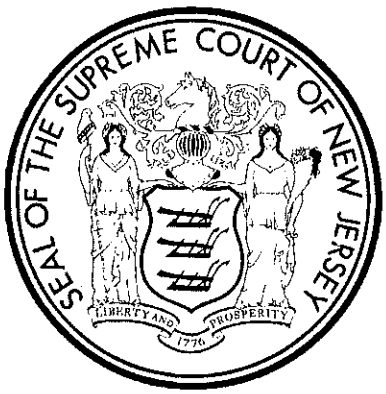
SUPREME COURT
FAMILY PRACTICE COMMITTEE
JUVENILE WAIVER REPORT



2015-2017
RULES CYCLE

May 26, 2016

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I. Introduction

The Supreme Court Family Practice Committee ("Committee") recommends that the Supreme Court adopt the proposed rule amendments and new rules contained in this report out of cycle. On August 10, 2015, Governor Christie signed into law juvenile justice reform legislation (S2003/A4299), which repealed the law that provides for the waiver of juveniles from family court to criminal court (N.J.S.A. 2A:4A-26) and enacted a new waiver law (N.J.S.A. 2A:4A-26.1). The enactment of N.J.S.A. 2A:4A-26.1 and the repeal of N.J.S.A. 2A:4A-26 took effect March 1, 2016. The Committee considered the current court rules pertaining to waiver and transfers of jurisdiction, and recommends amendments to address the new waiver standards, reverse waiver provisions and detention of waived juveniles while awaiting trial.

The Committee recommends citing to the relevant statutory sections of the new waiver law in the court rules as appropriate to streamline the rules. This format also would obviate changes to the court rules if the statute is amended in the future. The Committee also recommends that the court rules reference the waiver proceeding throughout the waiver rules as "waiver of jurisdiction and referral" to another court to be consistent with the statutory text.

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

II. Proposed Rule Amendments

A. Proposed Amendment to R. 5:21-3(b) -- Detention Hearings

Probable cause hearings

The Committee recommends amending R. 5:21-3(b), the detention hearing rule, the portion of which, references waiver. Rule 5:21-3 (b) requires the court to conduct a probable cause hearing within 2 court days after an initial hearing if the juvenile is detained. Although this rule pertains to the detention of a juvenile, the rule as currently drafted refers to waiver and the probable cause hearing held as part of a waiver procedure:

> . . . If the prosecutor has filed a motion seeking waiver of jurisdiction pursuant to Rule 5:22-2 or indicates an intention to file such a motion, or the court determines based upon the circumstances that such a motion is likely, the court shall permit the parties to present evidence regarding the issues of age of the juvenile and other standards for referral which may be addressed at the time of the probable cause hearing. . . .

The Committee recommends deleting the text in R. 5:21-3(b) that relates to waiver as it is more appropriately addressed in R. 5:22-1 to -4, the waiver rules. This change clarifies the requirement of two separate probable cause hearings, one under R. 5:21-3 for detention decisions, and another under R. 5:22-2 for waiver determinations.

5:21-3. Detention Hearings

(a) Initial Detention Hearing. . . . no change.

(b) Probable Cause Hearing. If the juvenile is detained following the initial detention hearing, the court shall conduct a probable cause hearing within two court days after the initial hearing. Where a second detention hearing is required by paragraph (a), it shall be held with the probable cause hearing. [If the prosecutor has filed a motion seeking waiver of jurisdiction pursuant to Rule 5:22-2 or indicates an intention to file such a motion, or the court determines based on the circumstances that such a motion is likely, the court shall permit the parties to present evidence regarding the issues of age of the juvenile and other standards for referral which may be addressed at the time of the probable cause hearing.] If the court determines that there is no probable cause to believe that the juvenile has committed the conduct alleged in the complaint, the juvenile shall be forthwith released. If probable cause is found, detention review hearings shall be conducted as provided in paragraph (c).

(c) Detention Review Hearing. . . . no change.

(d) Findings. . . . no change.

(e) Credit for Time Served. . . . no change.

Note: Source-R.R. (1969) 5:8-2(c) and (d); R. (1969) 5:8-6(d). Adopted December 20, 1983, to be effective December 31, 1983; paragraph (e) adopted November 1, 1985 to be effective January 2, 1986; paragraph (b) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a) and (e) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended _____ to be effective _____.

B. ***Rule 5:22-2 -- Waiver of Jurisdiction and Referral without the Juvenile's Consent***

The enactment of N.J.S.A. 2A:4A-26.1 has significantly amended the waiver process. First, the prosecutor is permitted to file, within 60 days (previously 30 days) after receipt of the complaint, a motion seeking waiver of jurisdiction from the Family Part to the Criminal Division. The time for filing may be extended for good cause shown. Second, a motion seeking waiver must be accompanied by a written statement of reasons setting forth the facts used in assessing all factors now contained in N.J.S.A. 2A:4A-26.1 et seq., and an explanation as to how those facts support waiver of the juvenile to adult criminal court.

Under the previous waiver law, waiver motions could be denied if the court found that the likelihood of rehabilitation substantially outweighed the reasons for waiver. Under the previous law, waiver motions, however, must be granted if the prosecutor established probable cause that the juvenile committed one of the enumerated offenses, and the juvenile was 16 years of age. These standards for waiver and transfer of jurisdiction have been completely revised. Under the newly enacted N.J.S.A. 2A:4A-26.1, a court may deny a motion to waive jurisdiction of a juvenile if the court is clearly convinced that the prosecutor abused his or her discretion in considering the 11 factors set forth in N.J.S.A. 2A:4A-26.1(c)(3). The new waiver law also includes the following changes:

a. Raises the minimum age of the juvenile for waiver from 14 years of age to 15;
b. Eliminates some lesser serious crimes from the waivable offenses list;
c. Expands the list of factors the court may consider in determining whether the prosecutor abused discretion in seeking waiver;
d. Creates a presumption that a juvenile waived to adult court and convicted of the offense shall serve any custodial sentence in a Juvenile Justice Commission facility until the age of 21;
e. Remands a case to the Family Part if the juvenile is convicted in adult court of a non-waivable offense, and deems the conviction for this non-waivable offense as an adjudication of delinquency.

The Committee recommends amending R. 5:22-2 to reflect the new standards for waiver. Specifically, the Committee recommends referencing the statute rather than enumerating the factors to be considered within the rule. The Committee also recommends moving paragraph (e) regarding the admissibility of the juvenile's testimony in the current court rule to paragraph (b) as it relates to the waiver hearing.

Rule 5:22-2. Waiver of Jurisdiction and Referral without the Juvenile's Consent

5:22-2. Waiver of Jurisdiction and Referral without the Juvenile's Consent

(a) Motion for Waiver of Jurisdiction and Referral. A motion seeking waiver of jurisdiction by the Family Part shall be filed by the prosecutor within [30] 60 days after the receipt of the complaint, which time may [shall not] be extended [except] for good cause shown. The motion shall be accompanied by a written statement of reasons clearly setting forth the facts used in assessing all factors contained in N.J.S.A. 2A:4A-26.1 et seq., together with an explanation as to how evaluation of those facts support waiver for each particular juvenile.

(b) [Probable Cause; Evidence] Waiver Hearing. At the waiver [referral] hearing, the court shall receive the evidence offered by the State and by the juvenile [, limited to the issue of probable cause]. No testimony of a juvenile at a hearing to determine referral by this rule shall be admissible for any purpose in any subsequent hearing to determine delinquency or guilt of any offense. The court also shall permit cross-examination of any witnesses. The State shall provide proof to satisfy the requirements of N.J.S.A. 2A:4A-26.1(c)(1) with respect to the age of the juvenile and N.J.S.A. 2A-26.1(c)(2) with respect to probable cause to believe that the juvenile committed one of the enumerated delinquent acts. The court also shall review whether the State considered the factors set forth in N.J.S.A. 2A:4A-26.1(c)(3). [The court also shall permit cross-examination of any witnesses.]

(c) Factors to be Considered. The court may deny a motion by the prosecutor to waive jurisdiction of a juvenile delinquency case if it is clearly convinced that the prosecutor abused his or her discretion in considering the factors set forth within N.J.S.A. 2A:4A-26.1(c)(3).

[(c)] (d) Standards for Referral. The court shall waive jurisdiction of a juvenile delinquency action without the juvenile's consent and shall refer the action to the appropriate

court and prosecuting authority having jurisdiction pursuant to N.J.S.A. 2A:4A-26.1(c). [under the following circumstances:]

[(1) Judicial Discretion for Juveniles Age 14 or Older and Charged with a Chart 2 Offense. The juvenile must have been 14 years of age or older at the time of the alleged delinquent act and there must be probable cause to believe that he or she committed a delinquent act which if committed by an adult would constitute:]

[(A) a crime committed at a time when the juvenile had previously been adjudicated delinquent, or convicted of:]

[1. criminal homicide, other than death by auto; or]

[2. strict liability for drug-induced deaths (N.J.S.A. 2C:35-9); or]

[3. first degree robbery; or]

[4. carjacking; or]

[5. aggravated sexual assault; or]

[6. sexual assault; or]

[7. second degree aggravated assault; or]

[8. kidnapping; or]

[9. aggravated arson; or]

[(B) a crime committed at a time when the juvenile had previously been sentenced to and confined in an adult penal institution; or]

[(C) an offense against a person committed in an aggressive, violent, and willful manner, other than a Chart 1 offense enumerated in N.J.S.A. 2A:4A-26a(2)(a); or the unlawful possession of a firearm, destructive device or other prohibited weapon; or arson; or death by auto if the juvenile was operating the vehicle under the influence of an intoxicating liquor, narcotic,

hallucinogenic, or habit-producing drug; or an attempt or conspiracy to commit any of these crimes; or]

[(D) a violation of N.J.S.A. 2C:35-3 (Leader of a Narcotics Trafficking Network), N.J.S.A. 2C:35-4 (Maintaining and Operating a CDS Production Facility), N.J.S.A. 2C:35-5 (Manufacturing, Distributing or Dispensing Narcotics), or an attempt or conspiracy to commit any of these crimes, other than where the violation, attempt or conspiracy involves the distribution for pecuniary gain of any controlled dangerous substance or controlled substance analog while on any school property or within 1000 feet of such school property; or]

[(E) a crime or crimes that are part of a continuing criminal activity in concert with two or more persons, when the circumstances show that the juvenile has knowingly devoted himself or herself to criminal activity as a source of livelihood; or]

[(F) theft of an automobile.]

[On a finding of probable cause for any of the offenses enumerated above, the burden is on the prosecution to show that the nature and circumstances of the charge or the juvenile's prior record are sufficiently serious that the interests of the public require waiver. Waiver shall not be granted, however, if the juvenile can show that the probability of his or her rehabilitation prior to reaching the age of 19 by use of the procedures, services, and facilities available to the court substantially outweighs the reasons for waiver.]

[(2) Judicial Discretion for Juveniles Age 14 or 15 and Charged with a Chart 1 Offense or with Certain Drug Offenses Committed Within a School Zone. The juvenile must have been 14 or 15 years old at the time of the alleged delinquent act and there must be probable cause to believe that he or she committed a delinquent act that if committed by an adult would constitute]

[(A) criminal homicide, other than death by auto; or strict liability for drug-induced deaths; or first degree robbery; or carjacking; or aggravated sexual assault; or sexual assault; or second degree aggravated assault; or kidnapping; or aggravated arson; or an attempt or conspiracy to commit any of these crimes; or]

[(B) possession of a firearm with a purpose to use it unlawfully against the person of another under subsection (a) of N.J.S.A. 2C:39-4, or possession of a firearm while committing or attempting to commit, including the immediate flight therefrom, aggravated assault, aggravated criminal sexual contact, burglary or escape; or]

[(C) a violation of N.J.S.A. 2C:35-3 (Leader of a Narcotics Trafficking Network), N.J.S.A. 2C:35-4 (Maintaining and Operating a CDS Production Facility), N.J.S.A. 2C:35-5 (Manufacturing, Distributing or Dispensing Narcotics), or an attempt or conspiracy to commit any of these crimes; and which violation, attempt or conspiracy involves the distribution for pecuniary gain of any controlled dangerous substance or controlled substance analog while on any school property or within 1000 feet of such school property; or]

[(D) computer activity that would be a crime of the first or second degree pursuant to section 4 or section 10 of P.L.1984, c.184 (N.J.S.A. 2C:20-25 or 2C:20-31).]

[On a finding of probable cause for any of these enumerated offenses, there is a rebuttable presumption that waiver will occur. The juvenile can rebut this presumption only by demonstrating that the probability of his or her rehabilitation prior to reaching the age of 19 by use of the procedures, services or facilities available to the court substantially outweighs the reasons for waiver.]

[(3) Prosecutorial Discretion for Juveniles Age 16 or Older and Charged with a Chart 1 Offense or Certain Other Enumerated Offenses. The juvenile must have been 16 years of age or

older at the time of the alleged delinquent act and there must be probable cause to believe that he or she committed a delinquent act that if committed by an adult would constitute]

[(A) criminal homicide, other than death by auto; or strict liability for drug-induced deaths; or first degree robbery; or carjacking; or aggravated sexual assault; or sexual assault; or second degree aggravated assault; or kidnapping; or aggravated arson; or]

[(B) possession of a firearm with a purpose to use it unlawfully against the person of another under subsection (a) of N.J.S.A. 2C:39-4, or possession of a firearm while committing or attempting to commit, including the immediate flight therefrom, aggravated assault, aggravated criminal sexual contact, burglary or escape; or]

[(C) a violation of N.J.S.A. 2C:35-3 (Leader of a Narcotics Trafficking Network), N.J.S.A. 2C:35-4 (Maintaining and Operating a CDS Production Facility), or N.J.S.A. 2C:39-4.1 (Weapons Possession While Committing Certain CDS Offenses); or]

[(D) computer activity that would be a crime of the first or second degree pursuant to section 4 or section 10 of P.L.1984, c.184 (N.J.S.A. 2C:20-25 or C.2C:20-31).]

[On a finding of probable cause for any of these enumerated offenses, no additional showing is required for waiver to occur. Jurisdiction of the case shall be transferred immediately.]

[(4) Judicial Discretion for Juveniles Age 16 or 17 and Charged with Certain Drug Offenses Committed Within a School Zone. The juvenile must have been 16 years of age or older at the time of the alleged delinquent act and there must be probable cause to believe that he or she committed a delinquent act that if committed by an adult would constitute]

[(A) a violation of N.J.S.A. 2C:35-5 (Manufacturing, Distributing or Dispensing Narcotics), or an attempt or conspiracy to commit this crime; and which violation, attempt or

conspiracy involves the distribution for pecuniary gain of any controlled dangerous substance or controlled substance analog while on school property or within 1000 feet of such school property.]

[On a finding of probable cause for any such offense, there is a rebuttable presumption that waiver will occur. The juvenile can rebut this presumption only by demonstrating that the probability of his or her rehabilitation prior to reaching the age of 19 by use of the procedures, services and facilities available to the court substantially outweighs the reasons for waiver.]

(e) [(d)] Order to Waive Jurisdiction and for Referral [of Reference]. An order waiving jurisdiction of the case and referring [a] the case to the appropriate court and prosecuting authority [and] shall [incorporate] specify therein [not only] the alleged act or acts upon which the referral is based, [but] and all other delinquent acts charged against the juvenile arising out of or related to the same transaction.

[(e) Admissibility of Testimony Given at Referral Hearing. No testimony of a juvenile at a hearing to determine referral by this rule shall be admissible for any purpose in any subsequent hearing to determine delinquency or guilt of any offense.]

Note: Source-R.R. (1969) 5:9-5(b), (c). Adopted December 20, 1983, to be effective December 31, 1983; paragraph (b)(2)(E) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (b)(2)(F) and (b)(4) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (b)(2)(D), (E) and (F) amended, paragraph (b)(2)(G) adopted June 28, 1996 to be effective September 1, 1996; paragraphs (b) and (b)(1) amended, former paragraphs (b)(2), (b)(3), and (b)(4) deleted, new paragraphs (b)(2), (b)(3), and (b)(4) added July 10, 2002 to be effective September 3, 2002; paragraphs (b)(2)(B) and (b)(2)(C) amended, new paragraph (b)(2)(D) adopted, paragraph (b)(3) caption amended, paragraphs (b)(3)(B) and (b)(3)(C) amended, new paragraph (b)(3)(D) adopted July 28, 2004 to be effective September 1, 2004; new paragraph (b) added, and former paragraphs (b), (c), (d) redesignated as paragraphs (c), (d), (e) June 15, 2007 to be effective September 1, 2007; rule caption amended, paragraph (a) caption and text amended, paragraph (b) caption and text amended, new paragraph (c) adopted, former paragraph (c) redesignated as paragraph (d) and text amended, former paragraph (d) redesignated as paragraph (e) and caption and text amended, former paragraph (e) deleted and included in paragraph (b) _____ to be effective _____.

C. *Proposed Amendment to R. 5:22-3 -- Detention Hearing After Referral*

Include presumption to detain juvenile in a juvenile facility after waiver is granted

The Committee recommends amending R. 5:22-3, which addresses detention after referral. The proposed amendment includes the new statutory text relating to the inclusion of a presumption in the law that, if a juvenile is detained after a court has granted waiver, there shall be a presumption that the juvenile shall be detained in a juvenile detention facility unless good cause is shown that it is necessary to detain the juvenile in a county jail or other correctional facility where adults are incarcerated. The proposed detention provision anticipates that the Criminal Division judge will conduct a subsequent public safety assessment hearing based on the recently enacted criminal justice reform law.

Rule 5:22-3. Detention Hearing After Referral

5:22-3. Detention Hearing After Referral

When a case is referred to another court as provided by R. 5:22-1 or R. 5:22-2, the court waiving jurisdiction shall, on hearing, determine pursuant to [the criteria set forth in] N.J.S.A. 2A:4A-36[(a)], whether detention is necessary [the juvenile, if in custody pending trial, shall be confined in an adult or juvenile detention facility]. If detention is deemed necessary, there shall be a presumption that the juvenile shall be detained in a county juvenile detention facility, unless good cause is shown that it is necessary to detain the juvenile in a county jail or other county correctional facility in which adults are incarcerated. In no case shall a juvenile be remanded to an adult detention facility prior to the hearing provided for herein.

Note: Source-R.R. (1969) 5:9-5(d). Adopted December 20, 1983, to be effective December 31, 1983; caption and text amended November 5, 1986 to be effective January 1, 1987; amended _____ to be effective _____.

D. Proposed Amendments to R. 5:22-4 -- Proceedings After Waiver

Amendment to address proceedings after waiver

Upon conviction of a waivable offense in adult court, the law now provides for a presumption that the juvenile shall serve any custodial sentence imposed in a State juvenile facility until the age of 21 except as provided in N.J.S.A. 2A:4A-26.1(f). Therefore, the Committee recommends the following amendment to R. 5:22-4 regarding proceedings after waiver.

Rule 5:22-4. Proceedings After Waiver [Transfer]

5:22-4. Proceedings After Waiver [Transfer]

(a) Whenever a juvenile [case] is referred to another court as provided by R. 5:22-1 or R. 5:22-2, the action shall proceed in the same manner as if it has been instituted in that court in the first instance[.], and shall be subject to the sentencing provisions available to that court.

(b) Upon conviction for any offense which is subject to waiver pursuant to N.J.S.A. 2A:4A-26.1(c)(2), there shall be a presumption that the juvenile shall serve any custodial sentence imposed in a State juvenile facility operated by the Juvenile Justice Commission until the juvenile reaches the age of 21, except as provided in N.J.S.A. 2A:4A-26.1(f).

Note: Source-R.R. (1969) 5:9-5(e). Adopted December 20, 1983, to be effective December 31, 1983; rule caption amended, rule text amended and designated as paragraph (a), and new paragraph (b) adopted _____ to be effective _____.

E. Proposed New Rule 5:22-5 -- Remand to Family Part

Remand of waived juvenile to the Family Part

The Committee recommends adopting a new court rule to set forth the procedure to remand a waived juvenile to the Family Part in accordance with the new statute. N.J.S.A. 2A:4A-26.1(f)(2) and -26.1(f)(3). Remand to the Family Part may occur with the consent of the defense and the prosecutor if it appears that the interest of the public and the best interests of the juvenile require it, and the interests of the public are no longer served by waiver. Remand to Family Part also shall occur if the waived juvenile is convicted of a non-waivable offense in adult court so that the family court may enter the disposition for the juvenile.

New Rule 5:22-5. Remand to Family Part

5:22-5. Remand to the Family Part [new]

(a) With the consent of the juvenile defendant and the prosecutor, at any point in the proceedings subsequent to the decision ordering waiver, the Criminal Division may remand to the Family Part if it appears that:

(1) the interests of the public and the best interests of the juvenile require access to programs or procedures uniquely available in the Family Part; and

(2) the interests of the public are no longer served by waiver.

(b) If a juvenile is not convicted of an offense set forth in N.J.S.A 2A:4A-26.1(c)(2), a conviction for any other offense shall be deemed a juvenile adjudication and be remanded to the Family Part for disposition, in accordance with the dispositional options available to the Family Part and all records related to the act of delinquency shall be subject to the provisions of section 1 of P.L. 1982, c.79 (C.2A:4A-60).

Note: Adopted _____ to be effective _____.

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Respectfully submitted,

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Dated: May 25, 2016