REPORT OF THE

SUPREME COURT COMMITTEE

ON

CRIMINAL PRACTICE

2015 – 2017 TERM

February 7, 2017

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I. Rule Amendments Recommended for Adoption

A. Proposed Amendments to Address Repeal of Death Penalty – Housekeeping

L. 2007, c. 204, effective December 17, 2007, repealed the death penalty and replaced it with a sentence of life imprisonment without eligibility for parole for certain murders. The Court Rules, however, still include provisions with death penalty terminology. Therefore, the Criminal Practice Committee recommends rule amendments in the following Part III Rules to remove those references. No other changes are proposed in these rules.

1. R. 3:7-2. Use of Indictment or Accusation.
2. R. 3:7-3. Nature and Contents of Indictment or Accusation; Timing of Supplemental Indictment.
3. R. 3:9-2. Pleas.
4. R. 3:13-4. Additional Discovery in Capital Cases.
5. R. 3:21-2. Presentence procedure.
6. R. 3:21-4A. Sentence, murder under N.J.S.A. 2C:11-3(a)(1) or N.J.S.A. 2C:11-3(a)(2).
7. R. 3:21-5. Judgment.
8. R. 3:22-12. Limitations.
9. R. 3:25-2. Order for trial.

The Committee has also asked the Civil Practice Committee to consider proposing similar amendments to remove the death penalty terminology in the Part I and Part II Court Rules.

The proposed amendments removing the death penalty terminology in the Part III rules follow.

1. R. 3:7-2. Use of Indictment or Accusation

The Committee recommends deleting the first sentence that "A crime punishable by death shall be prosecuted by indictment" and the word "other" in the next sentence. Crimes punishable by death were repealed by L. 2007, c. 204.

The proposed amendments to R. 3:7-2 follow.

3:7-2. Use of indictment or accusation

[A crime punishable by death shall be prosecuted by indictment.] Every [other] crime shall be prosecuted by indictment unless the defendant, after having been advised of the right to indictment, shall waive the right in a signed writing, in which case the defendant may be tried on accusation. Such accusation shall be prepared by the prosecuting attorney and entitled and proceeded upon in the Superior Court. Nothing herein contained, however, shall be construed as limiting the criminal jurisdiction of a municipal court over indictable offenses provided by law and these rules.

Note: Source-R.R. 3:4-2(a)(b). Amended August 28, 1979 to be effective September 1, 1979; amended July 13, 1994 to be effective September 1, 1994[.]; amended to be effective .

2. R. 3:7-3. Nature and Contents of Indictment or Accusation; Timing of Supplemental Indictment.

The Committee recommends the removal of paragraphs (c) and (d) of R. 3:7-3.

Paragraph (c) addresses the specification of aggravating factors that the State intends to prove at the penalty phase in indictments or supplemental indictments for a crime punishable by death. This paragraph is now obsolete with the repeal of the death penalty.

Paragraph (d) addresses the timing of supplemental indictments specifying aggravating factors set forth in N.J.S.A. 2C:11-3c (repealed by L. 2007, c. 204).

The proposed amendments to R. 3:7-3 follow.

3:7-3. Nature and Contents of Indictment or Accusation; Timing of Supplemental Indictment.

(a) … No change

(b) … No change

[(c) Specification of Aggravating Factors. In addition to the requirements in paragraph (b) of this rule, every indictment or supplemental indictment for a crime punishable by death shall specify any aggravating factors as set forth in N.J.S.A. 2C:11-3(c)(4) that the State intends to prove at the penalty phase.]

[(d) Timing of Supplemental Indictments. Any supplemental indictment specifying aggravating factors set forth in N.J.S.A. 2C:11-3(c)(4) shall be returned no later than 90 days after the return or unsealing of the original indictment, which period shall be enlarged only for good cause shown.]

Note: Source-R.R. 3:4-3(a)(b)(c), 3:4-4. Paragraphs (a) and (b) amended August 28, 1979 to be effective September 1, 1979; paragraph (b) amended September 28, 1982 to be effective immediately; paragraph (b) amended July 13, 1993 to be effective immediately; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; caption amended and new paragraphs (c) and (d) adopted March 14, 2005 to be effective immediately; paragraph (b) text and caption amended June 15, 2007 to be effective September 1, 2007[.]; paragraphs (c) and (d) deleted to be effective .

3. R. 3:9-2. Pleas.

R. 3:9-2 governs the court's acceptance of a defendant's guilty plea. The Committee recommends the deletion of the sentence providing for an exception to the requirement that there be a factual basis before entry of a guilty plea for a defendant charged with a crime punishable by death (repealed by L. 2007, c. 204).

The proposed amendment to R. 3:9-2 follows.

3:9-2. Pleas

A defendant may plead only guilty or not guilty to an offense. The court, in its discretion, may refuse to accept a plea of guilty and shall not accept such plea without first questioning the defendant personally, under oath or by affirmation, and determining by inquiry of the defendant and others, in the court's discretion, that there is a factual basis for the plea and that the plea is made voluntarily, not as a result of any threats or of any promises or inducements not disclosed on the record, and with an understanding of the nature of the charge and the consequences of the plea. In addition to its inquiry of the defendant, the court may accept a written stipulation of facts, opinion, or state of mind that the defendant admits to be true, provided the stipulation is signed by the defendant, defense counsel, and the prosecutor. [When the defendant is charged with a crime punishable by death, no factual basis shall be required from the defendant before entry of a plea of guilty to a capital offense or to a lesser included offense, provided the court is satisfied from the proofs presented that there is a factual basis for the plea.] For good cause shown the court may, in accepting a plea of guilty, order that such plea not be evidential in any civil proceeding. If a plea of guilty is refused, no admission made by the defendant shall be admissible in evidence against the defendant at trial. If a defendant refuses to plead or stands mute, or if the court refuses to accept a plea of guilty, a plea of not guilty shall be entered. Before accepting a plea of guilty, the court shall require the defendant to complete, insofar as applicable, and sign the appropriate form prescribed by the Administrative Director of the Courts, which shall then be filed with the criminal division manager's office.

Note: Amended July 14, 1972 to be effective September 5, 1972. Amended July 17, 1975 to be effective September 8, 1975; amended September 28, 1982 to be effective immediately; amended July 13, 1994 to be effective January 1, 1995; amended July 28, 2004 to be effective September 1, 2004[.]; amended to be effective .

4. R. 3:13-4. Additional Discovery in Capital Cases

The Committee recommends the deletion of R. 3:13-4 in its entirety. With the repeal of the death penalty, the need for a rule on additional discovery in capital cases is obsolete.

The proposed deletion of R. 3:13-4 follows.

[3:13-4. Additional Discovery in Capital Cases

(a) In addition to any discovery provided pursuant to R. 3:13-3, the prosecuting attorney shall provide the defendant with the indictment containing the aggravating factors that the State intends to prove at the penalty phase together with all discovery bearing on these factors. The prosecuting attorney shall provide the defendant with any discovery in the possession of the prosecution that is relevant to the existence of any mitigating factors. Such discovery shall be transmitted at the arraignment/status conference unless the time to do so is enlarged for good cause. If the aggravating factors are not contained in the original indictment, but are contained in a supplemental indictment, the prosecuting attorney shall provide the defendant with any discovery bearing on these factors immediately upon return of the supplemental indictment, unless the time to do so is enlarged for good cause shown.

(b) The defendant shall provide the prosecuting attorney with an itemization setting forth the mitigating factors the defendant intends to rely on at the sentencing hearing together with any discovery in the possession of the defendant in support of those factors. Such discovery shall be transmitted to the prosecuting attorney forthwith upon a verdict of guilty, or plea of guilty, to a crime punishable by death.

(c) The duty to disclose the discovery relevant to the existence of aggravating and mitigating factors shall be a continuing one.]

Note: Adopted September 28, 1982 to be effective immediately; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 13, 1994 and December 9, 1994, to be effective January 1, 1995; paragraph (a) amended March 14, 2005 to be effective immediately[.]; rule deleted to be effective .

5. R. 3:21-2. Presentence procedure

R. 3:21-2 addresses the requirements for presentence procedures. Paragraph (a) requires that a presentence investigation and report are provided to the court.

The Committee is proposing the deletion of the last sentence in paragraph (a) containing an exception to preparing a presentence investigation report for death penalty counts (repealed by L. 2007, c. 204).

The proposed amendment to R. 3:21-2 follows.

3:21-2. Presentence procedure

(a) Investigation. Before the imposition of a sentence or the granting of probation court support staff shall make a presentence investigation in accordance with N.J.S.A. 2C:44-6 and report to the court. The report shall contain all presentence material having any bearing whatever on the sentence and shall be furnished to the defendant and the prosecutor. [On counts on which the death penalty is to be imposed, a presentence report shall not be prepared.]

(b) … No change

(c) … No change

Note: Source-R.R. 3:7-10(b). Amended July 7, 1971 to be effective September 13, 1971; amended June 29, 1973 to be effective September 10, 1973; amended August 27, 1974 to be effective September 9, 1974; amended July 29, 1977 to be effective September 6, 1977; amended July 16, 1979 to be effective September 10, 1979; paragraph designations and new paragraph (b) adopted and paragraph (c) amended August 28, 1979, to be effective September 1, 1979; paragraph (a) amended September 28, 1982, to be effective immediately; paragraphs (a) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a) and (b) amended July 13, 1994 to be effective January 1, 1995; paragraph (a) amended July 28, 2004 to be effective September 1, 2004[.]; paragraph (a) amended to be effective .

6. R. 3:21-4A. Sentence, murder under N.J.S.A. 2C:11-3(a)(1) or N.J.S.A. 2C:11-3(a)(2)

The Committee is recommending the deletion of R. 3:21-4A in its entirety. This rule implemented the requirement that in capital cases the issues of guilt and penalty be tried separately, which was required by N.J.S.A. 2C:11-3(c) (repealed by L. 2007, c. 204).

This rule was rendered obsolete with the repeal of the death penalty.

The proposed deletion of R. 3:21-4A follows.

[3:21-4A. Sentence, murder under N.J.S.A. 2C:11-3(a)(1) or N.J.S.A. 2C:11-3(a)(2)

Where the defendant has been convicted of, or has entered a plea of guilty to, N.J.S.A. 2C:11-3(a)(1) or N.J.S.A. 2C:11-3(a)(2) and where the provisions of N.J.S.A. 2C:11-3(c) apply, a separate sentencing hearing shall be conducted pursuant to N.J.S.A. 2C:11-3(c) immediately thereafter, except for good cause shown. At the sentencing hearing the jury, or the court if there is no jury, shall complete a special verdict form.]

Note: Adopted September 28, 1982 to be effective immediately[.]; rule deleted to be effective _____.

7. R. 3:21-5. Judgment

The Committee is recommending amending R. 3:21-5 to remove paragraph (a). Paragraph (a) addresses judgments of conviction for capital cases, which is now obsolete with the repeal of the death penalty.

With the deletion of paragraph (a), the Committee is also recommending removing the designation of paragraph (b) and the caption.

The proposed amendments to R. 3:21-5 follow.

3:21-5. Judgment

[(a) Capital Convictions. On the imposition of a sentence of death, the court shall immediately enter the judgment of conviction and the Criminal Division Manager shall transmit it within two days to the Clerk of the Supreme Court, all parties, and their counsel. If a defendant sentenced to death is later sentenced for non-capital offenses, the court shall prepare an amended judgment containing all convictions. A copy of such amended judgment shall be provided to the Clerk of the Supreme Court.]

[(b) Non-Capital Convictions.] The judgment shall be signed by the judge and entered by the clerk. A judgment of conviction shall set forth the plea, the verdict or findings, the adjudication and sentence, a statement of the reasons for such sentence, and a statement of credits received pursuant to R. 3:21-8. If the defendant is found not guilty or for any other reason is entitled to be discharged judgment shall be entered accordingly. The Criminal Division Manager shall forward a copy of the judgment forthwith to all parties and their counsel.

Note: Source-R.R. 3:7-10(e); amended August 27, 1974 to be effective September 9, 1974; amended July 29, 1977 to be effective September 6, 1977; amended November 1, 1985 effective January 2, 1986; new paragraph (a) added, and former text amended, caption added, and designated as paragraph (b) July 12, 2002 to be effective September 3, 2002[.]; paragraph (a) deleted, and caption and designation as paragraph (b) removed to be effective .

8. R. 3:22-12. Limitations

Paragraph (b) of R. 3:22-12 addresses the time limitations for the filing of post-conviction relief petitions in death penalty cases. This paragraph is now obsolete by the repeal of the death penalty.

The Committee recommends the deletion of paragraph (b) and redesignating paragraph (c) as paragraph (b).

The proposed amendments to R. 3:22-12 follow.

3:22-12. Limitations

(a) … No change

[(b) Capital Causes; Petition. In cases in which the death penalty has been imposed, defendant's petition for post-conviction relief must be filed within thirty days of the denial of certiorari or other final action by the United States Supreme Court in respect of defendant's direct appeal.]

[(c)] (b) These time limitations shall not be relaxed, except as provided herein.

Note: Source-R.R. 3:10A-13. Caption added and text designated as paragraph (a), and new paragraph (b) added July 12, 2002 to be effective September 3, 2002; paragraph (a) amended and new paragraph (c) adopted July 16, 2009 to be effective September 1, 2009; former paragraph (a) amended and allocated into subparagraphs (a)(1), (a)(3), and (a)(4), captions adopted for subparagraphs (a)(1), (a)(3), and (a)(4), and new subparagraph (a)(2) caption and text adopted January 14, 2010 to be effective February 1, 2010[.]; paragraph (b) deleted and paragraph (c) redesignated paragraph (b) to be effective .

9. R. 3:25-2. Order for trial

R. 3:25-2 provides that a defendant awaiting trial who is in custody for at least 90 days after the return of the indictment may move for a trial date.

The Committee recommends deletion of the exception for defendants in custody awaiting trial for capital offenses in the first sentence. This provision was made obsolete by the repeal of the death penalty.

The proposed amendment to R. 3:25-2 follows.

3:25-2. Order for trial

A defendant who has remained in custody awaiting trial on an indictment [, other than for a capital offense,] for at least 90 consecutive days after the return of that indictment may move for a trial date. The motion shall be on notice to the prosecutor and shall be accompanied by a certification that the defense is ready to proceed to trial. The court shall, after affording the prosecutor an opportunity to be heard, fix a date for trial. In the event the prosecutor is unable to proceed on the trial date, the court shall take such action and enter such orders as the interest of justice requires, which may include pretrial release.

Note: Source-R.R. 3:11-3(b); amended July 17, 1975 to be effective September 8, 1975; former Rule redesignated paragraph (a) and paragraph (b) adopted November 2, 1987 to be effective January 1, 1988; paragraph (a) deleted, paragraph (b) amended and paragraph designation removed July 13, 1994 to be effective January 1, 1995[.]; amended to be effective .

B. R. 3:22-12 – Post-Conviction Relief Petitions: General Time Limitations

The Committee reviewed R. 3:22-12 because of the annotation on the limitations for filing first post-conviction relief (PCR) petitions in State v. Brewster, 429 N.J. Super. 387, 399, n. 4 (App. Div. 2013). Specifically, the Appellate panel pointed out what appears to be an unintended anomaly in that paragraph (a)(2) of R. 3:22-12 specifically carves out a one-year time limit exception for a "second or subsequent petition" when a new constitutional rule is announced or the factual predicate for the defendant's petition could not have been discovered earlier. Whereas, paragraph (a)(1) provides for a five-year limitation for the filing of a post-conviction relief petition only if the defendant alleges facts to show that the delay of filing was due to excusable neglect and that there is a reasonable probability that the enforcement of the time limit would result in a fundamental injustice. As a result, the Brewster court stated that the rule "would be anomalous if it deemed timely a second or third PCR petition based on a new constitutional right or a factual predicate newly discovered but did not afford the same time period for a first PCR petition raising the same ground for relief." Ibid.

Members agreed with the Brewster court that clarification was needed with regards to first petitions that fall within the circumstances in paragraph (a)(2). In particular, paragraph (a)(2) provides:

> Second or Subsequent Petition for Post-Conviction Relief. Notwithstanding any other provision in this rule, no second or subsequent petition shall be filed more than one year after the latest of:
>
> (A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court

> of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or
>
> (B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence.

During the discussion, a member presented the following example to illustrate how the rule is intended to function as compared to how it could be interpreted:

> Defendant is convicted of a third degree regulatory offense after a plea bargain with the State and an appropriate sentence. The defendant does not file a petition for post-conviction relief. Ten years later the New Jersey Supreme Court rules the law involved in that same defendant's case is unconstitutional. According to the true meaning of R. 3:22-12, this defendant would have one year from the decision in the Supreme Court case to file his first post-conviction relief petition.

That member said that if the anomaly recognized in Brewster prevailed, the current language could prohibit, or could arguably prohibit this defendant from filing the petition because this is not a second or subsequent petition. Additionally, since five years had elapsed from the date of the sentence, he or she would be foreclosed from a remedy. Other members acknowledged that this unintended consequence could be interpreted as providing an incentive to file a first PCR petition even if it is groundless, to preserve the protections for subsequent PCR petitions.

After an extensive discussion, the Committee decided to break down paragraph (a)(1) into subparagraphs (a)(1)(A) and (a)(1)(B) to clarify the circumstances when first petitions can be filed more than five years after the entry of the judgment of conviction.

Specifically, subparagraph (a)(1)(A) contains the current exception to the five-year filing deadline for first petitions that allege excusable neglect.

Subparagraph (a)(2)(B) clarifies that a first PCR petition can be filed after the five-year deadline when it alleges a claim for relief that falls within the circumstances in paragraph (a)(2)(A) or (a)(2)(B) and is filed within the one-year period set forth in paragraph (a)(2).

Consistent with the Committee's recommendation to delete death penalty terminology in the first section of this Report, paragraph (b) is proposed for deletion since it addresses the time limitations for filing PCR petitions where the death penalty has been imposed.

In light of the proposed recommendation to delete paragraph (b), former paragraph (c) has been redesignated paragraph (b).

The proposed amendments to R. 3:22-12 follow.

3:22-12. Limitations

(a) General Time Limitations.

(1) First Petition For Post-Conviction Relief. Except as provided in paragraphs (a)(2), (a)(3), and (a)(4) of this rule, no petition shall be filed pursuant to this rule more than 5 years after the date of entry pursuant to Rule 3:21-5 of the judgment of conviction that is being challenged unless:

(A) it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect and that there is a reasonable probability that if the defendant's factual assertions were found to be true enforcement of the time bar would result in a fundamental injustice[.]; or

(B) it alleges a claim for relief as set forth in paragraph (a)(2)(A) or paragraph (a)(2)(B) of this rule and is filed within the one-year period set forth in paragraph (a)(2) of this rule.

(2) … No change

(3) … No change

(4) … No change

[(b) Capital Causes; Petition. In cases in which the death penalty has been imposed, defendant's petition for post-conviction relief must be filed within thirty days of the denial of certiorari or other final action by the United States Supreme Court in respect of defendant's direct appeal.]

(b) [(c)] These time limitations shall not be relaxed, except as provided herein.

Note: Source_R.R. 3:10A-13. Caption added and text designated as paragraph (a), and new paragraph (b) added July 12, 2002 to be effective September 3, 2002; paragraph (a) amended and new paragraph (c) adopted July 16, 2009 to be effective September 1, 2009; former paragraph (a) amended and allocated into subparagraphs (a)(1), (a)(3), and (a)(4), captions adopted for subparagraphs (a)(1), (a)(3), and (a)(4), and new subparagraph (a)(2) caption and text adopted January 14, 2010 to be effective February 1, 2010[.]; paragraph (a)(1) amended and allocated into subparagraphs (1)(A) and (1)(B) adopted, paragraph (b) deleted and paragraph (c) redesignated paragraph (b) _____ to be effective _____.

II. Matters Previously Sent to the Supreme Court and Referred Back

A. Revisions to the Pretrial Intervention (PTI) Program Due to Statutory Amendments

During the 2013-2015 term, the Criminal Practice Committee proposed new Rules 3:28-1 through -10 to govern the Pretrial Intervention (PTI) Program. That proposal incorporated current R. 3:28 and relevant provisions of the Guidelines for Operation of Pretrial Intervention in New Jersey (hereinafter "Guidelines") in those rules. The proposal, thus, recommended deletion of the current PTI Guidelines. See *Report of the Supreme Court Committee on Criminal Practice 2013-2015*, 219 N.J.L.J. 498 (2015)[1].

The Supreme Court subject to the Judicial Conference process approved those proposed ten rules on PTI in 2015. However, subsequent to the Court's referral of those rules for consideration at the September 2, 2015 Judicial Conference, statutory changes to N.J.S.A. 2C:43-12 were enacted by L. 2015, c. 98 on August 10, 2015. Due to those statutory amendments, the proposed rules were withdrawn from consideration at the Judicial Conference. See *Notice to the Bar*, 221 N.J.L.J. 585, 687 (2015).

The Supreme Court then requested that the Committee conduct a limited review of the proposed rule amendments to address any conflicts between the statutory amendments and the rules previously approved by the Court. The Court also directed the Committee not to review the rules that not affected by that enactment.

A PTI subcommittee of the Criminal Practice Committee was then formed to consider the statutory changes and propose conforming rule amendments for the Committee's consideration.

[1] http://www.judiciary.state.nj.us/reports2015/criminal.pdf.

At the outset, the PTI subcommittee was cognizant that even if the Court approved the proposed revisions in the summer of 2017, those rules would still be subject to consideration at the September 2017 Judicial Conference in accordance with N.J.S.A. 2C:43-15 to -20. Those rules would then not become effective until July 1, 2018, provided no legislative action to cancel or change the rules occurred in the interim. See N.J.S.A. 2C:43-17 to -18.

Whereas, the subcommittee believed that the Court as part of its rule-making authority under N.J. Const. (1947) Art. VI, § II, ¶ 3, could adopt proposed revisions that simply incorporated the statutory changes in the current PTI provisions in the Court Rules. Those changes would not require presentation at the Judicial Conference. Additionally, because the statutory amendments were effective August 10, 2015, the subcommittee thought it was equally important to incorporate the changes in the current PTI provisions.

As a result, the subcommittee presented two separate proposals for the Committee to consider: (1) The first proposal incorporates the statutory changes in PTI Guidelines 3 and 4; and (2) The second proposal incorporates the statutory changes in proposed R. 3:28-1 through R. 3:28-5.

The Committee agreed with the subcommittee's recommendation to incorporate the statutory amendments in two separate proposals for the Court to consider. Pursuant to the Supreme Court's request, the Committee did not make changes in R. 3:28-6 through R. 3:28-10, since the statutory amendments did not affect those rules.

The proposed recommendations for each proposal follow.

1. Proposal 1 - Amendments to the Current PTI Guidelines

The first proposal recommends revisions to current Guideline 3 and Guideline 4. There are no changes recommended for current R. 3:28 or in any of the other PTI Guidelines.

a. Proposed Revisions to Guideline 3

Current Guideline 3 addresses the criteria for evaluating a defendant's application for admission into PTI. In addition to setting forth the statutory criteria under N.J.S.A. 2C:43-12(e), Guideline 3 provides for consideration of additional factors.

Current Guideline 3(i) entitled "Assessment of the Nature of the Offense" already includes presumptions against admission for defendants charged with certain crimes. Therefore, the Committee decided that paragraph (i) should also include the statutory presumptions against admission added in N.J.S.A. 2C:43-12b(2).

Proposed Guideline 3(i) has been reorganized into the following four new subparagraphs.

Subparagraph (1) entitled "Organized Criminal Activity or Continuing Criminal Business" retains the current language in Guideline 3(i) for crimes that should generally be rejected from admission into PTI. However, current provision (3) addressing crimes "deliberately committed with violence or the threat of violence against another person" has been moved to subparagraph (2) for consistency with the reconfiguration of N.J.S.A. 2C:43-12b, which now includes the presumptions against admission in subsections (2)(a) and (2)(b). Because of that change, current provision (4) in Guideline 3(i) for crimes

involving a "breach of public trust" has been redesignated (c), and current provisions (1) and (2) have been redesignated (a) and (b).

Subparagraph (2)(a) entitled "Presumptions Against Admission" contains the presumption against admission for defendants who are public officials charged with an offense that involved or touched their public office or public employment enacted by L. 2007, c. 49. See N.J.S.A. 2C:43-12b(2)(a).

Subparagraph (2)(b) includes the presumptions against admission for defendants charged with a crime or offense involving domestic violence if the crime was committed when the defendant was subject to a temporary or permanent restraining order or defendants charged with crimes that involved violence or a threat of violence pursuant to N.J.S.A. 2C:43-12b(2)(b). The statutory definition for when a crime or offense involves violence or the threat of violence has also been included in this subparagraph.

Subparagraph (3) has been designated "Joint Applications." The current language in Guideline 3(i) has been retained for submission of a joint application for defendants who are not drug dependent and are charged with a first or second degree offense or charged with dispensing Schedule I or II narcotic drugs.

Subparagraph (4) has been designated "Submission of Compelling Reasons with the Application" and retains the current language in Guideline 3(i) that applications that fall under this paragraph shall have an opportunity to submit compelling reasons justifying admission into PTI.

Proposed new paragraph (l) in Guideline 3 was added to incorporate the requirement under N.J.S.A. 2C:43-12e that the court and prosecutor give due consideration to the

victim's position, if any, on whether the defendant should be admitted into PTI. The Committee decided to include this provision as a separate paragraph that can be easily referenced in recommendations or denials of admission into PTI.

The Committee is also recommending revisions to the Official Comment to Guideline 3 to reference the changes proposed in paragraphs (i) and (l).

The proposed amendments to Guideline 3 follow.

GUIDELINES FOR OPERATION OF PRETRIAL INTERVENTION IN NEW JERSEY

As Amended Effective September 1, 1996.

SUPREME COURT OF NEW JERSEY

ORDERED that the attached revised guidelines governing pretrial intervention programs are approved for implementation as applicable in counties where such programs have been authorized by the Supreme Court pursuant to R. 3:28; and FURTHER ORDERED that the guidelines approved by the order of January 10, 1979 are hereby superseded.

For the Court,
Robert N. Wilentz C.J.
Dated: July 13, 1994

Guideline 1

… No change

Guideline 2

… No change

Guideline 3

In evaluating a defendant's application for participation in a pretrial intervention program, consideration shall be given to the criteria set forth in N.J.S.A. 2C:43-12(e). In addition, thereto, the following factors shall also be considered together with other relevant circumstances:

(a) … No change

(b) ... No change

(c) … No change

(d) ... No change

(e) … No change

(f) … No change

(g) … No change

(h) … No change

(i) Assessment of the Nature of the Offense: Any defendant charged with a crime is eligible for enrollment in a PTI program, but the nature of the offense is a factor to be considered in reviewing the application.

(1) Organized Criminal Activity or Continuing Criminal Business. If the crime was: [(1)] (a) part of organized criminal activity; or [(2)] (b) part of a continuing criminal business or enterprise; or [(3) deliberately committed with violence or threat of violence against another person; or (4)] (c) a breach of the public trust where admission to a PTI program would deprecate the seriousness of defendant's crime, the defendant's application should generally be rejected. [;]

(2) Presumption Against Admission. There shall be a presumption against admission for a defendant: (a) who was a public officer or employee whose offense involved or touched upon his public office or employment; and (b) charged with any crime or offense involving domestic violence, as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19) if the defendant committed the crime or offense while subject to a temporary or permanent restraining order issued pursuant to the provisions of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et al.) or if the crime or offense charged involved violence or the threat of violence, which means if the victim sustained serious or significant bodily injury as defined in subsection b. or d. of N.J.S.2C:11-1, or the actor is armed with and used a deadly weapon or threatened by word or gesture to use a deadly weapon as defined in subsection c. of N.J.S.2C:11-1, or threatened to inflict serious or significant bodily injury.

(3) Joint Application: A defendant charged with a first or second degree offense or sale or dispensing of Schedule I or II narcotic drugs as defined in L.1970, c. 226 (N.J.S.A. 24:21-1

et seq.) by persons not drug dependent, should ordinarily not be considered for enrollment in a PTI program except on joint application by the defendant and the prosecutor.

(4) Submission of Compelling Reasons with the Application: [However, in such] For cases that fall under Guideline 3(i), the applicant shall have the opportunity to present to the criminal division manager, and through the criminal division manager to the prosecutor, any facts or materials demonstrating the applicant's amenability to the rehabilitative process, showing compelling reasons justifying the applicant's admission and establishing that a decision against enrollment would be arbitrary and unreasonable.

(j) … No change

(k) ... No change

(l) The prosecutor and the court, in formulating their recommendations or decisions regarding an applicant's participation in a supervisory treatment program, shall give due consideration to the victim's position if any, on whether the defendant should be admitted.

Official Comment

Guideline 3, in its introductory statement, requires that the statutory criteria of N.J.S.A. 2C:43-12(e) be considered in the evaluation of a defendant's application for pretrial intervention. That statutory provision requires consideration of those criteria "among others." Accordingly, the original criteria of this guideline have also been retained as explanatory of and supplemental to the statutory criteria. For convenience in reference, the statutory criteria are as follows:

(1) The nature of the offense;

(2) The facts of the case;

(3) The motivation and age of the defendant;

(4) The desire of the complainant or victim to forego prosecution;

(5) The existence of personal problems and character traits which may be related to the applicant's crime and for which services are unavailable within the criminal justice system, or which may be provided more effectively through supervisory treatment and the probability that the causes of criminal behavior can be controlled by proper treatment;

(6) The likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his participation in supervisory treatment;

(7) The needs and interests of the victim and society;

(8) The extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior;

(9) The applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others;

(10) Whether or not the crime is of an assaultive or violent nature, whether in the criminal act itself or in the possible injurious consequences of such behavior;

(11) Consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act;

(12) The history of the use of physical violence toward others;

(13) Any involvement of the applicant with organized crime;

(14) Whether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution;

(15) Whether or not the applicant's involvement with other people in the crime charged or in other crime is such that the interest of the State would be best served by processing his case through traditional criminal justice system procedures;

(16) Whether or not applicant's participation in pretrial intervention will adversely affect the prosecution of co-defendants; and

(17) Whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program.

Guideline 3(a) indicates that the services of PTI programs may, in appropriate instances and at the request of juvenile authorities and programs, be made available to juvenile defendants when the need for inter-program cooperative work is indicated.

Under Guideline 3(b), residents of other States, charged with offenses in New Jersey counties in which there exist pretrial intervention programs may, with the approval of the prosecuting attorney, the designated judge, and Administrative Office of the Courts, be permitted to participate in such out-of-state program while enrolled pursuant to R. 3:28.

Regardless of the New Jersey jurisdiction in which the complaint, indictment or accusation has been filed, defendants or participants may, with the agreement of the PTI coordinators involved, be transferred for participation among the various county or vicinage programs.

Guideline 3(c) establishes jurisdictional requirements. However, defendants charged in other States or in the Federal Courts, may in appropriate instances and with the permission of the Administrative Office of the Court, be permitted to participate in the counseling or supervision regimes of the county or vicinage PTI programs on request of the Federal Authorities or a PTI program in another State.

Guideline 3(d) sets forth the policy that those charged with minor violations should not be admitted to a PTI program. It is felt that while no per se exclusion of non-indictable offenses is appropriate, the PTI process is not appropriate for such cases which do not involve a potential sentence of consequence. Rodriguez v. Rosenblatt, 58 N.J. 281, 277 A.2d 216 (1971).[2]

[2] Of course, all defendants with an indictable offense are eligible for PTI.

Guideline 3(e) makes it clear that a prior criminal record may be indicative of a behavioral pattern not conducive to short term rehabilitation. Therefore, pretrial intervention should ordinarily be limited to persons who have not previously been convicted of a crime and hence a rebuttable presumption against enrollment is created by the fact of a prior conviction. An even heavier onus is placed upon defendants whose prior conviction is of a first or second degree crime or who have completed a term of imprisonment, probation or parole within the five-year period immediately preceding the application for diversion. As to those defendants, admission to the program is ordinarily dependent upon the prosecutor joining in the PTI application.

Guideline 3(f) sets forth a policy permitting probationers and parolees to enter PTI programs. Since the parolee/probationer is under the supervision of the District Parole Supervisor or Chief Probation Officer, consultation should be sought prior to recommending enrollment of the defendant into a PTI program.

Guideline 3(g) creates a bar against admission into a PTI program for those defendants who have previously been diverted under N.J.S.A. 2C:43-12 et seq. or conditionally discharged pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1. The Pretrial Intervention Registry established pursuant to N.J.S.A. 2C:43-21(a) and R. 3:28 serves as the means of identifying defendants previously diverted through a PTI program. This registry is designed to complement the Controlled Dangerous Substance Registry Act of 1970, pursuant to N.J.S.A. 26:2G-17 et seq.

Guideline 3(h) deems it appropriate that PTI programs may assume the supervision of N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1 cases.

Guideline 3(i) has been amended to include the presumptions against admission in N.J.S.A. 2C:43-12b(2)(a) & (2)(b). This Guideline recognizes that consistent with State v. Leonardis, 71 N.J. 85, 363 A.2d321 (1976) and 73 N.J. 360, 375 A.2d 607 (1977), there must be

a balance struck between a defendant's amenability to correction, responsiveness to rehabilitation and the nature of the offense. It is to be emphasized that while all persons are eligible for pretrial intervention programs, those charged with offenses encompassed within certain enumerated categories must bear the burden of presenting compelling facts and materials justifying admission. First and second degree crimes (and their Title 2A cognates) and the sale or dispensing of Schedule I and II narcotics by persons not drug dependent are specific categories of offenses that establish a rebuttable presumption against admission of defendants into a PTI program. This presumption reflects the public policy of PTI. PTI programs should ordinarily reject applications by defendants who fall within these categories unless the prosecutor has affirmatively joined in the application. A heavy burden rests with the defendant to present to the criminal division manager at the time of application (a) proof that the prosecutor has joined in the application and (b) any material that would otherwise rebut the presumption against enrollment. When a defendant charged with a first or second degree crime or the sale or dispensing of Schedule I or II narcotics has been rejected because the prosecutor refuses to consent to the filing of the application, or because in the sound discretion of the criminal division manager the defendant has not rebutted the presumption against admission, the burden lies with the defendant upon appeal to the court to show that the prosecutor or criminal division manager abused such discretion. When an application is rejected because the defendant is charged with a crime of the first or second degree or sale or dispensing of Schedule I or II narcotics, and the prosecutor refuses to join affirmatively in the filing of an application or later refuses to consent to enrollment, such refusal should create a rebuttable presumption against enrollment.

Guideline 3(k) recognizes that the use of restitution and community service may play an integral role in rehabilitation. Requiring either is strongly consonant with the individual approach defined in State v. Leonardis, 71 N.J. 85, 363 A.2d 321 (1976) and 73 N.J. 360, 375

A.2d 607 (1977), which emphasized the needs of the offender. In determining the restitution requirement and its terms including ability of the offender to pay, the Court should rely on the procedures outlined in State in Interest of DGW, 70 N.J. 488, 361 A.2d 513 (1976) and State v. Harris, 70 N.J. 586 (1976).

Full restitution need not be completed during participation in the program. In determining whether a restitution requirement has been fulfilled, the designated judge shall consider good-faith efforts by the defendant. In appropriate cases, at the conclusion of participation, a civil judgment by confession may be entered by the court. However, restitution should never be used in PTI for the sole purpose of collecting monies for victims.

Guideline 3(l) contains the requirement that that court and the prosecutor must consider the victim's position, if any, when evaluating the defendant's application into PTI pursuant to N.J.S.A. 2C:43-12e.

b. Proposed Revisions to Guideline 4

The Committee recommends separating current Guideline 4 into new paragraphs (a) and (b).

Proposed paragraph (a) contains the language included in current Guideline 4 that a defendant's enrollment into the Pretrial Intervention program should not be predicated upon an informal admission or entry of a guilty plea.

Proposed paragraph (b) includes the statutory requirement that defendants charged with certain crimes or offenses must enter a guilty plea for admission into PTI. See N.J.S.A. 2C:43-12g(3).

The Committee also recommends revisions to the Official Comment to Guideline 4 to reference the statutory requirement for entry of a guilty plea.

The proposed amendments to Guideline 4 follow:

Guideline 4

(a) In General. Enrollment in PTI programs should be conditioned upon neither informal admission nor entry of a plea of guilty. Enrollment of defendants who maintain their innocence should be permitted unless the defendant's attitude would render pretrial intervention ineffective.

(b) Guilty Plea Required. To be admitted into PTI, a guilty plea must be entered for a defendant who is charged with: (1) a first or second degree crime; (2) any crime if the defendant had previously been convicted of a first or second degree crime; (3) a third or fourth degree crime involving domestic violence, as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19); or (4) any disorderly persons or petty disorderly persons offense involving domestic violence, as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19) if the defendant committed the offense while subject to a temporary or permanent restraining order issued pursuant to the provisions of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et al.).

Official Comment

Guideline 4 differentiates when defendants will be required to enter a guilty plea to be admitted into PTI pursuant to N.J.S.A. 2C:43-12g(3). A PTI program is presented to defendants as an opportunity to earn a dismissal of charges for social reasons and reasons of present and future behavior, legal guilt or innocence notwithstanding. This stance produces a relation of trust between counselor and defendant. Within the context of pretrial intervention when and whether guilt should be admitted is a decision for counselors. Counselors should be free to handle each case individually according to their best judgment. Neither admission of guilt nor acknowledgment of responsibility is required, except for defendants who are charged with a crime or offense falling under Guideline 4(b). Steps to bar participation solely on such grounds would be an unwarranted discrimination. Nevertheless, many guilty defendants blame their

behavior on society, family, friends or circumstance, and avoid recognition of the extent of their own role and responsibility. While such an attitude continues, it is unlikely that behavioral change can occur as a result of short-term rehabilitative work. An understanding and acceptance of responsibility for behavior achieved through counseling, can and often does, result in the beginnings of the defendant's ability to control his/her acts and is an indication that rehabilitation may, in large measure, have been achieved.

Guideline 5

…No change

Guideline 6

…No change

Guideline 7

… No change

Guideline 8

… No change

Guidelines 2, 3, 6 and 8 and Comments to Guidelines 2, 3, 5 and 6 amended July 13, 1994 to be effective January 1, 1995; Guidelines 3(g) and (h) and Comments to Guidelines 3(g) and (h) amended June 28, 1996 to be effective September 1, 1996; Guideline 3(a) amended July 19, 2012 to be effective September 4, 2012; Comment to Guideline 6 amended August 1, 2016 to be effective September 1, 2016[.]; Guidelines 3(i) and Comments to Guidelines 3(i) amended, Guideline 3(l) added and Comment to Guideline 3(1) added, Guideline 4 amended and redesignated into subparagraphs (a) and (b) and Comments to Guideline 4 amended to be effective .

2. Proposal 2 - Revisions to Proposed Rules Previously Approved by the Supreme Court in 2015 Subject to Judicial Conference

The recommendations in this proposal reflect further amendments to five of the proposed Rules included in the packet of PTI Rules that were approved by the Court in 2015 subject to consideration at the September 2, 2015 Judicial Conference, and then withdrawn from consideration due to the statutory enactments on August 10, 2015. As such, the five rules included in this proposal, once the Court takes action on them, will need to be included with the other five PTI rules approved by the Court in 2015 for consideration at a Judicial Conference in 2017.

The five rules proposed for further amendments are R. 3:28-1 through R. 3:28-5. The Committee did not propose changes to R. 3:28-6 to – 10, which were not affected by the statutory changes to N.J.S.A. 2C:43-12. The proposed revisions shown here therefore are to the rule recommendations approved by the Court in 2015, but not formally adopted through the Judicial Conference process. In other words, the underscored language in these rule proposals represents new language that would be added to the rules as approved in 2015, and the bracketed language represents deletions from those previously approved versions.

a. Revisions to Proposed R. 3:28-1 – Eligibility for Pretrial Intervention

No changes are proposed in paragraphs (a) through (c) in R. 3:28-1 as previously approved by the Court in 2015.

Paragraph (d) in the rule approved by the Court addresses defendants who must first obtain the prosecutor's consent to consider the PTI application. Subparagraph (d)(3) in that rule included defendants who are public officers or employees and are charged with a crime or crimes that touched their public employment or office. See 219 N.J.L.J. 498 (2015). Because subsection (b) of N.J.S.A. 2C:43-12 was reconfigured to include the statutory presumptions against admission in two subsections, the Committee recommends moving this provision to new proposed paragraph (e)(1) for consistency.

Therefore, new proposed paragraph (e) separates the statutory presumptions against admission in N.J.S.A. 2C:43-12b(2) into the following three subparagraphs.

Subparagraph (e)(1) now includes the presumption against admission for public officers or employees contained in N.J.S.A. 2C:43-12b(2)(a).

Subparagraphs (2) and (3) in paragraph (e) include the presumptions against admission in N.J.S.A. 2C:43-12b(2)(b).

Specifically, subparagraph (2) contains the presumption against admission for crimes or offenses involving domestic violence if the defendant was the subject of a temporary or permanent restraining order.

Subparagraph (3) contains the presumption against admission for crimes or offenses that involve violence or the threat of violence.

The proposed language in subparagraph (4) conforms to the proposed language in R. 3:28-3 requiring submission of a statement of extraordinary and compelling circumstances with the application. The Committee believes that it is equally important that this paragraph include language emphasizing that applications falling under subparagraphs (1) to (3) need to include reasons rebutting the presumption against admission into PTI.

RULE 3:28. PRETRIAL INTERVENTION PROGRAMS

3:28-1. Eligibility for Pretrial Intervention.

(a) … No change from the proposal approved by the Court in 2015.

(b) … No change from the proposal approved by the Court in 2015.

(c) … No change from the proposal approved by the Court in 2015.

(d) Persons Ineligible for Pretrial Intervention Without Prosecutor Consent to Consideration of the Application.

The following persons who are not ineligible for pretrial intervention under paragraph (c) shall be ineligible for pretrial intervention without prosecutor consent to consideration of the application:

(1) … No change from the proposal approved by the Court in 2015.

(2) … No change from the proposal approved by the Court in 2015.

[(3) Public Officer or Employee. A person who was a public officer or employee and who is charged with a crime that involved or touched the public office or employment.]

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

(1) Public Officer or Employee. There shall be a presumption against admission for a person who was a public officer or employee and who is charged with a crime that involved or touched the public office or employment.

(2) Crime or Offense Involving Domestic Violence. There shall be a presumption against admission for a defendant charged with any crime or offense involving domestic violence, as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19) if the defendant committed the crime or offense while subject to a temporary or permanent restraining

order issued pursuant to the provisions of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et al.).

(3) Crime or Offense Involved Violence or Threat of Violence. There shall be a presumption against admission if the crime or offense charged involved violence or the threat of violence, which means if the victim sustained serious or significant bodily injury as defined in subsection b. or d. of N.J.S.2C:11-1, or the actor is armed with and used a deadly weapon or threatened by word or gesture to use a deadly weapon as defined in subsection c. of N.J.S.2C:11-1, or threatened to inflict serious or significant bodily injury.

(4) Submission of Statement with the Application. To rebut the presumption against admission in subparagraphs (1), (2) and (3) of paragraph (e), applicants shall include with their application a statement of the extraordinary and compelling circumstances that justify consideration of the application notwithstanding the presumption against admission.

Adopted to be effective .

b. Revisions to Proposed R. 3:28-2 - Timing of Application

In the proposed R. 3:28-2 previously approved by the Court in 2015, the Committee required filing PTI applications no later than 14 days after the "arraignment/status conference."

However, the "arraignment/status conference" was eliminated by the revisions to R. 3:9-1, effective May 20, 2016, which provide that the arraignment shall occur no later than 14 days after the return or unsealing of the indictment. See R. 3:9-1(b)(1). Additional revisions to R. 3:9-1 limit the case disposition conferences to the initial, final, and discretionary conference. See R. 3:9-1(d).

In light of those rule amendments, the PTI subcommittee recommended revising this rule to require filing PTI applications no later than the "Initial Case Disposition Conference."

However, during the Committee's discussion of this proposed change, a member suggested that the arraignment should be the deadline for filing PTI applications to enable this decision to be made earlier than the Initial Case Disposition Conference. That member pointed out that the defendant would have the discovery before the arraignment.

Members expressed strong concerns that moving the application filing deadline up to the arraignment would result in more out-of-time PTI applications because of the good cause exception in this rule. Those members believed that the Initial Case Disposition Conference would be the appropriate court event for filing PTI applications because at that conference, the court sets the dates for submission of briefs, the hearings for pretrial motions, and the date for the final disposition case conference, if necessary. Additionally,

those members recognized that this deadline does not preclude the court from encouraging earlier submission of PTI applications.

Therefore, the Committee proposes revising R. 3:28-2 to require filing PTI applications no later than the "Initial Case Disposition Conference."

The proposed amendment to R. 3:28-2 follows.

3:28-2. Timing of Application

Applications for pretrial intervention, shall be made at the earliest possible opportunity, including before indictment, but in any event no later than [14 days after the arraignment/status] the Initial Case Disposition Conference, unless good cause is shown or consent by the prosecutor is obtained.

Adopted to be effective .

c. Revisions to Proposed R. 3:28-3 – Application Process

The Committee proposes the following additional changes to R. 3:28-3 as previously approved by the Court in 2015.

Because proposed new paragraph (e) in R. 3:28-1 provides for submission of a statement for applications when there is a presumption against admission, the Committee proposes conforming revisions to paragraph (b)(1). Specifically, the proposed language adds cross references to R. 3:28-1(d)(1) and (d)(2) to also require submission of a statement of "extraordinary and compelling circumstances" for applications that fall within those two paragraphs, which require the prosecutor's consent to consider the PTI application based upon the nature of the crime charged or any prior convictions.

The proposed revisions to paragraph (b)(3) add the statutory requirement under N.J.S.A. 2C:43-12e that prosecutors shall give due consideration to the position of the victim, if any, in determining whether to consent to further consider the application.

The proposed amendments to R. 3:28-3 follow.

3:28-3. Application Process

(a) … No change from the proposal approved by the Court in 2015.

(b) Procedure for Persons Ineligible for Pretrial Intervention without Prosecutor Consent to Consideration of the Application.

(1) An application that requires prosecutor consent pursuant to R. 3:28-1(d)(1) & (2) shall include a statement of the extraordinary and compelling circumstances that justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions.

(2) … No change from the proposal approved by the Court in 2015.

(3) In making a determination whether to consent to further consideration of the application, the prosecutor shall give due consideration to the victim's position, if any, and shall not be required to consider any facts, materials, or circumstances other than the information presented in the defendant's application. [, but it] It shall not be an abuse of discretion for the prosecutor to consider only those additional facts and circumstances which shall [may] include the victim's position if any, on whether the defendant should be admitted into the program, that the prosecutor deems relevant to a determination whether circumstances justify consideration of the application notwithstanding the presumption of ineligibility based on the nature of the crime charged and any prior convictions.

(c) … No change from the proposal approved by the Court in 2015.

(d) … No change from the proposal approved by the Court in 2015.

Adopted to be effective .

d. Revisions to Proposed R. 3:28-4 Factors to Consider in Assessing Applications

R. 3:28-4 sets forth the criteria in evaluating a defendant's application into PTI.

The Committee proposes the following additional change to the rule as previously approved by the Court in 2015.

In accordance with N.J.S.A. 2C:43-12e, the Committee recommends adding new paragraph (3) providing for consideration of the victim's position, if any, on whether the defendant should be admitted into PTI.

The proposed amendment to R. 3:28-4 follows.

3:28-4. Factors to Consider in Assessing Applications

(1) … No change from the proposal approved by the Court in 2015.

(2) … No change from the proposal approved by the Court in 2015.

(3) The prosecutor and the court, in formulating their recommendations or decisions regarding an applicant's participation in a supervisory treatment program, shall give due consideration to the victim's position if any, on whether the defendant should be admitted.

Adopted to be effective .

e. Revisions to Proposed R. 3:28-5 – Admission into Pretrial Intervention

R. 3:28-5 addresses enrollment into the Pretrial Intervention program. The Committee proposes the following additional changes to this rule as previously approved by the Court in 2015.

The Committee recommends reorganizing paragraph (b) into two subparagraphs to distinguish when entry of a guilty plea is required for admission into PTI.

Proposed paragraph (b)(1) retains the language previously approved in this rule that enrollment shall not be required for admission into PTI. Similar language is included in current Guideline 4.

The Committee proposes new paragraph (b)(2) to enumerate the crimes or offenses where a defendant must enter a guilty plea for admission into the PTI program in accordance with N.J.S.A. 2C:43-12g(3).

The proposed amendments to R. 3:28-5 follow.

3:28-5. Admission into Pretrial Intervention

(a) … No change from the proposal approved by the Court in 2015.

(b) Enrollment in Pretrial Intervention.

(1) In General. Enrollment in Pretrial Intervention programs shall not be conditioned upon either informal admission or entry of a plea of guilty. Enrollment of defendants who maintain their innocence is to be permitted unless the defendant's attitude would render pretrial intervention ineffective.

(2) Guilty Plea Required. To be admitted into Pretrial Intervention, a guilty plea must be entered for a defendant who is charged with: (1) a first or second degree crime; (2) any crime if the defendant had previously been convicted of a first or second degree crime; (3) a third or fourth degree crime involving domestic violence, as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19); or (4) any disorderly persons or petty disorderly persons offense involving domestic violence, as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19) if the defendant committed the offense while subject to a temporary or permanent restraining order issued pursuant to the provisions of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et al.).

(c) … No change from the proposal approved by the Court in 2015.

(d) … No change from the proposal approved by the Court in 2015.

Adopted to be effective .

III. Non - Rule Recommendations

A. Joint Criminal/Municipal Subcommittee on Electronic Discovery Formats

The Hon. Glenn Grant, Acting Administrative Director of the Courts, asked the Criminal Practice Committee and Municipal Court Practice Committee in February 2013 to form a joint subcommittee to review standard formats for electronic discovery and recommend any changes, and to work with the Office of the Attorney General to develop a protocol to ensure discovery systems' compatibility for trial and appellate courts.

The Joint Criminal/Municipal Subcommittee on Electronic Discovery Formats, after reviewing these issues, submitted its recommendations to Judge Grant in February 2015. The Subcommittee's overall conclusion was that further examination was needed from the perspective of technology regarding emerging and outdated formats, compatibility of audio, video and digital software, and ensuring that prison inmates can view discovery.

Consistent with that conclusion, Judge Grant will create a subcommittee of the Advisory Committee on Information Technology with diverse membership representing all viewpoints to focus on issues relating to electronic discovery. In addition to the areas identified by the Joint Subcommittee, this subcommittee would make recommendations directed at ensuring that pro se litigants have access to electronic filing systems, that audio/video equipment is up-to-date and compatible for the needs of trial and appellate courts, and that prisons use standard platforms or equipment to enable inmates to view discovery.

B. Telephonic Issuance of Search Warrants by Municipal Court Judges

This topic is a carry-over from the 2013-2015 Committee term. During that term, upon the request of the Hon. Glenn A. Grant, Acting Administrator Director of the Courts, the Criminal Practice Committee and Municipal Court Practice Committee formed a joint subcommittee to consider and make recommendations regarding the scope of authority for Municipal Court judges to issue telephonic search warrants.

Information was needed as to the current protocols for Municipal Court judges to issue search warrants for applications in-person or telephonically. Therefore, the Committee requests issuance of a referral to the Criminal and Municipal Conferences of Presiding Judges and/or Division Managers to collect this information.

IV. Rule Amendments Considered and Rejected

A. R. 3:25A-1 Consolidation of Complaints – Referral in State v. Amparo

During the Committee's 2013-2015 term, a referral was made to the Criminal Practice Committee and the Municipal Court Practice Committee to consider whether revisions were needed in R. 3:25A-1 and R. 7:8-4[3], which govern consolidation of complaints. See State v. Amparo, No. 0223-W-2014 et al. (Law Div. 2014).

In Amparo, the Law Division judge denied defendant's motion to consolidate complaints charging various drug offenses in two counties, and found that consolidation was only appropriate for the charges in one municipality. In denying defendant's motion to consolidate, the court advised that it did not have the authority to consolidate all the charges because they did not arise out of the "same facts and circumstances." See slip op. at 6. The court also noted that consolidating the charges "would create unnecessary procedural complexities," since the county prosecutor would be prosecuting a Superior Court charge it had already downgraded to a disorderly persons offense and a charge that arose in another county. See slip op. at 7.

Additionally, the court stated:

> A separate and distinct question, which might well be preserved, would be if the defendant's counsel obtained a plea agreement involving all matters and then came before the court seeking consolidation. It appears, at first blush, that consolidation might well then be permitted as all of the outstanding concerns would be resolved. R. 3:25A-1 permits consolidation of charges pending in one or more counties for the purposes of entering a plea or for sentencing. The intention of R. 3:25A-1 is to have the matters resolved prior to seeking consolidation. The comment to R. 3:25A-1 states it is inadvisable to collect charges in a single county other than for the purposes of a plea or dismissal. Here, the defendant's

[3] The Municipal Court Practice Committee decided that R. 7:8-4 did not need to be revised. See 219 N.J.L.J. 599 (2015).

> counsel did not attempt to provide for a global disposition prior to bringing this motion as no plea agreement currently exists. [Slip op. at 7.]

The Criminal Practice Committee decided that the procedures for a motion to consolidate charges set forth in R. 3:25A-1 are sufficient. Therefore, the Committee is not recommending any changes to R. 3:25A-1.

B. Rule Amendments Considered and Rejected with a Recommendation for Other Action

1. R. 3:21-8 - Jail Credits and Drug Court Participants – Recommendation for Consideration by the Legislature

The Criminal Practice Committee considered a proposal to revise R. 3:21-8 to provide that all Drug Court participants receive jail credits for commitment in a residential facility whether admitted pursuant to "special probation" (N.J.S.A. 2C:35-14), known as "Track 1" or regular probation (N.J.S.A. 2C:45-1), known as "Track 2."

This proposal was brought to the Committee's attention due to the Appellate court's decision in State v. Stalter, 440 N.J. Super. 548 (App. Div. 2015). In Stalter, the Appellate panel held that Track 2 Drug Court participants were not entitled to jail credits because they were not sentenced to special probation under N.J.S.A. 2C:35-14 so the provision in that statute, N.J.S.A. 2C:35-14f(4), awarding jail credits does not apply to these individuals. Id. at 555-56.

Specifically, N.J.S.A. 2C:35-14f(4) provides that upon revocation of special probation and imposition of a term of imprisonment, the defendant shall receive credit "for each day during which the person satisfactorily complied with the terms and conditions of special probation while committed pursuant to this section to a residential treatment facility." The court in determining the number of credits for time spent in a residential facility "shall consider the recommendation of the treatment provider." Ibid.

The proposal would add a new paragraph to R. 3:21-8 that essentially mirrors the special probation statutory provision under N.J.S.A. 2C:35-14f(4) by permitting jail credits for each day during which the person satisfactorily complied with the terms and conditions

while committed at a residential treatment facility, but specifies that it is applicable to both Drug Court Tracks.

During the Committee's discussion, the following example was raised to illustrate how the statutory provision permitting jail credits provides an incentive for defendants to apply to Drug Court. The defendant is charged with a second degree crime who could be subject to mandatory Drug Court under Track 1. However, if the defendant pleads down to a third degree charge the defendant could still be eligible for Drug Court under Track 2, but would not be able to receive jail credits. This could create a disincentive for a defendant to plead under Track 2.

Some members thought reconciling the receipt of jail credits for both Track 1 and Track 2 Drug Court participants on its face seemed appropriate. However, it was asserted that the special probation statute also provides that defendants assigned to a treatment facility are "deemed to be subject to official detention for the purposes of N.J.S. 2C:29-5 (escape)." See N.J.S.A. 2C:35-14d. This distinction that Track 1 defendants can be subject to a separate charge of escape for unauthorized departure from a treatment facility, rather than just a violation of probation was also identified by the court in Stalter. Id. at 554.

Other members raised concerns that it may not be appropriate to extend jail credits to Drug Court participants in a court rule when the statute limited jail credits to only Track 1 participants. Those members said that this could be considered a substantive change that falls under the purview of the Legislature, and not the Court's rule-making authority under N.J. Const. Art. VI, § II, ¶ 3. See Winberry v. Salisbury, 5 N.J. 240, 255, cert. denied, 340 U.S. 877 (1950) (rule-making power of the Supreme Court, confined to practice, procedure and administration of the courts, is not subject to over-riding legislation). Those members

suggested that it would be better to recommend that the Legislature consider enacting a law that would also provide jail credits to participants admitted to Drug Court under Track 2.

The Committee ultimately decided not to make any changes to R. 3:21-8.

Instead, the Committee recommends that the Court consider making a recommendation to the Legislature to consider statutory amendments similar to the Track 1 provision that would allow jail credits for Drug Court participants admitted under Track 2 pursuant to N.J.S.A. 2C:45-1.

2. R. 3:22-6(a) - Post-Conviction Relief: Waiver of Counsel – Advisory Letter Recommended

The Committee considered a referral by the Appellate Court in State v. Quixal, 431 N.J. Super. 502, 507, n. 3 (App. Div. 2013) to consider whether R. 3:22-6(a) should be amended consistent with its decision regarding a defendant knowingly and intelligently waiving counsel in a post-conviction relief (PCR) matter. The court found that R. 3:22-6(a) provides for a first PCR petition for an indictable offense to be assigned to the Office of the Public Defender "unless defendant affirmatively states an intention to proceed *pro se*," which defendant in Quixal affirmatively did in writing. See Quixal, supra, 431 N.J. Super. at 507.

In Quixal, the defendant submitted a post-conviction relief (PCR) petition by mail, which included a waiver of his appearance, as well as a waiver of appearance for representation by counsel. At the request of the defendant, the court considered the PCR petition on the papers and denied the petitioner's PCR. The defendant filed a second PCR petition asserting that his waiver in the first petition was not made knowingly or intelligently because he did not have counsel. He asserted that another inmate assisted him with the first PCR and that his lack of understanding was due to a language barrier. The Appellate panel held that defendants have a State constitutional right to counsel when raising an ineffective assistance of trial counsel claim for the first time, whether raised on direct appeal or by way of PCR. Id. at 513. The court declined to decide whether the federal constitution also affords this right. Ibid. Additionally, the court found that the written waiver procedure, such as the one in Quixal, did not meet the requirements of a

knowing and intelligent waiver of counsel, especially by defendant who indicated he speaks only Spanish and requires an interpreter. Ibid.

The Committee acknowledged that Quixal presented a unique set of circumstances because the issue before the court came up during a second PCR petition filed to confront issues concerning the first PCR petition and the underlying case. At the outset, the first PCR court was presented with a written waiver of counsel, a waiver of the defendant's appearance, and the PCR petition itself. The court accepted the waiver on its face and chose to proceed on the papers. Members said that this decision to proceed on the papers provided the opportunity for error in this matter, and not R. 3:22-6(a) as presently written.

A discussion then ensued as to the logistics of producing defendants to appear in court for judges to determine whether the defendant's waiver is knowing and intelligent. For example, would detainers or writs of transfer be used for defendants who are incarcerated out-of-state or under ICE custody to be produced in court regarding their request to proceed pro se. Defendants would need to be advised that they should work out the logistics of appearing in court to be heard on a waiver of counsel application.

A suggestion was made that out-of-state defendants who file a waiver of counsel could be given counsel to facilitate the arrangements necessary for the defendant to appear in court. This would address concerns of an inmate in a foreign jurisdiction who may not know the options available for participation in the court proceeding. The appointed attorney would briefly handle the logistics of the defendant's appearance in New Jersey and not necessarily the PCR case. Other members mentioned alternative methods of appearance, such as video conference and telephone in lieu of in-person.

Some members suggested that the Office of the Public Defender could intervene for defendants who would like to waive counsel. Other members responded that this raises two separate issues. First, and purely on procedural grounds, the Public Defender's office is not included in the process until the criminal division has determined that the defendant is indigent based upon the indigency application (5A) and that information is then forwarded to the Public Defender's office. See R. 3:22-6(a). If a client of the Office of the Public Defender wishes to appear pro se after they are assigned to represent the defendant, then a separate set of procedures would have to be followed to be relieved from the case. Second, compelling the Office of the Public Defender to assign counsel for the sole purpose of assisting the defendant in waiving his right to counsel appears fraught with the same issues that the court in Quixal was attempting to avoid.

Members recognized that it would not be the norm for a court to handle an issue of waiver of counsel on the papers without producing the defendant and making a record of the inquiry to determine whether the defendant's waiver of counsel was knowing and intelligent. Judges are mindful of the requirements for the inquiry to determine whether defendant's waiver of the right to counsel is knowing and intelligent. See State v. Crisafi, 128 N.J. 499, 509-10 (1992).

Additionally, the Court in State v. DuBois, 189 N.J. 454 (2007), advised that the inquiry requires the trial court to inform a defendant asserting a right to self-representation of:

> (1) the nature of the charges, statutory defenses, and possible range of punishment; (2) the technical problems associated with self-representation and the risks if the defense is unsuccessful; (3) the necessity that defendant comply with the rules of criminal procedure and the rules of evidence; (4) the fact that the lack of knowledge of

> the law may impair defendant's ability to defend himself or herself; (5) the impact that the dual role of counsel and defendant may have; (6) the reality that it would be unwise not to accept the assistance of counsel; (7) the need for an open-ended discussion so that the defendant may express an understanding in his or her own words; (8) the fact that, if defendant proceeds pro se, he or she will be unable to assert an ineffective assistance of counsel claim; and (9) the ramifications that self-representation will have on the right to remain silent and the privilege against self-incrimination.
> [Id. at 468-69.]

The Committee also discussed the need for defendants to be produced in-person so that they can be questioned on the record concerning their desire to proceed on their own, despite written requests from defendants to the contrary. In doing so, trial judges can then assure themselves that defendants understand the impact of their decision and a proper record can be made of the exchange.

The Committee ultimately agreed that courts should abide by these same methods for the determination on a waiver of counsel for PCR petitions. Therefore, the Committee decided that no changes were necessary in R. 3:22-6(a).

Instead, the Committee recommends issuance of a general advisory letter to the Criminal Division judges advising that upon receipt of the first post-conviction relief application accompanied with a waiver of counsel, the court shall also make every reasonable effort to make sure the waiver of counsel is knowing, intelligent, and voluntary on the record and include its findings.

V. Matters Held for Future Consideration

A. Presentence Investigation Reports

In the 2007-2009 term, the Committee submitted a package of recommendations to the Supreme Court addressing corrections to presentence investigation (PSI) reports, including: developing a uniform protocol to memorialize challenges and corrections made to the presentence investigation report; incorporating the court's findings regarding challenges and corrections; and forwarding revised presentence investigation reports to the parties and interested entities. The Committee also recommended adding "disclaimer" language to the "offense circumstances" section of the presentence investigation report to clarify that the offense circumstances includes descriptions of charges of which the defendant may not have been found guilty by a jury or may not have pled guilty to and that the offense circumstances section should be read in conjunction with the final charges and the defendant's version of the offense.

The Court considered these recommendations and the Committee was asked to further consider the following:

1. Develop a procedure to ensure that a defendant's challenge to a criminal or court history record is resolved, memorialized and forwarded to the appropriate parties and entities.

2. Reconsider the recommendation to add "disclaimer" language to the offense circumstances section of the PSI report, in that it may not sufficiently address the impact upon the use of PSI reports by outside agencies and during post-sentencing proceedings, such as in Sexually Violent Predator cases and parole board hearings, where PSI reports are relied upon in subsequent hearings to determine the actual facts of the case.

This matter is carried for the PSI subcommittee to continue exploring these issues.

B. State v. Bueso, 225 N.J. 193 (2016) - Child competency determination questions

The Supreme Court in State v. Bueso, 225 N.J. 193, 214, n.6 (2016), requested that the Criminal Practice Committee consider developing model questions for use in competency determinations involving child witnesses.

In Bueso, the Court found that the examination to determine competency of the child witness during the trial satisfied N.J.R.E. 601; however, a more compelling record including detailed questions would have been ideal. Id. at 214. The Court further advised that "Trial courts and counsel should develop the record on the question of competency by means of a thorough and detailed questioning of the child witness." Ibid.

Because of the potentially significant evidential implications, the Committee requested input from the Supreme Court Committee on the Rules of Evidence to develop these model questions. The Evidence Committee agreed. As a result, a joint subcommittee will be exploring this topic.

C. R. 3:9-2 – Alford and Nolo Contendere Pleas

The Supreme Court referred a proposal from the Office of the Public Defender to amend R. 3:9-2 to permit both Alford and Nolo Contendere pleas for the Committee's consideration.

In North Carolina v. Alford, 400 U.S. 25, (1969), the United States Supreme Court held that a sentencing judge may accept a plea from a defendant who makes claims of innocence at the time of sentencing as long as a "factual basis for the plea is demonstrated by the State." See State v. Taccetta, 200 N.J. 183, 196 (2009).

Nolo Contendere pleas are defined as "a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for the purpose of the case to treat him as if he were guilty." See Alford, supra, 400 U.S. at 35.

In noting the different standards for pleas, the Taccetta Court stated "The notion that a defendant can enter a plea of guilty, while maintaining his innocence, is foreign to our state jurisprudence." Id. at 195. R. 3:9-2 further instructs our courts not to accept a plea of guilty unless "there is a factual basis for the plea and that the plea is made voluntarily, not as a result of any threats or of any promises or inducements not disclosed on the record, and with an understanding of the nature of the charge and the consequences of the plea." Id. at 196.

The Committee had preliminary discussions with representatives from the Public Defender's office, and will explore this topic further upon submission of a formal proposal.

D. PTI Guideline 3(i) - State v. Coursey, 445 N.J. Super. 506 (App. Div. 2016)

In State v. Coursey, 445 N.J. Super. 506, 511, n. 1, (App. Div. 2016), the Appellate court asked the Criminal Practice Committee to consider whether Guideline 3(i) needs to be revised to clarify whether it "applies to possession of Schedule I and II narcotics with intent to distribute, or only to the 'sale' of those narcotics."

In Coursey, the Appellate court held "both the prosecutor's office and the trial court mistakenly applied the presumption against admission in PTI Guideline 3(i) to fourth-degree possession of marijuana with intent to distribute." Id. at 509. The court reversed the PTI order and remanded the matter back to the prosecutor's office for reconsideration of defendant's PTI application. Ibid.

In light of the Committee's current two proposals to amend the PTI program contained in this Report, the Committee withheld consideration of this issue until the Court takes action on those proposals.

E. State In the Interest of N.H., 226 N.J. 242 (2016) - Juvenile Discovery

The Court in State in the Interest of N.H., 226 N.J. 242, 257 (2016), asked the Family Practice and Criminal Practice Committees to develop a proposed rule to regulate timely discovery in juvenile proceedings. In N.H., the Court held that juveniles facing waiver to the Criminal Part are entitled to full discovery. The statutes and Court Rules do not expressly address discovery in juvenile cases. Id. at 257.

A joint working group was formed to propose a rule for consideration of the Practice Committees. This matter is pending the proposed rule recommendation from the joint working group.

F. Referral from the Court -R. 1:38-3 – Court Records Excluded from Public Access

By Order dated December 6, 2016, the Supreme Court relaxed and supplemented Rule 1:38-3 "Court Records Excluded from Public Access" such that records relating to the Pretrial Services Program shall be excluded from public access, except as follows: (a) certain records, such as motions or exhibits, the results of any risk assessment instrument, shall be made available to the attorneys of record for the purposes of determining, setting, or modifying conditions of release, determining violations of conditions of release, determining whether pretrial detention is appropriate, and sentencing of the defendant; if the records sought are otherwise obtainable under these Court Rules, such records will be made available to the public; (b) recommendations of release provided by the Pretrial Services Program shall be made available to the attorneys of record; and (c) orders pertaining to conditions of pretrial release or pretrial detention shall be available to the public.

This topic is pending consideration of the Committee.

G. Consideration of December 6, 2016 Supreme Court Order – Conforming Rule Amendments

By Order dated December 6, 2016, the Supreme Court supplemented Rule 3:25-4(a) so as to include juvenile defendants within the categories of "defendant" and "eligible defendant" when the juvenile defendant's complaint is transferred to adult status and the juvenile defendant is remanded to a juvenile detention facility, jail, or other detention facility.

Additionally, the Part III Court Rules were relaxed and supplemented such that no statement or other disclosure, written or otherwise, by the defendant to the Pretrial Services Program may be used at any stage of the matter for any purpose, except (a) for purposes specifically provided for under the Rules of Court, or (b) in the prosecution of fraudulently obtaining pretrial release or the services of the Public Defender.

These matters are pending consideration of the Committee.

H. Referral in State v. Deshaun P. Wilson – Notice and Demand Procedures (N.J.S.A. 2C:35-7.1e)

The Supreme Court authorized the use of a "Notice and Demand" procedure in lieu of production of a witness for the authentication of a map created pursuant to N.J.S.A. 2C:35-7.1(e) in State v. Deshaun P. Wilson ___ N.J. ___ (2017).

The Court set forth the following requirements for prosecutions for distributing, dispensing or possessing within 500 feet of certain public property (N.J.S.A. 2C:35-7.1):

> [T]he State may give notice to a defendant, at least thirty days before trial, that a map prepared pursuant to N.J.S.A. 2C:35-7.1(e) will be offered at trial for a violation of N.J.S.A. 2C:35-7.1 and may demand an objection to its use within ten days. An objection will require the State to produce an authenticating witness who can testify to the map's authenticity and be cross-examined on the methodology of the map's creation and its margin of error. If there is no such objection, the map may be admitted without production of an authenticating witness.
> [Slip op. at 25].

The Court referred the crafting of a rule on pretrial notice and demand in prosecutions under N.J.S.A. 2C:35-7.1 to the Criminal Practice Committee. See slip op. at 25-26. This matter has been carried for the Committee to consider proposing a rule in accordance with the Court's decision.

Respectfully submitted,

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