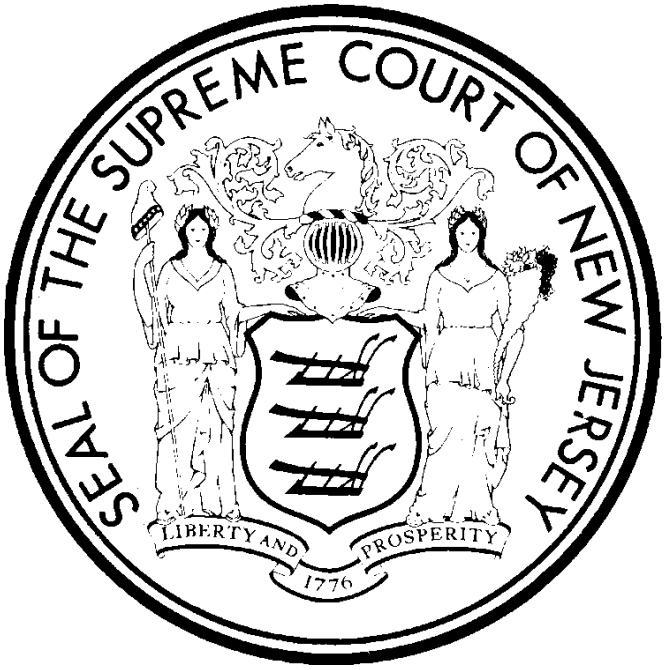
REPORT OF THE SUPREME COURT COMMITTEE ON CRIMINAL PRACTICE



2021-2023 RULES CYCLE

January 13, 2023

Table of Contents

I. Introduction

During the 2021-2023 term, the Criminal Practice Committee proposed amendments to the Part III Rules Governing Criminal Practice contained in its "Ad Hoc Report of the Supreme Court Committee on Criminal Practice 2021 – 2023 Term", dated December 15, 2021. The report contained the Committee's recommendation to amend Rule 3:13-3 to address the discovery obligations relating to jailhouse informants. It was published for comment on January 31, 2022 and acted upon by the Supreme Court.

This Report contains additional recommendations and issues considered by the Committee during the 2021 - 2023 term. The Committee also reports on other issues reviewed where it concluded no rule change was appropriate.

Where rule changes are proposed, deleted text is bracketed **[as such]**, and added text is underlined **as such**. No change to a paragraph of the rule is indicated by "**. . . no change**."

II. Rules Recommended for Adoption

A. Expungement Rules

The Criminal Practice Committee is proposing new rules in conformance with the December 8, 2020 Supreme Court Order that relaxed and supplemented the Part III court rules which supported the implementation of the Judiciary's eCourts Expungement System. A working group was formed to offer recommendations on conforming rules that were consistent with the requirements set forth in N.J.S.A. 2C:52-10.1 ("System to Electronically File Expungement Applications").

N.J.S.A. 2C:52-10.1 states in pertinent part:

> (a)(1) … [T]he Administrative Office of the Courts shall develop and maintain a system for petitioners to electronically file expungement applications pursuant to N.J.S.2C:52-1 et seq.
>
> (2) The system shall, in accordance with N.J.S.2C:52-10, electronically notify and serve copies of the petition and all supporting documents upon the Superintendent of State Police, the Attorney General, and each county prosecutor as described in that section.
>
> (3) The system shall electronically compile a listing of all possibly relevant Judiciary records for an expungement petitioner and transmit this information to all parties served with copies of the petition and all supporting documents in accordance with paragraph (2) of this subsection.
>
> (b) Upon receipt of the information from the court pursuant to paragraphs (2) and (3) of subsection a. of this section, the Superintendent of State Police, the Attorney General, and the county prosecutor of any county in which the person was convicted shall, within 60 days, review and confirm, as appropriate, the information against the person's criminal history record information files and notify the court of any inaccurate or incomplete data contained in the information files, or of any other basis for ineligibility, if applicable, pursuant to N.J.S.2C:52-14.

> (c) The court shall provide copies of an expungement order to the person who is the subject of the petition and electronically transmit the order to the law enforcement and criminal justice agencies which, at the time of the hearing on the petition, possess any records specified in the order in accordance with N.J.S.2C:52-15.

The Committee sought to draft rules that served as a bridge between the legislation and the mandates set forth in the Court's rule relaxation order, while also being understandable to both lawyers and pro se petitioners.

Because of the different expungement types, members drafted two distinct court rules to provide guidance and information to petitioners and lawyers who may not be familiar with the expungement process. Proposed R. 3:30-1 addresses the procedural aspects of filing for an expungement of records, whereas proposed R. 3:30-2 encompasses expungements with special requirements.

For the reasons set forth below, the Committee is recommending that the Court adopt proposed new rules, R. 3:30-1 and R. 3:30-2.

1. R. 3:30-1 – Expungement of Records

Proposed R. 3:30-1 sets forth procedures for the electronic expungement of records. Various provisions from the expungement statutes and the December 8, 2020 Court order were incorporated into one rule designed to provide a general overview of the expungement process.

Paragraph (a) includes the statutory definition for "expungement" as defined in N.J.S.A. 2C:52-1(a). This paragraph also includes a provision to address crimes that are ineligible for expungement.

Paragraph (b) addresses the requirement that petitioners electronically file for an expungement of a crime, disorderly persons offense, petty disorderly persons offense, or municipal ordinance violation using the electronic system developed and maintained by the Administrative Office of the Courts to conform with the provision in N.J.S.A. 2C:52-10.1.

Paragraph (c) incorporates the requirements set forth in N.J.S.A. 2C:52-10.1 that notice and a copy of the expungement petition shall be electronically transmitted to the county prosecutor and law enforcement authorities except for petitions seeking expungement of marijuana and hashish offenses.

Paragraph (d) includes the timelines set forth in the December 8, 2020 Court order and N.J.S.A. 2C:52-10.1(b), that require the county prosecutor, within 60 days of the notice of petition, to electronically submit a response indicating whether that office objects to the petition and reasons for any objection. The Committee

intentionally referenced the "Judiciary's computerized system" as opposed to the "eCourts Expungement System" to allow flexibility for future advancements in technology without referencing a specific application.

Paragraph (e) pertains to the individuals who will receive the prosecutor's notice of objection. This provision mirrors the December 8, 2020 Court order. When drafting this rule, the Committee added language to account for private counsel. As in paragraph (d), the Committee removed reference to the "eCourts Expungement System".

Paragraph (f) outlines the persons who are eligible to receive copies of the court order. The language is borrowed directly from the December 8 Court order; however the Committee removed references to the "eCourts Expungement System" and changed the "expungement order" language to "court order".

Paragraph (g) pertains to the disposition of records following the entry of an order of expungement. The rule directs that such records be handled in accordance with N.J.S.A. 2C:52-15 and that expunged records may be used for authorized purposes as set forth in the expungement statutes.

Paragraph (h) addresses motions to vacate an expungement order and is based on N.J.S.A. 2C:52-26. As proposed in subsection (e), the Committee thought it was appropriate to also include the "attorney of record". Although a cross reference to N.J.S.A. 2C:52-10 appears to suggest that agencies other than the prosecutor may notify the court of statutory disqualifications that existed at the time of the petition, the

Committee intentionally only referenced "the prosecutor" to establish a best practice that those other agencies should contact the prosecutor who would notify the court as the State's representative.

Proposed new R. 3:30-1 follows.

R. 3:30-1. Expungement of Records

(a) Expungement.

(1) Defined. An expungement is the extraction, sealing, impounding, or isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system.

(2) Ineligible. A conviction for a crime which is not subject to expungement pursuant to subsection b. or c. of N.J.S.A. 2C:52-2 cannot be expunged.

(b) Applying for an Expungement. Persons shall apply electronically for an expungement of a crime, disorderly persons offense, petty disorderly persons offense, or a municipal ordinance violation in the Judiciary's computerized system, except for the expungements that do not require a petition pursuant to R. 3:30-2(b)(1) and (c)(1).

(c) Notice of Petition. Notice and a copy of the expungement petition shall be transmitted electronically to the county prosecutor and other law enforcement authorities, except that a petition seeking expungement of marijuana and hashish offenses pursuant to N.J.S.A. 2C:52-5.1 shall be transmitted directly to the court for a determination.

(d) Response by the Prosecutor. Within 60 days of notice of the petition, the county prosecutor shall submit a response electronically in the Judiciary's computerized

system, which response shall indicate whether that office objects to the petition and set forth the reasons for any objection.

(e) Reply to Objection. Notice of an objection by the prosecutor shall be electronically transmitted to the petitioner or attorney of record, and to the Office of the Public Defender if there is no private attorney. Within 30 days of notice, the petitioner or counsel on their behalf may submit a response electronically in the system.

(f) Judicial Determination. Copies of the court order shall be electronically available in the system to the person who is the subject of the expungement petition, counsel for the petitioner, and the applicable law enforcement and criminal justice agencies.

(g) Records. When the expungement is granted, the records of the applicable law enforcement and criminal justice agencies shall be handled in accordance with N.J.S.A. 2C:52-15. Expunged records may be used for the authorized purposes set forth in chapter 52 of Title 2C.

(h) Motions to Vacate Expungement Order. The prosecutor may file a motion to vacate an expungement order in the county where the expungement was granted within 5 years of the expungement pursuant to N.J.S.A. 2C:52-26. Copies of the motion shall be provided to the petitioner or attorney of record, and the Office of the Public Defender if there is no private attorney. Within 30 days of notice, the petitioner or counsel on their behalf may file a response with the court and provide a copy to the prosecutor. The court shall schedule a hearing as soon as reasonably practical.

Note: Adopted _____ to be effective _____.

2. R. 3:30-2 – Expungements for Marijuana/Hashish Offenses, Recovery Court, Dismissals/Acquittals, and Clean Slate

Proposed R. 3:30-2 sets forth the procedures for expungements with special requirements. The Committee sought to consolidate each of these "special" expungement types into one cohesive rule by specifically designating one paragraph for each: (1) marijuana/hashish offenses, (2) recovery court, (3) arrests not resulting in conviction, and (4) clean slate. This was accomplished by incorporating elements from proposed R. 3:30-1, the recovery court statute (N.J.S.A. 2C:35-14) and the expungement statutes (N.J.S.A. 2C:52-1 to 32.1).

i. Expungements Limited to Certain Marijuana or Hashish Offenses

As a result of the Marijuana Decriminalization Law, L. 2021, c. 19 (codified in relevant part at N.J.S.A. 2C:35-23.1 and N.J.S.A. 2C:52-6.1), signed by Governor Murphy on February 22, 2021, prosecutors sought dismissal of charges related to certain marijuana or hashish offenses that were pending at the effective date of this new law. For those cases already resolved, in response to the Supreme Court's July 1, 2021 Order, the Administrative Office of the Courts vacated and/or expunged, by operation of law pursuant to N.J.S.A. 2C:52-6.1, any guilty verdict, plea, adjudication of delinquency, placement in a diversionary program, or other entry of guilt on a matter where the conduct occurred prior to February 22, 2021. The Order also provided that any case not captured by the automated processes may be brought by motion to dismiss or motion to vacate (depending on the status of the case) to the court that had

jurisdiction over the case (Municipal Court or Superior Court) or by individual expungement petition to the Superior Court.

Under this framework, the Committee crafted a rule that incorporated the requirements of N.J.S.A. 2C:52-5.1 while also borrowing language from proposed R. 3:30-1.

Specifically, subparagraph (a)(1) addresses the process for petitioners to apply electronically for an expungement for certain enumerated marijuana or hashish offenses. For consistency with proposed R. 3:30-1, the Committee thought it appropriate to generally reference "the Judiciary's computerized system for expungements".

Subparagraph (a)(2) sets forth the persons and agencies who shall receive a copy of the court order.

Subparagraph (a)(3) details the process and timeline for a prosecutor to object to an expungement order on statutory grounds. The Committee specifically referenced N.J.S.A. 2C:52-5.1(c)(3), which provides in relevant part: "[a] court order vacating an expungement that is granted to a person pursuant to this subsection may be issued upon an action filed by a county prosecutor with the court that granted the expungement …" Language concerning the timing of the response to prosecutor's objection was taken from proposed R. 3:30-1(e).

ii. Recovery Court Expungements

Paragraph (b) of the proposed rule relates to Recovery Court expungements. Recovery Court (previously known as "Drug Court") is a program that operates within the Superior Court to address non-violent drug addicted offenders. Based on a concept of Therapeutic Jurisprudence, participants are sentenced to a term of "special probation" into the program, which requires completion of distinct phases of intensive drug and alcohol treatment and recovery.

Individuals who successfully complete Recovery Court are eligible to have their complete criminal record expunged. This is an automatic process for participants who graduate from the program, except for those who graduated prior to April 18, 2016, in which case an expungement application is necessary. Because different expungement processes apply based on graduation date, the Committee felt that it was important to distinguish between expungements "Requested Prior to Graduation" and "Requests for an Expungement After Graduation".

The procedures outlined in subparagraph (b)(1) summarize the provisions set forth in N.J.S.A. 2C:35-14(m)(1) and apply to Recovery Court expungements "Requested Prior to Graduation." This section memorializes the process that was implemented following the amendments to N.J.S.A. 2C:35-14 and N.J.S.A. 2C:52-6 pursuant to L. 2015, c. 261, effective April 18, 2016. The law specifically provides that "the Superior Court may order the expungement of all records and information relating to all prior arrests, detentions, convictions, and proceedings for any Title 2C

offense upon a person's successful discharge from a term of special probation, regardless of whether the person was sentenced to special probation under N.J.S.A. 2C:35-14, N.J.S.A. 2C:35-14.2, or N.J.S.A. 2C:45-1, if the person satisfactorily completed a substance abuse treatment program as ordered by the court and was not convicted of any crime, or adjudged a disorderly person or petty disorderly person, during the term of special probation." See N.J.S.A. 2C:35-14(m)(1).

The Committee is proposing the title "Requested Prior to Graduation" for subparagraph (b)(1) to conform with the protocol that requires Recovery Court participants who wish to be considered for an expungement upon graduation, on or after April 18, 2016, to bring the matter to the attention of the Recovery Court judge prior to their graduation date.

Although the regular procedural requirements for expungements in N.J.S.A. 2C:52-7 through N.J.S.A. 2C:52-14 do not apply, and no fee will be charged, the Committee drafted section (A) of this subparagraph to reflect that counsel on behalf of the participant may electronically submit a proposed order in the Judiciary's computerized system for expungements. The prosecutor is required to notify the court of any disqualifying convictions or any other factors related to public safety that should be considered by the court when deciding whether to grant a recovery court expungement. See N.J.S.A. 2C:35-14(m)(2). Accordingly, the Committee incorporated language from proposed R. 3:30-1(d) into section (B) to encompass the timelines related to the prosecutor's response to the expungement request.

Additionally, the court is required to grant the expungement unless it finds that the need for the availability of the records outweighs the desirability of having the person freed from any disabilities associated with their availability, or it "finds that the person is otherwise ineligible for expungement because the person's records include a conviction for an offense barred from expungement under N.J.S.A. 2C:52-2(b) or (c)." See N.J.S.A. 2C:35-14(m)(1). The statute also requires the court order to be electronically available in the system to the parties, law enforcement, and criminal justice agencies. See N.J.S.A. 2C:35-14(m)(3). This is reflected in section (C) of proposed R. 3:30-2(b)(1).

The Committee is proposing the title "Requests for an Expungement After Graduation" for subparagraph (b)(2) in order to conform with the expungement protocol that applies to persons whose graduation from Recovery Court occurred prior to April 18, 2016. Specifically, those individuals may apply for an expungement of all records and information relating to all arrests, detentions, convictions, and proceedings for any Title 2C offense that existed at that time. See N.J.S.A. 2C:35-14(m)(5).

The Committee drafted subparagraph (b)(2) to reflect the application process that requires individuals seeking expungement under this section, to conform to the requirements set forth in proposed R. 3:30-1(b) and N.J.S.A. 2C:35-14(m)(5).

Subparagraph (b)(3) was included to address the process that occurs if the person whose records are expunged, pursuant to N.J.S.A. 2C:52-14(m)(1), is subsequently convicted of any crime following discharge from special probation. The

Committee titled this section "Restoring Records to Public Access After a Recovery Court Expungement", and it provides that the full record of arrests and convictions may be restored to public access, and the person is thereafter barred from any future expungement. See N.J.S.A. 2C:35- 15(m)(4).

iii. Expungements of Arrests Not Resulting in Conviction

Paragraph (c) of the proposed rule relates to expungements of arrests not resulting in conviction. The law sets forth the procedures to expunge all records and information of an arrest or charge when a person has been arrested or held to answer for a crime, disorderly persons offense, petty disorderly persons offense, or municipal ordinance violation, where the proceedings were dismissed, the person was acquitted, or the person was discharged without a conviction or finding of guilt in Municipal Court or Superior Court.

Statutory amendments to N.J.S.A. 2C:52-6 pursuant to L. 2019, c. 269, effective June 15, 2020, resulted in changes to procedures that require the court to order an expungement of all related records and information at the time of the dismissal, acquittal, or discharge without a conviction. The defendant is no longer required under the law to apply for an expungement of these matters.

The procedures outlined in subparagraph (c)(1) apply to expungements of arrests not resulting in conviction or adjudication of delinquency that occurred after June 15, 2020. The Committee expanded upon the procedures set forth in N.J.S.A. 2C:52-6(a) by specifying that the court order shall be submitted electronically in the

Judiciary's system. Members also proposed that the timeline for the entry of the order be "without undue delay".

Section (A) of this subparagraph mirrors the language in N.J.S.A. 2C:52-6(a)(3) that precludes expungement of dismissed charges that are the result of plea bargaining. The Committee is also proposing language in section (B) of this subparagraph that would bar expungement of dismissals related to a defendant who was determined to be insane or lacked the mental capacity to commit the crime charged.

The procedures outlined in subparagraph (c)(2) apply to expungements of arrests not resulting in conviction or adjudication of delinquency that occurred prior to June 15, 2020. This provision cross-references proposed R. 3:30-1, which sets forth the general procedures for applying for an expungement. In drafting this subparagraph, the Committee was mindful to distinguish this application process from the current process because for charges disposed of prior to June 15, 2020, petitioners were required to submit a duly verified petition for expungement that includes the information in N.J.S.A. 2C:52-7.

Subparagraph (c)(3) addresses a defendant's eligibility for expungement six months after a dismissal in connection with the completion of a diversionary program. The Committee combined the provisions of N.J.S.A. 2C:52-6(c)(1) and (2) under one section. As such, this subparagraph addresses dismissals due to completion of the pretrial intervention program, the conditional dismissal program, the conditional discharge program and the veterans diversion program.

iv. Clean Slate

Paragraph (d) of the proposed rule relates to clean slate expungements. The "clean slate" law is governed by N.J.S.A. 2C:52-5.3 and permits petitioners to apply for an expungement of their entire record ten years after the last conviction, payment of fines/fees and completion of probation/parole, whichever is later.

The Committee primarily relied upon the statute when drafting this paragraph by largely tracking the language of N.J.S.A. 2C:52-5.3. This paragraph of the proposed rule has been organized by individual subparagraphs that address specific components of the application process in order make the rule more accessible for petitioners and attorneys.

Subparagraph (d)(1) addresses the process for petitioners to apply electronically for a clean slate expungement of one or more crimes, disorderly persons or petty disorderly persons offenses or a combination of one or more crimes and offenses in New Jersey. The Committee borrowed language from N.J.S.A. 2C:52-5.3(a) in drafting this section.

The Committee is proposing the title "Ineligible" for subparagraph (d)(2) because this section deals with persons who are statutorily barred from filing for an expungement under the "clean slate" law.

"Time Period to Apply" is the Committee's proposed title for subparagraph (3), which outlines the timeframes for "clean slate" expungement petitions. More specifically, pursuant to N.J.S.A. 2C:52-5.3(b), an eligible petitioner may generally

apply for expungement after the expiration of ten years from the date of the person's most recent conviction. Taking language directly from N.J.S.A. 2C:52-5.3(c), the Committee included, in section (A), a provision regarding outstanding court-ordered financial assessment. This section provides that if a "clean slate" expungement is granted, any outstanding financial obligations will be transferred to collections.

Proposed new R. 3:30-2 follows.

R. 3:30-2. Expungements for Marijuana/Hashish Offenses, Recovery Court, Dismissals/Acquittals, and Clean Slate

(a) Expungements Limited to Certain Marijuana or Hashish Offenses.

(1) Applying. Persons may apply electronically for an expungement of the specific marijuana or hashish offenses pursuant to N.J.S.A. 2C:52-5.1 in the Judiciary's computerized system for expungements. The system shall electronically transmit the proposed court order directly to the court for a determination to grant or deny the expungement.

(2) Judicial Determination. Copies of the court order shall be electronically available in the system to the person who is the subject of the expungement, counsel for the petitioner, and the applicable law enforcement and criminal justice agencies.

(3) Objection by the Prosecutor. Within 30 days of the order, the prosecutor may file an objection requesting that the court vacate the expungement based upon a statutory disqualification that existed at the time the expungement was granted. Copies of the objection shall be provided to the petitioner or attorney of record, and to the Office of the Public Defender if there is no private attorney. Within 30 days of the objection, the petitioner or counsel on their behalf may file a response with the court and provide a copy to the prosecutor. The court shall schedule a hearing and make the determination whether to vacate the expungement as soon as reasonably practical.

(b) Recovery Court Expungements.

(1) Requested Prior to Graduation. The procedures in this subparagraph apply only to persons requesting a recovery court expungement prior to graduation from Recovery Court.

(A) Proposed Order. The Office of the Public Defender or counsel on behalf of a person in Recovery Court may submit the proposed order for a recovery court expungement electronically in the Judiciary's computerized system for expungements.

(B) Response by the Prosecutor. Within 60 days of the proposed order, the county prosecutor shall submit a response electronically in the Judiciary's computerized system, which response shall indicate whether that office objects to the expungement and set forth the reasons for the objection.

(C) Judicial Determination. Copies of the court order shall be electronically available in the system to the parties and the applicable law enforcement and criminal justice agencies.

(2) Requests for an Expungement After Graduation. Persons who previously graduated from Recovery Court may apply electronically for a recovery court expungement pursuant to paragraph (b) of R. 3:30-1, and the petition shall be processed in accordance with paragraphs (c) through (f) of that rule.

(3) Restoring Records to Public Access After a Recovery Court Expungement. When a person is subsequently convicted of a crime after having been

discharged from Recovery Court and having had their prior records expunged pursuant to N.J.S.A. 2C:35-14(m)(1), the prosecutor may request that the court restore the person's full record of arrests and convictions to public access pursuant to N.J.S.A. 2C:35-14(m)(4).

(c) Expungements of Arrests Not Resulting in Conviction.

(1) Dismissals or Acquittals After June 15, 2020. Except for the reasons set forth herein, the court shall submit an order for expungement electronically in the Judiciary's system without undue delay where the dismissal, acquittal, or discharge without a finding of guilt of a crime, disorderly persons offense, petty disorderly persons offense, or municipal ordinance violation was ordered on or after June 15, 2020. The court order will be electronically available to the defendant or defense counsel, and the applicable law enforcement and criminal justice agencies.

(A) Plea Bargain. An expungement shall not be ordered where the dismissal, acquittal or discharge resulted from a plea bargaining agreement involving the conviction of other charges. This bar does not apply once the conviction is itself expunged.

(B) Not Guilty by Reason of Insanity. An expungement shall not be granted if the dismissal, discharge or acquittal resulted from a determination that the person was insane or lacked the mental capacity to commit the crime charged.

(2) Dismissals or Acquittals Prior to June 15, 2020. Persons seeking an expungement for a dismissal, acquittal or discharge without a finding of guilt for a crime, disorderly persons offense, petty disorderly persons offense, or municipal ordinance violation that occurred prior to June 15, 2020 may apply electronically pursuant to paragraph (b) of R. 3:30-1. The expungement shall be processed in accordance with paragraphs (c) through (f) of R. 3:30-1.

(3) Dismissals Due to Diversionary Programs. Six months after entry of the court order for dismissal due to completion of the pretrial intervention program, the conditional dismissal program, or the conditional discharge program, persons may apply electronically for an expungement in accordance with paragraph (b) of R. 3:30-1. Persons may apply electronically for an expungement at any time following entry of the order for dismissal of charges upon completion of the veterans diversion program if the expungement was not ordered by the court at the time of the dismissal. Upon submission of the petition electronically, the expungement shall be processed in accordance with paragraphs (c) through (f) of R. 3:30-1.

(d) Clean Slate.

(1) Applying. Persons may apply electronically in the Judiciary's computerized system for a clean slate expungement of one or more crimes, one or more disorderly persons or petty disorderly persons offenses, or a combination of one or more crimes and offenses in this State. The person may apply

regardless of whether the person would otherwise be ineligible pursuant to N.J.S.A. 2C:52-14(e) for having had a previous criminal conviction expunged, or due to having been granted an expungement pursuant to this or any other provision of law. The petition shall be submitted to the county where the most recent conviction for a crime or offense was adjudged.

(2) Ineligible. A person convicted for a crime which is not subject to expungement pursuant to subsection b. or c. of N.J.S.A. 2C:52-2 is ineligible to apply for a clean slate expungement.

(3) Time Period to Apply. The person, if eligible, may apply for the expungement after the expiration of ten years from the date of the person's most recent conviction, payment of any court-ordered financial assessment, satisfactory completion of probation or parole, or release from incarceration, whichever is later.

(A) Outstanding Court-Ordered Financial Assessment. Notwithstanding the ten-year requirement in this paragraph, if, at the time of application, a court-ordered financial assessment is not yet satisfied due to reasons other than willful noncompliance, but the ten-year period is otherwise satisfied, the person may submit the expungement application. If the expungement is granted, the court shall enter a civil judgment for the unpaid portion of the court-ordered financial assessment in the name of the Treasurer, State of New Jersey and transfer collection and disbursement responsibility to

the State Treasurer for the outstanding amount in accordance with N.J.S.A. 2C:52-23.1.

Note: Adopted _____ to be effective _____.

B. Referral in State v. Carrion

The Criminal Practice Committee is proposing a new rule in response to the Supreme Court's referral in State v. Jose Carrion, 249 N.J. 253 (2021) for the Committee to "study the issue and propose a court rule" concerning the right to confrontation in the context of the admission of an affidavit attesting that a search of a State firearm registry revealed no lawful permit for an individual's possession of a handgun. Id. at 274.

In considering the referral, the Committee examined the circumstances presented in Carrion. The defendant was indicted on weapons and drug offenses after a gun was discovered in a pouch on a table at his home during his arrest. Id. at 262. At trial, the State sought to admit an affidavit from the State Firearms Investigative Unit attesting that there was no record that the defendant had a firearm permit. Id. at 266. Over defendant's objection, the State asked the court to submit the affidavit as a self-authenticating document under N.J.R.E. 902(k) and the absence-of-a-public-record exception to the hearsay rule under N.J.R.E. 803(c)(10). Id. The trial court found the document both reliable and admissible. Id. After defendant's conviction, the Appellate Division affirmed, and the Supreme Court granted certification. Id. at 267.

The Court held that "while the raw data contained in the database listing issued firearm permits is not 'testimonial' for purposes of a confrontation-right analysis, statements about the search of that database for information specific to defendant for

use in his prosecution is testimonial." Id. at 260. Therefore, "the State's reliance on an affidavit by a non-testifying witness to introduce the results of the State firearm registry database over defendant's objection violated defendant's right to confront the witnesses against him." Id.

In order to avoid confrontation violations and to alleviate the administrative concerns of the State, the Court adopted the following practice of notice and demand for the presentation of a State's witness to testify to the search of the firearm permit database:

> "Adoption of a notice requirement by which a defendant must inform the court and the State of a demand to have the State produce an appropriate witness will protect a defendant's right to confrontation. See State v. Williams, 219 N.J. 89, 99, 95 A.3d 701 (2014). By not demanding the witness's testimony, the defendant waives his confrontation right. See ibid. In many cases, the defendant may conclude that the production of the witness is unnecessary. At the same time, a notice requirement will promote administrative and judicial efficiency."
>
> [Carrion, 249 N.J. at 273–274.]

Consistent with the above principles, the Committee is proposing a new rule entitled "Notice of Intention to Proffer Affidavit Regarding Search of Firearm Permit Database." In drafting the rule, the Committee drew guidance from State v. Wilson, 227 N.J. 534 (2017), a case where the Supreme Court considered whether the admission into evidence of a map, prepared and adopted by a governmental entity pursuant to N.J.S.A. 2C:35-7.1(e) violated the Confrontation Clause of the Sixth Amendment of the U.S. Constitution and the analogous New Jersey constitutional

provision. Id. at 538-9. As such, the Committee tailored existing R. 3:10-8 ("Notice of Intention to Proffer Map of Public Housing, Park, or Building") to the circumstances described in Carrion.

Members thought it would be prudent to include a definition for "affidavit" to account for both paper affidavits that are traditionally submitted directly to the judge, as well as certifications in lieu of oath that can be submitted through the Judiciary's electronic portal.

The proposed new rule follows.

R. ___ Notice of Intention to Proffer Affidavit Regarding Search of Firearm Permit Database

Whenever the State intends to offer an affidavit that a defendant's name does not appear in a firearm permit database at trial for an alleged commission of a firearms offense under Chapter 39 of Title 2C, notice of an intent to proffer that affidavit shall be conveyed to defendant at least 30 days prior to trial. A defendant who intends to object to the admission of such affidavit into evidence shall give notice of objection within 10 days after receiving the State's notice of intent to proffer the affidavit. Whenever a notice of objection is given, the State shall produce a witness who has knowledge and can testify to how the search of the firearm permit database was performed and the results. In the event the person who conducted the search is unavailable, an individual who personally witnessed or conducted the search can be presented. If there is no notice of objection, the affidavit shall be admitted into evidence without the need to produce a witness with knowledge of the search that was performed. Failure to comply with the time limitations regarding the notice of objection required by this rule shall constitute a waiver of any objections to the admission of the affidavit. The time limitations set forth in this rule shall not be relaxed except upon a showing of good cause. For purposes of this rule, "affidavit" includes a certification in lieu of oath pursuant to Rule 1:4-4(b).

Note: Adopted _____ to be effective _____.

III. Rule Amendments Recommended for Adoption

A. Drug Court Name Change to New Jersey Statewide Recovery Court

The Committee is proposing amendments to R. 1:38-3 ("Court Records Excluded from Public Access"), R. 3:4-2 ("First Appearance After Filing Complaint; Prehearing Rights Advisement") and R. 3:21-8 ("Credit for Confinement Pending Sentence and Re-Sentence") in light of the changes that became effective on January 1, 2022, to rename "New Jersey Statewide Drug Court" to "New Jersey Statewide Recovery Court".

The purpose of this name change was to reflect the philosophy of helping "change lives through a road to recovery." As such, the Committee surveyed the New Jersey Court Rules to identify which rules would require updates to reflect the new name.

The proposed amendments to R. 1:38-3, R. 3:4-2 and R. 3:21-8 follow.

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

The following court records are excluded from public access:

(a) General … no change.

(1) … no change.

(2) … no change.

(b) Internal Records … no change.

(1) … no change.

(2) … no change.

(c) Records of Criminal and Municipal Court Proceedings.

(1) … no change.

(2) … no change.

(3) … no change.

(4) … no change.

(5) Records relating to participants in recovery [drug] court programs and programs approved for operation under R. 3:28 (Pre-trial Intervention), and reports made for a court or prosecuting attorney pertaining to persons enrolled in or applications for enrollment in such programs, but not the fact of enrollment and the enrollment conditions imposed by the court;

(6) … no change.

(7) … no change.

(8) … no change.

(9) … no change.

(10) … no change.

(11) … no change.

(12) … no change.

(13) … no change.

(14) … no change.

(15) … no change.

(d) Records of Family Part Proceedings.

(1) … no change.

(2) … no change.

(3) … no change.

(4) … no change.

(5) … no change.

(6) … no change.

(7) … no change.

(8) … no change.

(9) … no change.

(10) … no change.

(11) … no change.

(12) … no change.

(13) … no change.

(14) … no change.

(15) … no change.

(16) … no change.

(17) … no change.

(18) … no change.

(19) … no change.

(20) … no change.

(e) Records of Guardianship Proceedings … no change.

(f) Records of Other Proceedings.

(1) … no change.

(2) … no change.

(3) … no change.

(4) … no change.

(5) … no change.

(6) … no change.

(7) … no change.

(8) … no change.

(9) … no change.

(10) … no change.

(11) … no change.

Note: New Rule 1:38-3 adopted July 16, 2009 to be effective September 1, 2009; subparagraph (b)(1); amended December 9, 2009 to be effective immediately; paragraphs (e) and (f); amended January 5, 2010 to be effective immediately; subparagraph (c)(11); amended, subparagraph (c)(12) adopted, and subparagraph (d)(10); amended February 16, 2010 to be effective immediately; subparagraph (d)(1); amended June 23, 2010 to be effective July 1, 2010; paragraph (e); amended October 26, 2010 to be effective immediately; paragraph (e); amended February 28, 2013 to be effective immediately; subparagraph (d)(12); amended July 9, 2013 to be effective September 1, 2013; subparagraphs (f)(2) and (f)(5); amended, and new subparagraph (f)(9) added December 9, 2014 to be effective immediately; subparagraph (d)(2); amended July 27, 2015 to be effective September 1, 2015; subparagraph (b)(1); amended May 30, 2017 to be effective immediately; paragraph (a) and subparagraphs (d)(1) and (d)(13); amended July 28, 2017 to be effective September 1, 2017; subparagraphs (c)(1), (d)(1), (d)(2), (d)(5), (d)(6), (d)(9), and (f)(6); amended May 15, 2018 to be effective immediately; new subparagraph (c)(13) adopted July 27, 2018 to be effective September 1, 2018; new subparagraph (c)(14) adopted and subparagraph (f)(5); amended September 12, 2018 to be effective immediately; new subparagraph (f)(10) adopted April 23, 2019 to be effective May 1, 2019; new subparagraph (d)(18) adopted July 29, 2019 to be effective September 1, 2019; new subparagraphs (c)(15) and (d)(19) adopted February 5, 2021 to be effective February 15, 2021; subparagraph (c)(4); amended, subparagraph (d)(19); amended, new subparagraph (d)(20) adopted, and subparagraph (f)(10); amended July 30, 2021 to be effective September 1, 2021; new subparagraph (f)(11) adopted February 28, 2022 to be effective May 1, 2022; paragraph (a) amended August 4, 2022 to be effective January 1, 2023; subparagraph (c)(5) amended ____ to be effective ____.

R. 3:4-2. First Appearance After Filing Complaint; Prehearing Rights Advisement

(a) Time of First Appearance … no change.

(1) … no change.

(2) … no change.

(b) First Appearance; Where Held … no change.

(c) Discovery … no change.

(1) … no change.

(2) … no change.

(d) Procedure in Indictable Offenses … no change.

(1) … no change.

(2) … no change.

(3) … no change.

(4) … no change.

(5) … no change.

(6) … no change.

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

(8) … no change.

(9) … no change.

(10) … no change.

(e) Procedure in Non-Indictable Offenses … no change.

(1) … no change.

(2) … no change.

(3) … no change.

(4) … no change.

(5) … no change.

(f) Trial of Indictable Offenses in Municipal Court … no change.

(g) Waiver of First Appearance By Written Statement … no change.

(1) … no change.

(2) … no change.

(3) … no change.

(4) … no change.

(5) … no change.

(6) … no change.

(7) been informed that there is a recovery [drug] court program and where and how to make an application to that program.

The written statement waiving the first appearance shall be electronically filed with the court, and notification provided to the County Prosecutor or the Attorney General, if the Attorney General is the prosecuting attorney.

(h) Prehearing Rights Advisement … 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 Rule 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, subparagraph (a)(1) amended, paragraph (b) amended, new paragraph (c) adopted, former paragraph (c) amended and redesignated as paragraph (d), former paragraph (d) amended and redesignated as paragraph (e), former paragraph (e) redesignated as paragraph (f), and former paragraph (f) redesignated as paragraph (g) July 27, 2018, to be effective September 1, 2018; caption amended, paragraphs (a)(1), (d), (e) amended, and new paragraph (h) adopted May 26, 2020 to be effective June 8, 2020; subparagraphs (d)(7) and (g)(7) amended ___ to be effective ___.

R. 3:21-8. Credit for Confinement Pending Sentence and Re-Sentence

(a) … no change.

(b) While committed to a residential treatment facility, the defendant shall receive credit on the term of a custodial sentence for each day during which the defendant satisfactorily complied with the terms and conditions of Recovery [Drug] Court "special probation" pursuant to N.J.S.A. 2C:35-14 or Recovery [Drug] Court probation pursuant to N.J.S.A. 2C:45-1. The court, in determining the number of credits for time spent in a residential treatment facility, shall consider the recommendations of the treatment provider.

Note: Source -- R.R. 3:7-10(h) (first sentence); amended July 13, 1994 to be effective September 1, 1994; caption amended and text designated as paragraph (a), paragraph (b) adopted July 28, 2017 to be effective September 1, 2017; paragraph (b) amended ___ to be effective ___.

IV. Rule Amendments Considered and Not Recommended

A. Referral in State v. Chen

The Criminal Practice Committee considered whether a provision should be included in R. 3:28 et. seq. ("Pretrial Intervention Programs") that would prohibit prosecutors from requiring jail time as a condition for admission to the pretrial intervention program (PTI). The issue was referred to the Committee in response to the Appellate Division's published opinion in State v. Samuel Chen, 465 N.J. Super. 274 (App. Div. 2021).

In considering this referral, the Committee reviewed the circumstances presented in Chen, where the court held that the Prosecutor's Office patently and grossly abused its discretion by tainting the PTI application process when it required defendants to agree to serve jail time as a means to gain admission. The Appellate Division concluded that "it is illegal because to vest such authority to the Prosecutor's Office would give it powers contrary to the Legislature's intent in creating the program." Id. at 278-79. The Appellate Division further stated "Clearly the policy goal of avoiding traditional prosecution through PTI would be subverted by one of the most onerous consequences of all – incarceration. The Prosecutor's Office had no right to impose some form of penal punishment as a condition for defendant's admission to PTI." Id. at 289.

The Committee unanimously agreed that a condition of jail is the antithesis of PTI. After discussing the circumstances presented in Chen, the Committee decided that R. 3:28 et. seq. did not need to reference such a limited occurrence. Members believed the circumstances presented in Chen were too case-specific, and so far outside the norm that even the prosecutor in that case conceded there was no legal authority to condition PTI admission on serving jail time. The Committee determined the incident was so isolated and unlikely to recur that no further action was required.

B. Referral in State v. Lavrik

A referral was made pursuant to State v. Andrew Lavrik, 472 N.J. Super. 192 (App. Div. 2022) for the Committee to consider possible amendments to R. 3:9-2 ("Pleas") or R. 3:28-7 ("Conclusion of Period of Pretrial Intervention") to address whether a victim in a criminal matter has standing to appeal from a trial court order granting a defendant's motion for a civil reservation, where the victim neither moved to intervene, and the parties to the underlying action have not appealed. Id. at 218.

In considering the referral, the Committee contemplated the particular circumstances presented in Lavrik. The defendant, an ice skating coach affiliated with the United States Figure Skating Association (USFSA) was charged in a three-count indictment with two counts of fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1), against his sixteen-year-old student. Id. at 199. Defendant ultimately plead guilty to second-degree endangering in exchange for admission to PTI. Id. at 200. At the end of the plea hearing, defense counsel orally moved for a civil reservation under R. 3:9-2, to prohibit "the plea as entered at this point" from admission in evidence "in any civil proceeding." Id. Acknowledging the "unusual" timing of the application, defense counsel claimed the "PTI order may, in essence, be a final order in this case if defendant successfully completes PTI" and the application "has to be made at the time of the final order." Id. Due to the prosecutor's objection of the application, the court

adjourned the matter. Id. At a later hearing, the victim's mother was permitted to make a statement but did not move to intervene in the trial court proceeding. Id. at 201. The trial court granted defendant's motion and entered an order barring "any and all statements made by defendant Lavrik during court proceedings" from admission in evidence "in any civil proceeding pursuant to R. 3:9-2". Id. at 202. A month later, the victim appealed the trial court order. Id.

The Appellate Division held that because the victim had "a financial interest in the outcome of the litigation" and the civil reservation was not a condition of defendant's plea agreement, the victim – not the State – was "aggrieved" by entry of the civil reservation order and therefore had standing to appeal. Id. at 210. The court also held that the victim was required to move for leave to appeal from the trial court's order. Id. Nevertheless, the court "overlooked" the procedural deficiencies in view of the standing issue. Id. With respect to the effect of defendant's guilty plea as a condition of PTI on the practical application of the civil reservation order, the Appellate Division held that the trial court should have delayed consideration of defendant's application until the completion of his PTI term. Id. at 217.

The Committee concluded that rule amendments were not necessary because the circumstances presented in Lavrik are already covered by the court rules and existing caselaw. Committee members unanimously agreed that this was a fact-specific inquiry that could be addressed on a case-by-case basis.

C. Referral in State v. Smith

The Committee considered a referral to make a recommendation for possible amendments to R. 3:7-6 or R. 3:15-2 in accordance with the Appellate Division's decision, State v. Karl Smith, 471 N.J. Super. 548 (App. Div. 2022).

Specifically, the Appellate Division in Smith stated:

> The trial here suggests it may be time to revisit the rules regarding joinder at trial of "same or similar" offenses that are not part of a "common plan or scheme," and a defendant's ability to seek relief from prejudicial joinder through a pretrial motion for severance.
>
> Also, it may require the revisiting of the Chenique-Puey framework to ensure unfair prejudice will not seep into a trial when the State contends two different sets of offenses are "connected together" by N.J.R.E. 404(b). We shall serve a copy of this opinion on the Supreme Court's Committee on Criminal Practice for its consideration of possible amendments to Rule 3:7-6, or Rule 3:15-2(b).
>
> [Smith, 471 N.J. Super. 548, 582-3 (App. Div. 2022)]

In considering this referral, the Committee reviewed the circumstances presented in Smith. A twenty-count indictment was returned against the defendant charging him with eighteen counts of sexual offenses committed against K.W., his daughter, and two counts of sexual offenses committed against S.E., his girlfriend's daughter. One of the issues the defendant raised on appeal is that the trial court erred in denying his motion to sever the last two counts of the indictment that charged him with sexual offenses against S.E. Id. At 566. The Appellate Division found the argument persuasive, vacated the sentence, and remanded for a new trial.

The Committee acknowledges that the Smith case highlighted some of the joinder issues that can arise when a defendant is charged with multiple offenses in a single indictment. Despite the challenges that judges and practitioners face under these circumstances, a majority of the Committee did not believe that changes to R. 3:7-6 or R. 3:15-2 were necessary. The majority believed that if the trial court judge had properly applied the preexisting R. 404(b) analysis, then the matters would have been properly severed. "Other-crimes" evidence proffered under R. 404(b) must pass the rigorous test outlined in State v. Cofield, 127 N.J. 328 (1992). The majority felt that those requirements were not adhered to by the Smith trial court judge, which is what prompted the Appellate Division's reversal and referral.

A slim minority of Committee members were in support of an amendment to R. 3:7-6. These members believed that offenses are not related merely because they are of a "same or similar character", and a recommendation from the Committee to remove that language from R. 3:7-6 was more consistent with the Smith opinion.

Ultimately, the Committee felt that the rules would have worked as intended had they been followed and that no changes were necessary.

Committee Members and Staff

Hon. Benjamin C. Telsey, A.J.S.C.
Hon. Peter J. Tober, P.J.Cr.
Jeffrey J. Barile, Esq.
Bradley D. Billhimer, Esq.
Eric R. Breslin, Esq.
Raymond M. Brown, Esq.
Narline Casimir, Esq.
Hon. Martin G. Cronin, J.S.C. (ret.)
Claudia Joy Demitro, Esq.
Jason E. Foy, Esq.
Hon. J. Christopher Gibson, J.S.C.
Hon. Robert J. Gilson, J.A.D.
Karl Goldenbaum, CDM
Carol M. Henderson, Esq.
Hon. Pedro Jimenez, Jr., J.S.C.
Van Lane, Esq.
Hon. Marc C. Lemieux, P.J.Cr.
Jessica Lyons, Esq.
Joseph M. Mazraani, Esq.
Hon. Edward J. McBride, Jr., P.J.Cr.
Charles B. McKenna, Esq.
John K. McNamara, Esq.
Hon. Marybel Mercado-Ramirez, J.S.C.
Hon. Stuart A. Minkowitz, A.J.S.C.
Angelo J. Onofri, Esq.
Kenneth Ralph, Esq.
Hon. Nancy L. Ridgway, J.S.C.
Joseph J. Russo, Esq.
Hon. James X. Sattely, J.S.C.
Jeffrey H. Sutherland, Esq.
Donna Westhoven, Assistant Director

Committee Staff:
Larye N. German, Esq.

Respectfully submitted,

Benjamin C. Telsey, AJSC

Hon. Benjamin C. Telsey, A.J.S.C., Chair

Dated: January 13, 2023