

NOTICE TO THE BAR

CRIMINAL PRACTICE COMMITTEE REPORT -- PROPOSED AMENDMENTS TO COURT RULE 3:28-1(c) (“PERSONS INELIGIBLE TO APPLY FOR PRETRIAL INTERVENTION”) IN RESPONSE TO STATE V. GOMES, 253 N.J. 6 (2023) – PUBLICATION FOR COMMENT

The Supreme Court invites written comments on proposed amendments to Rule 3:28-1(c) (“Persons Ineligible to Apply for Pretrial Intervention”), as set out in the attached report of the Supreme Court Criminal Practice Committee.

Background; Supreme Court Referral

The Court in [State v. Richard Gomes](#), 252 N.J. 6 (2023), considered whether people who received conditional discharges for marijuana offenses before the 2021 adoption of the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), were statutorily ineligible for admission into the pretrial intervention program (PTI) for new offenses. The two consolidated cases involved defendants with a previous conditional discharge arising from a marijuana possession offense that was no longer unlawful in New Jersey after the adoption of CREAMMA. After differing conclusions by trial courts, the Appellate Division concluded that the “one diversion only” general limitation of the PTI statute, N.J.S.A. 2C:43-12(g)(1), as well as the provisions of earlier expungement statutes, rendered persons with pre-CREAMMA possessory marijuana convictions ineligible for consideration for admission to the PTI program.

The Supreme Court, however, held “that persons who received pre-CREAMMA conditional discharges for specified marijuana offenses -- just like persons who had pre-CREAMMA convictions for those marijuana offenses -- are no longer categorically precluded from future admission into PTI.” *Id.* at 11. The Court directed prosecutors and reviewing courts to consider the merits of the PTI applications of such persons, without regard to the existence or circumstances of the earlier marijuana-related conditional discharges. The Court asked the Criminal Practice Committee to develop and present expeditiously proposed amendments to Rule 3:28-1(c)(1) to conform with its opinion. *Id.* at 38.

Criminal Practice Committee Report and Recommendation

In response to the Court’s request, the Practice Committee submitted the attached ad hoc report, which proposes the following amendments to Rule 3:28-1(c):

(c)(1) Prior Diversion. A person who has previously been enrolled in a program of pretrial intervention; previously been placed into supervisory treatment in New Jersey under the conditional discharge statute pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1, unless the conditional discharge was for a specified marijuana offense expunged or vacated by N.J.S.A. 2C:52-6.1, or the conditional dismissal statute, N.J.S.A. 2C:43-13.1 et seq.; previously was granted a dismissal due to successful participation in the Veterans Diversion Program pursuant to N.J.S.A. 2C:43-23 et seq.; or previously was enrolled in a diversionary program under the laws of any other state or the United States for a felony or indictable offense, shall be ineligible to apply for admission into pretrial intervention.

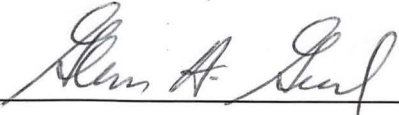
Request for Comments

Please send any comments on the proposed amendments to Rule 3:28-1(c) in writing by December 4, 2023 to:

Glenn A. Grant
Administrative Director of the Courts
Comments on Proposed Amendments to Rule 3:28-1(c)
("Persons Ineligible to Apply for Pretrial Intervention")
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Comments may also be submitted by email to: Comments.Mailbox@njcourts.gov.

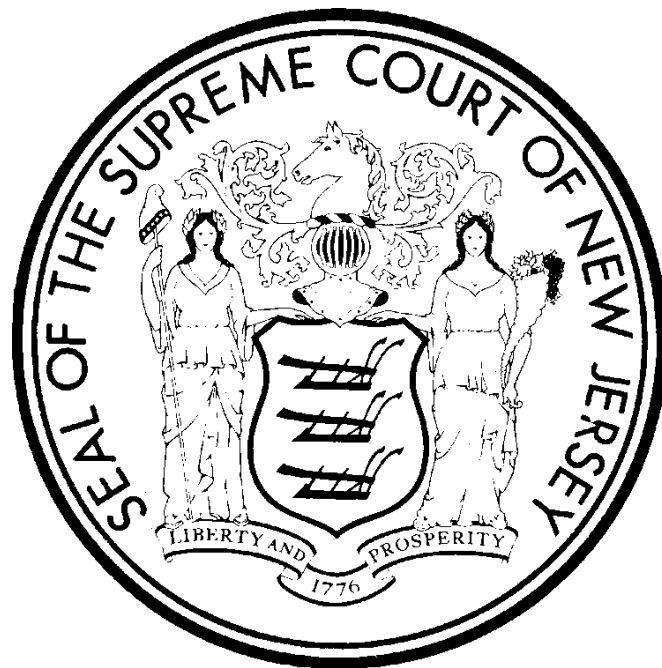
The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by email should include their name and email address. Comments submitted in response to this notice are subject to public disclosure.



Glenn A. Grant
Administrative Director of the Courts

Dated: November 2, 2023

**SECOND AD HOC REPORT OF THE
SUPREME COURT COMMITTEE
ON CRIMINAL PRACTICE**



**2021-2023
RULES CYCLE**

July 5, 2023

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I. Rule 3:28-1. Eligibility for Pretrial Intervention

The Criminal Practice Committee is proposing amendments to paragraph (c) of Rule 3:28-1 (“Eligibility for Pretrial Intervention”) in response to a referral from the Supreme Court that the Committee “develop and present expeditiously to this Court a proposed amendment of Rule 3:28-1(c)(1) conforming with our opinion.” See State v. Gomes, 253 N.J. 6, 34 n. 11 (2023). The proposed amendments are consistent with the Court’s holding, which “harmonize[s]” the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) and “its manifest legislative intent with the pre-existing general language of the PTI and expungement statutes,” including the “Legislature’s command in CREAMMA to apply its reforms to ‘any case’ that arose before its enactment.” Id. at 11.

A. State v. Gomes

In Gomes, the Supreme Court held that “persons who received pre-CREAMMA conditional discharges for specified marijuana offenses – just like persons who had pre-CREAMMA convictions for those marijuana offenses – are no longer categorically precluded from future admission into PTI.” Gomes, 253 N.J. at 11-12. Instead, prosecutors and reviewing courts must consider the merits of the PTI application, without regard to the existence or circumstances of the earlier marijuana-related conditional discharges. Id.

The procedural history of these consolidated appeals involves defendants, Richard Gomes and Moataz M. Sheira, who received conditional discharges for possessory marijuana¹ offenses prior to CREAMMA's adoption. Id. at 11. In November 2020, defendant Gomes was charged in Middlesex County with third- and fourth-degree assault by auto. Id. at 12. In March 2021, defendant Sheira was charged in Morris County with two counts of third-degree possession of cocaine and heroin. Id. Both defendants filed applications for admission into PTI for their respective new charges and were notified by criminal division managers that they were ineligible for the program. Id. at 13. Defendant Sheira filed a motion to appeal his rejection from PTI with the support of the Morris County prosecutor. That motion was denied by the trial court judge, who concluded that Sheira was statutorily ineligible because of his previous conditional discharge. Sheira moved for leave to appeal to the Appellate Division. Defendant Gomes filed a PTI motion that was opposed by the Middlesex County Prosecutor. Id. The trial court overruled the ineligibility determination and permitted Gomes to apply for PTI, directing the prosecutor to consider the merits of defendant's application. Id. at 14. The prosecutor moved for leave to appeal. Id.

The Appellate Division held that the defendants were statutorily barred from

¹ Both defendants were previously charged with disorderly persons possession of marijuana under the pre-CREAMMA terms of N.J.S.A. 2C:35-10(a)(4). In both cases, the charges were dismissed through a conditional discharge following each defendant's successful completion of a diversionary treatment program under N.J.S.A. 2C:36A-1.

PTI eligibility because of the “one diversion only” general limitation of the PTI statute² and the terms of the expungement statutes enacted before CREAMMA. See State v. Gomes, 472 N.J. Super. 515 (App. Div. 2022). The court concluded that defendants Gomes and Sheira “already benefitted” by receiving a conditional discharge because possessing less than fifty grams of cannabis was a disorderly persons offense at the time of the prior diversionary placements and remains a disorderly persons offense under CREAMMA. Id. at 534. In addition, N.J.S.A. 2C:52-6.1 was “neither inconsistent with, nor repugnant to, the Legislature’s earlier enacted rule permitting only one prior diversionary placement, including conditional discharges under N.J.S.A. 2C:36A-1(c)(3).” Id.

As part of its analysis, the court noted that the statute was “forward looking” and did not contradict N.J.S.A. 2C:43-12(g), which limits pretrial intervention to one opportunity. Id. Believing that the Legislature did not intend to allow PTI diversion for defendants who previously received a conditional discharge, the court relied on

² “A person who has previously been enrolled in a program of pretrial intervention; previously been placed into supervisory treatment in New Jersey under the conditional discharge statute pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1, or the conditional dismissal statute, N.J.S.A. 2C:43-13.1 et seq.; previously was granted a dismissal due to successful participation in the Veterans Diversion Program pursuant to N.J.S.A. 2C:43-23 et seq.; or previously was enrolled in a diversionary program under the laws of any other state or the United States for a felony or indictable offense, shall be ineligible to apply for admission into pretrial intervention.” See R. 3:28-1(c)(1).

language in the PTI statute³, the general expungement statute⁴, State v. O’Brien⁵, and other “extrinsic evidence⁶ [that] supports our reading of the statutes in question.” Id. at 532.

Defendants moved for leave to appeal the Appellate Division’s decision, and the Supreme Court granted the motions. State v. Gomes, 251 N.J. 468 (2022). After a comprehensive review of CREAMMA and the PTI and expungement statutes, the Court came to the conclusion that the PTI statute does not address “the present distinctive and extraordinary situation in which conduct that had previously been deemed unlawful is now, in retrospect, deemed to have not occurred.” State v. Gomes, 253 N.J. 6 (2023). The Court reasoned that despite the PTI statute’s generic language in N.J.S.A. 2C:43-12(g)(1) that “a person with a previous conditional discharge ‘shall not be eligible’ for PTI” the PTI statute “does not say that its ‘one diversion only’ general statutory bar must penalize individuals who had been charged with a marijuana offense that the Legislature has since declared ... to be a nullity.” Id. at 31. The Court also recognized that “persons who had previous marijuana convictions are

³ N.J.S.A. 2C:43-12.

⁴ N.J.S.A. 2C:52-20.

⁵ “The goals underlying pretrial intervention – to deter future criminal conduct and to provide a one-time diversion from prosecution ...” State v. O’Brien, 418 N.J. Super. 428, 441 (App. Div. 2011).

⁶ The court cited as “extrinsic evidence” a proposed bill introduced in the Legislature after CREAMMA’s enactment, A. 1978 (2022), which sought to amend the PTI statute to expressly allow those who received expungements from CREAMMA of their marijuana-related conditional discharges to apply for PTI. See State v. Gomes, 472 N.J. Super, 515, 532-33 (App. Div. 2022).

allowed to apply for PTI when charged with new offenses,” and “[t]here is nothing in the text or enactment history of CREAMMA that supports a legislative intent to deprive persons with previous conditional discharges of that same opportunity.” Id. The Court reversed the Appellate Division’s holding but emphasized that the reversal “does not automatically entitle a PTI applicant with a previous marijuana conditional discharge to be admitted into the program.” Id. at 34.

B. History of the Statutory Scheme Concerning Pretrial Intervention

PTI is a diversionary program that allows offenders to avoid criminal prosecution for certain first offenses in favor of an alternate disposition. State v. Gomes, 253 N.J. 6, 11 (2023). The PTI program is designed for first-time offenders who will benefit from early rehabilitative services to deter future criminal conduct. See N.J.S.A. 2C:43-12(a)(1).

PTI was initially established in 1970 by Rule 3:28 to provide the basis for the vocational-service pretrial intervention program operated by the Newark Defendants Employment Project. State v. Nwobu, 139 N.J. 236, 245 (1995). By 1976, the program expanded in various forms to twelve counties. Id.

In response to the Court’s two decisions in State v. Leonardis⁷, the Legislature enacted a statewide PTI program as part of the 1979 Code of Criminal Justice. Gomes, 253 N.J. at 17-18. As such, PTI programs are “governed simultaneously by the Rule

⁷ State v. Leonardis, 71 N.J. 85 (1976) (Leonardis I); State v. Leonardis, 73 N.J. 360 (1977) (Leonardis II).

and the statute which ‘generally mirror[]’ each other.” State v. Roseman, 221 N.J. 611, 621 (2015) (quoting State v. Watkins, 193 N.J. 507 (2008)). In 2018, the original version of Rule 3:28 was repealed and replaced with its current iteration, which eliminated the guidelines that based a defendant’s suitability for PTI on factors set forth in N.J.S.A. 2C:43-12(e) and Rule 3:28. See State v. Johnson, 238 N.J. 119, 128 (2019).

Prior to the adoption of CREAMMA, PTI eligibility has been governed by the so-called “one diversion only” policy. State v. Gomes, 253 N.J. at 18. Specifically, the language in the PTI statute provides:

It is the policy of the State of New Jersey that supervisory treatment should ordinarily be limited to persons who have not previously been convicted of any criminal offense under the laws of New Jersey.

[N.J.S.A. 2C:43-12(a)]

The statute further indicates that: “[s]upervisory treatment may occur only once with respect to any defendant and any person who has previously received ... a conditional discharge.” N.J.S.A. 2C:43-12(g)(1). The text of the current Rule 3:28-1(c)(1) has not been revised since CREAMMA’s enactment. The rule repeats the bars set forth in the statute and precludes PTI enrollment if the person “previously was enrolled in a diversionary program under the laws of any other state or the United States.” R. 3:28-1.

C. History and Pertinent Terms of the New Jersey Expungement Statutes

Prior to 1979, there was no “cohesive or uniform expungement practice” in New Jersey’s criminal justice system. See State v. T.P.M., 189 N.J. Super. 360 (App. Div. 1983). Effective September 1, 1979, the Legislature enacted Chapter 52 of the Code of Criminal Justice, which covered the expungement of criminal records. Id. at 364. With the enactment of Chapter 52, the Legislature “intended to establish ‘a comprehensive statutory scheme for the expungement of criminal records’” and to create “an equitable system of expungement of indictable and nonindictable offenses as well as of arrest record.” Id. (first quoting Allen, *Legislative History of Amendments to the New Jersey Cod of Criminal Justice Passed Prior to the Effective Date of the Code*, 7 *Crim. Just. Q.*, 41, 48 (1980); and then quoting *S. Judiciary Comm. Statement to S. 3203* (June 18, 1979)). Chapter 52 was construed with the primary objective of “providing relief to the reformed offender who has led a life of rectitude and disassociated himself with unlawful activity, but not to create a system whereby persistent violators of the law or those who associate themselves with continuing criminal activity have a regular means of expunging their police and criminal records.” See N.J.S.A. 2C:52-32.

On September 12, 2019, the Senate introduced Bill 4154 to “revise expungement eligibility and procedures, including new ‘clean slate’ automated process to render convictions and related records inaccessible; create[] e-filing system

for expungements; eliminate[] expungement filing fees; appropriate[] \$15 million to DLPS for implementation.” S. 4154. The reform bill amended various provisions of the expungement statutes (N.J.S.A. 2C:52-1 to -32.1), including the sealing of low-level marijuana convictions upon the disposition of a case. See N.J.S.A. 2C:52-5.2. On December 18, 2019, the bill was approved as L. 2019, c. 269.

N.J.S.A. 2C:52-20 governs how expungement records may be supplied and used in relation to a defendant’s eligibility for supervisory treatment or diversion programs. That provision states:

Expunged records may be used by the court in determining whether to grant or deny the person’s application for acceptance into a supervisory treatment or diversion program for subsequent charges. Any expunged records which are possessed by any law enforcement agency may be supplied to the Attorney General, any county prosecutor, or court of this State when same are requested and are to be used for the purpose of determining whether or not to accept a person into a supervisory treatment or diversion program for subsequent charges.

[N.J.S.A. 2C:52-20]

However, certain prior marijuana-related offense records are explicitly excluded from consideration in such pretrial detention or bail decisions. See N.J.S.A. 2C:52-21.

D. Background on CREAMMA

On February 22, 2021, Governor Murphy signed the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act

(CREAMMA), L. 2021, c. 16, which legalized and regulated cannabis use and possession for adults 21 years and older, decriminalized small amount marijuana and hashish possession, and removed marijuana as a Schedule I drug. As part of the CREAMMA legislation, N.J.S.A. 2C:35-10 was amended to include the following:

(b) On and after the effective date of [CREAMMA], possession of six ounces or less of marijuana, including any adulterants or dilutants, or 17 grams or less of hashish is not subject to any punishment, as this possession is not a crime, offense, act of delinquency, or civil violation of law[.]

[N.J.S.A. 2C:35-10(a)(4)(b)]

The Legislative intent behind CREAMMA was “to adopt a new approach to our marijuana policies by controlling and legalizing a form of marijuana, to be referred to as cannabis, in a similar fashion to the regulation of alcohol for adults.” N.J.S.A. 24:6I-32(a). In reviewing the legislative history, the Gomes Court noted that “[a]mong other things, CREAMMA signifies that such prior marijuana offenses must be deemed not to have occurred and directs, by operation of law, their automatic expungement from an offender’s criminal record.” Gomes, 253 N.J. at 11.

Contemporaneous with CREAMMA’s enactment, the New Jersey Office of the Attorney General issued Attorney General Law Enforcement Directive No. 2021-1 to instruct all prosecutors to dismiss certain pending marijuana-related charges where the conduct occurred on or before February 22, 2021. Cases involving qualified marijuana offenses that were already resolved but defendant was still serving a

sentence were vacated by operation of law. If a defendant completed serving their sentence for a qualified marijuana offense, their case was automatically expunged.

II. Committee Recommendation for Proposed Amendments to Rule 3:28-1

To ensure conformity with the Court's opinion, a subcommittee was formed to make recommendations on amendments to Rule 3:28-1. Upon reviewing State v. Gomes along with CREAMMA and the PTI and expungement statutes, the subcommittee formulated a proposal that included the addition of language to subparagraph (c)(1). The proposed language clarified that the prior diversion ineligibility does not apply to persons who previously received a conditional discharge for specified marijuana offenses. The following rule was submitted to the full Committee for a vote:

(c)(1) Prior Diversion. A person who has previously been enrolled in a program of pretrial intervention; previously been placed into supervisory treatment in New Jersey under the conditional discharge statute pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1, or the conditional dismissal statute, N.J.S.A. 2C:43-13.1 et seq.; previously was granted a dismissal due to successful participation in the Veterans Diversion Program pursuant to N.J.S.A. 2C:43-23 et seq.; or previously was enrolled in a diversionary program under the laws of any other state or the United States for a felony or indictable offense, shall be ineligible to apply for admission into pretrial intervention. This ineligibility does not apply to a person who previously received a conditional discharge for a specified marijuana offense expunged or vacated by N.J.S.A. 2C:52-6.1.

The Committee discussed concerns that the proposed language may be misconstrued as applicable to persons who were otherwise disqualified from PTI due

to a prior diversion that was non-marijuana related. As an example, a hypothetical was posed concerning whether an individual who had a prior out-of-state diversion for a qualifying marijuana offense would be ineligible for PTI post-Gomes.

Some members felt that the subcommittee's proposal ran the risk of exposing the rule to an interpretation that the Court did not intend. In response to those concerns, members suggested moving the marijuana conditional discharge language to appear next to the specific provision that it affects, as opposed to presenting it in the last sentence of the paragraph which leaves it subject to misinterpretation. As a result, the language was spliced into the sentence describing eligibility after a prior conditional discharge, as follows:

(c)(1) Prior Diversion. A person who has previously been enrolled in a program of pretrial intervention; previously been placed into supervisory treatment in New Jersey under the conditional discharge statute pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1, unless the conditional discharge was for a specified marijuana offense expunged or vacated by N.J.S.A. 2C:52-6.1, or the conditional dismissal statute, N.J.S.A. 2C:43-13.1 et seq.; previously was granted a dismissal due to successful participation in the Veterans Diversion Program pursuant to N.J.S.A. 2C:43-23 et seq.; or previously was enrolled in a diversionary program under the laws of any other state or the United States for a felony or indictable offense, shall be ineligible to apply for admission into pretrial intervention.

The Committee unanimously endorsed this alternate proposal, which appears as the proposed amendments to Rule 3:28-1 below:

Rule 3:28-1. Eligibility for Pretrial Intervention

(a) Age ... no change.

(1) ... no change.

(2) ... no change.

(b) Residence ... no change.

(c) Persons Ineligible to Apply for Pretrial Intervention.

(1) Prior Diversion. A person who has previously been enrolled in a program of pretrial intervention; previously been placed into supervisory treatment in New Jersey under the conditional discharge statute pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1, unless the conditional discharge was for a specified marijuana offense expunged or vacated by N.J.S.A. 2C:52-6.1, or the conditional dismissal statute, N.J.S.A. 2C:43-13.1 et seq.; previously was granted a dismissal due to successful participation in the Veterans Diversion Program pursuant to N.J.S.A. 2C:43-23 et seq.; or previously was enrolled in a diversionary program under the laws of any other state or the United States for a felony or indictable offense, shall be ineligible to apply for admission into pretrial intervention.

(2) ... no change.

(d) Persons Ineligible for Pretrial Intervention Without Prosecutor Consent to Consideration of the Application ... no change.

(1) ... no change.

(2) ... no change.

(e) Cases Where There is a Presumption Against Admission in Pretrial Intervention.

(1) ... no change.

(2) ... no change.

(3) ... no change.

Note: Adopted September 15, 2017 to be effective July 1, 2018; paragraphs (c) and (d) amended July 27, 2018 to be effective September 1, 2018; subparagraph (c)(1) amended ____ to be effective ____.

Committee Members and Staff

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Respectfully submitted,

Benjamin C. Telsey, AJSC

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

Dated: July 5, 2023