SUPPLEMENTAL REPORT

OF THE

SUPREME COURT COMMITTEE

ON

CRIMINAL PRACTICE

2017 – 2019 TERM

JANUARY 26, 2018

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I. Rule Amendments Recommended for Adoption

A. Waived Juvenile Defendants

1. Background

The Committee is proposing amendments to Rules 3:25-4 and 3:4-1 to address juvenile defendants waived to adult status pursuant to the Order of the Supreme Court issued December 6, 2016, which relaxed and supplemented the Part III and Part V Court Rules for development of conforming rule amendments.

The Supreme Court in its Order dated December 6, 2016 stated in pertinent part:

> WHEREAS the Criminal Justice Reform Law (P.L. 2014, c. 31) will take effect on January 1, 2017, which substantially reforms New Jersey's system of pretrial release, and which specifically provides for the adoption of Rules of Court to implement the Criminal Justice Reform Law; and …
>
> WHEREAS it is anticipated that juvenile defendants waived to adult status must be conferred the same benefits that accrue to adult defendants who fall within the class of eligible defendants as defined under the Criminal Justice Reform Law…
>
> IT IS ORDERED pursuant to N.J. Const. (1947), Art. VI, §2, par.3, that effective January 1, 2017, and until further order…
>
> (2) Rule 5:22-2(a) is supplemented so as to include the requirement to file a proposed complaint-warrant or complaint-summons with the motion papers to waive a juvenile to adult court.
>
> (3) Rule 3:25-4(a) … are supplemented so as to include juvenile defendants within the categories of 'defendant' and 'eligible defendant' when the juvenile defendant's complaint is transferred to adult status and the juvenile defendant is remanded to a juvenile facility, jail or other detention facility.

2. Report of the Joint Working Group on Waived Juvenile Defendants and Speedy Trial

To ensure consistency in the rule amendments concerning the waiver of jurisdiction by the Family Part to the Criminal Court, a joint working group was formed with members from the Criminal Practice Committee and the Family Practice Committee.

The Working Group centered its discussions on the following:

1. Whether rulemaking can be used to incorporate waived juveniles since the statute defines an "eligible defendant" as a person for whom a complaint-warrant is issued for an initial charge involving an indictable offense or certain disorderly persons offenses involving domestic violence. N.J.S.A. 2A:162-15.

2. Whether any proposed amendments would be considered a substantive change, so as to be within the ambit of the Legislature, or a procedural change, for which the Court would then have the authority to make the change. See Winberry v. Salisbury, 5 N.J. 240 (1950).

3. Identifying issues regarding the interplay between the Criminal Justice Reform Law and the Juvenile Waiver structure.

The Working Group concluded that a juvenile waived to adult court would not be subject to the Criminal Justice Reform Act until after the waiver decision and the issuance of a complaint-warrant. This analysis was based on the waiver statutes as amended in 2016 (after the Criminal Justice Reform Law had been passed but before becoming effective), the current Family Court Rules regarding juvenile detention, and the Speedy Trial portions of the Criminal Justice Reform Law. However, the Working Group also recommended that the Family Court Rules be amended to establish a time frame for the issuance of a complaint-warrant after waiver. *Note*: It was the understanding of the Working Group that

the Family Practice Committee was at that time working on the amendment, however, because it was a Part V Rule, its recommendations would be proposed in a separate report.

The Working Group focused on involuntary waivers of juvenile offenders enacted by L. 2015, c. 89, which became effective on March 1, 2016, and is *codified* at N.J.S.A. 2A:4A-26.1.[1] That law substantively changed several key factors of the juvenile waiver process. Under the former waiver statute, if a juvenile was fourteen years old and less than eighteen years old at the time of the offense, and where probable cause existed that the juvenile committed an enumerated offense,[2] then a prosecutor could, without the consent of the juvenile, move to waive jurisdiction over the case and refer the case from the Chancery Division, Family Part, to the Law Division. (See L. 2007, c. 341, *codified* at N.J.S.A. 2A:4A-26 and since repealed by L. 2015, c. 89).

Under the new statutory structure, a juvenile must now be at least fifteen years old and there must be probable cause established that he or she committed an offense eligible for waiver in order to have jurisdiction transferred into adult court. N.J.S.A. 2A:4A-26.1c. A major substantive change wrought by the new legislation codified a new standard of judicial review of a prosecutor's decision to seek involuntary waiver of a juvenile. N.J.S.A. 2A:4A-26.1c(3).

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[1] L. 2015, c. 89 was enacted on August 10, 2015, with an "effective date of the first day of the seventh month following enactment."

[2] The offenses for which a juvenile could be waived to adult court included criminal homicide other than death by auto, strict liability for drug induced deaths, robbery which would constitute a crime of the first degree, carjacking, aggravated sexual assault, sexual assault, aggravated assault which would constitute a crime of the second degree, kidnapping, aggravated arson, or gang criminality. N.J.S.A. 2A:4A-26a(2).

The most relevant amendment that impacted the analysis of the Working Group involves N.J.S.A. 2A:4A-36a, which requires the court waiving jurisdiction of a juvenile to adult criminal court to determine if a juvenile should be detained and, if so, in what facility. The text of that statute differs from the pretrial detention model, which the Working Group considered important. The Working Group's premise is that a juvenile detention decision in Family Court is conceptually different than a pretrial detention decision after waiver of jurisdiction. R. 5:21-5 establishes the standard for juvenile detention decisions in Family Court. The standards are different than those for the pretrial detention decision in adult Criminal Court.

For example, a detention decision in the juvenile system is based upon the need for rehabilitation in the appropriate case. The pretrial detention decision is regulatory regarding the proceedings in Criminal Court. Also, there is no system of presumptions in the juvenile detention model, unlike the Criminal Justice Reform model.

The Working Group believed the statutes are harmonized in the manner in which a juvenile case would track, which is as follows: A juvenile delinquency complaint would be filed. Pursuant to N.J.S.A. 2A:4A-26.1, if the State seeks involuntary waiver and without consent of the juvenile, the State shall file a motion, and a written statement of reasons in support of waiver, within 60 days after the receipt of the complaint, which time may be extended for good cause shown.

The court hearing the waiver request would consider the application and decide if waiver is appropriate. (It was the Working Group's understanding that, in most instances, the ultimate waiver litigation exceeds three months.) If waiver was appropriate and

ordered, the Court waiving jurisdiction would determine if detention is appropriate, and in what facility, pursuant to the standards of R. 5:21-5 and N.J.S.A. 2A:4A-36a.

Upon waiver of a case involving a juvenile to the appropriate court, the matter would then proceed as if it had originated in that court. Upon issuance of a complaint-warrant, the juvenile defendant would be considered an "eligible defendant" and would now be subject to the Criminal Justice Reform Law. A first appearance would be held, and if the State sought continued detention of the juvenile, the State would have to file a motion for Pretrial Detention. (The Working Group believes it is reasonable to assume that it would be a very rare instance where the State would seek waiver of a juvenile who was not also a candidate for pretrial detention upon waiver.)

Upon the filing of the motion for Pretrial Detention, the Criminal Court would consider pretrial detention, pursuant to the standards of the Criminal Justice Reform Law. If pretrial detention were to be ordered for a waived juvenile, he or she would fall under the same speedy trial deadlines as any other eligible defendant under the law.

There is no dispute the juvenile would be entitled to jail credit for pre-waiver detention. However, the time in juvenile detention should not count towards Criminal Justice Reform Law speedy trial requirements for the time to file an indictment for several reasons.

First, the Criminal Justice Reform Law specifically limits its reach to "eligible defendants." N.J.S.A. 2A:162-15. A juvenile cannot become an eligible defendant until after waiver, i.e., issuance of the complaint-warrant. The Criminal Justice Reform Law

does not carve out juvenile offenders who are waived. Cf. N.J.S.A. 2C:11-3b(5) (Juvenile waived to adult court is not subject to Life Without Parole upon conviction of murder).

Second, most waiver decisions would be expected to occur after the 90-day time frame for an indictment to be filed under the Criminal Justice Reform Act. N.J.S.A. 2A:162-22a(1)(a). Even allowing for the permitted statutory extension period of an additional 45 days, the result would be a truncation of the time the State may seek an indictment.

It should also be noted that even if the pre-waiver time of detention were subject to inclusion, a vast majority of the time might be considered excludable time as it would occur during the motion practice regarding waiver itself, or for good cause. N.J.S.A. 2A:162-22b(1).

The Working Group recognized the potential that a juvenile codefendant might spend more time incarcerated pending indictment than an adult codefendant who might be charged at the same time. However, any change regarding the statutory speedy trial limits for waived juveniles might fall within the orbit of substantive law, and thus, similar to the path evidenced in the Criminal Practice Committee's Report on the Implementation of Criminal Justice Reform, the Working Group advanced with caution.

The Working Group recommended that the Family Practice Committee amend the appropriate Family Court Rule(s) regarding waiver to include a fixed time frame for the issuance of a complaint-warrant after the court grants waiver.

Since an "eligible defendant" under R. 3:25-4 is defined as a person for whom a complaint-warrant was issued and who is detained under R. 3:4A, the Working Group believed this definition did not need to be amended to apply to a waived juvenile defendant.

The Working Group recommended that references to "commitment to county jail" should be amended where appropriate so as to make clear that the place of commitment for a juvenile waived to adult court pending trial remains governed by N.J.S.A. 2A:4A-36a and N.J.S.A. 2A:4A-37. Thus, R. 3:4-1(b) should be amended to include that the Court should order a juvenile who has been waived to adult criminal court be held at the appropriate juvenile detention facility.

R. 3:25-4(b)(1) should also be amended to make clear that the speedy trial calculation for indictment, as it relates to a juvenile defendant detained following waiver of jurisdiction by the Family Part, begins following issuance of the complaint-warrant after the juvenile has been waived to adult criminal court. Changes are also suggested in paragraph (a) and subparagraphs (b)(2), (c)(1), (c)(2), (d)(1) and (d)(3) to reference "juvenile detention facility" for juvenile defendants who are incarcerated post-waiver pursuant to N.J.S.A. 2A:4A-36a.

3. Discussion of the Committee

At the outset, the Committee agreed with the analysis and conclusions of the Working Group. A juvenile defendant who has been waived to the criminal court becomes an "eligible defendant" following issuance of the complaint-warrant, and as the Supreme Court noted in its December 6, 2016 Order, must be conferred the "same benefits that

accrue to adult defendants who fall within the class of eligible defendants as defined under the Criminal Justice Reform (CJR) Law."

The Committee identified the same concerns as the Working Group that a waived juvenile could spend more time in detention than a detained adult defendant because of the permissible timeframes before the waiver decision in the Family Part. It also sought to balance this concern within the parameters of the Criminal Justice Reform Law. However, the Committee concluded that any efforts to account for the time the juvenile was detained prior to the waiver decision would have to be addressed by the Legislature, since any such changes, although well-intentioned, would be substantive. Thus, the time spent in juvenile detention prior to the issuance of the complaint-warrant cannot count in the calculation of the speedy trial time frames because the Criminal Justice Reform Law specifically mandates that a complaint-warrant must be issued for a defendant to be an "eligible defendant." N.J.S.A. 2A:162-15.

It was also recognized that the fundamental processes for Criminal Justice Reform do not occur in the case of a juvenile who was initially charged on a juvenile delinquency complaint. For example, the linkage of the LiveScan electronic fingerprinting system with the Computerized Criminal History (CCH) System, which is initiated by law enforcement when processing the complaint in the Electronic Court Disposition Reporting (eCDR) system, does not occur when a juvenile is arrested. This linkage with LiveScan and the complaint also initiates the preliminary Public Safety Assessment (PSA), which in turn pulls the defendant's criminal history and case records from various computerized databases.

Therefore, it is essential for the complaint-warrant to be issued as soon as possible following the waiver decision. It was the consensus of the Committee that the filing of the complaint-warrant can be done quickly with respect to juvenile waiver cases. Some members believed that requiring the filing of the complaint-warrant no later than the next day would be more than enough time for the complaint-warrant to be processed in the eCDR system. Other members preferred a shorter time frame noting that the complaint should have been prepared prior to the signing of the waiver order and thus, in their view, processing the complaint in the eCDR system should be done contemporaneously following the waiver decision. Those members referred to the December 6, 2016 Supreme Court Order, which specifically required that a proposed complaint-warrant or complaint-summons be included in the motion papers to waive the jurisdiction of the juvenile defendant's case to the criminal court.

It was also recognized that once the complaint-warrant was issued, the juvenile case should proceed in the same manner as an adult defendant charged on a complaint-warrant in the criminal court. The centralized first appearance would be held for the judge to determine conditions of pretrial release, unless the prosecutor sought continued detention of the juvenile. In those instances, the prosecutor would need to file a motion for pretrial detention in accordance with R. 3:4A, notwithstanding the prior detention decision made by the family court. Members acknowledged that it would be rare for the State not to move to continue the pretrial detention for a juvenile defendant whose case was waived to criminal court because of the nature of the waivable offenses. See footnote 2, supra.

4. Proposed Amendments to R. 3:25-4 and R. 3:4-1

(a) R. 3:25-4 Speedy Trial for Certain Defendants

For adult defendants, the 90 days speedy trial time period to return the indictment commences following the date of the defendant's commitment to the county jail. R. 3:25-4(b)(1). For juvenile defendants who have been detained following the waiver decision, the Committee is proposing that this time period begin following issuance of the complaint-warrant. Specifically, the following language is proposed in paragraph (b)(1), "For a defendant who has been detained following waiver of jurisdiction by the Family Part, the time shall commence from the date following the issuance of a complaint-warrant after waiver has been ordered."

Because this Rule only refers to defendants detained in county jail, the Committee also recommends including "juvenile detention facility" to address waived juvenile defendants who are detained in those facilities. The proposed amendments are contained in paragraph (a), subparagraphs (b)(2), (c)(1), (c)(2), (d)(1), and (d)(3) in R. 3:25-4.

(b) R. 3:4-1 Procedure After Arrest

Similar amendments are proposed for paragraph (b) of R. 3:4-1 to specify that following waiver of jurisdiction by the Family Part, the juvenile's place of commitment should be continued as previously determined by that court, unless otherwise ordered, in accordance with N.J.S.A. 2A:4A-36a.

The proposed amendments to R. 3:25-4 and R. 3:4-1 follow.

3:25-4. Speedy Trial for Certain Defendants

(a) Eligible Defendant. For purposes of this rule, the term "defendant" or "eligible defendant" shall mean a person for whom a complaint-warrant or warrant on indictment was issued for an initial charge involving an indictable offense or a disorderly persons offense and who: (1) is detained pursuant to R. 3:4A or R. 3:26-2(d)(1), or (2) is detained in jail or a juvenile detention facility due to an inability to post monetary bail pursuant to R. 3:26. A defendant who is the subject of a warrant on indictment is an eligible defendant pursuant to N.J.S.A. 2A:162-15 et seq. This rule only applies to an eligible defendant who is arrested on or after January 1, 2017, regardless of whether the crime or offense related to the arrest was allegedly committed before, on, or after January 1, 2017. For defendants who are detained only for a disorderly persons offense, the limits on pretrial incarceration are governed by R. 7:8-11.

(b) On Failure to Indict.

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

For a defendant who has been detained following waiver of jurisdiction by the Family Part, the time shall commence from the date following the issuance of a complaint-warrant after waiver has been ordered.

(2) Motion by the Prosecutor to Extend Time for Failure to Indict. If the eligible defendant is not indicted within the time frame calculated pursuant to subparagraph (b)(1) of this rule, the eligible defendant shall be released from jail or a juvenile detention facility unless on motion of the prosecutor, the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result from the defendant's release from custody, so that no appropriate conditions for the defendant's release could reasonably address that risk, and also finds that the failure to indict the defendant in accordance with the time requirement set forth in this rule was not due to unreasonable delay by the prosecutor. The prosecutor must file a notice of motion accompanied by a brief with an explanation of the reasons for the delay that justify the extension of time for return of the indictment. The motion to extend the time to return an indictment shall be filed with the court and served upon the defendant and defense counsel by the prosecutor no later than 15 calendar days prior to the expiration of the 90 day time frame, adjusted for excludable time, calculated pursuant to paragraph (b)(1) of this rule. Upon good cause shown this deadline may be relaxed.

(3) … no change

(4) … no change

(A) … no change

(B) … no change

(C) … no change

(c) On Failure to Commence Trial.

(1) Time Period. Except as provided in paragraph (d), an eligible defendant who has been indicted shall not remain detained in jail or a juvenile detention facility for more than 180 days on that charge following the return or unsealing of the indictment or the detention of the eligible defendant pursuant to R. 3:26-2(d)(1), whichever is later, not counting excludable time as set forth in paragraph (i) of this rule, before commencement of the trial. For an eligible defendant whose most serious charge is a disorderly persons offense, the time period shall begin with the defendant's initial detention. See R. 7:8-11.

(2) Motion by the Prosecutor. If the trial does not commence within the time frame calculated pursuant to paragraph (c)(1) of this rule, the eligible defendant shall be released from jail or a juvenile detention facility unless, on motion of the prosecutor, the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result from the defendant's release from custody, so that no appropriate conditions for the defendant's release could reasonably address that risk, and also finds that the failure to commence trial in accordance with the time requirement set forth in this rule was not due to unreasonable delay by the prosecutor. The prosecutor must file a notice of motion accompanied by a brief explaining the reasons for the delay that justify the extension of time to commence trial. The motion to extend time to commence trial shall be filed with the court and served upon the defendant and defense counsel by the prosecutor no later than 15 calendar days prior to the date of the expiration of the 180 day time frame, adjusted for excludable time, calculated pursuant to subparagraph (c)(1) of this rule. Upon good cause shown this deadline may be relaxed.

(3) … no change

(4) … no change

(d) Period to Readiness of Prosecutor for Trial.

(1) An eligible defendant shall be released from jail or a juvenile detention facility upon conditions set by the court, after a release hearing if, excluding any delays attributable to the defendant, two years after the court's issuance of the pretrial detention order pursuant to R. 3:4A or R. 3:26-2(d)(1) for the eligible defendant or after the detention of the eligible defendant in jail due to an inability to post monetary bail as a condition of release, the prosecutor is not ready to proceed to voir dire or to opening argument, or to proceed to the hearing of any motions that had been reserved for the time of trial. In the case of an eligible defendant whose most serious charge is a fourth-degree offense, the maximum time period for the defendant's incarceration shall be 18 months. In the case of an eligible defendant whose most serious charge is a disorderly persons offense, the maximum time period for the defendant's incarceration shall be six months. See R. 7:8-11.

(2) … no change

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

(e) … no change

(f) … no change

(g) … no change

(h) … no change

(i) … no change

(j) … no change

Note: Adopted August 30, 2016 to be effective January 1, 2017; paragraphs (a), (c)(1), and (d)(1) amended November 14, 2016 to be effective January 1, 2017; paragraphs (a), (b)(4)(C), (c)(1), (c)(4)(C), and (d)(1) amended December 13, 2016 to be effective January 1, 2017[.]; paragraph (a) amended July 28, 2017 to be effective September 1, 2017; paragraphs (a), (b)(1), (b)(2), (c)(1), (c)(2), (d)(1), and (d)(3) amended _____ to be effective_____.

3:4-1. Procedure After Arrest

(a) … no change

(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. For a defendant for whom a Complaint-Warrant has been issued following waiver of jurisdiction by the Family Part, the place of commitment should be continued as previously determined by the Court waiving jurisdiction, unless otherwise ordered, in accordance with N.J.S.A. 2A:4A-36a.

(c) … no change

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[.]; paragraph (b) amended _____ to be effective_____.

B. First Appearances and Pretrial Detention Hearings – Timing and Discovery

The Committee is proposing amendments to R. 3:4-2(a)(1) and R. 3:4A to harmonize conflicts between the Court Rules and the Criminal Justice Reform (CRJ) Law regarding scheduling for the initial pretrial detention hearing and the first appearance. The Committee is also proposing that R. 3:4-2 specify time frames for the prosecutor to provide discovery to the defendant.

The Committee reviewed these rules due to concerns that the scheduling provisions of the pretrial detention court rule (R. 3:4A) are not consistent with the time frames in the statute (N.J.S.A. 2A:162-19d(1)).

N.J.S.A. 2A:162-19d(1) provides in relevant part:

> [T]he pretrial detention hearing shall be held no later than the eligible defendant's first appearance unless the eligible defendant, or the prosecutor, seeks a continuance. If a prosecutor files a motion for pretrial detention after the eligible defendant's first appearance has taken place or if no first appearance is required, the court shall schedule the pretrial detention hearing to take place within three working days of the date on which the prosecutor's motions was filed, unless the prosecutor or the eligible defendant seeks a continuance. [emphasis added.]

In contrast R. 3:4A(b)(1) provides:

> A pretrial detention hearing shall be held before a Superior Court judge no later than the defendant's first appearance unless the defendant or the prosecutor seeks a continuance or the prosecutor files a motion at or after the first appearance. If the prosecutor files a motion at or subsequent to the defendant's first appearance the pretrial detention hearing shall be held within three working days of the date of the prosecutor's motion unless the defendant or prosecutor seeks a continuance.
> [emphasis added.]

From the outset, the Committee agreed that the statute only allows for the three-day window if the motion is filed after the first appearance. If the motion is filed prior to the first appearance, the statute provides that the detention hearing must occur no later than the first appearance, unless a continuance is sought by either party.

It was acknowledged that, in practice, detention hearings were routinely being scheduled three days after the first appearance, regardless of whether the motion had been filed beforehand and even in the absence of a request for a continuance. Detention hearings were not, as a matter of course, being held on the day of the first appearance, even if the parties were ready to proceed.

After a lengthy discussion, the Committee explored whether the Court Rules could be amended to change the timing of the first appearance when a pretrial detention motion has been filed before the first appearance is scheduled to occur. It was asserted that there is no advantage for a defendant who is the subject of a pretrial detention motion to have the first appearance take place at the earliest opportunity – i.e., within the same timeframe as the pretrial release determination – since, barring the motion being withdrawn, pretrial release will not occur at that time as, per the CJR Law, the defendant has to remain in jail until the detention hearing. N.J.S.A. 2A:162-19d(2). Also, completion of the indigency determination (5A form) and assignment of counsel is not dependent on when the first appearance is held.

Current R. 3:4-2(a)(1) requires the first appearance to "occur within 48 hours of a defendant's commitment to the county jail." It was acknowledged that this provision was originally recommended by the Committee as a means to have the first appearance

coincide with the timing of the pretrial release determination, which must be made within 48 hours after the eligible defendant's commitment to the jail. N.J.S.A. 2A:162-16b(1). However, the statute does not specify the timing of the first appearance, thus allowing the timing to be set by Court Rule. The Committee recommends that the timing be adjusted so that the Court Rules are consistent with the statute and accurately reflect the practices that have developed since the CJR Law took effect. Under the proposal, in cases when a pretrial detention motion has been filed before a first appearance has been held, the first appearance would take place on the date scheduled for the pretrial detention hearing. Since such a hearing can only be conducted by a Superior Court judge, the first appearance would also be conducted by a Superior Court judge. The pretrial detention hearing could be held following that court event, if the parties did not request a continuance.

1. Proposed Amendments to R. 3:4-2 First Appearances After Filing Complaint

Paragraph (a)

To conform with the statutory requirements, the Committee is proposing amendments to bifurcate the first appearance. Specifically the Committee recommends amendments to paragraph (a)(1) in R. 3:4-2 to distinguish the two pathways for eligible defendants:

(1) Where the prosecutor has not filed a motion for detention, the first appearance would continue to occur within 48 hours of a defendant's commitment to the county jail.

(2) Where the prosecutor files a motion for pretrial detention prior to the first appearance, the first appearance would be required to occur before a Superior Court Judge within three working days of the date of the filing of the motion.

To address instances when the prosecutor withdraws the motion for pretrial detention before the Superior Court judge conducts the first appearance, the Committee recommends that the first appearance be held no later than the next business day by a Superior Court judge or judge designated by the Chief Justice. This provision is intended to eliminate unnecessary delays in the release of a defendant who is no longer the subject of a motion for detention, and, as such, is entitled to a pretrial release decision. The proposed language also codifies the July 18, 2017, Supreme Court Order, which supplemented R. 3:26-2 to permit designated municipal court judges to set initial conditions of release when a motion for pretrial detention is withdrawn after the first appearance was conducted.

The Committee also recommends deletion of the provision in the last sentence of paragraph (a)(1) prohibiting a designated municipal court judge from setting pretrial release conditions for a person charged with homicide when a motion for pretrial detention is filed. This exception was originally recommended to conform with similar language included in R. 3:26-2(a). See *Supplemental Report of the Supreme Court Committee on Criminal Practice Recommended Court Rules to Implement Bail Reform* Law (October 26, 2016), 222 N.J.L.J. 3473, 3558 (2016).

In light of the proposed revisions to bifurcate the first appearance, this exception for persons charged with homicide is no longer necessary. It was also asserted that there is no policy reason that a designated municipal court judge cannot set conditions for a defendant charged with homicide if the prosecutor does not file a motion for pretrial detention.

Similar amendments are also proposed for R. 3:26-2(a) in the discussion on amendments to that Rule in this Report.

Paragraph (b)

Consistent with the amendments proposed in paragraph (a), this paragraph was revised to include that "Superior Court Judges" can preside over the centralized first appearance for indictable offenses, in addition to municipal court judges designated by the Chief Justice.

Paragraph (c)

In State v. Robinson, 229 N.J. 44, 52 (2017), the Supreme Court revised R. 3:4-2(c)(1)(A) and (B), effective May 10, 2017, to "clarify and reframe the *Rule* to help ensure that it strikes the proper balance between two important concerns: a defendant's liberty interest and the State's ability to detain high-risk defendants before trial." Current paragraph (c)(1)(A) governs the scope of discovery when the prosecutor is not seeking pretrial detention, and paragraph (c)(1)(B) addresses the discovery requirements when pretrial detention is sought.

Because the current discovery provisions are contained in paragraph (c), which governs the procedures for indictable offenses, the Committee is proposing that the discovery obligations be included in a stand-alone paragraph. The justification is that detention motions are permitted for certain non-indictable offenses, i.e., disorderly persons offenses involving domestic violence. Thus, the Committee is proposing that the discovery obligations be included in a new paragraph (c), with two subparagraphs setting forth the

current discovery requirements. Current paragraphs (c) through (f) would be redesignated (d) through (g) respectively in the proposed rule.

Proposed paragraph (c)(1) retains the current discovery obligations in paragraph (c)(1)(A) for defendants that are not subject to pretrial detention. The only revision proposed for this paragraph is to require that the prosecutor provide the discovery to the defendant "at or before the first appearance."

Proposed paragraph (c)(2) retains the current discovery requirements in paragraph (c)(1)(B) when the prosecutor is seeking pretrial detention. However, the Committee recommends that this provision specify that the prosecutor provide discovery to the defendant "no later than 24 hours" before the detention hearing.

Members opposed expressed a preference for a quicker turnaround to provide defense counsel more time to review the discovery. Their alternative, which represents the minority view, requires the prosecutor to provide the discovery "no later than 48 hours" before the detention hearing.

Members in the majority who support the 24-hour time frame were of the view that 48 hours would be impractical. The concern was that prosecutors may not be able to obtain and review certain discovery materials that far in advance. As a result, those members thought this could lead to more requests for continuances that could result in detention hearings being delayed.

Therefore, the Committee recommends that paragraph (c)(2) require prosecutors to provide the discovery "no later than 24 hours" prior to the detention hearing.

Paragraph (d)

Conforming amendments are also proposed in redesignated paragraph (d)(1), which governs first appearances for indictable offenses, to delete the current discovery provisions since those provisions have been moved to new paragraph (c).

Revisions are also recommended in paragraph (d)(9) to specify that conditions of pretrial release should not be set at the first appearance for a defendant charged with an indictable offense, if a motion for pretrial detention has been filed or granted. In light of this revision, paragraph (d)(11), which contains similar language, is unnecessary and is recommended for deletion.

Paragraph (e)

Consistent with the changes in paragraph (d)(9), paragraph (e)(5), which governs first appearances for non-indictable offenses, has been revised to add that conditions of pretrial release should not be set if a motion for pretrial detention has been filed or granted.

Paragraphs (f) and (g)

Former paragraphs (e) and (f) have been redesignated as paragraphs (f) and (g) respectively.

The proposed amendments to R. 3:4-2 follow.

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 and the prosecutor has not filed a motion for pretrial detention, 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, the first appearance shall occur within three working days of the date of the filing of the motion and shall be before a Superior Court Judge. If the motion for pretrial detention is withdrawn prior to the first appearance, then the first appearance shall occur no later than the next business day after the withdrawal of the motion and shall be before a Superior Court judge or a judge designated by the Chief Justice. [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) … no change.

(b) First Appearance; Where Held. All first appearances for indictable offenses shall occur at a centralized location and before a Superior Court Judge or 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) Discovery.

(1) If the prosecutor is not seeking pretrial detention, at or before the first appearance the prosecutor shall provide the defendant with a copy of any available preliminary law enforcement incident report concerning the offense and the affidavit of probable cause.

(2) If the prosecutor is seeking pretrial detention, no later than 24 hours before the detention hearing the prosecutor shall provide the defendant with (A) the discovery listed in subparagraph (1) above, (B) all statements or reports relating to the affidavit of probable cause, (C) all statements or reports relating to additional evidence the State relies on to establish probable cause at the hearing, (D) all statements or reports relating to the factors listed in N.J.S.A. 2A:162-18a(1) that the State advances at the hearing, and (E) all exculpatory evidence.

[(c)] (d) 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 the affidavit of probable cause;

(B) if the prosecutor is seeking pretrial detention, the prosecutor shall provide the defendant with (i) the discovery listed in subsection (A) above, (ii) all statements or reports relating to the affidavit of probable cause, (iii) all statements or reports relating to

additional evidence the State relies on to establish probable cause at the hearing, (iv) all statements or reports relating to the factors listed in N.J.S.A. 2A:162-18(a)(1) that the State advances at the hearing, and (v) all exculpatory evidence.]

(2) … no change

(3) … no change

(4) … no change

(5) … no change

(6) … no change

(7) … no change

(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, unless a motion for pretrial detention has been filed or granted; and,

(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)] (e) 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) … no change

(2) … no change

(3) … no change

(4) … no change

(5) set conditions of pretrial release as provided in Rule 3:26 if the defendant has been committed to the county jail, unless a motion for pretrial detention has been filed or granted.

[(e)] (f) 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)] (g) Waiver of First Appearance By Written Statement. Unless otherwise ordered by the court, a defendant charged on a complaint-summons (CDR-1)

for an indictable offense and who is represented by an attorney and is not incarcerated may waive the first appearance by electronically 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) … no change

(2) … no change

(3) … no change

(4) … no change

(5) … no change

(6) … no change

(7) … no change

… no change

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; subparagraph (c)(1) amended May 10, 2017 to be effective immediately; paragraph (f) amended July

28, 2017 to be effective September 1, 2017[.]; paragraphs (a)(1) and (b) amended, former paragraph (c) amended, caption added, and subparagraphs (1) and (2) adopted, portions of former paragraph (c) redesignated paragraph (d), subparagraphs (d)(1) and (d)(9) amended, and subparagraph (d)(11) deleted, former paragraph (d) redesignated paragraph (e) and subparagraph (e)(5) amended, former paragraphs (e) and (f) redesignated as paragraphs (f) and (g) _____ to be effective _____.

2. Proposed Amendments to R. 3:4A Pretrial Detention

Paragraph (b)(1)

Consistent with the proposed recommendations as to R. 3:4-2, the Committee is proposing an amendment to R. 3:4A(b)(1) to conform with N.J.S.A. 2A:162-19 regarding the timing of the detention hearing. Specifically, paragraph (b)(1) has been revised to specify that if the prosecutor files the motion for pretrial detention "after" the first appearance, the pretrial detention hearing will be held within three working days of the date of the prosecutor's motion, unless one of the parties seeks a continuance. Otherwise, the pretrial detention hearing will be held no later than the first appearance, unless either party seeks a continuance.

Paragraph (b)(2)

Current paragraph (b)(2) includes a cross reference to R. 3:4-2(c)(1)(B), which sets forth the discovery requirements when the prosecutor is seeking pretrial detention. Because the Committee is proposing that the discovery requirements be contained in a new paragraph (c), the cross reference has been amended to cite to paragraph (c)(2) in R. 3:4-2.

Paragraph (b)(5)

R. 3:4A(b)(5) provides that the court may consider a recommendation by the Pretrial Services Program that the defendant's release is not recommended "(i.e., a determination that 'release not recommended or if released, maximum conditions')" as prima facie evidence sufficient to overcome the presumption of release.

In practice, consideration of the "release not recommended, if released, released on maximum conditions" became a two-part analysis: (1) detention or (2) if released, release the defendant on home detention and electronic monitoring. However, the intention was not to "convey a recommendation that equally valued the options of detention or release upon stringent conditions," i.e. electronic monitoring and home detention. State v. C.W., 449 N.J. Super. 231, 235-236 (App. Div. 2017) (referring to the March 2, 2017 guidance memorandum issued by the Acting Administrative Director of the Courts). Instead, the two-part format was meant to convey that detention was the preferred option, but if the trial court rejected that recommendation, then stringent conditions of release alternatively should be imposed. Ibid.

To eliminate confusion regarding the use of maximum conditions, such as electronic monitoring, as an alternative to pretrial detention, the Decision Making Framework and Pretrial Services recommendation were amended by the Supreme Court to instead simply state "No release recommended" for the highest-risk defendants. Id. at 240, n. 10.

To conform with these changes, the Committee recommends the deletion of "(i.e., a determination that "release not recommended or if released, maximum conditions")" in paragraph (b)(5).

The proposed amendments to R. 3:4A follow.

3:4A. Pretrial Detention

(a) … no change

(b) Hearing on Motion.

(1) A pretrial detention hearing shall be held before a Superior Court judge no later than the defendant's first appearance unless the defendant or the prosecutor seeks a continuance or the prosecutor files a motion [at or] after the defendant's first appearance. If the prosecutor files a motion [at or subsequent to] after the defendant's first appearance the pretrial detention hearing shall be held within three working days of the date of the prosecutor's motion unless the defendant or prosecutor seek a continuance. Except for good cause, a continuance on motion of the defendant may not exceed five days, not including any intermediate Saturday, Sunday or holiday. Except for good cause, a continuance on motion of the prosecutor may not exceed three days, not including any intervening Saturday, Sunday or holiday. The Superior Court judge in making the pretrial detention decision may take into account information as set forth in N.J.S.A. 2A:162-20.

(2) The defendant shall have a right to be represented by counsel and, if indigent, to have counsel appointed if he or she cannot afford counsel. The defendant shall be provided discovery pursuant to Rule [3:4-2(c)(1)(B)] 3:4-2(c)(2). The defendant shall be afforded the right to testify, to present witnesses, to cross-examine witnesses who appear at the hearing and to present information by proffer or otherwise. Testimony of the defendant given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but the testimony shall be admissible in proceedings related to

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

(3) … no change

(4) … no change

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

The standard of proof for the rebuttal of the presumption of pretrial release shall be by clear and convincing evidence. The court may consider as prima facie evidence sufficient to overcome the presumption of release a recommendation by the Pretrial

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

(c) … no change

(d) … no change

(e) … no change

Note: Adopted August 30, 2016 to be effective January 1, 2017; paragraph (a) amended July 28, 2017 to be effective September 1, 2017[;] paragraphs (b)(1), (b)(2), and (b)(5) amended to be effective .

C. Release Revocation Proceedings - R. 3:26-2 Authority to Set Conditions of Pretrial Release

In light of the requirements for the exchange of discovery when pretrial detention is sought as defined by the Supreme Court in State v. Robinson, 229 N.J. 44 (2017), and codified in R. 3:4-2(c), effective May 10, 2017, the Committee decided to revisit the requirements for the exchange of discovery when the prosecutor seeks revocation of release. The Committee agreed that the current discovery provision in paragraph (d)(2), which simply states: "The defendant shall be provided all available discovery," is inconsistent with the specific requirements for initial detention hearings. However, there were differing views as to the scope of discovery that should be provided to the defendant for release revocation proceedings.

Specifically, the Committee considered two options for the exchange of discovery before the revocation hearing. Both proposals would require the prosecutor to provide discovery and all exculpatory evidence to the defendant 24 hours before the hearing. It was also acknowledged that the remedies for non-compliance with the discovery requirements would include all those referenced in R. 3:13-3(f), which range from the court entering an order prohibiting the party from introducing in evidence the material not disclosed to granting a continuance for the exchange of such discovery.

The majority position as set forth in the proposed new paragraph (d)(3) in this Rule provides a bifurcated approach as follows:

(1) Where revocation is sought due to the commission of a new crime, the prosecutor must provide "all statements, reports, and exculpatory evidence" required for initial

detention hearings in current R. 3:4-2(c)(1)(B) that would establish probable cause for that new offense.

(2) Where the revocation of release is sought for a violation of any other pretrial release condition, the prosecutor must provide all statements or reports relating to the evidence the State relies on to establish the violation and to the factors listed in N.J.S.A. 2A:162-24[3] that the State advances at the hearing as well as all exculpatory evidence.

Under either scenario, prosecutors would not be required to provide discovery for the underlying offense for which the person was on pretrial release ("Robinson discovery"), unless the State asserts that the nature and circumstances of the prior offense justify release revocation. Members opposed to this approach advanced an alternative that would require the State to provide Robinson discovery relating to the underlying offense unless that discovery had been provided previously in connection with an initial pretrial detention motion.

Members in the majority, who opposed this option, expressed that the purposes and procedures for release revocation and pretrial detention hearings are conceptually distinct

[3] N.J.S.A. 2A:162-24, which governs violations of conditions of release, provides:

> Upon motion of a prosecutor, when an eligible defendant is released from custody before trial … [citation omitted] the court, upon a finding that the eligible defendant while on release has violated a restraining order or condition of release, or upon a finding of probable cause to believe that the eligible defendant has committed a new crime while on release, may not revoke the eligible defendant's release and order that the eligible defendant be detained pending trial unless the court, after considering all relevant circumstances including but not limited to the nature and seriousness of the violation or criminal act committed, finds clear and convincing evidence that no monetary bail, non-monetary conditions of release or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

under the Criminal Justice Reform Law. Pretrial detention is based on the prediction of future conduct using a risk assessment tool to show that the person is so dangerous that he or she cannot be released into the community safely, or presents a high risk for failure to appear in court. Release revocation, on the other hand, is based on a defendant's demonstrated conduct while on pretrial release. Moreover, N.J.S.A. 2A:162-24, which governs revocation of release, does not require the State to set forth the merits of the underlying case in which the defendant was released. Rather, the focus of the release revocation proceeding authorized by N.J.S.A. 2A:162-24 is the release conditions allegedly violated by the defendant or the new crime allegedly committed by the defendant while on pretrial release. The majority's view was that, unless the State advances a position regarding the underlying case in the release revocation proceeding, the State should not be required to provide discovery on that case.

Those members also asserted that Robinson stands for the principle that these pretrial hearings are not focused on guilt, and should not turn into mini-trials. Thus, the court does not need information on the underlying offense because it is not relevant to the decision to revoke release for the commission of a new crime or a violation of a condition of release, unless the State makes such information relevant, in which case the State would be required to provide it.

Finally, some of those members also expressed practical concerns. Specifically, the concern was that discovery that had never been compiled or reviewed at the outset of the case because a detention motion had not been filed would have to be located, reviewed, and produced in a very short timeframe.

Note: Section D of this Report outlines a related proposed Rule change regarding provision of discovery after release revocation has been ordered.

Proposed Amendments to R. 3:26-2

Paragraph (a)

Consistent with the amendments to R. 3:4-2(a)(1), the Committee is proposing amendments to delete the restriction in paragraph (a) that designated municipal court judges cannot set conditions of pretrial release at the first appearance for persons charged with homicide offenses when the prosecutor does not file a motion for pretrial detention.

Currently, only Superior Court judges are permitted to set conditions of pretrial release for homicide cases. R. 3:26-2(a) provides, "Conditions of pretrial release for any offense except homicide … may be set by any other judge provided that judge is setting conditions of pretrial release as part of a first appearance pursuant to Rule 3:4-2(b)." This exception for homicide offense was originally included to codify the April 29, 2013, rule relaxation order, which permitted municipal court judges to set bail in all matters other than homicide cases and extradition proceedings. See *Report of the Supreme Court Committee on Criminal Practice: Recommended Court Rules to Implement the Bail Reform Law: Part 1 Pretrial Release*: 222 *N.J.L.J.* 1441, 1527 (2016).

Paragraph (b)

This paragraph has been revised to amend the cross references to paragraphs (d) and (e) in R. 3:4-2 to conform with the proposed changes in that Rule.

Paragraph (d)(2)

Because proposed new paragraph (d)(3) defines the scope of discovery for release revocation proceedings, the Committee is proposing the deletion of the provision in paragraph (d)(2) that states "The defendant shall be provided all available discovery."

Paragraph (d)(3)

Proposed new paragraph (d)(3) provides a bifurcated approach to the scope of discovery in release revocation proceedings based upon whether revocation is sought for the commission of a new crime or for a violation of any other condition of pretrial release. Under either scenario, the prosecutor would be required to provide the defendant with the discovery no later than 24 hours before the release revocation hearing.

New subparagraph (A) defines the scope of discovery for release revocation hearings based on an allegation that the defendant committed a new crime while on pretrial release. Under these circumstances, the State would be required to provide the defendant with "all statements, reports, and exculpatory evidence as required by R. 3:4-2(c)(2) for that new offense." This provision would provide the same discovery obligations for that new offense as required for an initial motion for pretrial detention.

New subparagraph (B) provides the scope of discovery when release revocation is sought for a violation of any other pretrial release condition. Specifically, the State would be required to provide the defendant with: (i) all statements or reports relating to evidence the State relies on to establish the violation, (ii) all statements or reports relating to the factors listed in N.J.S.A. 2A:162-24 that the State advances at the hearing, and (iii) all exculpatory evidence."

The proposed amendments to R. 3:26-2 follow.

3:26-2. Authority to Set Conditions of Pretrial Release

(a) Authority to Set Conditions of Pretrial Release. A Superior Court judge may set conditions of pretrial release for a person charged with any offense and may set monetary bail or take any action in accordance with the Uniform Criminal Extradition Law, N.J.S.A. 2A:160-6 et seq., for any person arrested in any extradition proceeding. Conditions of pretrial release for any offense [except homicide] or a person arrested in any extradition proceeding may be set by any other judge provided that judge is setting conditions of pretrial release as part of a first appearance pursuant to Rule 3:4-2(b).

(b) Conditions of Release. Conditions of pretrial release shall be set pursuant to R. 3:4-2[(c)] (d) or [(d)] (e) for persons for whom a complaint-warrant or a warrant on indictment is issued for an initial charge involving an indictable offense or a disorderly persons offense. A defendant who is the subject of a warrant on indictment is an eligible defendant pursuant to N.J.S.A. 2A:162-15 et seq.

(1) … no change

(2) … no change

(3) … no change

(c) … no change

(d) Violations of Conditions of Release.

(1) … no change

(2) Hearing on Violations of Conditions of Release. The defendant shall have a right to be represented by counsel and, if indigent, to have counsel appointed if he or she cannot afford counsel. [The defendant shall be provided all available discovery.]

The defendant shall be afforded the right to testify, to present witnesses, to cross-examine witnesses who appear at the hearing and to present information by proffer or otherwise. Testimony of the defendant given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but the testimony shall be admissible in proceedings related to the defendant's subsequent failure to appear, proceedings related to any subsequent offenses committed during the defendant's release, proceedings related to the defendant's subsequent violation of any conditions of release, any subsequent perjury proceedings, and for the purpose of impeachment in any subsequent proceedings. The defendant shall have the right to be present at the hearing. The rules governing admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing.

(3) Discovery.

(A) If the prosecutor is seeking release revocation for the commission of a new offense, no later than 24 hours before the release revocation hearing, the prosecutor shall provide the defendant with all statements, reports and exculpatory evidence as required in Rule 3:4-2(c)(2) for that new offense.

(B) If the prosecutor is seeking release revocation for a violation of any other release condition, no later than 24 hours before the release revocation hearing the prosecutor shall provide the defendant with (i) all statements or reports relating to evidence the State relies on to establish the violation, (ii) all statements or reports relating to the factors listed in N.J.S.A. 2A: 162-24 that the State advances at the hearing, and (iii) all exculpatory evidence.

(e) … no change

Note: Source-R.R. 3:9-3(a) (b) (c); amended July 24, 1978 to be effective September 11, 1978; amended May 21, 1979 to be effective June 1, 1979; amended August 28, 1979 to be effective September 1, 1979; amended July 26, 1984 to be effective September 10, 1984; caption amended, former text amended and redesignated paragraph (a) and new paragraphs (b), (c) and (d) adopted July 13, 1994 to be effective January 1, 1995; paragraph (b) amended January 5, 1998 to be effective February 1, 1998; paragraph (d) amended July 9, 2013 to be effective September 1, 2013; paragraph (a) amended July 27, 2015 to be effective September 1, 2015; caption amended, paragraphs (a) and (b) caption and text amended, former paragraphs (c) and (d) deleted, and new paragraphs (c), (d), and (e) adopted August 30, 2016 to be effective January 1, 2017; paragraphs (b) and (d)(1) amended November 14, 2016 to be effective January 1, 2017; paragraph (a) amended December 6, 2016 to be effective January 1, 2017; paragraphs (b) and (d)(1) amended, and caption and text of paragraph (e) amended July 28, 2017 to be effective September 1, 2017[.] ; paragraphs (a), (b), and (d)(2) amended, new paragraph (d)(3) adopted _____ to be effective_____.

D. Discovery Post Revocation of Release - R. 3:13-3 Discovery and Inspection

During the discussion of the discovery obligations for release revocation proceedings in proposed R. 3:26-2(d)(3), the Committee acknowledged that defendants whose release was revoked and who were not the subject of a pretrial detention motion – and thus did not previously receive discovery – should have the discovery earlier than would be provided under the current discovery provisions for pre-indictment cases, which require production of discovery only if a pre-indictment plea offer has been made. There were concerns about the need to treat a defendant detained by way of release revocation in a manner that comports with principles of fundamental fairness so that defense counsel has the information to assess the merits of the client's case and identify any weaknesses earlier in the case process.

This concern was identified based upon the discovery requirements proposed in new paragraph (d)(3) in R. 3:26-2 and the difference between those requirements and those that currently apply to pretrial detention hearings. It was asserted that a defendant whose release has been revoked is not in the same position as a defendant for whom pretrial detention has been ordered. Defense counsel for a defendant who has been ordered detained would have already received all the discovery required in current R. 3:4-2(c)(1)(B).

In contrast, a defendant who is subject to a release revocation motion would be entitled to the discovery in the proposed new paragraph (d)(3) in R. 3:26-2, which would not include discovery regarding the underlying case unless the prosecutor relies on information about that case in seeking revocation. Thus, if revocation of release is ordered

for a defendant where the prosecutor does not rely on the facts of the underlying case, defense counsel would have only the information regarding the underlying offense provided at the first appearance. Pursuant to current R. 3:4-2(c)(1)(A), the discovery provided at the first appearance is limited to the complaint, the preliminary law enforcement incident report, and the affidavit of probable cause.

Members who supported the proposed discovery requirements in R. 3:26-2(d)(3), while noting that discovery on the underlying case ordinarily would not be relevant to the release revocation proceeding, ultimately agreed that if the court revokes release, the defendant should receive discovery materials for the underlying crime in accordance with R. 3:4-2(c)(1)(B) when the defendant was not previously the subject of a pretrial detention motion and thus did not receive the discovery at the outset of the case. The prevailing view was that a defendant who is detained due to revocation of release should not be subject to any disadvantages because the prosecutor did not seek detention initially. These defendants should have the same discovery had a motion for pretrial detention been filed for the underlying offense.

The Committee also recommends that the State provide the additional discovery no later than twenty days after the court orders detention by release revocation. Some members expressed a preference for a quicker turnaround for the discovery to be provided once detention was ordered, expressing that the discovery would have been turned over in a much shorter time frame had detention been sought at the outset.

It was also agreed that since this discovery would be provided after the release revocation decision, this new provision should be codified in R. 3:13-3 since that Rule

governs pre- and post- indictment discovery, rather than R. 3:26-2, which primarily focuses on setting or modifying pretrial release conditions and the procedures for the release revocation hearing.

Another benefit to including it in this Rule was to emphasize the continuing obligations to provide discovery and that the remedies for non-compliance provided for in paragraph (f) in R. 3:13-3 are applicable. Specifically, if it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this Rule, the court may enter an order to prohibit the party from introducing in evidence the material not disclosed. In the alternative, the court may permit the discovery of any materials not disclosed, grant a continuance or delay during trial for the exchange of such discovery.

Proposed Amendments to R. 3:13-3

The Committee recommends breaking down paragraph (a) on "Pre-Indictment Discovery" into two subparagraphs for discovery at the time of the plea offer and following revocation of release.

Paragraph (a)(1), entitled "Plea Offer," retains the current rule language for discovery at the time of the plea offer. Current subparagraphs (1) and (2) have been redesignated as (A) and (B) and consistent with that change the cross references in the last sentence have been changed accordingly.

New paragraph (a)(2), entitled "Revocation of Release," addresses discovery when the motion to revoke release is granted and a motion for pretrial detention was not filed for the underlying offense. Under these circumstances, the prosecutor must provide discovery

for that offense in accordance with the proposed new paragraph for the discovery provided for detention hearings in paragraph (c)(2) in R. 3:4-2. Additionally, the discovery is to be provided no later than twenty days from the entry of the order granting revocation of the defendant's release.

The amendments to R. 3:13-3 follow.

3:13-3. Discovery and Inspection

(a) Pre-Indictment Discovery.

(1) Plea Offer. Unless the defendant agrees to more limited discovery, where the prosecutor has made a pre-indictment plea offer, the prosecutor shall, at the time the plea offer is made, provide defense counsel with all available relevant material that would be discoverable at the time of indictment pursuant to paragraph (b)(1) of this rule, except that:

[(1)] (A) where the prosecutor determines that pre-indictment delivery of all discoverable material would hinder or jeopardize a prosecution or investigation, the prosecutor, consistent with the intent of this rule, shall provide to defense counsel at the time the plea offer is made such relevant material as would not hinder or jeopardize the prosecution or investigation and shall advise defense counsel that complete discovery has not been provided; or

[(2)] (B) where the prosecutor determines that physical or electronic delivery of the discoverable material would impose an unreasonable administrative burden on the prosecutor's office given the nature, format, manner of collation or volume of discoverable material, the prosecutor may in his or her discretion make discovery available by permitting defense counsel to inspect and copy or photograph such material at the prosecutor's office.

Notwithstanding the exceptions contained in paragraphs (a)(1)(A) and (a)(1)(B) [(a)(1) and (a)(2)] of this rule, the prosecutor shall provide defense counsel with any exculpatory information or material.

(2) Revocation of Release. If a motion to revoke release, pursuant to N.J.S.A. 2A:162-24, is granted, and if no motion for pretrial detention, pursuant to N.J.S.A. 2A:162-19, had been previously filed for the underlying offense, the prosecutor shall provide defense counsel with discovery as required by R. 3:4-2(c)(2) no later than twenty days from entry of the order granting revocation of release.

(b) … no change

(c) … no change

(d) … no change

(e) … no change

(f) … no change

Note: Source-R.R. 3:5-11(a)(b)(c)(d)(e)(f)(g)(h). Paragraphs (b)(c)(f) and (h) deleted; paragraph (a) amended and paragraphs (d)(e)(g) and (i) amended and redesignated June 29, 1973 to be effective September 10, 1973. Paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraphs (a) and (b) amended July 22, 1983 to be effective September 12, 1983; new paragraphs (a) and (b) added, former paragraphs (a), (b), (c), (d) and(f) amended and redesignated paragraphs (c), (d), (e), (f) and (g) respectively and former paragraph (e) deleted July 13, 1994 to be effective January 1, 1995; Rule redesignation of July 13, 1994 eliminated December 9, 1994, to be effective January 1, 1995; paragraphs (c)(6) and (d)(3) amended June 15, 2007 to be effective September 1, 2007; subparagraph(f)(1) amended July 21, 2011 to be effective September 1, 2011; new subparagraph (c)(10) adopted July 19, 2012 to be effective September 4, 2012; paragraph (a) amended, paragraph (b) text deleted, paragraph (c) amended and renumbered as paragraph (b)(1), paragraph (d) amended and renumbered as paragraph (b)(2), new paragraphs (b)(3) and (c) adopted, paragraphs (e) and (f) renumbered as paragraphs (d) and (e), paragraph (g) amended and renumbered as paragraph(f) December 4, 2012 to be effective January 1, 2013; paragraph (b)(1)(I) amended July 27, 2015 to be effective September 1, 2015; paragraph (b) amended April 12, 2016 to be effective May 20, 2016; paragraph (c) amended August 1, 2016 to be effective September 1, 2016[.]; paragraph (a) amended, caption added, subparagraphs redesignated (1)(A) and (1)(B), adopted new subparagraph (a)(2) to be effective .

E. Referral in State v. Wilson for a Pretrial "Notice and Demand" Procedure - R. 3:10-8 Notice to Proffer Map of Public Housing, Park or Building

The Committee is proposing new R. 3:10-8 in accordance with the Supreme Court's request that a rule be developed on pretrial notice and demand for the authentication of maps in prosecutions under N.J.S.A. 2C:35-7.1 (distributing, dispensing, or possessing with intent to distribute CDS/analog within 500 feet of public property). State v. Wilson 227 N.J. 534, 554 (2017). In Wilson, the Court authorized the use of a "Notice and Demand" procedure in lieu of production of a witness for the authentication of a map created pursuant to N.J.S.A. 2C:35-7.1e.

Specifically, the Wilson Court held that the map prepared and adopted by a governmental entity pursuant to N.J.S.A. 2C: 35-7.1e was nontestimonial and that its admission did not violate the defendant's confrontation rights if properly authenticated, under N.J.S.A. 2C:35-7.1e, and as a public record pursuant to N.J.R.E. 803(c)(8). Id. at 538.

The Court also provided the following procedures for the State to authenticate a map created pursuant to N.J.S.A. 2C:35-7.1e in lieu of producing a witness:

> [T]he State may give notice to a defendant, at least thirty days before trial, that a map prepared pursuant to N.J.S.A. 2C:35-7.1e will be offered at trial for a violation of N.J.S.A. 2C:35-7.1 and may demand an objection to its use within ten days. An objection will require the State to produce an authenticating witness who can testify to the map's authenticity and be cross-examined on the methodology of the map's creation and its margin of error. If there is no such objection, the map may be admitted without production of an authenticating witness.
> [Id. at 553-54.]

For the most part, the Committee's proposed language for R. 3:10-8 mirrors the procedures set forth in Wilson.

New proposed R. 3:10-8 follows.

R. 3:10-8. Notice to Proffer Map of Public Housing, Park or Building

Whenever a party intends to offer a map created pursuant to N.J.S.A. 2C:35-7.1e, notice of an intent to proffer that map shall be conveyed to the opposing party or parties at least 30 days prior to trial. An opposing party who intends to object to the admission into evidence of a map created pursuant to N.J.S.A. 2C:35-7.1e shall give notice of objection and the grounds for objection within 10 days upon receiving the adversary's notice of intent to proffer the map. Whenever a notice of objection is filed, the State shall produce a witness who can testify to the authenticity and margin of error of the map. If no objection is lodged, the map created pursuant to N.J.S.A. 2C:35-7.1e shall be admitted into evidence without producing an authenticating witness. A failure to comply with the time limitations regarding the notice of objection required by this section shall constitute a waiver of any objections to the admission of the map. The time limitations set forth in this section shall not be relaxed except upon a showing of good cause.

Adopted _____to be effective_____.

F. Ineffective Assistance of Counsel and Petitions for Post-Conviction Relief - R. 3:22-11 Determination; Findings and Conclusions; Judgment; Supplementary Orders

The Appellate Division Rules Committee referred amendments to R. 3:22-11 for consideration by the Committee. The amendments were to ensure that the defendant is provided with 45 days to file a direct appeal of a conviction or sentence when the PCR judge finds ineffective assistance of counsel based on the trial attorney's failure to file an appeal of the judgment of conviction and sentence after the defendant had timely requested such action.

To address these limited circumstances, the amendment authorizes the court to "allow defendant 45 days to file a direct appeal from the judgment of conviction and sentence from entry of the order granting defendant's petition for post-conviction relief."

This provision is recommended in accordance with the Supreme Court's order in State v. Carson, 227 N.J. 353, 354-55 (2016), which permitted the defendant to file a direct appeal of his conviction and sentence within 45 days of the entry of the order granting the petition of post-conviction relief (PCR) because defendant's trial attorney failed to file an appeal of his sentence and conviction when the defendant had requested it.[4]

[4] The Supreme Court also recognized the United States Supreme Court decision in Roe v. Flores-Ortega, 528 U.S. 470, 483-84 (2000), which held:

> [W]hen counsel's deficient performance "led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself[,]" …the "denial of the entire judicial proceeding … demands a presumption of prejudice." As a result, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal. [State v. Carson, supra, 227 N.J. at 354.]

Similarly, the appellate court held that "where a PCR judge finds that an appeal was sought by the defendant and not filed due to counsel's ineffective assistance, the judge has the authority to afford defendant a forty-five day period to file an appeal." State v. Perkins, 449 N.J. Super. 309, 312-13 (App. Div. 2017).

During the Committee's discussion of the proposed language, members questioned whether this amendment was intended to permit the direct appeal only when these allegations are made in a first PCR. It was noted that the petitions in Carson and Perkins appeared to be the first PCRs filed by the defendants.

Members also expressed a concern that the appeal could include other issues. A discussion then ensued whether the proposed amendment would provide sufficient flexibility for the PCR judge to determine whether other claims in the petition should be decided, or whether the remaining claims should be held in abeyance pending resolution of any issues that could be subject to a direct appeal.

The Committee also believed that if the PCR judge grants the petition on these grounds, the order must specify that the defendant has 45 days from entry of that order to file a direct appeal from the judgment of conviction and sentence.

The Committee recommends the language as proposed by the Appellate Division Rules Committee.

The proposed amendment to R. 3:22-11 follows.

3:22-11. Determination; Findings and Conclusions; Judgment; Supplementary Orders

The court shall make its final determination not later than 60 days after the hearing or, if there is no hearing, not later than 60 days after the filing of the last amended petition or answer, with discretion to extend the final determination an additional 30 days, if approved by the Criminal Presiding Judge. In making final determination upon a petition, the court shall state separately its findings of fact and conclusions of law, and shall enter a judgment, which shall include an appropriate order or direction with respect to the judgment or sentence in the conviction proceedings and any appropriate provisions as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or as may otherwise be required. Under the limited circumstances where defendant has demonstrated ineffective assistance of counsel in trial counsel's failure to file a direct appeal of the judgment of conviction and sentence upon defendant's timely request, the court is authorized to allow defendant 45 days to file a direct appeal from the judgment of conviction and sentence from entry of an order granting defendant's petition for post-conviction relief.

Note: Source - R.R. 3:10A-12; amended July 16, 2009 to be effective September 1, 2009; amended January 14, 2010 to be effective February 1, 2010[.]; amended _____ to be effective _____.

Respectfully submitted,

Edward J. McBride, P.J.Cr., Chair
Sheila A. Venable, P.J.Cr., Vice Chair
Naeem Akhtar, Esq.
Joseph J. Barraco, Esq.
Patrice Bearden, Esq.
Eric Breslin, Esq.
Hilary Brunell, Esq.
Diane Carl, Esq.
Mary Ciancimino, Esq.
Martin Cronin, J.S.C.
Lois De Julio, Esq.
Shelia Ellington, Esq.
Robert Gilson, J.A.D.
Christopher Gramiccioni, Esq.
Paul Heinzel, Esq.
Robert Honecker, Esq.
Jill Houck, C.D.M.
Adam Jacobs, J.S.C.
Pedro Jimenez, J.S.C.
Francis Koch, Esq.
Timothy Lydon, J.S.C.
John McMahon, Esq. (as designee of the Office of the Public Defender in his prior position as Assistant Deputy Public Defender)
John McNamara, Esq.
Stuart Minkowitz, A.J.S.C.
Samuel Natal, J.S.C. (retired and temporarily assigned on recall)
Michael Noriega, Esq.
Angelo Onofri, Esq.
Priya Ramrup-Jarosz, Esq.
Geoffrey Soriano, Esq.
Siobhan Teare, J.S.C.
Benjamin Telsey, A.J.S.C.
Patricia Wild, J.S.C.
Michael Williams, Esq.
Edward Wingren, Esq., A.T.C.A. (as designee of the Conference of Criminal Division Managers in his prior position as Criminal Division Manager)

<u>Administrative Office of the Courts Staff:</u>
Sue Callaghan, Assistant Director
Maria Pogue, Esq., Assistant Chief (Committee Staff)
Kya Saunders, Esq. (Committee Staff)

II. Concurring and Dissenting Statements

A. Concurring Statement by Honorable Martin Cronin, J.S.C.

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION
ESSEX VICINAGE

Chambers of
Honorable Martin Cronin
Judge

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

January 24, 2018

Hon. Edward J. McBride Jr., P.J.Cr.
Camden County Hall of Justice
101 South Fifth Street, Suite 370
Camden, NJ 08103

Re: Concurrence with Recommended R. 3:26-2(d)(3)

Dear Judge McBride:

Please accept these comments in support of R. 3:26-2(d)(3) as recommended by the majority of the Criminal Practice Committee and in opposition to the proposal made by the Office of the Public Defender ("OPD").

This committee modeled our recommendations for R. 3:26-2(d)(3) upon R. 3:4-2(c)(2) as approved by our Supreme Court in State v. Robinson, 229 N.J. 44 (2016). Rule 3:4-2(c)(2) is the product of a careful balancing of societal interests in public safety and individual liberty, resulting in a "workable" procedure which fully protects the defendant's due process rights. Id. at 52, 68 (balance), 68 (workable), 49-50 (due process). In striking this balance, the Robinson court was cognizant of the State's burden of persuasion in detention applications. Id. at 52. The discovery rule was crafted to provide the defendant with a fair opportunity to defend against the State's detention application. Id. at 64, interpreting R. 3:4-2(c)(2). Essentially, if the State relies upon a fact in its detention application, then it must provide discovery relating to those facts. Hence, the scope of the detention application defines the scope of its discovery application under R. 3:4-2(c)(2) as approved in Robinson.

Rule 3:4-2(c)(2) provides institutional incentives to limit the complexity and length of detention hearings, thereby promoting "workable" detention procedures. More specifically, the Appellate record in Robinson was clarified to include relevant portions of the rule making record:

> This [State] proposal [for R. 3:4-2(c)(2)] was crafted in view of the State's burden of persuasion at a detention hearing. More specifically, if the State relies upon a fact to satisfy its burden of persuasion, then the State must provide to the defendant all statements or reports in its possession that relate to that fact. Armed with this discovery, defense counsel can then challenge that fact at the detention hearing. If the State does not provide that discovery, then the Court can preclude the State from relying upon that fact to satisfy its burden of persuasion. Cf. D.C. Rule 46(f)(2) ("Court may not consider the testimony of a witness whose statement is withheld."), 18 U.S.C. 3500 (d)(court shall strike witness testimony if witness statement withheld). On the other hand, if the State does not intend to rely upon a certain fact to satisfy its burden of persuasion, then this proposed Rule does not require the State to provide the defendant with any statements or reports relating to that fact. Since the State is not relying upon that fact, there is no need for the defendant to challenge that fact and no need for discovery to facilitate that unnecessary challenge.
>
> Adoption of this proposed Rule provides a significant *institutional incentive* for the State to limit those facts upon which it relies to support its detention application. Simply put, under the proposed Rule, the fewer facts relied upon, the less discovery the State must provide to the defendant in the early stages of the litigation. Similarly, the fewer facts relied upon, the less time required by the Court to determine whether the State established these facts. Thus, as a practical matter, the proposed Rule has the potential to simplify the detention hearing, thereby decreasing the bench time required to fairly conduct it. As demonstrated in my dissenting and concurring statements dated February 26, 2016, the complexity and length of detention hearings may render the procedures for preventive detention and release revocation "unworkable," thereby undermining a Court's ability to detain the truly dangerous defendants and safely release everyone else. See Concurrence at 23 - 30 and Dissent at 23 - 30.

See, Hon. Ronald J. Wigler, P.J.Cr. to Hon. Susan Reisner, P.J.A.D. and Hon. Garry Rothstadt, J.A.D, State v. Robinson, A-1891-16T2, January 12, 2017 (at Ex. C-2 at 3-4). Significantly, the proposed discovery rule referenced above, which the Robinson court promulgated in modified form, expressly applied to both detention hearings and release revocation hearings. See Robinson, 229 N.J. at 60 (quoting proposed rule). By modeling the recommended R. 3:26-2(d)(3) after R. 3:4-2(c)(2) as approved in Robinson, this committee seeks to strike the same balance in release revocation proceedings as the Robinson court struck in detention proceedings.

In contrast, the OPD proposal requires the State to provide Robinson-type discovery for the underlying offense, regardless of whether the State is relying upon the facts of the underlying offense in its revocation application. (See OPD dissent at 3.) As clearly demonstrated in the OPD's third scenario, their proposal squarely conflicts with the balance struck in crafting R. 3:4-2(c)(2) as approved by the Court in Robinson. The OPD contends that this committee's recommended R. 3:26(d)(3) would "severely compromise [the defendant's] ability to argue that revocation should be

denied based upon the circumstances of the underlying offense." (OPD dissent at 2). When the State is not relying upon those circumstances, then there is no reason to present that argument.

Under this committee's recommended rule, if the State relies upon the circumstances of the underlying offense to support its revocation application, then the State is required to provide Robinson-type discovery for this underlying offense. If the State is not relying upon those circumstances, then this committee's recommended rule does not require the State to provide discovery concerning that underlying offense. Hence, the scope of the State's revocation application defines the scope of its discovery obligation under this committee's recommended R. 3:26-2(d)(3). This is precisely the balance which the Court approved in Robinson for R. 3:4-2(c)(2) and which guided this committee's recommendation for R. 3:26-2(d)(3). Thus, the OPD proposal disrupts this balance with no discernible benefit to the defendant.

Moreover, the OPD's proposal would provide prosecutors with a presumably unintended incentive to *expand* the scope of the release revocation proceeding to include proofs of the underlying offense. If the prosecutor is required to provide this discovery for the underlying offense, even though the prosecutor was not relying upon those proofs in its initial revocation application, then a practical incentive to limit the scope of the revocation hearing is severely diminished. As previously noted, this practical incentive was expressly considered in crafting R. 3:4-2(c)(2). See Wigler letter, supra at 2. Thus, the OPD proposal would disrupt operation of the "workable" procedures which this committee envisioned in crafting R. 3:26-2(d)(3).

Accordingly, the undersigned urges the Court to promulgate R. 3:26-2(d)(3) in the form as recommended by this committee.

Very truly yours,

MARTIN CRONIN, J.S.C.

MGC:tmh

The following members have joined in the concurrence statement filed by Honorable Martin Cronin, J.S.C.:

Francis A. Koch, Sussex County Prosecutor

John K. McNamara, Senior Assistant Prosecutor, Morris County Prosecutor's Office

Geoffrey D. Soriano, Assistant Attorney General, Division of Criminal Justice

Michael J. Williams, Assistant Attorney General, Division of Criminal Justice

B. Concurring Statement by Director Elie Honig Division of Criminal Justice

State of New Jersey

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Governor

SHEILA Y. OLIVER
Lt. Governor

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GURBIR S. GREWAL
Attorney General

ELIE HONIG
Director

January 24, 2018

Hon. Edward J. McBride, Jr., P.J.Cr.
Chair, Supreme Court Criminal Practice Committee
Camden County Hall of Justice
101 South 5th Street, 3rd Floor
Camden, New Jersey 08103-4001

Re: Concurrence to Proposed Rule 3:26-2(d)(3) Governing Release Revocation Proceedings

Your Honor:

Please accept this letter as a concurrence to Rule 3:26-2(d)(3), the discovery rule for release revocation proceedings that has been proposed by the Criminal Practice Committee (CPC). I submit this concurrence on behalf of all representatives on the CPC from the Division of Criminal Justice and County Prosecutors Offices. We strongly support the CPC's rule recommendation as to Rule 3:4-2 and Rule 3:26-2, for all the reasons expressed in the commentary to those proposed rules. We add the following comments as to Rule 3:26-2(d)(3).

The current version of Rule 3:26-2(d)(3) proposed by the CPC strikes the proper balance between a defendant's pretrial rights and the limited nature of a release revocation hearing. At a release revocation hearing, the State is simply not required to set forth the merits of the original charge for which the defendant was released as a basis for pretrial detention. See N.J.S.A. 2A:162-24; State v. White, ____ N.J. ____ (App. Div. 2017). Thus, unless the State advances a reason for revocation of release based upon the underlying case in the proceeding, defendant does not need information relating to the offense beyond the Complaint and Affidavit of Probable Cause.

The different discovery obligations at a release revocation hearing and a pretrial detention hearing are based on the conceptually distinct purposes and procedures for the hearings. Pretrial detention is based on the prediction of future conduct while revocation is based on a defendant's demonstrated disobedient conduct while on pretrial release.

The Public Defender's dissent and proposed revision of Rule 3:26-2(d)(3) would expand the scope of a release revocation hearing by requiring the State to establish the original charge in addition to the reasons for revocation. This runs counter to our Supreme Court's repeated

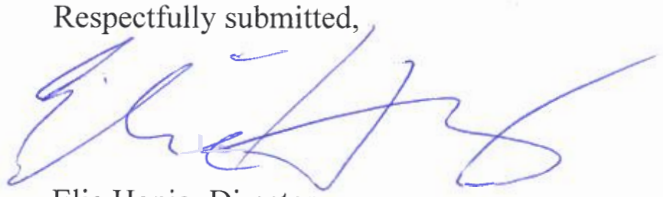
admonitions in State v. Ingram, 230 N.J. 190 (2017), and State v. Robinson, 229 N.J. 44 (2017), that pretrial hearings should not turn into mini-trials.

And the issue is not that a defendant will never receive the discovery; it is just a matter of when receipt will occur. Prosecutors must provide the discovery twenty days from the revocation order under the currently proposed Rule 3:13-3(a)(2). It is just not necessary for the hearing and thus should not be given beforehand.

It is also important to keep in mind that the proposed rule is only for a small subset of cases. The Public Defender's concern only applies when the State does not move for detention, the defendant is released on conditions, and he or she violates the conditions or commits a new offense. For all other cases—defendants who never violate and defendants for whom the State moved for detention but the court denied the motion—there is no concern to be addressed, as the Public Defender acknowledges.

Thus, we urge the Supreme Court to adopt Rule 3:26-2(d)(3) as currently proposed by the CPC.

Respectfully submitted,



Elie Honig, Director
Division of Criminal Justice

The following members have joined in the concurrence statement filed by Director Elie Honig, Division of Criminal Justice:

Christopher J. Gramiccioni, Monmouth County Prosecutor

Paul H. Heinzel, Chief Assistant Prosecutor, Somerset County Prosecutor's Office

Francis A. Koch, Sussex County Prosecutor

John K. McNamara, Senior Assistant Prosecutor, Morris County Prosecutor's Office

Angelo J. Onofri, Mercer County Prosecutor

Geoffrey D. Soriano, Assistant Attorney General, Division of Criminal Justice

Michael J. Williams, Assistant Attorney General, Division of Criminal Justice

C. Dissenting Statement by Public Defender Joseph E. Krakora

State of New Jersey

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January 11, 2018

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Hughes Justice Complex
25 W. Market St.
Trenton, NJ 08611

Re: Public Defender Dissent to the Recommendations Regarding Proposed R. 3:26-2(d)(3)(A) and (B) and R. 3:4-2(c)(2)

Dear Judge Grant:

The Office of the Public Defender is opposed to two recent rule recommendations that the Criminal Practice Committee is making to the Supreme Court. Both relate to Criminal Justice Reform. Our objections are based upon concerns of fundamental fairness, due process, statutory interpretation and the spirit of Criminal Justice Reform.

The first objection is to proposed R. 3:26-2(d)(3). This rule relates to the discovery obligation to be imposed on prosecutors when seeking detention based upon an alleged violation of a condition of release. As proposed, the rule would limit the discovery afforded the defendant. Specifically, prosecutors would only be required to turn over discovery related to the alleged violation of conditions of release or new offense and not the discovery related to the underlying offense that would have been required had the prosecutor sought detention at the outset of the case.

This is at odds with the language of N.J.S. 2A: 162-24 which makes it clear that the Court cannot order detention at a release revocation hearing unless "after considering all relevant circumstances including but not limited to the nature and seriousness of the violation or criminal act committed" it determines by clear and convincing evidence that no conditions of release will satisfy the goals of the statute. The use of the language "all relevant circumstances" must relate back to 2A: 162-20 which sets forth the factors to be considered by the Court at a detention hearing, including the weight of the evidence and the nature and circumstances of the offense. The rule as proposed would deny defendants at release revocation hearings the discovery related to the underlying offense to which he would have been entitled had the prosecutor sought detention at the beginning of the case. This would result in an anomaly that Criminal Justice Reform certainly did not envision. As illustrated below, it would result in unfair and uneven treatment of defendants.

Consider the following three scenarios. In the first, a defendant is charged with robbery and the prosecutor seeks detention. He is entitled to the discovery required in R. 3:4-2(c)(1)(B) or, if adopted, the new R. 3:4-2(c)(2). The Court grants the motion and the defendant is detained. In the second, a defendant is charged with robbery and the prosecutor seeks detention. He is entitled to the discovery required in R. 3:4-2(c)(1)(B). The Court denies the detention motion. Subsequently, the defendant is alleged to have violated a condition of release and the prosecutor seeks revocation of release. At the hearing, the defendant has access to discovery permitting him to argue that revocation should be denied based on the circumstances of the underlying charge. In the third, a defendant is charged with robbery and the prosecutor does not seek detention. He is entitled only to the discovery required in cases in which the prosecutor does not file a motion for detention. Subsequently, the defendant is alleged to have committed a violation of a condition of release. At the hearing, if the proposed rules are enacted, he will not have access to the same discovery that the defendants in the first two scenarios had and will be severely compromised in his ability to argue that revocation should be denied based on the circumstances of the underlying offense. In other words, the Court will not be able to fully assess the nature and circumstances of the offense or the weight of the evidence, potentially resulting in defendants being detained in cases the prosecutor will ultimately be unable to prove. Beyond that, it will happen in cases in which the defendant was not deemed a high enough risk to warrant a motion for detention in the first place. This is fundamentally unfair, violates due process and is contrary to the CJR statute.

The Committee does concede that it would be wrong to revoke release and detain a defendant

without the same discovery to which other detained defendants are entitled. However, the Committee's proposal by way of amendment to R. 3:13-3 is to order that R. 3: 4-2(c)(1)(B) discovery be provided "no later than twenty days from entry of the order granting revocation of release." Obtaining this evidence after the detention hearing, however, undermines the entire purpose of discovery: to provide defendants notice and to ensure that they may effectively present a defense at the hearing. Should this discovery be helpful to defendant's argument for release, the belated discovery would require reopening the hearing under N.J.S.A 2C:162-19(f). This would result in not only a waste of judicial resources, but the prolonged detention of defendants who may be ultimately released. The proposed Rule is particularly concerning given that it does not even require the discovery of exculpatory evidence relating to the underlying charge.

Our position of course is that this discovery should be provided prior to the release revocation hearing. In any event, there is simply no justification for a delay of twenty days in providing a detained defendant with the required discovery. The prosecution members of the Committee argued that twenty days were required to obtain the discovery from law enforcement. There is no support for this proposition. In fact, it is disingenuous because had the prosecutor sought detention from the outset he would have had to obtain the discovery in advance of the detention hearing.

The OPD's position is that the Court should reject the Committee's R. 3:26-2(d)(3)(A) and (B) proposal and instead adopt the following rule proposed by the OPD.

> R. 3:26-2(d)(3) Discovery –
>
> > If the prosecutor is seeking release revocation, and the prosecutor had not previously moved to detain defendant, then the prosecutor, no later than 48 hours before the release revocation hearing must comply with the discovery obligations as set forth in R. 3:4-2(c)(1)(B) as well as provide defendant with (i) all statements or reports relating to evidence the State relies on to establish the violation, (ii) all statements or reports relating to the factors listed in N.J.S.A. 2A:162-24 that the State relies upon to support release revocation at the hearing, and (iii) all exculpatory evidence.

In addition, if the Court decides to adopt R. 36-2(d)(3)(A) and (B), as proposed by the Committee, the OPD's position is that R. 3:13-3(a)(2) be amended to read as follow:

> Revocation of Release: If a motion to revoke release, pursuant to N.J.S.A. 2A:162-24 is granted, and if no motion for pretrial detention, pursuant to N.J.S.A. 2A:162-9 had been previously filed for the underlying offense, the prosecutor shall provide defense counsel with

discovery as required by R. 3:4-2(c)(2) no later than three days from entry of the order granting revocation of release.

The Public Defender's also objects to the Committee's proposed amendment to R. 3:4-2 dealing with the timing of the prosecution's obligation to provide the defendant with discovery when seeking detention. Pursuant to the proposed R. 3:4-2(c)(2) language, the defendant would not be entitled to discovery until 24 hours before the hearing. The OPD's position is that the rule should establish a 48 hour requirement. Such a rule would strike a fair balance by giving law enforcement some additional time if needed to meet its discovery obligation and by giving defendants an adequate opportunity to prepare for the hearing. Twenty-four hours is simply not enough time for that preparation in many cases. In addition, the issue of remedy when the prosecutor fails to provide a defendant with discovery in a timely manner is problematic. It forces a defendant to choose between a delay in the detention hearing while remaining in jail or going forward with inadequate preparation. Requiring the prosecutor to provide a defendant with discovery 48 hours before the hearing will reduce the number of cases in which he faces this dilemma.

Thank you for your consideration of these issues.

Respectfully submitted,

Joseph E. Krakora, Esq.
Public Defender

D. Dissenting Statement by Lois De Julio, Esq.

(On behalf of the Association of Criminal Defense Lawyers of New Jersey)

Lois De Julio
Attorney-at-Law

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ldejulio@comcast.net

January 22, 2017

The Honorable Edward J. McBride, Jr., P.J.Cr.
Camden County Hall of Justice
101 South Fifth Street, Suite 370
Camden, New Jersey 08103

Re: Proposed Amendments to
Rule 3:4-2(c)(2), *Rule* 3:26-2(d)(3)(A),
and *Rule* 3:26-2(d)(3)(B)

Dear Judge McBride:

I have spoken with Joseph Krakora regarding the position of the Office of the Public Defender on the proposed amendments to *Rules* 3:4-2(c)(2), 3:26-2(d)(3)(A), and 3:26-2(d)(3)(B). I have also had the opportunity to review the dissent which he has prepared and submitted. On behalf of the Association of Criminal Defense Lawyers of New Jersey, I support the positions he has taken.

The experiences of our membership, many of whom have also served as assistant prosecutors, as well as my own personal experience of 45 years of criminal law practice, lead us to conclude that there is no valid reason why the prosecution cannot comply, in all but the most unusual cases, with the shorter time limits proposed by Mr. Krakora for the service of discovery prior to detention and release revocation hearings. In those rare cases where some legitimate reason prevents compliance, application can be made to the court, and an extension of time would no doubt be granted.

Accordingly, the Association of Criminal Defense Lawyers of New Jersey joins in the dissent submitted by the Office of the Public Defender.

Respectfully,

Lois De Julio

Lois De Julio

cc: Maria Pogue, Esq., Asst. Chief
Joseph E. Krakora, Public Defender
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