NOTICE TO THE BAR

SUPREME COURT CRIMINAL PRACTICE COMMITTEE REPORT ON RECOMMENDED COURT RULES TO IMPLEMENT THE BAIL REFORM LAW – PART 1, PRETRIAL RELEASE – PUBLICATION FOR COMMENT

This notice publishes for written comment the May 9, 2016 **Report of the Supreme Court Criminal Practice Committee on Recommended Court Rules to Implement the Bail Reform Law – Part 1, Pretrial Release**.

Please send any comments on this report and its rule recommendations in writing by **Monday, June 6, 2016** to:

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Acting Administrative Director of the Courts
Comments on Pretrial Release Rules (Criminal)
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Comments may also be submitted via Internet e-mail to the following address: Comments.Mailbox@judiciary.state.nj.us.

Please note that while the comment period on this report will not close until June 6, 2016, the **rules hearing** scheduled for **June 1, 2016** on the reports of the Civil Practice Committee, Special Civil Part Practice Committee, and Tax Court Committee (see the Notice dated April 21, 2016) will also include this report of the Criminal Practice Committee. Thus, anyone wishing to speak on this report at that June 1 hearing should so indicate it writing to the above address.

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 e-mail should include their name and e-mail address). Comments submitted are subject to public disclosure.

Glenn A. Grant by DDB

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: May 10, 2016

REPORT OF THE SUPREME COURT COMMITTEE ON CRIMINAL PRACTICE ON RECOMMENDED COURT RULES TO IMPLEMENT THE BAIL REFORM LAW

Part 1

Pretrial Release

May 9, 2016

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I. BACKGROUND

On August 11, 2014, Governor Christie signed S-946 into law as L. 2014, c. 31, referred to hereinafter as *The Bail Reform Law*. That law contained provisions regarding pretrial release and pretrial detention. The law also contained a speedy trial provision for defendants who are detained. *The Bail Reform Law* takes effect on January 1, 2017.

In November 2014, Judge Grant established a few internal Judiciary working groups to address various areas of implementation of *The Bail Reform Law*. One of those groups was charged with reviewing rule and form changes that would be necessary in light of the new law.

The Bail Law Reform Rules and Speedy Trial Working Group divided its work into two areas: (1) review of the rules and forms necessary to implement the Supervised Pretrial Release aspects of *The Bail Reform Law*, and (2) review of the rules and forms necessary to implement the Speedy Trial provisions of *The Bail Reform Law*.

Thereafter, at the instruction of the Chief Justice, an informal group of judges and practitioners was established to review and comment on the proposals of the Working Group. The suggestions of the Rules Review Group were either incorporated into the Working Group Report or included in the commentary to that report for further consideration by the Criminal Practice Committee.

This report presents the recommendations of the Criminal Practice Committee for new rules and amendments to existing rules that the Committee believes are necessary to implement *The Bail Reform Law*. The report also makes recommendations for statutory changes.

This report addresses Pretrial Release. The second part, which will follow, will address Pretrial Detention and Speedy Trial.

II. RULES RECOMMENDED

A. Part III Rules

Part III of the Court Rules govern the practice and procedure in all indictable and non-indictable proceedings in the Superior Court Law Division and, insofar as they are applicable, the practice and procedure on indictable offenses in all other courts, including the municipal courts, and the practice and procedure in juvenile delinquency proceedings in the Chancery Division, Family Part except as otherwise provided for in Part V. See R. 3:1-1. The Criminal Practice Committee is recommending revision and/or addition of the following rules contained in Part III of the New Jersey Court Rules.

Rule 3:1-4. Orders; form; entry

(a) Time. Except for judgments to be prepared by the court and entered pursuant to R. 3:21-5 or pretrial release orders entered pursuant to R. 3:26-2, formal written orders shall be presented to the court in accordance with R. 4:42-1(e) except that only the original of the signed order shall be filed. The court may also issue and transmit to the Department of Corrections electronic Orders to Produce inmates, with those orders or writs containing an electronically affixed signature of a Superior Court judge. Such orders shall have the same authority as orders that contain a judge's original signature.

(b) … No change

(c) … No change

Adopted July 29, 1977 to be effective September 6, 1977. Paragraph (c) amended July 24, 1978 to be effective September 11, 1978; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 28, 2004 to be effective September 1, 2004[.]; paragraph (a) amended _____ to be effective _____.

COMMENTARY

Paragraph (a) of the rule is being amended to exempt pretrial release orders from the general requirement that orders be submitted to the court by a party. The pretrial release order will be submitted to the court by court staff.

Rule 3:2-1. Contents of complaint; forwarding of indictable complaints to prosecutor and criminal division manager

(a) … No change

(b) Forwarding of Indictable Complaints to Prosecutor and Criminal Division Manager.

Where a [the] complaint-summons alleges an indictable offense, the complaint, and all available investigative reports, shall be forwarded to the prosecutor within 48 hours. Where a complaint-warrant alleges an indictable offense, the complaint-warrant and all available investigative reports shall be forwarded to the prosecutor immediately upon issuance. The complaint-warrant shall be forwarded by the municipal court to the criminal division manager's office [within 48 hours] immediately upon issuance or where issued telephonically upon confirmation by the judge that the warrant has been issued. The complaint-summons shall be forwarded by the municipal court to the criminal division manager's office within 48 hours.

Source-R.R. 3:2-1(a)(b); amended July 26, 1984 to be effective September 10, 1984; main caption amended, caption added, former text amended and redesignated paragraph 3:2-1(a), paragraph (b) adopted July 13, 1994 to be effective January 1, 1995; paragraph (a) amended January 5, 1998 to be effective February 1, 1998[.]; paragraph (b) amended _____ to be effective _____.

COMMENTARY

The current rule requires that the municipal court send the criminal division manager a copy of the complaint within 48 hours. The rule also requires that where the complaint alleges an indictable offense, the complaint, and all available investigative reports, be forwarded to the prosecutor within 48 hours.

The Bail Reform Law requires that if a defendant is arrested and remanded to the county jail, a risk assessment, hereinafter *RA*, be completed and a judge determine pretrial release conditions within 48 hours of the person being committed to the jail. See N.J.S.A. 2A:162-17. This requirement will necessitate that complaint-warrants be sent to the criminal division manager's office quickly so that an interview with the defendant can be scheduled. Thus, the rule's current requirement of submission of a complaint-warrant to the criminal division manager's office within 48 hours will need to be dramatically reduced. In that regard the Criminal Practice Committee is recommending that paragraph (b) of the rule be amended to require that the complaint-warrant be forwarded immediately upon it being issued. It is envisioned that the process of submission will occur electronically. The Criminal Practice Committee is recommending that there be no change in the requirement of submission of complaint-summonses to the Criminal Division within 48 hours.

The Criminal Practice Committee is also recommending that parallel changes be made to the requirements for submission of complaint-warrants and complaint-summonses to the prosecutor because the prosecutor will want to decide, before conditions of pretrial release are set, whether to seek pretrial detention.

Rule 3:2-2. Summons

(a) A summons shall be made on a Complaint-Summons (CDR-1) form, a Uniform Traffic Ticket, [or] a Special Form of Complaint and Summons, or such other form as may be approved by the Administrative Director of the Courts. The summons shall be directed to the person named in the complaint, requiring that person to appear before the court in which the complaint is made at a stated time and place and shall inform the person that an arrest warrant will be issued for failure to appear. The summons shall be signed by the judicial or law enforcement officer issuing it. An electronic entry of the signature of the law enforcement officer shall be equivalent to and have the same force and effect as an original signature.

(b) A law enforcement officer may, in accordance with guidelines issued by the Attorney General pursuant to N.J.S.A. 2A:162-16, request a judge to issue or authorize the issuance of a summons that requires the person named in the complaint to comply with special pretrial conditions that may include: (1) restraining the person from having any contact with an alleged victim of domestic violence, or imposing any other condition or restraint authorized by N.J.S.A. 2C:25-26 or any other provision of The Prevention of Domestic Violence Act of 1991; (2) prohibiting the person from having any contact with an alleged sex offense victim, or imposing any other condition or restraint authorized by N.J.S.A. 2C:14-12 or any other provision of chapter 14 of Title 2C; (3) prohibiting the person from any place pursuant to N.J.S.A. 2C:35-5.7, or imposing any other condition or restraint authorized by the Drug Offender Restraining Order Act; or (4) imposing any other condition or restraint authorized by law.

(c) Issuance of Complaint Summons (CDR-1) with Conditions or Restraints by Electronic Communication. The law enforcement officer requesting a summons with any such special condition or restraint pursuant to paragraph (b) may make a request for a summons with conditions or restraints in person before a judge or make such a request by electronic communication. The law enforcement officer's affidavit or sworn oral testimony setting forth the grounds that establish probable cause and for imposing a special condition or restraint may be communicated to the judge by telephone, radio, or other means of electronic communication. The judge shall administer the oath to the applicant. Subsequent to taking the oath, the applicant must identify himself or herself, and read verbatim the Complaint-Summons (CDR-1) and any supplemental affidavit that establishes probable cause for the issuance of the Complaint-Summons and grounds for imposing a special condition or restraint. If the facts necessary to establish probable cause are contained entirely on the Complaint-Summons (CDR-1) and/or supplemental affidavit, the judge need not make a contemporaneous written or electronic recordation of the facts in support of probable cause. Where additional testimony is presented, the judge shall contemporaneously record such sworn oral testimony by means of a [tape-] recording device [or stenographic machine,] if [such are] available; otherwise adequate [longhand] notes summarizing the contents of the law enforcement officer's testimony shall be made by the judge. This sworn testimony shall be deemed to be an affidavit for the purposes of imposing special conditions or restraints. If the judge is satisfied that probable cause exists for issuance of a Complaint-Summons and that sufficient grounds for imposing a special condition or restraint have been shown, the judge shall memorialize the date, time, defendant's name, complaint number, the basis for the probable cause

determination, and the specific special condition(s) or restraint(s). If the judge has determined that a Complaint-Summons with conditions or restraints shall issue and has the ability to promptly access the Judiciary's computer system, the judge shall electronically issue the Complaint-Summons with conditions or restraints in the computer system.

If the judge has determined that a Complaint-Summons with conditions or restraints shall issue and does not have the ability to promptly access the Judiciary's computer system, the judge shall direct the applicant, pursuant to procedures prescribed by the Administrative Director of the Courts, to enter into the Judiciary computer system, for inclusion on the electronic complaint, the date and time of the probable cause and summons with conditions or restraints determinations. The judge shall also direct the applicant to complete the phrase: "I, Officer _____, certify that I have received telephonic or other approved electronic authorization from _____ (judge's name), _____ (title), for the issuance of the Complaint-Summons and the conditions or restraints identified herein." The judge shall then direct the law enforcement officer to electronically activate the Complaint-Summons with conditions or restraints in the computer system.

Upon approval of a Complaint-Summons with conditions or restraints, the judge shall memorialize the date, time, defendant's name, complaint number, the basis for the probable cause determination, the authorized conditions or restraint and any other specific terms of the authorization. That memorialization shall be either by means of a recording device or by adequate notes. The court shall verify, as soon as practicable, any Complaint-Summons with conditions or restraints authorized

under this subsection and activated by law enforcement. Unless rescinded or modified by the judge who imposed the special condition(s) or restraint(s) on notice to the County Prosecutor, or by a Superior Court judge on notice to the County Prosecutor, the special condition(s) or restraint(s) imposed on the summons shall remain in force and effect until the defendant's first appearance, and a violation of any such condition or restraint shall constitute contempt in violation of N.J.S.A. 2C:29-9.

Note: Adopted July 13, 1994 to be effective January 1, 1995; amended July 27, 2006 to be effective September 1, 2006[.] former paragraph of rule amended and designated paragraph (a) and new paragraphs (b) and (c) added _____ to be effective _____.

COMMENTARY

One of the major purposes of *The Bail Reform Law* is to release persons who can safely be released as soon as possible after arrest. The Committee was advised that there are cases where a person will have to be charged on a complaint-warrant because certain conditions, such as restraining orders, are currently not permitted on a complaint-summons. The Committee is proposing amendments to R. 3:2-2 to authorize a court to impose certain restraining orders/release conditions on defendants who are charged on a complaint-summons. These amendments are intended to afford protection to the victims of domestic violence and sex offenses, while avoiding the need to automatically transport defendants to a county jail, where they may be detained for up to 48 hours as required by *The Bail Reform Law.*

The Committee unanimously agreed that persons charged with offenses that warrant imposition of no-contact or other restraining orders, such as domestic violence, should not always have to be charged by complaint-warrant, since under *The Bail Reform Law* that would automatically require that these defendants be transported to a county jail and be detained for up to 48 hours. In order to provide a means by which to avoid such mandatory incarceration, the Committee is proposing language that would expressly authorize a court to impose release conditions/restraining orders when a defendant is charged by a complaint-summons.

The Committee recognizes the importance to police and prosecutors that there be a reliable and efficient (e.g., electronic or telephonic) mechanism by which a court can impose restraining orders on defendants charged by complaint-summons with domestic violence, sex offenses ("Nicole's Law"), and drug distribution offenses subject to the Drug Offender Restraining Order Act. In the absence of such judicial authority, police and

prosecutors would be forced to prepare complaint-warrants in those cases to achieve the paramount objective of protecting victims.

The Committee is not proposing that these kinds of restraining orders be monitored by the new pretrial services program, but rather that they be enforced by police and prosecutors in the same way that they have been for many years.

The Committee's proposal provides that the law enforcement officer issuing the summons with restraints may contact the court electronically - a feature that is absolutely necessary for practical reasons. The proposal proceeds on the assumption that the officer must provide the judge with the grounds for issuing a restraining order while under oath and subject to the same recording requirements as if the officer were submitting a complaint-warrant for the court's review and approval. Accordingly, the proposal incorporates relevant procedural requirements that apply to an application for a warrant in accordance with R. 3:2-3 and an application for a temporary restraining order in accordance with R. 5:7A. See also current R. 3:26-1(g).

Police officers will still be allowed to issue complaint-summonses pursuant to R. 3:3-1(b)(2). However, under this proposal, where they are also seeking release conditions/restraining orders, the court will still need to make an independent finding of probable cause because the court will be issuing the complaint-summons and imposing conditions. The court, considering the officer's affidavit or sworn oral testimony, will also be required to find the grounds for issuing a preliminary restraining order or other special condition(s) in accordance with law.

Paragraph (a)

The Committee is proposing a revision to paragraph (a) that would allow the Administrative Director of the Courts to approve a new complaint-summons form should

the current complaint-summons form not suffice for the change the Committee is proposing.

Paragraph (b)

A new paragraph (b) is being proposed for adoption. This paragraph would permit a law enforcement officer, pursuant to guidelines established by the Attorney General under N.J.S.A. 2A:162-16, to request that a judge issue a complaint-summons that contains special conditions. Those special conditions are: (1) issuance of a no-contact order prohibiting contact with an alleged victim of domestic violence, or any other condition permitted under N.J.S.A. 2C:25-6 or any other provision of the Prevention of Domestic Violence Act of 1991; (2) issuing a no contact order with an alleged victim of a sex offense, or any other condition permitted under law; (3) prohibiting a person from any place, or imposing any other condition permitted pursuant to the Drug Offender Restraining Order Act (N.J.S.A. 2C:35-5.7); or (4) imposing any other condition or restraint authorized by law. This last provision is intended to cover any provisions similar to the first three that may be added in the future. It is not intended as a broad authorization for courts to add conditions on complaint-summonses, such as those authorized for eligible defendants (persons arrested on a complaint-warrant after the effective date of the law) under *The Bail Reform Law*.

Paragraph (c)

A new paragraph (c) is being proposed for adoption to allow a law enforcement officer to seek a complaint-summons with conditions or restraints through electronic means and would provide the mechanism for accomplishing this. The Municipal Practice Committee suggested this amendment to be more consistent with the parallel Part VII R. 7:2-1(e). That mechanism draws from the mechanism proposed in R. 3:2-3 for arrest

warrants. This is a move away from the use of paper to the use of technology by judge and law enforcement in the complaint-summons process.

To make a request for a complaint-summons with conditions or restraints, the law enforcement officer may contact the judge through telephonic or electronic communication. The law enforcement officer must provide the judge with an affidavit or sworn testimony setting forth the grounds for probable cause to support the application for a complaint-summons with conditions or restraints. The judge would be required to administer the oath to the applicant and the law enforcement officer would then identify himself or herself. The law enforcement officer would be required to read the complaint-summons and any supplemental affidavit verbatim to establish probable cause and articulate grounds for imposing a special condition or restraint. The judge would not need to make a contemporaneous written or electronic record of the facts in support of the probable cause determination if the facts necessary to establish probable cause are contained entirely on the complaint-summons and/or the affidavit. Where additional testimony is presented by the law enforcement officer, the judge would contemporaneously record such sworn oral testimony using a recording device, if available. If a recording device is not available, adequate notes summarizing the content of the law enforcement officer's testimony are to be made by the judge. For the purposes of imposing special conditions or restraints, the law enforcement officer's sworn testimony would be deemed an affidavit.

If the judge determines that probable cause exists for the issuance of a complaint-summons and sufficient grounds have been established to impose special conditions or restraints, the judge would be required to memorialize the time, date, defendant's name, the complaint number, the basis for the probable cause determination, and the specific

special condition(s) or restraint(s). After the determination is made, the judge would be required to promptly electronically issue the complaint-summons with conditions or restraints into the computer system if the judge has access to the Judiciary's computer system.

If the judge is unable to promptly access the Judiciary's computer system to issue the complaint-summons with conditions or restraints, the judge would be required to direct the applicant to enter it into the Judiciary computer system for inclusion on the electronic complaint, including the date and time of the probable cause and summons with conditions or restraints determinations following the procedures prescribed by the Administrative Director of the Courts. The judge would also direct the applicant to complete the phrase: "I, Officer _____, certify that I have received telephonic or other approved electronic authorization from _____ (judge's name), _____ (title), for the issuance of the Complaint-Summons and the conditions or restraints identified herein." The judge would be required to then direct the law enforcement officer to electronically activate the complaint-summons with conditions or restraints in the computer system. Once the complaint-summons with conditions or restraints is in the computer system, the judge would be required to memorialize the date, time, defendant's name, complaint number, the basis for the probable cause determination, the authorized conditions or restraints and any other specific terms of authorization. That memorialization would be done by means of a recording device or by adequate notes. As soon as practicable, the court would be required to verify the complaint-summons with conditions or restraints authorized under this subsection and activated by the law enforcement officer.

Rule 3:2-3. Arrest Warrant

(a) An arrest warrant for an initial charge shall be made on a Complaint-Warrant (CDR-2) form. The warrant shall contain the defendant's name or if that is unknown, any name or description that identifies the defendant with reasonable certainty, and shall be directed to any officer authorized to execute it, ordering that the defendant be arrested and [brought before the court that issued the warrant] and remanded to the county jail pending a determination of conditions of pretrial release. [Except as provided in paragraph (b), t] The warrant shall be signed by the judge, clerk, deputy clerk, municipal court administrator, or deputy court administrator ("judicial officer").

(b) A [judge] judicial officer may issue an arrest warrant on sworn oral testimony of a law enforcement applicant who is not physically present. Such sworn oral testimony may be communicated by the applicant to the [judge] judicial officer by telephone, radio or other means of electronic communication.

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

adequate [longhand] notes summarizing the contents of the law enforcement applicant's testimony shall be made by the [judge] judicial officer. This sworn testimony shall be deemed to be an affidavit, or a supplemental affidavit, for the purposes of issuance of an arrest warrant.

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

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

If the judicial officer has determined that a warrant shall issue and does not have the ability to promptly access the Judiciary's computer system, the judicial officer shall direct the applicant, pursuant to procedures prescribed by the Administrative Director of the Courts, to enter into the Judiciary computer system, for inclusion on the electronic complaint, the date and time of the probable cause and warrant determinations. The judicial officer shall also direct the applicant to complete the phrase: "I, Officer _____, certify that I have received telephonic or other approved electronic authorization from _____ (judicial officer's name), _____ (judicial officer's title), for the issuance of [on] the Complaint-Warrant (CDR-2)."

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

Procedures authorizing issuance of restraining orders pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law") by electronic communication are governed by R. 3:26-1[(g)](e).

[Thereafter, the judge shall direct the applicant to print his or her name, the date and time of the warrant, followed by the phrase "By Officer _____, per telephonic authorization by _____" on the Complaint/Warrant (CDR-2) form. Within 48 hours the applicant shall deliver to the judge, either in person or via facsimile transmission, the signed Complaint-Warrant (CDR-2) and any supporting affidavit. The judge shall verify the accuracy of these documents by affixing his or her signature to the Complaint-Warrant (CDR-2)].

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

COMMENTARY

The Municipal Practice Committee suggested amendments to R. 3:2-3 to make it more consistent with Part VII R. 7:2-1(e). The amendment would permit changes in the process for the issuance of complaint-warrants regarding technology. This process moves away from the use of paper to allow for compliance with the 48 hour commitment of a defendant on a complaint-warrant prior to the determination of conditions of pretrial release.

Currently, only municipal court judges can authorize telephonic warrants. This proposal would expand the existing authority of the municipal court judges to authorized municipal court administrators and authorized deputy court administrators, collectively referred to throughout the rule as judicial officers.

Upon authorization by a judicial officer, the law enforcement officer would be allowed to activate the warrant in the system to alert the county jail that a defendant is coming and let the pretrial services program know that a case has been activated. The rule includes a new procedural requirement that the court verify that the judicial officer actually engaged in the authorization of a warrant which has been issued telephonically.

If the judicial officer has determined that a warrant would be issued and has the ability to promptly access the Judiciary's computer system, the judicial officer would be required to electronically issue the complaint-warrant in the computer system. If the judicial officer has determined that a warrant would be issued but is unable to promptly access the Judiciary's computer system, the judicial officer would be required to direct the applicant to electronically activate the warrant, for inclusion on the electronic complaint, the date and time of the probable cause and warrant determinations following

the procedures prescribed by the Administrative Director of the Courts. The judicial officer would also be required to direct the applicant to complete the phrase: "I, Officer _____, certify that I have received telephonic or other approved electronic authorization from _____ (judicial officer's name), _____ (judicial officer's title), for the issuance of [on] the Complaint-Warrant (CDR-2)." As soon as practicable after the issuance of the warrant, the court would be required to verify the warrant authorized under this subsection and activated by law enforcement.

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

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

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

(2) a judge, clerk, deputy clerk, municipal court administrator or deputy municipal court administrator finds that paragraph [(c)] (d), (e), or (f) of this rule allows a warrant rather than a summons to be issued.

(b) … No change.

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

(d) Grounds for Overcoming the Presumption of Charging by Complaint-Summons. Notwithstanding the presumption that a summons shall be issued when a defendant is charged with an offense other than one set forth in paragraphs (e) or (f) of this rule, when a law enforcement officer prepares a complaint-warrant rather than a complaint-summons in accordance with guidelines issued by the Attorney General pursuant to N.J.S.A. 2A:162-16, the judge, clerk, deputy clerk, municipal court administrator, or deputy municipal court administrator may issue an arrest warrant when the judicial officer finds pursuant to paragraph (a) of this rule that there is probable cause to believe that the defendant committed the offense, and:

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

(2) there is reason to believe that the defendant is dangerous to self if released on a summons;

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

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

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

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

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

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

When the application for an arrest warrant is based on reason to believe that the defendant will not appear in response to a summons, will pose a danger to the safety of any other person or the community, or will obstruct or attempt to obstruct the criminal justice process if released on a summons, the judge, clerk, deputy clerk, municipal court administrator, or deputy municipal court administrator shall consider the results of any available preliminary public safety assessment using a risk assessment instrument approved by the Administrative Director of the Courts pursuant to N.J.S.A. 2A:162-25, and shall also consider, when such information is available, whether within the preceding

ten years the defendant as a juvenile was adjudicated delinquent for escape, a crime involving a firearm, or a crime that if committed by an adult would be subject to the No Early Release Act (N.J.S.A. 2C:43-7.2), or an attempt to commit any of the foregoing offenses, or whether within the preceding five years the defendant as a juvenile failed to appear at any juvenile proceeding when required, when such information is available. The judicial officer shall also consider any additional relevant information provided by the law enforcement officer or prosecutor applying for an arrest warrant.

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

(f) Offenses Where Issuance of an Arrest Warrant is Presumed. Unless issuance of a summons rather than an arrest warrant is authorized pursuant to paragraph (g) of this rule, an arrest warrant shall be issued when a judge, clerk, deputy clerk, municipal court administrator, or deputy municipal court administrator finds pursuant to paragraph (a) of this rule that there is probable cause to believe that the defendant committed a violation of Chapter 35 of Title 2C that constitutes a first or second degree crime, a crime involving the possession or use of a firearm, or the following first or second degree crimes subject to the No Early Release Act (N.J.S.A. 2C:43-7.2), vehicular homicide (N.J.S. 2C:11-5), aggravated assault (N.J.S. 2C:12-1(b)), disarming a law enforcement officer (N.J.S.

2C:12-11), kidnapping (N.J.S. 2C:13-1), aggravated arson (N.J.S. 2C:17-(a)(1)), burglary (N.J.S. 2C:18-2), extortion (N.J.S. 2C:20-5), booby traps in manufacturing or distribution facilities (N.J.S. 2C:35-4.1(b)), strict liability for drug induced deaths (N.J.S. 2C:35-9), terrorism (N.J.S. 2C:38-2); producing or possessing chemical weapons, biological agents or nuclear or radiological devices (N.J.S. 2C:38-3), racketeering (N.J.S. 2C:41-2), firearms trafficking (N.J.S. 2C:39-9(i)), causing or permitting a child to engage in a prohibited sexual act knowing that the act may be reproduced or reconstructed in any manner, or be part of an exhibition or performance (N.J.S. 2C:24-4(b)(3)) or finds that there is probable cause to believe that the defendant attempted to commit any of the foregoing crimes.

(g) Grounds for Overcoming the Presumption of Charging by Complaint-Warrant. Notwithstanding the presumption that an arrest warrant shall be issued when a defendant is charged with an offense set forth in paragraph (f) of this rule: (1) a judge, clerk, deputy clerk, municipal court administrator, or deputy municipal court administrator may authorize issuance of a summons rather than an arrest warrant if the judge finds that were the defendant to be released without imposing or monitoring any conditions authorized under N.J.S.A. 2A:162-17, there are reasonable assurances that the defendant will appear in court when required, the safety of any other person or the community will be protected, and the defendant will not obstruct or attempt to obstruct the criminal justice process. The judge, clerk, deputy clerk, municipal court administrator, or deputy municipal court administrator shall not make such finding without considering the results of a preliminary public safety assessment using a risk assessment instrument approved by the Administrative Director of the Courts pursuant

to N.J.S.A. 2A:162-25, and without also considering whether within the preceding ten years the defendant as a juvenile was adjudicated delinquent for escape, a crime involving a firearm, or a crime that if committed by an adult would be subject to the No Early Release Act (N.J.S.A. 2C:43-7.2), or an attempt to commit any of the foregoing offenses, or whether within the preceding five years the defendant as a juvenile failed to appear at any juvenile proceeding when required. The judge, clerk, deputy clerk, municipal court administrator, or deputy municipal court administrator shall also consider any additional information provided by a law enforcement officer or the prosecutor relevant to the pretrial release decision; or (2) a law enforcement officer may issue a summons in accordance with guidelines issued by the Attorney General pursuant to N.J.S.A. 2A:162-16.

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

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

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

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

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

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

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

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

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

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

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

COMMENTARY

After *The Bail Reform Law* takes effect, once law enforcement decides to seek a complaint-warrant, the defendant will be brought before a court; usually a municipal court. The court will then determine probable cause and decide whether to issue a complaint-summons or complaint-warrant. If the court decides to issue a complaint-warrant, the court cannot establish conditions of release until the defendant is committed to the county jail and a full risk assessment is completed. See N.J.S.A. 2A:162-25. The court could, however, use the preliminary risk assessment, which contains the information available at that point, to aid in its determination whether to issue a complaint-warrant or complaint-summons.

Currently, R. 3:3-1 governs the process for issuing complaint-warrants and complaint-summonses. More specifically, paragraph (c) of the current rule explains when a complaint- summons should be issued rather than a complaint-warrant. As noted above, that determination will take on much greater practical significance under *The Bail Reform Law*. When a defendant is charged by complaint-warrant, the defendant must be transported to the county jail, where he or she will be held for up to 48 hours pending a full risk assessment conducted by the new pretrial services agency. If, on the other hand, the person is released on a summons, the defendant may be released immediately from the police station, but in that event, a full risk assessment will not be conducted to inform the pretrial release decision. Nor will the defendant be monitored by the pretrial services agency.

Given the heightened importance and practical ramifications of the determination whether to use a complaint-warrant or a complaint-summons, and given the need to

have an appropriate degree of statewide uniformity, it is necessary to provide a more fulsome explanation of the standards and criteria for selecting the appropriate charging instrument. Accordingly, this proposal would remove current paragraph (c) from R. 3:3-1, and in its place create new paragraphs (c)-(g) to explain more comprehensively when a complaint-warrant is required, when there is a rebuttable presumption of using a complaint-warrant, and when there is a rebuttable presumption of using a complaint-summons.

It is important to note that for the determination of whether to issue a complaint-warrant or a complaint-summons, the Criminal Practice Committee originally structured the Rule to first address the requirements on issuing a complaint-warrant rather than the presumption for using a complaint-summons. In particular, R. 3:3-1, as originally proposed, was organized as follows: paragraph (c) "Offenses Where Issuance of a Warrant is Required"; paragraph (d) "Offenses Where Issuance of an Arrest Warrant is Presumed"; paragraph (e) "Grounds for Overcoming the Presumption of Charging by Complaint-Warrant"; paragraph (f) "Offenses Where Issuance of a Summons is Presumed"; and paragraph (g) "Grounds for Overcoming the Presumption of Charging by Complaint-Summons."

The Municipal Practice Committee suggested that the Criminal Practice Committee reconsider the structure of the Rule, and begin with the paragraphs on the presumption for a summons and the grounds for overcoming that presumption, followed by the paragraphs on the complaint-warrant decision, i.e., paragraphs (c)-(g). The Criminal Practice Committee agreed with restructuring this Rule because it is more in line with the structure of the pretrial release decision for eligible defendants under *The Bail*

Reform Law. In particular, for an eligible defendant, the court in its pretrial release decision would first consider releasing the defendant on his or her own recognizance, and then non-monetary condition(s) that are the "least restrictive" conditions that will, in the judgment of the court, reasonably assure his or her appearance in court when required, the protection of the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process. See N.J.S.A. 2A:162-16(b)(2). Thus, the Rule continues that philosophy by first addressing issuance of a summons, and then the criteria on issuance of a warrant.

Paragraph (a)(2)

Paragraph (a)(2) is being amended to include paragraphs (d), (e), and (f), among the paragraphs that govern when a warrant may be issued.

Paragraph (c)

Proposed new paragraph (c) follows the basic format of the current rule that establishes that defendants charged with offenses that are not listed in current R. 3:3-1(c) should be charged on a summons, rather than a warrant, absent a specific reason to believe that the defendant poses a flight or community-safety risk. The Committee believes that this paragraph should retain the basic structure and format of the current court rule that establishes a presumption that a summons should be issued, rather than create an entirely new general exception that would cover all of the specific circumstances enumerated in the current rule.

This proposed new paragraph employs a different format with respect to the means for overcoming the new presumption of issuing a complaint-warrant in subsection (f). That subsection relies on a broad, general exception to the presumption, incorporating

the language in N.J.S.A. 2A:162-12 for when a person should be released pending trial. That approach for overcoming the presumption of issuing a warrant seemed prudent rather than attempting to identify and enumerate all of the possible circumstances that might militate in favor of overcoming the warrant presumption. Indeed, had the format of current R. 3:3-1(c) been followed as a model in paragraph (g) of the new rule, the court would have been required to find a negative (i.e., for example, that the defendant has not failed to appear; that there is no reason to believe that the defendant will pose a danger to the safety of any other person, etc.) with respect to each and every enumerated circumstance. With respect to overcoming the presumption of issuing a warrant under current R. 3:3-1(c), in contrast, the court need only make an affirmative positive finding with respect to the specific circumstances(s) upon which the law enforcement officer is relying in his or her application for a warrant in lieu of a presumptive summons.

Paragraph (d)

This proposed new paragraph would set forth the grounds for overcoming the presumption that a complaint-summons should issue pursuant to paragraph (c). It should be noted that a judicial officer will not be involved in the decision whether to issue a warrant rather than a summons until a law enforcement officer prepares a complaint-warrant for the judicial officer's approval. Pursuant to N.J.S.A. 2A:162-16, the Attorney General guidelines referenced in the proposed new rule will explain when and in what circumstances a law enforcement officer will be authorized to apply for an arrest warrant in cases involving charges for which there is a presumption that the defendant will be released on a summons. Those guidelines, which have not yet been drafted or vetted, may include a provision that requires approval from an assistant prosecutor or deputy

attorney general before an officer may apply for an arrest warrant in cases where the court rule establishes a presumption of issuing a summons.

Paragraph (d)(1)

This paragraph is taken verbatim from current R. 3:3-1(c)(2).

Paragraph (d)(2)

This new paragraph is based on current R. 3:3-1(c)(3), except that it separates the risk that the defendant poses a danger to himself/herself from the risk of danger the defendant poses to others. The latter risk is addressed separately in proposed R. 3:3-1(d)(3). Danger to oneself often involves issues concerning mental illness.

It should be noted that *The Bail Reform Law* does not specifically refer to the risk that a defendant poses to himself/herself, but rather refers to the risk that defendant poses "to the safety of any other person or the community." See N.J.S.A. 2A:162-17(a) (emphasis added). This proposal nonetheless recommends a continuation of the current practice of accounting for the danger that a defendant poses to himself/herself, if for no other reason than such risk is clearly relevant to the likelihood of appearing in court when required, and because the underlying cause of the danger to self may be correlated to the risk of committing new criminal activity (e.g., untreated opiate addiction, which often co-occurs with depression and suicidal behavior) that might be managed through court-ordered interventions and supervision.

It bears emphasis that the critical issue for purposes of the warrant versus summons determination is not whether the defendant should be detained, or even whether any particular release condition should be imposed and monitored. Rather, the critical issue at this initial stage of the criminal justice process is whether the defendant

should automatically be rendered ineligible for further evaluation by the pretrial services program, due to the issuance of a summons instead of a warrant.

Paragraph (d)(3)

This paragraph is adapted from current R. 3:3-1(c)(3). Aside from separating the danger that a defendant poses to others from the danger posed to himself/herself, this formulation adds the phrase "if released on a summons." That additional language underscores that when deciding whether to charge by complaint-summons or complaint-warrant, the court/judicial officer should focus on whether the defendant should be rendered ineligible for a full risk assessment, imposition of release conditions, and monitoring and related services by the pretrial services program established under *The Bail Reform Law*.

Paragraph (d)(4)

The Committee is recommending an amendment to current paragraph (c)(4) to state that “there are one or more outstanding warrants for the defendant.” (emphasis added). Current paragraph (c)(4) focused on a single outstanding warrant. This revision was suggested by the Municipal Practice Committee.

Paragraph (d)(5)

This paragraph is taken verbatim from current R. 3:3-1(c)(5).

Paragraph (d)(6)

The Committee is recommending that a new subparagraph (6) be added to this paragraph to cover the situation where the law enforcement officer is seeking a warrant due to the belief that the defendant will obstruct or attempt to obstruct the criminal justice process if released on a summons.

Paragraph (d)(7)

This paragraph is taken verbatim from current R. 3:3-1(c)(6).

Paragraph (d)(8)

The Committee recommends that new subparagraph (8) be added to this paragraph to cover the situation where the law enforcement officer is seeking a warrant due to the belief that it is necessary to protect the victim, a witness, other specified person, or the community.

Under the last paragraph of paragraph (d), a judicial officer would be required to consider a preliminary risk assessment before overcoming the summons-presumption only if that assessment is available. Cf., paragraph (g)(1), where a judge could not overcome the presumption of charging by complaint-warrant without considering a preliminary risk assessment. While it is assumed that these assessments will be done automatically when a defendant is fingerprinted through the LiveScan system, if for any reason the automated assessment is not performed or otherwise is not available, a defendant charged with an offense that carries a presumption of release on a complaint-summons should not automatically be detained for up to 48 hours. Likewise, if a defendant's juvenile history information is not available to inform the warrant/summons decision, a defendant charged with a presumptive-summons offense should not automatically be detained.

This paragraph also recognizes that, at least for the time being, the automated risk assessment instrument does not take into account a defendant's juvenile history, including violent crimes or failures to appear, that would clearly bear on the risk of flight and new criminal activity.

Paragraph (e)

Currently, R. 3:3-1(c) sets forth a list of crimes for which a complaint-warrant must be used once there has been a judicial finding of probable cause. Proposed R. 3:3-1(e) winnows down this list. The offenses specified in paragraph (e) for which an arrest warrant must be issued are drawn from the list of crimes in Dr. Marie VanNostrand's description of a proposed New Jersey Risk-Based System of Pretrial Decision Making. Under that system, when a defendant is charged with any of these specified crimes, the research-driven pretrial release/detention recommendation will always be "release not recommended, or if released, maximum conditions." This proposed paragraph provides that in all instances where a defendant is charged with one of the specified offenses identified through Dr. VanNostrand's empirical research, a warrant must be issued, rather than a summons.

The list developed by Dr. VanNostrand also includes attempts to commit a designated crime. The proposed court rule operates on the assumption that a person alleged to have attempted to commit a designated crime poses risks while on pretrial release that are comparable to the risks posed by a defendant who is alleged to have committed the designated offense.

Paragraph (f)

The crimes set forth in this paragraph include offenses currently listed in R. 3:3-1(c), which until now have been required to be charged by means of a complaint-warrant. Accordingly, this proposed paragraph creates a rebuttable presumption that a warrant will be issued when the defendant is charged with a No Early Release Act crime other

than those set forth in paragraph (e), a first or second-degree drug distribution crime, or a crime involving a firearm.

Consistent with the recognition of the heightened importance of the manner in which an offense is charged and with the significant impact of a decision to charge on a complaint-warrant, this proposal recommends that certain third-degree and fourth-degree crimes that currently are listed in R. 3:3-1(c) not be included in proposed paragraph (f). The crimes are aggravated criminal sexual contact, criminal sexual contact, arson, and burglary. Though these crimes could still be charged on a complaint-warrant, there would not be a presumption that they be charged on a complaint-warrant.

Paragraph (g)

New paragraph (g) would allow a judge, clerk, deputy clerk, municipal court administrator, or deputy municipal court administrator to overcome the presumption that an arrest warrant is to be issued, and to direct that a defendant charged with one of the crimes specified in paragraph (f) be released on a summons. The judicial officer would be authorized to overcome the presumption of charging by complaint-warrant only upon a finding that there are reasonable assurances that defendant will appear and will not commit a new offense if he or she were to be released without imposing and monitoring any conditions of release. This formulation is adapted from the basic standard governing the pretrial release decision under *The Bail Reform Law*. See N.J.S.A. 2A:162-18.

It is expected that police will run a "preliminary" risk assessment as part of the process of electronically fingerprinting the defendant. This preliminary assessment will inform the law enforcement decision to issue a summons or to prepare a complaint-

warrant in accordance with guidelines to be issued by the Attorney General pursuant to N.J.S.A. 2A:162-16.

Proposed paragraph (g) would not allow a judicial officer to overcome the presumption of charging by complaint-warrant unless a preliminary automated risk assessment has been conducted. That preliminary assessment will use administrative data (i.e., objective historical information kept in various judiciary and law enforcement databases) and research-based algorithms to calculate a FTA (Failure to Appear) score, an NCA (New Criminal Activity) score, and a NVCA (New Violent Criminal Activity) flag. The results of the preliminary automated risk assessment are critical to informing both the law enforcement officer and the court as to whether it is appropriate to release a defendant charged with one of these serious offenses on a summons; that is, without having the pretrial services agency conduct a more comprehensive assessment, and without imposing and monitoring pretrial release conditions.

This paragraph also seeks to address the fact that the risk assessment developed by Dr. Marie VanNostrand and a team of researchers working for the Laura and John Arnold Foundation, which relies on objective administrative records maintained in various databases, does not access or use a defendant's juvenile justice system records, which might include comparatively recent adjudications of delinquency for violent crimes and juvenile failures to appear. Accordingly, a judicial officer may not overcome the presumption of issuing an arrest warrant without first determining whether within the preceding ten years the defendant as a juvenile was adjudicated delinquent for escape, a crime involving a firearm, or a NERA crime, or an attempt to commit any such crimes, or whether within the preceding five years the defendant as a juvenile failed to

appear at a juvenile proceeding. Nothing in the proposed rule would preclude the court from considering any other involvement in the juvenile justice system that might be relevant to the pretrial release decision.

The proposed new paragraph recognizes the authority of the Attorney General to issue guidelines pursuant to N.J.S.A. 2A:162-16 that would authorize a law enforcement officer to issue a summons, rather than a complaint-warrant, in cases where there is a presumption that a warrant will be used as the charging instrument. It is expected that the Attorney General Guidelines will in many cases not only obviate the need to incarcerate defendants in county jail for up to 48 hours pending the completion of a full risk assessment, they will also obviate the need for a court to make a summons/warrant determination and to conduct a first appearance within 48 hours of an arrest. Defendants charged by means of a complaint-summons can be released from the police station and thus need not be transported to a county jail.

Paragraph (h)

This paragraph is taken verbatim from current R. 3:3-1(d).

Paragraph (i)

This paragraph is taken verbatim from current R. 3:3-1 paragraph (e).

Paragraph (j)

This paragraph is taken verbatim from current R. 3:3-1(f).

Rule 3:3-3. Execution or service; return

(a) … No change

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

(c) …No change

(d) …No change

(e) …No change

Source-R.R. 3:2-2(c); paragraphs (b) and (c) amended July 13, 1994 to be effective September 1, 1994[.]; paragraph (b) amended _____ to be effective _____.

COMMENTARY

In New Jersey the word "bail" has become synonymous with the term "monetary bail" because the present system relies on money to guarantee that a defendant appears for court when required. Under *The Bail Reform Law,* that will change. The court's pretrial release decision must conform to the following hierarchy regarding eligible defendants:

1. Release on personal recognizance or on the execution of an unsecured appearance bond when the court finds that such release would reasonably assure appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.
2. If the court does not find that release on personal recognizance or an unsecured bond will reasonably assure the justice and public safety purposes of the law, the court may order the pretrial release of the eligible defendant subject to certain conditions.
3. If the court does not find that release on personal recognizance/unsecured bond or release on conditions would reasonably assure the defendant's appearance in court when required, the court may order the release of the eligible defendant on monetary bail. The court may only impose monetary bail under this release option to reasonably assure the eligible defendant's appearance.
4. If the court does not find that any of the aforementioned release options will reasonably assure the justice and public safety purposes of the law, the court may order the pretrial release of an eligible defendant using a combination of non-

monetary conditions and monetary bail as set forth in the law. N.J.S.A. 2A:162-16(b)(2).

The Criminal Practice Committee is recommending that throughout the Court Rules the term “bail” be changed to “conditions of pretrial release” unless the term “bail” specifically references money bail. In those instances, the Criminal Practice Committee is recommending that the term “monetary bail” be utilized.

Paragraph (b)

The Criminal Practice Committee is recommending that the words “…who may admit to bail conditioned on the defendant's appearance before the court issuing the warrant” be removed from the rule because pretrial release, unless the pretrial release is based on monetary bail, is no longer conditioned only on a defendant’s appearance when required but also on the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

Rule 3:4-1. Procedure After Arrest

(a) Arrest without Warrant.

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

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

(b) Arrest on a Warrant. [If bail was not set when an arrest warrant was issued, t]The person who is arrested on that warrant shall [have bail set without unnecessary delay, and no later than 12 hours after arrest] 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.

(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[.]; paragraphs (a)(1), (a)(2) and (b) amended _____ to be effective _____.

COMMENTARY

For the reasons previously expressed, the Criminal Practice Committee is recommending that the word "bail" be changed to "conditions of pretrial release." See Commentary to R. 3:3-3 at page 39-40.

Paragraph (a)

This paragraph deals with the situation where there has been an arrest without a warrant. Under the current system, once a police officer has decided to prepare a complaint-warrant for submission to the court, that officer must present the warrant to a judicial officer within 12 hours. That judicial officer determines probable cause and whether a complaint-summons or complaint-warrant will issue and sets bail. Under *The Bail Reform Law*, the judicial officer will still be able to determine probable cause and make the determination whether to issue a warrant or summons, but will not be able to set conditions of release at that point because a complete *RA* will not have been prepared by the pretrial services agency to develop the appropriate conditions of release. Therefore, the Criminal Practice Committee is recommending an amendment to paragraph (a)(2) to provide that after the judicial officer determines probable cause and decides that a warrant shall issue, that judicial officer shall order the defendant remanded to the county jail pending a determination of conditions of pretrial release or a determination regarding pretrial detention if a motion has been filed by the prosecutor.

Paragraph (a)(1)

The Criminal Practice Committee is also recommending that the following language be removed from the first sentence of paragraph (a)(1): "or the prosecution of the person would be jeopardized by immediate release."

This language, read together with the remainder of the subsection, provides a mechanism for the improper detention of persons who would otherwise be subject to a summons under Rule 3:3-1(c). Currently, a warrant for the arrest of a person charged with committing a minor offense includes a bail amount, allowing the arrested person to post bail immediately following his or her detention. Pursuant to *The Bail Reform Law*, however, any person arrested on a warrant will be held for up to 48 hours before a pretrial release decision is made. Thus, it is important that law enforcement follow the criteria in Rule 3:3-1(c) in determining whether arrest on a warrant is even necessary, when a summons is otherwise appropriate. The above language, however, provides a loophole that allows detention of a person by obtaining a warrant, when the criteria of Rule 3:3-1(c) weigh in favor of obtaining a summons, rendering the criteria of Rule 3:3-1(c) meaningless.

However, because the Committee recognizes that a prosecutor needs the ability to apply for a warrant in this situation, the Committee is recommending the inclusion of paragraph (6) in the proposed revision to R. 3:3-1(d) to provide that a warrant may issue when there is reason to believe that the defendant will obstruct or attempt to obstruct the criminal justice process if released on a summons.

Paragraph (b)

This paragraph deals with the situation where there is an arrest after a complaint-warrant was issued and bail was not set at the point the warrant was issued. Under the current system, bail must be set within 12 hours. Under *The Bail Reform Law*, conditions of release cannot be set until the pretrial services agency completes a RA. Thus, in this situation the defendant must be remanded to the county jail, a RA must be done by the

pretrial services agency, and a judge must set conditions of release or order the defendant held pending a determination regarding pretrial detention if the prosecutor has filed a motion seeking detention. The Criminal Practice Committee is recommending that paragraph (b) be amended to so provide.

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

(a) Time of First Appearance. Following the filing of a complaint the defendant shall be brought before a judge for a first appearance as provided in this Rule. If the defendant remains in custody, the first appearance shall occur within [72 hours after arrest, excluding holidays] 48 hours of a defendant's commitment to the county jail, and shall be before a judge with authority to set [bail] conditions of release for the offenses charged. If a defendant is released on a complaint-summons, the first appearance shall be held no more than 60 days after the issuance of the complaint-summons or the defendant's arrest.

(b) …no change

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

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

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

(b) if the prosecutor is seeking pretrial detention, the prosecutor shall provide all relevant material in its possession that would be discoverable at the time of indictment as set forth in paragraph (a) of Rule 3:13-3;

(2) … no change

(3) … no change

(4) … no change

(5) … no change

(6) … no change

(7) ... no change

(8) … no change

(9) [admit the defendant to bail] set conditions of pretrial release, when appropriate as provided in Rule 3:26; [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 an application 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) … no change

(1) … no change

(2) … no change

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

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

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

(e) … no change

(f) … no change

(1) … no change

(2) … no change

(3) … no change

(4) … no change

(5) … no change

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[.]; paragraph (a) amended, subparagraph (c)(1) amended, new subparagraphs (c)(1)(a) and (c)(1)(b) added, subparagraphs (c)(9),(c)(10) amended, new subparagraph (c)(11) added, subparagraphs (d)(3), d(4) amended, new subparagraph (d)(5) adopted _____ to be effective _____.

COMMENTARY

Editor's Note: Prior to submitting this report to the Supreme Court, the Criminal Practice Committee submitted to the Court its Report on Implementing the Recommendations of the Joint Committee on Criminal Justice. That report contained several proposed revisions to R. 3:4-2. The Court has approved revisions to R. 3:4-2, which were adopted on April 12, 2016, and will become effective September 1, 2016. This report contains the Committee's recommendation for additional revisions.

Paragraph (a)

Under the current rule, when a defendant remains in custody, a first appearance must occur within 72 hours of arrest, excluding holidays, before a judge who has the authority to set bail. *The Bail Reform Law* requires that a RA be done and a judge set conditions of release within 48 hours. See N.J.S.A. 2A:162-17. *The Bail Reform Law* also requires that when a prosecutor makes a motion for pretrial detention, the hearing shall be held no later than at the defendant's first appearance unless a continuance is sought or the prosecutor files the motion after the first appearance. See N.J.S.A. 2A:162-19(d).

The Criminal Practice Committee is recommending that the time for a first appearance on a defendant who remains in custody be moved up to within 48 hours of a defendant's commitment to the county jail. The purpose for this recommendation is threefold. First, it will eliminate the need for two court events, i.e., a judge setting conditions of release within 48 hours and then having a first appearance at 72 hours. Second, it will create a single court event at which: the defendant is informed of the charges against him or her and advised of his or her rights, the judge can set conditions

of pretrial release, and the prosecutor has an opportunity to move for pretrial detention. Third, it will minimize the time defendants spend in jail.

The Criminal Practice Committee considered a proposal that the rule contain a requirement that all first appearances by defendants take place before judges sitting in the Superior Court, and not before judges sitting in the Municipal Court. Concern was expressed that there were not enough Superior Court judicial resources to accomplish this. It was also noted that the quality of municipal court judges has improved dramatically over the years, partially due to increased training. Thus, the Committee rejected this proposal and instead is recommending that it be up to the local Assignment Judge to determine whether a Superior Court or Municipal Court judge would handle this assignment.

Paragraph (c)(1)

The Committee is recommending that this paragraph be amended to provide that in addition to providing the defendant a copy of the complaint and informing him or her of the charge at the first appearance, the court also provide the defendant with certain additional material. The Committee is recommending two separate subparagraphs for adoption. These subparagraphs would address cases where a prosecutor is not seeking pretrial detention, and cases where a prosecutor is seeking pretrial detention. The reason for these separate requirements is because the Committee believes that a defendant should receive additional material where the prosecution is seeking detention.

Paragraph (c)(1)(a)

This paragraph addresses cases where the prosecutor is not seeking pretrial detention. The prosecutor would be required to provide the defendant with any available preliminary law enforcement incident report concerning the offense and any material used to establish probable cause.

Paragraph (c)(1)(b)

This paragraph addresses cases where the prosecutor is seeking pretrial detention. Because of the significant consequences of pretrial detention, the Committee is recommending that the prosecutor be required to provide all relevant material in its possession that would be discoverable at the time of indictment as provided in R. 3:13-3(a). It is not intended that this discovery obligation will turn the detention hearing into a full trial, but rather will ensure that defense counsel has enough information to prepare for the detention hearing.

The Committee had extensive discussion on what discovery would be "relevant" and "in the prosecutor's possession" at the time of the detention hearing, and thus, should be turned over to the defense. There were strong concerns raised about the nature of a detention hearing, and that it is supposed to be limited in scope. Some members noted that it would be overly burdensome for prosecutors to be required to provide "complete" discovery, i.e., all material that must be turned over under current R. 3:13-3 when the State tenders a plea offer. It was asserted that any such requirement would signal that the detention hearing could be as broad as a trial on the merits of the charge. Thus, it was important that the discovery obligation be limited to "relevant material" in the prosecutor's possession since these hearings would be convening, in most instances, within a few days of arrest.

The Committee acknowledges that linking the discovery requirements to R. 3:13-3(a) also includes exceptions for when a prosecutor may withhold certain pre-indictment discovery or make discovery available through inspection under paragraphs (a)(1) and (a)(2). These exceptions include where the prosecutor determines: (1) that pre-indictment delivery of all discoverable material would hinder or jeopardize the prosecution or investigation; or (2) 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 the material.

Concerns were also raised about the discoverability of exculpatory material and the prosecutorial obligations imposed pursuant to Brady, i.e., whether that information needed to be specifically accounted for in this paragraph. It was pointed out that R. 3:13-3(a) provides that "Notwithstanding the exceptions contained in paragraphs (a)(1) and (a)(2) … the prosecutor shall provide defense counsel with any exculpatory information or material."

Editor's Note: The Committee will be proposing a new Rule, R. 3:4A, on Pretrial Detention in its Part 2 report on Preventive Detention and Speedy Trial. However, the discovery requirements for when the prosecutor is or is not seeking pretrial detention in new subparagraphs (1)(a) and (1)(b) of R. 3:4-2(c) are independent of whether the Court approves R. 3:4A.

Paragraph (c)(9)

The Committee is recommending that the judge, at the first appearance set conditions of release if the defendant has been committed to the county jail.

New Paragraph (c)(11)

The Committee is also recommending that new paragraph (c)(11) be added regarding the scheduling of a pretrial detention hearing when the prosecutor has filed a motion seeking pretrial detention of the defendant. This paragraph provides that, if the prosecutor files a pretrial detention motion, then at the first appearance for an indictable offense the court shall set a date and time for the pretrial detention hearing and advise the defendant of the ability to seek a continuance of the hearing.

The Criminal Practice Committee generally agreed with this proposal as a conforming cross-reference to new R. 3:4A.

New Paragraph (d)(5)

The Criminal Practice Committee is recommending new paragraph (d)(5) to parallel the proposed revisions in paragraph (c)(9).

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

(a) … No change

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

Source-R.R. 3:2-3(c). Paragraph designations added and paragraphs (a) and (b) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended June 15, 2007 to be effective September 1, 2007[.]; paragraph (b) amended _____ to be effective _____.

COMMENTARY

The Criminal Practice Committee is recommending adding the word “monetary” before the word “bail” in paragraph (b) of this rule as the references to bail in the rule only address monetary bail, not other conditions of release.

Rule 3:4-4. Proceedings in arrest under Uniform Fresh Pursuit Law

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

Source-R.R. 3:2-3(d), 8:3-3(d); amended July 13, 1994 to be effective September 1, 1994[.]; amended to be effective .

COMMENTARY

The Criminal Practice Committee is recommending adding the word “monetary” before the word “bail” in this rule as the rule only addresses monetary bail, not other conditions of release.

Rule 3:6-8. Finding and Return of Indictment; No Bill

(a) Return; Secrecy. An indictment may be found only upon the concurrence of 12 or more jurors and shall be returned in open court to the Assignment Judge or, in the Assignment Judge's absence, to any Superior Court judge assigned to the Law Division in the county. With the approval of the Assignment Judge, an indictment may be returned to such judge by only the foreperson or the deputy foreperson rather than with all other members of the grand jury. Such judge may direct that the indictment shall be kept secret until the defendant is in custody or has [given bail] been released pending trial and in that event it shall be sealed by the clerk, and no person shall disclose its finding except as necessary for the issuance and execution of a warrant or summons.

(b) No Bill. If the defendant has been held to answer a complaint and, after submission to the grand jury, no indictment has been found, the foreperson shall forthwith so report in writing to the court, who shall forthwith order the defendant's release unless the defendant's detention is required by other pending proceedings. Notice of the action of the grand jury shall also be mailed by the clerk of the court to the defendant's attorney, a defendant not in custody, and the defendant's sureties if monetary bail has been posted.

Source-R.R. 3:3-8(a) (b); paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended June 15, 2007 to be effective September 1, 2007[.]; paragraphs (a) and (b) amended _____ to be effective _____.

COMMENTARY

Paragraph (a)

The Criminal Practice Committee is recommending that the term “bail” be changed to “conditions of release” in this paragraph for the reasons expressed in the Commentary to R. 3:3-3 at pages 39-40.

Paragraph (b)

The Criminal Practice Committee is also recommending adding the word “monetary” before the word “bail” in this paragraph as the reference to bail only addresses monetary bail, not other conditions of release.

Rule 3:7-8. Issuance of warrant or summons upon indictment or accusation

Upon the return of an indictment or the filing of an accusation a summons or warrant shall be issued in accordance with R. 3:3-1 by the criminal division manager as designee of the deputy clerk of the Superior Court in the manner provided by law for each defendant named in the indictment or accusation who [is not under bail] has not been released on conditions of pretrial release. The criminal division manager as designee of the deputy clerk of the Superior Court, upon request, shall issue more than one warrant or summons for the same defendant. If the defendant fails to appear in response to a summons, a warrant shall issue.

If a summons is issued upon indictment to a defendant who has not been previously held to answer a complaint, the defendant shall undergo all post-arrest identification procedures that are required by law upon arrest, on the return date of the summons, or upon written request of the appropriate law enforcement agency.

Source-R.R. 3:4-9. Amended July 22, 1983 to be effective September 12, 1983; amended July 13, 1994 to be effective January 1, 1995[.]; amended _____ to be effective _____.

COMMENTARY

For the reasons previously expressed, the Criminal Practice Committee is recommending that the word “bail” be changed to “conditions of pretrial release.” See Commentary to R. 3:3-3 at pages 39-40.

Rule 3:7-9. Form of warrant and summons

The warrant shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty, shall describe the offense charged in the indictment or accusation and shall command that the defendant be arrested and brought before [the court] a judge authorized to set conditions of pretrial release pursuant to R. 3:26-2. Conditions of pretrial release shall be fixed by the court and endorsed thereon, and in such case the sheriff or warden may take any monetary bail. The summons shall be in the same form as the warrant except that it shall be directed to the defendant and require the defendant to appear to plead before the court at a stated time and place. The summons shall also state that if the defendant fails to so appear, a warrant for defendant's arrest shall issue.

Source-R.R. 3:4-10(a) (b); amended July 13, 1994 to be effective January 1, 1995[.]; amended _____ to be effective _____.

COMMENTARY

There are two recommended changes to this rule. The first is intended make clear that when a person is arrested on a warrant that person is brought before a judge authorized to set conditions of pretrial release. The second change is adding the word “monetary” before the word “bail” in the rule as the references to bail in the rule only addresses monetary bail, not other conditions of release.

Rule 3:21-4. Sentence

(a) Imposition of Sentence; [Bail] Conditions of Release. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter [the bail] the conditions of release.

(b) … No change

(c) … No change

(d) … No change

(e) … No change

(f) … No change

(g) … No change

(h) … No change

(i) … No change

(j) … No change

Source-R.R. 3:7-10(d). Paragraph (f) amended September 13, 1971, paragraph (c) deleted and paragraphs (d), (e) and (f) redesignated as (c), (d) and (e) July 14, 1972 to be effective September 5, 1972; paragraph (e) adopted and former paragraph (e) redesignated as (f) August 27, 1974 to be effective September 9, 1974; paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraphs (d) and (e) amended August 28, 1979 to be effective September 1, 1979; paragraph (d) amended December 26, 1979 to be effective January 1, 1980; paragraph (g) adopted July 26, 1984 to be effective September 10, 1984; paragraph (d) caption and text amended November 5, 1986 to be effective January 1, 1987; paragraph (d) amended November 2, 1987 to be effective January 1, 1988; paragraph (d) amended January 5, 1988 to be effective February 1, 1988; new paragraph (c) adopted and former paragraphs (c), (d), (e), (f), and (g) redesignated (d), (e), (f), (g), and (h) respectively June 29, 1990 to be effective September 4, 1990; paragraph (b) amended July 14, 1992 to be effective September 1, 1992; paragraph (i) adopted April 21, 1994 to be effective June 1, 1994; paragraphs (b), (e), (f) and (g) amended July 13, 1994 to be effective January 1, 1995; former paragraphs (f), (g), (h), and (i) redesignated as paragraphs (g), (h), (i), and (j) and new paragraph (f) adopted July 10, 1998 to be effective September 1, 1998; paragraph (j) amended July 5, 2000 to be effective September 5, 2000; paragraph (e) caption and text amended, and paragraph (f) amended June 15, 2007 to be effective September 1, 2007; paragraph (h) caption and text amended July 16, 2009 to be effective September 1, 2009; paragraph (g) amended July 21, 2011 to be effective September 1, 2011[.]; paragraph (a) amended _____ to be effective _____.

COMMENTARY

Paragraph (a)

The Criminal Practice Committee is recommending that the term “bail” be changed to “conditions of release” in the caption and text of this paragraph for the reasons expressed in the Commentary to R. 3:3-3 at pages 39-40.

Rule 3:26-1. Right to Pretrial Release [Bail] Before Conviction

(a) Persons Entitled; Standards for Fixing.

(1) Persons Charged on a Complaint-Warrant. Except when the prosecutor files a motion for pretrial detention pursuant to N.J.S.A. 2A:162-18 and 19 and R. 3:4A, all [All] persons for whom a complaint-warrant or a complaint-warrant on indictment is issued for an initial charge involving an indictable offense or disorderly persons offense, [except those charged with crimes punishable by death when the prosecutor presents proof that there is a likelihood of conviction and reasonable grounds to believe that the death penalty may be imposed,] shall be [bailable] released before conviction on [such terms as,]the least restrictive non-monetary conditions that, in the judgment of the court, will reasonably ensure their presence in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process. In addition to these non-monetary conditions, monetary conditions may be set for an eligible defendant but only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required. The court shall consider all the circumstances, the Pretrial Services Program's risk assessment and recommendations and any information that may have been provided by a prosecutor or the eligible defendant on conditions of release before making any pretrial release decision. If the court enters a release order containing conditions contrary to those recommended by the Pretrial Services Program obtained using a risk assessment instrument then the court shall set forth its reasons for not accepting those recommendations. The court shall make a pretrial release determination no later than 48 hours after a defendant's commitment to the county jail.

[The factors to be considered in setting bail are: (1) the seriousness of the crime charged against defendant, the apparent likelihood of conviction, and the extent of the punishment prescribed by the Legislature; (2) defendant's criminal record, if any, and previous record on bail, if any; (3) defendant's reputation, and mental condition; (4) the length of defendant's residence in the community; (5) defendant's family ties and relationships; (6) defendant's employment status, record of employment, and financial condition; (7) the identity of responsible members of the community who would vouch for defendant's reliability; (8) any other factors indicating defendant's mode of life, or ties to the community or bearing on the risk of failure to appear, and, particularly, the general policy against unnecessary court may also impose terms or conditions appropriate to release including conditions necessary to protect persons in the community.] When a defendant is charged with a crime or offense involving domestic violence, the court authorizing the release may, as a condition of release, prohibit the defendant from having any contact with the victim. The court may impose any additional limitations upon contact as otherwise authorized by N.J.S.A. 2C:25-26.

(2) Persons Charged on a Complaint-Summons. A defendant who is charged on a complaint-summons shall be released from custody.

(b) Restrictions on Contact. If the court imposes conditions of [bail] pretrial release that include restrictions on contact between the defendant and defendant's minor child, (1) a copy of the order imposing the restrictions shall be transmitted to the Family Part, and (2) such restrictions shall not affect contact authorized by an order of the Family Part in a child abuse/neglect case entered after any restriction on contact was imposed as part of a bail order.

(c) Crimes with Bail Restrictions Defined in N.J.S.A. 2A:162-12. If a defendant is charged with a crime with bail restrictions as defined in N.J.S.A. 2A:162-12, and the court has set a monetary bail or a combination of a monetary bail and non-monetary conditions of pretrial release, no later than the time of posting monetary bail or proffering the surety or bail bond, the defendant shall provide to the prosecutor, on the Bail Source Inquiry Questionnaire promulgated by the Attorney General, relevant information about the obligor, indemnifier or person posting cash bail, the security offered, and the source of any money or property used to post the cash bail or secure the surety or bail bond.

[(d) On Failure to Indict. If a person committed for a crime punishable by death is not indicted within 3 months after commitment, a judge of the Superior Court, for good cause shown, may admit the person to bail.

(e) On Failure to Move Indictment. If an indictment or accusation is not moved for trial within 6 months after arraignment, a judge of the Superior Court, for cause shown, may discharge the defendant upon the defendant's own recognizance.]

[(f)] (d) Extradition Proceedings. Where a person has been arrested in any extradition proceeding, the court may set conditions of pretrial release [that person may be admitted to bail] except where that person is charged with a crime punishable by death.

[(g)] (e) Issuance of Restraining Orders By Electronic Communication.

(1) Temporary Domestic Violence Restraining Orders. Procedures authorizing the issuance of temporary domestic violence restraining orders by electronic communication are governed by R. 5:7A (b).

(2) N.J.S.A. 2C:35-5.7 and N.J.S.A. 2C:14-12 Restraining Orders. A judge may as a condition of release issue a restraining order pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law") upon

sworn oral testimony of a law enforcement officer or prosecuting attorney who is not physically present. Such sworn oral testimony may be communicated to the judge by telephone, radio or other means of electronic communication. The judge shall contemporaneously record such sworn oral testimony by means of a [tape-]recording device [or stenographic machine] if [such are] available; otherwise, adequate [long hand] notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the law enforcement officer or prosecuting attorney must identify himself or herself, specify the purpose of the request and disclose the basis of the application. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a restraining order. Upon issuance of the restraining order, the judge shall memorialize the specific terms of the order. That memorialization shall be either by means of a [tape-]recording device, [stenographic machine,] or by adequate [longhand] notes. Thereafter, the judge shall direct the law enforcement officer or prosecuting attorney to memorialize the specific terms authorized by the judge on a form, or other appropriate paper, designated as the restraining order. This order shall be deemed a restraining order for the purpose of N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law"). The judge shall direct the law enforcement officer or prosecuting attorney to print the judge's name on the restraining order. A copy of the restraining order shall be served upon the defendant by any officer authorized by law. Within 48 hours, the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, the signed restraining order along with a certification of service upon the defendant. The certification of service shall include the date and time that service upon the defendant was made or attempted to be made in a form approved by the Administrative Director of

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

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

Source-R.R. 3:9-1(a)(b)(c)(d); paragraph (a) amended September 28, 1982 to be effective immediately; paragraphs (a), (b), (c) and (d) amended July 13, 1994 to be effective January 1, 1995; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; new paragraph (b) adopted, and former paragraphs (b), (c), and (d) redesignated as paragraphs (c), (d), and (e) June 15, 2007 to be effective September 1, 2007; new paragraph (c) adopted and former paragraphs (c), (d), and (e) redesignated as paragraphs (d), (e), and (f) July 9, 2008 to be effective September 1, 2008; paragraph (a) amended and new paragraph (g) adopted July 9, 2013 to be effective September 1, 2013[.]; caption, former paragraph (a) amended and re-designated paragraph (a)(1), paragraph (a)(2) added, paragraphs (b) and (c) amended, paragraphs (d) and (e) deleted; former paragraph (f) amended and re-designated paragraph (d) and former paragraph (g) re-designated paragraph (e) and (e)(2) amended _____ to be effective _____.

COMMENTARY

Paragraph (a)

Paragraph (a) formerly set forth the proposition that all persons were bailable and also set the standards for setting bail. The Committee is recommending that this paragraph be amended and broken into two parts. Paragraph (a)(1) would address complaint-warrants and paragraph (a)(2) would address complaint-summonses.

Paragraph (a)(1)

Under the *The Bail Reform Law*, where a defendant is charged on a complaint-warrant and is remanded to the county jail, unless a prosecutor seeks pretrial detention and the court orders a defendant detained, a defendant is required to be released on the least restrictive non-monetary conditions that will, in the judgment of the court, reasonably ensure his or her presence in court when required, the protection of the safety of any other person or the community and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process. Monetary bail may be set for an eligible defendant only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required. The Committee is recommending that paragraph (a)(1) be amended to reflect this standard set forth in the statute.

The Committee is also recommending that paragraph (a)(1) contain the requirements, set forth in N.J.S.A. 2A:162-16, that the court make a pretrial release decision within 48 hours of the defendant's commitment to the county jail after considering the pretrial services program's risk assessment and recommendations on conditions. The Committee is also recommending deletion of the language in the rule addressing the death penalty since the death penalty no longer exists under New Jersey law.

The Committee entered into a prolonged debate over whether the factors set forth in State v. Johnson, 61 N.J. 351 (1972) and current R. 3:26-1(a) should continue to be set forth in a revised R. 3:26-1. Those arguing in favor of keeping the factors argued that judges will need guidance in setting monetary conditions of release after *The Bail Reform Law* takes effect January 1, 2017; and since *The Bail Reform Law* does not provide any guidance, the current Johnson factors should remain to provide such guidance. Additionally, those arguing in favor of retaining the Johnson factors argued that there were other relevant factors, such as the circumstances of the offense and the weight of the evidence, that are not reflected in the risk assessment. Those arguing in favor of keeping the Johnson factors also maintained that their deletion was in derogation of our common law and well established principles of statutory construction.

Those arguing against keeping the Johnson factors argued that they were inconsistent with the spirit of *The Bail Reform Law,* which is to allow monetary conditions only when non-monetary conditions were specifically found to be insufficient to reasonably ensure a defendant's presence in court when required, the protection of the safety of any other person or the community and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process. Additionally, it was opined that keeping the Johnson factors would send the wrong message, i.e., that the old method of setting monetary bail was acceptable.

The Committee decided to recommend that the Johnson factors be removed from R. 3:26-1(a). The Committee is of the opinion that *The Bail Reform Law* establishes a clear preference for non-monetary conditions of release and that release on monetary conditions, while allowable, is available only when release ROR or on non-monetary

conditions will not suffice. The Committee agrees that keeping the Johnson factors will send the wrong message that nothing has changed when monetary bail needs to be set.

The Bail Reform Law defines an eligible defendant as "a person for whom a complaint-warrant is issued for an initial charge involving an indictable offense or disorderly persons offense…." See N.J.S.A. 2A:162-15. Thus, the statute does not account for the fact that a defendant can be charged on an indictment without having been charged initially on a complaint-warrant or a complaint-summons. So, for example, a person charged on a direct indictment for murder would not be considered an eligible defendant under a literal reading of *The Bail Reform Law* but a person for whom an initial complaint-warrant was issued for murder would be considered an eligible defendant. The Committee believes that this could not have been an intentional choice by the Legislature but rather was an oversight. R. 3:7-8 addresses the direct indictment issue. The Rule directs that the criminal division manager, as designee of the deputy clerk of the Superior Court, issue either a summons or a warrant in accordance with R. 3:3-1 upon the return of an indictment. R. 3:3-1 governs the determination of whether to issue a summons or a warrant on a complaint.

The Committee is recommending substantial changes to R. 3:3-1. Thus, the determination of whether to issue a summons-on-indictment or complaint-warrant on indictment would be guided by the same standards as those that would apply when the charges are on a complaint-warrant prior to indictment. In other words, the determination of whether the defendant is an "eligible defendant" would not depend on whether the defendant was charged on a complaint or a direct indictment but whether the standards for issuance of a warrant under R. 3:3-1 had been met. The Committee is therefore recommending that paragraph (a) include as an "eligible defendant" a defendant for whom

a complaint-warrant on indictment was issued. Thus, paragraph (a) of the proposed rule defines an eligible defendant as "a person for whom a complaint-warrant, *or a complaint-warrant on indictment*, was issued for an initial charge involving an indictable offense or disorderly persons offense, and who: (1) is detained pursuant to R. 3:4A, or (2) is detained in jail due to an inability to post monetary bail pursuant to R. 3:26." The proposed rule tracks the language defining an eligible defendant in N.J.S.A. 2A:162-15 and N.J.S.A. 2A:162-22a with the exception of the inclusion of the term "complaint warrant on indictment."

Paragraph (a)(2)

This paragraph is proposed to address release on a complaint-summons. It merely states that when a person is charged on a complaint-summons that person is to be released from custody, i.e., released on their own recognizance (ROR) without conditions. This paragraph would also include summonses issued pursuant to R. 3:2-2(b).

Paragraph (b)

For the reasons previously expressed, the Committee is recommending that the word "bail" be changed to "pretrial release". See Commentary to R. 3:3-3 at pages 39-40.

Paragraph (c)

This paragraph addresses crimes with bail restrictions under our current money based system. N.J.S.A. 2A:162-12 establishes that certain crimes have bail restrictions. The statute provides that a person charged with a crime with bail restrictions may post the required amount of bail only in full cash, a surety bond executed by a bail bond corporation or a bail bond secured by real property situated in the State with an unencumbered equity equal to the amount of bail plus $20,000.

The Bail Reform Law sets forth a priority for setting conditions of release. Monetary bail, to which this N.J.S.A. 2A:162-12 applies, only becomes a factor if the person cannot be released ROR or on conditions. Therefore, the issue presented is whether N.J.S.A. 2A:162-12 somehow preempts the provisions of *The Bail Reform Law*, thereby only allowing the set of a monetary bail amount on these cases. The Committee does not believe that N.J.S.A. 2A:162-12 limits the ability to set conditions of release other than a monetary amount. The Committee believes that the clear legislative intent was to move from a monetary-based system to a risk-based system. If only monetary bail could be used for crimes with bail restrictions, that would gut *The Bail Reform Law* by making it inapplicable to a large number of cases. We presume that the Legislature would have specifically provided that *The Bail Reform Law* did not apply to crimes with bail restrictions if that was its intent.

The Committee would read both laws to complement each other. Consequently, it believes that the provisions of N.J.S.A. 2A:162-12 would only come into play if a judge sets monetary bail pursuant to *The Bail Reform Law*. Thus, the Committee is recommending that this paragraph be amended to make clear that the provisions of this paragraph only applies where monetary bail, or monetary bail with conditions, are the conditions of release set by the judge.

Paragraphs (d) and (e)

The Committee is recommending these paragraphs be deleted from the rule. They should be covered in the rule drafted to implement the speedy indictment and trial provisions of *The Bail Reform Law.*

Paragraph (d)

Former Paragraph (f) has been re-designated Paragraph (d).

The Committee is recommending that the word “bail” be changed to “pretrial release” in this paragraph. See Commentary to R. 3:3-3 at pages 39-40.

Paragraph (e)

Former Paragraph (g) has been re-designated Paragraph (e). Subparagraph (e)(2) would be amended to delete references to “tape” recording device, “stenographic machine,” and “longhand” notes to be consistent with the proposed technical changes in R. 3:2-3(b).

Rule 3:26-2. Authority to Set Conditions of Pretrial Release [Bail]

(a) Authority to Set Conditions of Pretrial Release [Initial Bail]. A Superior Court judge may set [bail] conditions of pretrial release for a person charged with any offense. [Bail] Conditions of pretrial release for any offense except homicide [murder, kidnapping, manslaughter, aggravated manslaughter, aggravated sexual assault, sexual assault, aggravated criminal sexual contact,] or a person arrested in any extradition proceeding [or a person arrested under N.J.S.A. 2C:29-9(b) for violating a restraining order] may be set by any other judge[, or in the absence of a judge, by a municipal court administrator or deputy court administrator] provided that judge is setting conditions of pretrial release as part of a first appearance pursuant to Rule 3:4-2(b).

(b) [Initial Bail Set] Conditions of Release. [Initial bail] Conditions of pretrial release shall be set pursuant to R. 3:4-1 (a) or (b) on indictable or non-indictable offenses.

(1) The court shall order the pretrial release of the eligible defendant on personal recognizance or on the execution of an unsecured appearance bond when, after considering all the circumstances, the Pretrial Services Program's risk assessment and recommendations on conditions of release prepared pursuant to section 11 of P.L.2014, c. 31 (c.2A:162-25), and any information that may be provided by a prosecutor or the eligible defendant, the court finds that the release would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process. When the court orders pretrial release pursuant to this subparagraph, the court shall, in the document authorizing the release, notify the defendant that the defendant must appear in court when required and that a failure to appear may result in the issuance of a warrant for the defendant's arrest.

(2) If the court does not find, after consideration, that the release described in subparagraph (1) of this paragraph will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may order the pretrial release of the eligible defendant subject to the following:

(a) the eligible defendant shall appear in court as required;

(b) the eligible defendant shall not commit any offense during the period of release;

(c) the eligible defendant shall avoid all contact with an alleged victim of the crime; and

(d) the eligible defendant shall avoid all contact with all witnesses who may testify concerning the offense that are named in the document authorizing the eligible defendant's release or in a subsequent court order.

The court may impose other non-monetary conditions of release as set forth in subparagraph (3).

(3) The non-monetary condition or conditions of a pretrial release ordered by the court pursuant to this paragraph shall be the least restrictive condition, or combination of conditions, that the court determines will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, which may include that the eligible defendant:

(a) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able to reasonably assure the court that the eligible defendant will appear in court when

required, will not pose a danger to the safety of any other person or the community, and will not obstruct or attempt to obstruct the criminal justice process;

(b) will maintain employment, or, if unemployed, actively seek employment;

(c) maintain or commence an educational program;

(d) abide by specified restrictions on personal associations, place of abode or travel;

(e) report on a regular basis to a designated law enforcement agency, or other agency, or pretrial services program;

(f) comply with a specified curfew;

(g) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(h) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

(i) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(j) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(k) be placed in a pre-trial home supervision capacity with or without the use of an approved electronic monitoring device. The court may order the eligible defendant to pay all or a portion of the costs of the electronic monitoring, but the court may wave the payment for an eligible defendant who is indigent and who has demonstrated to the court an inability to pay all or a portion of the costs; or

(l) satisfy any other condition that is necessary to reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other

person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

If the court enters a release order that is contrary to the release recommendations, including release conditions, of the Pretrial Services Program obtained by using a risk assessment instrument, then the court shall set forth in the document authorizing the release its reasons for not accepting the release recommendations.

[(c) Review of Initial Set. Any person unable to post bail shall have his or her bail reviewed by a Superior Court judge no later than the next day which is neither a Saturday, Sunday nor a legal holiday.

Except in those indictable cases in which a Superior Court judge has set bail, a municipal court judge has the authority to make bail revisions up to and including the time of the defendant's first appearance before the court. A municipal court judge has the authority to make bail revisions on any non-indictable offense at any time during the course of the proceedings.]

(c) [(d)] Modification of Release Conditions [Bail Reductions] [A first application for bail reduction shall be heard by the court no later than seven days after it is made].

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

(2) Review of Conditions of Release. Except as provided in paragraphs (d)(1) or (d)(2) a Superior Court Judge may review the conditions of pretrial release set pursuant to Rule 3:26-1 on its own motion, or upon motion by the prosecutor or the defendant alleging that there has been a material change in circumstance that justifies a change in conditions.

Any review of conditions pursuant to this rule shall be decided within 30 days of the filing of the motion. Upon a finding that there has been a material change in circumstance, the judge may set new conditions of release but may not order the defendant detained except as provided in Rule 3:4A.

(d) Violations of Conditions of Release

(1) Violation of condition of release when eligible defendant released from jail. Upon the motion of the prosecutor, when a defendant for whom a complaint-warrant was issued is released from custody, the court, upon a finding, by a preponderance of the evidence, that the defendant while on release violated a restraining order or condition of release, or upon a finding of probable cause to believe that the defendant has committed a new crime while on release, may revoke the defendant's release and order that the defendant be detained pending trial where 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 defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the defendant will not obstruct or attempt to obstruct the criminal justice process.

(2) Person released on a complaint-summons who is thereafter arrested on a warrant for a failure to appear. If a defendant charged on a complaint-summons is subsequently arrested on a warrant for a failure to appear in court when required, that defendant shall be eligible for release on personal recognizance or release on monetary bail by sufficient sureties at the discretion of the court. If monetary bail was not set when an arrest warrant

for the defendant was issued, the court shall set monetary bail without unnecessary delay, but in no case later than 12 hours after arrest.

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[.]; caption, paragraph (a) and (b) amended, former paragraph (c) deleted, former paragraph (d) amended and re-designated as paragraph (c) and new paragraph (d) added, _____ to be effective _____.

COMMENTARY

Paragraph (a)

For the reasons previously expressed, the Committee is recommending that the word "bail" be changed to "conditions of pretrial release". See Commentary to R. 3:3-3 at pages 39-40.

The Committee is recommending that the authority to set conditions of release be limited to the judges setting conditions of pretrial release as part of a first appearance. The reason for this change is twofold. First, conditions of release can only be set after a *RA* is completed and that will occur after a defendant is committed to the jail. Second, the Committee is recommending that conditions of pretrial release be set at a centralized first appearance which will be conducted by a judge after that judge receives a *RA*.

The Committee is also recommending that a municipal court judge be permitted to set bail for all indictable offenses except for homicide or persons arrested in any extradition proceeding, where the municipal court judge is setting conditions of release as part of a first appearance pursuant to Rule 3:4-2(b). This is consistent with the rule relaxation entered by the Supreme Court on April 29, 2013. If this proposal is adopted, the need for the rule relaxation would be obviated. The change would have the effect of not allowing municipal court judges to set conditions of release on indictable offenses unless they were doing so as part of a first appearance court. It would not impact the ability of municipal court judges on non-indictable offenses pursuant to Part VII of the Court Rules.

Paragraph (b)

For the reasons previously expressed, the Committee is recommending that the word "bail" be changed to "conditions of pretrial release". See Commentary to R. 3:3-3

at pages 39-40. Paragraph (b) is also being amended to include new paragraphs (1), (2) and (3).

Paragraph (b)(1)

Paragraph (b)(1) addresses pretrial release of an eligible defendant on his or her own recognizance (ROR). The language tracks the language in *The Bail Reform Law* (C. 2A:162-17a)*, but the* Committee discussed the issue of providing notice to an eligible defendant released on his or her own recognizance of the court date and that if the eligible defendant did not appear for his or her scheduled court date, a bench warrant could be authorized and decided to add language to that effect to the proposed rule.

Paragraph (b)(2)

Paragraph (b)(2) addresses pretrial release when the court finds that release on ROR is not sufficient to assure an eligible defendant's court appearance, the safety and protection of the community, and that the eligible defendant will not obstruct the criminal justice process. The Committee is recommending that this subparagraph mirror the language from *The Bail Reform Law* (C. 2A:162-17b(1)) regarding the mandatory conditions for pretrial release.

Paragraph (b)(3)

Paragraph (b)(3) addresses additional non-monetary conditions, or combination of conditions, of pretrial release that may be required for an eligible defendant. The Committee is recommending that the court rule mirror the language from *The Bail Reform Law*, (C. 2A:162-17(b)(2)). The conditions in this rule proposal that the court may require must be the least restrictive conditions, or combination of conditions, to ensure court appearance, safety and protection of the community, and that the eligible defendant will not obstruct the criminal justice process. This subparagraph would also require that if the

court enters a release order that is contrary to the release recommendations, including release conditions, of the Pretrial Services Program obtained by using a risk assessment instrument, then the court shall set forth in the document authorizing the release its reasons for not accepting the release recommendations. This is consistent with the requirements of *The Bail Reform Law*.

Former Paragraph (c)

This paragraph was intended to provide a mechanism for a quick review of an initial bail set. In many instances that initial bail set occurred telephonically at night. At the point the bail was set the judicial officer setting bail had very little information about the defendant. Thus, in many instances bail was set high. The review occurred after the person had been interviewed by the Criminal Case Manager's Office and a bail report was completed. Under *The Bail Reform Law* conditions of release will not be set until after a *RA* has been performed once the defendant is committed to the county jail. Thus, the reasons for a review of the initial set will not be present and this paragraph should be deleted.

New Paragraph (c)

Former paragraph (d) is being amended and re-designated paragraph (c).

Paragraph (c)(1)

The Bail Reform Law requires that when monetary bail is set, and a defendant is unable to post monetary bail, that the bail be reviewed promptly. The defendant also is given the right to file an application with the court seeking a bail reduction which is required to be heard in an expedited manner. See N.J.S.A. 2A:162-16d(2)(a). This subparagraph sets the process for review of a monetary bail set. The Committee is

recommending adoption of the subparagraph to implement the requirements set forth in N.J.S.A. 2A:162d(2).

Paragraph (c)(2)

There appears to be a gap in *The Bail Reform Law* that would not allow a judge to change conditions of release, i.e., step up or down conditions based on new facts or a change in circumstance. This subparagraph is being added to fill that gap.

This section would allow the court, on its own motion, or on motion of the prosecutor or defense counsel, to review conditions of pretrial release where there has been a material change in circumstance that justifies a change in conditions of pretrial release. While not specifically covered under *The Bail Reform Law*, the stated purpose of the law is to "…effectuate the purpose of primarily relying on pretrial release to reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community, that the defendant will not obstruct or attempt to obstruct the criminal justice process, and that the eligible defendant will comply with all conditions of release…" See N.J.S.A. 2A:162-15. Thus, the Committee is proposing adoption of this subparagraph because it believes that it is within the liberal construction permitted by *The Bail Reform Law.*

The Committee is also recommending that this subparagraph be amended to include a time parameter for when a motion to review conditions of release must take place. *The Bail Reform Law* is silent as to a time period. The time parameter recommended is 30 days.

Paragraph (d)

A new paragraph (d) is being proposed for adoption by the Court.

Paragraph (d)(1)

The Bail Reform Law requires that when a complaint-warrant is issued and the defendant is released from custody, if the court finds that the defendant while on release either (a) violated a restraining order or condition of release, or (2) committed a new crime while on release, the court may revoke the defendant's release and order that the defendant be detained pending trial. See N.J.S.A. 2A:162-24. The Committee is recommending that a new paragraph be added to the rule to address this requirement in the statute.

The Bail Reform Law was silent as to what the burden of proof was for the finding by the court that the defendant while on release violated a restraining order or condition of release. The Committee is recommending that this standard be by a preponderance of the evidence, similar to the standard for violations of probation, and that proposed standard is contained in subparagraph (d)(1).

Paragraph (d)(2)

The Bail Reform Law states that if a defendant is charged on a complaint-summons and is subsequently arrested on a warrant for a failure to appear in court when required, the defendant is eligible for release on personal recognizance or release on bail by sufficient sureties at the discretion of the court. If monetary bail was not set when an arrest warrant for the defendant was issued, the court is required to set monetary bail without unnecessary delay, but in no case later than 12 hours after arrest. See N.J.S.A. 2A:162-16d(2)(a). The Committee is recommending adding this subparagraph to the rule to address the requirement in the law.

Editor’s Note: The Committee will be proposing further amendments to this Rule in its Report of the Supreme Court – Part III Rules- Part 2 Pretrial Detention and Speedy

Trial. That additional change would only need to be considered if the Court approves the Committee's recommendation regarding detention.

Rule 3:26-4. Form and Place of Deposit; Location of Real Estate; Record of Recognizances, Discharge and Forfeiture Thereof

(a) Deposit of Monetary Bail. A person admitted to monetary bail or a combination of monetary bail and non-monetary conditions of pretrial release shall, together with that person's sureties, sign and execute a recognizance before the person authorized to take monetary bail or, if the defendant is in custody, the person in charge of the place of confinement. The recognizance shall contain the terms set forth in R. 1:13-3(b) and shall be conditioned upon the defendant's appearance at all stages of the proceedings until final determination of the matter, unless otherwise ordered by the court. One or more sureties may be required. Cash may be accepted and in proper cases no security need be required. A corporate surety shall be one approved by the Commissioner of Insurance and shall execute the recognizance under its corporate seal, cause the same to be duly acknowledged and shall annex, thereto, proof of authority of the officers or agents executing the same and of corporate authority and qualification. [Bail] Monetary bail given in the Superior Court shall be deposited with the Finance Division Manager in the county in which the offense was committed, provided that upon order of the court monetary bail shall be transferred from the county of deposit to the county in which defendant is to be tried. Real estate offered as monetary bail for indictable and non-indictable offenses shall be approved by and deposited with the clerk of the county in which the offense occurred and not with the Municipal Court clerk. In any county, with the approval of the Assignment Judge, a program may be instituted for the deposit in court of cash in the amount of 10 percent of the amount of monetary bail fixed.

(b) Limitation on Individual Surety. Unless the court for good cause otherwise permits, no surety, other than an approved corporate surety, shall enter into a recognizance or

undertaking for monetary bail if there remains undischarged any previous recognizance or monetary bail undertaken by that surety.

(c) Real Estate in Other Counties. Real estate owned by a surety located in a county other than the one in which the monetary bail is taken may be accepted, in which case the clerk of the court in which the monetary bail is taken shall forthwith transmit a copy of the recognizance certified by that clerk to the clerk of the county in which the real estate is situated, who shall record it in the same manner as if the recognizance had been taken in that clerk's county.

(d) … No change

(e) … No change

(f) … No change

(g) Ten Percent Cash Bail. Except in first or second degree cases and certain crimes or offenses involving domestic violence as set forth in N.J.S.A. 2A:162-12 and unless the order setting monetary bail specifies to the contrary for good cause shown, whenever monetary bail is set pursuant to Rule 3:26-1, monetary bail may be satisfied by the deposit in court of cash in the amount of ten-percent of the amount of monetary bail fixed and defendant's execution of a recognizance for the remaining ninety percent. No surety shall be required unless the court fixing monetary bail specifically so orders. When cash equal to ten-percent of the monetary bail fixed is deposited pursuant to this Rule, if the cash is owned by someone other than the defendant, the owner shall charge no fee for the deposit other than lawful interest and shall submit an affidavit or certification with the deposit so stating and also listing the names of any other persons for whom the owner has deposited monetary bail. The person making the deposit authorized by this subsection shall file an affidavit or certification concerning the lawful ownership thereof,

and on discharge such cash may be returned to the owner named in the affidavit or certification.

Source-R.R. 3:9-5(a)(b)(c)(d)(e)(f)(g). Paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (g) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraphs (f) and (g) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (b) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (g) amended February 27, 1995 to be effective immediately; paragraphs (a), (d), (e), (f) and (g) amended June 15, 2007 to be effective September 1, 2007; paragraph (g) amended July 9, 2013 to be effective September 1, 2013[.]; caption to paragraph (a) amended, paragraph (a), (b), (c) and (g) amended _____ to be effective _____.

COMMENTARY

This entire rule, with the exception of paragraph (e) which deals with real estate being posted, deals with posting monetary bail. In that regard the Criminal Practice Committee is recommending changing the word “bail” to “monetary bail” throughout the rule.

Paragraph (a)

The Criminal Practice Committee is also recommending adding the phrase “or a combination of monetary bail and condition of pretrial release” be added in the first sentence of R. 3:26-4(a), which governs the deposit of monetary bail.

Paragraph (g)

The Criminal Practice Committee is recommending that clarifying language be added to this paragraph to provide guidance as to the setting of 10 ten-percent cash bail. The argument is that currently no guidance is provided to judges (or litigants) about when an order setting bail might specify that a ten-percent alternative is unavailable and there exists "a presumption in favor of a ten-percent option, in lieu of a bond, for certain offenses that are not crimes with bail restrictions." State v. Steele, 430 N.J. Super. 24, 40 (App. Div. 2013); see also State v. Casavina, 163 N.J. Super. 27, 31, 394 A.2d 142 (App. Div. 1978). The Committee is recommending adding the following italicized language to R. 3:26-4(g): "Except in first or second degree cases and certain crimes or offenses involving domestic violence as set forth in N.J.S.A. 2A:162-12 and unless the order setting bail specifies to the contrary *for good cause shown*, whenever bail is set pursuant to R. 3:26-1, bail may be satisfied by the deposit in court of cash in the amount of ten-percent of the amount of bail fixed and defendant's execution of a recognizance for the remaining ninety percent."

Rule 3:26-5. Justification of Sureties

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

Source-R.R. 3:9-6; amended July 13, 1994 to be effective September 1, 1994[.]; amended _____ to be effective _____.

COMMENTARY

The Criminal Practice Committee is recommending adding the word “monetary” before the word “bail” in this rule as the rule only addresses monetary bail, not other conditions of release.

Rule 3:26-6. Forfeiture

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

(b) … No change

(c) … No change

Source-R.R. 3:9-7 (a)(b)(c) (first sentence) (d); paragraphs (a) and (c) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (b) and (c) amended July 28, 2004 to be effective September 1, 2004[.]; paragraph (a) amended _____ to be effective _____.

COMMENTARY

Paragraph (a)

This rule deals with forfeiture of bail. The Criminal Practice Committee is recommending changing the word “bail” to “monetary bail” in paragraph (a).

Rule 3:26-7. Exoneration

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

Source-R.R. 3:9-8[.]; amended _____ to be effective _____.

COMMENTARY

This rule deals with exoneration of bail. The Criminal Practice Committee is recommending changing the word “bail” to “monetary bail” in this rule.

Rule 3:26-8. Bail Sufficiency; Source Hearing

(a) Time and Notice. Where a defendant has posted monetary bail the [The] State may request either orally or in writing, at any time prior to the commencement of trial, a hearing pursuant to N.J.S.A. 2A:162-13. The request shall be made on notice to the defendant's counsel, or on notice to the defendant if he or she is unrepresented at the time the request is made.

(b) … No change

(c) Time of Hearing. The court shall conduct a hearing required or authorized pursuant to N.J.S.A. 2A:162-13 within three (3) business days after monetary bail is posted or proffered if defendant is incarcerated, or within a reasonable period of time after granting the request if the defendant has been released on bail.

(d) Release of Defendant; Failure to Appear. If the defendant has not yet been released when the State requests a hearing for a person charged with a crime enumerated in N.J.S.A. 2A:162-12 or when the court grants a request for a hearing for any other offense, the defendant shall remain in custody until further order of the court. If the defendant has already been released after posting monetary bail, the conditions of the defendant's pretrial release [bail] status shall be maintained until the completion of the hearing and the defendant will be notified when to appear in court for the hearing. Should the defendant fail to appear for the hearing the monetary bail shall be forfeited and a warrant shall issue for the arrest of the defendant.

(e) … No change

(f) Order. At the conclusion of the hearing, the court shall make specific findings of fact and issue an order complying with N.J.S.A. 2A:162-13(b) regarding the person posting or proffering cash bail or serving as obligor on any bond, the sufficiency and value

of the security for monetary bail posted or proffered by the defendant, the source of funds used to post cash bail or secure a bail bond and identifying the approved source(s) of monetary bail. The defendant shall not be released from custody unless he or she complies with the conditions of the court's order. If the defendant has already been released, he or she shall be returned to custody, immediately, and not be released until the conditions of the court order regarding the bail are satisfied.

(g) Nothing herein shall prevent the court from otherwise setting monetary bail, or altering monetary bail on motion therefor, in accordance with the rules of court.

Adopted July 9, 2008 to be effective September 1, 2008[.]; paragraphs (a), (c), (d), (f), and (g) amended _____ to be effective _____.

COMMENTARY

This rule deals with bail source hearings pursuant to N.J.S.A. 2A:162-12 and -13. The Criminal Practice Committee does not believe that *The Bail Reform Law* impacts this statute. Where the defendant is required to post monetary bail, the statute and rule set forth the process should the State seek a bail source hearing. The Criminal Practice Committee is proposing amendments to make clear that the rule applies to monetary bail and is therefore recommending amendments to paragraphs (a), (c), (d), (f) and (g).

III. Non-Rule Recommendation

A. Bail Schedules

The Committee urges that the Administrative Office of the Courts reconsider the continued viability of the bail schedules promulgated by Directive #9-05 (December 2013). The Committee believes that the schedules, in their present form, may help perpetuate the current system of setting monetary bail and are inconsistent with the intent of *The Bail Reform Law* which shifts to a risk based system of pretrial release. The Committee recognizes that there may be cases where the current bail schedules may still have to be used, e.g., cases where the offense occurred prior to the effective date of *The Bail Reform Law.*

B. Affordable Bail

During the Committee's debate on R. 3:26-1 a minority of Committee members proposed that the rule contain a provision that "monetary bail may not be set in an amount or form that results in the pretrial detention of the defendant". The Committee rejected that proposal because an earlier version of the bill contained language similar to what was proposed and that provision was rejected by the Legislature in the final bill. See S. 946 (Third Reprint), 216th Leg. (N.J. 2014). ("The court may not impose a financial condition that results in the pretrial detention of the person"). Thus, the Legislature made a conscious decision not to include such a provision in the legislation, and the Court, given that fact, should not do so through its rule-making authority as a matter of comity.

However, the Committee is concerned that the statute does not contain any mechanism to enforce the proscription against imposing monetary bail for the purpose of preventing pretrial release. It was suggested that this omission could be addressed by clarifying that a New Jersey court is authorized to set money bail in an amount that does

not result in the preventive detention of the person. Through this clarification *The Bail Reform Law*'s proscription against the imposition of monetary bail for the purpose of preventing pretrial release would be implemented by eliminating the central fact from which the prohibitive purpose could be inferred. This central fact would be the defendant's continued detention.

The Committee recommends that the Legislature revisit the affordable bail issue.

C. Presumption of Detention Upon a Motion for Release Revocation

During the Committee's debate on R. 3:26-2 a minority of Committee members proposed that the rule contain a provision that would provide for a presumption of detention where a motion for release revocation was made by the prosecutor. The Committee rejected that proposal because a majority of the Committee did not believe that this should be accomplished via a rule amendment.

However, a majority of the Committee was of the opinion that there should be a rebuttable presumption contained in *The Bail Reform* Law that the defendant should be detained pretrial in certain limited circumstances such as: (1) where the defendant, while on pretrial release for any crime or offense listed in N.J.S.A. 2A 162-19a(1-6), committed any crime listed in N.J.S.A. 2C:43-7.2d or substantially equivalent crime or offense under federal law or the law of any other state; or (2) where the defendant, while on pretrial release for any crime listed in N.J.S.A. 2C:43-7.2d, committed any offense listed in N.J.S.A. 2A 162-19a(1-6) or a substantially equivalent crime or offense under federal law or the law of any other state.

The Committee recommends that the Legislature consider amending *The Bail Reform Law* to provide for a presumption of detention where a motion for release revocation was made by the prosecutor.

DISSENTS AND CONCURRING STATEMENTS

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MEMORANDUM

To: Judge Carroll

From: Joseph Krakora, Public Defender

Date: April 27, 2016

Re: Comments on Part 1 Proposed Rules

Thank you for permitting me to participate in the Criminal Practice Committee's work in proposing Court Rules consistent with the upcoming reform of our pretrial justice system. These comments reflect the views of the Office of the Public Defender and its three representatives on the committee. I will break our comments down by specific rule.

1. R. 3:3-1 The proposed Rule includes manslaughter in the group of offenses for which a warrant will be required pursuant to subsection (e). I propose that it be moved to the group for which a warrant is presumed but not required pursuant to subsection (f). This change is appropriate given that manslaughter is not an offense requiring purposeful or knowing conduct and that factual scenarios leading to a manslaughter charge vary greatly.
2. R. 3:4-2 First Appearance I dissent from the proposed Rule that would permit the Assignment Judge to assign either a Municipal Court or Superior Court Judge to conduct First Appearances. Our view is that only Superior Court Judges should be assigned to conduct them. Under our new risk based pretrial release system, judges conducting First Appearances will only be setting the date and time of the detention hearing in those cases in which the State moves for preventive detention. In the vast majority of cases, however, the judge will be required to determine the conditions of release. This will be a critical point in the process given the statute's requirement that the judge impose the least restrictive conditions. This requirement is consistent with research

that shows that the over imposition of conditions is actually counterproductive because it decreases the likelihood that a given defendant will succeed on pretrial release. For the same reasons municipal court judges tend to set higher bails in the current system, we are concerned that they will over impose conditions of release especially if they are not given the same level of training that Superior Court Judges undoubtedly will.

3. R. 3:4-2 First Appearance I want to comment on the proposed Rule governing discovery to be provided at the First Appearance in cases in which the State is seeking detention. This rule was subject to considerable debate including a referral to a subcommittee for detailed discussion of the issue. Over objections primarily by prosecutors, the Committee recommended the proposed rule that parallels the discovery obligation in R. 3:13-3(a) for preindictment plea offers. Prosecutors preferred a version that would have limited the State's discovery obligation to material upon which it intends to rely at the detention hearing. A majority of the Committee recognized that such an approach is fundamentally flawed. It would permit the State to withhold evidence that is arguably exculpatory or that the defense could use to demonstrate weaknesses in the case. Given that the statute requires the Court to consider the weight of the evidence in making the detention/release decision at the hearing, fairness dictates that defendants have access to the available discovery. During our discussion, I used the following example. Assume a case in which there are four eyewitnesses to a crime. Assume further that two identify the defendant in out of court ID procedures and two fail to do so. Under the rule supported by prosecutors and some judges, the State would not have to disclose the existence of the two witnesses who failed to identify the defendant because it would not be relying on them to obtain an obtain an order of detention. Needless to say, however, their existence goes to the weight of the evidence supporting the State's case. This is just one example of many cases in which pertinent evidence bearing on the weight of the evidence would not be available to defendants at detention hearings if the "rely upon" rule were to be adopted.
4. R. 3:26-1(a) I would like to express my support for the Committee's decision to remove the so-called Johnson factors from the Rule. This was an important step consistent with the statute's emphasis on non-monetary conditions of release. Perhaps more importantly, it sends a message that the old failed system of money bail is a thing of the past.
5. Non-Rule Recommendation on Bail Schedules and Affordable Bail I strongly support the recommendation to eliminate the bail schedules. I also support any recommendation that makes it clear that monetary bail should not be set for the purpose of detaining the defendant. Obviously, I wish the statute contained language prohibiting the setting of monetary bail that results in the detention of the defendant but it does not.
6. Non-Rule Recommendation on Presumption of Detention in Release Revocation Proceedings. This issue came up secondary to discussion of a propose rule creating presumptions of detention for numerous offenses not enumerated in the statute. Clearly, creation of such presumptions goes beyond appropriate rule making given the legislature's specific decision not to include such presumptions. The Committee properly voted down the proposed rules. Making a recommendation to the legislature to change the statute even before it goes into effect is inappropriate. The issue in a nutshell comes down to law enforcement's fear that the statute as enacted makes it too difficult to justify preventive detention.

JEK

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May 4, 2016

Hon. Harry G. Carroll, J.A.D.
Chair, Supreme Court Criminal Practice Committee
583 Newark Ave.
Jersey City, N.J. 07306-2395

Re: Dissent to Proposed Rule 3:4-2(c)(1)(b) Governing Discovery for Pretrial Detention Hearings.

Your Honor:

Please accept this letter as a dissent to the discovery rule for pretrial detention hearings that was proposed by the Office of the Public Defender and accepted by a bare majority[1] of the Criminal Practice Committee (CPC) on April 13. I submit this dissent on behalf of all of the Division of Criminal Justice and County Prosecutor representatives on the CPC.

The significance of the proposed new Rule 3:4-2(c)(1)(b)[2] cannot be overstated. Our objection is not just based on the administrative burdens that would be imposed on courts and prosecutors already confronting the exigencies of pretrial detention hearings. Cf. note 3. Even more importantly, the broad discovery required by this proposal would send the wrong message on how

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1 The Committee voted 13 to 11 to accept the Public Defender's proposal, with one member abstaining. The Honorable Martin Cronin, J.S.C., had prepared a counterproposal, but because he was not able to attend the April 13 meeting, he had no opportunity to speak as a neutral and detached member of the Judiciary against the Public Defender's proposal, or to speak on behalf of his own proposal.

2 The specific language of the new Rule 3:4-2(c)(1)(b) proposed by the CPC reads:

> (b) if the prosecutor is seeking pretrial detention, the prosecutor shall provide all relevant material in its possession that would be discoverable at the time of indictment as set forth in paragraph (a) of Rule 3:13-3.

It should be noted that paragraph (a) of Rule 3:13-3, in turn, generally provides that material that would be discoverable at the time of indictment must be provided before indictment at the time a pre-indictment plea offer is made.

pretrial detention hearings should be conducted. Were the New Jersey Supreme Court to accept the proposed rule amendment, it would signal to the bench and bar that a defendant may probe and contest the State's case-in-chief at a detention hearing as if it were a trial to decide guilt or innocence.

We urge the Supreme Court to reject that approach, and instead adopt the more carefully-focused discovery rule proposed by Judge Cronin. His proposal would require the State to turn over all statements or reports within the prosecutor's possession that relate to the facts upon which the prosecutor relies to justify pretrial detention. That approach, in contrast to the one narrowly adopted by the CPC, embraces the commonsense principle that the State's discovery obligations should reflect the limited purpose and scope of a detention hearing.

In many instances, the breadth and scope of discovery will be an academic question. In cases where an arrest is made during or shortly after commission of the alleged crime, for example, as a practical matter, few discoverable documents will be produced before the pretrial detention hearing, which is held just a few days after the arrest. In some cases, however, police and prosecutors will conduct an extensive investigation to solve the crime and identify a suspect. In that event, a sizable investigation file may be developed before the defendant is apprehended. In those cases the proposed rule would require the prosecutor to review and turn over voluminous documents[3] detailing the investigation, including reports that contain information that has no material bearing on whether defendant's release would pose a risk of flight, new criminal activity, or obstruction of justice.

The rule proposed by the closely-divided CPC provides that when the State moves for pretrial detention, it must turn over all material in the prosecutor's possession that would be disclosed under Rule 3:13-3(a) as if the prosecutor had tendered a pre-indictment plea offer. See note 2. The proposed rule, in other words, affords a defendant facing a pretrial detention hearing the same pre-indictment discovery rights as a defendant confronted with the decision whether to plead guilty pursuant to a negotiated agreement.

It makes no sense, however, to conflate a pretrial detention hearing with the decision to accept or reject a prosecutor's pre-indictment plea offer. Indeed, the proposed pretrial detention discovery rule misapprehends the fundamental purpose undergirding Rule 3:13-3(a). That rule requires broad pre-indictment discovery when a prosecutor tenders a plea offer because the defense must be apprised of the proofs the State could muster at trial to determine the likelihood that the prosecution would be able to prove its case beyond a reasonable doubt. Such broad discovery is

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The proposed amendment creating a new Rule 3:4-2(c)(1)(b) presumably incorporates the limited exceptions set forth in Rule 3:13-3(a)(1) and (2), which authorize the prosecutor to withhold otherwise discoverable material if the prosecutor determines that disclosing the material before indictment would hinder or jeopardize an investigation, or where the prosecutor determines that providing complete discovery before indictment would impose an unreasonable administrative burden. Those exceptions do not ameliorate our chief concern that adoption of a broad discovery rule indicates that the scope of a pretrial detention hearing is correspondingly broad.

needed at that juncture so that the defendant can make a knowing, intelligent, and voluntary decision whether to waive the right to put the prosecution to its proofs at trial.

A pretrial detention hearing, in contrast, involves no such waiver of the right to a jury trial, and so a defendant need not have the opportunity at this early juncture to review the entirety of the State's proofs. The reasons that impel the need for broad discovery under Rule 3:13-3(a), in other words, simply do not apply in the context of a pretrial detention hearing, where the issue is not whether the defendant is guilty, but rather whether and to what extent he or she is likely to flee, to pose a danger to a victim, witness, or anyone in the community, or obstruct justice if released.

For decades, initial bail and bail-reduction hearings have been conducted – and countless defendants have been detained on high bail pending trial – without providing such discovery. Indeed, no defendant to our knowledge has claimed a right to complete discovery to prepare for an initial bail or bail reduction hearing, even though current Rule 3:26-1(a)(1) makes clear that "the apparent likelihood of conviction" is one of the enumerated factors to be considered in setting bail. Nor did anyone suggest that the Court Rules be amended to afford such discovery when the discovery rules were examined comprehensively by a special Supreme Court committee in 2012-13.

To be clear, prosecutors do not dispute that under the new framework of the Bail Reform Law, available discovery must be provided to allow the defense to address the facts and arguments that the State will present at the pretrial detention hearing. Except in cases where the defendant is charged with murder or is facing an ordinary or extended term of life imprisonment, the State bears the burden to show by clear and convincing evidence that preventive detention is warranted by reason of the risks that would be posed by defendant's pretrial release. See N.J.S.A. 2A:162-19(b) and (e)(3). Although the defense is entitled to discovery with respect to such evidence, the critical point underlying this dissent is that the scope of the State's discovery obligations should conform to the purpose and scope of the pretrial detention hearing.

Under Judge Cronin's counterproposal, which prosecutors fully support, a defendant would be armed with all available material actually relevant to the arguments and facts that will be offered by the State at the pretrial detention hearing to meet its burden of proof. The Public Defender's proposal, on the other hand, turns the principle that the scope of discovery should be determined by the scope of the hearing on its head by affording defendant early discovery of materials that have nothing to do with the State's pretrial detention case.

Indeed, the arguments that were made at the recent CPC meeting were revealing, and confirm that some proponents of the broad discovery rule believe that a defendant should be permitted to use the opportunity of a pretrial detention hearing to probe for inconsistencies or weaknesses in the State's case-in-chief as if the detention hearing were both a Wade[4] hearing and a jury trial. We

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United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

expect that other defense lawyers will be trained to use detention hearings for strategic advantage by making them expansive to probe the merit's of the State's ultimate case, and not just the merits of the State's arguments for pretrial detention. Those lawyers no doubt will argue that the Supreme Court would not have promulgated a rule requiring prosecutors to provide complete discovery upon moving for pretrial detention if the defense was not entitled at the detention hearing to examine any information that was required by Court Rule to be disclosed before the hearing.

Although the Bail Reform Law explains that a court at the pretrial detention hearing may take into account the "weight of the evidence against the eligible defendant,"[5] see N.J.S.A. 2A:162-20(b), that provision should not be construed to mean that a defendant is entitled to rehearse a trial by exploring the State's proofs. Indeed, the statute makes clear that the State need only establish probable cause that the eligible defendant committed the predicate offense. N.J.S.A. 2A:162-19(e)(2). This confirms that the purpose of a pretrial detention hearing is not to establish defendant's guilt or innocence, but rather to determine by a clear-and-convincing-evidence standard whether no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

In meetings with criminal justice reform stakeholders, the Administrative Director of the Courts on several occasions has expressed the principled and pragmatic view that pretrial detention hearings should not become mini-trials. That position accords with well-accepted principles of federal law. Like New Jersey's Bail Reform Law, the federal Bail Reform Act permits a defendant to call and cross-examine witnesses, see 18 U.S.C. §3142(f), and expressly authorizes the court at the detention hearing to consider "the weight of the evidence against the person." See 18 U.S.C. §3142(g)(2). It nonetheless is well-settled under federal law that a pretrial detention hearing:

> is neither a discovery device for the defense nor a trial on the merits. The process that is due is only that which is required by and proportionate to the purpose of the proceeding. That purpose includes neither a reprise of all the evidence presented before the grand jury, United States v. Suppa, 799 F.2d 115, 119 (3d Cir. 1986), nor the right to confront non-testifying government witnesses, see, e.g., United States v. Accetturo, 783 F.2d 382, 388-89 (3d Cir. 1986), [United States v.] Winsor, 785 F.2d [755,] 756-57 [(9th Cir. 1986)]; United States v. Delker, 757 F.2d 1390, 1397-98 (3d Cir. 1985).

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5 The weight of the evidence might be relevant to a defendant's flight risk because it indicates the likelihood of a guilty verdict and thus relates directly to the defendant's incentive to flee to avoid a likely trial conviction. The weight of the evidence would be less relevant, if relevant at all, to whether defendant's release would pose a danger to the community, especially considering that the Bail Reform Law makes clear that all that is needed to detain a defendant is probable cause to believe that he or she committed the charged offense. See N.J.S.A. 162-19(e)(2).

United States v. Smith, 79 F.3d 1208, 1210-11 (D.C. Cir. 1996).

The point simply is that the New Jersey Legislature's recognition that the "weight of the evidence" against a defendant could be a relevant factor in the pretrial release/detention decision was not intended to provide a stalking horse by which a defendant might turn a focused pretrial detention hearing into an unwieldy pre-examination of the State's case-in-chief. We believe it is imperative that the Supreme Court take resolute steps, starting with this issue, to ensure not only that the practices and procedures for conducting pretrial detention hearings are uniform throughout the State, but also that those practices and procedures prevent these hearings from being used as a discovery device, an opportunity to rehearse trials, or to intimidate witnesses.

In sum, we urge the Supreme Court to reject the discovery rule recommended by the CPC and instead adopt the rule proposed by Judge Cronin, which would create a new paragraph (c)(1) (b) of Rule 3:4-2 that reads:

> (b) if the prosecutor is seeking pretrial detention or release revocation, the prosecutor shall provide the defendant with all statements or reports in its possession that relate to the facts upon which the prosecutor relies in these motions.

We believe that compared to the rule recommended by the CPC, this formulation is more appropriately tailored to the legitimate discovery needs of defendants facing pretrial detention hearings, and is more consonant with the purpose and appropriate scope of those hearings.

Respectfully submitted,

Robert Lougy
Acting Attorney General

c. Hon. Glenn A. Grant, J.A.D., Acting Administrative Director of the Courts
Hon. Martin Cronin, J.S.C.
Elie Honig, Director, Division of Criminal Justice
Rebecca Ricigliano, First Assistant Attorney General
All County Prosecutors
AAG Ron Susswein, Counsel to the Division of Criminal Justice

The following members have joined in the dissent filed by Assistant Attorney General Ronald Susswein on behalf of Acting Attorney General Robert Lougy:

Honorable Edward McBride, Jr., P.J. Cr.

Honorable Martin G. Cronin, J.S.C.

Honorable Samual D. Natal, J.S.C., Recall

Honorable Patricia M. Wild, J.S.C.

Ehsan F. Chowdhry, Assistant Prosecutor, Ocean County Prosecutor's Office

Paul H. Heinzel, Senor Litigation Counsel, Monmouth County Prosecutor's Office

Fredric M. Knapp, Morris County Prosecutor

Francis A. Koch, Sussex County Prosecutor

Grace H. Park, Union County Prosecutor

Ronald Susswein, Assistant Attorney General, Division of Criminal Justice

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