Report of the

Supreme Court

Criminal Practice Committee

2002-2004 Term

January 23, 2004

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APPENDIX

A. Proposed Rule Amendments Recommended for Adoption.

1. State in the Interest of T.M.

This is the first of two proposed amendments to R. 3:9-2. As the two proposed amendments involve different issues related to guilty pleas, the Committee feels that it would be best to address them separately.

In State in the Interest of T.M., 166 N.J. 319 (2001), T.M., a twelve-year old juvenile, who was functioning at the level of a nine-year old, committed an act of criminal sexual contact on a six-year old girl. At the delinquency hearing, the prosecutor made a proffer of the "factual basis" for the crime in lieu of live testimony and agreed to a sentencing recommendation. Defense counsel stated that he did not oppose the proffer, but indicated that his client had no memory of the day the crime occurred. T.M. was sentenced to probation but moved to vacate his guilty plea three years later when his mother learned that he would be subject to Megan's Law. The motion was denied, a decision that was subsequently affirmed by the Appellate Division. The Appellate Division acknowledged, however, that the trial court had not inquired of T.M. concerning his guilt, but observed that this was unnecessary because the delinquency proceeding was a trial on a set of uncontroverted facts.

The Court disagreed with the Appellate Division and concluded that the delinquency proceeding resulted in a guilty plea that lacked the procedural safeguards that should have attended it. Id. at 325. The Court stated that while a trial of a criminal case based on stipulated facts may be a useful mechanism, in

some circumstances the procedure must be reconciled with the provisions of R. 3:9-2, applicable to delinquency proceedings pursuant to R. 5:21A, and due process.

The Supreme Court referred to the Criminal Practice Committee:

> The task of developing appropriate rule amendments to guide trial courts in developing a record that assures that a defendant's agreement to a trial on stipulated facts is voluntary and knowing. [Id. at 319].

The Court also instructed the Committee to consult and coordinate with the Family Practice Committee regarding juvenile cases.

The Committee now recommends revising R. 3:9-2 to allow a written stipulation of facts to supplement a guilty plea. By placing the proposed amendment within the rule regulating pleas and thereby obtaining all the waivers of rights incident to a guilty plea, the proposal enhanced the finality of the process. By requiring the defendant to accept, in writing, the stipulated facts as true, and by requiring the court to make the necessary finding regarding the adequacy of the factual basis, and that the plea was made voluntarily, the proposed amendment removed any questions about the actual guilt of the defendant.

It is preferable to secure the factual basis "from the lips of the defendant." State v. Barbozo, 115 N.J. 415, 422 (1989). Because it is anticipated that this procedure will be used rarely, it is not an undue burden requiring the stipulation to be in writing and signed by the defendant, defense counsel and the prosecutor and subjecting its use to the court's discretion. The use of stipulated facts in a guilty

plea is not a radical departure from nor is it intended to alter existing practice that allows the court to inquire of "others" to provide a factual basis. See State v. Dishon, 222 N.J. Super. 58 (App. Div. 1987) certif. denied 110 N.J. 508 (1988). The rule is not intended to affect New Jersey's rejection of "Alford" pleas where a defendant wishes to plead guilty pursuant to a plea bargain but continues to assert innocence. State v. Reali, 26 N.J. 222 (1958); North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970). There is no need to provide for any separate waiver of constitutional rights because those rights are waived as part of the guilty plea itself. Situations where stipulated facts might optionally be used include cases involving sex crimes such as State v. T.M. supra, or State v. Smullen, 118 N.J. 408 (1990), where a defendant does not deny the crime but finds it impossible to say some of the necessary words, cases where a defendant does not deny but does not remember some necessary element such as State v. Dishon, supra, or cases in which an element of the crime such as the actual level of injury to a victim or the value of goods stolen is beyond the knowledge of a defendant.

The basis for this recommendation is the holding of State v. T.M., supra, that a trial on stipulated facts should not be used to avoid the requirements of a plea under R.3:9-2 when the underlying goal is to have a plea bargain. State v. T.M., supra, illustrates the problems when that happens. Typically, there is neither a proper trial nor a fully informed plea. Although in most instances the defects in the procedure never become known because there is no appeal, the potential

problems should not be ignored. Most important, however, is the concern expressed in State v. T.M., supra, that under current practice a defendant may not be fully informed or may not fully understand that in a trial on stipulated facts the defendant may effectively be pleading guilty to an offense because the stipulated facts are sufficient for the trial court to find guilt. Accordingly, neither the defendant nor the observing public would understand what was happening and that would be wrong. Finally, it undermines the integrity of the rules themselves to have the subterfuge of a stipulated fact trial to "get around" the factual basis requirement of R.3:9-2.

First, the Committee concluded that a trial on stipulated facts should not be used where a guilty plea was intended. As the Supreme Court held in Boykin v. Alabama, 395 U.S. 238 at 242, 89 S. Ct.1709 at 1711, 23 L. Ed.2d 274 (1969), "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Adams v. Peterson, 968 F.2d 835, 839 (9th Cir.1992), cert. denied, 507 U.S. 1019, 113 S.Ct. 1818, 123 L.Ed.2d 448 (1993) further explained:

> Nor do the parties' expectations change the analysis. An expectation that the trier of fact will find that the facts as stipulated demonstrate the defendant's guilt does not render the stipulation a de facto guilty plea. When presented with a stipulation of fact, an Oregon trial court is under no statutorily or judicially imposed obligation to find the defendant guilty. The stipulation is only a method for introducing the evidence, and the parties' expectations are only their views on what the trial's outcome will be. [*citation omitted*]

The Committee believes that our rules should reflect and not confuse this distinction.

Second, as the Court explained in T.M., supra, 166 N.J. at 336-337:

> There is also a practical benefit in creating a record that demonstrates adherence to the specified procedures. Such a record insulates the guilty-plea conviction from subsequent attack by a defendant seeking relief from its consequences. The State has an interest in finality, and that interest is furthered when convictions are made less vulnerable to later appellate challenge through assurance of the procedural integrity of the initial proceedings.

Third, to accept a guilty plea without actual guilt is offensive to many, and is clearly so to our Court, because it risks that a defendant who consistently and constantly protests innocence might be sentenced for an offense which a defendant may not have committed.

The proposed rule considers each of these underlying rationales. By placing the provision within the rule regulating pleas and thereby obtaining all the waivers of rights incidental to a guilty plea, the proposal enhances the finality and integrity of the process. By requiring the defendant to "accept as true" the stipulated facts in writing and by requiring the court to make the necessary finding as to the adequacy of the factual basis and that it was made voluntarily, the proposed rule does not raise any questions about the actual guilt of the pleading defendant. Finally, because under this rule the defendant accepts the facts as true, the victim and the victim's family are provided with the closure they deserve and the knowledge that the true culprit has been identified.

In looking at the facts of State v. T.M., supra, it is obvious that the parties and the court were trying to do the right thing. There should have been a rule that would have authorized what they did so long as the juvenile's rights were protected and applicable waivers of those rights were obtained on the record. The proposed rule accomplishes that goal by simply allowing stipulated facts, accepted by the defendant as true, to be used as part of the factual basis for a plea.

The Committee carefully considered the possibility of creating a new rule regarding trials on stipulated facts; however, it ultimately rejected any such idea. The Committee found it virtually impossible to create a single rule that covers the wide variety of circumstances where stipulations are used without a lengthy commentary that would explain all of the variations and exceptions. Stipulations are routinely used to avoid the need to introduce evidence on uncontested facts. Those situations typically require no specific waiver of rights on the record. When or if the stipulations become so great that some kind of waiver is appropriate, is best left to trial courts to determine based upon the situation before them. Judge Alexander Kozinski discussed this problem in his concurrence in Adams, supra, 968 F.2d 835 at 846:

> With the benefit of hindsight, a tactical concession might well look like a major turning point in the case, one which made the outcome a foregone conclusion. Yet it would be entirely unworkable to demand a Boykin inquiry every time the defense and prosecution come to some arrangement--through stipulation, concession or whatever--that narrows the issues for trial. While the concession in Adams's case was just about as broad as one could imagine, I find it impossible to draw a crisp line between Adams's stipulation and a much narrower one that still gives up

> key facts. What, for example, if Adams had conceded the relevant physical facts, i.e., that he had intercourse with the victim, but had disputed intent? Or, conversely, what if he had conceded intent but challenged some of the physical facts? Whether one or both of these concessions would be viewed as critical--as a "de facto" guilty plea--turns on what was genuinely in dispute in light of the evidence available to the prosecutor. Determining whether Boykin is implicated outside the safe confines of the express guilty plea would obligate federal courts to reverse-engineer every criminal case where the defense makes any sort of nontrivial concession.

While Boykin v. Alabama, supra, only applies to guilty pleas, as footnote 5 in Adams, supra, 968 F.2d 835 at 842, explains, "no prosecutor can prevent the trial judge from going through the Boykin litany." Thus, in the rare situation where all or substantially all the facts are stipulated because, for example, the issue of guilt or innocence is perceived by the parties and the court to be strictly a legal issue, under existing rules, a trial court can determine what waivers, if any, are needed.

The Committee respectfully recommends that R. 3:9-2 be amended to comply with the Court's request in State in the Interest of T.M., supra.

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 addressing the defendant personally 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. The factual basis may, in the court's discretion, be supplemented by a written stipulation of facts, opinion or state of mind that the defendant accepts to be true and which 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: Source--R.R. 3:5-2 (a)(b). 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 _____, to be effective _____.

2. Placing Defendants under Oath during Plea Colloquy.

This is the second of two proposed amendments to R. 3:9-2. As the two proposed amendments involve different issues related to guilty pleas, the Committee feels that it would be best to address them separately.

The Division of Criminal Justice asked the Committee to consider adopting uniform procedures that would require a defendant to be placed under oath before providing a factual basis for a guilty plea. The Committee felt that a plea hearing was a solemn proceeding held in lieu of a trial, and that not requiring the defendant to be placed under oath affected the integrity of the proceedings. It was also noted that, in practice, the majority of judges already placed defendants under oath during the plea hearing.

The Committee recommended revising R. 3:9-2 to require that a defendant be placed under oath before providing a factual basis for a guilty plea. The Committee was of the opinion that under the amended rule, the inadvertent failure to place the defendant under oath would not affect the validity of the guilty plea. Nor would the rule affect the scope or detail of the factual basis provided by the defendant during the plea colloquy, or the ability to supplement the factual basis by inquiry of "others" to the extent that can be done. See also Item A.1., supra. The Committee was also of the opinion that the rule change would have no impact on applications to withdraw the plea or its use if the plea is not accepted or ultimately rejected. Finally, the Committee was of the opinion that the amended rule should be made prospective only to avoid any attack on guilty pleas that were

entered without placing the defendant under oath, even if the case was pending on direct appeal.

Despite the Committee's recommendation, there were some misgivings about the proposed amendment to R. 3:9-2. It was noted, for example, that under the Federal Rule, Fed.R.Crim.P. 11(b)(1), placing a defendant under oath before the plea colloquy was discretionary, rather than mandatory. The Committee was somewhat concerned that there may be consequences flowing from the failure to place the defendant under oath if there was a requirement to do so. There was a question, for example, about the ability to prosecute a defendant who was not sworn for false swearing. The Committee recommended that the Family and Municipal Practice Committees should be given the opportunity to consider whether this amendment should also apply in juvenile and municipal proceedings. Consequently, the Committee recommended that an administrative directive imposing the oath requirement be issued, rather than a rule amendment, while the issue was being studied.

On July 17, 2003, the Administrative Director issued a directive (Directive #5-03) requiring that a defendant be placed under oath during the plea colloquy. The directive also noted that the Court had asked the Committee to include a proposed conforming rule amendment in its 2002-04 report. The Committee is recommending that the Court adopt its original proposal. The Committee has also distributed its proposed amendments to R. 3:9-2 to the Family and Municipal Practice Committees.

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 [addressing] 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. 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: Source--R.R. 3:5-2(a)(b). 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 _____, to be effective _____.

3. Judicial Involvement in Plea Negotiations.

In its 1988 Report, the Criminal Practice Committee recommended amendments to R. 3:9-3 that would permit judges, at the request of one or both of the parties, to conduct a conference with both parties present, and indicate what the defendant's maximum exposure would be if he or she were to plead guilty and the material in the presentence report confirmed the information conveyed to the judge at the conference. See Report of the Supreme Court Committee on Criminal Practice 1988 Term, 122 N.J.L.J., 97, 112 (1988). A dissent to that report, filed on behalf of the prosecutor members of the Committee, proposed an amendment to the rule that only allowed judges to participate where there was an agreement between both the defendant and the State to conduct the conference. See Report of the Supreme Court Committee on Criminal Practice, 122 N.J.L.J. at page 178. The Court ultimately adopted an amendment to the Rule patterned after the dissent.

In the recent *Report of the Conferences of Criminal Presiding Judges and Criminal Division Managers on Backlog Reduction*, it was recommended that R. 3:9-3 "be reviewed and modified to permit judge involvement in plea negotiations when it appears that the parties are at a stalemate." See Recommendation 8 at page 28. The *Backlog Report* stated, in support of the change to R. 3:9-3, that:

> The practice of requesting judicial involvement in plea negotiations is determined locally by the county prosecutor. There are counties where the prosecutor steadfastly opposes any judicial involvement in plea negotiations or does not allow involvement by certain

> judges. Since sentencing authority is vested in the Judiciary, judges should be able to use that authority to arrive at the most appropriate sentence. Id. at page 28.

The *Backlog Report* was approved by the Judicial Council at its October 31, 2002 meeting. The Conference of Criminal Presiding Judges subsequently proposed an amendment to R. 3:9-3(c) and forwarded that recommendation to the Committee.

Consistent with its 1988 recommendation, the proposed amendment to R. 3:9-3(c) would allow judicial involvement in plea negotiations upon the request of either the prosecutor or defense counsel. Currently, judicial involvement is prohibited unless both parties request it. As a result, the county prosecutor essentially has the power to determine whether or not a judge can be involved in plea negotiations. It is still the case that in one county, the prosecutor opposes any judicial involvement at all. It was also reported that approximately five years ago, one prosecutor actually had a *written* policy that permitted the conference only with select judges. Nothing would prevent any prosecutor now, or in the future, from adopting such a policy.

The Committee was sharply split on this proposed amendment. Several members of the Committee felt that it could be used to cut a prosecutor "out of the loop," or to coerce a prosecutor into accepting a "deal" that he or she did not want. In addition, it was reported that the Prosecutors Association was unanimously opposed to the proposed amendment. The Prosecutors Association reportedly felt

that the amendment would allow the judge to undercut what the prosecutor considered to be a fair offer. In addition, a defense attorney would then have less incentive to deal with the prosecutor, especially if the judge had a reputation for leaning toward the defense.

In response, those in favor of the proposed amendment noted that the intent was simply to give judges the ability to bring the parties together, not to authorize ex parte communications or undercut prosecutors. It was noted that the judge would impose whatever sentence he or she considered to be fair, and that there was no harm in the parties receiving advance notice of what that sentence would likely be, and in reaching the ultimate result more expeditiously. In fact, in the one county where the prosecutor refuses to allow judges to participate, judges very often try cases and give lesser sentences then those offered by the prosecutor. In other words, cases are being tried unnecessarily merely because the prosecutor was willing to make a negotiated recommendation for a sentence substantially higher than the judge would give. If the prosecutor was not in a position to veto judicial involvement, a significant number of cases being tried in that county would not need to be tried. The majority also notes that the Rule does not permit the judge to dismiss or downgrade any count without consent of the prosecutor.

By a vote of 9-7, the Committee recommends that R. 3:9-3(c) be amended. The County Prosecutors Association of New Jersey has filed a dissent to the proposed amendment, which is contained in Attachment A of this report.

3:9-3. Plea Discussions; Agreements; Withdrawals

(a) . . . No Change.

(b) . . . No Change.

(c) Disclosure to Court. On request of the prosecutor [and] or defense counsel, the court in the presence of both counsel may permit the disclosure to it of the tentative agreement and the reasons therefor in advance of the time for tender of the plea or, if no tentative agreement has been reached, the status of negotiations toward a plea agreement. The court may then indicate to the prosecutor and defense counsel whether it will concur in the tentative agreement or, if no tentative agreement has been reached [and with the consent of both counsel], the maximum sentence it would impose in the event the defendant enters a plea of guilty, assuming, however, in both cases that the information in the presentence report at the time of sentence is as has been represented to the court at the time of the disclosure and supports its determination that the interests of justice would be served thereby. If the agreement is reached without such disclosure or if the court agrees conditionally to accept the plea agreement as set forth above, or if the plea is to be based on the court's conditional indication about the sentence, all the terms of the plea, including the court's concurrence or its indication concerning sentence, shall be placed on the record in open court at the time the plea is entered. Nothing in this Rule shall be construed to authorize the court to dismiss or downgrade any charge without the consent of the prosecutor.

(d) . . . No Change.

(e) . . . No Change.

(f) . . . No Change.

(g) . . . No Change.

Note: Adopted July 17, 1975 to be effective September 8, 1975. Paragraph (d) adopted July 29, 1977 to be effective September 6, 1977; paragraph (d) redesignated as (e); paragraph (f) adopted July 21, 1980 to be effective September 8, 1980; paragraphs (b), (c) and (e) and captions for paragraphs (b) and (c) amended May 23, 1989 to be effective June 15, 1989; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraphs (a) and (f) amended, paragraph (g) adopted July 13, 1994 to be effective January 1, 1995; caption to paragraph (g) amended July 5, 2000 to be effective September 5, 2000[.]; paragraph (c) amended _____, to be effective _____.

4. Telephonic Arrest Warrants.

This matter was listed in the 2000-2002 Committee report as a matter held for future consideration. The Committee was asked to consider whether the rules should be amended to permit the issuance of arrest warrants by telephone. The question arose when one of the Assignment Judges learned that the police officers in his county were obtaining telephonic arrest warrants. The current rules do not specifically permit such a practice with regards to arrest warrants, but do permit the issuance of telephonic search warrants. See Rules 3:2-3, 3:3-1, 3:4-1 and 3:5-3(b).

In June 2001, the Conference of Assignment Judges discussed the practice of issuing arrest warrants by telephone, and concluded that it should be discontinued. The Conference also requested that the Criminal Practice and Municipal Court Practice Committees consider whether the rules should be amended to permit a judicial officer to issue a telephonic arrest warrant.

In a memorandum to the Assignment Judges dated August 15, 2001, the Administrative Director reiterated the Conference's position, and advised that any vicinage with telephonic arrest warrant procedures in place could request Supreme Court approval to continue those procedures. In response, the Bergen and Hudson Vicinages submitted requests for a rule relaxation to permit arrest warrants to be issued upon the sworn oral testimony of an applicant who is not physically in the presence of the issuing judge or other authorized judicial officer. At its March 12, 2002 meeting, the Administrative Council approved the Bergen and Hudson

requests. On March 20, 2002, the Court issued an Order relaxing Rules 3:2-3, 3:4-1, 7:2-1(c) and 7:3-1, and permitting the issuance of telephonic arrest warrants in accordance with a set of approved procedures. Those procedures read as follows

> A judge, or other authorized judicial officer, may issue an arrest warrant upon sworn oral testimony of a law enforcement applicant who is not physically present. Such sworn oral testimony may be communicated by the applicant to the judge, or other authorized judicial officer, by telephone, radio or other means of electronic communication.
>
> The judge, or other authorized judicial officer, shall administer the oath to the applicant and contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise, adequate longhand notes summarizing what is said shall be made by the judge, or other authorized judicial officer. Subsequent to taking the oath, the applicant must identify himself or herself and disclose the basis of his or her information that establishes probable cause for the issuance of an arrest warrant. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of an arrest warrant.

> An arrest warrant may issue if the judge, or other authorized judicial officer, is satisfied that probable cause exists for issuing the warrant. Upon approval, the judge, or other authorized judicial officer, shall memorialize the specific terms of the authorization and shall direct the applicant to enter this authorization verbatim on the complaint/warrant form. The judge, or other authorized judicial officer, shall direct the applicant to print his or her name, the date and time of the warrant, followed by the phrase "By Officer _____, per telephonic authorization by _____" on the complaint/warrant form.

A joint subcommittee comprised of members of the Criminal Practice and Municipal Practice Committees was created to consider possible amendments to the Part III and Part VII Rules. At its initial meeting, a December 4, 2001 conference call, the subcommittee quickly agreed that the Part III and Part VII Rules should contain identical language, but reached an impasse regarding whether the judge should be required to contemporaneously record the applicant's sworn testimony. The Municipal Court members of the subcommittee felt that because Municipal Court judges are on-call 24 hours a day, and because of the large number of calls and the times and places they are received, it would be impractical to contemporaneously record or take notes of the oral testimony

provided over the telephone. The Superior Court members of the subcommittee, however, believed that contemporaneous recordation was necessary to properly document the probable cause determination that supported issuance of the warrant.

The issue of contemporaneous recordation was discussed by the full Criminal Practice Committee at its January 23, 2002 meeting. The Committee believed that under State v. Valencia, 93 N.J. 126 (1983), which addressed the issuance of telephonic search warrants, contemporaneous recordation was constitutionally required when issuing telephonic arrest warrants.

The Conference of Criminal Presiding Judges also discussed the issue of contemporaneous recordation. The Conference was of the opinion that a judge should not be required to take notes, make a recording, or otherwise memorialize the telephone call with the police officer. The Conference reasoned that the judge's notes could then become discoverable and/or the judge could become a witness in a future proceeding. Also, if note-taking or recording the probable cause finding were required, it would be more than what is currently required when the applicant is physically present. The Conference also felt that the recordation requirement would be satisfied by the police officer sending a copy of the signed arrest warrant to the judge within a reasonable period of time.

In October 2002, the Bergen and Hudson Vicinages issued reports summarizing their experiences with the court-approved telephonic arrest warrant procedures. The two vicinages reported receiving approximately 500 applications for telephonic arrest warrants during the previous six months; approximately 266

in Bergen and 234 in Hudson. Both vicinages reported extremely high compliance with the new procedures. In addition, Bergen noted that as a result of the new procedures, "there were 266 times that a judge did not have to get out of bed in the middle of the night and go to the court to physically conduct the warrant application." It was also noted that no warrants had been challenged in the criminal process or in any civil suit, and none had been demanded as part of discovery. (NOTE: Neither Bergen or Hudson reported that judges' notes were requested as part of discovery).

The subcommittee met a second time, on December 3, 2002, in an attempt to resolve the impasse over contemporaneous recordation. The Municipal Court representatives reported that the Conference of Municipal Presiding Judges felt that recordation was not necessary, and would not approve a rule that contained a recordation requirement. The Municipal Court representatives also reiterated their position that recordation was an impractical, onerous burden, especially for judges who served in several different towns. (NOTE: Neither Bergen or Hudson reported that recordation was a problem). One judge was concerned about having to keep her longhand notes, or a tape recording, when she might not be in the same court the following day, or even the following week. It was also noted that since Municipal Court judges were always on call, they often received telephone calls at inconvenient or inopportune moments. One Municipal Court judge felt that a recordation requirement for telephonic arrest warrants would not be honored, and

noted that it was not honored with temporary restraining orders in domestic violence situations, as is required by R. 5:7A(b).

The subcommittee eventually focused on the difference between a phone call after the defendant was already in custody, and a phone call requesting authorization to go into a home to arrest someone. Some members believed that in the former case, the warrant could be reviewed the following day, or as soon as practicable; but in the latter case, contemporaneous recordation would be required. The Municipal Court representatives had not previously considered this distinction. They were asked to develop a position on this issue, and were invited to speak before the full Criminal Practice Committee.

The Municipal Court representatives appeared before the Criminal Practice Committee at its meeting on January 22, 2003. One of the Municipal Court representatives, who had taken part in the pilot program in Bergen County, referred to the rule relaxation as a "gift." He felt that telephonic arrest warrants enhanced the availability of the judges and conserved judicial resources. He added, however, that although he supplemented the complaint with his own handwritten notes, he did not want to continue having to do so.

The Municipal Court representatives then essentially rehashed their position that, given the number of calls and the often inconvenient times that they arrived, requiring contemporaneous recordation would be an impractical, onerous burden. Several members of the Criminal Practice Committee, however, strongly believed that a contemporaneous recordation of probable cause was

constitutionally required. They did not see how to avoid recordation, particularly when a case was commenced by complaint and the suspect was not already in custody.

The discussion next turned to the definition of "recordation." There was a difference of opinion among Committee members whether the language of the complaint would be sufficient to record the finding of probable cause. There was concern among some Committee members that often complaints were simply regurgitations of the statute and did not sufficiently establish probable cause for the arrest. It was noted that Hudson County's telephonic warrant application form contained a line for the judge to initial next to the finding of probable case. The basis of probable cause was further detailed at the bottom of the form. The Committee, however, did not reach an agreement regarding whether to use the form.

The Committee than discussed the significant difference between a suspect who was already in custody, and one who will be arrested after the issuance of a warrant. One member urged the Committee to follow Valencia and err on the side of caution when issuing an arrest warrant for a suspect who was not yet in custody. Another felt that if the suspect was not yet arrested, judicial authorization to arrest must be analogized to telephonic search warrants, and therefore, recordation would be required. It was also felt that, per Valencia, the reading of an affidavit or statement by the officer to a judge over the telephone would not suffice to establish probable cause. The majority viewpoint of the Committee was that an

arrest pursuant to the issuance of a warrant requires contemporaneous recordation. Regarding an arrest warrant issued subsequent to an arrest, the sense of the Committee was that some confirming recordation the following day might suffice. The Subcommittee was asked to consider the following issues: (1) the definition of recordation, (2) sufficiency of the complaint itself as a recordation of probable cause determination, (3) use of a form to record probable cause determination similar to that currently used in Hudson County, and (4) a final determination as to when recordation is necessary (post-arrest vs. pre-arrest warrants).

The Subcommittee met on March 10, 2003 to discuss these issues. Although there was still confusion regarding when contemporaneous recordation was necessary, the majority view was that recordation would certainly be required for telephonic arrest warrants issued before the defendant was taken into custody.

The Subcommittee then discussed the proper level of recordation that would survive future scrutiny. The Municipal Court judges did not approve of the form currently used by Hudson County to record the determination of probable cause for issuing telephonic arrest warrants. They suggested, rather, that an affidavit of probable cause, submitted by the police officer and attached to the complaint, would be a sufficient recordation of the facts. Although the Superior Court members of the subcommittee doubted that the Attorney General, or law enforcement, would support these procedures, they agreed to seek the Attorney General's opinion.

At the November 17, 2003 Municipal Practice Committee meeting, a representative from the Attorney General's Office reported that she had "no problem" with requiring police officers to complete and sign an affidavit in support of a telephonic arrest warrant - a position that was contrary to that taken by members of the Attorney General's Office at previous meetings. It was subsequently explained that the representative of the Attorney General's Office was expressing her own personal views, rather than the views of that office. As it appeared that there was no way to resolve the impasse over recordation, the Criminal Practice Committee felt that it should come to some type of resolution of this issue. Consequently, the Committee agreed to consider amendments to R. 3:2-3.

The proposed amendments to R. 3:2-3 mirror the language contained in the procedures approved by the Court for the telephonic arrest warrant pilot programs in the Bergen and Hudson Vicinages. The Committee initially believed that the proposed amendments should distinguish between instances where the suspect was already in custody, and instances where the suspect will be arrested after the issuance of a warrant. Upon further reflection, however, and in light of the extensive debate regarding this subject, it was felt that the safer course would be to make no distinction. The Committee also believed that, since many requests for telephonic warrants are made in the middle of the night, it would be important to memorialize the time that the authorization was given. The Committee does not

intend for these amendments to prohibit or affect an arrest without a warrant when there is probable cause for that arrest.

Finally, regarding the proposed rule's recordation requirement, it is not the Committee's intent to suggest alteration of the procedures for transmitting complaints by facsimile transmission permitted under the Court's rule relaxation order dated June 4, 1996. Where the officer transmits a complaint via facsimile to a court administrator, and the facts supporting a finding of probable cause are fully contained on the complaint itself, *i.e.,* no other facts supporting the probable cause determination are relayed via telephone, radio or other means of electronic communication, no recordation or contemporaneous notes would be required. Of course, if the officer supplemented the facts contained on the complaint in support of a finding of probable cause, recordation or contemporaneous notes would be required.

3:2-3. Arrest Warrant

(a) An arrest warrant shall be made on a Complaint-Warrant (CDR2) form. The warrant shall contain the defendant's name or if that is unknown, any name or description which identifies the defendant with reasonable certainty, and shall be directed to any officer authorized to execute it, ordering that the defendant be arrested and brought before the court that issued the warrant. Except as provided in paragraph (b), [T]the warrant shall be signed by the judge, clerk or deputy clerk, municipal court administrator, or deputy court administrator.

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

The judge, or other authorized judicial officer, shall administer the oath to the applicant and contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise, adequate longhand notes summarizing what is said shall be made by the judge, or other authorized judicial officer. Subsequent to taking the oath, the applicant must identify himself or herself and disclose the basis of his or her information that establishes probable cause for the issuance of an arrest warrant. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of an arrest warrant.

An arrest warrant may issue if the judge, or other judicial officer, is satisfied that probable cause exists for issuing the warrant. Upon approval, the judge, or other authorized judicial officer, shall memorialize the time and the specific terms of the authorization and shall direct the applicant to enter this authorization verbatim on the Complaint/Warrant form. The judge, or other judicial officer, shall direct the applicant to print his or her name, the date and time of the warrant, followed by the phrase "By Officer _____, per telephonic authorization by _____" on the Complaint/Warrant (CDR-2) form.

Note: Adopted July 13, 1994 to be effective January 1, 1995 [.] original text of rule amended and designated paragraph (a) and new paragraph (b) added _____ to be effective _____.

5. Rule Changes Approved by the Appellate Division Management Committee.

The Committee was asked to consider proposed amendments to R. 2:5-5(a), R. 2:7-4, R. 2:5-3(d), R. 2:6-11(b), R. 2:6-8, R. 2:9-3(d) and R. 2:9-10, which were drafted by the Appellate Division Management Committee, some after being referred by this Committee.

The proposed amendment to R. 2:5-5(a) permits a party to request, prior to moving for an order to settle the record and upon notice to all other parties, that the Clerk of the Court -in which the appeal is pending review the tape of sound or video recorded proceedings to determine whether a particular portion of the transcript accurately transcribed what was said by a participant. The Clerk shall notify all parties of the determination, and shall request that any objection be submitted in writing within ten days of the notification. If no timely written objection is received, the transcript shall be deemed corrected, and a copy of the notification, shall be filed. If any party objects, the motion for correction of the transcript shall be made to the appellate court, rather than the trial court or agency, if the appeal has already been calendared.

The proposed amendment to R. 2:7-4 provides that an indigent defendant appealing from a judgment of conviction by the Law Division on a trial de novo, who has been provided a transcript of the municipal court proceedings at public expense pursuant to R. 3:23-8(a), shall similarly be entitled to a transcript of the Law Division proceedings paid for in the same manner.

The proposed amendment to R. 2:5-3(d) raises the amount of the deposit for a transcript from $300.00 to $500.00. This amendment is discussed further in Item A (6) of this report.

The proposed amendment to R. 2:6-11(b) limits a cross-appellant's reply brief to the issues raised in the cross-appeal.

The proposed amendment to R.2:6-8 requires the appellant's brief to include a footnote in the procedural history listing the date of each volume of transcript and its numbered designation.

The proposed amendments to R. 2:9-3 and R. 2:9-10 add a statutory reference to N.J.S.A. 2C:35-14c. These amendments are discussed further in Item A (12) of this report.

The Committee recommends that these rules be amended as approved by the Appellate Division Management Committee.

The Appellate Division Management Committee also approved amendments to R.1:17-1, R.1:21-2, and R. 1:34-2. The Criminal Practice Committee supports these proposed amendments.

2:5-5. Correction or Supplementation of Record

(a) Motion to Settle the Record. A party who questions whether the record fully and truly discloses what occurred in the court or agency below shall, except as hereinafter provided, apply on motion to that court or agency to settle the record. The appellate court, on motion, may review such determination or may, on its own motion, order a correction of the record or may direct the court or agency to do so. The making of a motion pursuant to this rule shall toll the time for serving and filing the next brief due, but the remaining time shall again begin to run from the date of entry of an order disposing of such a motion. If the proceedings were sound or video recorded, a party, prior to moving for an order settling the record, may, on notice to all other parties, request the clerk of the court in which the appeal is pending to review the tape thereof to determine whether a particular portion of the transcript accurately transcribed what was said by a participant. The clerk shall notify all parties of the determination, requesting that any objection be submitted in writing within ten days of the notification. If no timely written objection is received, the transcript shall be deemed so corrected, and a copy of the notification shall be filed. If a party timely objects in writing, that party shall move for correction of the transcript in the court or agency from which the appeal is taken; however, if the appeal has already been calendared, the motion shall be made to the court in which the appeal is pending.

(b) . . . No Change.

Note: Source--R.R. 1:6-6, 4:88-9, 4:88-11, 7:13-4. Paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 13,

1994 to be effective September 1, 1994[.]; paragraph (a) amended _____ to be effective _____.

2:7-4. Relief in Subsequent Courts

A person who has been granted relief as an indigent by any court shall be granted relief as an indigent in all subsequent proceedings resulting from the same indictment, accusation or criminal or civil complaint in any court without making application therefor upon filing with the court in the subsequent proceeding a copy of the order granting such relief or a sworn statement to the effect that such relief was previously granted and stating the court and proceeding in which it was granted. The filing of such order or statement shall be accompanied by an affidavit stating that there has been no substantial change in the petitioner's financial circumstances since the date of the entry of the order granting such relief. An indigent defendant appealing from a judgment of conviction by the Law Division entered on a trial de novo, who has been afforded or had a right to a transcript at public expense of municipal court proceedings pursuant to R. 3:23-8(a), shall be entitled to a transcript of the Law Division proceedings paid for in the same manner as the municipal court transcript.

Note: Amended July 13, 1994 to be effective September 1, 1994[.]; amended to be effective .

2:5-3. Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request Form

(a) . . . No Change.

(b) . . . No Change.

(c) . . . No Change.

(d) Deposit for Transcript; Payment Completion. The appellant, if not the State or a political subdivision thereof, shall, at the time of making the request for the transcript, deposit with the reporter or the clerk of the court or agency from whom a transcript is ordered, either the estimated cost of the transcript as determined by the court reporter, clerk or agency, or the sum of [$300.00] $500.00 for each day or fraction thereof of trial or hearing. If the appellant is the State or a political subdivision thereof, it shall provide a voucher to the reporter or the clerk or the agency for billing for the cost of the transcript. The reporter, clerk or agency, as the case may be, shall upon completion of the transcript, bill or reimburse the appellant, as appropriate, for any sum due for the preparation of the transcript or overpayment made therefor. If the appellant is indigent and is entitled to have a transcript of the proceedings below furnished without charge for use on appeal, either the trial or the appellate court, on application, may order the transcript prepared at public expense. Unless the defendant is represented by the Public Defender or that office is otherwise obligated by law to provide the transcript to an indigent, the court shall order the transcript of the proceedings below furnished at the county's expense if the appeal involves prosecution for

violation of a statute and at the municipality's expense if the appeal involves prosecution for violation of an ordinance.

(e) . . . No Change.

(f) . . . No Change.

Note: Source--R.R. 1:2-8(e) (first, second, third, fourth, sixth and seventh sentences), 1:2-8(g), 1:6-3, 1:7-1(f) (fifth sentence), 3:7-5 (second sentence), 4:44-2 (second sentence), 4:61-1(c), 4:88-8 (third and fourth sentences), 4:88-10 (sixth sentence). Paragraphs (a)(b)(c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraphs (b) and (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended June 29, 1973 to be effective September 10, 1973; caption amended and paragraph (a) caption and text amended July 24, 1978 to be effective September 11, 1978; paragraphs (c) and (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended, paragraph (d) caption and text amended, former paragraph (e) redesignated paragraph (f), and paragraph (e) caption and text adopted November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c), (e) and (f) amended July 13, 1994 to be effective September 1, 1994[.]; paragraph (d) amended _____ to be effective _____.

2:6-11. Time for Serving and Filing Briefs; Appendices; Transcript; Notice of Custodial Status

(a) . . . No Change

(b) Time Where Cross Appeal Taken. Except as otherwise provided by R. 2:9-11 (sentencing appeals), if a cross appeal has been taken, the party first appealing, who shall be designated the appellant/cross respondent, shall serve and file the first brief and appendix within 30 days after the service of the notice of cross appeal or within the time prescribed for appellants by R. 2:6-11(a), whichever is later. Within 30 days after the service of such brief and appendix, the respondent/cross appellant shall serve and file an answering brief and appendix, if any, which shall also include therein the points and arguments on the cross appeal. Within 30 days thereafter, the appellant/cross respondent shall serve and file a reply brief, which shall also include the points and arguments answering the cross appeal. Within 10 days thereafter, the respondent/cross appellant may serve and file a reply brief[.], which shall be limited to the issues raised on the cross appeal. No other briefs shall be served or filed without leave of court. If a cross appeal has been taken, the appellant/cross respondent shall be responsible for ordering and filing the transcript pursuant to R. 2:5-3(e) and for serving it pursuant to paragraph (a) of this rule and R. 2:6-12(a).

(c) . . . No Change

(d) . . . No Change

(e) . . . No Change

Note: Source--R.R. 1:7-12(a)(c), 1:10-14(b), 2:7-3. Paragraph (b) amended by order of September 5, 1969 effective September 8, 1969; paragraph (a) amended July 7, 1971 to be effective September 13, 1971; caption and paragraphs (a) and (b) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended May 8, 1975 to be effective immediately; paragraphs (c), (d) and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (b) amended and titles of paragraphs (c)(d) and (e) added November 2, 1987 to be effective January 1, 1988; paragraphs (a) and (b) amended July 14, 1992 to be effective September 1, 1992; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998[.]; paragraph (b) amended to be effective .

2:6-8. References to Briefs; Appendices; Transcripts

References to a brief or appendix shall be made to the appropriate pages, and references to the stenographic transcript shall be made to the appropriate pages and lines thereof, by the following abbreviations:

"Pb8" for plaintiff's brief, page 8;

"Db8" for defendant's brief, page 8;

"Pa8" for plaintiff's appendix, page 8;

"Da12" for defendant's appendix, page 12;

"Ja15" for joint appendix, page 15;

"Prb8" for plaintiff's reply brief, page 8;

"Pra7" for plaintiff's reply appendix, page 7;

"T8-3" for transcript, page 8, line 3.

If there is more than one plaintiff or defendant, the appropriate party's name or initial or other identifying designation should precede the abbreviation. If there are multiple volumes of transcript, they shall be numbered sequentially by chronology, i.e., 1T, 2T, etc., irrespective of the nature of the proceeding. The procedural history of the appellant's brief shall list in a footnote the date of each volume of transcript and its numbered designation.

Note: Source--R.R. 1:7-8; amended July 13, 1994 to be effective September 1, 1994; amended July 12, 2002 to be effective September 3, 2002[.]; amended to be effective _____.

2:9-3. Stay Pending Review in Criminal Actions

(a) . . . No Change

(b) . . . No Change.

(c) . . . No Change.

(d) Stay Following Appeal by the State. Notwithstanding paragraphs (b) and (c) of this rule, execution of sentence shall be stayed pending appeal by the State pursuant to N.J.S.A. 2C:44-1f(2) or N.J.S.A. 2C:35-14c. Whether the sentence is custodial or non-custodial, bail pursuant to R. 2:9-4 shall be established as appropriate under the circumstances. A defendant may elect to execute a sentence stayed by the State's appeal but such election shall constitute a waiver of the right to challenge any sentence [increase] on the ground[s] that execution has commenced.

(e) . . . No Change.

(f) . . . No Change.

Note: Source--R.R. 1:2-8(a) (sixth sentence), 1:4-3(a) (first sentence) (b)(c)(d); paragraph (c) amended and paragraph (d) deleted July 29, 1977 to be effective September 6, 1977; paragraph (c) caption amended July 24, 1978 to be effective September 11, 1978; paragraph (d) adopted September 10, 1979 to be effective immediately; paragraph (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) adopted November 1, 1985 to be effective January 2, 1986; paragraphs (c) and (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (e) redesignated as paragraph (f) and new paragraph (e) adopted June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 12, 2002 to be effective September 3, 2002[.]; paragraph (d) amended to be effective .

2:9-10. Effect of Appeal by the State

An appeal by the State pursuant to N.J.S.A. 2C:44-1f(2) or N.J.S.A. 2C:35-14c shall not stay the entry of final judgment for purposes of an appeal or cross-appeal by the defendant.

Note: Adopted September 10, 1979 to be effective immediately[.]; amended to be effective .

1:17-1. Persons Prohibited

The following persons in or serving the judicial branch of government shall not hold any elective public office nor be a candidate therefor, nor engage in partisan political activity:

(a) . . . No Change

(b) The Administrative Director of the Courts, the Clerk of the Supreme Court, the Clerk [and the Administrator] of the Appellate Division of the Superior Court, the Clerk of the Superior Court, the Administrator of the Tax Court, and all employees of their respective offices, and official court reporters;

(c) . . . No Change

(d) . . . No Change.

(e) . . . No Change.

(f) . . . No Change.

(g) . . . No Change.

(h) . . . No Change.

Note: Source--R.R. 1:25C(a); paragraph (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (g) amended June 15, 1983 to be effective immediately; paragraph (i) amended July 26, 1984 to be effective September 10, 1984; paragraph (g) amended June 29, 1990 to be effective September 4, 1990; caption amended, paragraphs (b) and (c) amended, paragraph (d) deleted, former paragraph (e) redesignated paragraph (d), former paragraph (f) amended and redesignated paragraph (e), former paragraph (g) amended and redesignated paragraph (f), former paragraph (h) redesignated paragraph (g), and former paragraph (i) amended and redesignated paragraph (h) December 7, 1993, to be effective immediately[.]; paragraph (b) amended to be effective .

1:21-2. Appearances Pro Hac Vice

(a) Conditions for Appearance. An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual or a member or employee of a partnership or an employee of a professional corporation or limited liability entity authorized to practice law in such other jurisdiction, or an attorney admitted in this state, of good standing, who does not maintain in this state a bona fide office for the practice of law may, at the discretion of the court in which any matter is pending, be permitted, *pro hac vice*, to speak in such matter in the same manner as an attorney of this state who maintains a bona fide office for the practice of law in this state and who is therefore, pursuant to R. 1:21-1(a), authorized to practice in this state. Except for attorneys representing the United States of America or a sister state, [N]no attorney shall be admitted under this rule without annually complying with R. 1:20-1(b), R. 1:28-2, and R. 1:28B-1(e) during the period of admission. An application for admission pro hac vice shall be made on motion to all parties in the matter.

(b) . . . No Change.

(c) . . . No Change.

(d) . . . No Change.

Note: Source--R.R. 1:12-8. Amended December 16, 1969 effective immediately; caption and text amended November 27, 1974 to be effective April 1, 1975; amended January 10, 1979 to be effective immediately; former rule amended and

redesignated as paragraphs (a) and (b) and paragraph (c) adopted July 22, 1983 to be effective September 12, 1983; paragraph (a) amended January 31, 1984 to be effective February 15, 1984; new paragraph (c) adopted and former paragraph (c) redesignated as paragraph (d) November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraphs (b)(2) and (3) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(1)(iv) added June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a)(1)(i), (a)(1)(ii), (a)(1)(iii), and (a)(1)(iv) amended and redesignated as (a)(1)(A), (a)(1)(B), (a)(1)(C), and (a)(1)(D) July 5, 2000 to be effective September 5, 2000; paragraph (a) amended and subsections of paragraph (a)(3) redesignated from (i) through (vi) to (A) through (F) July 12, 2002 to be effective September 3, 2002[.]; paragraph (a) amended to be effective .

. . .

1:34-2. Clerks of Court

The clerk of every court, except the Supreme Court, the Appellate Division, the Superior Court and the Tax Court, shall be responsible to and under the supervision of the judge or presiding judge of the court which the clerk serves, the Assignment Judge of the county, and the Administrative Director of the Courts. The clerks of the Supreme and Superior Courts shall be responsible to and under the supervision of the Administrative Director of the Courts and the Chief Justice. The clerk of the Appellate Division shall be responsible to and under the supervision of the Administrative Director of the Courts, the Chief Justice and the Presiding Judge for Administration of the court. The clerk of the Tax Court shall be responsible to and under the supervision of the presiding judge of the court and the Administrative Director of the Courts. Each county shall have one or more deputy clerks of the Superior Court with respect to Superior Court matters filed in that county; deputy clerks may issue writs out of the Superior Court. The Surrogate of the county shall be the deputy clerk of the Superior Court, Chancery Division, Probate Part, with respect to probate matters pending in that county. The Vicinage Chief Probation Officer shall be the deputy clerk of the Superior Court for the purpose of certifying child support judgments and orders as required by R. 4:101, and with respect to writs of execution as provided by R. 4:59-1(b). All employees serving as deputy clerks of the Superior Court shall be, in that capacity, responsible to the Clerk of the Superior Court.

Note: Source--R.R. 6:2-7, 7:21-1, 7:21-2, 8:13-4. Amended July 14, 1972 to be effective September 5, 1972; amended June 20, 1979 to be effective July 1, 1979; amended June 29, 1990 to be effective September 4, 1990; amended July 14, 1992 to be effective September 1, 1992; amended June 28, 1996 to be effective June 28, 1996[.]; amended to be effective .

6. Costs of Transcripts on Appeal.

The Committee was asked to consider amending the Court Rules to clarify who must pay for transcripts for defendants appealing to the Appellate Division when they do not qualify for assignment of counsel either by the Public Defender on indictable offenses, or under Rodriquez v. Rosenblatt, 58 N.J. 281 (1971), with respect to non-indictables. The amendments were intended to clarify that in appeals to the Appellate Division by indigents after the denial of a second or subsequent petition for post-conviction relief, and in appeals of trials de novo by indigents, transcripts should be paid for by the entity required to do so under R. 3:23-8(a). Under R. 3:23-8(a), transcripts are furnished at the county's expense, if the appeal involves violation of a statute, and at the municipality's expense, if the appeal involves violation of an ordinance.

The Committee recommends that R. 2:5-3(d) be amended. The Committee does not intend for the proposed amendments to affect or preclude the payment of transcripts for indigents permitted in limited circumstances in a civil setting, such as in termination hearings. The proposed amendment is consistent with the amendments approved by the Appellate Division Management Committee. See Item A.5, supra.

2:5-3. Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request Form

(a) . . . No Change.

(b) . . . No Change.

(c) . . . No Change.

(d) Deposit for Transcript; Payment Completion. The appellant, if not the State or a political subdivision thereof, shall, at the time of making the request for the transcript, deposit with the reporter or the clerk of the court or agency from whom a transcript is ordered, either the estimated cost of the transcript as determined by the court reporter, clerk or agency, or the sum of [$300.00] $500.00 for each day or fraction thereof of trial or hearing. If the appellant is the State or a political subdivision thereof, it shall provide a voucher to the reporter or the clerk or the agency for billing for the cost of the transcript. The reporter, clerk or agency, as the case may be, shall upon completion of the transcript, bill or reimburse the appellant, as appropriate, for any sum due for the preparation of the transcript or overpayment made therefor. If the appellant is indigent and is entitled to have a transcript of the proceedings below furnished without charge for use on appeal, either the trial or the appellate court, on application, may order the transcript prepared at public expense. Unless the defendant is represented by the Public Defender or that office is otherwise obligated by law to provide the transcript to an indigent, the court shall order the transcript of the proceedings below furnished at the county's expense if the appeal involves prosecution for

violation of a statute and at the municipality's expense if the appeal involves prosecution for violation of an ordinance.

(e) . . . No Change.

(f) . . . No Change.

Note: Source--R.R. 1:2-8(e) (first, second, third, fourth, sixth and seventh sentences), 1:2-8(g), 1:6-3, 1:7-1(f) (fifth sentence), 3:7-5 (second sentence), 4:44-2 (second sentence), 4:61-1(c), 4:88-8 (third and fourth sentences), 4:88-10 (sixth sentence). Paragraphs (a)(b)(c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraphs (b) and (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended June 29, 1973 to be effective September 10, 1973; caption amended and paragraph (a) caption and text amended July 24, 1978 to be effective September 11, 1978; paragraphs (c) and (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended, paragraph (d) caption and text amended, former paragraph (e) redesignated paragraph (f), and paragraph (e) caption and text adopted November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c), (e) and (f) amended July 13, 1994 to be effective September 1, 1994[.]; paragraph (d) amended _____ to be effective _____.

7. Attorney for Complaining Witness Acting as Prosecuting Attorney in Appeals from Courts of Limited Criminal Jurisdiction.

The Committee considered whether R. 3:23-9(d), which permits the Law Division to allow the attorney for the complainant to represent the State on a municipal appeal, should be amended. In State v. Storm, 141 N.J. 245 (1995), the Court considered the practice of allowing private counsel for a complainant to prosecute a complaint in municipal court. This practice was permitted under what was formerly R. 7:4-4(b), but which is now R. 7:8-7(b). In considering this issue, the Court noted the various arguments against the use of private prosecutors, including that they pose a risk to a defendant's right to a fair trial; that the dual responsibilities to the complaining witness and to the State can create a conflict or the appearance of impropriety; and that those conflicting interests can undermine the prosecutor's impartiality and affect the assessment of probable cause, the disclosure of exculpatory evidence and the willingness to plea bargain. The Court observed that "[I]nevitably, private prosecutions undermine confidence in the integrity of the proceedings." Id. at 254.

The Court, however, also noted the long history of allowing private prosecutors in the United States and New Jersey; the valuable role of municipal courts in resolving private disputes; and that R. 7:4-4(b) facilitated access to the municipal courts. Consequently, the Court upheld the practice of allowing private counsel to prosecute a complaint in municipal court. The Court also requested that the Committee on Municipal Courts develop guidelines governing the

appointment of private prosecutors, and suggested that the following procedures be followed:

> . . . an attorney wishing to appear as a private prosecutor should notify the municipal prosecutor and the court. If the municipal prosecutor insists on proceeding with the prosecution, the prosecutor's decision should be final. In all other cases, the private attorney should disclose in a written certification all facts that foreseeably may affect the fairness of the proceedings . . .
>
> The relevant facts include the identity of the complainant, indicating (1) whether the complainant is an individual, a business (such as a department store), or an entity with its own police department (such as Rutgers University); (2) any actual conflict of interest arising from the attorney's representation of, and fee arrangement with, the complainant; (3) any civil litigation, existing or anticipated, between the complainant and the defendant; (4) whether the defendant is, or is expected to be, represented by counsel; and (5) any other facts that reasonably could affect the impartiality of the prosecutor and the fairness of the proceedings or otherwise create the appearance of impropriety. Id. at 255.

The Court also noted that the decision to appoint a private prosecutor should be made on a case-by-case basis. Ibid.

Since State v. Storm, the Supreme Court Committee on Municipal Courts has developed guidelines, and a Certification Application form, consistent with the Court's request. In addition, R. 7:8-7(b) was amended to include the following:

> The court may also, in its discretion and in the interest of justice . . . permit a private prosecutor to represent the government. A prosecutor may, however, be so permitted only if the court has first reviewed the attorney certification submitted on a form prescribed by the Administrative Director of the Courts, ruled on the contents of the certification, and granted the attorney's motion to act as

private prosecutor for good cause shown. The finding of good cause shall be made on the record.

The Committee recommends that R. 3:23-9(d) be amended to reflect the requirements of State v. Storm, and to be more consistent with R. 7:8-7(b). Although Storm addressed only whether a private prosecutor should be allowed at the municipal level, the Committee believes that the benefits and burdens of this practice are relevant on appeal to the Law Division. Consequently, the Law Division should follow the procedures outlined in Storm in determining whether to allow the complainant's attorney to act as the prosecuting attorney during the appeal. The complainant's attorney should first notify the prosecuting attorney and the court of the request. If the prosecuting attorney insists on handling the appeal, then that decision should be final. If the prosecutor agrees to let the private prosecutor handle the case, the Law Division can then follow the same guidelines, and use the same form, that were first set forth in Storm, and which were used by the municipal court below. The Certification Application form has been modified for use in the Superior Court.

The Committee also believes that, in making the determination of whether to allow a private prosecutor, the Law Division is not bound by the decision of the municipal court.

The Committee recommends that R. 3:23-9(d) be amended to essentially follow the language contained in R. 7:8-7(b), but also to clarify that the prosecuting attorney must agree before a private prosecutor is allowed to handle

the appeal to the Law Division.

3:23-9. Prosecuting Attorney Defined

In all appeals under R. 3:23 the prosecuting attorney shall be:

(a) . . . No Change.

(b) . . . No Change.

(c) . . . No Change.

(d) With the assent of the prosecuting attorney and the consent of the court, the attorney for a complaining witness or other person interested in the prosecution may be permitted to act for the prosecuting attorney[.]; provided, however, that the court has first reviewed the attorney certification submitted on a form prescribed by the Administrator Director of the Courts, ruled on the contents of the certification, and granted the attorney's motion to act as private prosecutor for good cause shown. The finding of good cause shall be made on the record.

Note: Source--R.R. 3:10-13. Paragraph (b) amended September 5, 1969 to be effective September 8, 1969; paragraph (d) amended November 22, 1978 to be effective December 7, 1978; paragraph (d) amended July 11, 1979 to be effective September 10, 1979[.];amended _____, to be effective _____.

RULE 3:23-9(d) CERTIFICATION APPLICATION FOR APPOINTMENT AS PRIVATE PROSECUTOR

State of New Jersey vs. _____
Docket Number(s): _____
Charge(s) _____

Attorney Information:
Name: _____
Address: _____
_____
Telephone Number: _____

This Certification is supplied to the _____ Superior Court, pursuant to the provisions of R. 3:23-9(d) and State v. Storm, 141 N.J. 245 (1995) to provide the court and the prosecutor with all facts that may foreseeably affect the fairness of the proceedings to enable the court to determine whether I may be appointed as an impartial private prosecutor for _____, the complaining witness in the above matter.

1. (Please circle the applicable letter). The complaining witness is (a) an individual, (b) a business (please describe): _____
or (c) an entity with its own police department (please describe): _____
_____

2. There is no actual conflict of interest arising from my representation of, and fee arrangement with, the complaining witness. Check if correct. [ ] If not, please explain:
_____
_____

3. The municipal prosecutor has elected not to conduct the prosecution. Check if correct. [ ] If not, please explain: _____
_____

4. The defendant is or is expected to be represented by counsel. [ ] Yes [ ] No [ ] Unknown. Notice has been given to defendant's attorney. [ ] Yes [ ] No

5. There is no civil litigation, existing or anticipated, between the complaining witness and the defendant concerning the same or similar facts as are contained in the complaint. In the event of such civil litigation, I have informed the complaining witness that neither I nor any member of my firm will undertake the complaining witness' representation in that matter. Check if correct.
[ ] If not, please explain: _____
_____

6. There are no other facts that could reasonably affect the impartiality of the private prosecutor and the fairness of the proceedings or otherwise create an appearance of impropriety. Check if correct. [ ] If not, please explain: _____
_____

Comments: _____

_____

Please attach additional sheets if necessary.

CERTIFICATION IN LIEU OF OATH

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

_____ _____

Date Name of Applicant

8. Presentence Reports on Non-Capital Counts.

On July 2, 2002, the Court issued its *Revised Supreme Court Directive on Capital Cause Appeal and Post-Conviction Relief Procedures.* Part IV of the Directive, which governs proportionality review procedures, requires that the Criminal Division Manager provide the Administrative Office of the Courts, Criminal Division, with a variety of case-related documents. Included among those documents is a copy of the presentence report on a conviction for murder and the imposition of the death sentence. R. 3:21-2(a), however, provides that in cases in which the death penalty will be imposed, a presentence report shall not be prepared.

The Committee believed that R. 3:21-2(a) was intended to apply only to the capital count of the indictment, and that a presentence report would still be prepared for the non-capital counts. Consequently, the Committee is recommending amendments to R. 3:21-2(a) that would clarify that intent.

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. [In cases in] On counts on which the death penalty [will] shall 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 , to be effective .

9. Automated Writ Process.

The Administrative Director of the Courts issued Directive #6-00 on October 2, 2000. That directive governed the writ process used for production of State inmates. That directive set forth to whom writs were to be sent and provided a standardized writ form.

At the request of the Department of Corrections, the Administrative Office of the Courts and the Department of Corrections reviewed the writ process in an effort to streamline the process. The major result of that review was the development of an automated writ capable of being sent electronically to the Department of Corrections. Prior to the development of an automated writ, writs had to be prepared and mailed to the Department of Corrections.

By order dated April 30, 2002, the Supreme Court relaxed the provisions of R. 3:1-4 to permit the Superior Court to issue and transmit to the Department of Corrections electronic orders to produce inmates for court proceedings. The Court's order further permitted the orders or writs to contain an electronically affixed signature of a Superior Court judge, and provided that such orders would have the same authority as orders to produce that contained the judge's original signature.

The Committee recommends the amendment of R. 3:1-4(a) to implement the Court's relaxation Order. The Committee recommends the adoption of additional language that essentially tracks the language contained in the Court's Order.

3:1-4. Orders; Form; Entry

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

(b) . . . No Change.

(c) . . . No Change.

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

10. Trial of Non-Indictables in Superior Court.

The Committee was asked to consider amending R. 3:1-6, which governs the trial of non-indictable offenses in Superior Court, by removing the reference to N.J.S.A. 2C:34-2b. Originally, that statute made the sale of obscene material a disorderly persons offense. The passage of L. 1982, c. 211, however, upgraded the offense to a crime of the fourth degree. Consequently, it is necessary to remove the reference to N.J.S.A. 2C:34-2b contained in R. 3:1-6(a).

The Committee notes that R. 3:1-6(a) was originally intended to eliminate the belief that non-indictable offenses could be filed in the Law Division as a matter of course. With the passage of time, however, it is now clearly established that except as required by law, such offenses shall generally be heard in Municipal Court. The Committee therefore recommends that all references to specific statutes be deleted from R. 3:1-6(a).

3:1-6. Trial of Non-Indictables in Superior Court

(a) Generally. Proceedings involving charges constituting disorderly persons offense or a petty disorderly persons offense shall be heard in Superior Court [when they are brought pursuant to N.J.S.A. 2C:34-2b, N.J.S.A. 2C:37-8, or] as [otherwise] required by law, and shall be governed by the rules in Part III insofar as applicable.

(b) . . . No Change.

Note: Adopted August 28, 1979 to be effective September 1, 1979. Formerly designated as R. 3:1-5(a), redesignated and new paragraph (b) added December 20, 1983 to be effective December 31, 1983[.]; paragraph (a) amended , to be effective .

11. Order and Dates for Filing, Briefing and Hearing Motions to Suppress.

This matter was listed in the 2000-2002 Committee report as a matter held for future consideration. The Committee had been asked to consider the procedures for filing suppression motions for warrantless searches. The rule currently permits the defendant to file a motion to suppress by alleging that an unlawful search occurred. The prosecutor must then file a brief in support of the search. In one county, prosecutors filed "check-off" briefs, or briefs relying on the police reports. The defendant responds by brief and counter-statement. As a result, the proceeding resembles discovery, and some judges have had difficulty determining whether a fact issue will be presented at the hearing.

A Subcommittee on Motions to Suppress was formed to review the procedures regarding the filing of suppression motions, including whether hearings should be routinely scheduled if the defense alleges that material facts are in dispute, whether briefs should be submitted after the hearing, and whether the motions should be decided sufficiently in advance of trial (*i.e.,* before the plea cut-off date). The Subcommittee was instructed not to change the burden of proof.

The Subcommittee recommended an amendment to R. 3:5-7(b) that would give judges the discretion, at the arraignment or status conference, to decide the order of filing and briefing and whether to hold a hearing.

The Committee discussed whether an evidentiary hearing should be held on every motion to suppress that involved a warrantless search, even when the defendant does not contest the facts. Some members of the Committee expressed

concern with the proposed amendments, if the hearing requirement was removed. The Committee also considered amending both paragraphs (b) and (c) of R. 3:5-7, and incorporating R. 3:10-2(a) into R. 3:5-7. The Committee was initially unable to reach a consensus, and asked the Conference of Criminal Presiding Judges for its comments. The Presiding Judges recommended adoption of the proposed amendment to R. 3:5-7(b).

The Committee, therefore, recommends R. 3:5-7(b) be amended, as follows.

3:5-7. Motion to Suppress Evidence and for Return of Property

(a) . . . No Change.

(b) Briefs. If the search was made with a warrant, a brief stating the facts and arguments in support of the motion shall be submitted with the notice of motion. The State shall, within ten days thereafter, submit a brief stating the facts and arguments in support of the search to which the movant may reply by brief submitted no later than three days before the hearing. If the search was made without a warrant, the State shall, within 15 days of the filing of the motion, file a brief, including a statement of the facts as it alleges them to be, and the movant shall file a brief and counter statement of facts no later than three days before the hearing. Pursuant to R. 3:10-2(a), the court may change the order and dates for filing, briefing and hearing any such motion, but any such change shall not alter the burden of proof imposed by law to establish the validity or invalidity of the search.

(c) . . . No Change.

(d) . . . No Change.

(e) . . . No Change.

(f) . . . No Change.

(g) . . . No Change.

Note: Source--R.R. 3:2A-6(a)(b). Paragraph (a) amended, paragraphs (b), (c), (d) adopted and former paragraphs (b), (c), (d) redesignated as (e), (f), (g) respectively January 28, 1977 to be effective immediately; paragraphs (a) and (c) amended July

16, 1979 to be effective September 10, 1979; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended June 9, 1989 to be effective June 19, 1989; paragraph (a) amended July 13, 1994 to be effective January 1, 1995; paragraph (a) amended January 5, 1998 to be effective February 1, 1998[.]; paragraph (b) amended _____, to be effective _____.

12. Rule 2:9-3(d) and Rule 2:9-10.

In State v. Hester, 357 N.J. Super. 428 (App. Div. 2003) certif. denied, 177 N.J. 428 (2003), the defendant was charged with various drug offenses. The defendant applied to be admitted into the Morris County Drug Court Program. The prosecutor opposed the defendant's application. The Morris County Drug Court Program rejected the defendant's application and he appealed to the drug court judge, who overruled the rejection. The State filed a Notice of Appeal, appealing the sentencing of the defendant over the prosecutor's objection.

The Appellate Division reversed the trial judge's decision, finding that because the defendant pled guilty to offenses for which there was a presumption of incarceration, the prosecutor had the right to object to the person being placed on special probation. N.J.S.A. 2C:35-14c. The Appellate Division held that the standard of review to be applied by the trial court in reviewing a prosecutor's objection to admission into a Drug Court Program and imposition of conditions of probation pursuant to N.J.S.A. 2C:35-14c was the "patent and gross abuse of discretion" standard.

In State v. Hester, the Appellate Division stated, in footnote 8, that R. 2:9-3(d), which governs stays of sentence following appeals by the State, has not been amended since the enactment of N.J.S.A. 2C:35-14c. Under that statute, drug court "special probation" sentences imposed over the prosecutor's objection are not final for ten days to permit appeals of such sentences by the prosecution.

The Committee recommends that R. 2:9-3(d) be amended to include a specific reference to N.J.S.A. 2C:35-14c, and to clarify that if the defendant elects to execute the sentence, that election shall constitute a waiver of the right to challenge any sentence increase or modification on the grounds that execution has commenced. The Committee also recommends that R. 2:9-10 be amended to include a specific reference to N.J.S.A. 2C:35-14c. This amendment is intended to clarify that an appeal by the State challenging a sentence of special probation pursuant to N.J.S.A. 2C:35-14c will not stay the entry of a final judgment for purposes of a defendant filing an appeal or cross-appeal. See Item A (5), supra.

2:9-3. Stay Pending Review in Criminal Actions

(a) . . . No Change

(b) . . . No Change.

(c) . . . No Change.

(d) Stay Following Appeal by the State. Notwithstanding paragraphs (b) and (c) of this rule, execution of sentence shall be stayed pending appeal by the State pursuant to N.J.S.A. 2C:44-1f(2) or N.J.S.A. 2C:35-14c. Whether the sentence is custodial or non-custodial, bail pursuant to R. 2:9-4 shall be established as appropriate under the circumstances. A defendant may elect to execute a sentence stayed by the State's appeal but such election shall constitute a waiver of the right to challenge any sentence [increase] on the ground[s] that execution has commenced.

(e) . . . No Change.

(f) . . . No Change.

Note: Source--R.R. 1:2-8(a) (sixth sentence), 1:4-3(a) (first sentence) (b)(c)(d); paragraph (c) amended and paragraph (d) deleted July 29, 1977 to be effective September 6, 1977; paragraph (c) caption amended July 24, 1978 to be effective September 11, 1978; paragraph (d) adopted September 10, 1979 to be effective immediately; paragraph (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) adopted November 1, 1985 to be effective January 2, 1986; paragraphs (c) and (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (e) redesignated as paragraph (f) and new paragraph (e) adopted June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 12, 2002 to be effective September 3, 2002[.]; paragraph (d) amended to be effective _____.

2:9-10. Effect of Appeal by the State

An appeal by the State pursuant to N.J.S.A. 2C:44-1f(2) or N.J.S.A. 2C:35-14c shall not stay the entry of final judgment for purposes of an appeal or cross-appeal by the defendant.

Note: Adopted September 10, 1979 to be effective immediately[.]; amended to be effective ____.

13. Rule 3:23-2.

The Committee was asked by the Municipal Courts Committee to consider amending R. 3:23-3 to permit appeals from post-judgment orders entered in municipal court. With the adoption of the Part VII Rules Governing the Practice in Municipal Courts, several post-conviction applications were expressly embodied in municipal court practice, *i.e.* motions for change or reduction of sentence, motion for a new trial and applications for post-conviction relief. See R. 7:9; 7:10.

Currently, R. 3:23-2 permits the defendant, a defendant's legal representative or other person aggrieved by the judgment of conviction entered by a court of limited jurisdiction to appeal within 20 days. However, there is no express authority for parties to appeal to the Law Division from an adverse determination of a post-conviction application.

The Committee recommends amending the rule to permit appeals by the defendant or State if aggrieved by an adverse final order granting or denying an application for post-conviction relief. The Committee is limiting the application of this rule to final post-judgment orders in contemplation that other court rules permit both a defendant and the State to seek leave to appeal from an interlocutory order entered by a court of limited criminal jurisdiction. See R. 3:24. The Committee will reconsider the matter if the amendment results in a large number of municipal appeals that do not currently occur or that adversely impact court administration.

3:23-2. Appeal; How Taken; Time

The defendant, a defendant's legal representative or other person aggrieved by a judgment of conviction [(including a judgment imposing a suspended sentence)], or the defendant or State, if aggrieved by a final post-judgment order entered by a court of limited jurisdiction shall appeal therefrom by filing a notice of appeal with the clerk of the court below within 20 days after the entry of judgment. Within five days after the filing of the notice of appeal, one copy thereof shall be served upon the prosecuting attorney, as hereinafter defined, and one copy thereof shall be filed with the Criminal Division Manager's office together with the filing fee therefor and an affidavit of timely filing of said notice with the clerk of court below and service upon the prosecuting attorney (giving the prosecuting attorney's name and address). On failure to comply with each of the foregoing requirements, the appeal shall be dismissed by the Superior Court, Law Division without further notice or hearing. However, if the appeal is from a final judgment of the Superior Court arising out of a municipal court matter heard by a Superior Court judge sitting as a municipal court judge, the appeal shall be to the Appellate Division in accordance with R. 2:2-3(a)(1) and the time limits of R. 2:4-1(a) shall apply.

Note: Source--R.R. 1:3-1(c), 1:27B(d), 3:10-2, 3:10-5. Amended November 22, 1978 to be effective December 7, 1978; amended July 11, 1979 to be effective September 10, 1979; amended November 5, 1986 to be effective January 1, 1987; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000

to be effective September 5, 2000; amended July 12, 2002 to be effective September 3, 2002[.]; amended to be effective .

B. Matters Previously Sent to the Supreme Court.

1. DNA Testing.

L. 2003, c. 183, enacted on September 22, 2003, amended N.J.S.A. 53:1-20.20 to require that every person convicted of a crime, or found not guilty by reason of insanity, have a blood sample drawn or other biological sample collected for purposes of DNA testing. When first enacted in 1994, the "DNA Database and Databank Act of 1994" required DNA testing for convictions or adjudications of certain sexual offenses. As a result, questions regarding DNA testing were included on the *Additional Questions for Certain Sexual Offenses* plea form (*Megan's Law Plea Form*). Subsequent revisions to the law, enacted on September 13, 2000, provided that convictions or adjudications for the following crimes also required DNA testing: murder, manslaughter, certain second degree aggravated assaults, first degree kidnapping, luring or enticing a child, engaging in sexual conduct which would impair or debauch the morals of a child, or an attempt to commit any of those crimes. As a result of those revisions, a new form, entitled *Additional Questions for Offenses Requiring DNA Testing*, was approved by the Court.

As a result of L. 2003, c. 183, the Committee considered whether the plea forms required further revision. Some members of the Committee felt that DNA testing was a collateral consequence of the plea, and that there was no need to include any questions pertaining to DNA testing on the plea forms. The

consensus, however, was that the following question should be included on the *Main Plea Form*:

> 5h. You will be required to provide a DNA sample, which could be used by law enforcement for the investigation of criminal activity, and pay for the cost of testing.

The Committee determined that because L. 2003, c. 183 required that every person convicted of a crime, or found not guilty by reason of insanity, have a blood sample drawn or other biological sample collected for purposes of DNA testing, the *Additional Questions for Offenses Requiring DNA Testing Form* was no longer necessary. As a result, that form was deleted.

The Committee also amended the Judgment of Conviction forms. Page one of the two-page Judgment of Conviction form was amended to remove the check box that ordered the defendant to provide a DNA sample and to pay for the costs of testing that sample. As L. 2003, c. 183 required that every person convicted of a crime, or found not guilty by reason of insanity, have a blood sample drawn or other biological sample collected for DNA testing, the Committee felt that it was no longer necessary to include a check box for applicable cases. Page one of the three-page Judgment of Conviction for Theft of a Motor Vehicle and Unlawful Taking of a Motor Vehicle form was also amended to include the following language:

> The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided.

The revised *Main Plea Form* and Judgment of Conviction forms were forwarded to the Administrative Director, who approved the amendments and, on November 6, 2003, promulgated the forms in Directive #12-03.

PLEA FORM

County _____

Prosecutor File Number _____

DEFENDANT'S NAME _____

before Judge _____

1. List the charges to which you are pleading guilty:

Ind./Acc./Comp.#	Count	Nature of Offense	Degree		Statutory Maximum Time	Fine	VCCB Assmt*
_____	_____	_____	_____	MAX	_____	_____	_____
_____	_____	_____	_____	MAX	_____	_____	_____
_____	_____	_____	_____	MAX	_____	_____	_____
_____	_____	_____	_____	MAX	_____	_____	_____
_____	_____	_____	_____	MAX	_____	_____	_____
Your total exposure as the result of this plea is:				TOTAL	_____	_____	_____

PLEASE CIRCLE APPROPRIATE ANSWER

2. a. Did you commit the offense(s) to which you are pleading guilty? [YES] [NO]

   b. Do you understand that before the judge can find you guilty, you will have to tell the judge what you did that makes you guilty of the particular offense(s)? [YES] [NO]

3. Do you understand what the charges mean? [YES] [NO]

4. Do you understand that by pleading guilty you are giving up certain rights? Among them are:

   a. The right to a jury trial in which the State must prove you guilty beyond a reasonable doubt? [YES] [NO]

   b. The right to remain silent? [YES] [NO]

   c. The right to confront the witnesses against you? [YES] [NO]

5. Do you understand that if you plead guilty:

   a. You will have a criminal record? [YES] [NO]

   b. Unless the plea agreement provides otherwise, you could be sentenced to serve the maximum time in confinement, to pay the maximum fine and to pay the maximum Violent Crimes Compensation Board Assessment? [YES] [NO]

   c. You must pay a minimum Violent Crimes Compensation Board assessment of $50 ($100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty? (Penalty is $30 if offense occurred between January 9, 1986 and December 22, 1991 inclusive. $25 if offense occurred before January 1, 1986.) [YES] [NO]

   d. If the offense occurred on or after February 1, 1993 but was before March 13, 1995, and you are being sentenced to probation or a State correctional facility, you must pay a transaction fee of up to $1.00 for each occasion when a payment or installment payment is made? If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, you must pay a transaction fee of up to $2.00 for each occasion when a payment or installment payment is made? [YES] [NO]

* VIOLENT CRIMES COMPENSATION BOARD ASSESSMENT

Defendant's Initials _____

5. e. If the offense occurred on or after August 2, 1993 you must pay a $75 Safe Neighborhood Services Fund assessment for each conviction? [YES] [NO]

   f. If the offense occurred on or after January 5, 1994 and you are being sentenced to probation, you must pay a fee of up to $25 per month for the term of probation? [YES] [NO]

   g. If the crime occurred on or after January 9, 1997 you must pay a Law Enforcement Officers Training and Equipment Fund penalty of $30? [YES] [NO]

   h. You will be required to provide a DNA sample, which could be used by law enforcement for the investigation of criminal activity, and pay for the cost of testing? [YES] [NO]

6. Do you understand that the court could, in its discretion, impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentenced imposed? [YES] [NO]

7. Did you enter a plea of guilty to any charges that require a mandatory period of parole ineligibility or a mandatory extended term? [YES] [NO]

   a. If you are pleading guilty to such a charge, the minimum mandatory period of parole ineligibility is _____ years and _____ months (fill in the number of years/months) and the maximum period of parole ineligibility can be _____ years and _____ months (fill in the number of years/months) and this period cannot be reduced by good time, work, or minimum custody credits.

8. Are you pleading guilty to a crime that contains a presumption of imprisonment which means that it is almost certain that you will go to state prison? [YES] [NO]

9. Are you presently on probation or parole? [YES] [NO]

   a. Do you realize that a guilty plea may result in a violation of your probation or parole? [YES] [NO] [N/A]

10. Are you presently serving a custodial sentence on another charge? [YES] [NO]

    a. Do you understand that a guilty plea may affect your parole eligibility? [YES] [NO] [N/A]

11. Do you understand that if you have plead guilty to, or have been found guilty on other charges, or are presently serving a custodial term and the plea agreement is silent on the issue, the court may require that all sentences be made to run consecutively? [YES] [NO] [N/A]

12. List any charges the prosecutor has agreed to recommend for dismissal:

Ind./Acc./Compl.#	Count	Nature of Offense and Degree

13. Specify any sentence the prosecutor has agreed to recommend:

_____

_____

_____

Defendant's Initials _____

14. Has the prosecutor promised that he or she will NOT: [YES] [NO]
    a. Speak at sentencing? [YES] [NO]
    b. Seek an extended term of confinement? [YES] [NO]
    c. Seek a stipulation of parole ineligibility? [YES] [NO]
15. Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution? [YES] [NO] [N/A]
16. Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty? [YES] [NO] [N/A]
17. Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty? [YES] [NO] [N/A]
18. Have you discussed with your attorney the legal doctrine of merger? [YES] [NO] [N/A]
19. Are you giving up your right at sentence to argue that there are charges you pleaded guilty to for which you cannot be given a separate sentence? [YES] [NO] [N/A]
20. List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as a part of this plea of guilty:

    _____

    _____

    _____

21. Have any promises other than those mentioned on this form, or any threats, been made in order to cause you to plead guilty? [YES] [NO]
22. a. Do you understand that the judge is not bound by any promises or recommendations of the prosecutor and that the judge has the right to reject the plea before sentencing you and the right to impose a more severe sentence? [YES] [NO]
    b. Do you understand that if the judge decides to impose a more severe sentence than recommended by the prosecutor, that you may take back your plea? [YES] [NO]
    c. Do you understand that if you are permitted to take back your plea of guilty because of the judge's sentence, that anything you say in furtherance of the guilty plea cannot be used against you at trial? [YES] [NO]
23. Are you satisfied with the advice you have received from your lawyer? [YES] [NO]
24. Do you have any questions concerning this plea? [YES] [NO]

DATE _____ DEFENDANT _____

DEFENSE ATTORNEY _____

PROSECUTOR _____

[ ] This plea is the result of the judge's conditional indications of the maximum sentence he or she would impose independent of the prosecutor's recommendation. Accordingly, the "Supplemental Plea Form for Non-Negotiated Pleas" has been completed.

PLEA FORM
FORMULARIO DE DECLARACIÓN

County _____
Condado
Prosecutor File Number _____
Número del expediente de la fiscalía

DEFENDANT'S NAME _____
NOMBRE DEL ACUSADO

before Judge _____
ante el Juez

1. List the charges to which you are pleading guilty: Enumere los cargos de que usted se declara culpable:

Ind./Acc./Comp.# N° de Ac. Formal/ Ac./Denun.	Count Cargo	Nature of Offense Naturaleza de la Infracción	Degree Grado		Statutory Maximum Máximo por Estatuto Time Tiempo	Fine Multa	VCCB Assmt.* Multa de la VCCB*
_____	_____	_____	_____	MAX / MÁX	_____	_____	_____
_____	_____	_____	_____	MAX / MÁX	_____	_____	_____
_____	_____	_____	_____	MAX / MÁX	_____	_____	_____
_____	_____	_____	_____	MAX / MÁX	_____	_____	_____
_____	_____	_____	_____	MAX / MÁX	_____	_____	_____
Your total exposure as the result of this plea is:		Su exposición total como resultado de esta declaración es:		TOTAL	_____	_____	_____

PLEASE CIRCLE
APPROPRIATE ANSWER
SÍRVASE MARCAR LA RESPUESTA
APROPIADA CON UN CÍRCULO

2. a. Did you commit the offense(s) to which you are pleading guilty?	¿Cometió usted la infracción (las infracciones) de que se declara culpable?	[YES/SÍ]	[NO]
b. Do you understand that before the judge can find you guilty, you will have to tell the judge what you did that makes you guilty of the particular offense(s)?	¿Entiende que antes de que el juez lo puede encontrar culpable, tendrá que decirle al juez qué es lo que usted hizo que lo hace culpable de la infracción particular (de las infracciones particulares)?	[YES/SÍ]	[NO]
3. Do you understand what the charges mean?	¿Entiende lo que significan los cargos?	[YES/SÍ]	[NO]

* VIOLENT CRIMES COMPENSATION BOARD ASSESSMENT
MULTA DE LA JUNTA DE COMPENSACIÓN POR DELITOS VIOLENTOS

Defendant's Initials
Iniciales del acusado _____

4. Do you understand that by pleading guilty you are giving up certain rights? Among them are:	¿Entiende que al declararse culpable, usted renuncia a ciertos derechos? Entre ellos están:		
a. The right to a jury trial in which the State must prove you guilty beyond a reasonable doubt?	El derecho a juicio con jurado en que el Estado tiene que probar su culpabilidad fuera de duda razonable?	[YES/SÍ]	[NO]
b. The right to remain silent?	El derecho de guardar silencio?	[YES/SÍ]	[NO]
c. The right to confront the witnesses against you?	El derecho de confrontar a los testigos en su contra?	[YES/SÍ]	[NO]
5. Do you understand that if you plead guilty:	¿Entiende que si usted se declara culpable:		
a. You will have a criminal record?	Tendrá antecedentes penales?	[YES/SÍ]	[NO]
b. Unless the plea agreement provides otherwise, you could be sentenced to serve the maximum time in confinement, to pay the maximum fine and to pay the maximum Violent Crimes Compensation Board Assessment?	A menos que el convenio declaratorio estipule otra cosa, se le podría sentenciar a cumplir el tiempo máximo de reclusión, a pagar la multa máxima y a pagar la multa máxima de la Junta de Compensación por Delitos Violentos?	[YES/SÍ]	[NO]
c. You must pay a minimum Violent Crimes Compensation Board assessment of $50 ($100 minimum if you are convicted of a crime of violence) for each count to which you plead guilty? (Penalty is $30 if offense occurred between January 9, 1986 and December 22, 1991 inclusive. $25 if offense occurred before January 1, 1986.)	Tendrá que pagar una multa mínima de la Junta de Compensación por Delitos Violentos de $50 dólares (un mínimo de $100 dólares si se le condena por un delito violento) por cada cargo de que usted se declara culpable? (La multa es $30 dólares si la infracción ocurrió entre el 9 de enero de 1986 y el 22 de diciembre de 1991. $25 dólares si la infracción ocurrió antes del primero de enero de 1986.)	[YES/SÍ]	[NO]
d. If the offense occurred on or after February 1, 1993 but was before March 13, 1995, and you are being sentenced to probation or a State correctional facility, you must pay a transaction fee of up to $1.00 for each occasion when a payment or installment payment is made? If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, you must pay a transaction fee of up to $2.00 for each occasion when a payment or installment payment is made?	Si la infracción ocurrió el primero de febrero de 1993 o después de dicha fecha pero antes del 13 de marzo de 1995 y se le sentencia a libertad a prueba o a un instituto correccional del estado, usted tendrá que pagar un gasto de transacción de hasta $1.00 dólar en cada ocasión en que se haga un pago o en que se abone una cuota? Si la infracción occurió el 13 de marzo de 1995 o después de dicha fecha, y se le sentencia a libertad a prueba, o si la sentencia por otro motivo requiere pagos de obligaciones económicas a la división de libertad a prueba, usted tendrá que pagar un gasto de transacción de hasta $2.00 dólares en cada ocasión en que se haga un pago o se abone una cuota?	[YES/SÍ]	[NO]

Defendant's Initials
Iniciales del acusado _____

5. e. If the offense occurred on or after August 2, 1993 you must pay a $75 Safe Neighborhood Services Fund assessment for each conviction?	Si la infracción ocurrió el 2 de agosto de 1993 o después de dicha fecha usted tendrá que pagar una multa de $75 dólares al Fondo de Servicios de Vecindarios Seguros por cada condena?	[YES/SÍ]	[NO]
f. If the offense occurred on or after January 5, 1994 and you are being sentenced to probation, you must pay a fee of up to $25 per month for the term of probation?	Si la infracción ocurrió el 5 de enero de 1994 o después de dicha fecha y se le sentencia a libertad a prueba, usted tendrá que pagar un cargo mensual de un máximo de $25 dólares durante el término de la libertad a prueba?	[YES/SÍ]	[NO]
g. If the crime occurred on or after January 9, 1997 you must pay a Law Enforcement Officers Training and Equipment Fund penalty of $30?	Si el delito ocurrió el 9 de enero de 1997 o después de esa fecha, usted tiene que pagar una multa de $30 dólares al Fondo de Capacitación y Equipo de Oficiales del Orden?	[YES/SÍ]	[NO]
h. You will be required to provide a DNA sample, which could be used by law enforcement for the investigation of criminal activity, and pay for the cost of testing?	Se requerirá que usted suministre y pague el costo del análisis de una muestra de su ADN que podría ser usada por las authoridades del orden público en la investigación de actividades delictuosas.	[YES/SÍ]	[NO]
6. Do you understand that the court could, in its discretion, impose a minimum time in confinement to be served before you become eligible for parole, which period could be as long as one half of the period of the custodial sentenced imposed?	¿Entiende que a su discreción el juez podría imponerle un tiempo mínimo de reclusión que cumplir antes que usted esté en condiciones para estar en libertad condicional, y que ese período podría ser tan largo como la mitad del período de la sentencia custodial que se le haya impuesto a usted?	[YES/SÍ]	[NO]
7. Did you enter a plea of guilty to any charges that require a mandatory period of parole ineligibility or a mandatory extended term?	¿Presentó usted una declaración de culpabilidad a cualquier cargo que requiera un período obligatorio sin posibilidades de libertad condicional o un término obligatorio prolongado?	[YES/SÍ]	[NO]
a. If you are pleading guilty to such a charge, the minimum mandatory period of parole ineligibility is _____ years and _____ months (fill in the number of years/months) and the maximum period of parole ineligibility can be _____ years and _____ months (fill in the number of years/months) and this period cannot be reduced by good time, work, or minimum custody credits.	Si usted se declara culpable de tal cargo, el período mínimo obligatorio sin posibilidades de libertad condicional es _____ años y _____ meses (llene la cantidad de años/meses) y el período máximo en que no está en condiciones de estar en libertad condicional pordrá ser de _____ años y _____ meses (llene la cantidad de años/meses) y dicho período no se podrá reducir por créditos por buen comportamiento, trabajo o custodia mínima.		

Defendant's Initials _____
Iniciales del acusado

8. Are you pleading guilty to a crime that contains a presumption of imprisonment which means that it is almost certain that you will go to state prison?	¿Usted se declara culpable de un delito que conlleve la presunción de encarcelamiento lo cual quiere decir que es casi seguro que usted irá a una prisión del estado?	[YES/SÍ]	[NO]	
9. Are you presently on probation or parole?	¿Actualmente se encuentra usted bajo libertad a prueba o libertad condicional?	[YES/SÍ]	[NO]	
a. Do you realize that a guilty plea may result in a violation of your probation or parole?	¿Se da cuenta usted que una declaración de culpabilidad podrá resultar en una infracción de su libertad a prueba o libertad condicional?	[YES/SÍ]	[NO]	[N/A] [NO ME INCUMBE]
10. Are you presently serving a custodial sentence on another charge?	¿Actualmente está cumpliendo usted una sentencia custodial por otro cargo?	[YES/SÍ]	[NO]	
a. Do you understand that a guilty plea may affect your parole eligibility?	¿Entiende usted que una declaración de culpabilidad podrá afectar sus posibilidades de conseguir libertad condicional?	[YES/SÍ]	[NO]	[N/A] [NO ME INCUMBE]
11. Do you understand that if you have plead guilty to, or have been found guilty on other charges, or are presently serving a custodial term and the plea agreement is silent on the issue, the court may require that all sentences be made to run consecutively?	¿Entiende usted que si se ha declarado culpable de otros cargos, o se lo han encontrado culpable de otros cargos, o si actualmente está cumpliendo un término custodial y el convenio declaratorio no menciona el tema, el juez podrá requerir que las sentencias sean consecutivas?	[YES/SÍ]	[NO]	[N/A] [NO ME INCUMBE]

12. List any charges the prosecutor has agreed to recommend for dismissal: Enumere los cargos que el (la) fiscal haya acordado recomendar que se desestimen:

Ind./Acc./Compl.# N° de Ac. Formal/Ac./Denun.	Count Cargo	Nature of Offense and Degree Naturaleza y Grado de la Infracción

Defendant's Initials
Iniciales del acusado _____

13. Specify any sentence the prosecutor has agreed to recommend:

Especifique cualquier sentencia que el fiscal haya acordado recomendar:

_____

_____

_____

14. Has the prosecutor promised that he or she will NOT:

¿Ha prometido el fiscal que él o ella NO:

a. Speak at sentencing?	Hablará cuando lo sentencien a usted?	[YES/SÍ]	[NO]
b. Seek an extended term of confinement?	Tratará de obtener un término prolongado de reclusión?	[YES/SÍ]	[NO]
c. Seek a stipulation of parole ineligibility?	Tratará de obtener la estipulación de que usted no tiene posibilidades de conseguir libertad condicional?	[YES/SÍ]	[NO]

15. Are you aware that you must pay restitution if the court finds there is a victim who has suffered a loss and if the court finds that you are able or will be able in the future to pay restitution?	¿Sabe usted que tendrá que pagar una restitución si el juez determina que existe una víctima que ha sufrido una pérdida y si el juez determina que usted puede o en el futuro podrá pagar una restitución?	[YES/SÍ]	[NO]	[N/A] [NO ME INCUMBE]
16. Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty?	¿Entiende usted que si ocupa un cargo público o si es empleado público se podrá requerir que renuncie su cargo o empleo en virtud de su declaración de culpabilidad?	[YES/SÍ]	[NO]	[N/A] [NO ME INCUMBE]
17. Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?	¿Entiende usted que si no es ciudadano o nativo de los Estados Unidos, podrá ser deportado en virtud de su declaración de culpabilidad?	[YES/SÍ]	[NO]	[N/A] [NO ME INCUMBE]
18. Have you discussed with your attorney the legal doctrine of merger?	¿Ha hablado usted con su abogado sobre la doctrina legal de fusión?	[YES/SÍ]	[NO]	[N/A] [NO ME INCUMBE]
19. Are you giving up your right at sentence to argue that there are charges you pleaded guilty to for which you cannot be given a separate sentence?	¿Renuncia usted al derecho que tiene cuando lo sentencien de arguir que hay cargos de que se declaró culpable para los cuales no se le puede imponer una sentencia aparte?	[YES/SÍ]	[NO]	[N/A] [NO ME INCUMBE]

Defendant's Initials
Iniciales del acusado _____

20. List any other promises or representations that have been made by you, the prosecutor, your defense attorney, or anyone else as a part of this plea of guilty:

Enumere cualquier otra promesa o representación que haya hecho usted, el fiscal, su abogado defensor, o cualquier otra persona como parte de esta declaración de culpabilidad:

_____

_____

_____

21. Have any promises other than those mentioned on this form, or any threats, been made in order to cause you to plead guilty?	Además de las que se mencionan en este formulario, ¿se le ha hecho alguna otra promesa o amenaza para conseguir que usted se declare culpable?	[YES/SÍ]	[NO]
22. a. Do you understand that the judge is not bound by any promises or recommendations of the prosecutor and that the judge has the right to reject the plea before sentencing you and the right to impose a more severe sentence?	¿Entiende usted que el juez no se ecuentra obligado por ninguna promesa o recomendación del fiscal y que el juez tiene el derecho de rechazar la declaración antes de sentenciarlo a usted y el derecho de imponerle una sentencia mayor?	[YES/SÍ]	[NO]
b. Do you understand that if the judge decides to impose a more severe sentence than recommended by the prosecutor, that you may take back your plea?	¿Entiende usted que si el juez decide imponerle una sentencia mayor que la que recomienda el fiscal, usted podrá retractar su declaración?	[YES/SÍ]	[NO]
c. Do you understand that if you are permitted to take back your plea of guilty because of the judge's sentence, that anything you say in furtherance of the guilty plea cannot be used against you at trial?	¿Entiende que si se permite que usted retracte su declaración de culpabilidad por la sentencia del juez, cualquier cosa que usted diga que promueva la declaración de culpabilidad no se podrá usar en su contra en un juicio?	[YES/SÍ]	[NO]
23. Are you satisfied with the advice you have received from your lawyer?	¿Está usted conforme con los consejos que ha recibido de su abogado?	[YES/SÍ]	[NO]
24. Do you have any questions concerning this plea?	¿Tiene usted alguna pregunta con respecto a esta declaración?	[YES/SÍ]	[NO]

DATE _____ DEFENDANT _____
FECHA ACUSADO

DEFENSE ATTORNEY _____
ABOGADO DEFENSOR

PROSECUTOR _____
FISCAL

[ ] This plea is the result of the judge's conditional indications of the maximum sentence he or she would impose independent of the prosecutor's recommendation. Accordingly, the "Supplemental Plea Form for Non-Negotiated Pleas" has been completed.

Esta declaración es el resultado de las indicaciones condicionales del juez en cuanto a la sentencia máxima que él o ella impondría sin consideración de la recomendación del fiscal. Por consiguiente, se ha completado el "Formulario Suplementario para Declaraciones No Negociadas".

State of New Jersey

v.

DEFENDANT:
(Specify Complete Name)

DATE OF BIRTH	SBI NUMBER
DATE OF ARREST	DATE INDICTMENT/ ACCUSATION FILED
DATE OF ORIGINAL PLEA	ORIGINAL PLEA ☐ NOT GUILTY ☐ GUILTY

New Jersey Superior Court Law Division - Criminal

- ☐ **JUDGMENT OF CONVICTION**
- ☐ **CHANGE OF JUDGMENT**
- ☐ **ORDER FOR COMMITMENT**
- ☐ **INDICTMENT / ACCUSATION DISMISSED**
- ☐ **JUDGMENT OF ACQUITTAL**

ADJUDICATION BY

☐ GUILTY PLEA DATE: ☐ NON-JURY TRIAL DATE:

☐ JURY TRIAL DATE: ☐ Dismissed/Acquitted DATE:

ORIGINAL CHARGES

IND / ACC NO.	COUNT	DESCRIPTION	DEGREE	STATUTE

FINAL CHARGES

COUNT	DESCRIPTION	DEGREE	STATUTE

It is, therefore, on _____ **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows:

☐ The defendant is hereby sentenced to community supervision for life.

☐ The defendant is hereby ordered to serve a _____ year term of parole supervision which term shall begin as soon as defendant completes the sentence of incarceration.

☐ The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.

☐ The court finds that the defendant is amenable to sex offender treatment.

☐ The court finds that the defendant is willing to participate in sex offender treatment.

The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided.

☐ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

☐ Defendant is to receive credit for time spent in custody (R. 3:21-8).	TOTAL NUMBER OF DAYS	DATE (From/To) DATE (From/To)
☐ Defendant is to receive gap time credit for time spent in custody (N.J.S.A. 2C:44-5b(2)).	TOTAL NUMBER OF DAYS	DATE (From/To)

Total Custodial Term _____ Institution _____ Total Probation Term _____

State of New Jersey v. _____ S.B.I. # _____ IND / ACC # _____

Total FINE $_____

Total RESTITUTION $_____

If the offense occurred on or after December 23, 1991, an assessment of $50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $25 if offense is before January 9, 1986.)

☐ Assessment imposed on

count(s) _____

is $ _____ each.

Total VCCB Assessment $ _____

☐ Installment payments are due at the rate of

$ _____ per _____

beginning _____
(DATE)

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)

___ 1st Degree @ $3000
___ 2nd Degree @ $2000
___ 3rd Degree @ $1000
___ 4th Degree @ $750
___ Disorderly Persons or Petty Disorderly Persons @ $500

Total D.E.D.R. Penalty $_____

☐ Court further ORDERS that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED. _____ Offenses @ $50.

Total Lab Fee $_____

3) Name of Drugs involved _____

4) A mandatory driver's license suspension of _____ months is ORDERED.

The suspension shall begin today, _____ and end _____

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant's Address _____

Eye Color _____ Sex _____ Date of Birth _____

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____. Driver's License Number _____

☐ Defendant's non-resident driving privileges are hereby revoked for _____ months.

If the offense occurred on or after February 1, 1993 but was before March 13, 1995 and the sentence is to probation or to a state correctional facility, a transaction fee of up to $1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 169). If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, a transaction fee of up to $2.00 is ordered for each occasion when a payment is made. (P.L. 1995, c. 9).

If the offense occurred on or after August 2, 1993, a $75 Safe Neighborhood Services Fund assessment is ordered for each conviction. P.L. 1993, c. 220

If the offense occurred on or after January 5, 1994 and the sentence is to probation, a fee of up to $25 per month for the probationary term is ordered. (P.L. 1993, c. 275) Amount per month _____.

If the crime occurred on or after January 9, 1997, a $30 Law Enforcement Officers Training and Equipment Fund penalty is ordered.

If the crime occurred on or after May 4, 2001, and the defendant has been convicted of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of a minor under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(4), luring or enticing a child pursuant to 2C:13-6, criminal sexual contact pursuant to 2C:14-3b if the victim is a minor, kidnapping pursuant to 2C:13-1, criminal restraint pursuant to 2C:13-2 or false imprisonment pursuant to 2C:13-3 if the victim is a minor and the offender is not the parent, promoting child prostitution pursuant to 2C:34-1b(3) or (4), or an attempt to commit any of these crimes, a $800 Statewide Sexual Assault Nurse Examiner Program Penalty is ordered for each of these offenses.

NAME (Court Clerk or Person preparing this form)	TELEPHONE NUMBER	NAME (Attorney for Defendant at Sentencing)

STATEMENT OF REASONS - Include all applicable aggravating and mitigating factors

JUDGE (Name)	JUDGE (Signature)	DATE

State of New Jersey

v.

DEFENDANT:
(Specify Complete Name)

DATE OF BIRTH	SBI NUMBER
DATE OF ARREST	DATE INDICTMENT/ ACCUSATION FILED
DATE OF ORIGINAL PLEA	ORIGINAL PLEA ☐ NOT GUILTY ☐ GUILTY

New Jersey Superior Court Law Division - Criminal

- ☐ JUDGMENT OF CONVICTION
- ☐ CHANGE OF JUDGMENT
- ☐ ORDER FOR COMMITMENT
- ☐ INDICTMENT / ACCUSATION DISMISSED
- ☐ JUDGMENT OF ACQUITTAL

ADJUDICATION BY

☐ GUILTY PLEA DATE: ☐ NON-JURY TRIAL DATE:

☐ JURY TRIAL DATE: ☐ Dismissed/Acquitted DATE:

ORIGINAL CHARGES

IND / ACC NO.	COUNT	DESCRIPTION	DEGREE	STATUTE

FINAL CHARGES

COUNT	DESCRIPTION	DEGREE	STATUTE

It is, therefore, on _____ **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows:

☐ The defendant is hereby sentenced to community supervision for life.

☐ The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.

☐ The court finds that the defendant is amenable to sex offender treatment.

☐ The court finds that the defendant is willing to participate in sex offender treatment.

The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided.

☐ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

☐ Defendant is to receive credit for time spent in custody (R. 3:21-8).	TOTAL NUMBER OF DAYS	DATE (From/To) DATE (From/To)
☐ Defendant is to receive gap time credit for time spent in custody (N.J.S.A. 2C:44-5b(2)).	TOTAL NUMBER OF DAYS	DATE (From/To)

Total Custodial Term _____ Institution _____ Total Probation Term _____

State of New Jersey v. _____ S.B.I. # _____ IND / ACC # _____

Total FINE $_____

Total RESTITUTION $_____

If the offense occurred on or after December 23, 1991, an assessment of $50 is imposed on each count on which the defendant was convicted unless the box below indicates a higher assessment pursuant to N.J.S.A. 2C:43-3.1. (Assessment is $30 if offense is on or after January 9, 1986 but before December 23, 1991, unless a higher penalty is noted. Assessment is $25 if offense is before January 9, 1986.)

☐ Assessment imposed on

count(s) _____

is $ _____ each.

Total VCCB Assessment $ _____

☐ Installment payments are due at the rate of

$ _____ per _____

beginning _____
(DATE)

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each.)

___ 1st Degree @ $3000
___ 2nd Degree @ $2000
___ 3rd Degree @ $1000
___ 4th Degree @ $750
___ Disorderly Persons or Petty Disorderly Persons @ $500

Total D.E.D.R. Penalty $_____

☐ Court further ORDERS that collection of the D.E.D.R. penalty be suspended upon defendant's entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED. _____ Offenses @ $50.

Total Lab Fee $_____

3) Name of Drugs involved _____

4) A mandatory driver's license suspension of _____ months is ORDERED.

The suspension shall begin today, _____ and end _____

Driver's License Number _____

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant's Address _____

Eye Color _____ Sex _____ Date of Birth _____

☐ The defendant is the holder of an out-of-state driver's license from the following jurisdiction _____. Driver's License Number _____

☐ Defendant's non-resident driving privileges are hereby revoked for _____ months.

If the offense occurred on or after February 1, 1993 but was before March 13, 1995 and the sentence is to probation or to a state correctional facility, a transaction fee of up to $1.00 is ordered for each occasion when a payment or installment payment is made. (P.L. 1992, c. 169). If the offense occurred on or after March 13, 1995 and the sentence is to probation, or the sentence otherwise requires payments of financial obligations to the probation division, a transaction fee of up to $2.00 is ordered for each occasion when a payment is made. (P.L. 1995, c. 9).

If the offense occurred on or after August 2, 1993, a $75 Safe Neighborhood Services Fund assessment is ordered for each conviction. P.L. 1993, c. 220

If the offense occurred on or after January 5, 1994 and the sentence is to probation, a fee of up to $25 per month for the probationary term is ordered. (P.L. 1993, c. 275) Amount per month _____.

If the crime occurred on or after January 9, 1997, a $30 Law Enforcement Officers Training and Equipment Fund penalty is ordered.

NAME (Court Clerk or Person preparing this form)	TELEPHONE NUMBER	NAME (Attorney for Defendant at Sentencing)

If the offense occurred on or after April 2, 1991 and the conviction or guilty plea is for violation of N.J.S.A. 2C:20-2 for theft of a motor vehicle
or
If the offense occurred on or after August 2, 1993 and the conviction or guilty plea is for a violation of N.J.S.A. 2C:20-10 for unlawful taking of a motor vehicle ("Joyriding") the following are imposed:

1. A mandatory penalty of $ _____.

First Offense	$ 500
Second	$ 750
3rd or Subsequent Offense	$ 1000

2. A mandatory driver's license suspension of _____ years is **ORDERED.**

First Offense	1 year license suspension
Second Offense	2 year license suspension
3rd or Subsequent Offense	10 year license suspension

The suspension shall begin today, _____ and end _____. Driver's License Number _____.

IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING:

Defendant's Address _____ Eye color _____ Sex ____ Date of Birth _____

☐ Defendant is the holder of an out-of-state driver's license from the following jurisdictiion _____. Driver's License Number _____
☐ Defendant's non-resident driving privileges are hereby revoked for _____ Months.

State of New Jersey v. _____ S.B.I. # _____ IND / ACC # _____

STATEMENT OF REASONS -- INCLUDE ALL APPLICABLE AGGRAVATING AND MITIGATING FACTORS

JUDGE (Name)	JUDGE (Signature)	DATE

2. Additional Questions for Certain Sexual Offenses/Additional Questions for Certain Sexual Offenses Committed on or after December 1, 1998 Plea Forms.

The Office of the Public Defender, Special Hearings Unit, asked the Committee to consider amending the *Additional Questions for Certain Sexual Offenses* plea form to advise defendants that community supervision for life is a form of parole, and may lead to substantial restrictions on where they could live, work or travel. There was also a request made to amend the standard plea form to advise the defendant that by pleading guilty he may, in certain cases, be putting himself at risk for civil commitment under the *New Jersey Sexually Violent Predator Act.*

In State v. Mumin, 361 N.J. Super., 370 (App. Div. 2003), the defendant pled guilty to criminal sexual contact. Criminal sexual contact qualifies as a predicate sexually violent offense for civil commitment pursuant to N.J.S.A. 30:4-27.26(b), a provision of the *New Jersey Sexually Violent Predator Act.* The defendant was, thereafter, found to be a sexually violent predator and was committed to the Special Treatment Unit. Based on his involuntary commitment, defendant moved to retract his original plea because he had not been advised that he could be involuntarily committed by virtue of his plea. The trial judge denied the motion and the defendant appealed. The Appellate Division held that the trial court was not obliged to advise the defendant that he could be involuntarily committed as a consequence of his plea, because the commitment under the

Sexually Violent Predator Act was not penal in nature. Thus, the consequence was a collateral consequence of the plea.

Out of an abundance of caution, the Committee decided that a defendant must be advised that involuntary civil commitment under the *Sexually Violent Predator Act* is a possible consequence of his or her plea, even though State v. Bellamy, 178 N.J. 127 (2003), was then pending before the Supreme Court. During the arguments before the Court in Bellamy, the parties agreed that several plea forms were in need of revision. Bellamy has now been decided, requiring those revisions.

In State v. Jamgochian, 363 N.J. Super. 220 (App. Div. 2003), the defendant pled guilty to second degree sexual assault. He sought post-conviction relief from the restrictions imposed on him by the *Megan's Law* requirement that he be sentenced to community supervision for life by virtue of his conviction for sexual assault. See N.J.S.A. 2C:43-6.4. Post-conviction relief was denied by the trial court without an evidentiary hearing and the defendant appealed. The Appellate Division held that the defendant was entitled to an evidentiary hearing. In *dicta*, the Appellate Division suggested that the plea form should contain an explanation of what community supervision for life entails.

These issues were discussed by the Committee, which recommended the following changes to the plea forms:

1) That the ***Additional Questions for Certain Sexual Offenses Committed on or after December 1, 1998 Form*** be amended to

delete Question 8, concerning civil commitment under the *Sexually Violent Predator Act*, N.J.S.A. 30:4-27.24 to -27.38. Including that question on this form could lead to the mistaken belief that only sexually violent offenses that occurred on or after December 1, 1998 are eligible for civil commitment. The recommendation is to move this question to the *Additional Questions for Certain Sexual Offenses Form.*

2) That the ***Additional Questions for Certain Sexual Offenses Form*** be amended to include a new Question 7, concerning civil commitment under the Sexually Violent Predator Act, N.J.S.A. 30:4-27.24 to -27.38. This addition is intended to clarify that a defendant convicted of a sexually violent offense, regardless of the date of that offense, is eligible for civil commitment. In addition, the introductory paragraph of the form has been amended to reflect the range of offenses that could later result in the defendant's civil commitment. Included in this language is the "catch-all" provision contained in N.J.S.A. 30:4-27.26, which specifies that a "sexually violent offense" includes "any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the person's offense should be considered a sexually violent offenses." As a result of this "catch-all" provision, an offense that is not specifically listed in N.J.S.A. 30:4-27.27, such as stalking, could later be found to be a sexually violent offense, and could result in the defendant's civil commitment. Consequently, when taking a guilty plea, the judge should consider whether the defendant's actions had a sexual component and, if so, should consider advising the defendant of the possibility of civil commitment. Finally, the form has been amended to include a question (Question 4(b)) that lists some of the possible restrictions under a sentence of community supervision for life. This change is intended to comply with the suggestion made in State v. Jamgochian, 363 N.J. Super. 220 (App. Div. 2003).

The full Committee approved the changes recommended by the Subcommittee on Forms. The revised plea forms were forwarded to the Administrative Director, who approved the amendments and, on November 6, 2003, promulgated the forms in Directive #12-03.

ADDITIONAL QUESTIONS FOR CERTAIN SEXUAL OFFENSES

These additional questions need to be answered if you are pleading guilty to the offense of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(4), luring or enticing a child pursuant to 2C:13-6, criminal sexual contact pursuant to 2C:14-3b if the victim is a minor; kidnapping pursuant to 2C:13-1, criminal restraint pursuant to 2C:13-2 or false imprisonment pursuant to 2C:13-3 if the victim is a minor and the offender is not the parent, promoting child prostitution pursuant to 2C:34-1b(3), (4), or any attempt to commit any such offense. Note also that Question 7 includes the offense of felony murder if the underlying crime is sexual assault, as well as any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the offense should be considered a sexually violent offense, or an attempt to commit these offenses.

1. Registration

a) Do you understand that you must register with certain public agencies? [YES] [NO]

b) Do you understand that if you change residence you must notify the law enforcement agency where you are registered, and must re-register with the chief law enforcement officer of the municipality in which you will reside, or the Superintendent of State Police if the municipality does not have a chief law enforcement officer agency, no less than 10 days before you intend to reside at the new address? [YES] [NO]

2. Address Verification

Do you understand that if you are pleading guilty to aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to 2C:13-1c(2) or any attempt to commit any of these crimes and at sentencing the court finds that your conduct was characterized by a pattern of repetitive, compulsive behavior you must verify your address with the appropriate law enforcement agency every 90 days or if the court finds your conduct is not characterized by a pattern of repetitive and compulsive behavior, you must verify your address annually? [YES] [NO]

3. Notification

Do you understand that the requirement of registration may result in notification to law enforcement, community organizations, or the public at large, of your release from incarceration or presence in the community? [YES] [NO]

4. Community Supervision for Life

(a) Do you understand that if you are pleading guilty to the crime of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to 2C:24-4a, luring, or an attempt to commit any such offense, the court, in addition to any other sentence, will impose a special sentence of community supervision for life? [YES] [NO]

(b) Do you understand that being sentenced to community supervision for life means that: you will be supervised for at least 15 years as if on parole, and subject to conditions appropriate to protect the public and foster rehabilitation, including, but not limited to counseling; and other restrictions, which may include restrictions on where you can live, work or travel? [YES] [NO]

5. Internet Posting

Do you understand that as a result of your conviction your name, age, race, sex, date of birth, height, weight, eye color, any distinguishing scars or tattoos you have, your photograph, the make, model, color, year and license plate number of any vehicle you operate, the street address, zip code, municipality and county in which you reside and a description of the offense for which you are pleading guilty, may be publicly available on the internet? [YES] [NO]

6. Statewide Sexual Assault Nurse Examiner Program Penalty

Do you understand that if the crime occurred on or after May 4, 2001 as a result of your guilty plea you will be required to pay a penalty of $800 for each offense for which you are pleading guilty? [YES] [NO]

7. Civil Commitment

Do you understand that if you are convicted of a sexually violent offense, such as aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2)(b), criminal sexual contact, felony murder if the underlying crime is sexual assault, an attempt to commit any of these offenses, or any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the offense should be considered a sexually violent offense, you may upon completion of your term of incarceration, be civilly committed to another facility if the court finds, after a hearing, that you are in need of involuntary civil commitment? [YES] [NO]

Date_____ Defendant _____

Defense Attorney_____ Prosecutor_____

ADDITIONAL QUESTIONS FOR CERTAIN SEXUAL OFFENSES

PREGUNTAS ADICIONALES PARA CIERTOS ACTOS CRIMINALES SEXUALES

These additional questions need to be answered if you are pleading guilty to the offense of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(4), luring or enticing a child pursuant to 2C:13-6, criminal sexual contact pursuant to 2C:14-3b if the victim is a minor; kidnapping pursuant to 2C:13-1, criminal restraint pursuant to 2C:13-2 or false imprisonment pursuant to 2C:13-3 if the victim is a minor and the offender is not the parent, promoting child prostitution pursuant to 2C:34-1b(3), (4), or any attempt to commit any such offense. Note also that Question 7 includes the offense of felony murder if the underlying crime is sexual assault, as well as any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the offense should be considered a sexually violent offense, or an attempt to commit these offenses.

Usted debe contestar a estas preguntas adicionales si se declara culpable del acto criminal de agresión sexual con agravantes, agresión sexual, contacto sexual criminal con agravantes, rapto bajo 2C:13-1c(2), poner en peligro el bienestar de un niño participando en conducta sexual que perjudique o pervierta la moral del niño bajo 2C:24-4a, poner en peligro el bienestar de un niño comforme a 2C:24-4b(4), seduciendo o atrayendo con engaño a un niño conforme a 2C:13-6, contacto sexual criminal conforme a 2C:14-3b si la víctima es un menor; rapto conforme a 2C:13-1, constreñimiento ilegal conforme a 2C:13-2 o privación ilegal de libertad conforme a 2C:13-3 si la víctima es un menor y el infractor no es uno de los padres, fomento de la prostitución infantil conforme a 2C:34-1b(3), (4), o cualquier intento de cometer cualquiera de dichos actos criminales. Tenga en cuenta también que la pregunta 7 incluye el delito de homicidio preterintencional si el delito subyacente es agresión sexual, así como también cualquier delito respecto al cual el juez hace constar en el acta su decisión específica de que, dadas las circunstancias del caso, dicho delito se debe considerar un delito sexualmente violento, o un intento de cometer dichos delitos.

1. Registration	**Registro**	
a. Do you understand that you must register with certain public agencies?	¿Entiende usted que tiene que registrarse con ciertas agencias públicas?	[YES/SÍ] [NO]
b. Do you understand that if you change residence you must notify the law enforcement agency where you are registered and must re-register with the chief law enforcement officer of the municipality in which you will reside, or the Superintendent of State Police if the municipality does not have a chief law enforcement officer agency, no less than 10 days before you intend to reside at the new address?	¿Entiende usted que si cambia de residencia tiene que notificar a la agencia del orden público donde está registrado y tiene que volver a registrarse con el oficial principal del orden público del municipio en que usted residirá, o con el Superintendente de la Policía Estatal si el municipio no tiene una agencia principal del orden público, por lo menos 10 días antes de que usted decida residir en la dirección nueva?	[YES/SÍ] [NO]
2. Address Verification	**Verificación de Su Dirección**	
Do you understand that if you are pleading guilty to aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to 2C:13-1c(2) or any attempt to commit any of these crimes and at sentencing the court finds that your conduct was characterized by a pattern of repetitive, compulsive behavior you must verify your address with the appropriate law enforcement agency every 90 days or if the court finds your conduct is not characterized by a pattern of repetitive and compulsive behavior, you must verify your address annually?	¿Entiende que si usted se declara culpable de agresión sexual con agravantes, agresión sexual, contacto sexual criminal con agravantes, rapto conforme a 2C:13-1c(2) o cualquier intento de cometer cualquiera de dichos delitos y cuando lo sentencien el juez encuentra que su conducta se caracterizaba por una manera de comportamiento reincidente y compulsiva, usted tiene que verificar su dirección con la agencia apropiada del orden público cada 90 días o si el juez encuentra que su conducta no se caracteriza por una manera de comportamiento reincidente y compulsiva usted tiene que verificar su dirección una vez al año?	[YES/SÍ] [NO]
3. Notification	**Notificación**	
Do you understand that the requirement of registration may result in notification to law enforcement, community organizations, or the public at large, of your release from incarceration or presence in the community?	¿Entiende usted que el requerimiento de registro podrá dar por resultado que se notifique a agencias del orden público, a organizaciones en la comunidad o al público en general, de que salió en libertad o de su presencia en la comunidad?	[YES/SÍ] [NO]

4. Community Supervision for Life	**Supervisión de por Vida en la Comunidad**		
a. Do you understand that if you are pleading guilty to the crime of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to 2C:24-4a, luring, or an attempt to commit any such offense, the court, in addition to any other sentence, will impose a special sentence of community supervision for life?	¿Entiende usted que si se declara culpable de un delito de agresión sexual con agravantes, agresión sexual, contacto sexual criminal con agravantes, rapto conforme a 2C:13-1c(2), poner en peligro el bienestar de un niño participando en conducta sexual que perjudique o pervierta la moral del niño conforme a 2C:24-4a, de seducir, o el intento de cometer cualquiera de dichos delitos, el juez, además de cualquier otra sentencia, le impondrá una sentencia especial de supervisión de por vida en la comunidad?	[YES/SÍ]	[NO]
b. Do you understand that being sentenced to community supervision for life means that: you will be supervised for at least 15 years as if on parole, and subject to conditions appropriate to protect the public and foster rehabilitation, including, but not limited to counseling; and other restrictions, which may include restrictions on where you can live, work or travel?	¿Entiende usted que la sentencia de supervisión de por vida en la comunidad significa que: usted estará bajo supervisión durante un mínimo de 15 años como si se encontrara en libertad condicional y estará sujeto a las condiciones que sean apropiadas para proteger al público y promover su rehabilitación, que incluirán pero no se limitarán a asesoramiento; y a otras restricciones que podrán incluir restricciones en cuanto a donde usted podrá vivir, trabajar o viajar?	[YES/SÍ]	[NO]
5. Internet Posting	**Divulgación en el Internet**		
Do you understand that as a result of your conviction your name, age, race, sex, date of birth, height, weight, eye color, any distinguishing scars or tattoos you have, your photograph, the make, model, color, year and license plate number of any vehicle you operate, the street address, zip code, municipality and county in which you reside and a description of the offense for which you are pleading guilty, may be publicly available on the internet?	¿Entiende usted que como resultado de su condena, pueden estar públicamente disponibles en el Internet su nombre y apellido, raza, sexo, fecha de nacimiento, estatura, peso, color de los ojos, cualquier cicatriz o tatuaje particular que tenga, su fotografía, la marca, el modelo, el color, año y número de la placa de cualquier vehículo que opere, la dirección, código postal, municipio y condado en que reside y una descripción del delito del que se está declarando culpable?	[YES/SÍ]	[NO]

6. Statewide Sexual Assault Nurse Examiner Program Penalty	**Multa del Programa Estatal de Enfermeras Examinadoras de Víctimas de Agresiones Sexuales**	
Do you understand that if the crime occurred on or after May 4, 2001 as a result of your guilty plea you will be required to pay a penalty of $800 for each offense for which you are pleading guilty?	¿Entiende usted que si el delito ocurrió el 4 de mayo de 2001 o después de esa fecha, como resultado de su declaración de culpabilidad se requerirá que pague una multa de $800 dólares por cada delito del cual se está declarando culpable?	[YES/SÍ] [NO]
7. Civil Commitment	**Confinamiento Civil**	
Do you understand that if you are convicted of a sexually violent offense, such as aggravated sexual assault, sexual assault, aggravated criminal sexual conduct, kidnapping under 2C:13-1c(2)(b), criminal sexual contact, felony murder if the underlying crime is sexual assault, an attempt to commit any of these offenses, or any offense for which the court makes a specific finding on the record that, based on the circumstances of the case, the offense should be considered a sexually violent offense, you may upon completion of your term of incarceration, be civilly committed to another facility if the court finds, after a hearing, that you are in need of involuntary civil commitment?	¿Entiende usted que si lo condenan por un delito sexualmente violento, como por ejemplo agresión sexual con agravantes, agresión sexual, contacto sexual criminal con agravantes, rapto conforme a 2C:13-1c(2)(b), contacto sexual criminal, homicidio preterintencional si el delito subyacente es agresión sexual, un intento de cometer cualquiera de dichos delitos o cualquier delito respecto al cual el juez hace constar en el acta su decisión específica de que, dadas las circunstancias del caso, el delito se debe considerar un delito sexualmente violento, cuando usted termine su término de encarcelamiento, es posible que lo confinen mediante un proceso civil en otra instalación si después de una audiencia el juez decide que a usted le hace falta un confinamiento civil involuntario?	[YES/SÍ] [NO]

DATE _____ DEFENDANT _____
FECHA ACUSADO

DEFENSE ATTORNEY _____ PROSECUTOR _____
ABOGADO DEFENSOR FISCAL

ADDITIONAL QUESTIONS FOR CERTAIN SEXUAL OFFENSES COMMITTED ON OR AFTER DECEMBER 1, 1998

These additional questions need to be answered if you are pleading guilty to the offense of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(4), or any attempt to commit any such offense.

1. Do you understand you will be required to submit to a psychological examination by the Department of Corrections the purpose of which is to determine if your conduct in committing the offense was characterized by a pattern of repetitive and compulsive behavior and if it was, whether you are amenable to (will benefit from) sex offender treatment and you are willing to participate in such treatment? [YES] [NO]

2. Do you understand if the examination reveals that your conduct is characterized by a pattern of repetitive and compulsive behavior, and you are amenable to (will benefit from) sex offender treatment and willing to participate in such treatment, the judge shall, upon recommendation of the Department of Corrections, sentence you to confinement at the Adult Diagnostic and Treatment Center for sex offender treatment; however, if the sentence imposed is greater than 7 years, you will first be confined at a facility other than the Adult Diagnostic and Treatment Center? [YES] [NO]

3. Do you understand if the court finds your conduct is characterized by a pattern of repetitive and compulsive behavior and you are not amenable to sex offender treatment or if you are amenable (will benefit from) but you are not willing to participate in such treatment, the court will sentence you to a term of incarceration to be served in another facility which will not provide for sex offender treatment and in such event, you will not receive commutation time for good behavior or each work credits for time served in such other facility? [YES] [NO]

4. Do you understand you will be able to challenge the findings of the Department of Corrections in a hearing and at that hearing you will have the right to confront the witnesses against you and to cross examine them and then present evidence on your own behalf? [YES] [NO]

5. Do you understand if you are sentenced to the Adult Diagnostic and Treatment Center

   a. that any future parole will not be guided by the normal parole guidelines? [YES] [NO]

b. that you will be eligible for release when the State Parole Board, after receiving a recommendation from a special classification review board, finds you have achieved a satisfactory level of progress in sex offender treatment and that you will then be released on parole unless the State Parole Board determines by a preponderance of the evidence that you have failed to cooperate in your rehabilitation or there is reasonable expectation that you will violate conditions of parole? [YES] [NO]

c. that you could spend more time in treatment than you would spend if sentenced to state prison? [YES] [NO]

6. Do you understand that if you are determined to be a repetitive, compulsive sex offender who is amenable to (will benefit from) sex offender treatment but you are not willing to participate in such treatment and are confined to a facility other than theAdult Diagnostic and Treatment Center, you will also be subject to the same parole eligibility terms as contained in section 5 above? [YES] [NO]

7. Do you understand that if your conduct is not characterized by a pattern of repetitive, compulsive behavior or you are not amenable to sex offender treatment you will not become primarily eligible for parole until you have served any mandatory minimum term imposed by the court or one third of the sentence imposed where no mandatory minimum term is fixed and neither term will be reduced by commutation time for good behavior or work credits? [YES] [NO]

Date _____ Defendant _____

Defense Attorney _____

Prosecutor _____

NOTE: If the defendant is a female and qualifies for sex offender treatment, she will not be confined at the Adult Diagnostic and Treatment Center but a facility designated by the Commissioner of Corrections where she will receive similar sex offender treatment.

ADDITIONAL QUESTIONS FOR CERTAIN SEXUAL OFFENSES COMMITTED ON OR AFTER DECEMBER 1, 1998

PREGUNTAS ADICIONALES PARA CIERTOS DELITOS SEXUALES COMETIDOS A PARTIR DEL PRIMERO DE DICIEMBRE DE 1998

These additional questions need to be answered if you are pleading guilty to the offense of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping under 2C:13-1c(2), endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child under 2C:24-4a, endangering the welfare of a child pursuant to 2C:24-4b(4), or any attempt to commit any such offense.

Usted tiene que contestar a estas preguntas adicionales si se está declarando culpable del delito de agresión sexual con agravantes, agresión sexual, contacto sexual criminal con agravantes, rapto según 2C:13-1c(2), poner en peligro el bienestar de un menor participando en una conducta sexual que perjudique o corrompa la moral del menor según 2C.24-4a, poner en peligro el bienestar de un menor conforme a 2C.24-4b(4) o del intento de cometer cualquiera de dichos delitos.

1. Do you understand you will be required to submit to a psychological examination by the Department of Corrections the purpose of which is to determine if your conduct in committing the offense was characterized by a pattern of repetitive and compulsive behavior and if it was, whether you are amenable to (will benefit from) sex offender treatment and you are willing to participate in such treatment?	¿Entiende usted que se requerirá que se someta a un examen psicológico realizado por el Departamento de Correcciones con el propósito de determinar si su conducta se caracterizaba por un patrón de comportamiento repetidor y compulsivo cuando cometió el delito, y de ser así, si usted aceptaría (se beneficiaría de) un tratamiento para delincuentes sexuales y si usted estaría dispuesto a participar en dicho tratamiento?	[YES/SÍ] [NO]
2. Do you understand if the examination reveals that your conduct is characterized by a pattern of repetitive and compulsive behavior, and you are amenable to (will benefit from) sex offender treatment and willing to participate in such treatment, the judge shall, upon recommendation of the Department of Corrections, sentence you to confinement at the Adult Diagnostic and Treatment Center for sex offender treatment; however, if the sentence imposed is greater than 7 years, you will first be confined at a facility other than the Adult Diagnostic and Treatment Center?	¿Entiende usted que si el examen revela que su conducta se caracteriza por un patrón de comportamiento repetidor y compulsivo, y usted aceptaría (se beneficiaría de) un tratamiento para delincuentes sexuales y estaría dispuesto a participar en dicho tratamiento, el juez, ante la recomendación del Departamento de Correctiones, lo sentenciará a reclusión en el Centro de Diagnóstico y Tratamiento de Adultos, para tratamiento de delincuentes sexuales; sin embargo, si la sentencia que le impongan es de más de 7 años, primero lo recluirán en una institución que no sea el Centro de Diagnóstico y Tratamiento de Adultos?	[YES/SÍ] [NO]

3. Do you understand if the court finds your conduct is characterized by a pattern of repetitive and compulsive behavior and you are not amenable to sex offender treatment or if you are amenable (will benefit from) but you are not willing to participate in such treatment, the court will sentence you to a term of incarceration to be served in another facility which will not provide for sex offender treatment and in such event, you will not receive commutation time for good behavior or work credits for time served in such other facility?	¿Entiende que si el juez determina que su conducta se caracteriza por un patrón de comportamiento repetidor y compulsivo y usted no aceptaría un tratamiento para delincuentes sexuales o si aceptaría (se beneficiaría de) dicho tratamiento pero no está dispuesto a participar en él, el juez lo sentenciará a un término de encarcelamiento que cumplirá en otra institución que no incluirá ningún tratamiento para delincuentes sexuales y en dicho caso, no se le conmutará el tiempo por buena conducta ni recibirá créditos de trabajo por el tiempo cumplido en esa otra institución?	[YES/SÍ] [NO]
4. Do you understand you will be able to challenge the findings of the Department of Corrections in a hearing and at that hearing you will have the right to confront the witnesses against you and to cross examine them and then present evidence on your own behalf?	¿Entiende usted que podrá disputar en una vista los hallazgos del Departamento de Correcciones y que en esa vista tendrá el derecho de confrontar a los testigos en su contra, de contrainterrogarlos y de presentar pruebas a su favor?	[YES/SÍ] [NO]
5. Do you understand if you are sentenced to the Adult Diagnostic and Treatment Center	¿Entiende usted que si lo sentencian al Centro de Diagnóstico y Tratamiento de Adultos	
a. that any future parole will not be guided by the normal parole guidelines?	las pautas normales de libertad condicional no regirán para cualquier libertad condicional en el futuro?	[YES/SÍ] [NO]
b. that you will be eligible for release when the State Parole Board, after receiving a recommendation from a special classification review board, finds you have achieved a satisfactory level of progress in sex offender treatment and that you will then be released on parole unless the State Parole Board determines by a preponderance of the evidence that you have failed to cooperate in your rehabilitation or there is reasonable expectation that you will violate conditions of parole?	usted calificará para que lo pongan en libertad cuando la Junta Estatal de Libertad Condicional, después de recibir la recomendación de una junta especial de revisión de clasificaciones, encuentre que usted ha logrado un nivel satisfactorio de progreso en el tratamiento para delincuentes sexuales y que entonces lo pondrán en libertad bajo palabra a menos que la Junta Estatal de Libertad Bajo Palabra determine por una preponderancia de las pruebas que usted ha dejado de colaborar en su rehabilitación o si es razonable esperar que usted infrinja las condiciones de libertad condicional?	[YES/SÍ] [NO]

5. c. that you could spend more time in treatment than you would spend if sentenced to state prison?	que usted podría pasar más tiempo bajo tratamiento que el que pasaría si lo sentenciaran a la prisión estatal?	[YES/SÍ] [NO]
6. Do you understand that if you are determined to be a repetitive, compulsive sex offender who is amenable to (will benefit from) sex offender treatment but you are <u>not</u> willing to participate in such treatment and are confined to a facility other than the Adult Diagnostic and Treatment Center, you will also be subject to the same parole eligibility terms as contained in section 5 above?	¿Entiende usted que si se determina que es un delincuente sexual repetidor y compulsivo y que aceptaría (se beneficiaría de) un tratamiento para delincuentes sexuales pero usted <u>no</u> está dispuesto a participar en dicho tratamiento y queda recluido en una institución que no sea el Centro de Diagnóstico y Tratamiento de Adultos, también estará sujeto a los mismos términos que figuran más arriba en la sección 5 para salir en libertad condicional?	[YES/SÍ] [NO]
7. Do you understand that if your conduct is <u>not</u> characterized by a pattern of repetitive, compulsive behavior or you are not amenable to sex offender treatment you will not become primarily eligible for parole until you have served any mandatory minimum term imposed by the court <u>or</u> one third of the sentence imposed where no mandatory minimum term is fixed <u>and</u> neither term will be reduced by commutation time for good behavior or work credits?	¿Entiende usted que si su conducta <u>no</u> se caracteriza por un patrón de comportamiento repetidor y compulsivo o si usted no aceptaría recibir tratamiento para delincuentes sexuales, no calificará para primariamente salir en libertad condicional hasta que haya cumplido cualquier término mínimo obligatorio impuesto por el juez <u>o</u> un tercio de la sentencia impuesta cuando no se haya fijado ningún término mínimo obligatorio <u>y</u> ninguno de los términos será reducido por tiempo de conmutación por buen comportamiento o créditos de trabajo?	[YES/SÍ] [NO]

DATE _____ DEFENDANT _____
FECHA ACUSADO

DEFENSE ATTORNEY _____ PROSECUTOR _____
ABOGADO DEFENSOR FISCAL

NOTE: If the defendant is a female and qualifies for sex offender treatment, she will not be confined at the Adult Diagnostic and Treatment Center but a facility designated by the Commissioner of Corrections where she will receive similar sex offender treatment.

NOTA: Si se trata de una acusada y ella califica para recibir tratamiento para delincuentes sexuales, no quedará recluida en el Centro de Diagnóstico y Tratamiento de Adultos sino en una institución designada por el Comisionado de Correcciones donde recibirá un tratamiento similar para delincuentes sexuales.

C. Rule Recommendations and Other Issues Considered and Rejected.

1. Cash-Only Bail.

The Committee considered whether to recommend a rule providing judges with the discretion to set "cash-only" bail – bail that could be satisfied only by a cash payment of the entire amount. A Subcommittee on Bail examined the various issues pertaining to cash-only bail, and reported its finding to the full Committee. The Subcommittee recommended that Superior Court judges have the discretion to issue cash-only bail for first or second-degree crimes, but also noted a number of potential problems. In State v. Rayshawn Cannon, for example, the Appellate Division issued an unpublished order interpreting N.J.S.A. 2A:162-12, the statute concerning crimes with bail restrictions. The court wrote that N.J.S.A. 2A:162-12(b) was "clear on its face," in that it allowed the defendant to choose "one of three approved bail forms: full cash, surety bond or bail bond." The court also wrote:

> If the defendant is unable to raise the required amount of bail by use of one of the three approved forms, he or she may combine the forms so that they aggregate the amount of bail required, "provided the court does not direct otherwise." The judge has discretion under N.J.S.A. 2A:162-12(c) to deny a particular combination of bail forms proposed by a defendant. However, the judge does not have discretion to favor one of the legislatively prescribed forms over the other.

Several judges interpreted the Cannon order as prohibiting cash-only bail, while others believed that as an unpublished order, the Cannon order was not considered precedent and was not required to be followed. As a result, some

counties allowed cash-only bail for certain crimes, while other counties strictly prohibited the practice.

The Subcommittee also questioned whether cash-only bail was permitted under the New Jersey Constitution. Article 1, paragraph 11, of the New Jersey Constitution provides as follows:

> All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.

The Subcommittee found that in three other states with "bailable by sufficient sureties" constitutional provisions, the courts have held that cash-only bail, to the exclusion of other acceptable forms of bond, is not permitted. Some members of the Subcommittee therefore believed that imposing cash-only bail would also be deemed unconstitutional in New Jersey.

The Municipal Practice Committee reportedly objected to the Subcommittee's recommendation that Municipal Court judges be prohibited from issuing cash-only bail for any crime. Since bail is set in the Municipal Courts for most cases, and must be reviewed by a Superior Court judge the following day, the Municipal Practice Committee felt that Municipal Court judges should also be allowed to set cash-only bail. It was also noted that the Municipal Courts have a serious problem with defendants failing to appear for court dates, and cash-only bail is sometimes the only way of guaranteeing that a defendant will appear.

The Committee was divided on whether it was necessary, or desirable, to draft a rule regarding cash-only bail. Some members of the Committee felt that if there were questions regarding the constitutionality of cash-only bail, then perhaps the issue should be decided by case law, rather than by court rule. Others felt that a court rule was unnecessary, since judges throughout the state were already imposing cash-only bail. The Committee agreed, however, that in order to achieve uniformity throughout the state, it should offer some type of guidance regarding cash-only bail.

The Committee initially decided to outline the various issues regarding cash-only bail, such as the lack of uniformity throughout the state, and the different interpretations of the Cannon order and the "bailable by sufficient sureties" constitutional provision, and to present them to the Court for some type of direction. On September 12, 2003, however, L. 2003, c. 177, which allows cash-only bail in certain circumstances, was signed into law. As a result, the Committee concluded that there was no need for it to resolve the remaining issues concerning cash-only bail, and that any issues flowing from the new statute should be developed by case law.

2. State v. Dangerfield.

In State v. Dangerfield, 171 N.J. 446 (2002), the defendant was arrested for the petty disorderly persons offense of defiant trespassing that occurred in the officer's presence. The officer conducted a search incident to the arrest and discovered cocaine in defendant's pockets. Defendant was indicted for possession of cocaine.

After a pretrial hearing, the trial court found that because the defendant was visiting his son, and believed he was welcome at the premises, there was no probable cause to arrest defendant for trespass or to conduct a search. It entered an order suppressing the evidence.

On appeal, the Appellate Division held that there was no probable cause to arrest defendant, and, even if probable cause did exist for the arrest, he presumptively was entitled to be released on issuance of a summons. State v. Dangerfield, 339 N.J. Super. 229, 240 (App. Div. 2001).

The Supreme Court agreed that there was no probable cause to arrest defendant, and, therefore the search was improper. In addition, the Court modified R. 3:4-1(a)(1) and held that,

> if, after making a non-pretextual warrantless arrest for a disorderly persons offense under the Code, the officer, in the exercise of his or her discretion, wishes to issue a summons pursuant to Rule 3:3-1(b)(2) on being satisfied that Rule 3:3-1(c) does not require the issuance of a warrant, he or she need not transport the arrestee to a police station to prepare a complaint-summons contemplated by Rule 3:4-1(a)(1). [State v. Dangerfield, 171 N.J. at 463].

The Court referred the matter to the Criminal Practice Committee to amend Rule 3:4-1(a)(1).

The Part III rules govern the practice and procedure in all indictable and non-indictable proceedings in the Superior Court Law Division, and, insofar as they are applicable, the practice and procedure on indictable offenses in all other courts, including the municipal courts, and juvenile delinquency proceedings in the Chancery Division, Family Part. R. 3:1-1. The Part VII rules govern the practice and procedure in the municipal courts in all matters within their statutory jurisdiction, including disorderly and petty disorderly persons offenses and other non-indictable offenses not within the exclusive jurisdiction of the Superior Court. R. 7:1.

R. 3:4-1(a)(1) addresses the procedure for arrests without a warrant and states that a law enforcement officer shall take a person who is arrested without a warrant to a police station where a complaint shall be prepared immediately. The corollary Municipal Court authority is found in R. 7:3-1(b). It also requires the police officer to transport a person, arrested without a warrant, to the police station so that a complaint can be prepared.

In Dangerfield, the defendant was arrested for the petty disorderly persons offense of defiant trespass. Immediately after the arrest, the police officer searched the defendant and discovered the drugs. This evidence led to the indictable drug possession charge.

A joint subcommittee was formed to work with members of the Municipal Practice Committee in drafting appropriate amendments to R. 3:4-1(a)(1) and the Part VII rules. The Dangerfield Subcommittee felt that the warrantless arrest of a person charged with a disorderly or petty disorderly persons offense would almost always be heard in Municipal Court, rather than in Superior Court. An exception would be a case such as Dangerfield, where the defendant was initially arrested for trespassing, but was then found to be in possession of cocaine, an indictable offense. The Dangerfield Subcommittee consequently decided that it would be more appropriate to amend R. 7:3-1, R. 7:2-2 and R. 7:2-1, rather than the Part III rules.

The Committee examined the opinion in State v. Dangerfield as directed by the Court. Part VII governs non-indictable offenses, except those initiated in the Superior Court. See R. 3:1-1. Given that there are very few non-indictable offenses tried upon direct complaint in Superior Court, the Committee believes that only the Part VII rules need to be amended. The Committee acknowledges that in State v. Dangerfield, the Court modified R. 3:4-1(a)(1). However, an order implementing this modification was never entered. The Committee is of the opinion that no order should be entered. The Committee is also of the opinion that officers have the discretion under R. 3:3-1 to issue a summons "on the spot."

3. Regulation of Bounty Hunters.

This matter was listed in the 2000-2002 Committee report as a matter held for future consideration. The Committee was asked to consider whether there should be a court rule governing bounty hunters. The United States Supreme Court, in Taylor v. Taintor, 83 U.S. 366 (1872), set forth the foundation for the common law rights of bounty hunters pursuing and arresting fugitives. Most jurisdictions consider bail to be an extension of the defendant's original confinement, in which the bounty hunter, acting on behalf of the surety, may arrest a fugitive with the same authority as a law enforcement official over an escaping prisoner. However, bounty hunters have been long recognized by courts as private actors and, therefore, immune from criminal restraints.

The Committee felt that this matter would be better addressed by the legislature, than by court rule.

4. Drug Offender Restraining Order Act.

This matter was listed in the 2000-2002 Committee report as a matter held for future consideration. The Committee was asked to consider whether the plea forms should include questions pertaining to the Drug Offender Restraining Order Act (DORA). DORA provides that when a person is charged with, convicted of or adjudicated delinquent for certain CDS or weapons offenses, the court, upon application of a law enforcement officer or prosecuting attorney, shall issue an order prohibiting the person from entering the place where the offense occurred or any place that was affected by the offense. If the defendant subsequently violates the DORA restraining order, revocation of probation or parole are among the possible sanctions. It was noted that under State v. Heitzman, 209 N.J. Super. 617 (App. Div. 1986), aff'd o.b. 107 N.J. 603 (1987), a defendant "need be informed only of the penal consequences of his plea and not the collateral consequences, such as loss of public or private employment, effect on immigration status, voting rights, possible auto license suspension, possible dishonorable discharge from the military, or anything else." Because revocation of probation or parole could be considered a "penal consequence," and because the Supreme Court warned in Heitzman that "a trial court would be well advised to inform a defendant of any collateral consequences of which the court may be aware," it was suggested that DORA should be included on a separate plea form. The consensus of the Committee, however, was that a DORA restraining order was a collateral consequence of the plea. It was thought to be similar to a condition of probation,

and judges were not obligated to inform defendants of all such conditions. But see State v. Saperstein, 202 N.J. Super. 478 (App. Div. 1985). In addition, DORA restraining orders were rarely sought in practice.

Although the Committee typically errs on the side of caution when including collateral consequences on the plea forms, the Committee decided not to include DORA on any of the plea forms at the present time. It did not, however, rule out re-examining the issue again in the future.

5. State v. Bryan Miller.

This matter was listed in the 2000-2002 Committee report as a matter held for future consideration. In State v. Bryan Miller, A-5257-99T4, the defendant was charged with robbery and aggravated assault, along with other offenses. The jury initially found the defendant guilty of first degree robbery by purposely inflicting or attempting to inflict serious bodily injury. The jury also found the defendant not guilty of second-degree aggravated assault under N.J.S.A. 2C:12-1b(1), but guilty of the third-degree crime under N.J.S.A. 2C:12-1b(7). As explained in the verdict sheet, the difference between the two assault crimes was that the second-degree crime required the jury to find that the defendant "did recklessly cause serious bodily injury," while the third degree crime required the jury to find that the defendant "did recklessly cause significant bodily injury."

It appeared to the judge and counsel that the robbery and assault verdicts were inconsistent because of the disparity in the nature of the bodily injury found in each. Instead of accepting the verdicts, the judge, with the concurrence of counsel, explained the inconsistency to the jury in order to permit it to clarify its intended result by continuing deliberations. The jury was permitted to return the same verdicts or modify either the robbery or assault verdict. After further deliberations, the jury reached the same robbery verdict, but concluded that the assault had the element of serious bodily injury, rather than significant bodily injury.

The Appellate Division stated:

> Although a jury being asked to continue its deliberations when its verdict appears inconsistent is clearly a sanctioned procedure in civil cases, see R. 4:39-2; Mahoney v. Podolnick, 168 N.J. 202, 221-23 (2001), there is no analog rule or reported case in this jurisdiction addressing that procedure in criminal cases.

The Committee was asked to consider the need for a rule addressing how a jury should be asked to continue deliberations when an inconsistent verdict is perceived. The Committee was of the opinion that it would be too late to instruct the jury at that point, because the court would then be substituting its judgment for the judgment of the jury. The Committee was also of the opinion that it would be difficult to fashion a uniform or standard procedure because inconsistent verdicts were extremely fact-sensitive situations. Consequently, the Committee agreed that there was no need to adopt a rule at the present time.

6. Parole Revocation Hearings.

The Committee was asked to consider drafting a rule giving the Parole Board authority to assign counsel in parole revocation hearings. Currently, N.J.A.C. 10A:71-7.7(c)(2) requires that counsel be assigned, from lists promulgated pursuant to R. 3:27-2, in cases requiring the assignment of counsel for parole revocation hearings. Some members expressed concern that a regulation of an administrative agency, the Department of Corrections, was requiring the judiciary to assign pro bono counsel, without a Supreme Court rule or directive authorizing the regulation or accepting its implementation. Douglas Chiesa, an Executive Assistant with the New Jersey Parole Board, informed the Committee that the current system had been working well for several years, and that there was no need to change it. The Committee agreed.

7. State v. Taihisha Brown

The Committee discussed a possible revision of the plea preservation rule, in light of the Appellate Division's opinion in State v. Taihisha Brown, 352 N.J. Super. 338 (App. Div. 2002) certif. denied, 174 N.J. 544 (2002). In Brown, the defendant pled guilty to a drug offense following the denial of her motion to suppress. On appeal, she argued that her statements admitting ownership of a suitcase containing marijuana should have been suppressed because they were integrally related to the seizure of the marijuana. The defendant, however, did not specifically reserve her right, under R. 3:9-3(f), to challenge her oral statements on appeal. In addition, R. 3:5-7(d) applies only to seizures of physical evidence, not unsuccessful challenges to statements and Miranda violations.

A subcommittee was formed to consider possible revisions to R. 3:5-7(d) or R. 3:9-3(f), but it could not reach an agreement. The Public Defender felt that issues pertaining to the admissibility of oral statements should be preserved, along with issues regarding the suppression of evidence, under R. 3:5-7(d). The Attorney General, on the other hand, felt that all such issues should be expressly preserved under R. 3:9-3(f).

The issue was then brought back to the full Committee because of a concern over the number of similar cases that seemed to be reaching the Appellate Division. As in Brown, defendants were not reserving their right to appeal an issue, such as the admissibility of their statements, but were then arguing on

appeal that the statements were inextricably intertwined with the physical evidence.

Because of differences in opinion concerning the scope of the plea preservation rule, the Committee was of the opinion that the current rules were working well, except in an odd case such as Brown, and that there was no reason to amend them. The consensus of the Committee was that the best course of action would be to let the issue be resolved through case law.

8. Defendant's Post-Conviction Request for a DNA Test

In State v. Hogue, 175 N.J. 578 (2003), the defendant, on direct appeal to the Appellate Division, filed a motion seeking a partial remand to the trial court to obtain forensic samples for DNA testing. The Appellate Division denied the motion, and the defendant moved to file an interlocutory appeal to the Supreme Court. The Court held that concerns of basic fairness and the need to conserve judicial resources required a limited remand to the trial court during the defendant's direct appeal to allow him to request DNA testing. The Court also noted that there was no rule that specifically authorized a post-judgment motion for such testing.

The Committee considered whether, in light of Hogue, it should now draft a rule regarding post-conviction DNA testing. The consensus of the Committee was that N.J.S.A. 2A:84A-32a, a recently enacted statute governing post-conviction DNA testing, was sufficient for now, and that there was no need to draft a conforming rule at the present time.

9. Defendant's Appearance at Trial *De Novo*

The Committee considered whether it was necessary to revise the court rules to provide for the defendant's appearance at the trial de novo on a municipal appeal, and for de novo sentencing if no sentencing issues are raised on appeal. It was noted that the defendant technically had a right to be there, but often was not present and had not waived his or her right to attend.

Several members of the Committee stated that, in their experience, the defendants were often present at trials de novo, and the sentences were often modified in some way. Consequently, the Committee was of the opinion that there was no need to adopt any rules regarding those issues.

D. Other Business.

1. Setting Forth the Actual *NERA* Term on the Judgment of Conviction.

This matter was listed in the 2000-2002 Committee report as a matter held for future consideration. The Committee was asked to consider whether the actual 85% parole ineligibility term mandated under NERA must be included on the Judgment of Conviction, in terms of years, months and days. The current practice is that the judgment of conviction in NERA cases indicates that the offender "must serve 85% of the maximum term," without setting forth the actual amount of time that must be served. It was suggested that to avoid problems in the distant future, when many defendants sentenced under *NERA* will become eligible for parole, judgments should include the actual *NERA* term in years, months and days. It was also noted that the judgments did not always clearly state the sentence, and that the Parole Board or the Department of Corrections could misinterpret what the court intended. However, short of using a calculator with a date function, such as those used by the Parole Board, it was not possible to accurately convert a number of days to a particular date. Past attempts to create an accurate chart for judges had failed because any such chart must take into account the month of sentence, the number of days in each succeeding month, and the additional day that must be added for each leap year that occurs during the term of incarceration. The Committee eventually decided to redistribute a November 2, 1998 memo by the Honorable Joseph F. Lisa, J.A.D., which described the proper way to set forth a *NERA* term on the Judgment of Conviction, to the Criminal Division judges.

SUPERIOR COURT OF NEW JERSEY

EPH F. LISA
siding Judge
Criminal

Gloucester County Justice Center
Hunter & Euclid Streets
Woodbury, New Jersey 08096
(609) 853-3516

November 2, 1998

MEMORANDUM TO: Criminal Division Judges

FROM: Honorable Joseph Lisa, P.J.Cr.

SUBJECT: *JOC's for No Early Release Act Cases*

As a result of discussions with the Conference of Criminal Presiding Judges, Department of Corrections and State Parole Board staff, it was agreed that Judgment of Convictions in cases where the *No Early Release Act* applies need only indicate that the offender "must serve 85% of the maximum term". The JOC does not have to indicate the parole disqualifier in years, months and days. However, the parole disqualifier must be marked on the judgment in a standardized, uniform and consistent manner so that the Department of Corrections and State Parole Board know that the 85% parole disqualifier applies. Therefore, the JOC must reflect the following:

1) The 85% parole disqualifier statement must be indicated on the front of the JOC in the section where the actual sentence is listed. See the attached example.

2) The 85% parole disqualifier must be reflected on all applicable counts for each indictment. Note: In the attached example the 85% disqualifier did not apply to the second court.

3) Each applicable count must contain the statement "must serve 85% of the maximum term".

It is important to remember that while the length of the parole disqualifier will not have to be noted on the JOC, it will have to be noted in terms of years and months on the "Supplemental Plea Form for No Early Release Act Cases". See attached.

Finally, unless the court imposes a sentence of lifetime parole supervision, it must impose a five-year term of parole supervision if the defendant is being sentenced for a crime of the first degree or a three-year term of parole supervision if the defendant is sentenced for a crime of the second degree. The parole supervision term must be reflected on the JOC.

/ma
Attachment

c: Honorable James J. Ciancia
Criminal Division Managers
John P. McCarthy, Jr., Esq.
Douglas Chiesa, Esq.
Stan Repko
James Mannion
John J. Wieck
Marie Pirog, Esq.
Mary Ann Byrne

2. Sound-Recording Issues.

The Committee heard from Jeff Newman, the Deputy Clerk of Appellate Division Administrative Services, regarding problems with the sound recording equipment. The Appellate Division was seeing more and more motions to reconstruct the record, largely because sidebar conversations were not being adequately recorded, or were unintelligible because the equipment had been wrongly positioned. Mr. Newman reported that there were several recurring problems involving the sound equipment: 1) judges often inadvertently placed their robes over a microphone that resembled a thin black box, resulting in garbled reception; 2) judges and attorneys often turned away from the microphones in their efforts to ensure that the juries didn't hear their conversations; 3) court clerks often shuffled papers or took care of other business while court was in session, and as a result, did not realize that the proceedings were not being adequately recorded; and 4) many clerks were not comfortable interrupting the proceedings when they noticed a problem with the sound recording equipment.

Mr. Newman suggested a number of remedies to correct the aforementioned problems. First, judges and attorneys should always be aware of where the microphones were positioned. Second, since whispering voices all sound alike, the parties should position themselves very close to the microphones so the transcribers can identify them more easily. Mr. Newman also noted that floor stands were available to enable the judges to place the microphones where they like. He also stressed the importance of the court clerks using headsets to

ensure that the recording equipment was picking up the sidebars, and of cultivating relationships with the clerks so that they won't be afraid to speak up if they notice a problem with the equipment.

Mr. Newman agreed to draft a memo detailing the problems, and the solutions, pertaining to sound recording. It was anticipated that his memo would then be distributed to various groups of judges and court personnel.

3. **Municipal Court Proceedings.**

The Committee discussed an issue regarding Municipal Court proceedings that was commonly noted when reviewing transcripts of those proceedings. It was noted that the Municipal Court proceedings were often "compressed," so that it was often difficult, for example, to determine where a motion to suppress ended and where the municipal trial began. Another member agreed that Municipal Court proceedings were often compressed, but felt that that was simply a result of the informal nature of the Municipal Courts. He did not believe that adopting a rule would improve matters. The Committee decided that this issue should be brought to the attention of the Assignment Judges, so that they could then discuss it during their meetings with their Municipal Court judges.

E. Matters Held for Future Consideration.

1. Revising Plea Forms.

The Committee considered whether it might be necessary for a comprehensive review of the plea forms, including a review of which questions should be considered relevant. Several members of the Committee felt that the forms were becoming unmanageable, largely because there were so many of them and they were in need of nearly constant revision. It was noted, for example, that the plea forms that had been revised and disseminated in August 2002 were in need of further revision within a month because of changes in the law. It was suggested that the forms could be computerized and placed on the Judiciary's website. The Committee agreed that a small group should meet at a later date to discuss the possibility of computerizing the forms.

The Committee also discussed whether the surcharges contained in L. 2002, c. 35, § 50, and L. 2002, c. 35, § 53, should be included on the plea forms. L. 2002, c. 35, § 50 provided for $100 surcharge for persons convicted of an act of domestic violence, while L. 2002, c. 35, § 53 provided for a $100 surcharge for any person found to have committed insurance fraud. One member thought that all substantial collateral consequences, including surcharges, should be on the forms. Another member felt that all surcharges should be removed from the forms. It was also suggested that there be a separate sheet for all fines or penalties, so that only one form would have to be changed when the law was

revised. As the Committee could not reach a consensus, it was decided to leave the forms as they were, and to revisit the issue during the next term.

2. Circumstances of the Offense Contained in the Presentence Report.

The Committee considered which version of the offense should be included in the presentence report, which is subsequently forwarded to the Parole Board. The Committee observed that presentence reports were initially intended only to aid the court during sentencing, but are now used by the Parole Board and Corrections for far different purposes.

Several members of the Committee claimed that the version of the offense contained in the presentence report often included facts stated in police reports contained in the discovery package, or facts that were vastly different from what the defendant admitted when pleading guilty or from the evidence adduced at trial. It was suggested that perhaps providing Parole and Corrections with a transcript of the plea hearing might be helpful, because it reflected the crime for which the defendant was convicted. It was also noted, however, that what the defendant admitted at the plea hearing might not be helpful to the Parole Board, because defendants often plead guilty to far less than what is indicated by their behavior.

The difference between the "official version," the indictment, and the factual basis offered at the time of plea is significant. For example, a 75-count indictment charging burglary and theft which is later pled down to five charges of theft may not present an accurate picture of the defendant's criminal behavior. The dismissed charges would be lost if the offense circumstances were limited to only the crimes to which the defendant pled guilty. Both the Assistant Director of Probation and the Executive Assistant of the Parole Board reported that it was

extremely important for their agencies to have a full account of a defendant's purported criminal behavior.

The Committee also discussed how to ensure that the defendant's version of the offense was included in the presentence report. One member of the Committee noted that defendants are asked for their version of the offense, but their attorneys typically advised them to remain silent. It was suggested that attorneys should encourage their clients to speak freely when asked for their version of the offense.

It was also noted that some counties included the discovery in their presentence reports, a practice that was supposed to be prohibited. In response, it was noted that the sentencing judge is not always the judge who took the plea, and the discovery is necessary when a judge is sentencing blindly.

The Committee decided that a subcommittee, consisting of defense attorneys, prosecutors, and probation and parole board staff, be convened to consider various corrections to the presentence report, including the version or versions of the offense to be contained in presentence reports, and to consider what is properly included in the presentence report when a defendant pleads guilty to a lesser offense, or only one or more of multiple charges. This issue will be considered during the next term.

3. Presentence Reports.

The Committee was asked to consider various issues regarding changes to presentence reports. During sentencing, the court often accepts changes to the presentence report proposed by defense counsel, or decides not to consider items for purposes of sentencing when defense counsel objects. It was argued that the presentence report, however, is not then officially amended, so the changes made at sentencing do not reach the Department of Corrections or the Parole Board. Consequently, when the Parole Board later considers whether to parole a particular defendant, it often relies on the original, uncorrected presentence report.

A Deputy Public Defender from Camden County appeared before the Committee and asserted that the Parole Board's reliance on the original presentence report, rather than on the corrected report, may have an impact on when the defendant is paroled. In response, several members of the Committee observed that a judge's responsibility is to determine the most appropriate sentence, not the possible parole consequences of the presentence report. It was also observed that a judge may accept changes to the presentence report for sentencing purposes when it has no impact on the disposition of the case. Additionally, what a defense counsel may tell a judge at sentencing would need to be verified before being accepted as fact. Others wondered how the State could be expected to verify information that was provided for the first time at sentencing, and felt that it should not be the prosecutor's burden to investigate such claims.

It was noted that presentence reports contained an addendum page, UDIR-C, which could be modified to include a Corrections/Exceptions form. In the alternative, it was suggested that the defense attorney could file a motion, along with supporting papers, regarding any inaccuracies in the presentence report. Although sentencing would be delayed while the defendant's claims were investigated, this procedure would ensure that the Parole Board received the latest, most accurate copy of the presentence report.

The Committee tentatively decided to refer the Corrections/Exceptions form on UDIR-C, the addendum page of the presentence report, to the Conference of Criminal Division Managers for their comments. The Committee also requested that the pages of the presentence report be numbered.

The Conference of Criminal Division Managers discussed this topic, and the proposed form, at its October 2003 meeting. The Conference was informed that the Camden County Public Defender's Office had been asked to provide specific cases where the changes made at sentencing had not been forwarded to Corrections or the Parole Board. The Public Defender's Office was not able to provided any specific cases. Consequently, the Conference was satisfied that the changes requested at sentencing were being made. The Criminal Practice Committee decided to convene a subcommittee to study this issue further.

4. Post-Conviction Relief Issues.

The Committee considered several issues pertaining to petitions for post-conviction relief. It was noted that there were huge delays throughout the state in getting PCR petitions scheduled and heard. In addition, a recent Supreme Court opinion, State v. Dudley Rue, 175 N.J. 1 (2002), had held that PCR counsel must advance even those arguments that he or she believes to be without merit. The Committee discussed whether the volume of PCR petitions affected the ability of the Public Defender's Office to choose those cases that truly warranted representation. One member claimed that there were delays in the Criminal Division Manager's Office forwarding cases to the Public Defender. It was also suggested that there were delays in assigned counsel receiving the transcripts for such cases. Another issue discussed was whether R. 3:22-10 should be amended to expressly allow oral argument by defense counsel on a first petition for post-conviction relief. See State v. Mayron, 344 N.J. Super. 382 (App. Div. 2001).

It was also noted that the Public Defender's Office was actively working to alleviate some of the aforementioned problems, and will be submitting a proposal regarding rule-based solutions in the future. The Committee was also advised that the Criminal Presiding Judges were drafting a proposal to address the backlog of post-conviction relief problems. The Committee expects to revisit these issues during the upcoming term.

5. Notice Under Specific Criminal Code Provisions.

The Committee was asked to consider amending R. 3:12-1, which requires the defendant to serve written notice on the prosecutor if he/she intends to rely on certain defenses contained in the Code of Criminal Justice. That notice is to be served on the prosecutor no later than seven days before the arraignment/status conference. The Criminal Division Visitation Team has observed that, in practice, R. 3:12-1 was not being followed in many counties, largely because the 7-day time limit is not realistic. This issue will be considered during the next term.

Respectfully submitted,

Honorable Edwin H. Stern, Chairman
Honorable Lawrence Lawson, Vice-Chairman
Honorable Carmen H. Alvarez
Honorable Eugene H. Austin
Honorable Linda G. Baxter
Honorable Michael R. Casale
Honorable James N. Citta
Honorable Elaine L. Davis
Honorable Frederick P. DeVesa
Honorable Katherine R. Dupuis
Honorable Donald S. Goldman
Honorable Paul T. Koenig, Jr.
Honorable Joseph F. Lisa
Honorable James F. Mulvihill
Honorable John Tomasello
Honorable Thomas R. Vena
Honorable Isaiah Steinberg
Honorable Harvey Weissbard
Prosecutor Robert D. Bernardi
Prosecutor Jeffrey S. Blitz
Alan Dexter Bowman, Esquire
John M. Cannel, Esquire
Peter C. Harvey, Attorney General
Pedro J. Jimenez, Jr., Deputy Attorney General
Dale Jones, Assistant Public Defender
Maria Noto, Esq., President, Association of Criminal Defense Lawyers of NJ
Steven C. Lember, First Assistant Prosecutor, Hunterdon
James P. Lynch, First Assistant Prosecutor, Camden
Peter D. Manahan, Esquire
Michael Marucci, Deputy Public Defender
Vaughn McKoy, Director, Division of Criminal Justice
Boris Moczula, Assistant Attorney General
Dennis A. Murphy, Esquire, Hudson County Criminal Division Manager
Joan H. Richardson, First Assistant Public Defender
Brenda B. Smith, Deputy Public Defender
Luis A. Valentin, Assistant United States Attorney
Justin P. Walder, Esquire
AOC Staff: Joseph J. Barraco, Esquire
Vance D. Hagins, Esquire
Melaney S. Payne, Esquire
January 23, 2004

APPENDIX

ATTACHMENT A

COUNTY PROSECUTORS ASSOCIATION OF NEW JERSEY

January 7, 2004

Honorable Edwin Stern, J.A.D.
Chair, Supreme Court Committee on Criminal Practice
1101 North Tower
158 Headquarters Plaza
Morristown, New Jersey 07960-3965

Subject: Prosecutorial Objections to the Proposed Revisions to R. 3:9-3c

Your Honor:

Please accept this letter on behalf of the County Prosecutor's Association of New Jersey.

I. INTRODUCTION AND OVERVIEW

On October 15, 2003, a sharply divided Criminal Practice Committee voted by a nine to seven margin to amend R. 3:9-3c to authorize greater and more direct judicial involvement in plea bargaining. Earlier that same day, the County Prosecutors Association had voted *unanimously* to leave the current rule unchanged. The purpose of this letter is to explain why the County Prosecutors Association is opposed to the revisions to R. 3:9-3c. This letter will thus serve as our dissenting opinion, explaining why we believe that the current rule is working well and why we anticipate that the amended rule would create more problems than it would solve. Although we believe that the current rule should not be amended at all, we will take this opportunity to suggest possible revisions to the amended rule that would ameliorate some of our concerns.

II. THE CURRENT RULE WAS CAREFULLY CRAFTED AND IS WORKING WELL

R. 3:9-3c was adopted in 1989 by the New Jersey Supreme Court after a protracted and occasionally rancorous debate regarding the appropriate role that judges should play in the plea bargaining process. The County Prosecutors back

Reply to: County Prosecutors Association of New Jersey C/O Prosecutor Robert D. Bernardi 49 Rancocas Road,
P.O. Box 6000, Mount Holly, NJ, 08060 (Phone 609-265-5035) (Fax 609-265-5007)

then had expressed concern that some judges might use the informal[1] conference contemplated by R. 3:9-3c to pressure assistant prosecutors to tender more lenient plea offers in order to dispose of cases. Some defense attorneys had also voiced reservations, fearing that some judges might exert pressure on defendants to plead guilty or else face the prospect of a stiffer sentence if convicted at trial. In response to those concerns, the New Jersey Supreme Court ultimately embraced a compromise that had been suggested by then Prosecutor Alan Rockoff. The Rule that was finally adopted permits a judge to become involved in plea negotiations only when both parties consent to the judicial intervention. This means that no party can be drawn into a substantive plea bargaining discussion over its objection.

A. The Proponents of the Rule Change Have Not Met Their Burden of Demonstrating the Need to Amend a Long-Standing Rule

The compromise formulation of the Rule that was eventually accepted by the Supreme Court has worked well and we respectfully submit that those who would now authorize a more active role for judges in plea negotiations have not established a satisfactory reason to amend the rule. Everyone seems to agree that objections to a R. 3:9-3c conference are rare. In a letter to Judge Williams proposing the rule change on behalf of the Conference of Criminal Presiding Judges, the Honorable Elaine L. Davis, P.J.S.C., observed in this regard that, "[m]ost judges report attorneys on both sides generally welcome these conferences because it helps them make a more informed decision as to whether pre-trial hearings and/or a trial is really practical in a particular case." We agree with Judge Davis that prosecutors and defense attorneys are usually willing to invite limited judicial participation in the plea bargaining process. This means that rule change will affect only a small number of cases, thus limiting its touted systemic benefit, which is to increase the percentage of cases that are resolved by a guilty plea rather than a trial.

A more fundamental reason exists for retention of R. 3:9-3c in its present form. This court rule has been in effect for 14 years. The Supreme Court promulgated R. 3:9-3c after full consideration of opposing views on the precise issue that now has been resurrected in an attempt at amendment. By adopting the "Rockoff compromise," the Supreme Court expressly rejected the view that the

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[1] Our experience is that R. 3:9-3c conferences are rarely if ever conducted in open court or even on the record. Judge Pressler in her annotation to the Court Rules observes that, "[t]he fact that this paragraph of the rule requires that an agreement conditionally approved in advance by the court be placed on the record in open court at the time the plea is entered clearly contemplates that the conditional approval discussions may take place off the record and in chambers." Pressler, Current N.J. Court Rules, Comment R. 3:9-3c at p. 917 (Gann 2003).

unilateral request of either the defense or prosecution was sufficient to generate a plea-bargaining conference with the judge. Therefore, the question is whether there exists any new information or change of circumstances since the rule's adoption in 1989 to warrant a change in 2003.

The Conference of Criminal Presiding Judges appears to have proposed a rule amendment principally on the basis of alleged disparity in County Prosecutors' policies regarding prosecutorial consent under R. 3:9-3. However, inquiry at the October 15, 2003 Criminal Practice Committee meeting confirmed that a large majority of County Prosecutors welcome, and routinely consent to, judicial participation authorized by R. 3:9-3c.

Only two exceptions were identified. Representations have previously been made that one County Prosecutor had a policy of consenting to conferences with some judges, but not with others. But further inquiry at the October 15 Criminal Practice Committee meeting revealed that, at best, such a policy may have existed as many as five years ago, with no affirmative evidence being presented that this policy currently remains in effect. The only other exception mentioned was a County Prosecutor who apparently has adopted a per se policy of not authorizing assistant prosecutors to consent to judicial conferences pursuant to R. 3:9-3c.

Thus, as acknowledged by the proponents of the rule amendment, the R. 3:9-3 process, by and large, is working well in nineteen or twenty of the 21 counties. The single-county-exception is an insufficient basis for amendment of the rule, particularly when there has been no allegation, in either the written or oral submissions of the Conference of Presiding Criminal Judges, that the prosecutor's blanket policy has substantially undermined the plea disposition rate in that county. The advocates of the rule amendment simply have not met their burden of demonstrating the necessity of changing a long-standing rule. Judicial dissatisfaction with the policy of one of twenty-one county prosecutors is not a good reason for revision of the rule. (Surely, there are less drastic means of addressing this policy; if any judge has a complaint about the way a County Prosecutor is applying the rule, that court is free to contact the Division of Criminal Justice, which is responsible for supervising the County Prosecutors.) The integrity of the process of amending court rules requires more than has been presented to the Committee.

B. The Amended Rule is Not Likely to Achieve Its Intended Result

As noted above, because the amendment to the Rule would only affect a few cases, it is not likely to have a significant impact on plea disposition rates. We also believe that the amended rule would not facilitate too many dispositions because the proposed amendment undermines the principal reason why the current

practice is effective. Simply stated, the current practice works well in most cases when the rule is invoked precisely because both parties must first agree to direct judicial participation in the plea-bargaining process. Because of this important precondition, judges tend to be invited to participate in cases where the parties are already close to an agreement and need only some tentative assurances from the court that it would accept the terms of the negotiated disposition. This approach is consistent with the Supreme Court's original design. As noted by Judge Pressler in her commentary to the Court Rules, "[i]t should be pointed out further that in the Committee's view, the use of the conditional approval technique should be reserved for those special cases in which counsel, having agreed between themselves, have reason to believe that there may be substantial doubt as to the court's attitude to the agreement." Pressler, Current N.J. Court Rules, Comment R. 3:9-3c, supra at 917.

The critical point is that R. 3:9-3c conferences have proved to be a useful case management tool because they occur selectively in those cases where both the prosecutor and defense counsel believe that direct judicial intervention would be beneficial. We expect that there would be far fewer successes or benefits associated with judicial intervention in any case where either party objects to a judge's active participation in the plea bargaining process. In those cases, a court would be confronting parties who are not merely seeking the court's ratification of an agreement that has already been worked out. Nor would the parties be close to reaching an agreement on their own. Rather, an objection by either party would suggest that plea negotiations have stalled. (We suspect in this regard that the whole point of the proposed amendment is to authorize a court to deploy its good offices to reinvigorate plea negotiations that have come to a standstill.)

Faced with this circumstance, a court bent on breaking the impasse might be tempted to pursue one or more of the following courses of action: (1) the court might exert pressure on either or both parties to re-think their plea bargaining position; (2) the court might treat the conference as an adversarial proceeding by requiring either or both parties to argue the merits of their plea bargaining position, or (3) the court might tender what is in essence its own plea offer to the defendant, displacing any outstanding plea offer that had been tendered by the prosecutor. All of these judicial intervention tactics raise serious practical, policy and ethical concerns that are discussed more fully in Section III, infra.

III. THE AMENDED RULE COULD FUNDAMENTALLY ALTER THE NEUTRAL AND DETACHED ROLE OF JUDGES, CREATING MORE PROBLEMS THAN IT SOLVES

A. The Amended Rule Might be Construed to Authorize Judges to Tender Their Own Plea Offers

Prosecutors will often attempt to induce defendants to plead guilty by agreeing to "cap" the defendant's sentence at some point below the maximum term of imprisonment that might otherwise be imposed. This form of consideration – to borrow a term from basic contract law – is typically referred to as "sentence bargaining," and is distinguished from "charge bargaining" where the prosecutor offers to dismiss or downgrade one or more pending charges.[2]

Many prosecutors have expressed concern that their plea bargaining position would be "undercut" if they were ordered to participate in R. 3:9-3c conferences against their will. Our concerns on this point requires a thorough and candid explanation, since we recognize that this argument has raised the hackles of some judges who resent the implication that trial courts would be attempting to usurp authority from a prosecutor. Proponents of the rule change argue that trial courts in these circumstances would merely be exercising their independent and legitimate authority to determine the appropriate sentence. As Judge Davis forcefully notes in her February 20 letter to Judge Williams, "[s]ince the sentencing authority is vested in the Judiciary, judges should be able to use that authority to arrive at the most appropriate sentence." We certainly do not quarrel with that proposition or with the self-evident notion that judges should have the final say in sentencing. Rather, our argument and objection focuses on when and in what forum this unquestioned judicial sentencing authority should be exercised. While a judge must have the final word in determining an appropriate sentence, a court should not negotiate with a defense counsel[3] over the sentence to impose on a defendant who has not yet been convicted and who is still presumed to be innocent.

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[2] In actual practice, a single plea offer will often combine both types of bargains; the prosecutor agrees to dismiss counts and also agrees to cap the maximum sentence imposed on any remaining counts. Under R. 3:9-3c, judges are expressly prohibited from engaging in charge bargaining, and we recognize that the amended rule would not relax that restriction. We note, however, that judicial "sentence bargaining" would seem to be permitted. This type of bargaining is especially significant in cases that are subject to the "No Early Release Act," N.J.S.A. 2C:43-7.2, since any negotiated reduction in the maximum sentence that might be imposed would automatically translate into a significant reduction in the term of parole ineligibility that the defendant would have to serve. This practical reality is cause for concern because it suggests that judges might be more inclined to exercise their new sentence bargaining authority under the revised rule in cases involving violent crimes. As discussed more fully in § IIIc, infra, we believe that active judicial participation in plea bargaining over a prosecutor's objections creates a significant risk that crime victims may be inappropriately excluded from the sentencing process.

[3] We recognize, of course, that any such "negotiations" between the defense counsel and the court would not be ex parte. The prosecutor in these circumstances would certainly be present at the conference, but would be powerless to prevent the court from essentially offering to the defendant a more lenient sentence than the one called for in the prosecutor's own plea offer.

Our practical concern, simply stated, is that were a prosecutor to be drawn into a R. 3:9-3c conference over objection, and were the prosecutor at the conference to refuse to soften the State's plea offer, the court at that point might be inclined to tender what is in essence its *own* plea offer, that is, the court might on its own agree to limit the defendant's prison exposure in exchange for the defendant agreeing to plead guilty. Because the court would be offering to the defendant a sentencing outcome more lenient than the one proposed by the prosecutor, the prosecutor's outstanding offer would be displaced or trumped by the more generous one tendered by the trial court. We are concerned that any such practice would encourage defendants to pursue a kind of forum shopping; if the defense counsel is not satisfied with the offer tendered by the prosecutor, counsel would then seek to negotiate directly with the court in the hope of obtaining a more lenient sentence in return for the defendant's agreement to plead guilty and remove the case from the court's calendar. Arguably the proposed change could have the unintended effect of increasing backlog by causing defense counsel to unilaterally seek judicial intervention in an effort to gain a more lenient offer from the Court itself.

B. The Amended Rule Would Transform an Informal Consultation Conference into an Adversarial Proceeding

There are other practical reasons why we object to the amended rule besides our concern that a prosecutor's plea negotiation posture may be "undercut." As noted above, we believe that in those rare cases where prosecutors object to judicial participation in the bargaining process, a R. 3:9-3c conference will tend to involve much more than a mere "disclosure" to the court of the status of the current negotiations. (Note that R. 3:9-3c is presently captioned as "Disclosure to Court.") Rather, we expect that in these circumstances, the conference will transform into a full blown adversarial proceeding, akin to an oral argument, at which a prosecutor would be expected to argue why the defendant should be sentenced in accordance with the prosecutor's proposed plea offer.

As advocates in the adversarial process, we are certainly prepared to marshal sentencing arguments, but note that the proper time and place for such argument is at a sentencing proceeding following a conviction. We are concerned that the amended rule would allow a court to become actively involved in fashioning the ultimate disposition prematurely, resolving disputes of fact and law that are more appropriately heard after conviction.

It is important to recognize that sentencing arguments are fundamentally different from plea bargaining negotiations because in the latter circumstance, the defendant is still presumed innocent. Indeed, many if not most of the arguments made by prosecutors and defense attorneys during the course of plea negotiations

do not relate to the application of aggravating and mitigating sentencing factors. Rather, plea negotiations more typically hinge on arguments concerning the strengths and weaknesses of the State's case. (These case-sensitive issues are, of course, irrelevant by the time of sentencing since the strength of the State's case on any count to which the defendant has pleaded guilty is irrebutably presumed.) The point is simply that the kind of factual disputes that are at the crux of hard-nosed plea negotiations cannot fairly be decided by a neutral judge at this stage in the proceedings. Any dispute regarding the strengths of the State's proofs should only be resolved, when the parties fail to agree, at trial.

C. The Amended Rule Would Marginalize the Role of Crime Victims

We are especially concerned that the proposed rule change could have an adverse impact on victims, running afoul of the spirit of Art. 1, par. 22 of the New Jersey Constitution and statutes that guarantee the right of victims to have direct input in the plea negotiation and sentencing process.[4] In essence, the amended rule would seem to authorize a court to tender its own plea offer without having first consulted with or heard from the victim. Compare N.J.S.A. 52:4B-44b(20) (establishing a "standard" to guarantee "assistance to victims in submitting a written impact statement to a representative of the county prosecutor's office concerning the impact of the crime which shall be considered prior to the prosecutor's accepting a negotiated plea agreement containing recommendations as to sentence . . .") (emphasis added). Moreover, to the extent that these informal conferences might be transformed into adversarial proceedings, see Section IIIB, supra, a court would be hearing "arguments" from the opposing sides and would render a conditional sentence at a closed-door proceeding from which the victim has been excluded. Compare N.J.S.A. 52:4B-36n (declaring the right of a crime victim "[t]o make, prior to sentencing, an in person statement directly to the sentencing court concerning the impact of the crime. This statement is to be made in addition to the statement permitted for inclusion in the presentence report by N.J.S. 2C:44-6."). We believe that any such exclusionary practice would lead some victims to believe that their role in sentencing is merely perfunctory,

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[4] We recognize that a similar argument could be leveled against the current system, which authorizes judges to determine tentative sentences in closed door, off-the-record proceedings. We think, however, that there is far less risk of minimizing the legitimate role of victims when the prosecutor agrees to participate in the conference. In those circumstances, the prosecutor, complying with the statutory requirements set forth in the victims' Bill of Rights, would have already consulted with the victim and would typically have explained in at least general terms the range of sentences that the prosecutor would be willing to accept in exchange for the defendant's guilty plea. It is also important to note, once again, that under the current rule, informal conferences tend to occur only when the parties are already close to an agreement. This means that the "final" sentence tentatively approved by the court is usually very close to the one already deemed acceptable to the prosecutor after having consulted with the victim.

since, for all practical purposes, the final sentencing decision would already have been made by the judge before the victim has had a chance to exercise his or her right to personally address the court and offer information concerning the impact that the crime has had on the victim's life.

IV. THE AMENDED RULE COULD UNDERMINE JUDICIAL INTEGRITY AND INDEPENDENCE

The proposed revisions to R. 3:9-3c have rekindled the debate concerning the appropriate role that judges should play in the plea bargaining process. While we think that the new rule would be rarely invoked (as noted throughout this letter, in most cases, R. 3:9-3c conferences are held without objection, controversy or fanfare), we think that the amended rule could be construed as authorizing a whole new type and degree of judicial entanglement in plea bargaining, circumventing the current limitations on active judicial participation that were designed as much to protect the integrity and independence of the Judiciary as to promote the efficient disposition of criminal cases.

Plea bargaining is, without question, a necessary and important part of the criminal justice system. Historically, between 96 to 97 percent of all convictions involving indictable matters are resolved by means of a negotiated guilty plea, as opposed to a trial verdict. Given this staggering statistic, it is evident that our criminal justice system would soon collapse if even a small additional percentage of defendants were to exercise their constitutional right to a jury trial. It is not surprising, then, that our system has evolved mechanisms and practices to encourage guilty defendants to plead guilty, and also to encourage prosecutors to tender reasonable and realistic plea offers.

Needless to say, prosecutors no less than judges have a keen interest in the efficient disposition of cases. There is much truth to the adage that justice delayed is justice denied, and our goal as prosecutors is to ensure that convicted offenders face the imposition of swift as well as certain punishment. We do not doubt in this regard that greater judicial involvement in plea bargaining could in a few cases expedite a disposition. We are concerned, however, that greater judicial involvement, at least when not invited by both parties, could have unintended consequences, and certainly, greater judicial involvement will come at a price.

More than 30 years ago the United States Supreme Court described plea bargaining as a "highly desirable" component of the administration of justice. See Santobello v. New York, 404 U.S. 257, 260-61 (1971). Even so, the practice has a darker side. Implicit in the very concept of sentence bargaining is the notion that prosecutors will dangle a seductive benefit, offering to a defendant the

prospect of a reduced sentence in exchange for the defendant's waiver of important constitutional rights. Some critics argue that this practice is inherently coercive, tantamount to bullying, because the withholding of such a benefit has the practical effect of increasing the punishment that will be imposed on those defendants who reject the prosecutor's offer and who choose instead to exercise their constitutional right to a trial.

While it may be appropriate for prosecutors as advocates to engage in this inherently coercive practice, it would be improper and disquieting for judges to resort to such high-pressure tactics. Indeed, the New Jersey Code of Criminal Justice expressly prohibits a court from considering a defendant's failure to plead guilty when determining an appropriate sentence to impose following a conviction. See N.J.S.A. 2C:44-1c(1) ("A plea of guilty by a defendant or failure to so plead shall not be considered in withholding or imposing a sentence of imprisonment.")

Therein lies the rub. The harsh but undeniable reality is that plea bargaining "works" as a practical means of encouraging defendants to plead guilty largely because prosecutors can make good on their threat to seek a longer sentence if the defendant were to reject the prosecutor's offer, insist on a trial and then have the misfortune of being convicted. But judges cannot and should not play this inherently coercive game of poker. It is one thing for a court to ratify a deal that had been negotiated at arms length by the parties. It is another thing entirely for a judge to actively broker a deal between reticent parties, or worse, to assume the role of an advocate and attempt to leverage another party to yield its litigation position, or to waive constitutional rights.

Even putting aside the ethical and public perception implications of such direct judicial involvement in hard-nosed plea bargaining, the system would not work, from a purely pragmatic perspective, unless the court were to don the lion's cloak of a prosecutor and at least implicitly threaten the defendant with a longer sentence if the defendant rejects the deal and elects to go to trial. We have no doubt that appellate courts would never tolerate any such practice. This means that if a court at a R. 3:9-3c conference were to suggest that it would be willing to cap the defendant's sentence at a given point, the court, having tentatively announced the "appropriate" sentence, would be hardpressed thereafter to impose a harsher sentence if the defendant were to reject the court's offer and were to be convicted after a trial.[5] Certainly, any such harsher sentence would be immediately suspect and subject to attack on appeal. Knowing this, some defendants might well choose to take their chance of acquittal at trial, confident

[5] As a practical matter, this is not a problem under the current rule because, as noted repeatedly above, judges tend to be invited by both parties to participate only in those cases where the parties are already close to an agreement.

that their sentencing exposure had already been limited by virtue of the court's tentative plea offer.

V. SUGGESTED REVISIONS TO R. 3:9-3C

We respectfully submit that the current rule should not be amended at all. If the New Jersey Supreme Court nonetheless deems it appropriate to amend the rule to enlarge the ambit of judicial involvement in plea bargaining, we respectfully propose two additional revisions that would, at least to some extent, ameliorate some of our concerns.

First, we recommend that the Rule provide that at the request of either party, a R. 3:9-3c conference should be convened in open court. At an absolute minimum, the rule should be amended to provide that at the request of either party, the conference must be placed on the record. We believe that a contemporaneous recording of the conference would provide an important safeguard that would discourage inappropriate judicial intervention in the inherently coercive process that characterizes a typical plea-bargaining session. Convening these conferences in open court, moreover, would allow the public and victims to witness the process, providing them with assurances that a R. 3:9-3c conference is not some sort of secret sentencing hearing.

Second, we urge the New Jersey Supreme Court to amend the Rule to expressly recognize the rights of crime victims and the role that they play in both plea-bargaining and sentencing. While victims do not and should not have the power to "veto" a plea agreement, they do have a statutory right to be consulted and to have input in the plea-bargaining process.

As currently worded, R. 3:9-3c recognizes that a judge's evaluation of the appropriate sentence is "tentative" and is contingent upon a subsequent determination that "the information in the presentence report at the time of sentence is as has been represented to the court at the time of the disclosure and supports its determination that the interests of justice would be served thereby." We submit that the Rule should be amended to recognize that a presentence report is not the sole source of information that courts should consider in determining the appropriate sentence. Victims, after all, have a statutory right to make an "impact" statement in open court, and the Legislature has made clear that this right to personally address the court is "in addition to the statement permitted for inclusion in the presentence report. . . ." N.J.S.A. 52:4B-36n, par. 2. Accordingly, the Court Rule should recognize that information provided directly to the court by a victim might lead the court to conclude that the tentative agreement negotiated during a R. 3:9-3c conference does not serve the interests of justice.

VI. CONCLUSION

For all of the foregoing reasons, we believe that the proponents of amending R. 3:9-3c have not established an adequate basis for changing a rule that is basically working well. We respectfully submit that the potential costs and risks associated with greater judicial participation in the plea bargaining process outweigh the hypothesized benefits in terms of facilitating and expediting case dispositions. Moreover, we fear that the amended rule would promote public (and especially victim) cynicism about the criminal justice system by undermining the perceived neutrality of judges, who are expected to be above the fray of plea bargaining and to remain detached from the inherently coercive tactics that characterize a typical plea bargaining session. We submit that this negative symbolic impact alone would more than offset any case disposition benefits that might conceivably result in those few cases where the revised rule would be invoked.

Respectfully submitted,

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