199 |
| PASSAIC | 613 | 582 |
| SALEM | 27 | 23 |
| SOMERSET | 160 | 119 |
| SUSSEX | 37 | 44 |
| UNION | 257 | 253 |
| WARREN | 35 | 26 |
| **TOTAL** | **6,315** | **6,394** |

**Table 1**: Table 1 shows the breakdown of mandatory and presumed warrants cases filed on citizen complaints since January 1, 2017.

**Table 2**: Table 2 shows the cumulative breakdown for calendar year 2016 and 2017 of all private citizen complaints by degree (1st, 2nd, 3rd and 4th degree filings) and also includes DP, PDP, other non-traffic matters (ordinance violations and other lesser offenses), parking and traffic filings. These numbers represent charges.

Indictable charge: 1, 2, 3, 4, I
DP charge: D, N
PDP charge: P
Local ordinance: 0

**Table 3**: Table 3 shows 2015 and 2016 citizen complaint dispositions (guilty, not guilty and dismissed) for cases that were always in the jurisdiction of the Municipal Court (never an indictable) and those cases transferred from Superior Court to Municipal Court (initially an indictable charge but downgraded to a DP/PDP and disposed of by Municipal. These numbers include Complaint-Warrants and Complaint-Summonses, but exclude conditional discharges, conditional dismissals, Superior Court and Family Court dispositions. In Appendix 4 of the research memo previously provided to the Working Group, it was noted that in 2015, 7,273 Superior Court cases were downgraded to a municipal charge and remanded back to Municipal Court. In 2016, 7,023 Superior Court cases were downgraded to a municipal charge and remanded back to Municipal Court. The dismissed numbers in Table 3 are significantly higher for those cases resolved and dismissed in Municipal Court. That is the case because the Superior Court data reflects “cases” whereas the Municipal Court data reflects “charges”. In municipal cases, a complaint can have multiple charges. For example, a defendant can have three complaints with six charges. Municipal’s ATS/ACS systems are charge-based systems. (Please note that cases disposed in 2015 or 2016 were not necessarily transferred in 2015 or 2016.)

**Table 4**: Table 2 shows the number of citizen-initiated complaints and the dispositions (guilty, not guilty and dismissed) compared to police-generated complaints for 2015 and 2016. These numbers represent all case types but exclude conditional discharges, conditional dismissals, Superior Court and Family Court dispositions.

| CITIZEN COMPLAINT - CHARGES FILED IN 2017<br>MANDATORY WARRANT AND PRESUMED WARRANT CHARGES | | | |
|---|---|---|---|
| **OFFENSE** | **DEGREE** | **DESCRIPTION** | **# CHARGES** |
| 2C:11-3A(1) | 1 | MURDER - PURPOSELY | 4 |
| 2C:11-3A(3) | 1 | MURDER - DURING COMMISSION OF A CRIME | 2 |
| 2C:11-4B(1) | 2 | MANSLAUGHTER - COMMITTED RECKLESSLY | 1 |
| 2C:14-2A(1) | 1 | AGGRAVATED SEXUAL ASSAULT - VICTIM < 13 | 4 |
| 2C:14-2A(2)(C) | 1 | AGG SEX ASSAULT-V>=13 & <16-D RESOURCE PARENT/GUARDIAN | 1 |
| 2C:14-2A(6) | 1 | AGG SEX ASSAULT-FORCE/COERCION & SEVERE INJURY TO VIC | 1 |
| 2C:14-2A(7) | 1 | AGG SEX ASSAULT-V HELPLESS, INCAPACITATED, ETC. | 1 |
| 2C:14-2B | 2 | SEXUAL ASSAULT-VIC < 13 & DEF 4+ YEARS OLDER | 2 |
| 2C:14-2C(1) | 2 | SEXUAL ASSAULT-FORCE/COERCION NO SEVERE PERSONAL INJURY | 9 |
| 2C:15-1A(1) | 1 | ROBBERY-INFLICTS BI OR USES FORCE - ARMED | 10 |
| | 2 | ROBBERY-INFLICTS BI OR USES FORCE | 24 |
| 2C:15-1A(2) | 1 | ROBBERY-THREAT OR FEAR OF BI - ARMED | 7 |
| | 2 | ROBBERY-THREAT OR FEAR OF BI | 3 |
| 2C:15-1A(3) | 1 | ROBBERY-THREAT OR COMMITS - ARMED | 2 |
| 2C:35-4 | 1 | MAINTAINING/OPERATING CDS PRODUCTION FACILITY | 5 |
| 2C:35-5.3B.A | 2 | MANU/DIST/PWI SYNTHETIC CANNABINOID =/> 1OZ | 1 |
| 2C:35-5B(1) | 1 | CDS - MANU/DIST/PWID - HEROIN/COCAINE - =/> 5OZ | 2 |
| 2C:35-5B(10)(A) | 1 | CDS MANU/DIST/PWID- MARIJ =/> 25LB/50 PLANT;HASH =/>5LB | 3 |
| 2C:35-5B(10)(B) | 2 | CDS - MANU/DIST/PWID -MARI =/>5LB<25LB, HASH =/>1LB<5LB | 5 |
| 2C:35-5B(2) | 2 | CDS - MANU/DIST/PWID - HEROIN/COCAINE - .5OZ TO <5OZ | 5 |
| 2C:35-5B(4) | 2 | CDS - MANU/DIST/PWID - SCHD I II - =/> 1OZ | 2 |
| 2C:35-5B(8) | 1 | CDS - MANU/DIST/PWID - METH - =/> 5OZ | 1 |
| 2C:35-5B(9)(A) | 2 | CDS - MANU/DIST/PWID - METH - .5OZ TO <5OZ | 2 |
| 2C:35-7.1A | 2 | POSS/DIST WITHIN 500 FT CERTAIN PUBLIC PROPERTY | 2 |
| 2C:39-4.1A | 2 | POSSESSION OF FIREARM WHILE COMMITTING CDS/BIAS CRIME | 2 |
| 2C:39-4.1B | 2 | WEAPONS POSSESSION EXCEPT FIREARM WITH PURPOSE TO USE | 2 |
| 2C:39-5B(1) | 2 | UNLAWFUL POSS WEAPON-HANDGUNS WITHOUT PERMIT | 32 |
| 2C:39-5B(2) | 3 | UNLAWFUL POSS WEAPON - HANDGUNS AIR/SPRING/PISTOL | 1 |
| 2C:39-7B(1) | 2 | CERT PERSON NOT TO HAVE WEAP PRIOR CONV 2C:16-1, ETC. | 13 |
| **TOTAL** | | | **149** |

| CITIZEN COMPLAINTS<br>ISSUED SINCE JAN 1, 2017 | | |
|---|---|---|
| **DEGREE** | **2016** | **2017** |
| | 358 | 3 |
| 0 | 13,969 | 11,546 |
| 1 | 70 | 55 |
| 2 | 588 | 446 |
| 3 | 3,900 | 3,174 |
| 4 | 3,047 | 2,314 |
| D | 12,191 | 11,187 |
| I | 5,076 | 19 |
| N | 15,494 | 34 |
| P | 9,679 | 8,520 |
| T | 9 | 0 |
| X | 4 | 149 |
| **TOTAL** | **64,385** | **37,447** |

| CITIZEN COMPLAINTS<br>CASES RESOLVED IN MUNICIPAL COURT<br>DISPOSITIONS BY YEAR | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| COUNTY | 2015 | | | | | | 2016 | | | | | |
| | GUILTY | % | NOT GUILTY | % | DISMISSED | % | GUILTY | % | NOT GUILTY | % | DISMISSED | % |
| ATLANTIC | 360 | 20.4% | 17 | 1.0% | 1,385 | 78.6% | 267 | 17.2% | 24 | 1.5% | 1,265 | 81.3% |
| BERGEN | 237 | 29.0% | 29 | 3.5% | 551 | 67.4% | 224 | 31.7% | 15 | 2.1% | 468 | 66.2% |
| BURLINGTON | 208 | 42.6% | 12 | 2.5% | 268 | 54.9% | 143 | 32.4% | 2 | .5% | 296 | 67.1% |
| CAMDEN | 726 | 24.1% | 46 | 1.5% | 2,235 | 74.3% | 432 | 16.3% | 60 | 2.3% | 2,152 | 81.4% |
| CAPE MAY | 78 | 27.8% | 2 | .7% | 201 | 71.5% | 45 | 19.8% | 4 | 1.8% | 178 | 78.4% |
| CUMBERLAND | 330 | 28.6% | 11 | 1.0% | 813 | 70.5% | 256 | 23.8% | 12 | 1.1% | 806 | 75.0% |
| ESSEX | 302 | 7.7% | 72 | 1.8% | 3,571 | 90.5% | 175 | 5.4% | 40 | 1.2% | 3,025 | 93.4% |
| GLOUCESTER | 265 | 22.8% | 13 | 1.1% | 882 | 76.0% | 190 | 19.3% | 14 | 1.4% | 783 | 79.3% |
| HUDSON | 210 | 16.1% | 27 | 2.1% | 1,065 | 81.8% | 159 | 13.3% | 6 | .5% | 1,034 | 86.2% |
| HUNTERDON | 7 | 21.9% | 2 | 6.3% | 23 | 71.9% | 13 | 32.5% | 1 | 2.5% | 26 | 65.0% |
| MERCER | 122 | 11.9% | 13 | 1.3% | 888 | 86.8% | 119 | 10.7% | 17 | 1.5% | 977 | 87.8% |
| MIDDLESEX | 294 | 16.9% | 83 | 4.8% | 1,361 | 78.3% | 262 | 18.8% | 37 | 2.6% | 1,098 | 78.6% |
| MONMOUTH | 465 | 45.6% | 23 | 2.3% | 532 | 52.2% | 305 | 36.1% | 8 | .9% | 531 | 62.9% |
| MORRIS | 102 | 31.2% | 19 | 5.8% | 206 | 63.0% | 83 | 30.0% | 19 | 6.9% | 175 | 63.2% |
| OCEAN | 126 | 15.6% | 13 | 1.6% | 669 | 82.8% | 161 | 19.4% | 18 | 2.2% | 649 | 78.4% |
| PASSAIC | 494 | 40.8% | 47 | 3.9% | 669 | 55.3% | 357 | 23.3% | 37 | 2.4% | 1,140 | 74.3% |
| SALEM | 52 | 16.8% | 6 | 1.9% | 252 | 81.3% | 27 | 11.0% | 2 | .8% | 216 | 88.2% |
| SOMERSET | 139 | 35.7% | 13 | 3.3% | 237 | 60.9% | 109 | 36.8% | 6 | 2.0% | 181 | 61.1% |
| SUSSEX | 15 | 12.0% | 2 | 1.6% | 108 | 86.4% | 27 | 20.8% | 2 | 1.5% | 101 | 77.7% |
| UNION | 136 | 17.9% | 13 | 1.7% | 611 | 80.4% | 100 | 18.6% | 6 | 1.1% | 432 | 80.3% |
| WARREN | 58 | 32.8% | 9 | 5.1% | 110 | 62.1% | 38 | 19.8% | 5 | 2.6% | 149 | 77.6% |
| **TOTAL** | **4,726** | **21.6%** | **472** | **2.2%** | **16,637** | **76.2%** | **3,492** | **17.9%** | **335** | **1.7%** | **15,682** | **80.4%** |

| CITIZEN COMPLAINTS<br>CASES TRANSFERED FROM SUPERIOR COURT<br>DISPOSITIONS BY YEAR | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **COUNTY** | **2015** | | | | | | **2016** | | | | | |
| | **GUILTY** | **%** | **NOT GUILTY** | **%** | **DISMISSED** | **%** | **GUILTY** | **%** | **NOT GUILTY** | **%** | **DISMISSED** | **%** |
| ATLANTIC | 112 | 14.0% | 8 | 1.0% | 681 | 85.0% | 160 | 19.5% | 23 | 2.8% | 638 | 77.7% |
| BERGEN | 146 | 29.7% | 15 | 3.1% | 330 | 67.2% | 238 | 32.3% | 13 | 1.8% | 485 | 65.9% |
| BURLINGTON | 72 | 43.6% | 2 | 1.2% | 91 | 55.2% | 107 | 45.9% | 2 | .9% | 124 | 53.2% |
| CAMDEN | 209 | 31.1% | 8 | 1.2% | 456 | 67.8% | 286 | 31.0% | 26 | 2.8% | 612 | 66.2% |
| CAPE MAY | 6 | 16.7% | 0 | .0% | 30 | 83.3% | 7 | 10.0% | 0 | .0% | 63 | 90.0% |
| CUMBERLAND | 31 | 10.7% | 3 | 1.0% | 256 | 88.3% | 55 | 15.6% | 2 | .6% | 296 | 83.9% |
| ESSEX | 171 | 14.3% | 14 | 1.2% | 1,008 | 84.5% | 160 | 11.0% | 17 | 1.2% | 1,271 | 87.8% |
| GLOUCESTER | 75 | 18.0% | 11 | 2.6% | 330 | 79.3% | 139 | 16.9% | 23 | 2.8% | 662 | 80.3% |
| HUDSON | 80 | 17.9% | 3 | .7% | 364 | 81.4% | 135 | 25.1% | 2 | .4% | 401 | 74.5% |
| HUNTERDON | 0 | .0% | 0 | .0% | 13 | 100.0% | 1 | 6.3% | 1 | 6.3% | 14 | 87.5% |
| MERCER | 42 | 33.1% | 1 | .8% | 84 | 66.1% | 55 | 29.7% | 1 | .5% | 129 | 69.7% |
| MIDDLESEX | 130 | 22.6% | 39 | 6.8% | 407 | 70.7% | 205 | 28.2% | 19 | 2.6% | 502 | 69.1% |
| MONMOUTH | 145 | 37.3% | 8 | 2.1% | 236 | 60.7% | 145 | 28.9% | 4 | .8% | 352 | 70.3% |
| MORRIS | 24 | 20.7% | 9 | 7.8% | 83 | 71.6% | 45 | 31.5% | 12 | 8.4% | 86 | 60.1% |
| OCEAN | 12 | 3.8% | 9 | 2.9% | 294 | 93.3% | 45 | 10.9% | 7 | 1.7% | 361 | 87.4% |
| PASSAIC | 48 | 11.6% | 20 | 4.8% | 347 | 83.6% | 64 | 12.7% | 40 | 8.0% | 398 | 79.3% |
| SALEM | 6 | 10.9% | 4 | 7.3% | 45 | 81.8% | 7 | 10.4% | 1 | 1.5% | 59 | 88.1% |
| SOMERSET | 0 | .0% | 0 | .0% | 8 | 100.0% | 0 | .0% | 1 | 25.0% | 3 | 75.0% |
| SUSSEX | 3 | 8.1% | 1 | 2.7% | 33 | 89.2% | 8 | 12.9% | 0 | .0% | 54 | 87.1% |
| UNION | 0 | .0% | 0 | .0% | 11 | 100.0% | 5 | 38.5% | 0 | .0% | 8 | 61.5% |
| WARREN | 7 | 12.5% | 0 | .0% | 49 | 87.5% | 10 | 19.2% | 3 | 5.8% | 39 | 75.0% |
| **TOTAL** | **1,319** | **19.9%** | **155** | **2.3%** | **5,156** | **77.8%** | **1,877** | **21.7%** | **197** | **2.3%** | **6,557** | **76.0%** |

| CITIZEN COMPLAINTS<br>DISPOSITIONS BY YEAR | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **COUNTY** | **2015** | | | | | | **2016** | | | | | |
| | **GUILTY** | **%** | **NOT GUILTY** | **%** | **DISMISSED** | **%** | **GUILTY** | **%** | **NOT GUILTY** | **%** | **DISMISSED** | **%** |
| ATLANTIC | 1,665 | 30.8% | 55 | 1.0% | 3,692 | 68.2% | 1,641 | 32.1% | 71 | 1.4% | 3,397 | 66.5% |
| BERGEN | 1,068 | 34.5% | 59 | 1.9% | 1,969 | 63.6% | 1,113 | 36.3% | 45 | 1.5% | 1,905 | 62.2% |
| BURLINGTON | 637 | 31.0% | 31 | 1.5% | 1,385 | 67.5% | 516 | 28.2% | 11 | .6% | 1,302 | 71.2% |
| CAMDEN | 1,699 | 27.2% | 93 | 1.5% | 4,451 | 71.3% | 1,058 | 18.6% | 133 | 2.3% | 4,497 | 79.1% |
| CAPE MAY | 159 | 20.7% | 7 | .9% | 603 | 78.4% | 121 | 17.2% | 6 | .9% | 577 | 82.0% |
| CUMBERLAND | 491 | 25.1% | 21 | 1.1% | 1,445 | 73.8% | 398 | 23.1% | 14 | .8% | 1,311 | 76.1% |
| ESSEX | 2,344 | 21.4% | 132 | 1.2% | 8,492 | 77.4% | 1,753 | 18.0% | 85 | .9% | 7,881 | 81.1% |
| GLOUCESTER | 562 | 21.5% | 31 | 1.2% | 2,024 | 77.3% | 518 | 20.3% | 40 | 1.6% | 1,998 | 78.2% |
| HUDSON | 581 | 14.3% | 61 | 1.5% | 3,420 | 84.2% | 565 | 15.8% | 12 | .3% | 2,989 | 83.8% |
| HUNTERDON | 65 | 25.6% | 17 | 6.7% | 172 | 67.7% | 40 | 19.9% | 2 | 1.0% | 159 | 79.1% |
| MERCER | 417 | 21.6% | 20 | 1.0% | 1,490 | 77.3% | 470 | 21.0% | 21 | .9% | 1,746 | 78.1% |
| MIDDLESEX | 1,880 | 37.8% | 167 | 3.4% | 2,925 | 58.8% | 1,866 | 43.4% | 74 | 1.7% | 2,358 | 54.9% |
| MONMOUTH | 934 | 36.4% | 45 | 1.8% | 1,585 | 61.8% | 683 | 29.7% | 30 | 1.3% | 1,585 | 69.0% |
| MORRIS | 321 | 29.0% | 114 | 10.3% | 673 | 60.7% | 254 | 27.3% | 52 | 5.6% | 624 | 67.1% |
| OCEAN | 259 | 14.3% | 54 | 3.0% | 1,499 | 82.7% | 263 | 15.4% | 32 | 1.9% | 1,418 | 82.8% |
| PASSAIC | 1,491 | 34.0% | 93 | 2.1% | 2,795 | 63.8% | 1,102 | 31.6% | 99 | 2.8% | 2,283 | 65.5% |
| SALEM | 116 | 21.1% | 18 | 3.3% | 415 | 75.6% | 63 | 13.7% | 5 | 1.1% | 393 | 85.2% |
| SOMERSET | 391 | 32.6% | 27 | 2.2% | 783 | 65.2% | 524 | 39.8% | 17 | 1.3% | 775 | 58.9% |
| SUSSEX | 114 | 27.8% | 14 | 3.4% | 282 | 68.8% | 151 | 28.4% | 5 | .9% | 376 | 70.7% |
| UNION | 760 | 29.5% | 31 | 1.2% | 1,782 | 69.3% | 571 | 24.9% | 28 | 1.2% | 1,697 | 73.9% |
| WARREN | 93 | 22.0% | 14 | 3.3% | 316 | 74.7% | 71 | 17.0% | 18 | 4.3% | 328 | 78.7% |
| **TOTAL** | **16,047** | **27.0%** | **1,104** | **1.9%** | **42,198** | **71.1%** | **13,741** | **25.4%** | **800** | **1.5%** | **39,599** | **73.1%** |

| POLICE GENERATED COMPLAINTS<br>DISPOSITIONS BY YEAR | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **COUNTY** | **2015** | | | | | | **2016** | | | | | |
| | **GUILTY** | **%** | **NOT GUILTY** | **%** | **DISMISSED** | **%** | **GUILTY** | **%** | **NOT GUILTY** | **%** | **DISMISSED** | **%** |
| ATLANTIC | 3,790 | 44.9% | 74 | .9% | 4,586 | 54.3% | 3,457 | 42.4% | 118 | 1.4% | 4,575 | 56.1% |
| BERGEN | 9,631 | 46.4% | 123 | .6% | 11,011 | 53.0% | 9,601 | 41.9% | 124 | .5% | 13,196 | 57.6% |
| BURLINGTON | 6,454 | 46.9% | 123 | .9% | 7,193 | 52.2% | 6,468 | 43.9% | 54 | .4% | 8,195 | 55.7% |
| CAMDEN | 14,315 | 47.0% | 213 | .7% | 15,933 | 52.3% | 10,500 | 40.1% | 205 | .8% | 15,451 | 59.1% |
| CAPE MAY | 2,764 | 56.3% | 16 | .3% | 2,128 | 43.4% | 2,712 | 52.5% | 15 | .3% | 2,434 | 47.2% |
| CUMBERLAND | 3,833 | 42.2% | 17 | .2% | 5,234 | 57.6% | 3,448 | 39.5% | 10 | .1% | 5,279 | 60.4% |
| ESSEX | 12,648 | 24.9% | 72 | .1% | 38,099 | 75.0% | 12,929 | 22.9% | 84 | .1% | 43,542 | 77.0% |
| GLOUCESTER | 4,691 | 43.4% | 23 | .2% | 6,098 | 56.4% | 4,567 | 38.5% | 24 | .2% | 7,279 | 61.3% |
| HUDSON | 11,523 | 40.4% | 46 | .2% | 16,970 | 59.5% | 11,621 | 42.2% | 58 | .2% | 15,843 | 57.6% |
| HUNTERDON | 671 | 29.6% | 25 | 1.1% | 1,574 | 69.3% | 751 | 30.5% | 37 | 1.5% | 1,678 | 68.0% |
| MERCER | 4,663 | 40.2% | 24 | .2% | 6,920 | 59.6% | 4,592 | 39.3% | 28 | .2% | 7,072 | 60.5% |
| MIDDLESEX | 9,582 | 45.7% | 794 | 3.8% | 10,570 | 50.5% | 9,481 | 44.9% | 375 | 1.8% | 11,264 | 53.3% |
| MONMOUTH | 12,480 | 55.2% | 288 | 1.3% | 9,823 | 43.5% | 13,495 | 48.8% | 233 | .8% | 13,911 | 50.3% |
| MORRIS | 3,773 | 45.1% | 374 | 4.5% | 4,221 | 50.4% | 4,244 | 43.0% | 586 | 5.9% | 5,050 | 51.1% |
| OCEAN | 6,921 | 54.9% | 267 | 2.1% | 5,417 | 43.0% | 7,209 | 55.2% | 227 | 1.7% | 5,612 | 43.0% |
| PASSAIC | 10,328 | 51.0% | 131 | .6% | 9,783 | 48.3% | 9,939 | 43.3% | 90 | .4% | 12,919 | 56.3% |
| SALEM | 933 | 39.4% | 12 | .5% | 1,423 | 60.1% | 897 | 40.8% | 11 | .5% | 1,290 | 58.7% |
| SOMERSET | 2,499 | 45.5% | 19 | .3% | 2,973 | 54.1% | 2,536 | 48.5% | 21 | .4% | 2,671 | 51.1% |
| SUSSEX | 898 | 45.5% | 86 | 4.4% | 989 | 50.1% | 1,096 | 51.0% | 98 | 4.6% | 954 | 44.4% |
| UNION | 5,872 | 37.1% | 38 | .2% | 9,931 | 62.7% | 6,483 | 39.3% | 36 | .2% | 9,978 | 60.5% |
| WARREN | 1,492 | 57.4% | 91 | 3.5% | 1,015 | 39.1% | 1,404 | 55.6% | 133 | 5.3% | 988 | 39.1% |
| **TOTAL** | **129,761** | **42.6%** | **2,856** | **.9%** | **171,891** | **56.4%** | **127,430** | **39.9%** | **2,567** | **.8%** | **189,181** | **59.3%** |

# APPENDIX 5

**LINDA R. S. v. RICHARD D. ET AL.**

**No. 71-6078**

**SUPREME COURT OF THE UNITED STATES**

***410 U.S. 614*; *93 S. Ct. 1146*; *35 L. Ed. 2d 536*; *1973 U.S. LEXIS 99***

**December 6, 1972, Argued**
**March 5, 1973, Decided**

**PRIOR HISTORY:** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

**DISPOSITION:** *335 F.Supp. 804*, affirmed.

**SUMMARY:**

The appellant, the mother of an illegitimate child, brought a class action in the United States District Court for the Northern District of Texas, seeking an injunction against the discriminatory application of a Texas criminal statute making a parent's wilful desertion, neglect, or refusal to provide for the support and maintenance of a child under 18 a misdemeanor punishable by not more than 2 years' confinement in a county jail. Although the statute made no distinction between legitimate and illegitimate children, the Texas courts had consistently construed it to apply solely to the parents of legitimate children and to impose no duty of support on the parents of illegitimate children. The district attorney had therefore refused, on the mother's complaint, to institute an action against the child's father, although similar actions had been instituted against fathers of legitimate children by various state officials in the past. A three-judge District Court was convened pursuant to *28 USCS 2281*, but that court dismissed the action for want of standing (*335 F Supp 804*).

On appeal, the United States Supreme Court affirmed. In an opinion by Marshall, J., expressing the views of five members of the court, it was held that the appellant had failed to allege a sufficient nexus between her injury and the government action which she attacked to justify judicial intervention, in view of her failure to show that enforcement of the statute would result in support of her child rather than in the mere jailing of the child's father.

White, J., joined by Douglas, J., dissented, saying that the appellant and the class she represented had been intentionally excluded from the class of persons protected by the law, and that if Texas prosecuted fathers for nonsupport of legitimate children on their mother's complaint, no basis existed for saying that the mother of an illegitimate child had no standing to seek the institution of similar proceedings against her child's father.

Blackmun, J., joined by Brennan, J., dissented, saying that the standing issue was a difficult one with constitutional overtones, and that in view of the fact that the court's decision in *Gomez v Perez (1973) 409 US 535, 35 L Ed 2d 56, 93 S Ct 872*, had beclouded the state precedents relied upon by both parties in the District Court, the case should be remanded for clarification of the status of the litigation.

**LAWYERS' EDITION HEADNOTES:**

COURTS §235

PARTIES §2

case or controversy -- proper party --

Headnote:[1]

Before a person may invoke the judicial process, he must present a federal court with a "case" or "controversy" in the constitutional sense, and must show that he is a proper plaintiff to raise the issues he seeks to litigate.

PARTIES §3

standing to sue -- actual or threatened injury --

Headnote:[2]

In the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from a putatively illegal action before a federal court may assume jurisdiction.

COURTS §229

COURTS §762

PARTIES §2

advisory opinions -- jurisdiction -- creation of statutory rights --

Headnote:[3]

Although Congress may not confer jurisdiction on Article III federal courts to render advisory opinions, it may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.

CONSTITUTIONAL LAW §347.7

PARENT AND CHILD §2

PARTIES §3

standing -- mother of illegitimate child -- equal protection --

Headnote:[4A][4B]

The mother of an illegitimate child--who seeks an injunction against a state district attorney to require him to prosecute the child's father under a state criminal law which provides that any parent who shall wilfully desert, neglect, or refuse to provide for the support and maintenance of his or her child or children under 18 years of age, shall be guilty of a misdemeanor punishable by not more than 2 years' confinement in a county jail, because the district attorney, pursuant to a consistent construction by state courts that the statute applies solely to the parents of legitimate children and imposes no duty of support on the parents of illegitimate children, has refused to institute such an action--has failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention, and lacks standing to challenge the statute on the ground that it discriminates between legitimate and illegitimate children without rational foundation and therefore violates the *equal protection clause of the Fourteenth Amendment*.

PARTIES §3

standing -- direct injury --

Headnote:[5]

In addition to showing the bare existence of an abstract injury, a party, in order to have standing to invoke judicial intervention, must be able to show that he has sustained or is immediately in danger of sustaining some direct injury as the result of a statute's enforcement.

PARTIES §3

standing -- logical nexus between status and claim --

Headnote:[6]

A plaintiff in a federal court must show a logical nexus between the status asserted and the claim sought to be adjudicated, such inquiries being essential to insure that he is a proper and appropriate party to invoke the federal judicial power.

PARTIES §2

prosecuting attorney -- policies -- standing --

Headnote:[7]

A citizen lacks standing to contest the policies of prosecuting authorities when he himself is neither prosecuted nor threatened with prosecution.

PARTIES §2

private citizen -- prosecution of another -- standing --

Headnote:[8]

In American jurisprudence, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.

**SYLLABUS**

Appellant, the mother of an illegitimate child, brought a class action to enjoin the "discriminatory application" of Art. 602 of the Texas Penal Code providing that any "parent" who fails to support his "children" is subject to prosecution, but which by state judicial construction applies only to married parents. Appellant sought to enjoin the local district attorney from refraining to prosecute the father of her child. The three-judge District Court dismissed appellant's action for want of standing: *Held*: Although appellant has an interest in her child's support, application of Art. 602 would not result in support but only in the father's incarceration, and a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Pp. 616-619.

**COUNSEL:** Windle Turley argued the cause and filed a brief for appellant.

Robert W. Gauss, Assistant Attorney General of Texas, argued the cause for appellees. On the brief were Crawford C. Martin, Attorney General, Nola White, First Assistant Attorney General, Alfred Walker, Executive Assistant Attorney General, J. C. Davis and Pat Bailey, Assistant Attorneys General, and Samuel D. McDaniel.

**JUDGES:** Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, Powell, and Rehnquist, JJ., joined. White, J., filed a dissenting opinion, in which Douglas, J., joined, post , p. 619. Blackmun, J., filed a dissenting opinion, in which Brennan, J., joined, post, p. 622.

**OPINION BY:** MARSHALL

**OPINION**

[*614] [***539] [**1147] MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant, the mother of an illegitimate child, brought this action in United States District Court on behalf of herself, her child, and others similarly situated to enjoin [*615] the "discriminatory application" of Art. 602 of the Texas Penal Code. A three-judge court was convened pursuant to *28 U. S. C. § 2281*, but that court dismissed the action for want of standing. [1] *335 F.Supp. 804 (ND Tex. 1971)*. We postponed consideration of jurisdiction until argument on the merits, *405 U.S. 1064*, and now affirm the judgment below.

1 The District Court also considered an attack on Art. 4.02 of the Texas Family Code, which imposes civil liability upon "spouses" for the support of their minor children. Petitioner argued that the statute violated equal protection because it imposed no civil liability on the parents of illegitimate children. However, the three-judge court held that the challenge to this statute was not properly before it since appellant did not seek an injunction running against any state official as to it. See *28 U. S. C. § 2281*. The Court, therefore, remanded this portion of the case to a single district judge. *335 F.Supp. 804, 807*. The District Court's disposition of petitioner's Art. 4.02 claim is not presently before us. But see *Gomez v. Perez, 409 U.S. 535 (1973)*.

Article 602, in relevant part, provides: "any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years." The Texas courts have consistently construed this statute to apply solely to the parents of legitimate children and to impose no duty of support on the parents of illegitimate children. See *Home of the Holy Infancy v. Kaska, 397 S. W. 2d 208, 210 (Tex. 1966)*; *Beaver v. State, 96 Tex. Cr. R. 179, 256 S. W. 929 (1923)*. In her complaint, appellant alleges that one Richard D. is the father of her child, that Richard D. has refused to provide support for the child, and that although appellant made application to the local district attorney for enforcement of Art. 602 against Richard D., the district attorney refused to take action for the express [*616] reason that,

in his view, the fathers of illegitimate children were not within the scope of Art. 602. [2]

2 Appellant attached to her complaint an affidavit, signed by an assistant district attorney, stating that the State was unable to institute prosecution "due to caselaw construing Art. 602 of the Penal Code to be inapplicable to fathers of illegitimate children."

[**1148] Appellant argues that this interpretation of Art. 602 discriminates between legitimate and illegitimate children without rational foundation and therefore violates the *Equal* [***540] *Protection Clause of the Fourteenth Amendment*. Cf. *Gomez v. Perez, 409 U.S. 535 (1973)*; *Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)*; *Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968)*; *Levy v. Louisiana, 391 U.S. 68 (1968)*. But cf. *Labine v. Vincent, 401 U.S. 532 (1971)*. Although her complaint is not entirely clear on this point, she apparently seeks an injunction running against the district attorney forbidding him from declining prosecution on the ground that the unsupported child is illegitimate.

[***LEdHR1] [1]Before we can consider the merits of appellant's claim or the propriety of the relief requested, however, appellant must first demonstrate that she is entitled to invoke the judicial process. She must, in other words, show that the facts alleged present the court with a "case or controversy" in the constitutional sense and that she is a proper plaintiff to raise the issues sought to be litigated. The threshold question which must be answered is whether the appellant has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr, 369 U.S. 186, 204 (1962)*.

[***LEdHR2] [2] [***LEdHR3] [3]Recent decisions by this Court have greatly expanded the types of "personal stake[s]" which are capable of [*617] conferring standing on a potential plaintiff. Compare *Tennessee Electric Power Co.* v. *TVA, 306 U.S. 118 (1939)*, and *Alabama Power Co.* v. *Ickes, 302 U.S. 464 (1938)*, with *Barlow v. Collins, 397 U.S. 159 (1970)*, and *Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970)*. But as we pointed out only last Term, "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Sierra Club v. Morton, 405 U.S. 727, 738 (1972)*. Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, [3] federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction. [4] See, *e. g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-167 (1972)*; [***541] *Flast v. Cohen, 392 U.S. 83, 101* [**1149] *(1968)*; *Baker v. Carr, 369 U.S. 186, 204 (1962)*. Cf. *Laird v. Tatum, 408 U.S. 1, 13 (1972)*.

3 It is, of course, true that "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions," *Sierra Club v. Morton, 405 U.S. 727, 732 n. 3 (1972)*. But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. See, *e. g., Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972)* (WHITE, J., concurring); *Hardin v. Kentucky Utilities Co., 390 U.S. 1, 6 (1968)*.

4 One of the leading commentators on standing has written, "Even though the past law of standing is so cluttered and confused that almost every proposition has some exception, the federal courts have consistently adhered to one major proposition without exception: One who has no interest of his own at stake always lacks standing." K. Davis, Administrative Law Text 428-429 (3d ed. 1972).

[***LEdHR4A] [4A] [***LEdHR5] [5] [***LEdHR6] [6]Applying this test to the facts of this case, we hold that, in the unique context of a challenge to a criminal statute, appellant has failed to allege a sufficient nexus [*618] between her injury and the government action which she attacks to justify judicial intervention. To be sure, appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments. But the bare existence of an abstract injury meets only the first half of the standing requirement. "The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some *direct* injury *as the result of* [a statute's] enforcement." *Massachusetts v.*

*Mellon, 262 U.S. 447, 488 (1923)* (emphasis added). See also *Ex parte Levitt, 302 U.S. 633, 634 (1937)*. As this Court made plain in *Flast v. Cohen, supra*, a plaintiff must show "a logical nexus between the status asserted and the claim sought to be adjudicated. . . . Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power." *Id., at 102*.

Here, appellant has made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of Art. 602. Although the Texas statute appears to create a continuing duty, it does not follow the civil contempt model whereby the defendant "keeps the keys to the jail in his own pocket" and may be released whenever he complies with his legal obligations. On the contrary, the statute creates a completed offense with a fixed penalty as soon as a parent fails to support his child. Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative. Certainly the "direct" relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.

[*619] [***LEdHR4A] [4B] [***LEdHR7] [7] [***LEdHR8] [8]The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. See *Younger v. Harris, 401 U.S. 37, 42 (1971)*; *Bailey v. Patterson, 369 U.S. 31, 33 (1962)*; *Poe v. Ullman, 367 U.S. 497, 501 (1961)*. Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. Appellant does have an interest in the support of her child. But given the special status of criminal prosecutions in our system, we hold that appellant has made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the [***542] State's criminal laws. The District Court was therefore correct in dismissing the action for want of standing, [5] and its judgment must be affirmed. [6]

5 We noted last Term that "the requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process." *Sierra Club v. Morton, 405 U.S., at 740*. That observation is fully applicable here. As the District Court stated, "the proper party to challenge the constitutionality of Article 602 would be a parent of a legitimate child who has been prosecuted under the statute. Such a challenge would allege that because the parents of illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children." *335 F.Supp., at 806*.

6 Since we dispose of this case on the basis of lack of standing, we intimate no view as to the merits of appellant's claim. But cf. *Gomez v. Perez, 409 U.S. 535 (1973)*.

*So ordered.*

**DISSENT BY:** WHITE; BLACKMUN

**DISSENT**

[**1150] [***542contd] [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Appellant Linda R. S. alleged that she is the mother of an illegitimate child and that she is suing "on behalf of [*620] herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father." Appellant sought a declaratory judgment that Art. 602 is unconstitutional and an injunction against its continued enforcement against fathers of legitimate children only. Appellant further sought an order requiring Richard D., the putative father, "to pay a reasonable amount of money for the support of his child."

Obviously, there are serious difficulties with

appellant's complaint insofar as it may be construed as seeking to require the official appellees to prosecute Richard D. or others, or to obtain what amounts to a federal child-support order. But those difficulties go to the question of what relief the court may ultimately grant appellant. They do not affect her right to bring this class action. The Court notes, as it must, that the father of a legitimate child, if prosecuted under Art. 602, could properly raise the statute's underinclusiveness as an affirmative defense. See *McLaughlin v. Florida, 379 U.S. 184 (1964)*; *Railway Express Agency v. New York, 336 U.S. 106 (1949)*. Presumably, that same father would have standing to affirmatively seek to enjoin enforcement of the statute against him. Cf. *Rinaldi v. Yeager, 384 U.S. 305 (1966)*; see also *Epperson v. Arkansas, 393 U.S. 97 (1968)*. The question then becomes simply: why should only an actual or potential criminal defendant have a recognizable interest in attacking this allegedly discriminatory statute and not appellant and her class? They are not, after all, in the position of members of the public at large who wish merely to force an enlargement of state criminal laws. Cf. *Sierra Club v. Morton, 405 U.S. 727 (1972)*. Appellant, her daughter, and the children born out of wedlock whom [*621] she is attempting to represent have all allegedly been excluded intentionally [***543] from the class of persons protected by a particular criminal law. They do not get the protection of the laws that other women and children get. Under Art. 602, they are rendered nonpersons; a father may ignore them with full knowledge that he will be subjected to no penal sanctions. The Court states that the actual coercive effect of those sanctions on Richard D. or others "can, at best, be termed only speculative." This is a very odd statement. I had always thought our civilization has assumed that the threat of penal sanctions had something more than a "speculative" effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law. Certainly Texas does not share the Court's surprisingly novel view. It assumes that criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children.

Unquestionably, Texas prosecutes fathers of legitimate children on the complaint [**1151] of the mother asserting nonsupport and refuses to entertain like complaints from a mother of an illegitimate child. I see no basis for saying that the latter mother has no standing to demand that the discrimination be ended, one way or the other.

If a State were to pass a law that made only the murder of a white person a crime, I would think that Negroes as a class would have sufficient interest to seek a declaration that that law invidiously discriminated against them. Appellant and her class have no less interest in challenging their exclusion from what their own State perceives as being the beneficial protections that flow from the existence and enforcement of a criminal child-support law. [*622] I would hold that appellant has standing to maintain this suit and would, accordingly, reverse the judgment and remand the case for further proceedings.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, dissenting.

By her complaint, appellant challenged Texas' exemption of fathers of illegitimate children from both civil and criminal liability. Our decision in *Gomez v. Perez, 409 U.S. 535 (1973)*, announced after oral argument in this case, has important implications for the Texas law governing a man's civil liability for the support of children he has fathered illegitimately. Although appellant's challenge to the civil statute, as the Court points out, is not procedurally before us, *ante*, at 615 n. 1, her brief makes it clear that her basic objection to the Texas system concerns the absence of a duty of paternal support for illegitimate children. The history of the case suggests that appellant sought to utilize the criminal statute as a tool to compel support payments for her child. The decision in *Gomez* may remove the need for appellant to rely on the criminal law if she continues her quest for paternal contribution.

The standing issue now decided by the Court is, in my opinion, a difficult one with constitutional overtones. I see no reason to decide that question in the absence of a live, ongoing controversy. See *Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)*. *Gomez* now has beclouded the state precedents relied upon by [***544] both parties in the District Court. Thus "intervening circumstances may well have altered the views of the participants," and the necessity for resolving the particular dispute may no longer be present. *Protective Committee v. Anderson, 390 U.S. 414, 453-454 (1968)*. Under these circumstances, I would remand the case to the District Court for clarification of the status of the litigation.

**REFERENCES**

*10 Am Jur 2d, Bastards 68*; *59 Am Jur 2d, Parties 24, 26-28, 30*; *63 Am Jur 2d, Prosecuting Attorneys 25, 26*; *63 Am Jur 2d, Public Officers and Employees 533, 534*

5 Am Jur Pl & Pr Forms (Rev ed), Bastards, Forms 21-33

3 Am Jur Legal Forms 2d, Bastards 40:11-40:19

2 Am Jur Proof of Facts 445, Bastards

10 Am Jur Trials 653, Disputed Paternity Cases; 17 Am Jur Trials 721, Defense Against Wife's Action for Support

US L Ed Digest, Constitutional Law 347.7; Courts 229, 235, 762; Parent and Child 2; Parties 2, 3

ALR Digests, Courts 273.3, 348; Parent and Child 3; Parties 1, 2, 5, 97

L Ed Index to Anno, Children and Minors; Courts; Equal Protection of the Laws; Officers; Parties

ALR Quick Index, Bastards; Courts; Custody and Support of Children ;Equal Protection of Law; Parent and Child; Parties; Support

Federal Quick Index, Bastards; Children or Minors; Courts; Custody of Children; Equal Protection of the Laws; Parties; Public Officers and Employees; Support and Maintenance

Annotation References:

Discrimination on basis of illegitimacy as denial of constitutional rights. *38 ALR3d 613*.

Nonstatutory duty of father to support illegitimate child. 30 ALR 1069.

2 of 2 DOCUMENTS

**LEEKE, DIRECTOR OF SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. v. TIMMERMAN ET AL.**

**No. 80-2077**

**SUPREME COURT OF THE UNITED STATES**

***454 U.S. 83*; *102 S. Ct. 69*; *70 L. Ed. 2d 65*; *1981 U.S. LEXIS 144*; *50 U.S.L.W. 3399***

**November 16, 1981, Decided**

**PRIOR HISTORY:** ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

**DISPOSITION:** Certiorari granted; *639 F.2d 783*, reversed.

**DECISION:**

Private citizen's right to prevent state officials from presenting information that will assist magistrate in determining whether to issue arrest warrant, held not judicially cognizable.

**SUMMARY:**

South Carolina prison inmates who claimed that they had been unnecessarily beaten by prison guards during a prison uprising sought criminal arrest warrants against the guards from a state court magistrate. After the magistrate expressed his intent to issue the warrants, the state solicitor--as a result of a meeting with the legal advisor to the state's department of corrections, the prison warden, the county sheriff, and deputy attorney--wrote the magistrate a letter which requested that the warrants not be issued and stated that the solicitor intended to ask state officials to conduct an investigation concerning the charges made against the officers involved. The magistrate did not issue the warrants, and no investigation was conducted. The inmates subsequentely filed suit in the United States District Court for the District of South Carolina contending, among other claims, that the state correctional officials had conspired in bad faith to block the issuance of the arrest warrants and thereby violated *42 USCS 1983* and *1985(3)*. The District Court ultimately concluded that the state correctional officials denied the inmates their right to a meaningful ability to set in motion the governmental machinery, because the officials' activity stopped the machinery unlawfully, not in a proper way, as for example, upon a valid determination of lack of probable cause, and the court awarded the inmates compensatory and punitive damages. The United States Court of Appeals for the Fourth Circuit affirmed, concluding that even though a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another, that did not foreclose the inmates' right to seek an arrest warrant.

Granting certiorari, the United States Supreme Court reversed. In a per curiam opinion, expressing the view of Burger, Ch. J., and White, Powell, Rehnquist, Stevens, and O'Connor, JJ., it was held that a private citizen has no judicially cognizable right to prevent state officials from presenting information, through intervention of the state solicitor, that will assist the magistrate in determing whether to issue the arrest warrant.

Brennan, J., joined by Marshall and Blackmun, JJ.,

dissented, expressing the view that prisoners had standing in the civil action brought pursuant to *42 USCS 1983* and *1985(3)*, since they alleged that conspiratorial acts by state officials deprived them of their right to seek an arrest warrant, and thus denied them their constitutional right of access to the courts, assured by the *First* and *Fourteenth Amendments*.

**LAWYERS' EDITION HEADNOTES:**

PARTIES §2

private citizen -- right against state officials -- information as to arrest warrant --

Headnote:

A private citizen has no judicially cognizable right to prevent state officials from presenting information, through intervention of the state solicitor, that will assist a magistrate in determining whether to issue an arrest warrant. (Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

**SYLLABUS**

Respondents, who were inmates in a South Carolina prison, contended that they were unnecessarily beaten by prison guards during a prison uprising. One respondent sought criminal arrest warrants against four guards, and a state-court Magistrate, acting on the basis of affidavits and information presented by the respondent, informed the legal adviser to the South Carolina Department of Corrections of his intent to issue the warrants. After a meeting with correctional officials, the State Solicitor, by a letter to the Magistrate, requested that the warrants not be issued and stated that he intended to seek an investigation of the charges against the prison guards. The Magistrate did not issue the warrants, and no state investigation was initiated. Respondents subsequently filed suit against petitioners (the legal adviser and the Director of the Department of Corrections) and other state officials in Federal District Court, contending that they had violated *42 U. S. C. § 1983* by conspiring in bad faith to block the issuance of arrest warrants for the prosecution of the guards. The District Court found petitioners liable for damages and attorney's fees, although the State Solicitor and the Magistrate were found to be immune from liability. The Court of Appeals affirmed.

*Held*: Petitioners' actions, by which they influenced the State Solicitor's decision to oppose issuance of the arrest warrants, did not violate any judicially cognizable rights of respondents. There is a questionable nexus between respondents' injury -- the alleged beatings -- and the state officials' actions in which they gave information to a Magistrate prior to issuance of an arrest warrant. Even if a prosecution could remedy respondents' injury, the issuance of an arrest warrant is simply a prelude to, and would not necessarily result in, actual prosecution. The decision to prosecute is solely within the prosecutor's discretion. Thus, a private citizen has no judicially cognizable right to prevent state officials from presenting information, through intervention of the state solicitor, that will assist a magistrate in determining whether to issue an arrest warrant. *Linda R. S. v. Richard D., 410 U.S. 614*, controls here.

**OPINION BY:** PER CURIAM

**OPINION**

[*84] [***66] [**69] Petitioners, state correctional officials, seek review of a decision of the United States Court of Appeals for the Fourth Circuit finding petitioners in violation of *42 U. S. C. § 1983* for opposing respondents' application for an arrest warrant. We grant the motion of respondents for leave to proceed *in forma pauperis* and the petition for writ of certiorari and reverse on the basis of our decision in *Linda R. S. v. Richard D., 410 U.S. 614 (1973)*.

I

Respondents were prison inmates [***67] in the Central Correctional Institution in Columbia, S. C., at the time of a prison uprising in August 1973. Respondents contend that during the uprising they were unnecessarily beaten by prison guards. Respondent Timmerman sought criminal arrest warrants against four prison guards. In support of his action, Timmerman presented sworn statements to a Magistrate along with alleged "confidential information" from an employee at the prison who purportedly investigated the incident and concluded that respondents were victimized by the prison guards. Although a subsequent hearing in the Federal District Court indicated that the information provided by Timmerman was "suspect at best," it provided sufficient evidence to convince the state-court Magistrate that probable cause existed for issuance of arrest warrants against the prison guards. The Magistrate informed the

legal adviser to the South Carolina Department of Corrections of his intent to issue the warrants and the legal adviser relayed this information to the prison Warden.

In an effort to have the criminal action against the correctional officers dropped, the legal adviser and Warden met with the County Sheriff, Deputy Attorney, and State Solicitor. At the meeting, the State Solicitor reviewed the facts and stated that there would be no indictment against three of the accused guards, but that he was [**70] unsure whether an indictment [*85] would be sought against the fourth guard. As a result of the meeting, the State Solicitor wrote a letter to the Magistrate requesting that the warrants not be issued. The Solicitor also stated that he intended to ask the State Law Enforcement Division to conduct an investigation concerning the charges made against the officers involved; the Magistrate did not issue the warrants and no state investigation was initiated.

Respondents subsequently filed suit in the United States District Court for the District of South Carolina contending, among other claims, that petitioners conspired in bad faith to block the issuance of the arrest warrants for the prosecution of the prison guards. The District Court concluded that petitioners denied respondents their right to "a meaningful ability to set in motion the governmental machinery because [petitioners' activities] stopped the machinery unlawfully, not in a proper way, as for example, upon a valid determination of lack of probable cause." [1] Although the State Solicitor and the Magistrate were found to be immune from damages, the District Court concluded that the legal adviser to the prisons and the Director of the Department of Corrections were liable for their actions in requesting the State Solicitor to discourage issuance of the warrants. Respondents were awarded $ 3,000 in compensatory damages, $ 1,000 in punitive damages and attorney's fees against the two petitioners.

1 The case had previously been appealed to the United States Court of Appeals for the Fourth Circuit, at which time the Court of Appeals determined that the State Magistrate and State Solicitor were not insulated from declaratory and injunctive relief by judicial immunity and that the action was not barred by *Younger v. Harris, 401 U.S. 37 (1971). Timmerman v. Brown, 528 F.2d 811 (1975).*

The United States Court of Appeals for the Fourth Circuit affirmed [***68] and acknowledged that under *Linda R. S.* v. *Richard D., supra, at 619*, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of [*86] another." The Court of Appeals concluded, however, that *Linda R. S.* did not foreclose respondents' right to seek an arrest warrant.

II

In *Linda R. S.* the mother of an illegitimate child brought an action in United States District Court to enjoin "discriminatory application" of a Texas Penal Code provision that imposed criminal sanctions on a parent who willfully deserted, neglected, or refused to provide child support. The Texas courts had held that the statute applied only to the parents of legitimate children and did not apply to the parents of illegitimate children. We held that the appellant in *Linda R. S.* did not have standing to challenge the statute because she had failed to allege a sufficient nexus between her injury and the government's failure to prosecute fathers of illegitimate children. Even if the appellant in *Linda R. S.* were granted the requested relief, the Court concluded that the remedy sought by the appellant would not guarantee payment of child support. The remedy sought would only increase the probability of prosecution of the father for the failure to provide support, and "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Ibid.*

Our holding in *Linda R. S.* controls disposition here. The threshold inquiry is whether respondents have standing to challenge the actions of petitioners. As in *Linda R. S.*, there is a questionable nexus between respondents' injury -- the alleged beatings -- and the actions of the state officials in which they gave information to a Magistrate prior to issuance of an arrest warrant. Even without the prosecutor's acts, there is no guarantee that issuance of the arrest warrant would remedy claimed past misconduct of guards or prevent future misconduct. Even if a prosecution could remedy respondents' injury, the *issuance* of an arrest warrant in this case is simply a prelude to actual prosecution. Respondents [*87] [**71] concede that the decision to prosecute is solely within the discretion of the prosecutor. It is equally clear that issuance of the arrest warrant in this case would *not* necessarily lead to a subsequent prosecution.

A private citizen therefore has no judicially cognizable right to prevent state officials from presenting information, through intervention of the state solicitor, that will assist the magistrate in determining whether to issue the arrest warrant. Just as respondents were able to present arguments as to why an arrest warrant should issue, a state solicitor must be able to present arguments as to why an arrest warrant should not issue. This is not a case in which prison officials interfered with the transmittal of information from respondents to the magistrate, thereby interfering with respondents' ability under South Carolina law to seek the arrest of another. *S. C. Code § 22-3-710* (1976). [2]

2 As early as 1870 the South Carolina Supreme Court indicated that under South Carolina law, "[save] for the just and proper vindication of the law, no one has an interest in the conviction of [another]." *State v. Addison, 2 S. C. 356, 364*.

[***69] In this case respondents had access to judicial procedures to redress any claimed wrongs. Respondents, in other words, were able to "set in motion the governmental machinery," *Lane v. Correll, 434 F.2d 598, 600 (CA5 1970)*, and bring their complaints to the attention of the Magistrate. The actions of the state officials, by which they influenced the decision of the State Solicitor to oppose issuance of the arrest warrants, thus did not violate any judicially cognizable rights of respondents. [3]

3 This conclusion comports with the smooth functioning of the criminal justice system. The American Bar Association Standards for Criminal Justice, The Prosecution Function 3-3.4 (2d ed. 1980), propose that where the law permits a private citizen to complain directly to a judicial officer, the complainant "should be required to present the complaint for prior approval to the prosecutor, and the prosecutor's actions or recommendation thereon should be communicated to the judicial officer or grand jury." Many jurisdictions contain provisions for private citizens to initiate the criminal process, and some have required or encouraged input of the prosecuting attorney before issuance of an arrest warrant. See, *e. g., Neb. Rev. Stat. § 29-404* (1979); *Ohio Rev. Code Ann. § 2935.10* (1975); S. D. Comp. Laws Ann. § 23A-2-2 (1979); *Wis. Stat. § 968.02(3)* (1977).

The judgment of the Court of Appeals is

*Reversed*.

**DISSENT BY:** BRENNAN

**DISSENT**

[*88] JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

In my view, the Court, by mischaracterizing respondents' alleged injury, improperly invokes *Linda R. S.* v. *Richard D., 410 U.S. 614 (1973)*, to deny respondents standing in this civil action brought pursuant to *42 U. S. C. § 1983* and *42 U. S. C. § 1985(3) (1976 ed., Supp. IV)*.

*Linda R. S.* involved a challenge to Texas' enforcement of Art. 602 of the Texas Penal Code, brought by the mother of an illegitimate child. Article 602 provided in part that "any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years." The State construed Art. 602 to apply only to parents of legitimate children, and had accordingly declined to prosecute the father of the appellant's child despite his refusal to provide support for the child. The appellant sought to enjoin the State's "discriminatory application" of the statute. Holding that the appellant lacked standing to raise this challenge to the construction of the State's criminal statute, this Court affirmed the dismissal of the action. The Court reasoned that while the "appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments," there was no "'direct' relationship" between the State's failure to prosecute the father and the injury sustained. *Linda R. S., supra, at 618.* [**72] Rather, the Court declared, "[the] prospect that prosecution will, at least in the [*89] future, result in payment of support can, at best, be termed only speculative." *410 U.S., at 618*.

The Court seeks to bring the present [***70] case within the holding of *Linda R. S.* by suggesting that "[as] in *Linda R. S.*, there is a questionable nexus between respondents' injury -- the alleged beatings -- and the actions of the state officials in which they gave

information to a Magistrate prior to issuance of an arrest warrant. . . . It is . . . clear that issuance of the arrest warrant in this case would *not* necessarily lead to a subsequent prosecution." *Ante*, at 86-87. The Court's analysis simply cannot withstand scrutiny. Contrary to the Court's suggestion, the respondents' alleged injury -- for the purposes of their civil action brought pursuant to *§§ 1983* and *1985(3)* -- is not the "beatings," but rather the deprivation of their constitutional right of access to the courts, assured by the *First* and *Fourteenth Amendments*. They have alleged that petitioners' conspiratorial acts deprived them of their right to *seek* an arrest warrant, and thus denied them their constitutional right of access to the courts. Plainly there is a substantial nexus between the alleged injury and petitioners' acts, thus making *Linda R. S.* wholly inapposite. If there is a basis for denying respondents standing to bring their civil action, it is not to be found in *Linda R. S.*

Under the circumstances, plenary review is merited. Accordingly, I dissent.

**REFERENCES**

*59 Am Jur 2d, Parties 26, 30*

*42 USCS 1983, 1985*

US L Ed Digest, Parties 2

L Ed Index to Annos, Parties

ALR Quick Index, Capacity to Sue or be Sued; Parties

Federal Quick Index, Parties

**Randy Kailey, Petitioner-Appellant, v. Carol Chambers, District Attorney-Appellee.**

**Court of Appeals No. 10CA1209**

**COURT OF APPEALS OF COLORADO, DIVISION TWO**

***261 P.3d 792*; *2011 Colo. App. LEXIS 1044***

**June 23, 2011, Decided**

**PRIOR HISTORY:** [**1]

Arapahoe County District Court No. 10CV644. Honorable Marilyn Leonard Antrim, Judge.

**DISPOSITION:** ORDER AFFIRMED.

**COUNSEL:** Randy Kailey, Pro se.

Carol Chambers, District Attorney, Andrew Cooper, Chief Deputy District Attorney, Centennial, Colorado, for Attorney-Appellee.

**JUDGES:** Opinion by JUDGE DAILEY. Casebolt and Webb, JJ., concur.

**OPINION BY:** DAILEY

**OPINION**

[*793] Petitioner, Randy Kailey, appeals the district court's order denying his motion for appointment of a special prosecutor or, in the [*794] alternative, a warrant to arrest a particular person. We affirm.

*I. Background*

In 1985, Kailey was convicted of two counts of aggravated incest involving his daughters, NJ and BK, for which he was sentenced to thirty-two years imprisonment. In 2004, he received information from NJ that DMB, Kailey's former sister-in-law, had sexually assaulted both his daughters and his granddaughter, MM, while they stayed with her at an undisclosed Englewood, Colorado address in Arapahoe County. He later received information that DMB had sexually assaulted BK in 2007.

According to Kailey, in May 2009, he filed documents with the Denver Police Department and District Attorney's office, accusing DMB of sexually assaulting BK beginning in 1996 (when BK was fifteen) and of [**2] sexually assaulting four-year-old MM in 2003 or 2004. The Denver District Attorney's office responded that (1) it could not commence a criminal prosecution against DMB because the alleged crimes had occurred outside the City and County of Denver and (2) he should contact the District Attorney's office for the Eighteenth Judicial District instead.

Kailey then sent copies of his daughters' letters and affidavits, as well as independent investigative reports conducted by the Colorado Innocence Project, to both the Englewood Police Department and to Carol Chambers, the District Attorney for the Eighteenth Judicial District. After five months passed without receiving a response from either the police department or the District Attorney, he prepared the motion that is at issue in this appeal; four months later, he filed that motion with the court.

In his motion, Kailey requested appointment of a special prosecutor pursuant to *section 16-5-209, C.R.S. 2010*, and the issuance of a warrant to arrest DMB

pursuant to *section 16-3-108, C.R.S. 2010*. Without requiring a response from the District Attorney or conducting a hearing, the district court denied Kailey's motion, finding that he had not met [**3] his burden under *section 16-5-209* "of overcoming the presumption that the prosecutor acted in accordance with the law and prov[ing] by clear and convincing evidence that the prosecutor's decision was arbitrary and capricious." The court did not explicitly address Kailey's alternative request for a warrant to arrest DMB.

*II. Appellate Contentions*

On appeal, Kailey contends that, for the following reasons, the trial court erred:

- first, under *section 16-5-209*, the court abused its discretion when it did not order the District Attorney to (1) respond to his motion and (2) initiate an investigation; and
- second, under *section 16-3-108*, the trial court erred by not issuing an arrest warrant for DMB.

We address and reject each contention in turn.

*III. Section 16-5-209*

District attorneys are not part of the judicial branch of government; they belong, instead, to the executive branch. *People v. Dist. Court, 632 P.2d 1022, 1024 (Colo. 1981)*. As executive officers, they have broad discretion in the performance of their duties. *Id.; J.S. v. Chambers, 226 P.3d 1193, 1200 (Colo. App. 2009)*. "The scope of this discretion extends to the power to investigate and to determine who shall be prosecuted and [**4] what crimes shall be charged." *Dist. Court, 632 P.2d at 1024*; *see also People v. Renander, 151 P.3d 657, 659 (Colo. App. 2006)* ("[A]s a general matter, the power to initiate, alter, or dismiss charges rests solely within the prosecuting attorney's discretion, and may not be controlled or limited by judicial intervention.").

*Section 16-5-209* limits this power, *J.S., 226 P.3d at 1200*, by providing relief in the event of an unjustifiable refusal to prosecute a person for a crime:

> The judge of a court having jurisdiction of the alleged offense, upon affidavit filed with the judge alleging the commission of a crime and the unjustified refusal of the prosecuting attorney to prosecute any person for the crime, may require the prosecuting attorney to appear before the judge [*795] and explain the refusal. If after that proceeding, based on the competent evidence in the affidavit, the explanation of the prosecuting attorney, and any argument of the parties, the judge finds that the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse, the judge may order the prosecuting attorney to file an information and prosecute the case or may appoint a special [**5] prosecutor to do so.

*§ 16-5-209*.

Because a district attorney's charging decision is afforded a presumption of correctness, there must be a clear and convincing showing that his or her decision not to prosecute was arbitrary or capricious and without reasonable excuse before the court will order prosecution or the appointment of a special prosecutor. *See Landis v. Farish, 674 P.2d 957, 959 (Colo. 1984)*. Hence, "[a]bsent a clear abuse of discretion, a judge may not substitute his judgment or discretion for that of the prosecutor." *J.S., 226 P.3d at 1201* (quoting *Landis, 674 P.2d at 959*). We review de novo the district court's application of the statutory abuse of discretion standard (i.e., "arbitrary or capricious and without reasonable excuse") to the district attorney's decision. *J.S., 226 P.3d at 1203*.

*A. The Charging Decision*

Ordinarily, when, as here, a person alleges a district attorney's unjustified refusal to prosecute, a trial court should first determine whether the district attorney has made a charging decision not to prosecute. If no such decision has been made, then there has not been a "refusal" to prosecute, as contemplated by *section 16-5-209*, and [**6] no further inquiry is necessary.

In the present case, nothing in the record, other than the passage of time, indicates that the District Attorney had made any decision not to prosecute (or, for that matter, investigate) DMB based on the allegations in Kailey's and his daughters' affidavits. Because the parties

on appeal assume that the District Attorney decided not to prosecute, we will do likewise.[1]

> 1 Because we conclude that Kailey is not entitled to relief, judicial economy weighs against a remand for further findings concerning this assumption.

*B. Lack of a Response*

As quoted above, *section 16-5-209* states that upon receiving an affidavit alleging the commission of a crime and the unjustified refusal of the district attorney to prosecute, a court "*may* require the prosecuting attorney to appear before the judge and explain the refusal." (Emphasis added.)

When interpreting statutes, our primary task is to ascertain and give effect to the intent of the legislature in enacting them; we give statutory terms their commonly accepted meaning to discern that intent. *People v. Triantos, 55 P.3d 131, 134 (Colo. 2002)*. When the language is unambiguous and the legislative intent reasonably clear, [**7] we need not resort to other rules of statutory construction. *Id*.

The legislature's use of the term "may" indicates a grant of discretion or choice among alternatives. *Id*. "[T]o say that a court has discretion in resolving an issue means that it has the power to choose between two or more courses of action and that it is therefore not bound in all cases to select one over the other." *Carruthers v. Carrier Access Corp., 251 P.3d 1199, 1204 (Colo. App. No. 09CA2138, 2010)* (quoting *Bruce W. Higley Defined Benefit Annuity Plan v. Kidder, Peabody & Co., 920 P.2d 884, 891 (Colo. App. 1996))*.

The legislature, by using the term "may" in *section 16-5-209*, granted the district court discretion whether to require the prosecuting attorney to appear before the court and explain the refusal to prosecute. *See Schupper v. Smith, 128 P.3d 323, 326 (Colo. App. 2005)* (construing the present version of *section 16-5-209* as "providing for an evidentiary hearing at the trial court's discretion, once it had considered the petitioner's affidavit; *the explanation of the district attorney, if required by the trial court*; and any argument of the parties") (emphasis added).

Thus, we must determine if, under [**8] the circumstances here, the court abused that discretion.

[*796] *C. Failure to Require an Investigation*

Initially, we note that, although district attorneys have investigative powers, *section 16-5-209* addresses only a district attorney's unjustified refusal to "prosecute"; it says nothing about a district attorney's failure or refusal to "investigate."

The power to prosecute is distinct from the power to investigate. *Compare, e.g., Black's Law Dictionary* 1341 (9th ed. 2009) (defining "prosecute," as pertinent here, as "[t]o commence and carry out a legal action"; "[t]o institute and pursue a criminal action against (a person)"), *and State v. Arculeo, 29 Kan. App. 2d 962, 36 P.3d 305, 313 (Kan. Ct. App. 2001)* ("To prosecute is to proceed against judicially. A prosecution is the act of conducting or waging a proceeding in court . . . . It is also defined as the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information.") (quoting *State v. Bowles, 70 Kan. 821, 79 P. 726, 728 (Kan. 1905))*, *with Black's Law Dictionary* at 902 (defining [**9] investigate as "[t]o inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry"), *and Wright v. Kellogg Co., 289 Mich. App. 63, 795 N.W.2d 607, 610 (Mich. Ct. App. 2010)* (same).

Because statutory restrictions on the powers of district attorneys are "construed as narrowly as possible by the courts," *J.S., 226 P.3d at 1201* (quoting *People ex rel. Losavio v. Gentry, 199 Colo. 153, 159, 606 P.2d 57, 61-62 (1980))*, we interpret *section 16-5-209* as providing a remedy only for a district attorney's refusal to file formal criminal charges against an individual, and not for the refusal to investigate criminal allegations. *Cf. Henisse v. First Transit, Inc., 247 P.3d 577, 580 (Colo. 2011)*("When the legislature specifically includes one thing in a statute, it implies the exclusion of another."). This makes sense: in Colorado, a district attorney's investigative effort ordinarily is supplemental to that of local law enforcement agencies, that is, to that of local police departments and sheriffs' offices. *See Ma v. People, 121 P.3d 205, 210 (Colo. 2005)* ("Police officers are responsible for enforcing criminal laws. They do this by investigating crimes, and arresting, detaining, [**10] and assisting in the prosecution of suspected criminals."). Sensibly construed, the statute does not contemplate the

court's supplanting a district attorney's authority based merely on the attorney's not performing a function ordinarily undertaken by **other** law enforcement agencies.[2]

> 2 To the extent that Kailey asserts that the District Attorney is statutorily required by *section 19-3-308(5)* and *(5.3)*, C.R.S. 2010, to investigate allegations of sexual assault on a child, he is wrong. The investigative duties discussed in those provisions are those of a "local law enforcement agency," which, "as used in part 3 of article 3 of this title, means a police department in incorporated municipalities or the office of the county sheriff." *§ 19-1-103(74), C.R.S. 2010*.
>
> Kailey's reliance on *section 19-3-501(1), C.R.S. 2010*, as requiring a District Attorney to investigate is also misplaced. That provision does not require the District Attorney to initiate any sort of investigation, but rather, allows a court to direct the probation department, social services department, or another agency to investigate a petition to remove a child from a home.

*D.* [**11] *Failure to Order Prosecution or Appoint a Special Prosecutor*

In *Sandoval v. Farish, 675 P.2d 300 (Colo. 1984)*, the supreme court quoted with approval the following language from American Bar Association, Standards for Criminal Justice Relating to the Prosecution Function § 3.9(b) (3d ed. 1993), regarding guidelines for reviewing a prosecutor's charging decision:

> The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:
>
> (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
>
> (ii) the extent of the harm caused by the offense;
>
> [*797] (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
>
> (iv) possible improper motives of a complainant;
>
> (v) reluctance of the victim to testify;
>
> (vi) cooperation of the accused in the apprehension or conviction of others; and
>
> (vii) availability and likelihood of prosecution [**12] by another jurisdiction.

*675 P.2d at 303*.

In a footnote, the supreme court identified other factors that could be also considered: (1) the likelihood of conviction; (2) sufficiency of the evidence; (3) availability of witnesses in corroboration of the offense; (4) credibility of the victim; (5) evidence relating to motive or intent of the offender; (6) seriousness of the injuries inflicted; and (7) the competing demands of other cases on the time and resources of the prosecution. *Id*. at n.4.

Applying the pertinent factors here, the court found that

> o the complaint was brought by Kailey, who had been convicted of aggravated incest against two of the victims (The court also found that Kailey had "alleged a long standing pattern of abuse" of the victims and that the Colorado Innocence Project had been involved in investigating that abuse. Read together, these three findings imply that the court believed Kailey's motive for filing his motion was to cast blame on others for the crimes of which he had been convicted.);
>
> o when, at one point, the police were called to DMB's house, BK recanted her story;
>
> o no one in the family believed the allegations;

> o BK had also alleged that she had been similarly [**13] abused by her ex-husband; and
>
> o the independent investigative reports of the Innocence Project showed that NJ and BK were reluctant to participate in pursuing the allegations.

Based on these findings[3] the court determined that Kailey had not proved by clear and convincing evidence that the District Attorney's decision not to prosecute was arbitrary or capricious. In this regard, the court noted that it was "quite probable that . . . the district attorney came to the conclusion that she would be unable to obtain a conviction."

> 3 The court made an additional finding that neither NJ nor BK reported the alleged abuse to the police. The record is otherwise (i.e., the daughters' affidavits and the investigative reports from the Colorado Innocence Project state that the crimes were reported to the police). However, in our view, this finding was not critical to the district court's decision.

In light of the significant credibility issues with the daughters' averments, the lack of factual specificity regarding where and when the events occurred, and the passage of time, we too conclude that the District Attorney's decision (assuming there was one) not to prosecute was not arbitrary or capricious.

*IV.* [**14] *Section 16-3-108*

Kailey also contends that the trial court erred by not issuing a warrant for DMB's arrest. We are not persuaded.

*Section 16-3-108* addresses the issuance of an arrest warrant in the absence of an information or complaint:

> A court shall issue an arrest warrant only on affidavit sworn to or affirmed before the judge or a notary public and relating facts sufficient to establish probable cause that an offense has been committed and probable cause that a particular person committed that offense.

*Section 16-3-108* does not specify who may apply to a court for an arrest warrant. From this statutory silence, Kailey infers that not only law enforcement officers, but private citizens too, may apply for an arrest warrant. We do not agree.

The District Attorney does not dispute Kailey's right, as a private citizen, to seek an arrest warrant under *section 16-3-108* for another individual. Because of its jurisdictional nature, however, the issue of Kailey's standing to seek an arrest warrant requires our sua sponte inquiry. *See People in Interest of J.C.S., 169 P.3d 240, 244 (Colo. App. 2007).*

To determine if standing exists, a court must consider whether a plaintiff was [*798] injured in fact [**15] and whether the injury was to a legally protected right. *Peters v. Smuggler-Durant Mining Corp., 910 P.2d 34, 38 (Colo. App. 1995), aff'd, 930 P.2d 575 (Colo. 1997).* With respect to the latter requirement, "[a] complaining party may show injury to a legally protected right by demonstrating that the harm allegedly suffered is protected by a statutory or constitutional provision, or by a judicially created rule of law that entitles the complaining party to some form of judicial relief." *Sender v. Kidder Peabody & Co., 952 P.2d 779, 781 (Colo. App. 1997).*

"[I]n American jurisprudence at least, a private citizen [ordinarily] lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D., 410 U.S. 614, 619, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536 (1973)*; *see Anderson v. Norfolk & W. Ry., 349 F. Supp. 121, 122 (W.D. Va. 1972)* ("criminal statutes can neither be enforced by civil action . . . nor by private parties"); *see also Gansz v. People, 888 P.2d 256, 257 n.4 (Colo. 1995)* (quoting *Linda R.S.* with approval). Applying that principle, courts have held that a private citizen lacks standing to request the issuance of a warrant for the arrest of [**16] another person. *See DeMillard v. No Named Defendant, 407 Fed. Appx. 332, 333 (10th Cir. 2011)*; *Larry v. Uyehara, 270 Fed. Appx. 557, 558 (9th Cir. 2008)*; *see also Kelly v Dearington, 23 Conn. App. 657, 583 A.2d 937, 940-41 (Conn. App. Ct. 1990)* (concluding that a citizen has no standing to obtain review of a prosecutor's refusal to seek arrest warrant).

A legally protected right can, of course, be created by statute. However, if the General Assembly wishes to change common law, it must manifest its intent expressly or by clear implication. *See, e.g., Vaughan v. McMinn,*

*945 P.2d 404, 408 (Colo. 1997)*; *cf. Hildebrand v. New Vista Homes II, LLC, P.3d , , 252 P.3d 1159, 2010 Colo. App. LEXIS 1667 at *31 (Colo. App. No. 08CA2645, Nov. 10, 2010)* ("Statutes are presumed not to alter the common law unless they do so expressly.").

Here, unlike in *section 16-5-209*, there is no language in *section 16-3-108* which either expressly or impliedly authorizes a private citizen to petition the court to take action against a third party.[4] Under the reasoning of the *Linda R.S.*, *DeMillard*, and *Vaughan* cases, then, *section 16-3-108* cannot be read to authorize a private citizen to seek an arrest warrant.

> 4 While *section 16-5-209* does not expressly authorize action by [**17] private citizens, it does so by implication: it presupposes the filing of affidavits with respect to a charging decision by persons other than the governmental officials normally responsible for making that decision. In contrast, nothing in *section 16-3-108* implies that persons other than the government officials who customarily seek warrants may do so.

Further, even if *section 16-3-108*'s silence on the subject would render the statute ambiguous, in construing that section we must presume that "[a] just and reasonable result is intended" and that "[p]ublic interest is favored over any private interest." *§ 2-4-201(1)(c), (e)*, C.R.S. 2010. In addition, we may also consider the "consequences of a particular construction." *§ 2-4-203(1)(e), C.R.S. 2010*. In our view, all three considerations support a construction of *section 16-3-108* as not authorizing private citizens to seek arrest warrants. We hold this view for the following reasons:

> (1) Most law enforcement officers (i.e., police officers, sheriff's officers, and district attorneys' and the attorney general's investigators) are certified peace officers whose very job it is to investigate crime. *See §§ 16-2.5-102, 16-2.5-103, C.R.S. 2010*. [**18] All of those officers are experienced at investigation, and are trained to prepare affidavits and to know the meaning of probable cause and how to apply it. Most lay people are not so experienced or so trained.
>
> (2) Law enforcement officers are subject to additional employment sanctions besides those associated with criminal charges for perjury if they lie or recklessly disregard the truth in an affidavit. Most lay people are not subject to such employment sanctions.
>
> (3) Law enforcement officers are, ideally, objective investigators with no stake in [*799] the outcome of a case, and thus, they evaluate the information that they receive without bias. Such objectivity is not presumed from lay people who are "involved" in cases.

For all these reasons, we construe *section 16-3-108* as not authorizing a private citizen to seek an arrest warrant for another. Because Kailey had no right to demand that the court issue an arrest warrant in this case, we need not further address the court's failure to issue a warrant here.

The order is affirmed.

JUDGE CASEBOLT and JUDGE WEBB concur.

**KENNETH L. SMITH, Plaintiff-Appellant, v. HON. MARCIA S. KRIEGER, in her official capacity as Judge of the United States District Court for the District of Colorado; THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO; THE TENTH CIRCUIT COURT OF APPEALS; THE COLORADO COURT OF APPEALS; THE SUPREME COURT OF COLORADO; JOHN DOES 1-99, Defendants-Appellees. KENNETH L. SMITH, Plaintiff-Appellant, v. STEPHEN H. ANDERSON; ROBERT R. BALDOCK; ROBERT E. BLACKBURN; MARY BECK BRISCOE; ROBERT H. HENRY; PAUL J. KELLY, JR.; MARCIA S. KRIEGER; MICHAEL W. MCCONNELL; STEPHANIE K. SEYMOUR; DEANELL REECE TACHA; JOHN DOES 1-20; WILEY Y. DANIEL; JUDGE DOE 21, in their representative capacities; UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, Defendants-Appellees.**

**No. 09-1503, No. 10-1012**

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

***389 Fed. Appx. 789*; *2010 U.S. App. LEXIS 15584***

**July 27, 2010, Filed**

**NOTICE:** PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

**SUBSEQUENT HISTORY:** US Supreme Court certiorari denied by *Smith v. Anderson, 2011 U.S. LEXIS 1311 (U.S., Feb. 22, 2011)*

**PRIOR HISTORY:** [**1]

(D.C. No. 1:08-CV-00251-CMA-KMT). (D. Colo.). (D.C. No. 1:09-CV-01018-PAB). (D. Colo.)

*Smith v. Krieger, 2009 U.S. Dist. LEXIS 89523 (D. Colo., Sept. 9, 2009)*

*Smith v. Anderson, 2010 U.S. Dist. LEXIS 6758 (D. Colo., Jan. 13, 2010)*

**COUNSEL:** KENNETH L. SMITH (09-1503), (10-1012), Plaintiff - Appellant, Pro se, Golden, CO.

For MARCIA S. KRIEGER, in her official capacity as Judge of the United States District court for the DIstrict of Colorado, Defendant - Appellee: Jeannette Frazier Swent, Office of the United States Attorney District of Utah, Salt Lake City, UT.

For THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (09-1503), THE TENTH CIRCUIT COURT OF APPEALS, Defendants - Appellees: Paul Farley, Office of the United States Attorney District of Colorado, Denver, CO.

For THE COLORADO COURT OF APPEALS (09-1503), THE SUPREME COURT OF COLORADO, John Does 1-99, Defendants - Appellees: Dianne Eret, Maurice Knaizer, Attorney General for the State of Colorado, Denver, CO.

For STEPHEN H. ANDERSON (10-1012), ROBERT R. BALDOCK, MARY BECK BRISCOE, PAUL J. KELLY, JR., MICHAEL W. MCCONNELL,

STEPHANIE K. SEYMOUR, DEANELL RECCA TACHA, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, Defendants - Appellees: Paul Farley, Terry Fox, Office of the United States Attorney District of Colorado, Denver, CO.

For ROBERT E. BLACKBURN, Defendant [**2] - Appellee: Jeannette Frazier Swent Office of the United States Attorney District of Utah, Salt Lake City, UT.

For ROBERT H. HENRY, Defendant - Appellee: Paul Farley, Teny Fox, Office of the United States Attorney District of Colorado, Denver, CO; Jeannette Frazier Swent, Office of the United States Attorney District of Utah, Salt Lake City, UT.

For MARCIA S. KRIEGER, Defendant - Appellee: Jeannette Frazier Swent, Office of the United States Attorney District of Utah, Salt Lake City, UT.

**JUDGES:** Before HOLMES and PORFILIO, Circuit Judges, and BRORBY, Senior Circuit Judge.

**OPINION BY:** Jerome A. Holmes

**OPINION**

[*791] **ORDER AND JUDGMENT**[*]

> * After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See Fed. R. App. P. 34(a)(2)*; *10th Cir. R. 34.1(G)*. The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with *Fed. R. App. P. 32.1* and *10th Cir. R. 32.1*.

These appeals are the latest in a series of cases and appeals filed [**3] pro se by Kenneth L. Smith, all of which can be traced to the Colorado Supreme Court's denial of his application for admission to the Colorado bar after he refused to submit to a mental status examination. *See Smith v. Mullarkey, 67 F. App'x 535, 536 (10th Cir. 2003)* (*Mullarkey I*) (explaining denial of Mr. Smith's application); *Smith v. Mullarkey, 121 P.3d 890, 891 (Colo. 2005)* (*Mullarkey II*) (same). In No. 09-1503, *Smith v. Krieger*, the district court granted the defendants' motions to dismiss and denied Mr. Smith's post-judgment motion to alter or amend the judgment. In No. 10-1012, *Smith v. Anderson*, the district court granted the defendants' motions to dismiss, denied Mr. Smith's post-judgment motion, and imposed filing restrictions.

This court, on its own motion, has consolidated these appeals for submission and disposition. Because Mr. Smith proceeded pro se in the district court and on appeal, we give his filings a liberal construction, but we do not act as his advocate, and his pro se status does not relieve him of complying with procedural rules applicable to all litigants. *See Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005)*. In *Krieger*, we conclude [**4] that we have jurisdiction over only the denial of his post-judgment motion, which we affirm, deeming that appeal frivolous. In *Anderson*, we conclude that we have jurisdiction over the district court's dismissal of his action and its order imposing filing restrictions, both of which we affirm. Further, based on Mr. Smith's abusive pattern of litigation, we impose a monetary sanction of $3,000 and appellate filing restrictions.

**I.09-1503,*Smith v. Krieger***

**A. Background**

In *Smith v. Krieger*, Mr. Smith filed a complaint in the United States District Court for the District of Colorado. He initially named the Honorable David M. Ebel as a defendant in his official capacity, apparently with an eye to policing Judge Ebel's handling of another case Mr. Smith had filed in that district, *Smith v. Bender*, No. 1:07-cv-01924-MSK-KMT (filed Sept. 12, 2007). *See* Aplt. Opening Br. at 17 ("this lawsuit was filed [*792] with the purpose of attempting to prevent what happened in [*Bender*]"). Mr. Smith also named the district court and this court (the Federal Defendants), the Colorado Court of Appeals and the Colorado Supreme Court (the State Defendants), and 99 John Does as defendants. The case was drawn to Judge Ebel, [**5] who recused himself, and reassigned to the Honorable Marcia S. Krieger. After Judge Ebel recused himself in *Bender*, that case was assigned to Judge Krieger. Mr. Smith then filed an amended complaint in this case, substituting Judge Krieger in her official capacity for Judge Ebel.

Mr. Smith's amended complaint was based on allegations that "[d]efendants' practices of issuing 'designer law' (opinions applicable to one and only one set of defendants), issuing so-called 'unpublished' opinions (opinions declared to be devoid of precedential effect), and issuing opinions that fabricate and/or elide key facts" exceeded judicial power as defined in Article III of the Constitution and deprived him and similarly situated citizens of their right of access to the courts and to due process under the *First*, *Fifth*, and *Fourteenth Amendments*. R., Vol. 1 at 488-89, ¶¶ 104, 108. He also alleged that defendants violated his right to equal protection by treating "all pro se cases . . . shabbily and superficially." *Id.* at 488, ¶ 106 (internal quotation marks omitted). He requested a declaration that defendants violated these rights as alleged, and preliminary and permanent injunctions prohibiting them from [**6] issuing orders or decisions (1) without addressing all legal arguments or factual contentions in a manner sufficient to facilitate adequate appellate (and, in this court, en banc) review; (2) without providing a rationale for any deviation from controlling precedent "sufficient to ensure that an appellate court and the general public will be aware of the variance"; and (3) "designated as being without precedential effect." *Id.* at 490-91.

After being named as a defendant in this case, Judge Krieger recused herself and filed a motion to dismiss. The Federal Defendants and the State Defendants also filed motions to dismiss. A magistrate judge issued a recommendation that defendants' motions be granted for a variety of reasons and that Mr. Smith's motion for injunctive and declaratory relief be denied. Mr. Smith filed objections. The district court modified the recommendation and adopted it, granting defendants' motions, denying Mr. Smith's motion, and dismissing the case in its entirety. With respect to Judge Krieger and the Federal Defendants, the district court determined that they were protected by sovereign immunity, a "concept [that] has long been firmly established by the Supreme [**7] Court, *see, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12, 5 L. Ed. 257 (1821)*," *Smith v. Krieger, 643 F. Supp. 2d 1274, 1280 (D. Colo. 2009)*. The court also concluded Mr. Smith had failed to show a waiver of the Federal Defendants' or Judge Krieger's sovereign immunity. The court further explained that to the extent Mr. Smith's complaint could be read as requesting relief against those defendants under the mandamus provision of *28 U.S.C. § 1361*, this court had determined in *Trackwell v. United States Government, 472 F.3d 1242, 1245-46 (10th Cir. 2007)*, that *§ 1361* does not confer district-court jurisdiction over the federal courts or their judicial officers.

As to the State Defendants, the court concluded it lacked power to direct them in the performance of their judicial duties, *see Van Sickle v. Holloway, 791 F.2d 1431, 1436 n.5 (10th Cir. 1986)*, and that Mr. [*793] Smith's allegation that the Colorado Supreme Court's adverse decision in *Mullarkey II* was rendered without jurisdiction was no bar to the application of the *Rooker-Feldman* doctrine[1] to his present claims because "'there is no procedural due process exception to the *Rooker-Feldman* rule.'" *Krieger, 643 F. Supp. 2d at 1283* (quoting [**8] *Snider v. City of Excelsior Springs, Mo., 154 F.3d 809, 812 (8th Cir. 1998)*).

> 1 "The *Rooker-Feldman* doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by state-court losers challenging state-court judgments rendered before the district court proceedings commenced." *Lance v. Dennis, 546 U.S. 459, 460, 126 S. Ct. 1198, 163 L. Ed. 2d 1059 (2006)* (quotation omitted). This court previously relied on the *Rooker-Feldman* doctrine in rejecting Mr. Smith's challenge to the Colorado Supreme Court's denial of his bar application. *See Mullarkey I, 67 F. App'x at 538*.

The district court's order was filed on August 3, 2009, and its separate judgment on August 4, 2009. On August 21, 2009, Mr. Smith filed a motion titled "*Rule 59(e)* Motion to Alter or Amend Judgment" (the Post-Judgment Motion), and he later moved for a hearing on the motion. The district court denied both motions on September 9, 2009, concluding that in his Post-Judgment Motion, Mr. Smith had simply reargued his case, which was not an appropriate basis for relief under *Rule 59(e)*, and that a hearing was unnecessary.

Mr. Smith filed his notice of appeal (NOA) on November 6, 2009. In its substantive entirety, the NOA read:

> NOTICE IS HEREBY [**9] GIVEN that Kenneth L. Smith, Plaintiff in the above-captioned case, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Final Judgment entered herein on August 4, 2009 (post-judgment motions disposed of on

September 9, 2009).

R., Vol. 2 at 451.

**B. Discussion**

**1. Appellate Jurisdiction**

Although none of the appellees have expressed concern about the effect that the timing of Mr. Smith's Post-Judgment Motion or the substance of his NOA has on our jurisdiction over this appeal, we have an obligation to analyze our jurisdiction sua sponte. *See Amazon, Inc. v. Dirt Camp, Inc., 273 F.3d 1271, 1274 (10th Cir. 2001)*. Under *Rule 4 of the Federal Rules of Appellate Procedure*, "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell, 551 U.S. 205, 214, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007)*. And under *Rule 3(c)(1)* of those Rules, a "notice of appeal must . . . specify the party or parties taking the appeal," "designate the judgment, order, or part thereof being appealed," and "name the court to which the appeal is taken." *Fed. R. App. P. 3(c)(1)*. "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate [**10] review. Although courts should construe *Rule 3* liberally when determining whether it has been complied with, noncompliance is fatal to an appeal." *Smith v. Barry, 502 U.S. 244, 248, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992)*. Thus, to confer jurisdiction on this court, a document must be filed within the time specified by *Rule 4* and provide the notice required by *Rule 3*.

Although it is clear from his NOA that Mr. Smith intended to appeal to this court, the NOA is not timely with respect to the [*794] district court's underlying judgment, and it is debatable whether he adequately designated the order denying his Post-Judgment Motion as an object of his appeal. We first address timeliness.

Because Mr. Smith did not file his Post-Judgment Motion within ten days of the district court's judgment, excluding intervening weekend days and holidays, *see Fed. R. Civ. P. 6(a)(2)* (2009),[2] we treat it as a motion brought under *Rule 60(b)* rather than one brought under *Rule 59(e)*. *See Price v. Philpot, 420 F.3d 1158, 1167 n.9 (10th Cir. 2005)*. Thus construed, the motion did not toll the time for filing a notice of appeal because it was not filed within ten days of the district court's judgment. *See Fed. R. App. P. 4(a)(4)(A)*. In order to timely [**11] appeal the underlying judgment, therefore, Mr. Smith had to file his NOA "within 60 days after the judgment or order appealed from is entered," *Fed. R. App. P. 4(a)(1)(B)*, the time limit applicable when the United States, its officers, or one of its agencies is a party. The district court's judgment was filed August 4, 2009, so Mr. Smith's NOA was due by October 3, 2009, but he did not file it until November 6, 2009. As such, the NOA was clearly untimely as to the district court's underlying judgment, and we lack jurisdiction to review that judgment. *See Bowles, 551 U.S. at 214*.

2 Amendments to the Federal Rules of Civil and Appellate Procedure took effect December 1, 2009, and provide longer time periods under *Fed. R. Civ. P. 59(e)* and *Fed. R. App. P. 4(a)(4)(A)(vi)* that would likely lead to the conclusion that we have jurisdiction over Mr. Smith's appeal from the district court's underlying judgment. However, in this appeal, we apply the version of those rules in effect at the time Mr. Smith filed his Post-Judgment Motion and his NOA because the filing deadlines those rules contain expired prior to the effective date of the revisions. *See Ysais v. Richardson, 603 F.3d 1175, 1178 n.3 (10th Cir. 2010)* [**12] (applying prior version of *Rule 59* because ten-day period for filing *Rule 59* motion had expired prior to effective date of the 2009 amendments), *petition for cert. filed* (U.S. June 10, 2010) (No. 09-11225).

With respect to the district court's September 9 order denying the Post-Judgment Motion, Mr. Smith's NOA is timely but arguably noncompliant with the requirement that it "designate the judgment, order, or part thereof being appealed." *Fed. R. App. P. 3(c)(1)(B)*. The NOA clearly designates the underlying judgment as an object of the appeal, but makes only parenthetical reference to the date on which the district court denied the Post-Judgment Motion. Furthermore, in his opening appellate brief, Mr. Smith has not specifically addressed the district court's denial of his Post-Judgment Motion, suggesting that he did not intend to appeal it. Given Mr. Smith's pro se status, however, and the liberal construction we are to give *Rule 3*, *Smith, 502 U.S. at 248*, we will construe the NOA as sufficiently designating the order denying his Post-Judgment Motion for purposes of *Rule 3(c)(1)(B)* because it refers to the fact that the order was issued, and we will construe the arguments in his appellate [**13] brief as arguments that

the district court should have granted post-judgment relief because it committed clear error in issuing its order of dismissal, which is a valid basis for such relief, *see Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000)*.

**2. Merits**

We review the district court's denial of Mr. Smith's Post-Judgment Motion for an abuse of discretion. *See Jennings v. Rivers, 394 F.3d 850, 854 (10th Cir. 2005)*. Mr. Smith has advanced three main disagreements with the district court's underlying dismissal order: (1) that sovereign immunity lacks constitutional grounding; (2) that judicial immunity is no bar to relief in the nature of mandamus under *28 U.S.C. § 1361* [*795] against judges and courts; and (3) that the Colorado Supreme Court acted without jurisdiction in *Mullarkey II*, so its judgment is void, the *Rooker-Feldman* doctrine is inapplicable, and, apparently, the district court should have issued a declaration to that effect.

First, as the district court observed, the jurisdictional implications of the United States' sovereign immunity are firmly entrenched in Supreme Court jurisprudence. *See, e.g., United States v. Mitchell, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)* ("It is axiomatic [**14] that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."); *Cohens, 19 U.S. at 411-12* ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States[.]"). And we are not at liberty to cast aside applicable Supreme Court precedent. *United States v. Harris, 447 F.3d 1300, 1303 n.1 (10th Cir. 2006)*. The judiciary, which necessarily includes the Federal Defendants and Judge Krieger in her official capacity, forms one branch of the United States government, *see generally* U.S. Const. art. III, and therefore is protected by the sovereign immunity accorded the United States. Congress may waive the United States' sovereign immunity, but waiver must be express, *United States v. Mitchell, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980)*, and the burden is on Mr. Smith to identify a specific waiver of sovereign immunity as it applies to his claims against the Federal Defendants or Judge Krieger, *see Normandy Apartments, Ltd. v. U.S. Dep't of Housing and Urban Dev., 554 F.3d 1290, 1295 (10th Cir. 2009)*. He has failed to do so, arguing instead that sovereign immunity itself lacks a constitutional basis, [**15] a notion wholly incompatible with the long-standing Supreme Court precedent noted above.

Regarding the district court's denial of relief in the nature of mandamus, a panel of this court has held that such relief does not lie against the federal courts under *28 U.S.C. § 1361*, *Trackwell, 472 F.3d at 1246*, and another panel has held that federal courts lack mandamus power to order state courts or their judicial officers to perform their judicial duties, *Van Sickle, 791 F.2d at 1436*. There was no error in the district court's application of these holdings. Mr. Smith's argument that judicial immunity is no bar to relief under *§ 1361* is irrelevant, as the district court specifically did not base its dismissal in any respect on judicial immunity.

Finally, Mr. Smith's argument that *Mullarkey II* was rendered in the absence of jurisdiction and is therefore void, nullifying the application of *Rooker-Feldman* doctrine, lacks an arguable basis. We have already informed Mr. Smith once that "the *Rooker-Feldman* doctrine bars [him] from relitigating the refusal of the Justices of the Colorado Supreme Court to recuse from his appeal in . . . *Mullarkey* [*II*]." *Smith v. Bender, 350 F. App'x 190, 193 (10th Cir. 2009)*, [**16] *cert. denied, 130 S. Ct. 2097, 176 L. Ed. 2d 756 (2010)*. His recourse was to seek review in the United States Supreme Court, which he did, albeit without success. *See Smith v. Mullarkey, 547 U.S. 1071, 126 S. Ct. 1792, 164 L. Ed. 2d 519 (2006)* (order denying certiorari). And his due process challenge to the Colorado Supreme Court's exercise of jurisdiction, on the ground that it ran afoul of Colorado's statutory scheme for appeals, falls squarely within the *Rooker-Feldman* doctrine. *See Doe v. Mann, 415 F.3d 1038, 1042 n.6 (9th Cir. 2005)* ("*Rooker-Feldman* applies where the plaintiff in federal court claims that the state court did not have jurisdiction to render a judgment.").

In sum, we conclude that this appeal is legally frivolous because "it lacks an arguable [*796] basis in either fact or law," *Thompson v. Gibson, 289 F.3d 1218, 1222 (10th Cir. 2002)*. The district court properly followed controlling precedent.

**II.10-1012,*Smith v. Anderson***

**A. Background**

In *Smith v. Anderson*, Mr. Smith named as defendants the United States District Court for the District of Colorado, three of that court's judges plus one

"Judge Doe," and eight judges of this court plus twenty "Judge Does." He raised two claims. The first was "in the nature of a writ of *scire facias*,"[3] [**17] R., Vol. 1 at 5, ¶ 6, seeking to remove the defendant judges from their seats due to their alleged failure to maintain the "good Behaviour" required for continued tenure under *Article III, section 1, clause 2 of the United States Constitution*. In his second claim, he sought to prosecute crimes allegedly committed by the defendant judges against the United States. Mr. Smith claimed he had "inherent authority" to raise his first claim under "the *Ninth* and *Tenth Amendments of the United States Constitution*." *Id.* at 51, ¶ 255. With respect to his second claim, he contended he was "authorized to prosecute crimes committed against the United States by virtue of his inherent authority as co-sovereign, pursuant to powers reserved under the *Ninth* and *Tenth Amendments*, and crimes committed against his person and/or property in particular." *Id.* at 51-52, ¶ 259.[4]

> 3 *Scire facias*, meaning "'you are to make known, show cause,'" was "[a] writ requiring the person against whom it issued to appear and show cause why some matter of record should not be annulled or vacated, or why a dormant judgment against that person should not be revived." *Black's Law Dictionary* 1464 (9th ed. 2009). Although the writ [**18] is now abolished, "[r]elief previously available through [it] may be obtained by appropriate action or motion under these rules." *Fed. R. Civ. P. 81(b)*.
>
> 4 The *Ninth Amendment* provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The *Tenth Amendment* provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As the factual basis for his claims, Mr. Smith alleged that defendants Anderson, Briscoe, Blackburn, Baldock, McConnell, Seymour, Tacha, Henry, and Kelly had either (1) intentionally and criminally disregarded binding Supreme Court and Tenth Circuit precedent; (2) delayed issuing a decision in one of his earlier appeals for 26 months; (3) failed to exercise de novo review of magistrate judge recommendations and district court judgments; or, (4) motivated by "undue guild favoritism," R., Vol. 1 at 50, ¶ 245 (quotation marks omitted), summarily dismissed three complaints of judicial misconduct he had filed in the Tenth Circuit and one complaint filed by the plaintiff in a case in which [**19] Mr. Smith tried to file an amicus brief.

With regard to defendant Krieger, Mr. Smith alleged that prior to her recusal in *Krieger*, she violated his due process rights by not permitting him to file an amended complaint as of right and by not enforcing a deadline against his opponents. He also alleged that in *Bender*, Judge Krieger's failure to recuse herself because of her alleged personal friendship and professional collaboration with one of the defendants was felonious, and that she had fabricated or elided facts in order to exercise jurisdiction.[5]

> 5 Although Mr. Smith named the Honorable Wiley Y. Daniel as a defendant, he made no allegations regarding Judge Daniel other than to note that defendant "Judge Doe" would likely succeed Judge Daniel upon the latter's recusal from another case Mr. Smith had filed.

[*797] For substantive relief, Mr. Smith sought an order (1) removing the defendant judges from their offices; (2) convening a grand jury to hear evidence of federal crimes those judges and others allegedly committed; (3) compelling the Attorney General to provide supervisory counsel under *28 U.S.C. § 519*; and (4) granting him leave to prosecute any indictments returned by the grand jury in [**20] the event the local United States Attorney refused to prosecute. He also asked for reasonable fees, expenses, and costs, including attorney fees.

The defendants filed two motions to dismiss, which the district court granted under *Fed. R. Civ. P. 12(b)(1)* for lack of jurisdiction, concluding that "[r]emoving judges from office . . . is the sole province of Congress. U.S. Const., art. I, § 2,3." R., Vol. 4 at 60. Regarding Mr. Smith's second claim, the district court determined that he lacked authority to proceed as a private attorney general on behalf of the United States because *28 U.S.C. § 519* vests that authority solely in the Attorney General and his delegates.

The district court next proposed filing restrictions based in part on Mr. Smith's series of pro se lawsuits against the judges who had adversely decided cases against him, all stemming from the Colorado Supreme Court's order denying his application for admission to the

Colorado bar. The court also noted Mr. Smith's penchant for making duplicative arguments in the same case, such as an emergency motion for relief in the nature of mandamus and two emergency motions for declaratory relief, all of which raised the same arguments [**21] found in his complaint and his responses to defendants' motions to dismiss. The court further observed that his filings had "become increasingly abusive. In at least one prior case in this Court, as well as in the two cases still pending before [the district court], Mr. Smith suggests that violence against federal judges may be justified if a litigant, such as himself, does not get the relief he requests." *Id.* at 65. Based on this history, and over Mr. Smith's objections, the district court prohibited him from filing any new actions pro se in the United States District Court for the District of Colorado unless he first receives permission from that court to do so. The court also treated a post-judgment motion Mr. Smith had filed under *Rule 59(e)* as a *Rule 60(b)* motion and denied it.[6]

> 6 Mr. Smith has not taken issue with the denial of his Rule 60(b) motion, so we do not consider it any further.

**B. Discussion**

**1. Appellate Jurisdiction**

The district court issued its dismissal order in this case on November 19, 2009, and its separate judgment on November 23, 2009. On January 5, 2010, Mr. Smith filed a post-judgment motion, which contained his objections to the court's proposed filing restrictions. [**22] On January 13, 2010, the court overruled his objections to the filing restrictions and imposed them. The next day, January 14, 2010, Mr. Smith filed his notice of appeal, which read, in its substantive entirety:

> NOTICE IS HEREBY GIVEN that the United States of America, as represented by Kenneth L. Smith *in propria persona* in a relational capacity in the above-named cases, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Final Judgment entered herein on November 23, 2009 (motions for post-judgment relief are still pending).

[*798] *Id.* at 172. The NOA was timely with regard to the underlying judgment and the order imposing the filing restrictions. However, it does not designate that order as an object of this appeal, as required by *Fed. R. App. P. 3(c)(1)(B)*, and Mr. Smith did not file another NOA or an amended NOA designating that order for appeal. But regardless of whether the NOA was compliant with *Rule 3* as to the order imposing filing restrictions, Mr. Smith challenged the filing restrictions in his opening brief. *See* Aplt. Opening Br. at 60-67. That brief was filed on February 26, 2010, within sixty days of the order imposing the filing restrictions and [**23] therefore timely under *Fed. R. App. P. 4(a)(1)(B)*. Further, it complied with all three requirements of *Rule 3(c)(1)*. Therefore, we may treat it as the functional equivalent of an NOA from the order imposing filing restrictions, conferring jurisdiction on this court over that order. *See Smith, 502 U.S. at 244-48*.

**2. Merits**

Having established that we have jurisdiction to review the district court's underlying judgment and its order imposing filing restrictions, we now turn to Mr. Smith's appellate arguments. Our review of a district court's order dismissing an action under *Fed. R. Civ. P. 12(b)(1)* is de novo, *Colo. Envtl. Coal. v. Wenker, 353 F.3d 1221, 1227 (10th Cir. 2004)*, and our review of the imposition of filing restrictions is for an abuse of discretion, *Tripati v. Beaman, 878 F.2d 351, 354 (10th Cir. 1989)*.

Regarding his first claim, Mr. Smith argues that impeachment is not the sole means of removing Article III judges who no longer exhibit the "good Behaviour" required for continued tenure under Article III of the Constitution. Instead, he argues, the *Ninth* and *Tenth Amendments* work to reserve to the people the right to remove such Article III judges. We disagree. Although the [**24] Constitution itself does not expressly limit removal of Article III judges to Congressional impeachment, the Supreme Court has taken that view. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982)* (explaining that "[t]he 'good Behaviour' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment") (plurality opinion); *United States ex rel. Toth v. Quarles, 350 U.S. 11, 16, 76 S. Ct. 1, 100 L. Ed. 8 (1955)* (stating that "[Article III] courts are presided over by judges appointed for life, subject only to removal by impeachment"). For those "alleging that a judge has

engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability," *28 U.S.C. § 351(a)*, Congress has established a statutory mechanism for complaints of judicial misconduct that can culminate in Congressional impeachment proceedings. *See 28 U.S.C. §§ 351-364*.

Mr. Smith's second claim fares no better than his first. Congress has by statute conferred the power to prosecute crimes in the name of the United States on the United [**25] States Attorney General and his delegates. *See 28 U.S.C. §§ 516, 519*. The long-standing view of the Supreme Court is that such power is exclusive. *See, e.g., United States v. Nixon, 418 U.S. 683, 693, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)* ("the Executive Branch has *exclusive authority* and absolute discretion to decide whether to prosecute a case") (emphasis added); *id. at 694* ("Under the authority of Art. II, [§] 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of [*799] the United States Government. *28 U.S.C. [§] 516*."); *The Confiscation Cases, 74 U.S. 454, 457, 19 L. Ed. 196 (1868)* ("Public prosecutions, until they come before the court to which they are returnable, are within the *exclusive direction* of the district attorney . . . .") (emphasis added). Therefore, as the district court concluded, Mr. Smith has no right to initiate a criminal prosecution in the name of the United States under the *Ninth* or *Tenth Amendments*, or otherwise.

Finally, Mr. Smith contends that the district court's filing restrictions violate his *First Amendment* right of access to the courts and his due process rights, and he suggests that a finding of frivolousness is essential to the imposition of filing restrictions. [**26] We have rejected these arguments. "[T]he right of access to the courts is neither absolute nor unconditional, and there is no constitutional right of access to the courts to prosecute an action that is frivolous *or* malicious." *Tripati, 878 F.2d at 353* (citation omitted) (emphasis added). Federal courts have "power under *28 U.S.C. § 1651(a)* to enjoin litigants who abuse the court system by harassing their opponents." *Id. at 352*. Thus, federal courts may "regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances." *Id.* (quotation omitted). Although "[l]itigiousness alone will not support an injunction restricting filing activities," filing restrictions "are proper where a litigant's abusive and lengthy history is properly set forth," *id. at 353*, the court provides guidelines as to what the litigant "must do to obtain the court's permission to file an action," and the litigant receives "notice and an opportunity to oppose the court's order before it is instituted," *id. at 354*.

Here, the district court complied with all requirements for imposing filing restrictions. It recounted Mr. Smith's lengthy, abusive filing history, [**27] which we have alluded to throughout this decision and discuss below in greater detail. The court also provided Mr. Smith with pertinent guidelines for obtaining the court's permission to file an action and with an opportunity to oppose the restrictions. Although the district court did not consider the case before it to be frivolous, it did not need to; abuse of the judicial process suffices. Indeed, having reviewed Mr. Smith's litigation history, we conclude that not only should the district court's filing restrictions be affirmed, but that a monetary sanction and filing restrictions in this court are warranted, and we now turn to those.

**III. Monetary Sanctions and Filing Restrictions**

Mr. Smith has had nine pro se cases decided adversely in courts of this circuit and the state of Colorado, each of which stemmed directly or indirectly from the denial of his bar application. In *Mullarkey I* and *II*, he sued the Colorado Supreme Court justices over that court's denial of his bar application. Unsuccessful, he then turned his sights on the constitutionality of unpublished judicial decisions issued by the Colorado Supreme Court and this court, specifically including our decision in *Mullarkey* [**28] *I. See Smith v. U.S. Court of Appeals for the Tenth Circuit, 484 F.3d 1281, 1284 (10th Cir. 2007)* (consolidated disposition of appeals in two cases). Again unsuccessful, he filed *Bender*, suing the Justices of the Colorado Supreme Court along with the attorney general and an assistant attorney general of the State of Colorado. The dismissal of that case was affirmed on the basis of sovereign and qualified immunity, the *Rooker-Feldman* doctrine, and preclusion doctrine. *See Bender, 350 F. App'x at 192-94*. As discussed above, Mr. Smith also filed *Krieger* and *Anderson*, largely targeting judges [*800] who had issued rulings adverse to him in the prior cases.

The same district judge who presided over *Anderson* has also dismissed two other cases Mr. Smith filed, and he has appealed one of those. The district court's decisions indicate Mr. Smith again challenged the process

that the Colorado Supreme Court used in denying his admission to the Colorado bar and has continued his pattern of suing judges who have ruled against him. *See Smith v. Arguello, No. 09-cv-02589-PAB, 2010 U.S. Dist. LEXIS 52076, 2010 WL 1781937, at *1 (D. Colo. May 4, 2010), appeal docketed,* No. 10-1280 (10th Cir. July 6, 2010); [**29] *Smith v. Eid, No. 10-cv-00078-PAB, 2010 U.S. Dist. LEXIS 52042, 2010 WL 1791549, at *1-*2 (D. Colo. May 4, 2010).*[7]

> 7 According to the district court's decision in *Arguello*, Mr. Smith also claimed that opposing counsel in prior suits violated his constitutional rights by seeking sanctions against him, and he challenged "his inclusion on a 'threat list' which prevents him from entering courthouses without 'harassment' by U.S. Marshals." *Arguello, No. 09-cv-02589-PAB, 2010 U.S. Dist. LEXIS 52076, 2010 WL 1781937, at *1*.

Not only has Mr. Smith persisted down a futile path, the tenor of his court filings has turned increasingly abusive. We made note of this in *Bender* and warned Mr. Smith of the consequences:

> Mr. Smith's opening and reply briefs are littered with frivolous and irrelevant arguments and tirades. His briefs also contain scurrilous allegations and personal attacks regarding alleged wrongdoing by the named Justices of the Colorado Supreme Court and the district judge. . . . We admonish and warn Mr. Smith that if he files future appeals in this court containing similar unsupported claims, allegations, or personal attacks, we will not hesitate to impose hefty sanctions and filing restrictions in order to curb his abusive and disrespectful litigation practices. [**30] *Bender, 350 F. App'x at 195*. Mr. Smith did not heed our warning, and we conclude that it is time to impose those "hefty sanctions and filing restrictions" we warned him about in *Bender*.

"This court has the . . . inherent power to impose sanctions that are necessary to regulate the docket, promote judicial efficiency, and . . . to deter frivolous filings." *Christensen v. Ward, 916 F.2d 1462, 1469 (10th Cir. 1990)*. Thus, we have ordered pro se appellants to make a monetary payment directly to this court "as a limited contribution to the United States for the cost and expenses of this action." *Id.* (imposing $500 sanction); *see also Van Sickle, 791 F.2d at 1437* (imposing $1,500 sanction). Mr. Smith's appeal in *Krieger* is frivolous, and his appeal in *Anderson* borders on the frivolous. In both cases, and despite our warning in *Bender*, he has persisted in making unsupported allegations of judicial corruption, baseless claims, and personal attacks on the judges of the district court, this court, and several Justices of the United States Supreme Court and the Colorado Supreme Court. His briefs contain vulgar language, threats of lethal violence against judges rendering decisions he considers [**31] tyrannical, and tirades on a number of irrelevant topics. Accordingly, we order Mr. Smith to show cause within ten days of the entry of this Order and Judgment why he should not be ordered to pay $3,000 to the Clerk of the United States Court of Appeals for the Tenth Circuit as a limited contribution to the United States for the costs and expenses of these appeals. *See Sain v. Snyder, Nos. 09-2153, 09-2175, 369 Fed. Appx. 932, 2010 U.S. App. LEXIS 5819, 2010 WL 1006589 (10th Cir. Mar. 19, 2010)* (sanctioning pro se appellant $3,000 under reasoning of *Christensen* and *Van Sickle*), *petition for cert. filed,* 78 U.S.L.W. 3653 (U.S. Apr. 14, 2010) (No. 09-1332) [cert. denied, *131 S. Ct. 85, 178 L. Ed. 2d 27 (2010)*]. The response shall not exceed five pages. If [*801] the response is not received by the Clerk within the specified ten days, the sanction will be imposed.

Finally, as noted above, federal courts have the inherent power to impose carefully tailored filing restrictions. *Tripati, 878 F.2d at 352*. Based on Mr. Smith's "pattern of litigation activity[,] which is manifestly abusive," *Winslow v. Hunter (In Re Winslow), 17 F.3d 314, 315 (10th Cir. 1994)*, we now impose filing restrictions. Given the contemptuousness and utter lack of propriety evidenced in his appellate filings, we do not limit [**32] the restrictions to any specific subject matter. Thus, in order to proceed pro se in this court in any appeal or original proceeding, Mr. Smith must provide this court with:

1. A list of all appeals or original proceedings filed, whether currently pending or previously filed with this court, including the name, number, and citation, if applicable, of each case, and the current status or

disposition of each appeal or original proceeding; and

2. A notarized affidavit, in proper legal form, that recites the issues he seeks to present, including a short discussion of the legal basis asserted therefor, and describing with particularity the order being challenged. The affidavit must also certify, to the best of Mr. Smith's knowledge, that the legal arguments being raised are not frivolous or made in bad faith; that they are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that the appeal or original proceeding is not interposed for any improper purpose, such as delay or to needlessly increase the cost of litigation; and that he will comply with all appellate and local rules of this court.

These filings shall be submitted to the [**33] Clerk of the court, who shall forward them for review to the Chief Judge or her designee, to determine whether to permit Mr. Smith to proceed with a pro se appeal or original proceeding. Without such authorization, the matter will be dismissed. If the Chief Judge or her designee authorizes a pro se appeal or original proceeding to proceed, an order shall be entered indicating that the matter shall proceed in accordance with the Federal Rules of Appellate Procedure and the Tenth Circuit Rules.

In addition, Mr. Smith shall not submit any further pleadings or motions in this court not specifically authorized by the Federal Rules of Appellate Procedure. In the event that such a motion or pleading is submitted, the Clerk of the court may return it to Mr. Smith unfiled.

Mr. Smith shall have ten days from the date of this order and judgment to file written objections, limited to fifteen pages, to these proposed filing restrictions. If he does not file timely objections, the filing restrictions will take effect twenty days from the entry of this order and judgment. If he does file timely objections, these filing restrictions will not take effect unless the court overrules his objections, in [**34] which case these filing restrictions shall apply to any filing with this court after that ruling. Although Mr. Smith must comply with the Federal Rules of Appellate Procedure and the Tenth Circuit Rules in *Smith v. Arguello*, No. 10-1280, the filing restrictions shall have no other application to that matter.

**Conclusion**

For the foregoing reasons, we AFFIRM the district court's denial of Mr. Smith's Post-Judgment Motion in No. 09-1503. In No. 10-1012, we AFFIRM the district court's judgment and its order imposing filing restrictions. Further, we ORDER Mr. Smith to show cause why he should not be sanctioned and why filing restrictions [*802] should not be imposed, as set forth herein.

Entered for the Court

Jerome A. Holmes

Circuit Judge

## Private Citizens Initiating Criminal Charges

Posted on Apr. 9, 2015, 10:20 am by Jeff Welty • 39 comments

From time to time, I am asked about the right of private citizens to initiate criminal charges by approaching a magistrate. The arrest warrant statute, G.S. 15A-304, requires only that a magistrate be "supplied with sufficient information, supported by oath or affirmation" to find probable cause. The statute doesn't limit the source of that information to law enforcement officers. As most readers know, it is common in North Carolina for private citizens to seek the issuance of an arrest warrant or a summons.

I have long thought that this was a distinctive feature of North Carolina law, but it seems to be somewhat more common than I believed.

**The general rule in the United States is that private citizens can't initiate criminal prosecutions.** There turn out to be quite a few exceptions, but the general rule does seem to be that only government officials of various kinds can initiate criminal prosecutions. *See, e.g., Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (stating that "in American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"); *Smith v. Kreiger*, 389 Fed. Appx. 789 (10th Cir. 2010) (ruling that, in the federal system, prosecutors have exclusive authority to prosecute crimes and that a private citizen "has no right to initiate a criminal prosecution"); *Kailey v. Chambers*, 261 P.3d 792 (Colo. Ct. App. 2011) (collecting cases and concluding that private citizens cannot seek arrest warrants); Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L & Pub. Pol'y 357 (1986) (stating that "[c]ourts generally grant the public prosecutor

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the exclusive power to initiate criminal proceedings," and stating that "[w]here the right of a private citizen to file a criminal complaint has been recognized, it is generally statutorily based and limited to prosecution of specified crimes," otherwise, "no private citizen can initiate a criminal proceeding, even for a misdemeanor").

**Many states have exceptions.** I don't know exactly how many states allow private citizens to initiate criminal charges. I'm not aware of anyone who has done a 50-state survey. But a few hours of looking on my part has turned up the following partial list:

- North Carolina: as noted above.
- South Carolina: a private citizen may initiate a criminal case by approaching a magistrate, though the magistrate may issue only a summons, not an arrest warrant, in response to a private citizen's complaint. S.C. Code § 22-5-110.
- Maryland: a private citizen may apply to a "commissioner," similar to a North Carolina magistrate, who may issue a summons or, under limited circumstances, an arrest warrant. Md. Stat. § 2-607(c)(6) .
- Virginia: private citizen complaints are permitted but must be made in writing. Va. Stat. § 19.2-72.
- Georgia: criminal process may be issued based on a request by a private citizen, though only after a "warrant application hearing" at which the potential accused has an opportunity to argue that charges should not be issued. Ga. Code. 17-4-40.
- Pennsylvania: a private citizen may file a complaint with a prosecutor. If the prosecutor approves it, the complaint is transmitted to a judicial official for issuance of process. If the prosecutor disapproves the complaint, the citizen has the right to seek judicial review of that decision. Penn. R. Crim. P. 506.
- Ohio: a private citizen "may file an affidavit charging the offense committed with a [judge, prosecutor, or magistrate] for the purpose of review to determine if a complaint should be filed by the prosecuting attorney." Ohio Code § 2935.09. Apparently, this process was enacted in 2006, replacing a process by which a private citizen could charge a crime directly, without review by any official, by submitting an affidavit charging the offense. *State v. Mbodji*, 951 N.E.2d 1025 (Ohio 2011).

Users, Drug Sellers, and Probable Cause
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- Idaho: Idaho law appears to be similar to North Carolina's: "[A] warrant for arrest may be issued upon a complaint filed upon information by a private citizen if the magistrate, after investigation, is satisfied that the offense has been committed." *State v. Murphy*, 584 P.2d 1236 (Idaho 1978). See also Idaho Stat. 19-501 *et seq.* (describing the procedure for seeking an arrest warrant with no limitation to law enforcement officers).
- New Hampshire: at least certain minor offenses may be initiated – and prosecuted – by private citizens. *State v. Martineau*, 808 A.2d 51 (2002).
- Some states apparently allow crime victims or witnesses to approach the grand jury to seek an indictment. Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 Cath. U. L. Rev. 1135 (2007) (explaining that such a right exists in Texas).

**Limits on charges initiated by private citizens.** The above list illustrates that many jurisdictions that allow private citizens to initiate criminal charges place limitations on such cases. Some allow only low-level cases to begin with a citizen's complaint; others require citizen-initiated cases to begin with a summons rather than a warrant; others require a citizen's complaint to be in writing; and still others require a prosecutor or other official to review a citizen's complaint, or give the would-be accused an opportunity to be heard.

North Carolina does not have any of these limits by statute. However, as a matter of practice, magistrates impose some of these restrictions. Most magistrates will not issue felony charges based on a citizen's complaint. Some magistrates generally issue summonses rather than warrants in citizen-initiated cases. Some magistrates also ask citizen complainants to prepare a written statement of facts.

**Is it a good idea to allow citizens to initiate criminal charges?** It's often reporters that ask me about our system of allowing citizen-initiated criminal cases. They always ask whether it's a good system or not. Since we try to be neutral here at the School of Government, I usually just say that there are plusses and minuses.

On the plus side, if law enforcement officers in a particular

area are incompetent, corrupt, or biased against a citizen or a group of citizens, allowing those citizens to approach magistrates directly gives them access to the criminal justice system. Furthermore, allowing citizens to take their concerns to magistrates directly may reduce the burden on law enforcement of investigating minor offenses.

On the other hand, allowing citizens to approach magistrates directly means that magistrates must deal with citizens whose stories may be disorganized and who may be unfamiliar with what a magistrate needs to know to determine whether charges are appropriate. It also allows citizens who are so inclined to bring vexatious, baseless charges more easily that if an officer were involved in the matter.

Readers, what's your perspective? Should citizen-initiated charges be abolished as some have proposed? Subjected to some of the statutory limitations in place in other states? Or, has North Carolina struck an appropriate balance as it stands?

Category: Procedure | Tags: criminal charges, magistrates, private citizens, probable cause

## 39 comments on "Private Citizens Initiating Criminal Charges"

### Bruce A. Conway
April 9, 2015 at 11:38 am

I believe citizens should have the ability to prefer certain criminal charges before a magistrate. One reason is that such citizen is able (and compelled by subpoena) to enter the courtroom and seek the relief or justice to which they are entitled. Another reason is that, in many cases, the charges are not severe enough for officers to become involved such as neighbor disputes, nuisances, etc. I agree with the current practice of disallowing citizens to take felony charges. I think this should also be applied to more serious misdemeanors and domestic violence offenses. Those crimes do (or should) be investigated by law enforcement.

Citizens need to realize that with this "power" comes responsibility. The frivolous and sometimes malicious

# APPENDIX 6

7:2-1. Contents of Complaint, Complaint-Warrant (CDR-2) and Summons

(a) Complaint: General. The complaint shall be a written statement of the essential facts constituting the offense charged made on a form approved by the Administrative Director of the Courts. Except as otherwise provided by paragraphs (f) (Traffic Offenses), (g) (Special Form of Complaint and Summons), and (h) (Use of Special Form of Complaint and Summons in Penalty Enforcement Proceedings), the complaining witness shall attest to the facts contained in the complaint by signing a certification or signing an oath before a judge or other person so authorized by N.J.S.A. 2B:12-21.

If the complaining witness is a law enforcement officer, the complaint may be signed by an electronic entry secured by a Personal Identification Number (hereinafter referred to as an electronic signature) on the certification, which shall be equivalent to and have the same force and effect as an original signature.

(b) Acceptance of Complaint. The municipal court administrator or deputy court administrator shall accept for filing every complaint made by any person. Acceptance of the complaint does not mean that a finding of probable cause has been made in accordance with R. 7:2-2(a) or that the Complaint (CDR-2) or summons has been issued.

(c) Summons: General. The summons shall be on a Complaint-Summons form (CDR-1) or other form prescribed by the Administrative Director of the Courts and shall be signed by the officer issuing it. An electronic signature of any law enforcement officer or any other person authorized by law to issue a Complaint-Summons shall be equivalent to and have the same force and effect as an original signature. The summons shall be directed to the defendant named in the complaint, shall require defendant's appearance at a stated time and place before the court in which the

complaint is made, and shall inform defendant that an arrest a bench warrant may be issued for a failure to appear.

(d) Complaint-Warrant (CDR-2)

(1) Complaint-Warrant (CDR-2): General. The arrest warrant for an initial charge shall be made on a Complaint-Warrant (CDR-2) or other form prescribed by the Administrative Director of the Courts and shall be signed by a judicial officer after a determination of probable cause that an offense was committed and that the defendant committed it. A judicial officer, for purposes of the Part VII rules, is defined as a judge, authorized municipal court administrator or deputy court administrator. An electronic signature by the judicial officer shall be equivalent to and have the same force and effect as an original signature. The warrant shall contain the defendant's name or, if unknown, any name or description that identifies the defendant with reasonable certainty. It shall be directed to any officer authorized to execute it.

(2) Complaint-Warrant (CDR-2) -- Disorderly Persons Offenses. When a Complaint-Warrant (CDR-2) is issued and the most serious charge is a disorderly persons offense, the court shall order that the defendant be arrested and remanded to the county jail pending a determination of conditions of pretrial release. Complaints in which the most serious charge is an indictable offense are governed by R. 3:2-1.

(3) Complaint-Warrant (CDR-2) -- Petty Disorderly Persons Offense or Other Matters within the Jurisdiction of the Municipal Court. When a Complaint-Warrant (CDR-2) is issued and the most serious charge is a petty disorderly persons offense or other non-disorderly persons offense within the jurisdiction of the Municipal Court, the court shall order that the defendant be

arrested and brought before the court issuing the warrant. The judicial officer issuing a warrant may specify therein the amount and conditions of bail or release on personal recognizance, consistent with R. 7:4, required for defendant's release.

(e) Issuance of a Complaint-Warrant (CDR-2) When Law Enforcement Applicant is Not Physically Before a Judicial Officer. A judicial officer may issue a Complaint-Warrant (CDR-2) upon sworn oral testimony of a law enforcement applicant who is not physically present. Such sworn oral testimony may be communicated by the applicant to the judicial officer by telephone, radio, or other means of electronic communication.

The judicial officer shall administer the oath to the applicant. After taking the oath, the applicant must identify himself or herself and read verbatim the Complaint-Warrant (CDR-2) and any supplemental affidavit that establishes probable cause for the issuance of a Complaint-Warrant (CDR-2). If the facts necessary to establish probable cause are contained entirely on the Complaint-Warrant (CDR-2) and/or supplemental affidavit, the judicial officer need not make a contemporaneous written or electronic recordation of the facts in support of probable cause. If the law enforcement applicant provides additional sworn oral testimony in support of probable cause, the judicial officer shall contemporaneously record such sworn oral testimony by means of a recording device if available; otherwise, adequate notes summarizing the contents of the law enforcement applicant's testimony shall be made by the judicial officer. This sworn testimony shall be deemed to be an affidavit or a supplemental affidavit for the purposes of issuance of a Complaint-Warrant (CDR-2).

A Complaint-Warrant (CDR-2) may issue if the judicial officer finds that probable cause exists and that there is also justification for the issuance of a Complaint-Warrant (CDR-2)

pursuant to the factors identified in Rule 7:2-2(b). If a judicial officer does not find justification for a warrant under Rule 7:2-2(b), the judicial officer shall issue a summons.

If the judicial officer has determined that a warrant shall issue and has the ability to promptly access the Judiciary's computerized system used to generate complaints, the judicial officer shall electronically issue the Complaint-Warrant (CDR-2) in that computer system. If the judicial officer has determined that a warrant shall issue and does not have the ability to promptly access the Judiciary's computerized system used to generate complaints, the judicial officer shall direct the applicant to complete the required certification and activate the complaint pursuant to procedures prescribed by the Administrative Director of the Courts.

Upon approval of a Complaint-Warrant (CDR-2), the judicial officer shall memorialize the date, time, defendant's name, complaint number, the basis for the probable cause determination, and any other specific terms of the authorization. That memorialization shall be either by means of a recording device or by adequate notes.

A judicial officer authorized for that court shall verify, as soon as practicable, any warrant authorized under this subsection and activated by law enforcement. Remand to the county jail for defendants charged with a disorderly persons offense and a pretrial release decision are not contingent upon completion of this verification.

Procedures authorizing issuance of restraining orders 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") by electronic communications are governed by R. 7:4-1(d).

(f) Traffic Offenses

(1) Form of Complaint and Process. The Administrative Director of the Courts shall prescribe the form of Uniform Traffic Ticket to serve as the complaint, summons or other process to be used for all parking and other traffic offenses. On a complaint and summons for a parking or other non-moving traffic offense, the defendant need not be named. It shall be sufficient to set forth the license plate number of the vehicle, and its owner or operator shall be charged with the violation.

(2) Issuance. The complaint may be made and signed by any person, but the summons shall be signed and issued only by a law enforcement officer or other person authorized by law to issue a Complaint-Summons, the municipal court judge, municipal court administrator or deputy court administrator of the court having territorial jurisdiction. An electronic signature of any law enforcement officer or other person authorized by law to issue a Complaint-Summons shall be equivalent to and have the same force and effect as an original signature.

(3) Records and Reports. Each court shall be responsible for all Uniform Traffic Tickets printed and distributed to law enforcement officers or others in its territorial jurisdiction, for the proper disposition of Uniform Traffic Tickets, and for the preparation of such records and reports as the Administrative Director of the Courts prescribes. The provisions of this subparagraph shall apply to the Chief Administrator of the Motor Vehicle Commission, the Superintendent of State Police in the Department of Law and Public Safety, and to the responsible official of any other agency authorized by the Administrative Director of the Courts to print and distribute the Uniform Traffic Ticket to its law enforcement personnel.

(g) Special Form of Complaint and Summons. A special form of complaint and summons for any action, as prescribed by the Administrative Director of the Courts, shall be used in the manner prescribed in place of any other form of complaint and process.

(h) Use of Special Form of Complaint and Summons in Penalty Enforcement Proceedings. The Special Form of Complaint and Summons, as prescribed by the Administrative Director of the Courts, shall be used for all penalty enforcement proceedings in the municipal court, including those that may involve the confiscation and/or forfeiture of chattels. If the Special Form of Complaint and Summons is made by a governmental body or officer, it may be certified or verified on information and belief by any person duly authorized to act on its or the State's behalf.

Note: Source – Paragraph (a): R. (1969) 7:2, 7:3-1, 3:2-1; paragraph (b): R. (1969) 7:2, 7:3-1, 7:6-1, 3:2-2; paragraph (c): R. (1969) 7:2, 7:3-1, 7:6-1, 3:2-3; paragraph (d): R. (1969) 7:6-1; paragraph (e): R. (1969) 4:70-3(a); paragraph (f): new. Adopted October 6, 1997 to be effective February 1, 1998; paragraph (a) caption added, former paragraph (a) amended and redesignated as paragraph (a)(1), former paragraph (b) amended and redesignated as paragraph (a)(2), former paragraph (c) redesignated as paragraph (a)(3), former paragraph (d) redesignated as paragraph (b), former paragraph (e) caption and text amended and redesignated as paragraph (c), and former paragraph (f) redesignated as paragraph (d) July 12, 2002 to be effective September 3, 2002; caption for paragraph (a) deleted, former paragraphs (a)(1) and (a)(2) amended and redesignated as paragraphs (a) and (b), former paragraph (a)(3) redesignated as paragraph (c), new paragraph (d) adopted, former paragraph (b) amended and redesignated as paragraph (e), former paragraph (c) deleted, former paragraph (d) amended and redesignated as paragraph (f), and new paragraph (g) adopted July 28, 2004 to be effective September 1, 2004; paragraph (a) amended, new paragraph (b) adopted, former paragraphs (b), (c), (d), and (e) amended and redesignated as paragraphs (c), (d), (e), and (f), former paragraphs (f) and (g) redesignated as paragraphs (g) and (h) July 16, 2009 to be effective September 1, 2009; paragraph (e) caption and text amended July 9, 2013 to be effective September 1, 2013; caption amended, and paragraphs (d) and (e) caption and text amended August 30, 2016 to be effective January 1, 2017; paragraph (d) reallocated as paragraphs (d)(1) and (d)(2), new paragraph (d)(3) added, new

paragraph (d) caption added,  and paragraph (e) amended November 14, 2016 to be effective January 1, 2017; paragraph (b) amended January X, 2018 to be effective immediately.

7:2-2. Issuance of Complaint-Warrant (CDR-2) or Summons

(a) Probable Cause.[Authorization for Process.]

(1) Finding of Probable Cause. A finding of probable cause by a judicial officer that an offense was committed and that the defendant committed it must be made before issuance of a Complaint-Warrant (CDR-2) or a summons except as provided in paragraphs (a)(3) and (4). The Complaint-Warrant (CDR-2) or summons may be issued only of it appears to the judicial officer from the complaint, affidavit, certification or testimony that there is probable cause to believe that an offense was committed and the defendant committed it. The judicial officer's finding of probable cause shall be noted on the face of the Complaint-Warrant (CDR-2) or summons and shall be confirmed by the judicial officer's signature issuing the Complaint-Warrant (CDR-2) or summons.

(2) Finding of No Probable Cause. If the municipal court administrator or deputy court administrator finds that no probable cause exists to issue a Complaint-Warrant (CDR-2) or summons, or that the applicable statutory time limitation to issue the Complaint-Warrant (CDR-2) or summons has expired, that finding shall be reviewed by the judge. A judge finding no probable cause to believe that an offense occurred or that the statutory time limitation to issue a Complaint-Warrant (CDR-2) or a summons has expired shall not issue the Complaint-Warrant (CDR-2) or summons.

[(2)] (3) Complaint by Law Enforcement Officer or Other Statutorily Authorized Person. A summons on a complaint made by a law enforcement officer charging any offense may be issued by a law enforcement officer or by any person authorized to do so by statute without a finding by a judicial officer of probable cause for issuance. A law enforcement officer may personally serve the summons on the defendant without making a custodial arrest.

[(3)] (4) Complaint by Code Enforcement Officer. A summons on a complaint made by a Code Enforcement Officer charging any offense within the scope of the Code Enforcement Officer's authority and territorial jurisdiction may be issued without a finding by a judicial officer of

probable cause for issuance. A Code Enforcement Officer may personally serve the summons on the defendant. Otherwise, service shall be in accordance with these rules. For purposes of this rule, a "Code Enforcement Officer" is a public employee who is responsible for enforcing the provisions of any state, county or municipal law, ordinance or regulation which the public employee is empowered to enforce.

[(a)] (b) Authorization for Process of Citizen Complaints.

(1) [Citizen Complaint] Issuance of a Citizen Complaint Charging Disorderly Persons, Petty Disorderly Persons or any other Non-Disorderly Persons Offenses. A Complaint-Warrant (CDR-2) or a summons charging [any] a disorderly persons, petty disorderly persons or any other non-disorderly persons offense within the jurisdiction of the municipal court made by a private citizen may be issued only by a judge or, if authorized by the judge, by a municipal court administrator or deputy court administrator of a court with jurisdiction in the municipality where the offense is alleged to have been committed within the statutory time limitation. [The complaint-warrant (CDR-2) or summons may be issued only of it appears to the judicial officer from the complaint, affidavit, certification or testimony that there is probable cause to believe that an offense was committed, the defendant committed it, and a Complaint-Warrant (CDR-2) or summons can be issued. The judicial officer's finding of probable cause shall be noted on the face of the Complaint-Warrant (CDR-2) or summons and shall be confirmed by the judicial officer's signature issuing the Complaint-Warrant (CDR-2) or summons. If, however, the municipal court administrator or deputy court administrator finds that no probable cause exists to issue a Complaint-Warrant (CDR-2) or summons, or that the applicable statutory time limitation to issue the Complaint-Warrant (CDR-2) or summons has expired, that finding shall be reviewed by the judge. A judge finding no probable cause to believe that an offense occurred or that the

statutory time limitation to issue a Complaint-Warrant (CDR-2) or summons has expired shall dismiss the complaint.]

(2) County Prosecutor Review of Citizen Complaints Charging Disorderly Persons Offenses. Prior to issuance of a Complaint-Warrant (CDR-2) or a summons charging a disorderly persons offense made by a private citizen against a (i) party official or public servant as defined in N.J.S.A. 2C:27-1(e) and (g); (ii) a candidate or nominee for public office as defined in N.J.S.A. 19:1-1; or (iii) a judicial nominee, the Complaint-Warrant (CDR-2) or summons shall be reviewed by a county prosecutor for approval, disapproval, or modification of the charge. If the prosecutor approves the citizen complaint charging a disorderly persons offense, the prosecutor shall indicate this decision on the complaint and submit it to a judicial officer who will determine if probable cause exists and whether to issue a Complaint-Warrant (CDR-2) or summons in the Judiciary's computerized system used to generate complaints. If the prosecutor denies the citizen complaint charging a disorderly persons offense, the prosecutor shall report the denial and the basis therefor to the Assignment Judge on the record and shall notify the citizen complainant and the defendant.

(3) Issuance of a Citizen Complaint Charging Indictable Offenses. A Complaint-Warrant (CDR-2) or a summons charging any indictable offense made by a private citizen may be issued only by a judge.

(4) County Prosecutor Review of Citizen Complaints Charging Indictable Offenses. Prior to issuance of a Complaint-Warrant (CDR-2) or a summons charging any indictable offense made by a private citizen against any individual, the Complaint-Warrant (CDR-2) or summons shall be reviewed by a county prosecutor for approval, disapproval, or modification of the charge. If the prosecutor approves the citizen complaint charging an indictable offense, the prosecutor shall

indicate this decision on the complaint and submit it to a judge who will determine if probable cause exists and whether to issue a Complaint-Warrant (CDR-2) or summons in the Judiciary's computerized system used to generate complaints. If the prosecutor denies the citizen complaint charging an indictable offense, the prosecutor shall report the denial without presentation to the grand jury and the basis therefor to the Assignment Judge on the record and shall notify the citizen complainant and the defendant.

(5) The Complaint-Warrant (CDR-2) or summons charging any offense made by a private citizen may be issued by a judicial officer pursuant to (b)(1) or a judge pursuant to (b)(3) if it appears from the complaint, affidavit, certification, citizen complaint information form, or testimony that there is probable cause to believe that an offense was committed and the defendant committed it. The judicial officer's finding of probable cause shall be noted on the face of the Complaint-Warrant (CDR-2) or summons and shall be confirmed by the judicial officer's signature issuing the Complaint-Warrant (CDR-2) or summons.

[b] (c) Issuance of a Complaint-Warrant (CDR-2) or Summons

(1) Issuance of a summons. A summons may be issued on a complaint only if:

(i) a judge, authorized municipal court administrator or authorized deputy municipal court administrator (judicial officer) finds from the complaint or an accompanying affidavit or deposition, that there is probable cause to believe that an offense was committed and that the defendant committed it and notes that finding on the summons; or

(ii) the law enforcement officer or code enforcement officer who made the complaint, issues the summons.

(2) Issuance of a Warrant. A Complaint-Warrant (CDR-2) may be issued only if:

(i) a judicial officer finds from the complaint or an accompanying affidavit or deposition, that there is probable cause to believe that an offense was committed and that the defendant committed it and notes that finding on the Complaint-Warrant (CDR-2); and

(ii) a judicial officer finds that subsection [(e),] (f) [, or (g)] of this rule allows a Complaint-Warrant (CDR-2) rather than a summons to be issued.

[(c)] (d) Indictable Offenses. Complaints involving indictable offenses are governed by the Part III Rules, which address mandatory and presumed warrants for certain indictable offenses in Rule 3:3-1(e), (f).

[(d)] (e) Offenses Where Issuance of a Summons is Presumed. A summons rather than a Complaint-Warrant (CDR-2) shall be issued unless issuance of a Complaint-Warrant (CDR-2) is authorized pursuant to subsection [(e)] (f) of this rule.

[(e)] (f) Grounds for Overcoming the Presumption of Issuance of Complaint-Summons. Regarding a defendant charged on matters in which a summons is presumed, when a law enforcement officer requests, in accordance with guidelines issued by the Attorney General pursuant to N.J.S.A. 2A:162-16, the issuance of a Complaint-Warrant (CDR-2) rather than issues a complaint-summons, the judicial officer may issue a Complaint-Warrant (CDR-2) when the judicial officer finds that there is probable cause to believe that the defendant committed the offense, and the judicial officer has reason to believe, based on one or more of the following factors, that a Complaint-Warrant (CDR-2) is needed to reasonably assure a defendant's appearance in court when required, to protect the safety of any other person or the community, or to assure that the defendant will not obstruct or attempt to obstruct the criminal justice process:

(1) the defendant has been served with a summons for any prior indictable offense and has failed to appear;

(2) there is reason to believe that the defendant is dangerous to self or will pose a danger to the safety of any other person or the community if released on a summons;

(3) there is one or more outstanding warrants for the defendant;

(4) the defendant's identity or address is not known and a warrant is necessary to subject the defendant to the jurisdiction of the court;

(5) there is reason to believe that the defendant will obstruct or attempt to obstruct the criminal justice process if released on a summons;

(6) there is reason to believe that the defendant will not appear in response to a summons;

(7) there is reason to believe that the monitoring of pretrial release conditions by the pretrial services program established pursuant to N.J.S.A. 2A:162-25 is necessary to protect any victim, witness, other specified person, or the community.

The judicial officer shall consider the results of any available preliminary public safety assessment using a risk assessment instrument approved by the Administrative Director of the Courts pursuant to N.J.S.A. 2A:162-25, and shall also consider, when such information is available, whether within the preceding ten years the defendant as a juvenile was adjudicated delinquent for a crime involving a firearm, or a crime that if committed by an adult would be subject to the No Early Release Act (N.J.S.A. 2C:43-7.2), or an attempt to commit any of the foregoing offenses. The judicial officer shall also consider any additional relevant information

provided by the law enforcement officer or prosecutor applying for a Complaint-Warrant (CDR-2).

[(f)] (g) Charges Against Corporations, Partnerships, Unincorporated Associations. A summons rather than a Complaint-Warrant (CDR-2) shall issue if the defendant is a corporation, partnership, or unincorporated association.

[(g)] (h) Failure to Appear After Summons. If a defendant who has been served with a summons fails to appear on the return date, a bench warrant may issue pursuant to law and Rule 7:8-9 (Procedures on Failure to Appear). If a corporation, partnership or unincorporated association has been served with a summons and has failed to appear on the return date, the court shall proceed as if the entity had appeared and entered a plea of not guilty.

[(h)] (i) Additional Complaint-Warrants (CDR-2) or Summonses. More than one Complaint-Warrant (CDR-2) or summons may issue on the same complaint.

[(i)] (j) Identification Procedures. If a summons has been issued or a Complaint-Warrant (CDR-2) executed on a complaint charging either the offense of shoplifting or prostitution or on a complaint charging any non-indictable offense where the identity of the person charged is in question, the defendant shall submit to the identification procedures prescribed by N.J.S.A. 53:1-15. Upon the defendant's refusal to submit to any required identification procedures, the court may issue a Complaint-Warrant (CDR-2).

Note: Source - R. (1969) 7:2, 7:3-1, 3:3-1. Adopted October 6, 1997 to be effective February 1, 1998; paragraphs (b) and (c) amended July 10, 1998 to be effective September 1, 1998; paragraph (a)(1) amended July 5, 2000 to be effective September 5, 2000; paragraph (a)(1) amended, new paragraph (b)(5) added, and former paragraph (b)(5) redesignated as paragraph (b)(6) July 12, 2002 to be effective September 3, 2002; paragraph (a)(1) amended, and paragraph (a)(2) caption and text amended July 28, 2004 to be effective September 1, 2004; paragraph (a)(1) amended and new paragraph (a)(3) adopted July 16, 2009 to be effective September 1, 2009; caption amended, paragraph (a)(1) amended, former paragraph (b) deleted, new

paragraphs (b), (c), (d), (e), (f) adopted, former paragraph (c) amended and redesignated as paragraph (g), former paragraph (d) caption and text amended and redesignated as paragraph (h), and former paragraph (e) amended and redesignated as paragraph (i) August 30, 2016 to be effective January 1, 2017. [Update note when amendments are finalized.]

7:3-1. Procedure After Arrest

(a) First Appearance; Time; Defendants Not in Custody. Following the filing of a complaint and service of process upon the defendant, the defendant shall be brought, without unnecessary delay, before the court for a first appearance.

(b) First Appearance; Time; Defendants Committed to Jail. All defendants who are in custody shall have the first appearance conducted within 48 hours of their commitment to jail. For defendants incarcerated on an initial charge, on a Complaint-Warrant (CDR-2) for an indictable or disorderly persons offense, the first appearance shall be conducted at a centralized location and by a judge designated by the Chief Justice, as provided in Rule 3:26. For all other incarcerated defendants within the jurisdiction of the municipal court who require a first appearance, the first appearance shall be conducted by a judge authorized to set bail or other conditions of release; this includes those charged on an initial Complaint-Warrant (CDR-2) for a petty disorderly persons offense.

(c) Custodial Arrest Without Warrant.

(1) Preparation of a Complaint and Summons or Warrant. A law enforcement officer making a custodial arrest without a Complaint-Warrant (CDR-2) shall take the defendant to the police station where a complaint shall be immediately prepared. The complaint shall be prepared on a complaint-summons form (CDR-1 or Special Form of Complaint and Summons), unless the law enforcement officer determines that one or more of the factors in R. 7:2-2(f)[(b)] applies. Upon such determination, the law enforcement officer may prepare a Complaint-Warrant (CDR-2) rather than a complaint summons.

(2) Probable Cause; Issuance of Process. If a Complaint-Warrant (CDR-2) is prepared, the law enforcement officer shall, without unnecessary delay, but in no event later than 12 hours after arrest, present the matter to a judge, or in the absence of a judge, to a municipal court administrator or deputy court administrator who has been granted authority to determine whether a Complaint-Warrant (CDR-2) or summons will issue. The judicial officer shall determine whether there is probable cause to believe that an offense was committed and that the defendant committed an offense. If probable cause is found, a summons or Complaint-Warrant (CDR-2) may issue. If the judicial officer determines that the defendant will appear in response to a summons, a summons shall be issued consistent with the standard prescribed by R. 7:2-2. If the judicial officer determines that a warrant should issue, consistent with the standards prescribed by R. 7:2-2 after the Complaint-Warrant (CDR-2) is issued, the defendant charged with a disorderly persons offense shall be remanded to the county jail pending a determination of conditions of pretrial release. If the defendant is charged on a Complaint-Warrant (CDR-2) with a petty disorderly persons offense or any other non-disorderly persons offense within the jurisdiction of the municipal court, bail shall be set without unnecessary delay, but in no event later than 12 hours after arrest. The finding of probable cause shall be noted on the face of the summons or Complaint-Warrant (CDR-2). If no probable cause is found, the judge shall not issue the summons or Complaint-Warrant (CDR-2) [no process shall issue and the complaint shall be dismissed by the judge].

(3) Summons. If a complaint-summons form (CDR-1 or Special Form of Complaint and Summons) has been prepared, or if a judicial officer has determined that a summons shall issue,

the summons shall be served and the defendant shall be released after completion of post-arrest identification procedures required by law and pursuant to R. 7:2-2 (i).

(d) Non-Custodial Arrest. A law enforcement officer charging any offense may personally serve a complaint-summons (Special Form of Complaint and Summons) at the scene of the arrest without taking the defendant into custody.

(e) Arrest Following Bench Warrant. If a defendant is arrested on a bench warrant on an initial summons and monetary bail was not set at warrant issuance, a bail determination or release on personal recognizance must occur without unnecessary delay and no later than 12 hours after arrest. If the defendant is unable to post bail, the court shall review that bail promptly. The defendant may file an application with the court seeking a bail reduction; such bail reduction motion shall be heard in an expedited manner.

Note: Source -- R. (1969) 7:2, 7:3-1, 3:4-1. Adopted October 6, 1997 to be effective February 1, 1998; paragraphs (b)(1) and (b)(2) amended July 12, 2002 to be effective September 3, 2002; paragraph (b) caption amended, paragraphs (b)(1) and (b)(2) amended, and new paragraph (c) adopted July 28, 2004 to be effective September 1, 2004; paragraph (a) caption and text amended, new paragraph (b) adopted, former paragraph (b) amended and redesignated as paragraph (c) , and text amended, former paragraph (c) redesignated as paragraph (d), and new paragraph (e) adopted August 30, 2016 to be effective January 1, 2017; paragraphs (b), (c)(2) and (c)(3) amended November 14, 2016 to be effective January 1, 2017; paragraph (c)(1) and (c)(2) amended January X, 2018 to be effective immediately.

New Jersey Courts
Independence • Integrity • Fairness • Quality Service

Administrative Office of the Courts

GLENN A. GRANT, J.A.D.
Acting Administrative Director of the Courts

www.njcourts.com • Phone: 609-984-0275 • Fax: 609-984-6968

**MEMORANDUM**

**To:** **Municipal Court Judges**
**Municipal Court Directors**
**Municipal Court Administrators**

**From:** **Glenn A. Grant, J.A.D.**

**Subject:** **(1) Filing a Complaint in Municipal Court**

**(2) Certification in Support of Probable Cause**

**(3) Complaint Information Form (two versions)**

**Date:** **December 13, 2010**

Providing quality customer service is one of the Judiciary's core values. The documents referenced and attached were developed by the Conferences of Municipal Presiding Judges and Municipal Division Managers to provide municipal court staff with additional resources to assist citizens who wish to file a complaint in the municipal court, rather than through the local police department.

The first document, entitled Filing a Complaint in Municipal Court, is a two page handout that outlines the process involved in filing a citizen complaint and the role of court staff. This document is to be made available to all private citizens who come to court to file a complaint.

The remaining documents are being promulgated to supplement the court's handling of citizen complaints. The first document is the Certification in Support of Probable Cause statement, while the second is the Complaint Information Form. There are two versions of the Complaint Information Form. Specific detail about each document is found below.

Finally, each document is available for immediate use by the municipal courts and supersedes all other documents being used by the municipal courts for the intended purpose.

Certification in Support of Probable Cause

The current charging documents used by the municipal court to take citizen complaints contain limited space to capture all relevant information about the incident. As a result, many vicinages and/or municipal courts have elected to create their own form to supplement the information that is placed on the complaint. The attached form, entitled Certification in Support of Probable Cause, has been developed to standardize the use of such forms. Effective immediately, only this form is to be used by the municipal courts for this purpose.

Complaint Information Form (two versions)

As stated, there are two versions of the Complaint Information Form. The version entitled, Complaint Information Form – Domestic Violence Criminal Complaints, is to be given to citizen complainants who wish to file domestic violence related charges. The second version, entitled Complaint Information Form, is to be given to complainants filing non domestic violence related charges.

Similar to the preceding form, both Complaint Information Forms supplement the complaint generation process by directing the citizen complainant to provide the court with additional information, which may be helpful during the probable cause determination stage and lead to more effective service. Both versions are available for immediate use in the Municipal Courts and supersede all similar forms in use.

**Specific Instructions on the Use of these Forms**

The promulgation of these new forms is intended to supplement the complaint generation process, not replace it. Therefore, under no circumstance is the court to conduct a probable cause determination solely on the information provided on one or both of these forms. **A formal complaint must always be completed prior to the court rendering a probable cause determination.**

Additionally, while the court is required to provide all citizen complainants with copies of the new forms, their completion by the citizen is optional. A private citizen who chooses only to complete the formal complaint must be allowed to do so. The court's probable cause determination will simply be made without the benefit of the additional information.

Therefore, when a private citizen comes to court to file a complaint, he/she is to be provided with the aforementioned documents. Following the completion of the forms (unless the private citizen elects otherwise), the formal complaint must be prepared by the court. Once the formal complaint is completed, the court is to initiate the process for determining probable cause based on the available information and consistent with Rule 7:2-2(a) (1). All three documents are to be filed together.

Finally, as noted, these documents have been developed to assist the court's taking of citizen complaints. However, many citizen complaints are and should be initially handled by the police. Please be advised that nothing in this policy restricts the optional use of these forms by law enforcement in their handling of citizen complaints.

If you have any questions regarding the use of these new forms, please contact Debra Jenkins, Assistant Director, Municipal Court Services Division, at 609-984-8241.

Attachments

C: Assignment Judges
Conference of Municipal Presiding Judges
Robert W. Smith, Director
Trial Court Administrators
Debra Jenkins, Assistant Director
Steven D. Bonville, Chief of Staff
Gurpreet Singh, Special Assistant
Conference of Municipal Division Managers
Daniel Smith, Chief
Steven A. Somogyi, Chief
Carol A. Welsch, Assistant Chief

# FILING A COMPLAINT IN MUNICIPAL COURT

## What You Should Know and Do

In New Jersey, the police enforce the state and local laws. The police should be involved in the investigation of crimes or offenses. They are best suited for filing complaints against individuals who break the law, and they can provide charging information. Citizens may also choose to file a complaint in the municipal court.

The **defendant** (the person you are charging with a crime or offense) must generally be 18 years of age or older. Complaints against juveniles are typically filed by the police in the Superior Court, Family Division. The court administrator is able to provide you with specific information regarding complaints against juveniles.

The incident must have taken place within this municipality, except in certain domestic violence situations.

You (the **complainant**) will be asked to fill out a certification giving details of what happened, when, and where.

If you do not know the exact statute or ordinance to charge, you may ask court staff to provide a copy of the relevant statute book or municipal ordinance book for your review; however, they are not permitted to select the charge for you.

## What the Court Will Do

Filing a complaint in the municipal court is the first step in a two-step process. After you file the complaint, the second step requires a judicial officer and/or municipal court judge to determine that there is a reason to believe, based on the information you supplied, that a crime or offense has been committed and that the person being accused (the defendant) committed the offense. This is known as a finding of probable cause. The court will also determine whether the complaint was filed within the time period required.

If the court determines that there is probable cause and that the complaint was filed timely, the complaint will be sent to the defendant and the case will be scheduled for court. You will be notified when you are required to appear, so please notify the court of any mailing address changes.

If the judicial officer and/or judge conclude that there is no probable cause and/or the complaint was not filed timely, the court will notify you by mail. In that event, the court will dismiss the complaint and take no further action.

## If Your Complaint Goes to Court

In the municipal court, the lawyer who represents the State is called the municipal prosecutor. It is the municipal prosecutor's responsibility to review the merits of each case to determine if the case should proceed. The municipal prosecutor remains responsible for the case until its conclusion.

## Court Staff Assistance

The following is a list of some things the court staff can and cannot do for you. Please read it carefully before asking the court staff for help.

To assist you, court staff **can:**

- answer questions and explain how the court works.
- tell you what the requirements are to have your case considered by the court.
- provide you with samples of available court forms.
- provide you with guidance on how to fill out forms.
- usually answer questions about court deadlines.
- provide you with the telephone number of the lawyer referral service.

Court staff **cannot:**

- give you legal advice – only your lawyer can give you legal advice.
- tell you whether or not you should bring your case to court.
- give you an opinion about what will happen if you bring your case to court.
- recommend a specific lawyer.
- talk to the judge for you about what will happen in your case.
- let you talk to the judge outside of the courtroom.
- change an order issued by the judge.

Please notify the court for any accommodations needed. For additional information on the New Jersey Judiciary or the municipal courts, please go to www.njcourtsonline.com.

**November 2010**

# CERTIFICATION IN SUPPORT OF PROBABLE CAUSE

**State of New Jersey** **Court Name**_____

**County of:** _____ **Court Address**_____

Date of Incident: _____

Location of Incident: _____ Municipality: _____

I offer the following facts and information to establish probable cause in this complaint against _____,
(Defendant's Name)

whom I would like to charge with _____.
(List Statute(s) or Ordinance(s))

How do you know the identity of the person you are charging?_____

Describe incident in detail:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

**Certification**: I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

_____

Signature of complaining witness Date

November 2010


# COMPLAINT INFORMATION FORM

**Please complete the following information to the best of your ability. This information will help in the preparation of the complaint.**

Defendant's Name: _____

Defendant's Address: _____

Defendant's Phone # (if known): _____

Defendant's Date of Birth (if known): _____

Defendant's Driver's License # (if known): _____State_____

If this is a motor vehicle complaint, list license plate # of other vehicle: _____State_____

Description of vehicle (if known): _____

Names and addresses of witnesses (use additional paper if necessary):

_____

_____

Your Name (you are the complainant): _____

Your Address: _____

Your Telephone #: _____ E-mail: _____

---

**FOR COURT USE ONLY**

Court Administrator/Deputy Initials: _____ Date: _____

Corresponding complaint #'s:_____

(Every request **requires** the filing of a complaint.)

November 2010

## CONFIDENTIAL DOMESTIC VIOLENCE COMPLAINT INFORMATION FORM
## (Not to be Disclosed)

Please complete the following information to the best of your ability. This information will help in the preparation of the complaint.

Defendant's Name: _____

Defendant's Address: _____

Defendant's Phone # (if known): _____

Defendant's Date of Birth (if known): _____

What is your relationship to the defendant?: _____

When did the offense occur?: _____

Where did the offense occur?: _____

Is there a domestic violence restraining order in effect?: _____

In which county was the restraining order obtained?: _____

What is the effective date of the restraining order?: _____

Names and addresses of witnesses (use additional paper if necessary):

_____

_____

Your Name (you are the complainant): _____

Your Address: _____

Your Telephone #: _____ E-mail: _____

---

**FOR COURT USE ONLY**

Court Administrator/Deputy Initials: _____ Date: _____

Corresponding complaint #'s: _____

(Every request **requires** the filing of a complaint.)

November 2010

## IF UNSURE

- Do not provide information if you are unsure about confidentiality.
- If there is any doubt about whether a record or part of a record is confidential, the question should be referred to your Municipal Division Manager.



## LEGAL ADVICE

## VS.

## CUSTOMER SERVICE



## INTRODUCTION

- Every day municipal court staff are showered by questions about the court system; however, they are not permitted to give legal advice to the public.
- What is the difference between legal advice and providing assistance?

## LEGAL ADVICE & CUSTOMER SERVICE

**Why is this an important topic?**

- Increase in citizens filing complaints.
- Enhanced public knowledge of court processes.
- Increase in court services and programs.
- Enhanced responsibilities of court staff.



## LEGAL ADVICE

- Advising someone to follow a specific or general course of action.
- Involves an interpretation of the law (case law, statute, etc.) as it relates to the facts presented.



## WHY CAN'T WE PROVIDE LEGAL ADVICE?

- Court personnel must remain neutral in providing consistent information to the public.
- Court personnel must remain impartial with all parties involved in a matter before the courts.
- Court personnel must not engage in the unauthorized practice of law. (Canon 1 of the Code of Conduct.)

## COURT STAFF IS NOT PERMITTED TO GIVE LEGAL ADVICE

- The courts must be neutral
  - Belonging to neither side nor party - Webster's Dictionary
- The courts must be impartial
  - Not partial or biased - Webster's Dictionary
- Court staff must not engage in the unauthorized practice of law
  - Code of Conduct Canon prohibiting unauthorized practice of law



## LEGAL ADVICE GUIDELINES

| CAN PROVIDE | CANNOT PROVIDE |
|---|---|
| Definitions of legal terms | Legal interpretations |
| Information on court procedures | Procedural advice |
| Cites of statutes, court rules, and ordinances | Research of statutes, court rules, and ordinances |
| Public case information | Confidential case information |



## LEGAL ADVICE GUIDELINES

| CAN PROVIDE | CANNOT PROVIDE |
|---|---|
| General information on court operations | Confidential/restricted info. on court operations |
| Options | Opinions |
| Access | Information that would deny/discourage access |
| General referrals | Subjective/biased referrals |
| Forms and instructions on how to complete forms | Fill out forms for a party |

Although you cannot give legal advice, you must always provide **customer service.**

- Public Access
- Distribution of forms
- Provide information from the Lawyer Referral Service.
- Provide procedural options and definitions.



## GUIDELINE #1

- Municipal court staff can provide definitions of legal terms.
- Legal terms and phrases may be confusing for many people. Generally, it is permissible to provide the public with definitions of legal terms and procedures to help them understand the court system.
- Municipal court staff cannot provide legal interpretations.



## GUIDELINE #2

- Generally, information on court procedures may be confusing to many people.
- Municipal court staff can provide information on court procedures. This is not legal advice.
- Municipal court personnel can explain procedures but cannot apply procedures to individual circumstances.

## GUIDELINE #3

- Municipal court staff can provide citations, statutes, court rules, and ordinances.
- Municipal court staff cannot provide legal research.



## GUIDELINE #4

- Municipal court personnel can provide public case information, such as the DWI offense of their neighbor.
- Municipal court personnel cannot provide confidential case information, such as paperwork for a domestic violence case.



## GUIDELINE #5

- Municipal court personnel can provide general information on municipal court operations.
- Municipal court staff cannot provide confidential or restricted information on court operations.

## GUIDELINE #6

- Municipal court staff can provide legal options.
- Municipal court staff cannot provide legal opinions.



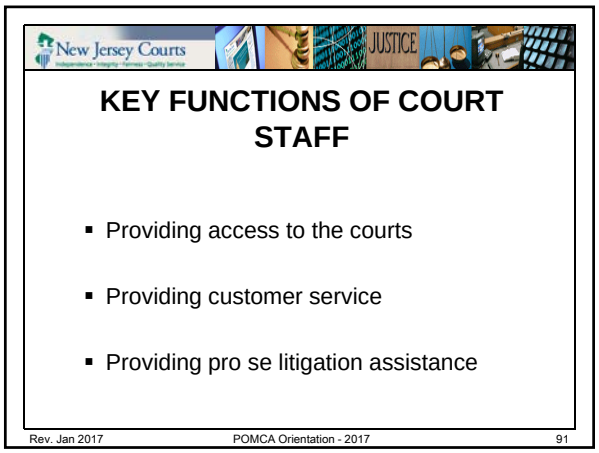
## GUIDELINE #7

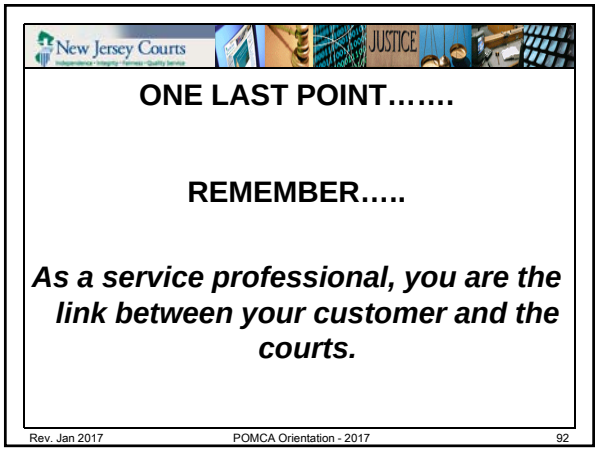
- Municipal court staff can provide general referrals.
- Municipal court staff cannot provide subjective referrals.



## GUIDELINE #8

- Municipal court staff can provide forms and instructions on how to complete forms.
- Municipal court personnel cannot fill out forms for a party unless a person is disabled and requires assistance.


New Jersey Courts
JUSTICE
KEY FUNCTIONS OF COURT STAFF
Providing access to the courts
Providing customer service
Providing pro se litigation assistance
Rev. Jan 2017
POMCA Orientation - 2017
91


New Jersey Courts
JUSTICE
ONE LAST POINT…….
REMEMBER…..
As a service professional, you are the link between your customer and the courts.
Rev. Jan 2017
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## Giving Advice vs. Assistance, *continued...*

# Suggested Guidelines to use in responding to Customer's Questions

**As court employee, we are expected to perform the following tasks:**

1. Provide information contained in docket reports, case files, indexes and other non-confidential reports.

2. Answer questions concerning court rules, procedures, and ordinary practices. Such questions often contain the words "Can I?" or "How do I?"

3. Provide examples of forms or pleadings for the guidance of litigants.

4. Answer questions about the completion of forms.

5. Explain the meaning of terms and documents used in the court process.

6. Answer questions concerning deadlines or due dates.

**In providing information, court employees will not:**

1. Give information when you are unsure of the correct answer. (Court employees should transfer such questions to supervisors.)

2. Advise litigants whether to take a particular course of action. Do not answer questions that contain the words "should I?" Suggest that questioners refer such issues to a lawyer.

3. Take sides in a case or proceeding pending before the court.

4. Provide information to one party that you would be unwilling or unable to provide to all other parties.

5. Disclose the outcome of a matter submitted to a judge for decision until the outcome is part of the public record, or until the judge directs disclosure of the matter.

**These guidelines are to be used for reference purposes only.**

## Giving Advice vs. Assistance, *continued...*

# Suggested answers to some of those recurring questions

### About Lawyers

Q. **Do I need a lawyer? or Should I hire a lawyer?**
A. *You are not required to have a lawyer to file papers or to participate in a case in court. You have the right to represent yourself. Whether to hire a lawyer must be your personal decision. You may want to consider how important the outcome of this case is to you in making that decision. A lawyer may not cost as much as you think. I have information on the Lawyer Referral Service if you want help in finding a lawyer who specializes in your kind of case.*

Q. **Can you give me the name of a good lawyer?**
A. *The court cannot recommend a particular lawyer. I have information on the Lawyer Referral Service if you want help in finding a lawyer who specializes in your kind of case.*

### About Cases

**Q. Should I plead guilty?**
A. *You need to decide that for yourself.*

**Q. What sentence will I get if I plead guilty (or plead not guilty)?**
A. *The judge will decide what sentence to impose based upon the facts and the law that apply to your case. I cannot predict what the judge will do.*

### About the Courts

**Q. What will happen in court?**
A. *(To plaintiff in small claims case) The judge will call on you to present your evidence first. Then (he/she) will call on the other side to present its evidence. The judge will ask questions if he/she needs clarification. When the judge has heard all the evidence, he/she will announce his/her decision.*

**Q. What should I say in court?**
A. *You must tell the truth.*

Q. **What do I do next?**
A. *Describe the next step in the court process.*

## Giving Advice vs. Assistance, *continued...*

## Suggested answers to some of those recurring questions
**(continued)**

### About the Judges

**Q. How do I get the money that the judge said I am entitled to?**
A. *You are responsible for taking the steps necessary to enforce a judgment (or an award of child support). Here is a pamphlet that describes the procedural options available to you. When you decide what option to pursue, I can provide you with the appropriate forms. (It may be appropriate to refer a litigant to an agency for help, e.g., with child support enforcement.)*

**Q. I want to see the judge. Where is his/her office?**
A. *The judge talks with both parties to a case at the same time. You would not want the judge to be talking to the (police office) (landlord) about this case if you were not present. Your case is scheduled for hearing on ____ at ____. That is when you should speak with the judge.*

**Q. The judge heard my case today but did not make a decision. When will he/she decide?**
A. *There is no way for me to know when the judge will issue a decision in your case. In general, judges try to reach a decision within (60) days of taking a case under advisement. But there is no guarantee that the judge will decide your case within that time.*

### About Forms

**Q. What should I put in this section of the form?**
A. *You should write down in your own words what happened.*

**Q. What should I put down here where it says, "remedy sought?"**
A. *You should write in your own words what you want the court to do.*

**Q. Would you look over this form and tell me if I did it right?**
A. *You have provided all of the required information. I cannot tell you whether the information you have provided is correct or complete; only you know whether it is correct and complete.*

**Q. I am not able to read or write. Would you fill out the form for me?**
A. *In that case, I am able to fill out the form for you, but you have to tell me what information to put down. I will write down whatever you say and read it back to you to make sure what I have written is correct.*

## Giving Advice vs. Assistance, *continued...*

# Suggested Guidelines to use in responding to Customer's Questions

**As court employee, we are expected to perform the following tasks:**

1. Provide information contained in docket reports, case files, indexes and other non-confidential reports.

2. Answer questions concerning court rules, procedures, and ordinary practices. Such questions often contain the words "Can I?" or "How do I?"

3. Provide examples of forms or pleadings for the guidance of litigants.

4. Answer questions about the completion of forms.

5. Explain the meaning of terms and documents used in the court process.

6. Answer questions concerning deadlines or due dates.

**In providing information, court employees will not:**

1. Give information when you are unsure of the correct answer. (Court employees should transfer such questions to supervisors.)

2. Advise litigants whether to take a particular course of action. Do not answer questions that contain the words "should I?" Suggest that questioners refer such issues to a lawyer.

3. Take sides in a case or proceeding pending before the court.

4. Provide information to one party that you would be unwilling or unable to provide to all other parties.

5. Disclose the outcome of a matter submitted to a judge for decision until the outcome is part of the public record, or until the judge directs disclosure of the matter.

**These guidelines are to be used for reference purposes only.**

## Giving Advice vs. Assistance, *continued...*

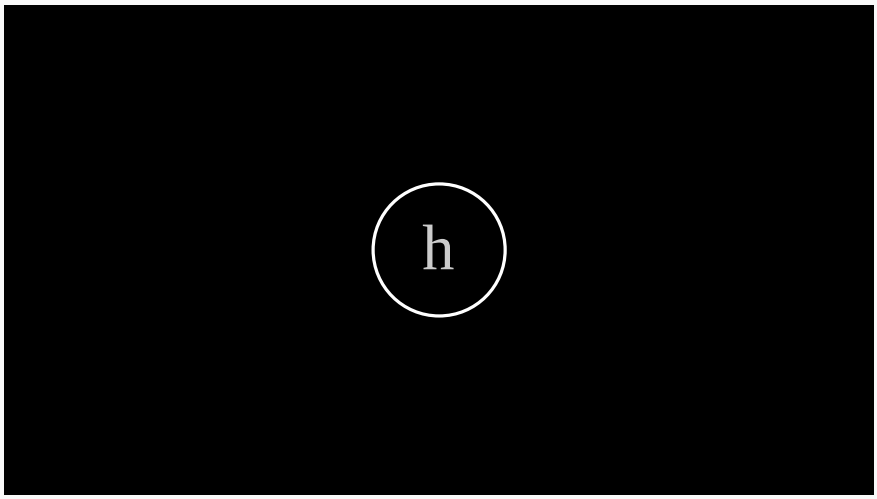
## What is and is not legal advice?

| Item | Example Question | Can Provide | Cannot Provide | Reason | Response |
|---|---|---|---|---|---|
| Legal definitions | What is child abuse? | X | | Legal terminology can be confusing and difficult. Providing definitions of legal terms or procedures helps the public understand the court system and does not involve the practice of law. | *According to the dictionary of legal terms, child abuse "is the mistreatment of a minor by an adult legally responsible for the minor."* |
| Legal Interpretation | My neighbors leave their kids alone all day without any supervision. Is that child abuse? | | X | Court employees cannot provide legal interpretations be cause it would be considered the unauthorized practice of law and would violate the concepts of neutrality and impartiality. | *I am not an attorney and cannot make a legal interpretation. However, I can refer you to someone that can help you.* |
| Cites for statutes, court rules and ordinance | An employer asks if the employer has to file a disclosure with the court every time an employee's paycheck is garnished. | X | | A court employee may cite the legal authority for a specific procedure. | *No. The court rules only require a disclosure to be filed within 14 days after the date writ was served.* |
| Research of statutes, court rules & ordinances | Please provide me with a copy of all of the laws regarding stalking. | | X | Court employees cannot research statutes, court rules and ordinances for parties because it would be considered the unauthorized practice of law and violates the concepts of impartiality and neutrality. | *I'm sorry, but I am not allowed to do legal research.* |
| General information about court operations | How long before I become the guardian? | X | | Court employees have considerable knowledge and information about how a court functions. Sharing this knowledge of general court operations is not considered legal advice. | *Hearings generally are scheduled in four to six weeks, and a determination is made at that time.* |
| Confidential information about court operations | How do I get a particular judge assigned to my case? | | X | Court employees cannot disclose confidential information about court operations or ex parte communications because it can give one side an unfair advantage. | *I'm sorry, I can't give you information about the court's internal assignment procedures.* |

| Item | Example Question | Can Provide | Cannot Provide | Reason | Response |
|---|---|---|---|---|---|
| Facilitate access | How do I convict my renter? | X | | Most people are not familiar with the court system. They often cannot describe their problem in legal terms. Court employees are the gatekeepers to the system. It is their job to ensure that the court system is accessible. The information that is presented, and the manner in which it is presented, can affect how accessible the system is. | *Do you want to evict your renter? The court that handles landlord/tenant disputes is down the hall.* |
| Distributing forms & instructions on how to complete forms | | X | | Court employees must facilitate access to the court system. | |
| Filling out forms unless there is a handicap or physical disability that prevents the person from filling out the form | | | X | Court employees should not fill out forms for parties because it violates the principles of neutrality and impartiality.<br><br>However, there may be some situations where it is appropriate for employees to record information on a form. Some examples include language barriers (illiteracy or foreign language) and physical handicaps (blindness or deafness). | |

# Passaic County's top judge orders all charges by newspaperman to go through him

**Joe Malinconico, Paterson Press** Published 12:44 a.m. ET Sept. 9, 2017 | **Updated 10:19 p.m. ET Sept. 10, 2017**



The Annual Labor Day Parade from the American Labor Museum to the Great Falls in Paterson took place, Sunday, September 3, 2017.


*(Photo: Tariq Zehawi/NorthJersey.com)*



PATERSON – The highest-ranking judge in Passaic County issued an order Friday telling all courts in his jurisdiction not to accept criminal or civil complaints filed by a controversial newspaper publisher without special permission.

The order came just days after the publisher, Sirrano Keith Baldeo of the New Jersey Pulse, filed official misconduct charges against a municipal court judge who dismissed 210 criminal complaints that the newspaperman had submitted against Paterson City Council members and others.

In dismissing the 210 cases, North Haledon Judge John Meola also had imposed $6,930 in court costs against Baldeo.

Passaic County assignment judge, Ernest Caposela, said in his court order that Baldeo was filing "possible frivolous litigation" and cited the $6,930 charge imposed by Meola.

"Despite these financial sanctions, Mr. Baldeo continues to file official misconduct complaints against anyone who disagrees with him, including Judge Meola," wrote

Caposela in his order.

Earlier this summer, Baldeo successfully convinced a judge in Pompton Lakes to find probable cause for misconduct charges Baldeo filed against seven Paterson council members who refused to allow him to speak at a public meetings. Those cases are still pending a possible grand jury decision and were not among the 210 that were dismissed

Baldeo has said that God wants him to expose corruption in Paterson and he has accused various judges as well as Passaic County Prosecutor Camelia Valdes of interfering with his efforts to protect political allies.

“Five Democratic judges so far giving immunity to Paterson officials,” Baldeo wrote on his Facebook page after Meola’s decision. “So this time I'm going after them.”

After being informed of Caposela’s order, Baldeo said, “None of my cases are frivolous.”

Baldeo said local political interference by Democratic Party members has prompted him to meet with authorities and that he also plans to contact the state attorney general. He said he will seek to have the cases shifted outside Passaic County.

Paterson City Councilman William McKoy welcomed the order issued by Caposela on Friday. “Finally, the reign of terror will come to an end,” McKoy said.

McKoy said that people familiar with Baldeo’s actions over the years see his track record of litigation as “abuse of the system.”

“He has turned the legal process on its head and used it as a ploy for his own benefit, to the disadvantage of the taxpayers and the law-abiding citizens of the county,” McKoy said.

Caposela’s action does not ban Baldeo from filing complaints. Several legal experts said such action would be unconstitutional. Instead, Caposela directed all courts in the county not to accept Baldeo’s complaints without permission from the county assignment judge – who at present is Caposela himself.



Caposela also ordered that all pending cases filed by Baldeo would be handled by the assignment judge office.

Valdes, the county prosecutor, did not respond when asked whether Caposela’s action would affect her office’s decision to pursue the misconduct charges still pending against the seven Paterson council members.

JOHN L. HIGGINS, III
First Assistant Prosecutor

ROBERT ANZILOTTI
Chief of Detectives

# Office of the County Prosecutor

## County of Bergen

Justice Center - 10 Main Street
HACKENSACK, NEW JERSEY 07601
(201) 646-2300

January 27, 2017

HAND DELIVERED

Honorable Bonnie J. Mizdol, A.J.S.C.
Bergen County Justice Center
Room 425
Hackensack, New Jersey 07601

Re: State v. Christopher J. Christie
Complaint No. 0219-S-001008

Your Honor:

The Bergen County Prosecutor's Office respectfully submits this letter to Your Honor to advise that our office does not intend to pursue charges against defendant based on our review of the evidence and our ethical obligations. See Rule 3:25-1(a). Additionally, we address what we perceive as certain practical problems which undermine the initial probable cause determination. Indeed, from our institutional perspective, we submit that legal and practical considerations militated against Complaint Summons No. 0219-S-00108 ever being issued. And we maintain that it is appropriate to bring them to the attention of Bergen County's Assignment Judge.

## A. Procedural History

On September 28, 2016, William J. Brennan filed Complaint-Summons No. 0219-S-001008 (2016) in the Fort Lee Municipal Court in Bergen County, alleging that defendant, Governor Christopher J. Christie, committed official misconduct in September of 2013. Specifically, Mr. Brennan claimed that defendant "refrained from ordering that his subordinates take all necessary action to re-open local access lanes to the George Washington Bridge" and that this inaction violated N.J.S.A. 2C:30-2(b). Complaint Summons No. 0219-S-001008 (2016).

On September 28, 2016, venue of the probable cause hearing was changed from the Fort Lee Municipal Court to the Municipal Court for Vicinage 2 (Bergen County).

On October 13, 2016, the Honorable Roy F. McGeady, P.J.M.C., conducted a probable cause hearing. Mr. Brennan was the sole witness, proffering eight pages of selected transcript excerpts from David Wildstein's testimony from the then on-going federal criminal trial of United States v. Baroni, et al., Docket No. 2:15-CR-00193 (SDW). At the conclusion of the hearing, Judge McGeady found probable cause that defendant committed the second degree crime of official misconduct, which exposed defendant to a sentence of 5-10 years in state prison with a mandatory five year period of parole ineligibility.

On October 19, 2016, Mr. Brennan filed an "Emergent Motion for Appointment of a Special Prosecutor" with the Superior Court, Law Division.

On November 2, 2016, defendant filed a motion for leave to appeal the probable cause finding in the Superior Court, Law Division.

On November 30, 2016, a hearing was held before Your Honor. The court denied Mr. Brennan's motion for the appointment of a special prosecutor. Mr. Brennan subsequently filed a motion for reconsideration, which the court denied.

On December 9, 2016, the BCPO joined in defendant's argument that the municipal court erred in denying defendant the presence of counsel at the probable cause hearing.

On December 30, 2016, defendant filed a brief in further support of his motion to dismiss, asking the court to rule on the merits and find there was insufficient probable cause defendant committed official misconduct, in violation of N.J.S.A. 2C:30-2(b), and to dismiss the complaint in its entirety.

On January 11, 2017, a hearing on defendant's motion to dismiss was held before Your Honor.

On January 12, 2017, Your Honor denied defendant's motion to dismiss the complaint with prejudice. The court did, however, reverse the probable cause determination and remand the matter to the Vicinage 2 Municipal Court for further proceedings.

The matter is scheduled to be heard by Judge McGeady on February 2, 2017.

B. Civilian Complaint

A citizen complaint may be brought in accordance with Rule 7:2-2. A summons on a complaint may be issued "only if it appears to the judicial officer from the complaint, affidavit, certification or testimony that there is probable cause to believe that an offense was committed." R. 7:2-2(a)(1). The New Jersey Practice Manual on Municipal Court Practice states that the testimony comes from the complainant. 17 N.J. Prac., Municipal Court Practice § 5:5 (Ramsey, 3d ed.).

Generally citizen-complaints are brought for minor crimes and involve matters where complainants have personal knowledge of the offense. See, e.g., State v. Storm, 141 N.J. 245, 248 (1995); State v. Myerowitz, 439 N.J. Super. 341, 346 (App. Div. 2015); State v. Bradley, 420 N.J. Super. 138 (App. Div. 2011); State v. Vitiello, 377 N.J. Super. 452, 454 (App. Div. 2005); State v. Dwyer, 229 N.J. Super. 531, 534 (App. Div. 1989).

Our Supreme Court has expressed its concern over citizen complaints and that "private prosecutions pose the risk that the complainant will use the municipal court proceeding to harass the defendant or to obtain an advantage in a related civil action." Storm, supra, 141 N.J. at 253. The Court subsequently observed the danger of private citizens presenting criminal

complaints could allow "political candidates, on the eve of an election, [to] charge their political opponents with fraud or some other nefarious activity[.]" In re Loigman, 183 N.J. 133, 145 (2005).

Moreover, a private citizen may not prosecute serious crimes. Id. at 139. It is "the responsibility of the public prosecutor to investigate and prosecute serious crimes, and it has been the role of the victim or concerned citizen to report knowledge of criminal activities to the proper law enforcement authorities." Ibid.

Here, Mr. Brennan alleged the serious crime of official misconduct against the sitting New Jersey Governor. In light of the above well-established caselaw, we respectfully submit that Judge McGeady erred when the instant complaint issued.[1]

In short, a matter of this gravity should not have been heard by a municipal court judge. Nevertheless, given the determination and referral, the BCPO undertook a review as noted below.

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[1] The BCPO recognizes that Rules 3:3-1 and 7:2-2(a)(1) read in pari materia arguably required Judge McGeady to decide the question of probable cause. However, Rule 1:1-2 provides that our court rules may be relaxed, if that would result in "the achievement of procedural due process in the service of substantial justice on the merits." Pressler & Verniero, Current N.J. Court Rules, Comment 1 on Rule 1:1-2 (2017). This unprecedented situation was just such a case.

C. Prosecution of This Matter is Unwarranted.

A juxtaposition of the pertinent statute and the evidence, coupled with an appreciation of our prosecutorial duties, underscores the soundness of our decision.

To establish a prima facie case of official misconduct, the State must prove that: (1) defendant was a "public servant" within the meaning of the statute, (2) who, with the purpose to obtain a benefit or deprive another of a benefit, (3) committed an act relating to but constituting an unauthorized exercise of his or her office, (4) knowing that such act was unauthorized or that he or she was committing such act in an unauthorized manner or knowingly refrained from performing a duty. State v. Thompson, 402 N.J. Super. 177, 191-92 (App. Div. 2008) (citing State v. Bullock, 136 N.J. 149, 153 (1994); State v. Schenkolewski, 301 N.J. Super. 115, 143 (App. Div.), certif. denied, 151 N.J. 77 (1997)).

The BCPO conducted a thorough review of the transcripts and exhibits in United States v. Baroni et al., Docket No. 2:15-CR-0019 (SDW), a prosecution which followed an extensive and comprehensive years-long federal investigation. Based upon our review of this material, as well as other relevant evidence, the BCPO has concluded that it will not proceed with official misconduct charges against defendant. The reason is simple, but

compelling -- that charge cannot be proven beyond a reasonable doubt.

Prosecutors are bound by ethical obligations beyond that of other attorneys. R.P.C. 3.8 (special responsibilities prosecutor). A prosecutor's "obligation to play fair is every bit as compelling as his responsibility to protect the public." State v. Harvey, 176 N.J. 522, 529 (2003) (quoting State v. Torres, 328 N.J. Super. 77, 94 (App. Div. 2000)).

As Your Honor knows, a prosecutor's charging decision is, of course, constrained by ethical and institutional imperatives. Prosecutors are "vested with broad discretionary powers in the discharge of the manifold responsibilities of [their] office." State v. Hermann, 80 N.J. 122, 127 (1979). And, "'inaction' may constitute a valid exercise of the discretion allowed to the prosecutor." State v. Muller, 246 N.J. Super. 518, 522 (App. Div. 1991). See also, State v. Winne, 12 N.J. 152, 174 (1953). Concomitantly, a prosecutor's exercise of judgment in declining to investigate and prosecute a matter is entitled to deference; judicial nullification of such a prosecutorial decision is limited to cases of "arbitrariness or abuse." Ringwood Fact Finding Comm., 65 N.J. 512, 516-17 (1974); State v. Ward, 303 N.J. Super. 47, 57-58 (App. Div. 1997); Muller, supra, 246 N.J. Super. at 522.

"Prosecutors routinely screen and investigate criminal complaints to determine whether there is probable cause to support the return of an indictment. Prosecutors are ethically bound not to seek an indictment in the absence of probable cause." Loigman, supra, 183 N.J. at 146. Indeed, prosecutors are prohibited from "prosecuting a charge that the prosecutor knows is not supported by probable cause." R.P.C. 3.8(a). Moreover, as the Standards of Criminal Justice make clear,

> A prosecutor should not institute, or cause to be instituted or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.
> [American Bar Association, Criminal Justice Standards, The Prosecution Function - Standard 3-3.9; emphasis added].

These considerations mandate the conclusion we have reached based on our review of the evidence.

## CONCLUSION

For all the foregoing reasons, the BCPO will not pursue the charge of official misconduct against defendant.

Respectfully submitted,

By: _____
John L. Higgins, III
First Assistant Prosecutor
Attorney ID No. 024851987

Cc: Hon. Roy F. McGeady, P.J.M.C. -- Hand Delivered
Craig Carpenito, Esq. -- Via Email
William Brennan -- Via Email

/mg

# ADMINISTRATIVE OFFICE OF THE COURTS
# STATE OF NEW JERSEY

**PHILIP S. CARCHMAN, P.J.A.D.**
**ACTING ADMINISTRATIVE DIRECTOR OF THE COURTS**

**RICHARD J. HUGHES JUSTICE COMPLEX**
**P.O. BOX 037**
**TRENTON, NEW JERSEY 08625-0037**

**[Questions or comments may be directed to 609-984-8241]**

## DIRECTIVE #02-08

**[Supersedes Directive #21-79 in Part]**

**TO: Assignment Judges**
**Presiding Judges – Municipal Courts**
**Municipal Court Judges**
**Trial Court Administrators**
**Municipal Division Managers**
**Municipal Court Directors and Court Administrators**

**FROM: Philip S. Carchman, PJ.A.D.**

**SUBJ: Procedures for the Dismissal of Municipal Court Complaints and Voiding Uniform Traffic Tickets and Special Forms of Complaints**

**DATE: February 25, 2008**

This directive restates and consolidates existing procedures for dismissal and voiding of municipal court complaints. These procedures are drawn from a number of sources, including the Rules of Court, case law, several editions of the Municipal Court Procedures Manual (1979, 1983, 1985), various Municipal Court Bulletin Letters, as well as Directive #21-79, which this directive thus supersedes in part. This directive also sets forth the procedures to be followed by a municipal court when a complaint is issued to a judge or employee of that court or an immediate family member of a judge or employee of that court.

## Dismissal of Complaints

All dismissals of complaints heard in the municipal courts shall be made on the record in open court, just as all other dispositions are made on the record in open court. In dismissing any matter, including parking tickets, the municipal court judge shall state on the record the complaint number, the charge, the defendant's name, if known, and the reasons for the dismissal. Further, the prosecutor must be given notice of all dismissals, with an opportunity to be heard. Dismissals shall be entered into the ATS/ACS system using the appropriate finding and method of disposition codes.

Occasionally, a law enforcement officer requests that a complaint be dismissed that he or she has written and signed. For example, an officer may have completed and signed a ticket for failure to produce a driver's license, but then the driver finds the license at the scene and the officer does not want to proceed with prosecution of the complaint. In such circumstance, the officer shall give a certification to the municipal prosecutor explaining the reasons for the request to dismiss. The certification must be approved and signed by the officer's superior officer. When requesting that a complaint be dismissed, the officer shall use the attached certification form, "Request to Dismiss or Void Complaint." All copies of the original complaint (except the defendant's copy) should be submitted to the municipal court, along with a copy of the officer's certification. The municipal court judge shall review the ticket and the certification. The prosecutor shall place his or her position regarding the dismissal on the record in person or, if the judge permits, the prosecutor may record his or her position on the officer's certification form. If the judge grants the dismissal request, the judge shall dismiss the ticket by placing on the record in open court the complaint number, the charge, the defendant's name (if known), the reasons for the dismissal, including either reading or summarizing the officer's certification. Defendant need not appear in court when the dismissal is put on the record.

When dismissing large numbers of parking tickets, such as under R. 7:8-9(f) (dismissal of parking tickets over three years old), rather than reading all the information on each ticket into the record, the judge may place into the record a report containing that information, referencing the name and date of the report.

In addition to the above requirements, a judge must continue to follow the specialized dismissal procedures found in R. 7:2-4(c) for dismissal of complaints for failure of service of process and those procedures set forth in the Administrative Director's December 2, 2004 memorandum on dismissal of drunk driving cases (attached).

## Voided Tickets or Special Forms of Complaint

There has been some confusion recently as to the difference between "dismissed tickets" and "voided tickets." In general, a traffic ticket or special form of complaint and summons (collectively referred to in this directive as "a ticket") that has been signed by a law enforcement officer cannot be voided. It may only be dismissed for an appropriate reason. An incomplete ticket — that is, a ticket that has not been signed by the officer — may be voided using the procedure described below. When asking that a ticket be voided (except for superseded tickets), the officer shall use the attached certification form, "Request to Dismiss or Void Complaint."

Ticket control is a vital function of the municipal courts and all blank tickets distributed to law enforcement officers must always be accounted for. **Tickets may be**

**voided only in the following limited circumstances (see below for the voiding process as to each):**

1. Incomplete tickets -- that is, tickets that have been partially completed and not signed. For example, a ticket on which an officer entered an incorrect license plate number, did not sign that ticket, and then issued a replacement ticket for the same offense. A replacement ticket is not always necessary, however. For example, a parking ticket that an officer begins to write and then realizes that parking is allowed at that location on Sundays; the officer does not complete the ticket and does not write a replacement ticket.

2. Lost tickets.

3. Spoiled, unusable tickets. For example, tickets that are pocket-worn, stained, or otherwise ruined.

4. Superseded tickets due to changes in the Uniform Traffic Ticket or the Special Form of Complaint. For example, traffic tickets that cannot be used because there has been a change in the preprinted payable amount.

### 1. Incomplete Tickets

For incomplete tickets, the officer shall file with the municipal court all copies of the incomplete ticket and the replacement ticket, if any, accompanied by the certification form ("Request to Dismiss or Void Complaint)", signed by the officer and approved and signed by a superior officer, explaining the circumstances of the incomplete ticket. The municipal court judge shall review the incomplete ticket, the replacement ticket, if any, and the certification. If the judge decides to grant the application, the judge shall void the ticket in open court, placing on the record the ticket number, the charge, the defendant's name (if known), the number of the replacement ticket, if any, and the reason for voiding. The judge then shall date and sign the incomplete ticket with a notation of his or her approval of the requests and mark the ticket "void." The judge then shall proceed to adjudicate the replacement ticket, if any. The court administrator or court staff shall enter the void information into the ATS system and shall file the voided incomplete ticket with the judge's signature and notations in the master file with the officer's certification attached.

A judge shall not void an incomplete ticket if the ticket has been signed, if defendant has been served with the ticket, or if the officer's explanation involves matters of defense, interpretation of the law or mitigating circumstances. In these instances, the case must be adjudicated, either through a dismissal or otherwise.

### 2. Lost Tickets

For lost tickets, the officer shall present to the municipal court a certification form ("Request to Dismiss or Void Complaint") signed by the officer and approved and signed by a superior officer, explaining how the tickets were lost. The municipal court judge shall review the certification and, if satisfied, shall void the lost tickets on the record in open court. The judge shall also sign and date the officer's certification. The court administrator or court staff shall enter the void information into the ATS system and shall file the officer's certification in the master file, in the position where the lost tickets would have been placed.

### 3. Spoiled Tickets

For spoiled, unusable tickets, the officer shall return to the court all copies of the tickets, accompanied by the completed certification form ("Request to Dismiss or Void Complaint"), signed by the officer and approved and signed by a superior officer, explaining what happened to make the tickets unusable. The judge shall void the spoiled, unusable tickets by placing on the record the ticket numbers of the spoiled tickets and the reasons they are spoiled. The court administrator or court staff shall enter the void information into the ATS system and file those voided spoiled tickets in the master file along with the officer's certification.

### 4. Superseded Tickets

For tickets returned due to changes in the approved ticket form, no certification is needed from the officer. The court administrator or court staff shall enter the void information into the ATS system and place the superseded tickets in a separate, clearly identified file. The superseded tickets shall be destroyed according to the Judiciary record retention schedule, Directive #3-01. There is no need to void superseded tickets on the record.

## Disposition of Complaints Issued to Municipal Court Judges or Court Employees

A municipal court shall not dispose of a complaint issued to a judge or an employee of that municipal court or to an immediate family member of a judge or employee of that municipal court, except if the matter is disposed of without any court appearance through the violations bureau. When the Assignment Judge receives notification of any such complaint – pursuant to Directives #4-81 (as to municipal court judges), #3-08 (as to municipal court employees and their immediate family members), or #4-08 (as to the immediate family members of municipal court judges) – the Assignment Judge will take appropriate action to reassign or transfer the case to a Superior Court Judge, to the Presiding Municipal Court Judge of that vicinage, or to

such other judge as designated by the Assignment Judge. If a municipal court judge or municipal court staff learns that, notwithstanding this transfer requirement, a municipal court is hearing or otherwise processing a complaint issued to a judge or an employee of that municipal court or to an immediate family member of a judge or employee of that municipal court (whether because the judge or employee failed to notify the Assignment Judge as required or for any other reason), then the municipal court shall stop such hearing or processing of the complaint and shall notify the Assignment Judge of the complaint immediately. The Assignment Judge need not be notified if the judge or employee paid through the violations bureau without any court appearance.

Any questions regarding this directive should be directed to Assistant Director Robert Smith (Municipal Court Services Division) at 609-984-8241.

P.S.C.

Attachments

cc: Chief Justice Stuart Rabner
Attorney General Anne M. Milgram
Theodore J. Fetter, Deputy Administrative Director
AOC Directors and Assistant Directors
John Podeszwa, Municipal Court Services
John J. Wieck, Criminal Practice Division
Carol A. Welsch, Municipal Court Services
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant

# REQUEST TO DISMISS OR VOID COMPLAINT

**ALL DISMISSALS AND VOIDS TO BE PLACED ON THE RECORD IN OPEN COURT, PER DIRECTIVE #02-08**

**Municipal Court of** _____

**FORM TO BE DISMISSED OR VOIDED:**

☐ **Uniform Traffic Ticket #**_____

☐ **Special Form of Complaint #**_____

☐ **CDR #**_____

***CHECK <u>ONE</u> BOX ONLY:***

☐ **DISMISSAL REQUEST: The undersigned has issued the above referenced ticket or complaint and requests that the ticket or complaint be DISMISSED because:**

_____
_____
_____

☐ **VOID REQUEST: The undersigned states that the above ticket or complaint was spoiled, not completed or lost and requests that it be VOIDED because:**

_____
_____
_____

Replacement ticket/complaint number(s), if any:

**CERTIFICATION:**

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

_____ _____

Date of Request Signature & Badge # of Officer/Requestor

**OFFICER SUPERVISOR REVIEW:**

I have reviewed and approved the above request to **dismiss** or **void** the above complaint.

_____ _____

Date of Review Signature of Police Chief (or Supervisor)

**REVIEW REQUEST TO DISMISS BY MUNICIPAL PROSECUTOR:**

☐ **DISMISSAL RECOMMENDED**

_____ _____

Date Municipal Court Prosecutor

**(1) All copies of the Uniform Traffic Ticket/Special Form of Complaint/CDR to be VOIDED MUST be attached to this request.**
**(2) All copies (EXCEPT defendant copy) of the Uniform Traffic Ticket/Special Form of Complaint/CDR MUST be attached to the DISMISSAL request.**
**(3) Officer may retain photocopy of request for police records.**
**(4) Municipal Prosecutor may retain copy for prosecutor records.**

# ADMINISTRATIVE OFFICE OF THE COURTS
## STATE OF NEW JERSEY

PHILIP S. CARCHMAN, J.A.D.
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## MEMORANDUM

**TO:** **Municipal Court Judges**

**FROM:** **Philip S. Carchman, J.A.D.**

**SUBJ:** **Sample Questions for Use in Drunk Driving Cases**

**DATE:** **December 2, 2004**

Attached is a series of sample questions that a judge should ask on the record when a prosecutor has moved to dismiss or amend a drunk driving charge (N.J.S.A. 39:4-50, driving while intoxicated). The Conference of Presiding Judges-Municipal Courts developed these questions, which are designed to establish a record and thereby prevent an improper dismissal or amendment of a N.J.S.A. 39:4-50 charge. These questions are intended as a guide, so you need not ask the prosecutor the questions exactly as written. You are expected, however, to ask these or similar questions and any additional questions necessary to establish, on the record, the prosecutor's detailed reasons for requesting a dismissal or amendment.

If you have any questions about this memorandum, please contact your Vicinage Municipal Court Presiding Judge or Municipal Division Manager.

*Attachment*

cc: Deborah T. Poritz, Chief Justice
Peter C. Harvey, Attorney General
Assignment Judges
Criminal Presiding Judges
Presiding Judges-Municipal Courts
Theodore J. Fetter, Deputy Administrative Director
AOC Directors and Assistant Directors
Trial Court Administrators
Criminal Division Managers
Municipal Division Managers
Municipal Court Directors and Administrators
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant
Carol A. Welsch, Esq., Municipal Court Services

## SAMPLE QUESTIONS
## ON MOTIONS BY PROSECUTOR
## TO DISMISS OR AMEND A DRUNK DRIVING CASE

The following are sample questions that Municipal Court Judges should consider in questioning the municipal prosecutor when the prosecutor seeks to dismiss or amend a drunk driving offense.

1. **Why do you wish to dismiss or amend the charges?**

   A general statement by the prosecutor that asserts only a conclusion that the State cannot prove the charge beyond a reasonable doubt is insufficient. The prosecutor must state on the record the specific reasons why the case cannot be proven beyond a reasonable doubt. The prosecutor should provide the court with a detailed explanation of the reasons the case cannot be proven. For example, the prosecutor saying, "I cannot prove operation," is insufficient. The prosecutor needs to set forth, on the record, specific reasons why operation cannot be proven. The court should be prepared to question the prosecutor in detail on any assertion made by the prosecutor.

2. **Did you review the police reports and any videotape and discuss the case with the arresting police officer?**

   If the prosecutor indicates that the police reports were not reviewed or that the police officer had not been consulted, the court should refuse to entertain the motion to dismiss or amend, until the prosecutor has indicated, on the record, that the police report was reviewed and the arresting officer was consulted.

3. **The court should be provided with specific facts to support the prosecutor's position that the charges cannot be established beyond a reasonable doubt. In exploring these facts, the court should consider asking the following questions:**

   a. If the operation cannot be proven, why not? Did the officer observe operation? Are there any witnesses who observed operation? Did the defendant make any admissions as to operation? Can the State seek to prove operation through any circumstantial evidence?

   b. Is there a blood alcohol reading? If yes, why does the prosecutor believe it cannot be introduced in evidence? The prosecutor should place on the record the specific facts as to why the reading cannot be introduced into evidence. For

example, a conclusion by the prosecutor that the machine is defective or there was a problem with the before or after test is insufficient. The prosecutor must state specific facts as to why the test is defective.

c. If the prosecutor indicates that the reading is defective, then the court should closely examine the prosecutor as to whether the charges can be proven without a blood alcohol reading. In examining the prosecutor in this regard, the court should ask about the facts of the stop (i.e. the observations of operation observed by the officer, the defendant's conduct on the stop, [i.e. physical appearance and demeanor], the defendant's ability to perform psychophysical tests at the scene and at the police department, the defendant's admissions as to consumption of alcohol).

4. **If the prosecutor seeks to dismiss or amend based on a defense expert's report, the court should closely question the prosecutor as to whether the State will be able to produce an expert to counter the defense expert. The court should also be informed of the conclusions reached in the defense expert's report.**

5. **Is the application to dismiss or amend the case the result of a plea bargain where the defendant has agreed to plea to some other charge in return for the prosecutor dismissing or amending the charges?**

Pursuant to Rule 7:6-2, any plea agreement must be in accordance with Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey. These Guidelines specifically prohibit a plea agreement in cases under N.J.S.A. 39:4-50.

# New Jersey Office of the Attorney General
# Division of Criminal Justice



## Uniform Statewide Procedures and Practices for Investigating and Reviewing Police Use-of-Force Incidents

September 2015

# Governing Attorney General Directives

- AG Directive 2006-5
  - Establishes procedures for multi-layered, independent investigation and review of police use-of-force incidents.
  - http://www.nj.gov/oag/dcj/agguide/directives/dir2006_5.pdf
- Supplemental AG Directive, July 28, 2015
  - Retains fundamental structure established in AG Directive 2006-5.
  - Takes additional steps to ensure independence and transparency.
  - http://www.nj.gov/oag/dcj/agguide/directives/2006-5_SRT_OIS.pdf

# 2015 Supplemental Directive

- **Collaborative Process**. 2015 Supplemental Directive drafted based on extensive study and collaboration with law enforcement and community leaders:

    - Asian Law Enforcement Officers Association
    - BIC (Black Issues Conference)
    - NJ Chiefs of Police Association
    - NJ Communities Forward
    - County Prosecutors and County Chiefs of Detectives
    - Division of Criminal Justice
    - NJ Institute for Social Justice
    - Latino Leadership Alliance
    - NAACP
    - National Action Network
    - NOBLE (National Organization of Black Law Enforcement Executives)
    - NJ State Police

# Core Principles

**Seven core principles** underlie both Directives:

- Comprehensive, rigorous, impartial investigation;
- Maintenance and protection of integrity of ongoing investigations and rights of the accused;
- Mandatory review of all actual and potential conflicts of interest;
- Multi-tiered layers of independent review;
- Uniformity in statewide investigative and legal practice, including grand jury practice;
- Transparency of process and factual findings at appropriate junctures;
- Ongoing outreach and study.

# Two Review Processes: OIS and SRT

- Every police use-of-force case is investigated and reviewed under one of two designations:

  **(1) Officer-Involved Shooting ("OIS"):** Any use of force by a municipal police officer; or

  **(2) Shooting Response Team ("SRT"):** Any use of force by a county-level officer (county prosecutor's office investigator, county sheriff's officer, etc.); state-level officer (State Police, Division of Criminal Justice, Bureau of Parole, etc.); or federal officer (FBI, DEA, etc.

# OIS: Independent Investigation by County Prosecutor

- **County Prosecutor**: OIS investigations are overseen and conducted by the County Prosecutor (not by the involved municipal police department).
    - DCJ receives immediate notification of the investigation.

- **Walling-Off:** The municipal police department that employs the officer who is the subject of the investigation must be walled off from conducting the investigation. (2015 Supp. Directive).
    - The involved municipal police department may conduct necessary first-responder functions, and may perform necessary CSI, forensic, or other specialized functions, but only with written authorization from the County Prosecutor.

- **Conflicts Check:** Within 72 hours of any incident, County Prosecutor must conduct a comprehensive review for actual or potential conflicts of interest between investigating personnel and the officer being investigated. (2015 Supp. Directive).
    - Conflicts check applies to the County Prosecutor, first assistant, chief of detectives, and all members of the investigative team.
    - Results must be reported to the AG/DCJ, who will determine whether any individuals must be walled off, or if the entire case must be superseded (i.e., reassigned to another County Prosecutor or DCJ).

# Investigation

- **Investigation.** In any OIS or SRT case, investigative steps including but not limited to the following will be taken:
  - Thorough canvass and interview of all eyewitnesses;
  - Thorough street and neighborhood canvass;
  - Photographing, measurement and analysis of crime scene;
  - Lab analysis of fingerprints and/or DNA, where recoverable samples found;
  - Lab examination of ballistics;
  - Review of 911 calls and police dispatch recordings;
  - Review of dash cam and body cam footage, if any exists;
  - Canvass and review for video taken by private surveillance (stores, homes, etc.) or private handheld camera.

# OIS: Presumption of Grand Jury

- **Grand Jury:** At conclusion of an investigation, County Prosecutor determines whether case should be presented to grand jury.
    - Grand jury is comprised of 23 civilians, drawn at random from the public.

- **Presumption of Grand Jury:** County Prosecutor must present all cases to grand jury unless "the undisputed facts indicate that the use of force was justifiable under the law."
    - Also may present to grand jury when "in the interests of justice," including to enhance public confidence in thoroughness, impartiality and integrity of investigation.

# OIS: Independent Review of County Prosecutor by DCJ

- **Review by AG/DCJ:** If County Prosecutor determines that a case does not need to be presented to a grand jury, that determination is independently reviewed by AG/DCJ.

- **Standard of Review:** AG/DCJ conducts independent review of the entire case file, including County Prosecutor's factual findings and legal analysis. (2015 Supp. Directive).

- **AG/DCJ Determination:** After completing its review, AG/DCJ determines next steps:
    - **Grand Jury:** case must be presented to grand jury (presumption of grand jury).
    - **No Grand Jury:** case does not need to be presented to grand jury ("the undisputed facts indicate that the use of force was justifiable under the law").
    - **Administrative Review:** police officer's conduct must be reviewed for administrative / disciplinary action (can accompany grand jury and potential criminal charges).
    - **Further Investigation:** County Prosecutor must conduct additional investigation and re-submit case to AG/DCJ for review.

# SRT: Independent Investigation Overseen by AG/DCJ

- **SRT:** Investigations of use of force by county, state, or federal officers are conducted by the Attorney General's Shooting Response Team (SRT).
    - Composition: SRT is comprised of deputy attorneys general, State Police Major Crimes Unit detectives, and DCJ detectives.
- **Conflicts Check:** Within 72 hours of any incident, the SRT must conduct a comprehensive review for actual or potential conflicts of interest between investigating personnel and the officer being investigated. (2015 Supp. Directive).
    - Conflicts check applies to the DCJ Director, DCJ chief of detectives, and all members of the investigative team.
    - Results must be reported to the AG/DCJ, who will determine whether any individuals must be walled off, or if the entire case must be superseded.
- **Chain of Command:** SRT chain of command runs directly and exclusively to Director of DCJ and the Attorney General. (2015 Supp. Directive).
    - SRT chain of command operates separately and independently of normal State Police chain of command.

# SRT: Presumption of Grand Jury

- **Grand Jury:** At conclusion of an investigation, AG and DCJ Director determine whether case should be presented to grand jury.
- **Presumption of Grand Jury:** Must present all cases to grand jury unless "the undisputed facts indicate that the use of force was justifiable under the law."
    - Also may present to grand jury when "in the interests of justice," including to enhance public confidence in thoroughness, impartiality and integrity of investigation.
    - Same standard as in OIS cases, described above.

# Grand Jury

- **Composition:** 23 civilians, drawn at random from the general public.
- **Function:** hears evidence and determines whether to issue an indictment.
- **Indictment:** official, written accusation charging a person with a crime.
- **Standard of Proof:** probable cause (not "proof beyond a reasonable doubt").
- **Terminology:**
  - **"True Bill":** decision by a grand jury to issue an indictment.
  - **"No True Bill":** decision by grand jury not to issue an indictment.

# Crimes and Legal Justification

- **Crimes:** In all cases, grand jury is instructed as to potentially applicable crimes, and the legal requirements ("elements") to prove each crime.
    - **Examples:** murder, attempted murder, aggravated assault, etc.

- **Justification:** Any criminal charge, in any case, is subject to a defense of justification. Three primary legal bases for justification in OIS/SRT cases:

    - **Self-defense (N.J.S.A. 2C:3-4):** actor can use only that amount or degree of force that he reasonably believes is necessary to protect himself against harm. If the actor is attempting to protect himself against exposure to death or the substantial danger of serious bodily harm, he may resort to the use of deadly force. Otherwise, he may resort only to non-deadly force.

    - **Defense of others (N.J.S.A. 2C:3-5):** use of force, including deadly force, is justifiable to protect a third person when: (1) the actor would be justified in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and (2) under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would be justified in using such protective force; and (3) actor reasonably believes that his intervention is necessary to protect the other person.

    - **Use of force in law enforcement (N.J.S.A. 2C:3-7A):** actor may use force when making or assisting in making arrest and reasonably believes that such force is immediately necessary to effect lawful arrest. Limited to arrests for crimes of homicide, kidnapping, sexual assault, criminal sexual contact, arson, robbery, burglary of a dwelling, or attempt to commit one of these crimes; and the actor reasonably believes: (a) there is an imminent threat of deadly force to himself or to a third party; or (b) the use of deadly force is necessary to thwart the commission of a crime listed above; or (c) the use of deadly force is necessary to prevent an escape.

- **Proof:** Once justification is asserted as a defense, the prosecution must <u>disprove</u> the justification beyond a reasonable doubt.

# Post-Closure Public Statement

- **Public Statement:** Where a case is not presented to a grand jury, or where a grand jury votes “no true bill” (no criminal charges), County Prosecutor or DCJ must issue a public statement setting forth findings of the investigation and findings regarding justification for use of force. (2015 Supp. Directive).

# Ongoing Study and Outreach

- **Advisory Group:** Formation of Advisory Group, comprised of law enforcement and community stakeholders, to continue to study the process and make recommendations for further improvements. (2015 Supp. Directive).
- **Outreach:** Requires development of outreach materials and requires each County Prosecutor to hold community outreach events. (2015 Supp. Directive).

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lieutenant Governor*

*State of New Jersey*
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 080
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JOHN J. HOFFMAN
*Acting Attorney General*

**SUPPLEMENTAL LAW ENFORCEMENT DIRECTIVE AMENDING ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2006-5**

**TO:** Director, Division of Criminal Justice
Superintendent, New Jersey State Police
All County Prosecutors
All County Sheriffs
All Chief Law Enforcement Executives

**FROM:** John J. Hoffman, Acting Attorney General

**DATE:** July 28, 2015

**SUBJECT:** **Supplemental Law Enforcement Directive Regarding Uniform Statewide Procedures and Best Practices for Conducting Police-Use-of-Force Investigations**

Under New Jersey law and practice, prosecutors and police departments are required to follow well-established procedures when responding to a law enforcement officer's decision to employ deadly force. Recent events across the nation present an opportunity, and responsibility, to examine and to enhance those practices and procedures as appropriate to ensure that use-of-force investigations are conducted fairly, expeditiously, thoroughly, and impartially.

The New Jersey Attorney General has broad authority under our Constitution and statutory law to establish and enforce uniform statewide standards that police and prosecutors must follow. For example, in this State, the rules governing when and in what circumstances a law enforcement officer is authorized to use physical, mechanical, enhanced mechanical, or deadly force are established by the Attorney General through the promulgation of the Attorney General's Use of Force Policy and supplemental use-of-force policies concerning specified types of weapons and ammunition. So too, the Attorney General is authorized to establish the rules governing how use-of-force incidents are investigated. See N.J.S.A. 52:17B-98 (providing for the "general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State, in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State").

Through the issuance of Attorney General Law Enforcement Directive No. 2006-5 (hereinafter: "Directive"), the Attorney General exercised this constitutional and statutory authority by establishing the basic process by which incidents are investigated when a police officer uses force

against a civilian. The Directive provides that investigations to determine the lawfulness of police use of force are not conducted by police agencies, but rather are conducted by and under the direct supervision of a County Prosecutor or the Division of Criminal Justice.

The Directive further provides that critical decisions are subject to multiple levels of independent review. For example, the Directive specifies that in determining whether the use of force was lawful, the circumstances of the incident must be presented to a grand jury, composed of 23 civilians, for its independent review unless the undisputed facts indicate that the use of force was justified under the law. Grand juries traditionally serve to ensure the rights of the accused and to assure the community that civilians, not just law enforcement officials, decide whether a criminal prosecution should be initiated.

In any case where a County Prosecutor overseeing the investigation decides not to present the matter to the grand jury for its review, that decision itself is subject to substantive review and approval by the Director of the Division of Criminal Justice. This independent review and oversight process is made possible by the Attorney General's supervisory authority as the State's chief law enforcement officer, and pursuant to the Attorney General's specific statutory authority to participate in or supersede any criminal investigation. See N.J.S.A. 52:17B-107(a).

Although New Jersey's existing procedures for investigating use-of-force incidents are already among the most comprehensive and rigorous in the nation, it is appropriate to strengthen those investigative standards and protocols to ensure that best practices are followed uniformly across the State. Accordingly, pursuant to the authority vested in me by the Constitution of the State of New Jersey and by the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, I hereby direct that Attorney General Law Enforcement Directive No. 2006-5 is amended and supplemented as follows:

1. Definitions.

As used in this Supplemental Directive:

a. "Director" means the Director of the New Jersey Division of Criminal Justice.

b. "Law enforcement agency" means any agency or department with law enforcement or prosecution powers and responsibilities operating under the authority of the laws of the State of New Jersey.

c. "Law enforcement officer" means any law enforcement officer operating under the authority of the laws of the State of New Jersey.

d. "Principal of the investigation" or "principal" means a law enforcement officer

whose conduct is the subject of the investigation conducted pursuant to this Supplemental Directive and Attorney General Law Enforcement Directive No. 2006-5.

e. "Use-of-force investigation" or "investigation" means an investigation conducted pursuant to Attorney General Law Enforcement Directive No. 2006-5 of any use of force by a law enforcement officer involving death or serious bodily injury to a person, or where deadly force is employed with no injury, or where any injury to a person results from the use of a firearm by a law enforcement officer. These terms include an investigation of the use of such force by an officer while acting in the performance of official duties or exhibiting evidence of his or her authority notwithstanding that the officer was not on duty when the force was used. These terms do not include a criminal investigation of the use of force by an officer who was not acting in performance of official duties or exhibiting evidence of his or her law enforcement authority (e.g., while committing an act of domestic violence).

2. Scope and Supersedure.

This Supplemental Directive applies to all use-of-force investigations as defined herein, and supersedes any contrary provision of Attorney General Law Enforcement Directive No. 2006-5. Any provision of Attorney General Law Enforcement Directive No. 2006-5 not inconsistent with this Supplemental Directive shall remain in force and effect.

3. Comprehensive Conflicts Inquiry to Inform Supersession/Recusal Decisions.

When the investigation is conducted by the County Prosecutor, the Prosecutor shall as expeditiously as feasible determine whether any actual or potential conflict of interest exists that might undermine public confidence in the impartiality and independence of the investigation. As part of this comprehensive conflicts inquiry, the Prosecutor shall determine whether any member of the leadership team of the office (e.g., the County Prosecutor, First Assistant Prosecutor, Chief of Detectives, etc.), has had any personal or professional interaction with or relationship to the principal(s) of the investigation that might reasonably create an actual or potential conflict of interest for the member or office. The Prosecutor likewise shall determine whether any person assigned to participate in or supervise the use-of-force investigation has had any such personal or professional interactions with or relationship to the principals(s) of the investigation. The Prosecutor also shall determine whether the principal(s) of the investigation is/are expected to testify on behalf of the State in pending matters being prosecuted by the Prosecutor's Office, and whether the principal(s) of the investigation has/have, within the preceding 5 years, been assigned to a task force operating under the direct supervision of the Prosecutor's Office.

The County Prosecutor within 3 days of initiating the investigation shall report the results

of the comprehensive conflicts inquiry to the Director. The County Prosecutor shall have an ongoing responsibility to update the comprehensive conflicts inquiry report based on new information or the involvement of additional persons in the investigation. The initial report and any updates to that report shall be made in a manner and on a form as shall be prescribed by the Director. The Director shall develop and make available forms to facilitate the comprehensive conflicts inquiry reporting process.

Based on the information in the comprehensive conflicts inquiry report, and any such additional information as the Director may require the Prosecutor to provide, the Director shall determine whether the interests of justice would best be served by superseding the investigation, assigning the investigation to another County Prosecutor's Office, ordering the recusal of any person or persons from the investigation, or taking such other actions as may be needed to ensure the impartiality and independence of the investigation.

When the investigation is conducted by the Division of Criminal Justice, the Deputy Director responsible for overseeing the Attorney General Shooting Response Team, or other Assistant Attorney General designated by the Director, shall undertake the comprehensive conflicts inquiry, and shall report thereon to the Director. The Director shall determine whether any actions are needed to ensure the impartiality and independence of the investigation.

4. Authorization to Disseminate Investigative Information to Principals and Other Witnesses.

To prevent contaminating a witness's personal recollection of events, express prior authorization from the assistant prosecutor or assistant/deputy attorney general supervising the investigation, or his or her designee, is required before information learned in the course of the use-of-force investigation may be shared with or provided to any law enforcement or civilian witness to the use-of-force event, including a principal of the investigation. An employee of a law enforcement agency shall not directly or indirectly (i.e., through another person) share information learned in the course of the use-of-force investigation, including but not limited to police video recordings or information learned from reviewing such videos, with any principal or other law enforcement or civilian witness without such prior authorization. Nor shall any law enforcement officer who is a witness to the use-of-force incident, including a principal, receive any such information from any sworn or civilian employee of a law enforcement agency without first obtaining authorization from the assistant prosecutor or assistant/deputy attorney general supervising the investigation, or his or her designee.

Any dissemination or receipt of investigative information without prior authorization as required by this section shall be reported promptly to the assistant prosecutor or assistant/deputy attorney general supervising the investigation, or his or her designee, who shall investigate the circumstances. The potential effects of any unauthorized dissemination or receipt of investigative information may be considered in determining whether the interests of justice would be served by

presenting the matter to a grand jury for its review, see section 6, and also may be considered in determining whether the interests of justice would be served by superseding the investigation, assigning the investigation to another County Prosecutor's Office, ordering the recusal of any person or persons from the investigation, or taking such other actions as may be needed to ensure the impartiality and independence of the investigation pursuant to section 3. Any law enforcement officer or civilian employee who knowingly violates this section shall be subject to discipline.

5. Procedures to Ensure That Investigations Are Conducted Independently From the Agency Whose Officer(s) Employed Force.

a. *General Rule Excluding Investigators From the Same Agency as the Officer(s) Who Employed Force.*

Except as may expressly be authorized pursuant to subsection b. or c. of this section, no employee of the police department or agency that employs the principal(s) of the investigation shall participate in the investigation or attend any investigative activities (e.g., interviews of principals or other witnesses), provided however that nothing herein shall be construed to preclude an officer employed by that department or agency from acting as a first responder to the scene of the use-of-force incident, from providing or facilitating medical assistance to any injured person, from helping to secure the scene (e.g., to control traffic or to prevent civilians from accessing the scene), or from participating in a be-on-the-lookout (B.O.L.O.) search for or pursuit of any person(s) suspected of a crime related to the use-of-force incident.

b. *Authorized Assistance for Good and Sufficient Cause.*

Notwithstanding the general rule established in subsection a. of this section, the County Prosecutor or designee, or Director or designee, may for good and sufficient cause authorize an officer or civilian employed by the department that employs the principal(s) of the investigation to assist in the investigation in the following circumstances:

i. *CSI Unit.*

Officers or civilians employed by a principal's department who have specialized crime scene investigation skills may be authorized to collect or document physical evidence at the scene when the County Prosecutor or designee, or the Director or designee, determines that the use of these personnel is necessary to support the investigation, provided that such personnel operate under the direct supervision of the on-scene assistant prosecutor or assistant/deputy attorney general overseeing the investigation, and further provided that the officers or employees shall operate independently of their ordinary chain of command and report directly to the County Prosecutor or designee, or to the Director or designee. Because of the exigent need

to dispatch officers or civilians with specialized crime scene investigation skills without delay, the County Prosecutor or Director may issue a standing order authorizing the use of an agency's CSI unit and personnel assigned to that unit, provided that the Prosecutor or Director finds in writing that such standing authorization is necessary to ensure the prompt collection/documentation of evidence by qualified personnel following a use-of-force incident, and that without such a standing order, a reasonable probability exists that evidence at the scene will not be collected/documented in a timely and proper manner.

ii. *Forensic Laboratory Examiners.*

Officers or civilians employed by a principal's department may be authorized to perform laboratory, ballistics, or other forensic tests or examinations where the County Prosecutor or designee, or the Director or designee, determines that the use of such laboratory facility/forensic unit/personnel is necessary to support the investigation, and further provided that such personnel shall operate independently from their ordinary chain of command and report directly to the County Prosecutor or designee, or to the Director or designee.

iii. *Other Specialized Expertise.*

Officers or civilians employed by a principal's department may be authorized to assist the investigation through their specialized knowledge, skills, non-English language proficiency, or training not otherwise accounted for in subsection b(i) or (ii), provided that the County Prosecutor or designee, or the Director or designee, determines that their specialized knowledge, skills, non-English language proficiency, or training is necessary to support the investigation, balancing practical, logistical, and operational needs against the possibility that such participation might undermine public confidence in the impartiality and independence of the investigation, and further provided that such personnel shall operate independently of their ordinary chain of command and report directly to the County Prosecutor or designee, or to the Director or designee.

iv. *Agency Liaison.*

An officer or civilian employee of the department may be designated by the County Prosecutor or designee, or the Director or designee, to serve as a liaison to the investigative team to facilitate obtaining departmental documents (e.g., personnel or internal affairs records, records involving other cases, etc.), identifying employees and providing contact information, identifying and locating local residents/witnesses, and performing other ministerial support functions.

c. *Composition of Attorney General Shooting Response Team.*

In accordance with the provisions of section 2 of Attorney General Law Enforcement Directive 2006-5, the Attorney General Shooting Response Team (SRT), which shall operate under the direction and supervision of an assistant or deputy attorney general designated by the Director, shall be staffed by Division of Criminal Justice detectives and New Jersey State Police Major Crimes detectives. All personnel assigned to the SRT shall operate independently of their ordinary chain of command and report directly and exclusively to the assistant or deputy attorney general designated by the Director.

d. *Documentation of Reasons for Authorizing Assistance.*

The County Prosecutor or designee, or Director or designee, authorizing an exemption pursuant to subsection b(i), (ii), or (iii) of this section shall: 1) document the reasons for the exemption in the case file, or in the case of a standing order pursuant to subsection b(i), include a copy of the standing order and justification therefor in the case file, and 2) indicate in any report provided to the Director or Attorney General pursuant to section 6 of this Supplemental Directive that personnel employed by the agency that employs a principal of the investigation participated in the investigation, explaining the reasons for the exemption.

6. Decision to Present Matter to Grand Jury.

a. *Presumption of Grand Jury Review.*

Except as provided in subsection b. of this section, the County Prosecutor, or Director in matters investigated by the Attorney General Shooting Response Team, shall present a matter to a grand jury for its independent review if: 1) the use of force resulted in death or serious bodily injury, or 2) the interests of justice would be served by having the matter reviewed by a grand jury. In determining whether the interests of justice would be served by having the matter reviewed by a grand jury, the County Prosecutor or Director shall consider all relevant circumstances, including whether review of the matter by a grand jury would enhance public confidence in the integrity, thoroughness, and impartiality of the investigation, and whether there had been any significant or knowing violation of or deviation from the restriction established in section 4 of this Supplemental Directive.

b. *Circumstances Where Grand Jury Review is not Required.*

Notwithstanding the provisions of subsection a(1) of this section, the County Prosecutor or Director shall not be required to present the matter to the grand jury where the undisputed facts indicate that the use of force was justifiable under the law. Nothing herein shall be construed to preclude presenting the matter to the grand jury where the County Prosecutor or Director determines

that the interests of justice would be served by having the matter reviewed by a grand jury.

c. *Review of Decision to Present Matter to a Grand Jury.*

If the County Prosecutor determines in accordance with Attorney General Law Enforcement Directive No. 2006-5 and this Supplemental Directive that the matter need not be presented to a grand jury for its independent review, the Prosecutor shall prepare and submit a report to the Director summarizing the results of the investigation and explaining the reason for the Prosecutor's recommendation. The Director shall review the Prosecutor's findings and legal analysis. The Director may require the Prosecutor to supply additional information or analysis, and may direct the prosecutor to conduct further investigation and report thereon. The Director shall make the final determination whether the matter should be presented to a grand jury. While affording appropriate deference to the recommendations of the County Prosecutor in consideration of local community interests, the Director shall make an independent assessment of the Prosecutor's factual findings to determine whether facts are disputed, and also shall make an independent assessment whether presentation to a grand jury would serve the interests of justice. The review performed pursuant to this section shall be deemed to satisfy the requirements of section 10 of Attorney General Law Enforcement Directive No. 2006-5.

In matters investigated by the Attorney General Shooting Response Team, if the Director determines that the matter need not be presented to a grand jury, the Director shall prepare and submit a report to the Attorney General summarizing the results of the investigation and explaining the reason for the Director's determination. The Attorney General or designee may require the Director to supply additional information or analysis, and may direct the Director to conduct further investigation and report thereon. The Attorney General or designee shall make the final determination whether the matter should be presented to a grand jury, applying the same standard of review as would apply to the Director's review of a County Prosecutor's recommendation.

7. Best Practices When Presenting Matters to the Grand Jury.

a. *Continuing Legal Education Course on Police Use-of-Force Grand Jury Presentations.*

The Director of the Division of Criminal Justice in consultation with the County Prosecutors and the Attorney General's Advocacy Institute shall develop a continuing legal education course on the legal, practical, ethical, and policy issues concerning the presentation of police use-of-force cases to a grand jury. The Attorney General's Advocacy Institute shall make this course available on at least an annual basis. Once available, every assistant prosecutor or assistant/deputy attorney general assigned to present a use-of-force case to a State or county grand jury shall be required to attend the course. In addition, the course materials shall be provided to every assistant prosecutor in the State, and to all assistant and deputy attorneys general in the Division of Criminal Justice.

b. *Uniform Grand Jury Instructions.*

Because a grand jury is authorized only to issue a "true bill" (when it decides that there is a basis to indict) or a "no bill" (when it declines to indict), the prosecutor presenting the matter shall instruct the grand jury on the underlying offense(s) (e.g., homicide, attempted murder, aggravated assault, etc.) and all applicable justification defenses. The Division of Criminal Justice has developed model grand jury instructions concerning the affirmative justification defenses that may apply (e.g., use of force in law enforcement under N.J.S.A. 2C:3-7, use of force in self protection under N.J.S.A. 2C:3-4, and use of force in protection of others under N.J.S.A. 2C:3-5). See N.J.S.A. 2B:22-9 (explicitly requiring that the grand jury be instructed on the justification defense of use of force in law enforcement.). The assistant prosecutor or assistant or deputy attorney general who presents the matter shall read to the grand jury all applicable model instructions.

c. *Separate Grand Juries to Decide Police Use-of-Force Issues and Underlying Criminal Activity That Precipitated Police Force.*

The underlying offense that gave rise to the police use of force (e.g., a crime alleged to have been committed by a civilian who was injured by police force) shall be presented to a different grand jury than the grand jury that will decide whether the police use of force was unlawful.

8. Public Statement on Results of Investigations Not Resulting in Prosecution.

To enhance transparency in conducting use-of-force investigations, in any instance where the matter is not presented to a grand jury for its review, or where the matter is presented to a grand jury and the grand jury returns a "no bill" (i.e., declines to issue an indictment), the County Prosecutor, or the Director in matters investigated by the Attorney General Shooting Response Team, shall prepare a statement for public dissemination. The statement shall include: 1) specific findings of the investigation concerning the factual circumstances of the incident, 2) specific findings of the investigation concerning the lawfulness of the police use of force under the New Jersey Code of Criminal Justice, 3) a statement explaining that the comprehensive conflicts inquiry required pursuant to section 3 of this Directive was conducted, and 4) a statement explaining that the matter was reviewed by the County Prosecutor, or the Director in matters investigated by the Attorney General Shooting Response Team, and that all relevant provisions of this Supplemental Directive have been complied with.

The public statement shall comply with all rules governing grand jury secrecy and the need to protect the rights of witnesses and to prevent discouraging witnesses from providing information or cooperating with investigations in future cases. Notwithstanding the foregoing, the statement's findings shall include sufficient detail about the circumstances of the use of force to explain why the matter is not being prosecuted as a criminal offense.

The County Prosecutor, or Director in matters investigated by the Attorney General Shooting Response Team, shall provide a copy of the statement to the Attorney General, or his designee, not less than 5 days before its public dissemination. Once released to the public, the County Prosecutor or Division of Criminal Justice shall make the statement available on its internet website.

9. Referrals for Administrative Review.

In any instance where the matter is not presented to a grand jury for its review, or where the matter is presented to a grand jury and the grand jury returns a "no bill" (i.e., declines to issue an indictment), the County Prosecutor, or the Director in matters investigated by the Attorney General Shooting Response Team, shall, as appropriate, refer the use-of-force incident to the appropriate agency for administrative review in accordance with the Attorney General's Internal Affairs Policy and Procedures manual. The County Prosecutor or Director shall monitor the review and take such actions as are necessary to ensure that the review is completed in a timely fashion, and that appropriate actions are taken based on the results of the administrative review.

10. Advisory Group to Study and Enhance Police-Use-of-Force Investigations.

The Director shall establish an Advisory Group consisting of members of the community and representatives from law enforcement as the Director deems appropriate. The Advisory Group will meet on a quarterly basis to advise the Attorney General on how to improve the process for investigating police use-of-force incidents. The Advisory Group shall study and provide advice to the Attorney General on any circumstances or conditions that impede or delay investigations, and also on ways to enhance the process for explaining investigation results to the public. See also section 11.

11. Community Relations and Outreach Programs.

To enhance public confidence in the integrity and impartiality of use-of-force investigations, it is vitally important for law enforcement executives to reach out to and engage community and faith-based leaders before use-of-force incidents occur. The Director of the Division of Criminal Justice shall confer with the County Prosecutors to discuss efforts that have been and are being undertaken across the State to establish positive relations of trust with community and faith-based leaders on matters concerning the use of force by law enforcement as part of a broader range of community-engagement activities.

The Director, in consultation with the County Prosecutors, should develop and disseminate model programs to explain the investigative process, the statutory and constitutional rights afforded to law enforcement officers whose use of force is subject to investigation, and how the presumption of innocence applies, and that the State at trial would be required to disprove an asserted justification defense beyond a reasonable doubt. In addition to explaining the standards and procedures for

conducting use-of-force investigations, the model community outreach programs should explain the law and policies governing the use of force by law enforcement.

Each County Prosecutor within 120 days of the effective date of this Supplemental Directive shall report to the Attorney General on efforts that have been or will be undertaken in his or her jurisdiction to engage community and faith-based leaders in discussions concerning police use-of-force matters.

12. Questions.

Any questions concerning the interpretation or implementation of this Supplemental Directive shall be addressed to the Director, or designee.

13. Effective Date.

This Supplemental Directive shall take effect immediately, and its provisions shall apply to use-of-force investigations initiated before the effective date to the extent practicable.

John J. Hoffman
Acting Attorney General

ATTEST:

Elie Honig
Director, Division of Criminal Justice

Dated: July 28, 2015

**STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. EDWARD A. WARD, II, DEFENDANT, WILLIAM R. HUFF, APPELLANT.**

**A-0409-96T1**

**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION**

***303 N.J. Super. 47*; *696 A.2d 48*; *1997 N.J. Super. LEXIS 311***

**April 7, 1997, Submitted**
**July 3, 1997, Decided**

**SUBSEQUENT HISTORY:** [***1] Approved for Publication July 3, 1997.

**PRIOR HISTORY:** On appeal from Superior Court, Law Division, Morris County.

**COUNSEL:** *Walder, Sondak & Brogan and Crummy, Del Deo, Dolan, Griffinger and Vecchione,* attorneys for appellant (*Jeffrey A. Walder,* of counsel, and *John J. Gibbons,* of counsel, on the brief).

*John B. Dangler,* Morris County Prosecutor, attorney for respondent (*Michael Jan,* Assistant Prosecutor, on the brief).

**JUDGES:** Before Judges PETRELLA, LANDAU and KIMMELMAN. The opinion of the court was delivered by LANDAU, J.A.D.

**OPINION BY:** LANDAU

**OPINION**

[*49] [**49] The opinion of the court was delivered by

LANDAU, J.A.D.

This is an appeal by William R. Huff, who had filed a number of complaints in Harding Township charging criminal offenses against the defendant, Edward A. Ward, II. As several of the complaints charged fourth degree indictable offenses, all of the complaints were referred to the Office of the Morris County Prosecutor.

Huff and his wife had pending at the same time a civil action against Ward and his wife. The Huffs' residential property includes a private road which is subject to an easement used by [*50] the Wards to reach their house. As the result of disputes about the speed at which the Wards' vehicles traverse the easement, assertedly [***2] endangering the Huffs and their young children, the Huffs placed speed bumps on sections of the private road which had been paved by the Wards. Ward objected particularly to one speed bump and asked that it be removed. When Huff refused, it is asserted that Ward had the speed bump removed and the asphalt residue dumped off the road portion of Huff's property. The civil suit has reportedly produced numerous claims and counterclaims. The disputes are obviously bitter.

Huff's complaints, filed in Harding Township Municipal Court, charged violations of *N.J.S.A. 2C:17-3(a)(1)* and *(2)*(purposefully or knowingly damaging property of another and purposefully or recklessly tampering with property of another so as to endanger people or property); criminal trespass, in violation of *N.J.S.A. 2C:18-3*; and violation of the Solid Waste Management Act, specifically *N.J.S.A. 13:1E-9.3(a)* and *(b)*. The latter sections prohibit collection, transport or disposal of solid waste in excess of .148 cubic yards of solids except at an approved disposal site.

The criminal mischief complaints asserted damages in excess of $ 500, and accordingly would constitute fourth degree crimes under the N.J. [***3] Code of Criminal Justice (Code). The other complaints charged disorderly persons offenses.

Initially, the Morris County Prosecutor sent a form letter to Ward and to the Harding Township Municipal Court advising that the complaints had been administratively dismissed. The form utilized contained a check mark in the box entitled "civil court matter." Upon learning of this disposition, Huff's personal attorney, James A. Plaisted, Esq., wrote to the prosecutor requesting that the disorderly persons offenses be remanded to

the municipal court rather than being dismissed. The prosecutor did not remand any of the complaints to the municipal court.

Thereafter, the Assignment Judge of Morris County entertained Huff's "motion", entitled under the summons numbers of [*51] the respective complaints, for an order remanding the disorderly persons complaints to the municipal court and further, for an [**50] order vacating the prosecutor's administrative dismissal. [1]

> 1 The parties have raised no question of Huff's standing to file the motion. In some ways that issue is related to the principal issues we discuss *infra* in this opinion. We believe that the alleged victim of a criminal offense, who is asserting a public interest in its prosecution, has a sufficient stake in the outcome to seek to invoke a review of the exercise of prosecutorial discretion in selecting matters for prosecution or dismissal. Although not specifically so designated, this would seem to be an action in lieu of prerogative writs. *See In re Ringwood Fact Finding Comm., 65 N.J. 512, 516-517, 324 A.2d 1 (1974)*; *also Elizabeth Federal Savings & Loan v. Howell, 24 N.J. 488, 500-502, 132 A.2d 779 (1957)*(standing of interested persons to challenge administrative action).

[***4] Initially denied, the judge granted reconsideration and required the prosecutor to explore further the substance of the complaints and requested that the assistant prosecutor meet with Huff's attorney. Following the meeting between the prosecutor and Huff's private attorney, the prosecutor reaffirmed the decision to dismiss all charges.

The judge again entertained briefs and arguments. Several counsel appeared for Huff, and a letter-brief from a professor of an out-of-state law school was also submitted on his behalf. This letter-brief was later incorporated in the appendix before us. [2]

> 2 The letter-brief should not have been accepted without *pro hoc vice* application and admittance of counsel. We note that Huff's briefs rely in part on the contents of the letter-brief.

The judge concluded that the standard to be applied in considering the prosecutor's determination was whether it constituted a clear abuse of discretion. He found, following the prosecutor's compliance with the court's direction to meet [***5] with Huff's representative and more fully consider Huff's complaints, that there was compliance with the policy of the New Jersey Crime Victim's Bill of Rights, *N.J.S.A. 52:4B-34* to 4B-49. The judge further found that there was no clear abuse of discretion in the prosecutor's determination that the criminal complaints were more appropriately addressed in the pending civil actions, but that there was [*52] "probable cause respecting each of the criminal complaints filed by William R. Huff against Edward A. Ward II." The final order affirmed the prosecutor's administrative dismissal of each of the five complaints.

On appeal, Huff argues that the judge erred in ruling that the county prosecutor had authority to dismiss the disorderly persons complaints when the complainant wished to pursue them in municipal court (Point I); that, assuming the prosecutor's authority to dismiss such complaints, the judge erred in applying an abuse of discretion standard rather than conducting an independent plenary review (Point II); that the prosecutor could not administratively dismiss environmental law complaints (Point III); and finally, that even if an abuse of discretion standard was proper, the judge [***6] erred in concluding that the discretion had not been abused (Point IV).

We have considered carefully these arguments in light of the record and applicable law, and affirm, substantially for the reasons set forth by Judge Stanton in the oral opinion and colloquy of the hearing of August 6, 1996. We add these comments.

I.

As to the prosecutor's authority to dismiss disorderly persons complaints, Judge Stanton's conclusion is supported by the picture of broad prosecutorial authority that emerges from a comprehensive reading of New Jersey statutes, court rules and cases. There is undisputedly a remaining role for private prosecutions of disorderly persons complaints, but that role has been restricted by New Jersey courts in recognition that the criminal laws exist to protect the public's interest rather than to afford vindication of private property rights or personal grievances.

While these public and private interests may frequently coincide, the Attorney General and the county prosecutors have been designated to prosecute the criminal business of the State, *N.J.S.A. 2A:158-4*, and to exercise the discretion whether to prosecute or to refrain from prosecution. *State v. Hermann*, [*53] [***7] *80 N.J. 122, 127, 402 A.2d 236 (1979)*; *State v. Mitchell, 164 N.J. Super. 198, 201, 395 A.2d 1257 (App.Div.1978)*.

[**51] In *State v. Downie, 117 N.J. 450, 569 A.2d 242, cert. denied, 498 U.S. 819, 111 S. Ct. 63, 112 L. Ed. 2d 38 (1990)*, the authority of the Monmouth County Prosecutor to intervene in on-going municipal court cases was recognized by the Supreme Court. Earlier, in *State v. Downie, 229 N.J. Super. 207, 550 A.2d 1313 (App.Div.1988)*, affirmed by the Supreme Court, we said:

> *N.J.S.A. 2A:158-4* and 5 give the Attorney General and county prosecutors plenary jurisdiction to prosecute all criminal matters in this State. It is clear from the wording of *N.J.S.A. 2A:158-5* that the words "criminal business" in § 4 are not limited to crimes, but include the prosecution of "offenders against the law." *Cf. R. 3:23-9.*
>
> [*Downie, supra, 229 N.J. Super. at 209 n. 1, 550 A.2d 1313.]*

*N.J.S.A. 2A:158-4* provides that "criminal business of the State shall be prosecuted by the Attorney General and the county prosecutors". [3] *N.J.S.A. 2A:158-5* provides that: [***8]

> Each prosecutor shall be vested with the same powers and be subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws. [*54]

Inasmuch as the prosecutor has been vested with the powers of the Attorney General, the powers of the latter official must also be explored. *N.J.S.A. 52:17b-107a* provides:

> Whenever in the opinion of the Attorney General the interests of the State will be furthered by so doing, the Attorney General may (1) supersede a county prosecutor in any investigation, criminal action or proceeding, (2) participate in any investigation, criminal action or proceeding, or (3) initiate any investigation, criminal action or proceeding. In such instances, the Attorney General may appear for the State in any court or tribunal for the purpose of conducting such investigations, criminal actions or proceedings as shall be necessary to promote and safeguard the public interests of the State and secure the enforcement of the laws of the State.

3 In *Morss v. Forbes, 24 N.J. 341, 132 A.2d 1 (1957)*, the Court reviewed the development of the Office of County Prosecutor, tracing it through its roots in the powers of the attorney general.

The Court noted that:

> At common law in England, the attorney general was the chief legal representative of the Crown, and in theory his powers of criminal prosecution were almost unlimited. As a practical matter, however, the responsibility for securing enforcement of the criminal laws was left largely in the hands of private parties. *See State v. Winne, 12 N.J. 152, 164-165, 96 A.2d 63 (1953)*. This distinction, if it ever received any recognition in the Colony of New Jersey, perished long before the Revolution, and the attorney general commonly undertook to prosecute "culprits from minor offenders to murderers." *Journal of the Courts of Common Right and Chancery of East New Jersey*, 1683-1702 (Edsall ed.1937), 3 and passim. *See State v. Winne, supra.* Public prosecution supplanted private prosecution, and, consequently, at the time of the adop-

> tion of the *Constitution of 1776*, the first attorney general of the State of New Jersey possessed and assumed considerable powers of law enforcement.
>
> [*Morss, supra, 24 N.J. at 364-365, 132 A.2d 1.]*

*N.J.S.A. 52:17B-103* [***9] provides in part:

> The Attorney General shall consult with and advise the several county prosecutors in matters relating to the duties of their office and shall maintain a general supervision over said county prosecutors with a view to obtaining effective and uniform enforcement of the criminal laws throughout the State.

Under *N.J.S.A. 2A:158-5*, since the county prosecutor has the same powers as the Attorney General, the county prosecutor also has general supervisory power over municipal prosecutors. *Cf. Kershenblatt v. Kozmor, 264 N.J. Super. 432, 437-439, 624 A.2d 1042 (L.Div.1993)*. This is confirmed by the recently-enacted *N.J.S.A. 2B:12-27*, which places municipal prosecutors under supervision of "the Attorney General or county prosecutor."

Several Court Rules also support the conclusion that the prosecutor's broad authority in municipal prosecutions includes the right to dismiss.

[**52] *Rule 3:23-9*, governing appeals to the Law Division from courts of limited jurisdiction, provides that the prosecuting attorney in such appeals shall be "the municipal attorney, in a case involving a violation of a municipal ordinance," but shall be "the county prosecutor in all [***10] other cases." Thus, the prosecutor has exclusive jurisdiction to represent the State in appeals from municipal court, subject to *R. 3:23-9(d)*.

As noted in Pressler, *Current New Jersey Court Rules*, comment 4 to *R. 3:23-9(d)*(1997), the provision that "[w]ith the consent of the court, the attorney for a complaining witness ... may be [*55] permitted to act for the prosecuting attorney", was added to the rules "for the purpose of making clear that in no event shall the attorney for the complaining witness be deemed the prosecuting attorney unless the court, with the consent of the prosecuting attorney permits him to so act." Inasmuch as the review from a municipal conviction is a trial *de novo* on the record, subject in some cases to further supplementation, *R. 3:23-8*, the county prosecutor clearly has a substantial interest in determining which cases shall be prosecuted.

The fact that participation by the county prosecutor in municipal court is contemplated by the Rules of Court is also borne out by *R. 7:4-8(b)*, which provides that plea agreements will be "allowed in any municipal court in cases handled by the Office of the Attorney General or the County Prosecutor." [***11] Similarly, *R. 7:4-2(f)*, a rule dealing with proceedings before trial, provides for motions to suppress in municipal court in any case "in which the Attorney General, county prosecutor, or municipal prosecutor is prosecuting attorney on behalf of the State and on notice to said prosecutor."

The Guidelines for Operation of Plea Agreements that follow *R. 7:4-8* provide:

> GUIDELINE 3. Prosecutor's Responsibilities. Nothing in these Guidelines should be construed to affect in any way the *prosecutor's discretion in any case to move unilaterally for* an amendment to the original charge or a *dismissal* of the charges pending against a defendant if the prosecutor determines and represents on the record the reasons in support of the motion.
>
> [Emphasis added.]

The official Comment to the *R. 7:4-8* Guidelines is illuminating. It states, in pertinent part, that:

> Plea agreements are to be distinguished from the discretion of a prosecutor to charge or unilaterally move to dismiss, amend or otherwise dispose of a matter.... The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to [***12] see that justice is done and truth is revealed in each individual case.

We reject Huff's contention that *State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951)*, has conclusively held that

a county prosecutor [*56] does not have the power to dismiss non-indictable offenses. The precise language relied on is:

> The Police Court was not deprived of jurisdiction by the course taken by the County Prosecutor. The grant of jurisdiction is not thus conditioned. Neither *R.S.* 2:182-4, *N.J.S.A.*, placing the prosecution of the criminal business of the State in the hands of the County Prosecutor, nor *Rule 8:3-3(d)* of this Court is directed to that end. Both have reference to indictable offenses, and not to prosecutions under the Disorderly Persons Act. This dual authority in matters of law enforcement undoubtedly gives rise to policy and administrative difficulties; but the remedy lies with the Legislature.
>
> [*Labato, supra, 7 N.J. at 151, 80 A.2d 617].

Reliance upon *Labato* is misplaced for two reasons. First, the prosecutor there had never sought to dismiss the prior prosecution in Police Court which was asserted as the basis for a double jeopardy defense. Instead, [***13] the county prosecutor had merely made an unsuccessful demand by way of objection that the defendant "be prosecuted under the Crimes Act". *Id. at 142, 80 A.2d 617*. Thus, the comment respecting *R.S.* 2:182-4 (predecessor to *N.J.S.A. 2A:158-4*) was at most dictum in the severely split *Labato* opinion. Second, and more importantly, there have been substantial statutory [**53] and court rule changes (as invited by the Court) since the questionable dictum in *Labato.* Among these changes has been enactment of the Code. Under the Code, the word "offense" includes crimes as well as lesser disorderly persons offenses. *N.J.S.A. 2C:1-14k.* Thus, as we noted in *State v. Downie, supra, 229 N.J. Super. at 209 n. 1 550 A.2d 1313*, the vesting of powers in the prosecutor under *N.J.S.A. 2A:158-5* respecting "offenders against the laws" includes all "criminal business", i.e., all "offenses", including disorderly persons violations.

We do not intend to suggest that there is no role for *pro se* prosecutions of disorderly persons offenses or for private prosecutions, when duly authorized. We emphasize merely that the determination of whether a matter should or should not be criminally prosecuted is fundamentally [***14] an executive determination delegated to the Attorney General and the county prosecutors. If the prosecutor arbitrarily or corruptly fails or refuses to act, the [*57] courts must then intervene to correct the administrative abuse. *In re Ringwood Fact Finding Comm., supra, 65 N.J. at 516-517, 324 A.2d 1*; *State v. Winne, 12 N.J. 152, 172, 96 A.2d 63 (1953).* The duty of a prosecuting officer necessarily requires that in each case he examine the available evidence, the law and the facts, and the applicability of each to the other, and that he intelligently weigh the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which might be initiated. Such duties necessarily involve a good faith exercise of sound discretion. *State v. Winne, 12 N.J. at 172-173, 96 A.2d 63* (citing *State ex rel. McKittrick v. Wallach, 353 Mo. 312, 182 S.W.2d 313 (1944)*; see also *State v. Childs, 242 N.J. Super. 121, 129-130, 576 A.2d 42 (App.Div.) , certif. denied, 127 N.J. 321, 604 A.2d 596 (1990). Rule 7:4-4(b)* allows a complaining witness who was the victim of a disorderly persons offense to enforce the criminal [***15] law in cases where the prosecutor has failed to act. *See, e.g., New Jersey v. Imperiale, 773 F. Supp. 747 (D.N.J.1991)*; *New Jersey v. Kinder, 701 F. Supp. 486, 488 (D.N.J.1988).* However, in the present case, based upon the competent directions of the judge, the prosecutor did not fail to act, rather, the prosecutor investigated further and exercised his authority to dismiss.

In evaluating the prosecutor's determination, Judge Stanton was evidently also conscious of his duty in private prosecutions to be satisfied of an entirely impartial, dispassionate and fair prosecution by a neutral prosecuting attorney. *State v. Storm, 141 N.J. 245, 252-255, 661 A.2d 790 (1995).*

The Supreme Court has recently recognized the discretionary authority of the prosecutor in determining whether or not to prosecute disorderly persons offenses in the municipal court, *see State v. Hessen, 145 N.J. 441, 452-453, 678 A.2d 1082 (1996),* subject to review of the prosecutor's discretion for arbitrariness or abuse. The *Hessen* Court invoked its authority to restrict exercise of prosecutorial discretion in drinking and driving cases, noting however, that this was necessary to support policy decisions [***16] [*58] of the legislative and executive branches, thereby avoiding a separation of powers violation. *Id. at 454, 678 A.2d 1082*.

In sum, the county prosecutor's discretion as to whether to prosecute or dismiss extends to disorderly persons offenses, but is subject to the judicial power to correct an abuse of discretion.

II.

Huff urges on appeal that it is no longer appropriate for the judiciary to review the exercise of prosecutorial discretion in a case such as this under the traditional abuse-of-discretion standard. He suggests that proper recognition of the rights of crime victims articulated in

recent constitutional and legislative provisions [4], requires that court review [**54] of a prosecutorial determination to prosecute or not be conducted as a plenary, *de novo* proceeding.

> 4 *N.J. Const., art. I, P22* adopted November 5, 1991, defines a "victim" as a person who "has incurred loss of or damage to personal or real property as a result of a crime". Included among the rights enumerated in *N.J.S.A. 52:4B-36* is the following:
>
> > m. To submit a written statement about the impact of the crime to a representative of the county prosecutor's office which shall be considered prior to the prosecutor's final decision concerning whether formal criminal charges will be filed.

[***17] As we noted above, in *State v. Hessen* the Supreme Court has again recognized that the appropriate standard for review of a prosecutor's independent decision-making authority not to prosecute is that of "arbitrariness or abuse." *Id. at 452-453, 678 A.2d 1082*. Of course, where the subject is one of far-reaching public interest such as curtailing drunk driving, manifested by policy decisions of the executive, legislative and judicial branches of government, the Court has not hesitated to insist upon rigorous enforcement. *Id. at 457-459, 678 A.2d 1082*. Such a palpable and paramount public interest is not here apparent. Moreover, comprehensive vindication of the asserted private rights is available in the pending private action through injunctive relief and damages. The private action may possibly establish sufficient basis for [*59] punitive damages as well, thereby, together with such injunctive relief as might be deemed appropriate, addressing public concerns.

To the extent that the Huff appeal suggests that a complainant in a disorderly persons offense matter has a right to a more intense review of a prosecutor's decision to dismiss than the victim of an indictable crime, we reject the argument as incongruous [***18] and unfounded. While impact on the victim may be an important policy factor for consideration as to propriety of an administrative dismissal, this does not equate with a requirement to change the standard of review. Moreover, both the *N.J. Constitution, art. I, P22*, and the Crime Victims' Bill of Rights (CVBR) each address only victims of a "crime". Even if we disregard the differences between a crime and the less serious category of disorderly persons offense set forth in *N.J.S.A. 2C:1-4*, there is surely no warrant suggested by P22 or the CVBR for us to afford to victims of lesser offenses greater rights than are afforded to victims of offenses which have been designated as "crimes".

In this case, the judge saw to it that Huff had an opportunity to fully set forth his position respecting the alleged offenses before prosecutorial representatives. *See N.J.S.A. 52:4B-36(m)*(requiring only *consideration* by the prosecutor) and *State v. Kraft, 265 N.J. Super. 106, 116-17, 625 A.2d 579 (App.Div.1993)*(recognizing "great deference" to be afforded to the prosecutor's decision whether or not to aggressively prosecute). With respect to disorderly persons offenses, as with indictable [***19] offenses, there is judicial responsibility to ensure unbiased, impartial prosecution in vindication of the public interest and, where the prosecutor has determined to dismiss a complaint, to ensure that such dismissal does not constitute a clear abuse of discretion.

Mindful of Huff's argument that a prosecutor has no authority to dismiss complaints that charge environmental violations, we add that presence or absence of *mens rea* as an element of environmental offenses is not a factor bearing upon either the [*60] authority of the prosecutor to dismiss such complaints or upon the standard of judicial review to be applied to the dismissal.

III.

We turn finally to the challenge to Judge Stanton's ruling that, notwithstanding existence of sufficient probable cause for each of the complaints, the prosecutor's exercise of discretion to dismiss was not arbitrary. In doing so, it is appropriate to recall what we said in *State v. Kraft, supra*:

> Unquestionably, policy determinations, such as which offenses to aggressively prosecute, fall within the domain of the prosecutor, not the judiciary. *State v. Dalglish, supra,* 86 N.J. at 511, 432 A.2d 74. This stems primarily [***20] from the fact that it is the fundamental responsibility of the prosecutor to decide whom to prosecute. *Id.* at 509, 432 A.2d 74; *Leonardis II, supra*, 73 N.J.at 381, 375 A.2d 607. Additionally, as noted above, once such a decision has been made, it is entitled to great deference. *See, e.g., State v. DeMarco,* [**55] *supra,* 107 N.J. at 566, 527 A.2d 417; *State v. Dalglish, supra,* 86 N.J. at 509, 432 A.2d 74; *State v. Bender, supra,* 80 N.J. at 89, 402 A.2d 217; *Leonardis II, supra,* 73 N.J. at 381, 375 A.2d 607; *State v. Hoffman, supra,* 224 N.J. Super. at 155, 539 A.2d 1254;

*State v. Litton, supra*, 155 N.J. Super. at 212, 382 A.2d 664.

[*Kraft, supra, 265 N.J. Super. at 116-117, 625 A.2d 579.]*

We identify at least three factors present here that satisfy us that the prosecutor's action was not arbitrary under this deferential standard of review.

First, the pending civil lawsuit was adequate to provide private redress, the possibility of punitive damages for willful wrongdoing, and injunctive correction of an adverse public or private impact from Ward's [***21] alleged misconduct.

Second, "private prosecutions pose the risk that the complainant will use the municipal court proceeding to harass the defendant or to obtain an advantage in a related civil action." *State v. Storm, supra, 141 N.J. at 253, 661 A.2d 790*; *New Jersey v. Bazin, 912 F. Supp. 106 (D.N.J.1995)*; *New Jersey v. Imperiale, 773 F. Supp. 747, 748-749 (D.N.J.1991)*. There is a strong governmental interest in dispassionate assessment of the propriety of criminal charges, particularly where there is a pending civil case which might benefit from the criminal prosecution. *Young v. United* [*61] *States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987)*.

Third, where the interests involved are predominantly private, and the pubic interest is not great, limiting the private complainant to available tort and equitable remedies does not constitute an abuse of prosecutorial or judicial discretion. In this regard we note that, while asphalt may be deemed solid waste, we have found no statutory or regulatory indication that the materials described as having been pushed from the roadway constitute hazardous or toxic substances. [***22] *See N.J.A.C. 7:1E-10*. Asphalt is defined as "a brown to black bituminous substance that is found in natural beds and is also obtained as a residue in petroleum refining ..." *Webster's Ninth New Collegiate Dictionary. N.J.A.C. 7:1E*, which treats with discharges of petroleum or petroleum products, refers to*liquid* products and the hazardous substances listed in Appendix A to *N.J.A.C. 7:1E-10*. As indicated, asphalt paving material does not appear to fall into this category. Thus, the public environmental interest might reasonably be regarded as not particularly significant.

Conclusion

The order under review is affirmed. We note that there was no cross appeal, and that in consequence, the decretal paragraph which determined that Huff had probable cause to file each of the criminal complaints is embraced by this affirmance.

**STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. KEVIN BROWN, DEFENDANT-APPELLANT.**

**A-1771-01T4**

**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION**

***362 N.J. Super. 62*; *826 A.2d 813*; *2003 N.J. Super. LEXIS 245***

**May 21, 2003, Submitted**
**July 8, 2003, Decided**

**SUBSEQUENT HISTORY:** Certification granted by *State v. Brown, 178 N.J. 251, 837 A.2d 1093, 2003 N.J. LEXIS 1618 (2003)*
Reversed by, Remanded by *State v. Brown, 180 N.J. 572, 853 A.2d 260, 2004 N.J. LEXIS 937 (2004)*

**PRIOR HISTORY:** [***1] On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment Number 00-12-2077.

**COUNSEL:** *Yvonne Smith Segars,* Public Defender, attorney for appellant (*Steven M. Gilson,* Designated Counsel, of counsel and on the brief).

*Peter C. Harvey,* Acting Attorney General, attorney for respondent (*H. John Witman III,* Deputy Attorney General, of counsel and on the brief).

**JUDGES:** Before Judges KESTIN, FALL and WEISSBARD. The opinion of the court was delivered by FALL, J.A.D.

**OPINION BY:** FALL

**OPINION**

[**814] The opinion of the court was delivered by

FALL, J.A.D.

[*63] This appeal addresses another issue arising from the Supreme Court's decision in *State v. Ragland, 105 N.J. 189, 519 A.2d 1361 (1986)* concerning a prosecution of the criminal offense of possession of a weapon by a convicted felon pursuant to *N.J.S.A. 2C:39-7*. We hold that where a defendant is indicted and charged with both a charge of unlawful possession of a weapon pursuant to *N.J.S.A. 2C:39-5b*, and a charge of possession of a weapon by a convicted felon pursuant to *N.J.S.A. 2C:39-7*, and the issue of [*64] "possession" [***2] is contested, if the State elects to administratively dismiss the unlawful possession charge to proceed solely on the possession by a convicted felon charge, the issue of "possession" must be tried first, absent any knowledge by the trier of fact of the defendant's prior conviction. This ruling is consistent with the fundamental underpinning of the Court's decision in *Ragland* that proof that a defendant is a convicted felon "clearly tends to prejudice the jury in considering" the issue of whether the defendant "possessed" the weapon. *Id. at 193, 519 A.2d 1361*.

Defendant Kevin E. Brown appeals from his conviction for possession of a weapon by a convicted felon and from the sentence imposed. Defendant was charged in Monmouth County Indictment Number 00-12-2077 with third-degree unlawful possession of a weapon, contrary to *N.J.S.A. 2C:39-5b* (count one), and second-degree possession of a weapon by a convicted felon, contrary to *N.J.S.A. 2C:39-7b* (count two).

The charges against defendant arose from an incident that occurred on Fourth Avenue in Asbury Park on August 28, 2000, at approximately 10:20 p.m. Sergeant Terrance Fellenz [***3] of the Asbury Park Police Department was the patrol supervisor for the four-to-midnight shift on that date. Fellenz responded in his patrol vehicle to assist an officer who had been dispatched to 304 Fourth Avenue. When he arrived at that location, Fellenz observed defendant, sitting astride a bicycle, speaking with two other men. Defendant matched the description of the person described by the dispatcher. Fellenz stopped, exited his vehicle, and approached the three men. After instructing defendant not to move away, defendant let the bicycle fall to the ground and started walking toward the entrance to the building at 304 Fourth Avenue.

As defendant walked toward the entrance, he reached under his sweatshirt, whereupon Fellenz drew his weapon and ordered defendant to put his hands up. As defendant reached two pillars that were located on either side of the entranceway, he extended his right arm away from his body, then turned around with his hands up. After defendant was secured, a search of his person [*65] disclosed no weapons. Two other officers who had arrived at the scene searched the area and found a 9-millimeter semi-automatic loaded handgun and holster in a grassy dirt area behind [***4] one of the pillars. Although Fellenz had not heard anything drop when defendant had extended his right arm, he believed defendant had possessed the weapon and discarded it prior to being searched. Some fingerprint impressions were on the handgun, but they lacked sufficient detail for comparison purposes. Defendant was charged with unlawful possession of the handgun and possession of a weapon by a convicted felon.

The matters came before the Law Division for trial on June 19, 2001. The State first advised the court it was aware that the charges in the indictment had to be severed for trial pursuant to *Ragland, supra,* [**815] *105 N.J. at 193-96, 519 A.2d 1361*, but stated that it intended to try the possession of a weapon by a convicted felon charge against defendant in count two first because it was the more serious of the charges. The State contended it had the sole discretion to determine the order in which the matters were to be tried. Defendant objected. The trial judge rejected the State's contention, stating, in pertinent part:

> I don't think that's an appropriate statement . . . of the law. Firstly, . . . the second count involves possession of a weapon by a convicted felon. Defendant evidently [***5] has been convicted of aggravated manslaughter. Now, that has a lot of splash with the jury. And no matter how many times you tell the jury that they may not consider that in terms of prejudicing the defendant and it cannot be used as an inference of guilt just because he has a prior record, although it's an element of the offense, the jury has to know it, it would appear to me that that's basically an attempt to bootstrap a more favorable jury on the issue of possession, which is the real key to the case.
>
> So in terms of fairness, I do think it's the court's business. And the second reason is, as the prosecutor alluded to, if the second count's tried first, it's an automatic that a brand new jury is going to have to be sequestered and impaneled to try the first count again.
>
> That involves judicial economy. That is the court's business in terms of the appropriate usage of the court's time, judicial economy, and I think that is my case. So I'm going to order that the State proceed on count one.

Thereafter, a jury was selected and impaneled, but not sworn. During the jury selection process, the prospective jurors were informed that defendant was charged with the unlawful possession [*66] of [***6] a weapon. After the jurors were excused for the day, the judge advised counsel that the State had shifted its position, stating, as follows:

> The ruling with respect to the order of trial of the counts of the Indictment has been placed on the record. The prosecutor, as the jury was coming in and at my request in chambers, has now indicated that they choose to dismiss the first count, leaving [us] to try only the second count, certain, persons not to have a weapon, a second-degree crime, the higher degree crime.
>
> I've put my findings on the record that to bootstrap a conviction or to bootstrap the possession issue by letting this jury know about the defendant's prior conviction initially I thought was unfair. And I perceived my role to be one necessary to make the call.
>
> Also I rule[d] based on the expediency of trial. Now the prosecutor wants to dismiss the first count. My role now blurs. I can't say don't dismiss the count. . . . And again since it's diminishing potential jeopardy to the defendant, my fairness argument sort of diminishes also.

Defendant objected to the dismissal of the possession charge in count one, contending that pursuant to *R. 3:25-1(b)*, during trial, any count [***7] "may be dismissed by the trial judge on motion by the prosecuting attorney with the consent of the defendant." The judge deferred ruling on the matter until the next day. On June 20, 2001, the judge concluded that the administrative dismissal of a charge by the prosecutor is reviewable

only under an abuse of discretion standard, ruling as follows:

> Is the prosecutor abusing her discretion by moving to dismiss a third-degree crime where the defendant is extended-term eligible? No. It's her administrative discretion to dismiss. A convoluted [**816] argument that it's not to the best interests of the defendant is just that. Convoluted. It is to his benefit. He has no standing to complain.
>
> I'm led to believe, as we discussed the status of the case, that he's extended term eligible. The application is granted over objection. We'll proceed on the second count, the only remaining count, and try the case.
>
> With respect to the element of the offense, prior convictions, there is permitted no detail. I don't know if there's going to be a stipulation to minimize the impact of that. If there is, the date of the conviction, stipulation that the prior conviction falls within the statutory criteria, then [***8] it still leaves the issue of possession before the jury. Only now it's in the second count.

After ruling on the State's application, the judge returned the jurors to the courtroom and explained that although he had earlier informed them that the charge was possession of a weapon, it was "possession of a weapon by someone who has been previously [*67] convicted of a crime." The judge also made inquiry as to whether "the fact that he has a prior record and the fact that you would hear testimony of that in any way affect your ability to be fair and impartial on the issue of whether he possessed that gun?" The jurors informed the judge they could still be fair.

The only witness called to testify was Sergeant Fellenz. Defendant's motion for a judgment of acquittal at the close of the State's case pursuant to *R. 3:18-1* was denied. The jury convicted defendant.

Defendant's motion for a new trial pursuant to *R. 3:20-1* was denied. The State's motion for sentencing defendant to an extended term as a persistent offender pursuant to *N.J.S.A. 2C:44-3(a)* was granted, and the trial judge imposed a ten-year term of imprisonment with a five-year period of parole ineligibility. [***9] Applicable mandatory fines and penalties were also imposed.

On appeal, defendant presents the following arguments for our consideration:

> *POINT I*
>
> DEFENDANT'S CONVICTION MUST BE REVERSED BECAUSE THE PROSECUTION ABUSED ITS DISCRETION BY DISMISSING COUNT ONE.
>
> *POINT II*
>
> THE ADMISSION OF HEARSAY FROM THE STATE'S WITNESS THAT A NON-TESTIFYING WITNESS IMPLICATED DEFENDANT DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION AND CONSTITUTED PLAIN ERROR (Not Raised Below).
>
> *POINT III*
>
> DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.
>
> *POINT IV*
>
> THE SENTENCING COURT ABUSED ITS DISCRETION BY IMPOSING AN EXTENDED TERM AND/OR FAILED TO STATE ITS REASONS FOR IMPOSING THE EXTENDED TERM (Partially Raised Below).

Defendant argues that the court erred by permitting the State to proceed on the possession by a convicted felon charge in count two without adhering to the principle established by *Ragland* that the issue of "possession" be submitted to the jury without evidence of defendant's felony conviction. We agree.

[*68] We begin our analysis by examining certain established principles. First, "[i]t is 'undeniable that [***10] the use of prior conviction evidence is fraught with a high risk of [**817] prejudice.'" *State v. Alvarez, 318 N.J. Super. 137, 149, 723 A.2d 91 (App.Div.1999)* (quoting *State v. Brunson, 132 N.J. 377, 385, 625 A.2d 1085 (1993)*). This principle underpins the Court's ruling in *Ragland, supra,* requiring severance "when a defendant is charged at the same time with unlawful possession of a weapon and possession of a weapon by a convicted felon." *105 N.J. at 193, 519 A.2d 1361*.

Accordingly, to avoid the potential for prejudice, the issue of "possession" is tried first by trial of the unlawful possession charge, without reference to defendant's prior conviction. *Ibid.* Even where a defendant testifies during the unlawful possession trial, proof of the prior conviction is only admissible on the issue of the defendant's "credibility," and not as "substantive proof" of the element of a criminal offense, and separate trials are still required. *State v. Wray, 336 N.J. Super. 205, 207, 764 A.2d 467 (App.Div.), certif. denied, 168 N.J. 290, 773 A.2d 1154 (2001).*

Here, the issue of whether defendant "possessed" the weapon was hotly contested. [***11] The evidence of possession was circumstantial. In an obvious attempt to enhance its chances for a conviction, the State initially sought to reverse the order of trial of the two counts by first trying the possession by a convicted felon charge. If that attempt had been successful, evidence of defendant's prior conviction would have been presented to the jury, along with its commensurate high risk of prejudice to the defendant. When that maneuver failed, the State attempted to reach the same result by administratively dismissing the unlawful possession charge, leaving only the possession by a convicted felon charge to be tried. Logically, that would mean the admission of defendant's prior conviction as substantive evidence of an element of the charged crime, which would thereby enhance the chances of conviction due to the potential for prejudice. Under such circumstances, even with an ideal limiting instruction, it would be naive [*69] to believe that a jury's knowledge of a prior conviction would not increase the chances of conviction.

In our view, under those circumstances, the action of administratively dismissing the charge in count one could also have been viewed as an abuse of prosecutorial [***12] discretion and should not have been countenanced. "The trial court must endeavor to prevent the jury from considering evidence or information that would unduly prejudice either the State or the defense with respect to the responsibility of the jury: determining criminal culpability." *State v. Short, 131 N.J. 47, 61, 618 A.2d 316 (1993).* Here, the attempt to circumvent the fundamental fairness principles established in *Ragland* should have been rejected.

*R. 3:25-1* regulates the dismissal of charges. Prior to indictment, the prosecutor may administratively dismiss a complaint without presentation to the grand jury. However, the prosecutor "shall report the dismissal and the basis therefor to the Assignment Judge and shall notify the defendant." *R. 3:25-1(a).* After an indictment, "[u]pon motion by the prosecuting attorney, an indictment, accusation or complaint, or any count thereof, may be dismissed prior to trial by order of the judge to whom the same has been assigned for trial." *R. 3:25-1(b).* However, "[d]uring trial an indictment or accusation, or any count thereof, may be dismissed by the trial judge on motion by the prosecuting attorney with the consent of [***13] the defendant." *Ibid.*

Here, the trial had not commenced at the time the prosecutor sought dismissal of count one. As the trial court correctly observed, the request for dismissal was reviewable only under an abuse of discretion [**818] standard. *See State v. Ward, 303 N.J. Super. 47, 52-58, 696 A.2d 48 (App.Div.1997).* Although the request for dismissal might have been viewed as an abuse of discretion, we need not reach that issue. We rule that the consequence of that dismissal--under these circumstances--required the trial on count two to be bifurcated, with the issue of defendant's "possession" of the subject weapon tried first without reference to defendant's prior conviction. If the jury determines that defendant was in [*70] possession of the weapon, then the issue of defendant's status as a convicted felon would be independently submitted to the same jury in accordance with the procedures set forth in *Ragland, supra, 105 N.J. at 194-196, 519 A.2d 1361.*

In light of our determination on this issue we need not address the remaining arguments advanced by defendant.

Reversed and remanded for a new trial consistent with [***14] this opinion.

*** This section is current through New Jersey 217th Second Annual Session, L. 2017, c. 126, 128, 130, 132, and J.R. 10 ***

Title 2C. The New Jersey Code of Criminal Justice
Subtitle 2. Specific Offenses
Part 4. Offenses Involving Public Administration Officials
Chapter 30. Official Misconduct

**GO TO THE NEW JERSEY ANNOTATED STATUTES ARCHIVE DIRECTORY**

*N.J. Stat. § 2C:30-2* (2017)

**§ 2C:30-2. Official misconduct**

A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:

**a.** He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or

**b.** He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a crime of the second degree. If the benefit obtained or sought to be obtained, or of which another is deprived or sought to be deprived, is of a value of $ 200.00 or less, the offense of official misconduct is a crime of the third degree.

**HISTORY:** L. 1978, c. 95; amended by L. 1979, c. 178, § 61.

**NOTES:**

Cross References:

Time limitations, see *2C:1-6*.

Crime of pattern of official misconduct, see *2C:30-7*.

"Public Corruption Profiteering Penalty Act", see *2C:30-8*.

Mandatory minimum prison term for public officer, employee convicted of certain crimes; waiver, reduction, see *2C:43-6.5*.

Forfeiture of public office, position, or employment, see *2C:51-2*.

Casino license -- disqualification criteria, see *5:12-86*.

Definitions; standards for interventions in rate filings; offenses [Expired July 16, 2006], see *17:29A-46.8*.

Disclosure statement; hearing after denial of registration, license; notification of change in disclosure statement, see *34:8-44*.

Forfeiture of pension, retirement benefit for conviction of certain crimes; definition, certain, see *43:1-3.1*.

Additional requirements for registration, see *56:8-122*.

Additional requirements; refusal to issue or suspend or revoke registration; grounds., see *56:8-141*.

LexisNexis (R) Notes:

CASE NOTES

**1.** State was barred from prosecuting defendant for extortion and misconduct at the state level, alleging violations of former *N.J. Stat. Ann. § 2A:105-1* and former *N.J. Stat. Ann. § 2A:85-1*, because defendant had been granted transactional immunity to testify in federal proceedings on behalf of the government. *State v. Kenny, 68 N.J. 17, 342 A.2d 189, 1975 N.J. LEXIS 127 (N.J. 1975).*

**2.** To prosecute a public official for official misconduct based solely on a violation of the New Jersey Conflicts of Interest Law, *N.J. Stat. Ann. §§ 52:13D-12* to -28, would violate the void-for-vagueness principle and deprive the defendant of procedural due process. *State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**3.** In a prosecution for the common law crime of misconduct in public office, the appellate court discerned in each of the cited portions of the jury charge that the trial court had opened the door to a conviction based on an act of official misconduct other than the particular act charged, namely, the entering of a defined corrupt agreement; as a result, defendant was deprived of the fundamental constitutional right to be informed of the nature and cause of the accusation, and a new trial was required. *State v. Begyn, 58 N.J. Super. 185, 156 A.2d 15, 1959 N.J. Super. LEXIS 559 (App.Div. 1959),* aff'd, *34 N.J. 35, 167 A.2d 161, 1961 N.J. LEXIS 190 (N.J. 1961).*

**4.** State was barred from prosecuting defendant for extortion and misconduct at the state level, alleging violations of former *N.J. Stat. Ann. § 2A:105-1* and former *N.J. Stat. Ann. § 2A:85-1*, because defendant had been granted transactional immunity to testify in federal proceedings on behalf of the government. *State v. Kenny, 68 N.J. 17, 342 A.2d 189, 1975 N.J. LEXIS 127 (N.J. 1975).*

**5.** As with official misconduct, *N.J. Stat. Ann. § 2C:30-2(a)*, where a non-pecuniary benefit is involved, bribery, N.J.S.A. 2C:27-2a, is a second-degree crime, and the State has no burden to prove that the benefit has a value of more than $ 200. *State v. Lake, 408 N.J. Super. 313, 974 A.2d 1115, 2009 N.J. Super. LEXIS 170 (App.Div. 2009).*

**6.** Although there was a lack of probable cause for an identity theft charge against plaintiff police officer under *N.J. Stat. Ann. § 2C:21-17(a)(4)* where defendant police officer did not verify whether plaintiff's business had been assigned a tax ID number that matched another person's social security number, which plaintiff entered in the social security number space on a credit card application, plaintiff's malicious prosecution claim failed because evidence showing that plaintiff used a state computer to submit multiple credit card applications containing false information provided probable cause for charging plaintiff with credit card fraud under *N.J. Stat. Ann. § 2C:21-6(b)* and official misconduct under N.J. Stat. Ann. § 2C:30-2. *Stolinski v. Pennypacker, 772 F. Supp. 2d 626, 2011 U.S. Dist. LEXIS 15745 (D.N.J. 2011).*

**7.** With regard to a defendant's conviction for fraudulent use of a credit card and third degree misconduct in office, the conviction for fraudulent use of the card was affirmed on appeal but because the illegal use of the card had nothing to do with his position as a police officer, it did not constitute misconduct in office. *State v. Kueny, 411 N.J. Super. 392, 986 A.2d 703, 2010 N.J. Super. LEXIS 10 (App.Div. 2010).*

**8.** Where defendant was charged with taking part in a scheme to obtain fraudulent motor vehicle documents, and the State presented evidence that the co-defendant, a co-conspirator, was performing governmental functions at the time of the conspiracy and was subject to *N.J. Stat. Ann. § 2C:30-2*, the official misconduct statute, defendant was properly charged and convicted of conspiracy to commit official misconduct; one did not escape the statute's reach merely because one was not an employee of the government. *State v. Perez, 185 N.J. 204, 883 A.2d 367, 2005 N.J. LEXIS 1134 (N.J. 2005).*

**9.** Defendant, who helped public servants accept bribes in order to recommend rental increases for rent-controlled units within the city, was properly indicted under *N.J. Stat. Ann. § 2C:30-2*; although defendant was not a public servant he could be found guilty as a an accomplice or a co-conspirator and this served the implicit statutory aims of deterrence and punishment. *State v. Bryant, 257 N.J. Super. 63, 607 A.2d 1343, 1992 N.J. Super. LEXIS 219 (App.Div. 1992).*

**10.** Convictions for official misconduct were reversed against a security guard who was employed by the State where her actions in joining a scheme to defraud the State Health Benefits Program had nothing to do with her status as a security guard but everything to do with her public employment and participation in the *State Health Benefits Program. State v. DeCree, 343 N.J. Super. 410, 778 A.2d 1119, 2001 N.J. Super. LEXIS 335 (App.Div. 2001),* certif. denied, *170 N.J. 388, 788 A.2d 772, 2001 N.J. LEXIS 1577 (N.J. 2001).*

**11.** Because the co-defendant, a police officer, was not acting in his official capacity when he stole items from the store and could not be found guilty of official misconduct, in violation of *N.J. Stat. Ann. § 2C:30-2*, the defendant, a security guard, should not have been charged as an accomplice to official misconduct. *State v. Hinds, 278 N.J. Super. 1, 650 A.2d 350, 1994 N.J. Super. LEXIS 490 (App.Div. 1994),* certif. denied, *140 N.J. 276, 658 A.2d 300, 1995 N.J. LEXIS 212 (N.J. 1995),* certif. denied, *140 N.J. 276, 658 A.2d 300, 1995 N.J. LEXIS 213 (N.J. 1995),* rev'd, *143 N.J. 540, 674 A.2d 161, 1996 N.J. LEXIS 358 (N.J. 1996).*

**12.** Defendant's conviction for official misconduct pursuant to *N.J. Stat. Ann. § 2C:30-2(a)* and (b) was reinstated even though he was acquitted of theft by unlawful taking under N.J. Stat. Ann. §§ 2C:20-3a and *2C:2-6*, and possession of cocaine with intent to distribute under former N.J. Stat. Ann. § 24:21-19a(1) (now *N.J. Stat. Ann. § 2C:35-10*) and *N.J. Stat. Ann. § 2C:2-6*, and such offenses occurred on the same date as the misconduct; the predicate offenses of theft and possession of cocaine formed the factual basis of the compound offense of official misconduct, and thus acquittal on one count of an indictment did not preclude the finding beyond a reasonable doubt of a common element of the offense charged in another count of the same indictment. *State v. Burnett, 245 N.J. Super. 99, 584 A.2d 268, 1990 N.J. Super. LEXIS 456 (App.Div. 1990),* certif. denied, *126 N.J. 333, 598 A.2d 891, 1991 N.J. LEXIS 546 (N.J. 1991),* certif. denied, *126 N.J. 340, 598 A.2d 897, 1991 N.J. LEXIS 752 (N.J. 1991).*

**13.** Defendant's conviction for misconduct in office in violation of former *N.J. Stat. Ann. § 2A:85-1* was proper where the evidence of an extraneous offense tended to show the relationship and course of dealings between the parties. *State v. Attanasio, 92 N.J. Super. 267, 223 A.2d 42,* N.J. Super. LEXIS 499 (App.Div. ), certif. denied, *48 N.J. 354, 225 A.2d 365, 1966 N.J. LEXIS 556 (N.J. 1966).*

**14.** Defendant, a volunteer emergency medical technician who worked for a private, non-profit first-aid squad that provided contractual services to a municipality, was not performing a governmental function within the meaning of *N.J. Stat. Ann. § 2C:27-1(g)*, and therefore was not a public servant for purposes of the official-misconduct statute; accordingly, the trial properly dismissed official misconduct charges against him that were based on his allegedly misappropriating the squad's funds. *State v. Morrison, 227 N.J. 295, 151 A.3d 561, 2016 N.J. LEXIS 1291 (N.J. 2016).*

**15.** Where the trial court sentenced defendant police officer, who was convicted of second-degree official misconduct, one degree lower pursuant to *N.J. Stat. Ann. § 2C:44-1*, it had to reconsider the sentence because it mistakenly believed that the "in the interest of justice" standard of § *2C:44-1(f)(2)* was the same as the "serious injustice" standard of *N.J. Stat. Ann. § 2C:43-6.5(c)(2). State v. Rice, 425 N.J. Super. 375, 41 A.3d 764, 2012 N.J. Super. LEXIS 56 (App.Div. 2012),* certif. denied, *212 N.J. 431, 54 A.3d 811, 2012 N.J. LEXIS 1140 (N.J. 2012).*

**16.** Where defendant was convicted of second-degree official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2*, the trial court did not err in applying mitigating factor eight, *N.J. Stat. Ann. § 2C:44-1(b)(8)*, that his conduct was the result of circumstances unlikely to recur, because as a consequence of his crime, he lost his job as a police officer. *State*

*v. Rice, 425 N.J. Super. 375, 41 A.3d 764, 2012 N.J. Super. LEXIS 56 (App.Div. 2012),* certif. denied, *212 N.J. 431, 54 A.3d 811, 2012 N.J. LEXIS 1140 (N.J. 2012).*

**17.** Alien's order of removal under *8 U.S.C.S. § 1227*(a)(2)(A)(ii) was error because, regardless of the alien's underlying conduct, his conviction under *N.J. Stat. Ann. § 2C:30-2(a)* was not for a crime of moral turpitude; the statute could have covered almost any official act done willfully and without authorization in a public servant's employment, and not all such acts involved moral turpitude. *Bobb v. AG of the United States, 379 Fed. Appx. 199, 2010 U.S. App. LEXIS 9614 (3d Cir. 2010).*

**18.** With regard to a defendant's conviction for fraudulent use of a credit card and third degree misconduct in office, the conviction for fraudulent use of the card was affirmed on appeal but because the illegal use of the card had nothing to do with his position as a police officer, it did not constitute misconduct in office. *State v. Kueny, 411 N.J. Super. 392, 986 A.2d 703, 2010 N.J. Super. LEXIS 10 (App.Div. 2010).*

**19.** When a volunteer firefighter calls in a false alarm it is misconduct related to a public office or position, as responding to fires and creating opportunities for enjoyment or self-gratification is a "benefit" under N.J. Stat. Ann. § 2C:30-2. *State v. Quezada, 402 N.J. Super. 277, 953 A.2d 1206, 2008 N.J. Super. LEXIS 183 (App.Div. 2008).*

**20.** Defendant, a volunteer fireman who called in false alarms and responded to the scene of the reported fires, was properly convicted of official misconduct under N.J. Stat. Ann. § 2C:30-2. However, his conviction for setting false fire alarms, *N.J. Stat. Ann. § 2C:33-3*, merged into the official misconduct charge as the false alarms constituted the official misconduct. *State v. Quezada, 402 N.J. Super. 277, 953 A.2d 1206, 2008 N.J. Super. LEXIS 183 (App.Div. 2008).*

**21.** To prosecute a public official for official misconduct based solely on a violation of the New Jersey Conflicts of Interest Law, *N.J. Stat. Ann. §§ 52:13D-12* to -28, would violate the void-for-vagueness principle and deprive the defendant of procedural due process. *State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**22.** Defendant state employees could not be charged with official misconduct under *N.J. Stat. Ann. § 2C:30-2* solely for violating the New Jersey Conflicts of Interest Law, *N.J. Stat. Ann. §§ 52:13D-12* to -28, and their department's code of ethics, by accepting gratuities from employees of a vendor that sought a state contract. But when such violations were combined with official acts benefiting or intending to benefit the vendor, official misconduct could be charged. *State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**23.** New Jersey Conflicts of Interest Law, *N.J. Stat. Ann. §§ 52:13D-12* to -28, standing alone, does not set forth a basis for criminal liability under the official misconduct statute, N.J. Stat. Ann. § 2C:30-2. The terms of the Law are not self-executing, do not proscribe any conduct, and do not assign levels of culpability to particular conduct. *State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**24.** Defendant, a volunteer fireman who called in false alarms and responded to the scene of reported fires, was properly convicted of official misconduct under *N.J. Stat. Ann. § 2C:30-2*, because under *N.J. Stat. Ann. § 2C:27-1*, he was "public servant" even though unpaid, and the gratification he received in participating in the response constituted a "benefit." *State v. Quezada, 402 N.J. Super. 277, 953 A.2d 1206, 2008 N.J. Super. LEXIS 183 (App.Div. 2008).*

**25.** Evidence that defendant, a police officer, used public resources during business hours to further his illicit internet relationship with a police officer posing as a 14-year-old girl was sufficient to convict him of official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2(a). State v. Davis, 390 N.J. Super. 573, 916 A.2d 493, 2007 N.J. Super. LEXIS 55 (App.Div. 2007),* certif. denied, *192 N.J. 599, 934 A.2d 640, 2007 N.J. LEXIS 1394 (N.J. 2007).*

**26.** Where defendant was charged with taking part in a scheme to obtain fraudulent motor vehicle documents, and the State presented evidence that the co-defendant, a co-conspirator, was performing governmental functions at the time of the conspiracy and was subject to *N.J. Stat. Ann. § 2C:30-2*, the official misconduct statute, defendant was properly charged and convicted of conspiracy to commit official misconduct; one did not escape the statute's reach merely because one was not an employee of the government. *State v. Perez, 185 N.J. 204, 883 A.2d 367, 2005 N.J. LEXIS 1134 (N.J. 2005).*

**27.** Where, more than 10 years following the completion of his sentence of imprisonment and parole, a private citizen who was an accomplice to criminal activities committed by a public official pled guilty to a number of crimes directly related to the operation of his waste disposal business, including aiding and abetting official misconduct of a public official in violation of *N.J. Stat. Ann. § 2C:30-2*, applied for expungement of his record of convictions, which, under

*N.J. Stat. Ann. § 2C:52-27*, would have deemed them not to have occurred, the third paragraph of *N.J. Stat. Ann. § 2C:52-2(b)*, which listed the bar against expungement to public officials, construed in accordance with *N.J. Stat. Ann. § 2C:52-32*, only applied to those holding a public office, position, or employment, and accordingly the applicant was not barred from seeking expungement. *In re Expungement Application of P.A.F., 176 N.J. 218, 822 A.2d 572, 2003 N.J. LEXIS 467 (N.J. 2003).*

**28.** Official misconduct count against defendants was properly dismissed because defendants, the officers of a private, non-profit corporation that provided educational programs for handicapped students placed there at public expense, were not public servants; nothing in the record or the function and powers granted to the defendants supported the conclusion that defendants were anything other than private citizens performing services pursuant to government contracts. *State v. Mason, 355 N.J. Super. 296, 810 A.2d 88, 2002 N.J. Super. LEXIS 454 (App.Div. 2002).*

**29.** Trial court improperly convicted defendant of third degree official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2* because the benefit defendant received from the funds at issue was the face amount of the funds inappropriately used, not the interest that defendant earned on the funds. *State v. Cetnar, 341 N.J. Super. 257, 775 A.2d 198, 2001 N.J. Super. LEXIS 258 (App.Div. 2001),* certif. denied, *170 N.J. 89, 784 A.2d 721, 2001 N.J. LEXIS 1176 (N.J. 2001).*

**30.** Where an indictment charged defendant donor with giving money to a defendant, who was a religious leader wielding considerable political influence among his constituents and was also chairman of a town's zoning board, purportedly in exchange for the religious leader's agreement to support a controversial cogeneration facility that donor company was proposing to build in the town, there was sufficient evidence to sustain an indictment against the defendants for official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2* because the religious leader was a public servant who violated a public duty as chairman of the zoning board and liaison to the planning board and an accomplice or co-conspirator to the offense of official misconduct did not have to be a public servant. *State v. Schenkolewski, 301 N.J. Super. 115, 693 A.2d 1173, 1997 N.J. Super. LEXIS 234 (App.Div. 1997),* certif. denied, *151 N.J. 77, 697 A.2d 549, 1997 N.J. LEXIS 1660 (N.J. 1997).*

**31.** Private security guard could be convicted of official misconduct, in violation of *N.J. Stat. Ann. § 2C:30-2*, because he was an accomplice with police officer in shoplifting scheme and shared the intent to abuse the detective's office. *State v. Hinds, 143 N.J. 540, 674 A.2d 161, 1996 N.J. LEXIS 358 (N.J. 1996).*

**32.** Conviction under *N.J. Stat. Ann. § 2C:30-2(a)* for official misconduct was error where, at the time defendant committed certain weapons-related offenses, he was suspended from city police force and had neither duties nor authority permitting him to act as a public servant. *State v. Bullock, 264 N.J. Super. 419, 624 A.2d 1036, 1993 N.J. Super. LEXIS 188 (App.Div. 1993),* certif. denied, *134 N.J. 484, 634 A.2d 530, 1993 N.J. LEXIS 1229 (N.J. 1993),* rev'd, *136 N.J. 149, 642 A.2d 397, 1994 N.J. LEXIS 498 (N.J. 1994).*

**33.** Defendant could not be convicted of official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2(a)* for acts committed while he was suspended from the *New Jersey State Troopers. State v. Bullock, 264 N.J. Super. 419, 624 A.2d 1036, 1993 N.J. Super. LEXIS 188 (App.Div. 1993),* certif. denied, *134 N.J. 484, 634 A.2d 530, 1993 N.J. LEXIS 1229 (N.J. 1993),* rev'd, *136 N.J. 149, 642 A.2d 397, 1994 N.J. LEXIS 498 (N.J. 1994).*

**34.** Defendant's conviction of violation of *N.J. Stat. Ann. § 2C:30-2(a)* was proper, where that statute provided that a public servant was guilty of official misconduct when, with purpose to obtain a benefit for himself or to injure or to deprive another of a benefit, he committed an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act was unauthorized; charges of official misconduct could be sustained without proof of a criminal act. *State v. Parker, 124 N.J. 628, 592 A.2d 228, 1991 N.J. LEXIS 74 (N.J. 1991),* cert. denied, *503 U.S. 939, 112 S. Ct. 1483, 117 L. Ed. 2d 625, 1992 U.S. LEXIS 1769 (U.S. 1992).*

**35.** Law creating and limiting the office of constable was unclear and did not give fair warning of what conduct was prohibited; thus, it was unfair to prosecute defendant for official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2* based on defendant's actions undertaken as a constable to remove tenants. *State v. Grimes, 235 N.J. Super. 75, 561 A.2d 647, 1989 N.J. Super. LEXIS 303 (App.Div. 1989),* certif. denied, *118 N.J. 222, 570 A.2d 976, 1989 N.J. LEXIS 1550 (N.J. 1989).*

**36.** In a prosecution for official misconduct, "official functions" described in *N.J. Stat. Ann. § 2C:30-2(a)* must include those duties that are imposed by law or are clearly inherent or implicit in the nature of the office, in accordance with *N.J. Stat. Ann. § 2C:30-2(b). State v. Maioranna, 225 N.J. Super. 365, 542 A.2d 510, 1988 N.J. Super. LEXIS 207 (Law Div. 1988),* aff'd in part, *240 N.J. Super. 352, 573 A.2d 475, 1990 N.J. Super. LEXIS 136 (App.Div. 1990).*

**37.** In a trial of a police officer for misconduct in office by failing to report a gambling enterprise in violation of *N.J. Stat. Ann. § 2C:30-2(b)*, taped statements of coconspirators made out of the presence of the police officer were properly admitted under N.J. Evid. R. 63(9)(b); the evidence overwhelmingly indicated a common plan to promote gambling, the telephone conversations occurred during and in furtherance of the conspiracy, and the existence of that common scheme and the police officer's membership in that scheme were properly decided by the trial court alone on the basis of a preponderance of independent evidence corroborated by the hearsay declarations themselves. *State v. Phelps, 96 N.J. 500, 476 A.2d 1199, 1984 N.J. LEXIS 2709 (N.J. 1984).*

**38.** Where police officer was indicted for official misconduct under *N.J. Stat. Ann. § 2C:30-2* conducting an unjustified strip search, defendant's motion to dismiss for failure to claim a specific violation of duty was denied; where the indictment set forth actions that constituted an unlawful search and seizure undertaken for the implied benefit of defendant and the satisfaction of his prurient interests, the charge of the crime of misconduct in office was sufficient to provide him with adequate information upon which to base his defense. *State v. Stevens, 203 N.J. Super. 59, 495 A.2d 910, 1984 N.J. Super. LEXIS 1331 (Law Div. 1984).*

**39.** A defendant was improperly convicted of the offense of misconduct in office, a violation of former *N.J. Stat. Ann. § 2A:85-1*, because he was not a public officer and because the fact that he received federal funds as an executive director of a nonprofit corporation did not make him a public officer. *State v. Williams, 189 N.J. Super. 61, 458 A.2d 1295, 1983 N.J. Super. LEXIS 816 (App.Div. 1983),* certif. denied, *94 N.J. 543, 468 A.2d 193, 1983 N.J. LEXIS 2912 (N.J. 1983).*

**40.** Where bribery and official misconduct charges were based on the same facts, an acquittal on a bribery charge did not impugn a verdict of guilty on a misconduct charge. *State v. Peterson, 181 N.J. Super. 261, 437 A.2d 327, 1981 N.J. Super. LEXIS 728 (App.Div. 1981),* certif. denied, *89 N.J. 413, 446 A.2d 144, 1982 N.J. LEXIS 1985 (N.J. 1982),* abrogated in part as stated in *State v. Hudson, 2010 N.J. Super. Unpub. LEXIS 1087* (App.Div. May 21, 2010), overruled in part as stated in *State v. Wardrick, 2012 N.J. Super. Unpub. LEXIS 2519* (App.Div. Nov. 16, 2012).

**41.** Where commissioners left a convention and expensed an unauthorized trip to Las Vegas, their convictions for obtaining money under false pretenses in violation of former *N. J. Stat. Ann. § 2A:111-1* were reversed because the state could not prove the essential element of reliance; however, because their convictions for of misconduct in office, in violation of former *N.J. Stat. Ann. § 2A:85-1*, were based on the same conduct, the court affirmed, holding that both charges involved a single transaction and defendants should not be punished twice. *State v. Varlese, 171 N.J. Super. 347, 409 A.2d 285, 1979 N.J. Super. LEXIS 980 (App.Div. 1979),* certif. denied, *82 N.J. 298, 412 A.2d 804, 1980 N.J. LEXIS 1895 (N.J. 1980).*

**42.** Convictions of misconduct in office in violation of former *N.J. Stat. Ann. § 2A:85-1* and unlawful taking of money for the performance of duties in violation of former *N.J. Stat. Ann. § 2A:105-1* were reversed on appeal because defendant county official was granted transactional immunity when he was compelled to testify in a federal trial. *State v. Kenny, 128 N.J. Super. 94, 319 A.2d 232, 1974 N.J. Super. LEXIS 646 (App.Div. 1974),* aff'd, *68 N.J. 17, 342 A.2d 189, 1975 N.J. LEXIS 127 (N.J. 1975).*

**43.** Police officer's privilege against self-incrimination was not violated when the court admitted a false report he made into evidence because the report itself was the essence of the crime, misconduct in office, with which he was charged. *State v. Falco, 60 N.J. 570, 292 A.2d 13, 1972 N.J. LEXIS 273 (N.J. 1972).*

**44.** Pursuant to former *N.J. Stat. Ann. § 2A:85-1*, criminal intent is an essential element of the common law offense of misconduct in office where it is based upon a violation of *N.J. Stat. Ann. § 40A:4-57*, 58. *State v. Boncelet, 107 N.J. Super. 444, 258 A.2d 894, 1969 N.J. Super. LEXIS 414 (App.Div. 1969).*

**45.** Where defendants did not violate a statutory or common law duty while acting as members of a board of education, indictments alleging misconduct of office were dismissed *State v. Lally, 80 N.J. Super. 502, 194 A.2d 252, 1963 N.J. Super. LEXIS 363 (Law Div. 1963).*

**46.** Indictment against an undersheriff for misconduct in office in violation of former *N.J. Stat. Ann. § 2A:85-1* was not defective where it had been based on the undersheriff letting a surety that was not licensed who did not have the proper security cover the face amount of bail bonds without making the proper sworn oath in his affidavits as required by N.J. Ct. R. 3:9-6. *State v. Silverstein, 76 N.J. Super. 536, 185 A.2d 45, 1962 N.J. Super. LEXIS 504 (App.Div. 1962),* aff'd, *41 N.J. 203, 195 A.2d 617, 1963 N.J. LEXIS 146 (N.J. 1963).*

**47.** Notwithstanding the contention that during the period of time set forth in the indictment defendant did not hold the office of sanitary inspector as charged in the indictment but was in fact performing the duties of a sanitarian as the result of an unauthorized appointment by the municipal manager, the indictment was sufficient to charge the common law crime of misconduct in public office. *State v. Begyn, 58 N.J. Super. 185, 156 A.2d 15, 1959 N.J. Super. LEXIS 559 (App.Div. 1959),* aff'd, *34 N.J. 35, 167 A.2d 161, 1961 N.J. LEXIS 190 (N.J. 1961).*

**48.** Evidence that defendant state employee, with a purpose to obtain additional gifts from a vendor, refrained from performing the duty to recuse himself from the process of determining whether any actions should be taken regarding an allegation that the vendor was over-billing, was sufficient to expose defendant to criminal liability for official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2(b). State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**49.** Evidence that defendant state employees, who had received gratuities from a vendor's employees, played a role in the selection of the evaluation committee and the determination of the winning bidder--the vendor--was sufficient to support an indictment alleging official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2(a). State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**50.** Evidence that defendant, a state employee who had received gratuities from a vendor's employees, recommended the extension of the vendor's contract for six months, with the purpose to obtain additional gratuities, was sufficient to support an official misconduct indictment under *N.J. Stat. Ann. § 2C:30-2(a). State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**51.** As with official misconduct, *N.J. Stat. Ann. § 2C:30-2(a),* where a non-pecuniary benefit is involved, bribery, N.J.S.A. 2C:27-2a, is a second-degree crime, and the State has no burden to prove that the benefit has a value of more than $ 200. *State v. Lake, 408 N.J. Super. 313, 974 A.2d 1115, 2009 N.J. Super. LEXIS 170 (App.Div. 2009).*

**52.** Trial court erred by sentencing a defendant convicted of second-degree official misconduct and second degree bribery in the third-degree range (one degree lower than those of which he was convicted) since under the interest of justice prong of *N.J. Stat. Ann. § 2C:44-1(f)(2),* the trial judge erred in considering the defendant's many years of public service, his first offender status, his acts of kindness over the years to his family and members of the public, and the like when sentencing him. Personal characteristics of a defendant were held to be applicable to a downgraded sentence pursuant to the interest of justice prong of § *2C:44-1(f)(2)* only if they related to the offense itself and gave fuller context to the offense circumstances, which in the case, they did not as they were only appropriate for consideration as mitigating factors. *State v. Lake, 408 N.J. Super. 313, 974 A.2d 1115, 2009 N.J. Super. LEXIS 170 (App.Div. 2009).*

**53.** Trial court properly denied defendant's motion to dismiss the indictment charging official misconduct and theft by unlawful taking of public documents, in violation of *N.J. Stat. Ann. § 2C:30-2,* because the State presented to the grand jury a prima facie showing with respect to the elements of each offense charged and did not withhold from the grand jury exculpatory information or a charge regarding a defense that it was compelled by law to present. *State v. Saavedra, 222 N.J. 39, 117 A.3d 1169, 2015 N.J. LEXIS 641 (N.J. 2015).*

**54.** Trial court properly denied defendant's motion to dismiss an indictment charging her with official misconduct and theft of public documents because case law precedent entitled Quinlan did not decriminalize her conduct of taking her employer's records to support her civil discrimination suit, the State presented a prima facie case to support the indictment, and defendant could raise Quinlan at trial to negate the state of mind requirements of the charges crimes as an affirmative defense. *State v. Saavedra, 433 N.J. Super. 501, 81 A.3d 693, 2013 N.J. Super. LEXIS 185 (App.Div. 2013),* aff'd, *222 N.J. 39, 117 A.3d 1169, 2015 N.J. LEXIS 641 (N.J. 2015).*

**55.** Trial court erred by ordering all of defendant's pension benefits forfeited under *N.J. Stat. Ann. § 43:1-3.1* from the date of the first criminal act alleged in the indictment forward following his conviction for official misconduct because the plain language of the statute mandated forfeiture of only the portion of his pension that was earned as a member of the retirement fund covering the position involved in the offense and gave no discretion to the trial court to limit it to the date of the first offense or broaden it to include credit earned from a separate pension system that did not cover

the position involved in the offense. *State v. Steele, 420 N.J. Super. 129, 18 A.3d 1087, 2011 N.J. Super. LEXIS 95 (App.Div. 2011).*

**56.** Plain language of the pension forfeiture statute, *N.J. Stat. Ann. § 43:1-3.1(a),* mandates forfeiture of only the portion of a defendant's pension that was earned as a member of the retirement fund that he participated in at the time he committed the offense and that covered the position involved in the offense, and a trial court has no discretion to limit the forfeiture to the credit earned from the date of the first criminal act alleged in the indictment forward or to require forfeiture of all pension credit, including credit earned as a member of a separate pension system that did not cover the position involved in the offense. *State v. Steele, 420 N.J. Super. 129, 18 A.3d 1087, 2011 N.J. Super. LEXIS 95 (App.Div. 2011).*

**57.** Defendant's conviction for official misconduct was reversed on appeal because it was based solely on an underlying, invalid conviction for bias intimidation. *State v. Pomianek, 429 N.J. Super. 339, 58 A.3d 1205, 2013 N.J. Super. LEXIS 10 (App.Div. 2013),* aff'd in part and rev'd in part, *221 N.J. 66, 110 A.3d 841, 2015 N.J. LEXIS 275 (N.J. 2015).*

**58.** A pretrial ruling of a trial court that found a statement made by defendant to fellow police officers admissible in his subsequent conviction, based on a guilty plea, for second-degree official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2(a)* arising out of defendant's involvement in an incident of stolen narcotics, was error and required the judgment of conviction to be reversed; defendant's statement, given two hours after he was given Miranda warnings, was tainted where the police officers did not scrupulously honor defendant's assertion of his right to remain silent when they persistently urged him to give a statement and help himself. *State v. Barowski, 226 N.J. Super. 235, 543 A.2d 1039, 1988 N.J. Super. LEXIS 248 (App.Div. 1988).*

**59.** A pretrial ruling of a trial court that found a statement made by defendant to fellow police officers admissible in his subsequent conviction, based on a guilty plea, for second-degree official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2(a)* arising out of defendant's involvement in an incident of stolen narcotics, was error and required the judgment of conviction to be reversed; defendant's statement, given two hours after he was given Miranda warnings, was tainted where the police officers did not scrupulously honor defendant's assertion of his right to remain silent when they persistently urged him to give a statement and help himself. *State v. Barowski, 226 N.J. Super. 235, 543 A.2d 1039, 1988 N.J. Super. LEXIS 248 (App.Div. 1988).*

**60.** A pretrial ruling of a trial court that found a statement made by defendant to fellow police officers admissible in his subsequent conviction, based on a guilty plea, for second-degree official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2(a)* arising out of defendant's involvement in an incident of stolen narcotics, was error and required the judgment of conviction to be reversed; defendant's statement, given two hours after he was given Miranda warnings, was tainted where the police officers did not scrupulously honor defendant's assertion of his right to remain silent when they persistently urged him to give a statement and help himself. *State v. Barowski, 226 N.J. Super. 235, 543 A.2d 1039, 1988 N.J. Super. LEXIS 248 (App.Div. 1988).*

**61.** Trial court properly denied defendant's motion to dismiss the indictment charging official misconduct and theft by unlawful taking of public documents, in violation of *N.J. Stat. Ann. § 2C:30-2,* because the State presented to the grand jury a prima facie showing with respect to the elements of each offense charged and did not withhold from the grand jury exculpatory information or a charge regarding a defense that it was compelled by law to present. *State v. Saavedra, 222 N.J. 39, 117 A.3d 1169, 2015 N.J. LEXIS 641 (N.J. 2015).*

**62.** Convictions of misconduct in office in violation of former *N.J. Stat. Ann. § 2A:85-1* and unlawful taking of money for the performance of duties in violation of former *N.J. Stat. Ann. § 2A:105-1* were reversed on appeal because defendant county official was granted transactional immunity when he was compelled to testify in a federal trial. *State v. Kenny, 128 N.J. Super. 94, 319 A.2d 232, 1974 N.J. Super. LEXIS 646 (App.Div. 1974),* aff'd, *68 N.J. 17, 342 A.2d 189, 1975 N.J. LEXIS 127 (N.J. 1975).*

**63.** Indictment charging defendant councilman-elect with misconduct in office in violation of former *N.J. Stat. Ann. § 2A:85-1* was dismissed because the statute was inapplicable to defendant before he was sworn into office. *State v. Penta, 127 N.J. Super. 201, 316 A.2d 733, 1974 N.J. Super. LEXIS 720 (Law Div. 1974).*

**64.** Trial court properly denied defendant's motion to dismiss an indictment charging her with official misconduct and theft of public documents because case law precedent entitled Quinlan did not decriminalize her conduct of taking her employer's records to support her civil discrimination suit, the State presented a prima facie case to support the indictment, and defendant could raise Quinlan at trial to negate the state of mind requirements of the charges crimes as an affirmative defense. *State v. Saavedra, 433 N.J. Super. 501, 81 A.3d 693, 2013 N.J. Super. LEXIS 185 (App.Div. 2013),* aff'd, *222 N.J. 39, 117 A.3d 1169, 2015 N.J. LEXIS 641 (N.J. 2015).*

**65.** Evidence that defendant state employees, who had received gratuities from a vendor's employees, played a role in the selection of the evaluation committee and the determination of the winning bidder--the vendor--was sufficient to support an indictment alleging official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2(a). State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**66.** Evidence that defendant, a state employee who had received gratuities from a vendor's employees, recommended the extension of the vendor's contract for six months, with the purpose to obtain additional gratuities, was sufficient to support an official misconduct indictment under *N.J. Stat. Ann. § 2C:30-2(a). State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**67.** Where police officer was indicted for official misconduct under *N.J. Stat. Ann. § 2C:30-2* conducting an unjustified strip search, defendant's motion to dismiss for failure to claim a specific violation of duty was denied; where the indictment set forth actions that constituted an unlawful search and seizure undertaken for the implied benefit of defendant and the satisfaction of his prurient interests, the charge of the crime of misconduct in office was sufficient to provide him with adequate information upon which to base his defense. *State v. Stevens, 203 N.J. Super. 59, 495 A.2d 910, 1984 N.J. Super. LEXIS 1331 (Law Div. 1984).*

**68.** Indictment against an undersheriff for misconduct in office in violation of former *N.J. Stat. Ann. § 2A:85-1* was not defective where it had been based on the undersheriff letting a surety that was not licensed who did not have the proper security cover the face amount of bail bonds without making the proper sworn oath in his affidavits as required by N.J. Ct. R. 3:9-6. *State v. Silverstein, 76 N.J. Super. 536, 185 A.2d 45, 1962 N.J. Super. LEXIS 504 (App.Div. 1962),* aff'd, *41 N.J. 203, 195 A.2d 617, 1963 N.J. LEXIS 146 (N.J. 1963).*

**69.** Notwithstanding the contention that during the period of time set forth in the indictment defendant did not hold the office of sanitary inspector as charged in the indictment but was in fact performing the duties of a sanitarian as the result of an unauthorized appointment by the municipal manager, the indictment was sufficient to charge the common law crime of misconduct in public office. *State v. Begyn, 58 N.J. Super. 185, 156 A.2d 15, 1959 N.J. Super. LEXIS 559 (App.Div. 1959),* aff'd, *34 N.J. 35, 167 A.2d 161, 1961 N.J. LEXIS 190 (N.J. 1961).*

**70.** State was barred from prosecuting defendant for extortion and misconduct at the state level, alleging violations of former *N.J. Stat. Ann. § 2A:105-1* and former *N.J. Stat. Ann. § 2A:85-1*, because defendant had been granted transactional immunity to testify in federal proceedings on behalf of the government. *State v. Kenny, 68 N.J. 17, 342 A.2d 189, 1975 N.J. LEXIS 127 (N.J. 1975).*

**71.** In a trial of a police officer for misconduct in office by failing to report a gambling enterprise in violation of *N.J. Stat. Ann. § 2C:30-2(b),* taped statements of coconspirators made out of the presence of the police officer were properly admitted under N.J. Evid. R. 63(9)(b); the evidence overwhelmingly indicated a common plan to promote gambling, the telephone conversations occurred during and in furtherance of the conspiracy, and the existence of that common scheme and the police officer's membership in that scheme were properly decided by the trial court alone on the basis of a preponderance of independent evidence corroborated by the hearsay declarations themselves. *State v. Phelps, 96 N.J. 500, 476 A.2d 1199, 1984 N.J. LEXIS 2709 (N.J. 1984).*

**72.** Police officer's privilege against self-incrimination was not violated when the court admitted a false report he made into evidence because the report itself was the essence of the crime, misconduct in office, with which he was charged. *State v. Falco, 60 N.J. 570, 292 A.2d 13, 1972 N.J. LEXIS 273 (N.J. 1972).*

**73.** In a prosecution for the common law crime of misconduct in public office, the appellate court discerned in each of the cited portions of the jury charge that the trial court had opened the door to a conviction based on an act of official misconduct other than the particular act charged, namely, the entering of a defined corrupt agreement; as a result, defendant was deprived of the fundamental constitutional right to be informed of the nature and cause of the accusation, and a new trial was required. *State v. Begyn, 58 N.J. Super. 185, 156 A.2d 15, 1959 N.J. Super. LEXIS 559 (App.Div. 1959),* aff'd, *34 N.J. 35, 167 A.2d 161, 1961 N.J. LEXIS 190 (N.J. 1961).*

**74.** Trial court erred by ordering all of defendant's pension benefits forfeited under *N.J. Stat. Ann. § 43:1-3.1* from the date of the first criminal act alleged in the indictment forward following his conviction for official misconduct because the plain language of the statute mandated forfeiture of only the portion of his pension that was earned as a member of the retirement fund covering the position involved in the offense and gave no discretion to the trial court to limit it to the date of the first offense or broaden it to include credit earned from a separate pension system that did not cover the position involved in the offense. *State v. Steele, 420 N.J. Super. 129, 18 A.3d 1087, 2011 N.J. Super. LEXIS 95 (App.Div. 2011).*

**75.** Plain language of the pension forfeiture statute, *N.J. Stat. Ann. § 43:1-3.1(a),* mandates forfeiture of only the portion of a defendant's pension that was earned as a member of the retirement fund that he participated in at the time he committed the offense and that covered the position involved in the offense, and a trial court has no discretion to limit the forfeiture to the credit earned from the date of the first criminal act alleged in the indictment forward or to require forfeiture of all pension credit, including credit earned as a member of a separate pension system that did not cover the position involved in the offense. *State v. Steele, 420 N.J. Super. 129, 18 A.3d 1087, 2011 N.J. Super. LEXIS 95 (App.Div. 2011).*

**76.** Trial court erred by sentencing a defendant convicted of second-degree official misconduct and second degree bribery in the third-degree range (one degree lower than those of which he was convicted) since under the interest of justice prong of *N.J. Stat. Ann. § 2C:44-1(f)(2),* the trial judge erred in considering the defendant's many years of public service, his first offender status, his acts of kindness over the years to his family and members of the public, and the like when sentencing him. Personal characteristics of a defendant were held to be applicable to a downgraded sentence pursuant to the interest of justice prong of § *2C:44-1(f)(2)* only if they related to the offense itself and gave fuller context to the offense circumstances, which in the case, they did not as they were only appropriate for consideration as mitigating factors. *State v. Lake, 408 N.J. Super. 313, 974 A.2d 1115, 2009 N.J. Super. LEXIS 170 (App.Div. 2009).*

**77.** Where the trial court sentenced defendant police officer, who was convicted of second-degree official misconduct, one degree lower pursuant to *N.J. Stat. Ann. § 2C:44-1,* it had to reconsider the sentence because it mistakenly believed that the "in the interest of justice" standard of § *2C:44-1(f)(2)* was the same as the "serious injustice" standard of *N.J. Stat. Ann. § 2C:43-6.5(c)(2). State v. Rice, 425 N.J. Super. 375, 41 A.3d 764, 2012 N.J. Super. LEXIS 56 (App.Div. 2012),* certif. denied, *212 N.J. 431, 54 A.3d 811, 2012 N.J. LEXIS 1140 (N.J. 2012).*

**78.** Where defendant was convicted of second-degree official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2,* the trial court did not err in applying mitigating factor eight, *N.J. Stat. Ann. § 2C:44-1(b)(8),* that his conduct was the result of circumstances unlikely to recur, because as a consequence of his crime, he lost his job as a police officer. *State v. Rice, 425 N.J. Super. 375, 41 A.3d 764, 2012 N.J. Super. LEXIS 56 (App.Div. 2012),* certif. denied, *212 N.J. 431, 54 A.3d 811, 2012 N.J. LEXIS 1140 (N.J. 2012).*

**79.** Defendant, a volunteer fireman who called in false alarms and responded to the scene of the reported fires, was properly convicted of official misconduct under N.J. Stat. Ann. § 2C:30-2. However, his conviction for setting false fire alarms, *N.J. Stat. Ann. § 2C:33-3,* merged into the official misconduct charge as the false alarms constituted the official misconduct. *State v. Quezada, 402 N.J. Super. 277, 953 A.2d 1206, 2008 N.J. Super. LEXIS 183 (App.Div. 2008).*

**80.** Where, more than 10 years following the completion of his sentence of imprisonment and parole, a private citizen who was an accomplice to criminal activities committed by a public official pled guilty to a number of crimes directly related to the operation of his waste disposal business, including aiding and abetting official misconduct of a public official in violation of *N.J. Stat. Ann. § 2C:30-2*, applied for expungement of his record of convictions, which, under *N.J. Stat. Ann. § 2C:52-27*, would have deemed them not to have occurred, the third paragraph of *N.J. Stat. Ann. § 2C:52-2(b)*, which listed the bar against expungement to public officials, construed in accordance with *N.J. Stat. Ann. § 2C:52-32*, only applied to those holding a public office, position, or employment, and accordingly the applicant was not barred from seeking expungement. *In re Expungement Application of P.A.F., 176 N.J. 218, 822 A.2d 572, 2003 N.J. LEXIS 467 (N.J. 2003).*

**81.** Defendant's conviction for official misconduct was reversed on appeal because it was based solely on an underlying, invalid conviction for bias intimidation. *State v. Pomianek, 429 N.J. Super. 339, 58 A.3d 1205, 2013 N.J. Super. LEXIS 10 (App.Div. 2013)*, aff'd in part and rev'd in part, *221 N.J. 66, 110 A.3d 841, 2015 N.J. LEXIS 275 (N.J. 2015).*

**82.** Evidence that defendant, a police officer, used public resources during business hours to further his illicit internet relationship with a police officer posing as a 14-year-old girl was sufficient to convict him of official misconduct in violation of *N.J. Stat. Ann. § 2C:30-2(a). State v. Davis, 390 N.J. Super. 573, 916 A.2d 493, 2007 N.J. Super. LEXIS 55 (App.Div. 2007)*, certif. denied, *192 N.J. 599, 934 A.2d 640, 2007 N.J. LEXIS 1394 (N.J. 2007).*

**83.** Where defendants did not violate a statutory or common law duty while acting as members of a board of education, indictments alleging misconduct of office were dismissed *State v. Lally, 80 N.J. Super. 502, 194 A.2d 252, 1963 N.J. Super. LEXIS 363 (Law Div. 1963).*

**84.** In a trial of a police officer for misconduct in office by failing to report a gambling enterprise in violation of *N.J. Stat. Ann. § 2C:30-2(b)*, taped statements of coconspirators made out of the presence of the police officer were properly admitted under N.J. Evid. R. 63(9)(b); the evidence overwhelmingly indicated a common plan to promote gambling, the telephone conversations occurred during and in furtherance of the conspiracy, and the existence of that common scheme and the police officer's membership in that scheme were properly decided by the trial court alone on the basis of a preponderance of independent evidence corroborated by the hearsay declarations themselves. *State v. Phelps, 96 N.J. 500, 476 A.2d 1199, 1984 N.J. LEXIS 2709 (N.J. 1984).*

**85.** Doctrine of equitable tolling was applied where plaintiff, who was sexually assaulted by a police officer, was hindered from filing a suit in a timely manner by the fact that the officer acted in such a way to prevent her from ascertaining his identify and by his failure to report his criminal actions in violation of his clear duty as a police officer to do so, the officer could not assert the privilege against self-incrimination to avoid disclosing his sexual assault of plaintiff. *Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 693 A.2d 1248, 1997 N.J. Super. LEXIS 266 (App.Div. 1997)*, certif. denied, *153 N.J. 402, 709 A.2d 795, 1998 N.J. LEXIS 484 (N.J. 1998).*

**86.** Evidence supported jury's verdict that police officer was guilty of second degree official misconduct, in violation of *N.J. Stat. Ann. § 2C:30-2*, because he was present when drugs were sold but did not arrest the person who made the sale. *State v. Corso, 355 N.J. Super. 518, 810 A.2d 1130, 2002 N.J. Super. LEXIS 468 (App.Div. 2002)*, certif. denied, *175 N.J. 547, 816 A.2d 1048, 2003 N.J. LEXIS 231 (N.J. 2003).*

**87.** Where, more than 10 years following the completion of his sentence of imprisonment and parole, a private citizen who was an accomplice to criminal activities committed by a public official pled guilty to a number of crimes directly related to the operation of his waste disposal business, including aiding and abetting official misconduct of a public official in violation of *N.J. Stat. Ann. § 2C:30-2*, applied for expungement of his record of convictions, which, under *N.J. Stat. Ann. § 2C:52-27*, would have deemed them not to have occurred, the third paragraph of *N.J. Stat. Ann. § 2C:52-2(b)*, which listed the bar against expungement to public officials, construed in accordance with *N.J. Stat. Ann. § 2C:52-32*, only applied to those holding a public office, position, or employment, and accordingly the applicant was not

barred from seeking expungement. *In re Expungement Application of P.A.F., 176 N.J. 218, 822 A.2d 572, 2003 N.J. LEXIS 467 (N.J. 2003).*

**88.** Indictment charging defendant councilman-elect with misconduct in office in violation of former *N.J. Stat. Ann. § 2A:85-1* was dismissed because the statute was inapplicable to defendant before he was sworn into office. *State v. Penta, 127 N.J. Super. 201, 316 A.2d 733, 1974 N.J. Super. LEXIS 720 (Law Div. 1974).*

**89.** Doctrine of equitable tolling was applied where plaintiff, who was sexually assaulted by a police officer, was hindered from filing a suit in a timely manner by the fact that the officer acted in such a way to prevent her from ascertaining his identify and by his failure to report his criminal actions in violation of his clear duty as a police officer to do so, the officer could not assert the privilege against self-incrimination to avoid disclosing his sexual assault of plaintiff. *Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 693 A.2d 1248, 1997 N.J. Super. LEXIS 266 (App.Div. 1997),* certif. denied, *153 N.J. 402, 709 A.2d 795, 1998 N.J. LEXIS 484 (N.J. 1998).*

**90.** Defendant, a volunteer emergency medical technician who worked for a private, non-profit first-aid squad that provided contractual services to a municipality, was not performing a governmental function within the meaning of *N.J. Stat. Ann. § 2C:27-1(g),* and therefore was not a public servant for purposes of the official-misconduct statute; accordingly, the trial properly dismissed official misconduct charges against him that were based on his allegedly misappropriating the squad's funds. *State v. Morrison, 227 N.J. 295, 151 A.3d 561, 2016 N.J. LEXIS 1291 (N.J. 2016).*

**91.** Defendant, who helped public servants accept bribes in order to recommend rental increases for rent-controlled units within the city, was properly indicted under *N.J. Stat. Ann. § 2C:30-2*; although defendant was not a public servant he could be found guilty as a an accomplice or a co-conspirator and this served the implicit statutory aims of deterrence and punishment. *State v. Bryant, 257 N.J. Super. 63, 607 A.2d 1343, 1992 N.J. Super. LEXIS 219 (App.Div. 1992).*

**92.** Indictment against an undersheriff for misconduct in office in violation of former *N.J. Stat. Ann. § 2A:85-1* was not defective where it had been based on the undersheriff letting a surety that was not licensed who did not have the proper security cover the face amount of bail bonds without making the proper sworn oath in his affidavits as required by N.J. Ct. R. 3:9-6. *State v. Silverstein, 76 N.J. Super. 536, 185 A.2d 45, 1962 N.J. Super. LEXIS 504 (App.Div. 1962),* aff'd, *41 N.J. 203, 195 A.2d 617, 1963 N.J. LEXIS 146 (N.J. 1963).*

**93.** When a volunteer firefighter calls in a false alarm it is misconduct related to a public office or position, as responding to fires and creating opportunities for enjoyment or self-gratification is a "benefit" under N.J. Stat. Ann. § 2C:30-2. *State v. Quezada, 402 N.J. Super. 277, 953 A.2d 1206, 2008 N.J. Super. LEXIS 183 (App.Div. 2008).*

**94.** Defendant, a volunteer fireman who called in false alarms and responded to the scene of reported fires, was properly convicted of official misconduct under *N.J. Stat. Ann. § 2C:30-2*, because under *N.J. Stat. Ann. § 2C:27-1*, he was "public servant" even though unpaid, and the gratification he received in participating in the response constituted a "benefit." *State v. Quezada, 402 N.J. Super. 277, 953 A.2d 1206, 2008 N.J. Super. LEXIS 183 (App.Div. 2008).*

**95.** Defendant state employees could not be charged with official misconduct under *N.J. Stat. Ann. § 2C:30-2* solely for violating the New Jersey Conflicts of Interest Law, *N.J. Stat. Ann. §§ 52:13D-12* to -28, and their department's code of ethics, by accepting gratuities from employees of a vendor that sought a state contract. But when such violations were combined with official acts benefiting or intending to benefit the vendor, official misconduct could be charged. *State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**96.** New Jersey Conflicts of Interest Law, *N.J. Stat. Ann. §§ 52:13D-12* to -28, standing alone, does not set forth a basis for criminal liability under the official misconduct statute, N.J. Stat. Ann. § 2C:30-2. The terms of the Law are not self-executing, do not proscribe any conduct, and do not assign levels of culpability to particular conduct. *State v. Thompson, 402 N.J. Super. 177, 953 A.2d 491, 2008 N.J. Super. LEXIS 171 (App.Div. 2008).*

**97.** Convictions for official misconduct were reversed against a security guard who was employed by the State where her actions in joining a scheme to defraud the State Health Benefits Program had nothing to do with her status as a security guard but everything to do with her public employment and participation in the *State Health Benefits Program. State v. DeCree, 343 N.J. Super. 410, 778 A.2d 1119, 2001 N.J. Super. LEXIS 335 (App.Div. 2001),* certif. denied, *170 N.J. 388, 788 A.2d 772, 2001 N.J. LEXIS 1577 (N.J. 2001).*

**98.** Suspended state trooper remained a "public servant" pursuant to *N.J. Stat. Ann. § 2C:30-2* for the purposes of a criminal prosecution for official misconduct; although he was suspended, he remained subject to all the administrative rules and regulations pertaining to police officers as he was carried on the payroll, even though he received no pay during the suspension, and at the time of the suspension he had been advised that he was still required to report to his supervisor and respond to subpoenas during the period of suspension. *State v. Bullock, 136 N.J. 149, 642 A.2d 397, 1994 N.J. LEXIS 498 (N.J. 1994).*

**99.** Member of the Society for the Prevention of Cruelty to Animals (Society) was a "public servant" for the purposes of charging him with official misconduct pursuant to *N.J. Stat. Ann. § 2C:30-2* where he solicited donations of salvaged pet food for a fictitious organization by using his affiliation with the Society; in addition to the fact that the role of the Society was formally acknowledged and established by statute, examination of some of the specific powers granted to the Society made it clear that it performed a government function and thus, while the scope of the Society's power was limited, when members operated within that scope to perform a government function, they acted as public servants. *State v. Vickery, 275 N.J. Super. 648, 646 A.2d 1159, 1994 N.J. Super. LEXIS 345 (Law Div. 1994).*

**100.** A valid conviction for official misconduct under former *N.J. Stat. Ann. § 2A:85-1* could not be merged into an invalid conviction for unlawfully obtaining a thing of value, a violation of former N.J. Stat. Ann. § 2A:135-3, which was dismissed. *State v. Makwinski, 133 N.J. Super. 487, 337 A.2d 403, 1975 N.J. Super. LEXIS 843 (Law Div. 1975).*

**101.** Alien's order of removal under *8 U.S.C.S. § 1227*(a)(2)(A)(ii) was error because, regardless of the alien's underlying conduct, his conviction under *N.J. Stat. Ann. § 2C:30-2(a)* was not for a crime of moral turpitude; the statute could have covered almost any official act done willfully and without authorization in a public servant's employment, and not all such acts involved moral turpitude. *Bobb v. AG of the United States, 379 Fed. Appx. 199, 2010 U.S. App. LEXIS 9614 (3d Cir. 2010).*

**102.** Although there was a lack of probable cause for an identity theft charge against plaintiff police officer under *N.J. Stat. Ann. § 2C:21-17(a)(4)* where defendant police officer did not verify whether plaintiff's business had been assigned a tax ID number that matched another person's social security number, which plaintiff entered in the social security number space on a credit card application, plaintiff's malicious prosecution claim failed because evidence showing that plaintiff used a state computer to submit multiple credit card applications containing false information provided probable cause for charging plaintiff with credit card fraud under *N.J. Stat. Ann. § 2C:21-6(b)* and official misconduct under N.J. Stat. Ann. § 2C:30-2. *Stolinski v. Pennypacker, 772 F. Supp. 2d 626, 2011 U.S. Dist. LEXIS 15745 (D.N.J. 2011).*

**103.** Doctrine of equitable tolling was applied where plaintiff, who was sexually assaulted by a police officer, was hindered from filing a suit in a timely manner by the fact that the officer acted in such a way to prevent her from ascertaining his identify and by his failure to report his criminal actions in violation of his clear duty as a police officer to do so, the officer could not assert the privilege against self-incrimination to avoid disclosing his sexual assault of plaintiff. *Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 693 A.2d 1248, 1997 N.J. Super. LEXIS 266 (App.Div. 1997),* certif. denied, *153 N.J. 402, 709 A.2d 795, 1998 N.J. LEXIS 484 (N.J. 1998).*

Related Statutes & Rules:

ADMINISTRATIVE CODE:

1. N.J.A.C. 13:19-14.9 (2013), CHAPTER COMPLIANCE AND SAFETY, Denial, suspension, or revocation of provider license; administrative penalties.

2. *N.J.A.C. 13:20-44.17* (2013), CHAPTER ENFORCEMENT SERVICE, Additional violations.

3. N.J.A.C. 13:20-47.18 (2013), CHAPTER ENFORCEMENT SERVICE, Additional violations.

4. *N.J.A.C. 13:23-2.12* (2013), CHAPTER DRIVING SCHOOLS, Denial, suspension or revocation of license.

5. *N.J.A.C. 13:45A-17.6* (2013), CHAPTER ADMINISTRATIVE RULES OF THE DIVISION OF CONSUMER AFFAIRS, Disclosure statement.

6. *N.J.A.C. 13:45D-3.3* (2013), CHAPTER TELEMARKETING: DO NOT CALL, Disclosure statement.

LAW REVIEWS & JOURNALS:

1. *24 Seton Hall L. Rev. 394,* New Jersey's Other-Crimes Rule and the Evidence Committee's Abrogation of Almost Two Hundred Years of JudicialPrecedent.

JURY INSTRUCTIONS:

1. *NJ Criminal JI 2C:30-2*, Official Misconduct

*** This section is current through New Jersey 217th Second Annual Session, L. 2017, c. 126, 128, 130, 132, and J.R. 10 ***

Title 2C. The New Jersey Code of Criminal Justice
Subtitle 2. Specific Offenses
Part 4. Offenses Involving Public Administration Officials
Chapter 27. Bribery and Corruption

**GO TO THE NEW JERSEY ANNOTATED STATUTES ARCHIVE DIRECTORY**

*N.J. Stat. § 2C:27-1* (2017)

**§ 2C:27-1. Definitions**

In chapters 27 through 30, unless a different meaning plainly is required:

**a.** "Benefit" means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including a pecuniary benefit or a benefit to any other person or entity in whose welfare he is interested;

**b.** "Government" includes any branch, subdivision or agency of the government of the State or any locality within it;

**c.** "Harm" means loss, disadvantage or injury, or anything so regarded by the person affected, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested;

**d.** "Official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency, arbitration proceeding, or official authorized to take evidence under oath, including any arbitrator, referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding;

**e.** "Party official" means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts, or participates in directing or conducting party affairs at any level of responsibility;

**f.** "Pecuniary benefit" is benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain;

**g.** "Public servant" means any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function, but the term does not include witnesses;

**h.** "Administrative proceeding" means any proceeding, other than a judicial proceeding, the outcome of which is required to be based on a record or documentation prescribed by law, or in which law or regulation is particularized in application to individuals;

**i.** "Statement" means any representation, but includes a representation of opinion, belief or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

**HISTORY:** L. 1978, c. 95; Amended by L. 1979, c. 178, § 47.

**NOTES:**

Cross References:

Murder, see *2C:11-3*.

Acceptance or receipt of unlawful benefit by public servant for official behavior, see *2C:27-10*.

Offer of unlawful benefit to public servant for official behavior, see *2C:27-11*.

"Public Corruption Profiteering Penalty Act", see *2C:30-8*.

Casino license -- disqualification criteria, see *5:12-86*.

LexisNexis (R) Notes:

CASE NOTES

**1.** In a suit brought against the New Jersey State Firemen's Association, under the Open Public Records Act (OPRA), *N.J. Stat. Ann. §§ 47:1A-1* to *47:1A-13*, the Association was held to be a public agency whose records were subject to inspection under OPRA as it was an independent State instrumentality created pursuant to state law, *N.J. Stat. Ann. § 43:17-41*, and was the direct recipient of taxes on certain fire insurance premiums, pursuant to *N.J. Stat. Ann. §§ 54:18-1* and 54:18-2. *Paff v. New Jersey State Firemen's Ass'n, 431 N.J. Super. 278, 69 A.3d 118, 2013 N.J. Super. LEXIS 90 (App.Div. 2013).*

**2.** Where defendant threatened, in conversations with school officials, to make public information regarding the misconduct of other teachers unless given tenure, evidence presented by the state primarily to prove threats and other improper influence in official matters in violation of *N.J. Stat. Ann. § 2C:27-3(a)(2)*, was not sufficient to sustain defendant's conviction for bribery in official and political matters in violation of *N.J. Stat. Ann. §§ 2C:27-2(b)* and *2C:27-2(d)* because defendant's behavior in threatening "harm" as defined by *N.J. Stat. Ann. § 2C:27-1(c)* by disclosing information did not establish the bribery element of a "benefit" as defined by *N.J. Stat. Ann. § 2C:27-1(a). State v. Scirrotto, 115 N.J. 38, 556 A.2d 1195, 1989 N.J. LEXIS 48 (N.J. 1989).*

**3.** District court did not err by denying defendant's motion for judgment of acquittal on Travel Act charges because fact that defendant as mayor had no actual jurisdiction over school board's decision concerning insurance contract when he accepted bribe from insurance broker was no defense to crime. *United States v. Bencivengo, 749 F.3d 205, 2014 U.S. App. LEXIS 7599 (3d Cir. N.J. 2014),* cert. denied, *135 S. Ct. 236, 190 L. Ed. 2d 178, 2014 U.S. LEXIS 6634 (U.S. 2014).*

**4.** Defendant, a volunteer emergency medical technician who worked for a private, non-profit first-aid squad that provided contractual services to a municipality, was not performing a governmental function within the meaning of this section, and therefore was not a public servant for purposes of the official-misconduct statute, *N.J. Stat. Ann. § 2C:30-2*; accordingly, the trial properly dismissed official misconduct charges against him that were based on his allegedly misappropriating the squad's funds. *State v. Morrison, 227 N.J. 295, 151 A.3d 561, 2016 N.J. LEXIS 1291 (N.J. 2016).*

**5.** Trial court properly denied defendant's motion to dismiss the indictment charging official misconduct and theft by unlawful taking of public documents, in violation of *N.J. Stat. Ann. § 2C:30-2*, because the State presented to the grand jury a prima facie showing with respect to the elements of each offense charged and did not withhold from the

grand jury exculpatory information or a charge regarding a defense that it was compelled by law to present. *State v. Saavedra, 222 N.J. 39, 117 A.3d 1169, 2015 N.J. LEXIS 641 (N.J. 2015).*

**6.** Defendant, a volunteer fireman who called in false alarms and responded to the scene of reported fires, was properly convicted of official misconduct under *N.J. Stat. Ann. § 2C:30-2*, because under *N.J. Stat. Ann. § 2C:27-1*, he was "public servant" even though unpaid, and the gratification he received in participating in the response constituted a "benefit." *State v. Quezada, 402 N.J. Super. 277, 953 A.2d 1206, 2008 N.J. Super. LEXIS 183 (App.Div. 2008).*

**7.** Official misconduct count against defendants was properly dismissed because defendants, the officers of a private, non-profit corporation that provided educational programs for handicapped students placed there at public expense, were not public servants; nothing in the record or in the function and powers granted to the defendants supported the conclusion that the defendants were anything other than private citizens performing services pursuant to government contracts. *State v. Mason, 355 N.J. Super. 296, 810 A.2d 88, 2002 N.J. Super. LEXIS 454 (App.Div. 2002).*

**8.** Trial court properly denied defendant's motion to dismiss an indictment charging her with official misconduct and theft of public documents because case law precedent entitled Quinlan did not decriminalize her conduct of taking her employer's records to support her civil discrimination suit, the State presented a prima facie case to support the indictment, and defendant could raise Quinlan at trial to negate the state of mind requirements of the charges crimes as an affirmative defense. *State v. Saavedra, 433 N.J. Super. 501, 81 A.3d 693, 2013 N.J. Super. LEXIS 185 (App.Div. 2013),* aff'd, *222 N.J. 39, 117 A.3d 1169, 2015 N.J. LEXIS 641 (N.J. 2015).*

**9.** Where defendant threatened, in conversations with school officials, to make public information regarding the misconduct of other teachers unless given tenure, evidence presented by the state primarily to prove threats and other improper influence in official matters in violation of *N.J. Stat. Ann. § 2C:27-3(a)(2)* was not sufficient to sustain defendant's conviction for bribery in official and political matters in violation of *N.J. Stat. Ann. § 2C:27-2(b)* and *2C:27-2(d)* because defendant's behavior in threatening "harm" as defined by *N.J. Stat. Ann. § 2C:27-1(c)* by disclosing information did not establish the bribery element of a "benefit" as defined by *N.J. Stat. Ann. § 2C:27-1(a). State v. Scirrotto, 115 N.J. 38, 556 A.2d 1195, 1989 N.J. LEXIS 48 (N.J. 1989).*

**10.** District court did not err by denying defendant's motion for judgment of acquittal on Travel Act charges because fact that defendant as mayor had no actual jurisdiction over school board's decision concerning insurance contract when he accepted bribe from insurance broker was no defense to crime. *United States v. Bencivengo, 749 F.3d 205, 2014 U.S. App. LEXIS 7599 (3d Cir. N.J. 2014),* cert. denied, *135 S. Ct. 236, 190 L. Ed. 2d 178, 2014 U.S. LEXIS 6634 (U.S. 2014).*

**11.** Trial court properly denied defendant's motion to dismiss an indictment charging her with official misconduct and theft of public documents because case law precedent entitled Quinlan did not decriminalize her conduct of taking her employer's records to support her civil discrimination suit, the State presented a prima facie case to support the indictment, and defendant could raise Quinlan at trial to negate the state of mind requirements of the charges crimes as an affirmative defense. *State v. Saavedra, 433 N.J. Super. 501, 81 A.3d 693, 2013 N.J. Super. LEXIS 185 (App.Div. 2013),* aff'd, *222 N.J. 39, 117 A.3d 1169, 2015 N.J. LEXIS 641 (N.J. 2015).*

**12.** Defendant, a volunteer emergency medical technician who worked for a private, non-profit first-aid squad that provided contractual services to a municipality, was not performing a governmental function within the meaning of this section, and therefore was not a public servant for purposes of the official-misconduct statute, *N.J. Stat. Ann. § 2C:30-2*; accordingly, the trial properly dismissed official misconduct charges against him that were based on his allegedly misappropriating the squad's funds. *State v. Morrison, 227 N.J. 295, 151 A.3d 561, 2016 N.J. LEXIS 1291 (N.J. 2016).*

**13.** In a suit brought against the New Jersey State Firemen's Association, under the Open Public Records Act (OPRA), *N.J. Stat. Ann. §§ 47:1A-1* to *47:1A-13*, the Association was held to be a public agency whose records were subject to inspection under OPRA as it was an independent State instrumentality created pursuant to state law, *N.J. Stat. Ann. § 43:17-41*, and was the direct recipient of taxes on certain fire insurance premiums, pursuant to *N.J. Stat. Ann. §§*

*54:18-1* and 54:18-2. *Paff v. New Jersey State Firemen's Ass'n, 431 N.J. Super. 278, 69 A.3d 118, 2013 N.J. Super. LEXIS 90 (App.Div. 2013).*

**14.** Defendant, a volunteer fireman who called in false alarms and responded to the scene of reported fires, was properly convicted of official misconduct under *N.J. Stat. Ann. § 2C:30-2*, because under *N.J. Stat. Ann. § 2C:27-1*, he was "public servant" even though unpaid, and the gratification he received in participating in the response constituted a "benefit." *State v. Quezada, 402 N.J. Super. 277, 953 A.2d 1206, 2008 N.J. Super. LEXIS 183 (App.Div. 2008).*

**15.** Trial court properly denied defendant's motion to dismiss the indictment charging official misconduct and theft by unlawful taking of public documents, in violation of *N.J. Stat. Ann. § 2C:30-2*, because the State presented to the grand jury a prima facie showing with respect to the elements of each offense charged and did not withhold from the grand jury exculpatory information or a charge regarding a defense that it was compelled by law to present. *State v. Saavedra, 222 N.J. 39, 117 A.3d 1169, 2015 N.J. LEXIS 641 (N.J. 2015).*

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1. N.J.A.C. 13:19-14.9 (2013), CHAPTER COMPLIANCE AND SAFETY, Denial, suspension, or revocation of provider license; administrative penalties.

2. *N.J.A.C. 13:20-44.17* (2013), CHAPTER ENFORCEMENT SERVICE, Additional violations.

3. N.J.A.C. 13:20-47.18 (2013), CHAPTER ENFORCEMENT SERVICE, Additional violations.

4. *N.J.A.C. 13:23-2.12* (2013), CHAPTER DRIVING SCHOOLS, Denial, suspension or revocation of license.

5. *N.J.A.C. 10A:9-2.8* (2013), CHAPTER CLASSIFICATION PROCESS, Severity of Offense Scale.

LAW REVIEWS & JOURNALS:

1. *7 Seton Hall Const. L.J. 663,* COMMENT: THE LAST LINE OF DEFENSE: A COMPARATIVE ANALYSIS OF UNITED STATES SUPREME COURT AND NEW JERSEY SUPREME COURT APPROACHES TO RACIAL BIAS IN THE IMPOSITION OF THE DEATH PENALTY.

2. *19 Seton Hall Legis. J. 195,* NOTE: HELL BENT ON INTENT: NEW JERSEY BROADENS THE CLASS OF DEATH ELIGIBLE DEFENDANTS.

*** This section is current through New Jersey 217th Second Annual Session, L. 2017, c. 214 and J.R. 18 ***

Title 19. Elections
Subtitle 1. Provisions Applicable to Any Election
Chapter 1. Definitions and Application of Title

**GO TO THE NEW JERSEY ANNOTATED STATUTES ARCHIVE DIRECTORY**

*N.J. Stat. § 19:1-1* (2017)

**First of two versions of this section.**

**§ *19:1-1*. Definitions. [Effective until January 1, 2019]**

As used in this Title:

"Election" means the procedure whereby the electors of this State or any political subdivision thereof elect persons to fill public office or pass on public questions.

"General election" means the annual election to be held on the first Tuesday after the first Monday in November and, where applicable, includes annual school elections held on that date.

"Primary election for the general election" means the procedure whereby the members of a political party in this State or any political subdivision thereof nominate candidates to be voted for at general elections, or elect persons to fill party offices.

"Municipal election" means an election to be held in and for a single municipality only, at regular intervals.

"Special election" means an election which is not provided for by law to be held at stated intervals.

"Any election" includes all primary, general, municipal, school and special elections, as defined herein.

"Municipality" includes any city, town, borough, village, or township.

"School election" means any annual or special election to be held in and for a local or regional school district established pursuant to chapter 8 or chapter 13 of Title 18A of the New Jersey Statutes.

"Public office" includes any office in the government of this State or any of its political subdivisions filled at elections by the electors of the State or political subdivision.

"Public question" includes any question, proposition or referendum required by the legislative or governing body of this State or any of its political subdivisions to be submitted by referendum procedure to the voters of the State or political subdivision for decision at elections.

"Political party" means a party which, at the election held for all of the members of the General Assembly next preceding the holding of any primary election held pursuant to this Title, polled for members of the General Assembly at least 10% of the total vote cast in this State.

"Party office" means the office of delegate or alternate to the national convention of a political party or member of the State, county or municipal committees of a political party.

"Masculine" includes the feminine, and the masculine pronoun wherever used in this Title shall be construed to include the feminine.

"Presidential year" means the year in which electors of President and Vice-President of the United States are voted for at the general election.

"Election district" means the territory within which or for which there is a polling place or room for all voters in the territory to cast their ballots at any election.

"District board" means the district board of registry and election in an election district.

"County board" means the county board of elections in a county.

"Superintendent" means the superintendent of elections in counties wherein the same shall have been appointed.

"Commissioner" means the commissioner of registration in counties.

"File" or "filed" means deposited in the regularly maintained office of the public official wherever said regularly maintained office is designated by statute, ordinance or resolution.

**HISTORY:** Amended 1947, c. 168, § 1; 1948, c. 438, § 1; 1965, c. 213; 1995, c. 278, § 13; 2005, c. 136, § 1, eff. Jan. 1, 2006; 2011, c. 134, § 1, eff. Sept. 26, 2011; 2011, c. 202, § 24, eff. Jan. 17, 2012.

**NOTES:**

Effective Dates:

Section 67 of L. 2005, c. 136 provides: "This act shall take effect on the January 1 next following enactment." Chapter 136, L. 2005, was approved on July 7, 2005.

Amendment Note:

2011 amendment, by Chapter 134, deleted the definition of "Presidential primary election", which read: "'Presidential primary election' means the procedure whereby the members of a political party in this State or any political subdivision thereof elect persons to serve as delegates and alternates to national conventions."

2011 amendment, by Chapter 202, in the definition of "General election", added "and, where applicable, includes annual school elections held on that date."

Cross References:

Definitions relative to voting by mail, see *19:63-2*.

LexisNexis (R) Notes:

OPINIONS OF ATTORNEY GENERAL

**1.** FORMAL OPINION No. 9 -- 1977, *1977 N.J. AG LEXIS 18.*

CASE NOTES

**1.** "Party" is not part of the name of a political party under *N.J. Stat. Ann. § 19:13-4* and 19:1-1. *Democratic-Republican Org. v. Guadagno, 900 F. Supp. 2d 447, 2012 U.S. Dist. LEXIS 145716 (D.N.J. 2012),* aff'd, *700 F.3d 130, 2012 U.S. App. LEXIS 22707 (3d Cir. N.J. 2012).*

**2.** Where the only parties that qualified as political parties under *N.J. Stat. Ann. § 19:1-1* for placement on the upcoming general election ballots were the Democratic Party and the Republican Party, pursuant to *N.J. Stat. Ann. § 19:13-4*, no slogan could contain the terms "Democratic" or "Republican." *Democratic-Republican Org. v. Guadagno, 900 F. Supp. 2d 447, 2012 U.S. Dist. LEXIS 145716 (D.N.J. 2012),* aff'd, *700 F.3d 130, 2012 U.S. App. LEXIS 22707 (3d Cir. N.J. 2012).*

**3.** Limited purpose regional school district was obligated to pay the cost of a special school election to determine a city's proposed withdrawal from the school district, because it was an election held at a time other than the time of the general election, thus bringing it within the ambit of N.J. Stat. Ann. § 19:60-12. *In re December 9, 2014 Special School Election, 439 N.J. Super. 416, 109 A.3d 670, 2015 N.J. Super. LEXIS 32 (App.Div. 2015).*

**4.** There is no legislative intent in *N.J. Stat. Ann. § 40:69A-20* to repeal or modify the provisions of *N.J. Stat. Ann. § 19:1-1*; rather the intention to repeal a prior statute must be manifest, since repeals by implication are not favored. *Seligson v. Bruin, 174 N.J. Super. 60, 415 A.2d 375, 1980 N.J. Super. LEXIS 549 (Law Div. 1980).*

**5.** Borough clerk exceeded the limits of his authority under *N.J. Stat. Ann. § 40:69A-20*, in scheduling the vote on the referendum proposing a change in the form of borough government for the same date as party primary elections; a primary election was a political party election, not a "general or regular municipal election" as defined in *N.J. Stat. Ann. § 19:1-1*, and § *40:69A-20* required a vote on the referendum to be held at a general or regular municipal election or at a special election, nor did the clerk have the authority to include any other questions or candidates on a primary ballot pursuant to *N.J. Stat. Ann. §§ 19:23-23* to *19:23-25*, and *N.J. Stat. Ann. §§ 19:23-30* and 19:23-31. *Seligson v. Bruin, 174 N.J. Super. 60, 415 A.2d 375, 1980 N.J. Super. LEXIS 549 (Law Div. 1980).*

**6.** There is no legislative intent in *N.J. Stat. Ann. § 40:69A-20* to repeal or modify the provisions of *N.J. Stat. Ann. § 19:1-1*; rather the intention to repeal a prior statute must be manifest, since repeals by implication are not favored. *Seligson v. Bruin, 174 N.J. Super. 60, 415 A.2d 375, 1980 N.J. Super. LEXIS 549 (Law Div. 1980).*

**7.** Limited purpose regional school district was obligated to pay the cost of a special school election to determine a city's proposed withdrawal from the school district, because it was an election held at a time other than the time of the general election, thus bringing it within the ambit of N.J. Stat. Ann. § 19:60-12. *In re December 9, 2014 Special School Election, 439 N.J. Super. 416, 109 A.3d 670, 2015 N.J. Super. LEXIS 32 (App.Div. 2015).*

**8.** Trial court abused its discretion by denying a mayoral candidate permanent injunctive relief and declining to order the municipal clerk to print ballots without his name because the ballots were not printed and the time constraints under *N.J. Stat. Ann. § 19:13-16* required relaxation since printing ballots bearing plaintiff's name may potentially result in a voter casting a vote for a candidate no longer pursuing the office, thereby depriving that voter of the opportunity to cast a meaningful vote for another viable candidate. *Regalado v. Curling, 430 N.J. Super. 342, 64 A.3d 589, 2013 N.J. Super. LEXIS 59 (App.Div. 2013).*

**9.** Superior Court of New Jersey, Appellate Division holds that the time constraints set forth in *N.J. Stat. Ann. § 19:13-16* may be relaxed when enforcement of the right of choice in the election process is unreasonably thwarted. *Regalado v. Curling, 430 N.J. Super. 342, 64 A.3d 589, 2013 N.J. Super. LEXIS 59 (App.Div. 2013).*

**10.** Primary election is not a "general or regular municipal election" as defined in *N.J. Stat. Ann. § 19:1-1* because in a primary election only those persons registered or eligible to register as members of a "political party" are entitled to vote under N.J. Stat. Ann. § 19:23-45. *Seligson v. Bruin, 174 N.J. Super. 60, 415 A.2d 375, 1980 N.J. Super. LEXIS 549 (Law Div. 1980).*

**11.** Borough clerk exceeded the limits of his authority under *N.J. Stat. Ann. § 40:69A-20*, in scheduling the vote on the referendum proposing a change in the form of borough government for the same date as party primary elections; a primary election was a political party election, not a "general or regular municipal election" as defined in *N.J. Stat. Ann. § 19:1-1*, and § *40:69A-20* required a vote on the referendum to be held at a general or regular municipal election or at a

special election, nor did the clerk have the authority to include any other questions or candidates on a primary ballot pursuant to *N.J. Stat. Ann. §§ 19:23-23* to *19:23-25*, and *N.J. Stat. Ann. §§ 19:23-30* and 19:23-31. *Seligson v. Bruin, 174 N.J. Super. 60, 415 A.2d 375, 1980 N.J. Super. LEXIS 549 (Law Div. 1980).*

**12.** There is no legislative intent in *N.J. Stat. Ann. § 40:69A-20* to repeal or modify the provisions of *N.J. Stat. Ann. § 19:1-1*; rather the intention to repeal a prior statute must be manifest, since repeals by implication are not favored. *Seligson v. Bruin, 174 N.J. Super. 60, 415 A.2d 375, 1980 N.J. Super. LEXIS 549 (Law Div. 1980).*

**13.** *N.J. Stat. Ann. § 19:1-1* defines certain terms used in the election statutes and "(a)s used in this title;" therefore, it applies unless expressly indicated to the contrary by the language of a particular section, throughout all of the sections and subsections of the election statutes. *Seligson v. Bruin, 174 N.J. Super. 60, 415 A.2d 375, 1980 N.J. Super. LEXIS 549 (Law Div. 1980).*

**14.** Trial court abused its discretion by denying a mayoral candidate permanent injunctive relief and declining to order the municipal clerk to print ballots without his name because the ballots were not printed and the time constraints under *N.J. Stat. Ann. § 19:13-16* required relaxation since printing ballots bearing plaintiff's name may potentially result in a voter casting a vote for a candidate no longer pursuing the office, thereby depriving that voter of the opportunity to cast a meaningful vote for another viable candidate. *Regalado v. Curling, 430 N.J. Super. 342, 64 A.3d 589, 2013 N.J. Super. LEXIS 59 (App.Div. 2013).*

**15.** Superior Court of New Jersey, Appellate Division holds that the time constraints set forth in *N.J. Stat. Ann. § 19:13-16* may be relaxed when enforcement of the right of choice in the election process is unreasonably thwarted. *Regalado v. Curling, 430 N.J. Super. 342, 64 A.3d 589, 2013 N.J. Super. LEXIS 59 (App.Div. 2013).*

**16.** "Party" is not part of the name of a political party under *N.J. Stat. Ann. § 19:13-4* and 19:1-1. *Democratic-Republican Org. v. Guadagno, 900 F. Supp. 2d 447, 2012 U.S. Dist. LEXIS 145716 (D.N.J. 2012),* aff'd, *700 F.3d 130, 2012 U.S. App. LEXIS 22707 (3d Cir. N.J. 2012).*

**17.** Where the only parties that qualified as political parties under *N.J. Stat. Ann. § 19:1-1* for placement on the upcoming general election ballots were the Democratic Party and the Republican Party, pursuant to *N.J. Stat. Ann. § 19:13-4*, no slogan could contain the terms "Democratic" or "Republican." *Democratic-Republican Org. v. Guadagno, 900 F. Supp. 2d 447, 2012 U.S. Dist. LEXIS 145716 (D.N.J. 2012),* aff'd, *700 F.3d 130, 2012 U.S. App. LEXIS 22707 (3d Cir. N.J. 2012).*

**18.** *N.J. Stat. Ann. § 19:1-1* defines "political party" as a party which, at the election held for all of the members of the New Jersey General Assembly next preceding the holding of any primary election held pursuant to N.J. Stat. Ann. tit. 19, polled for members of the New Jersey General Assembly at least 10 percent of the total vote cast in *New Jersey. Council of Alternative Political Parties v. State, 344 N.J. Super. 225, 781 A.2d 1041, 2001 N.J. Super. LEXIS 356 (App.Div. 2001).*

Related Statutes & Rules:

ADMINISTRATIVE CODE:

*N.J.A.C. 13:69-7.2* (2013), CHAPTER GENERAL PROVISIONS, Definitions.

LAW REVIEWS & JOURNALS:

*41 Seton Hall L. Rev. 1111*, COMMENT: Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture.