NOTICE TO THE BAR

Rule Amendments Proposed by the Supreme Court's Trial Judges Committee on Capital Causes – Implementation of the Death Penalty Repealer Legislation

At the request of the Supreme Court, the Trial Judges Committee on Capital Causes reviewed the Rules of Court to identify those Rules in need of amendment as a result of the repeal of the death penalty. The Committee recently provided the Court with its recommendations for rule amendments in that regard. Those recommendations are published with this notice, with each proposed rule amendment accompanied by explanatory commentary from the Committee. This material also is available for downloading on the Judiciary's Internet web site at www.njcourtsonline.com.

Please send any comments on the Committee's proposed rule amendments in writing by Monday, August 11, 2008 to:

Philip S. Carchman, P.J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Comments on the proposed rule amendments may also be submitted via Internet e-mail to the following address: Comments.Mailbox@judiciary.state.nj.us.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address (and those submitting comments by e-mail should include their name and e-mail address). However, comments submitted in response to this notice will be maintained in confidence if the author specifically requests confidentiality. In the absence of such a request, the author's identity and his or her comments may be subject to public disclosure after the Court has acted on the Committee's recommendations.

/s/ Philip S. Carchman

Philip S. Carchman, P.J.A.D.
Acting Administrative Director of the Courts

Dated: July 9, 2008

1:8-1. Trial by Jury

(a) Criminal Actions. Criminal actions required to be tried by a jury shall be so tried unless the defendant, in writing and with the approval of the court, after notice to the prosecuting attorney and an opportunity to be heard, waives a jury trial. [In sentencing proceedings conducted pursuant to N.J.S.A. 2C:11-3(c)(1), the consent of prosecutor shall be required for such waiver.]

(b) . . . No Change.

Note: Source-R.R. 3:7-1(a), 4:40-3; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; captions added to paragraphs (a) and (b) and paragraph (b) amended July 10, 1998 to be effective September 1, 1998[.]; paragraph (a) amended , to be effective .

COMMENTARY

The first sentence of the Rule, in its present form, permits the court to waive a trial by jury unless the defendant waives his or her right to a jury trial and the judge agrees to the defendant's request. It also gives the prosecutor the right to be heard on the waiver. The second sentence of the Rule requires the consent of the prosecutor to waive a sentencing proceeding required in death penalty cases. The second sentence of the Rule was added because of a provision contained in the statute re-enacting the death penalty in 1982 that required two separate trials in

capital cases, a guilt phase trial and a sentencing phase trial. See N.J.S.A. 2C:11-3(c)(1) (repealed by L. 2007, c. 204).

L. 2007, c. 204, enacted December 17, 2007, repealed the death penalty and the requirement that there be a separate sentencing proceeding. See N.J.S.A. 2C:11-3(c)(1) (repealed by L. 2007, c. 204). The death penalty repealer established a sentence of life imprisonment without parole if a jury finds beyond a reasonable doubt that any of the aggravating factors set forth in the statute exist. See N.J.S.A. 2C:11-3(b)(4). The death penalty repealer also repealed the provision in the prior law that only allowed waiver of the requirement that a jury find aggravating and mitigating factors "…on motion of the defendant and with the consent of the prosecutor…" See N.J.S.A. 2C:11-3(c)(1) (repealed by L. 2007, c. 204).

The Committee is recommending that the second sentence of the Rule be deleted. A defendant does not have a constitutional right to waive a jury trial. However, where a defendant seeks to waive his or her right to have a jury determine guilt, the State's consent is not a prerequisite to granting such a waiver. See State v. Dunne, 124 N.J. 303 (1991). The Committee believes that if the defendant can waive his or her right to a jury trial without the prosecutor's consent, they can, absent a constitutionally valid statute to the contrary, waive their right to have a jury determine aggravating factors without the prosecutor's consent. Although it could be

argued that the statute envisions that a jury would make this determination, the Committee does not believe that argument holds much validity given the repeal of the section in the prior statute that required prosecutorial consent. See N.J.S.A. 2C:11-3(c)(1) (repealed by L. 2007, c. 204). Additionally, the death penalty repealer deleted the provision in the prior law that required that a jury be empanelled when the defendant pled guilty or whose guilt was determined by a judge.

1:8-2. Number of Jurors

(a) Number Deliberating in Criminal Actions. A deliberating jury in a criminal action shall consist of 12 persons, but at any time before verdict the parties may stipulate that the jury shall consist of any number less than 12. [except in the trials of crimes punishable by death.] Such stipulations shall be in writing and with the approval of the court.

(b) . . . No Change.

(c) . . . No Change.

(d) . . . No Change.

Note: Source-R.R. 3:7-1(b), 3:7-2(d), 4:48-2, 4:49-1(a)(b). Amended July 7, 1971 to be effective September 13, 1971; paragraph (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (d) amended June 29, 1973 to be effective September 10, 1973; paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (d) amended July 29, 1977 to be effective September 6, 1977; paragraph (d) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998[.]; paragraph (a) amended , to be effective .

COMMENTARY

The requirement contained in paragraph (a) that juries consist of twelve jurors in capital cases of jurors was added while the prior death penalty law was in effect. Paragraph (a) was never deleted after that prior law was declared unconstitutional in Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), as accepted in State v.

Funicello, 60 N.J. 60, 66-67 (1972), cert. denied by, New Jersey v. Presha, 408 U.S. 942, 92 S.Ct. 2849, 33 L.Ed.2d 766 (1972) but was amended in 1982 after re-enactment of the death penalty. The rule was changed to eliminate the ability in capital cases to stipulate to a jury of less than twelve persons and to delete the reference to the prosecutor's waiving the death penalty. See Pressler, Current N.J. Court Rules, Comment 1 on R. 1:8-2 (1984). N.J.S.A. 2B:23-1, which was enacted in 1995, was not amended by L. 2007, c. 204. The statute prohibits juries of less than twelve persons in trials for crimes punishable by death. Nevertheless, the Committee recommends that since the death penalty has been repealed, the Rule should be amended to delete the reference to death penalty trials.

1:8-3. Examination of Jurors; Challenges

(a) Examination of Jurors. For the purpose of determining whether a challenge should be interposed, the court shall interrogate the prospective jurors in the box after the required number are drawn without placing them under oath. The parties or their attorneys may supplement the court's interrogation in its discretion. [At trials of crimes punishable by death, the examination shall be made of each juror individually, as his name is drawn, and under oath.]

(b) . . . No Change.

(c) . . . No Change.

(d) Peremptory Challenges in Criminal Actions. Upon indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by N.J.S.A. 2C:21-1(b), or perjury, the defendant shall be entitled to 20 peremptory challenges if tried alone and to 10 such challenges when tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defendants when tried jointly. In other criminal actions each defendant shall be entitled to 10 peremptory challenges and the State shall have 10 peremptory challenges for each 10 challenges afforded defendants. [The trial judge shall have the

discretionary authority to increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized.] When the case is to be tried by a foreign jury, each defendant shall be entitled to 5 peremptory challenges, and the State 5 peremptory challenges for each 5 peremptory challenges afforded defendants.

(e) . . . No Change.

(f) . . . No Change.

Note: Source-R.R. 3:7-2(b)(c), 4:48-1, 4:48-3. Paragraphs (c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraph (d) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (d) amended July 26, 1984 to be effective September 10, 1984; paragraph (d) amended November 5, 1986 to be effective January 1, 1987; paragraph (c) amended November 7, 1988 to be effective January 2, 1989; paragraph (e) added July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (f) added July 5, 2000 to be effective September 5, 2000; paragraph (f) amended July 27, 2006 to be effective September 1, 2006[.]; paragraphs (a) and (d) amended to be effective .

COMMENTARY

The Committee is proposing that certain language contained in paragraphs (a) and (d) be deleted. Paragraph (a) of the rule was adopted as part of the 1969 revision of the court rules. It required that at all trials, except criminal trials where the death penalty may be imposed, (see

N.J.S.A. 2A:78-4, repealed by L. 1995, c. 44), the required number of jurors be called and seated in the jury box prior to any interrogation and that initial interrogation be conducted by the court and supplemented by the parties only in the court's discretion. As originally adopted, paragraph (a) of the rule contained an exception for death penalty trials, requiring that for these trials, each juror be examined individually as his name is drawn, and under oath. That language was rendered surplusage by State v. Funicello, 60 N.J. 60 (1972), and it did not apply in cases where the prosecutor had waived the death penalty.

As part of the 1982 amendments of the rules implementing L. 1982, c. 111 (N.J.S.A. 2C:11-3), which restored the death penalty, paragraph (a) of the rule was amended, eliminating the reference to the prosecutor's waiver. With respect to the death penalty, effective September 28, 1982, the last sentence of paragraph (a) was amended to state: "[a]t trials of crimes punishable by death, the examination shall be made of each juror individually, as his name is drawn, and under oath."

L. 1995, c. 44, repealed N.J.S.A. 2A:78-4 and enacted N.J.S.A. 2B:23-10. Paragraph (b) of N.J.S.A. 2B:23-10 stated: "The examination of jurors shall be under oath only in cases in which a death penalty may be imposed." The death penalty repealer law deleted paragraph (b) from N.J.S.A. 2B:23-10b. See N.J.S.A. 2B:23-10b (repealed by L. 2007, c. 204, eff. Dec 17, 2007).

Paragraph (d) of the rule also was adopted as part of the 1969 version of the court rules. While it referred to murder, it had no specific reference to peremptory challenges in capital cases. L. 1985, c. 178, amended N.J.S.A. 2A:78-7, which addresses peremptory challenges, to add language to authorize additional peremptory challenges in cases for which the death penalty was applicable.

Thereafter, effective January 1, 1987, paragraph (d) of the rule was amended to track the statutory revisions. L. 1995, c. 44 repealed N.J.S.A. 2A:78-7 and enacted N.J.S.A. 2B:23-13. Paragraph (b) of N.J.S.A. 2B:23-13 contained a sentence (which was the same as N.J.S.A. 2A:78-7) that read, "[t]he trial court, in its discretion, may, however, increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized." Paragraph (d) of Rule 1:8-3, which was consistent with N.J.S.A. 2B:23-13b, remained unchanged. Most recently, the death penalty repealer law deleted references to the death penalty from N.J.S.A. 2B:23-13(b). See N.J.S.A. 2B:23-13(b) (repealed by L. 2007, c. 204, eff. Dec 17, 2007).

The Committee recommends that since the death penalty has been repealed the Rule be amended to delete references to death penalty trials.

1:8-5. Availability of petit jury list

The list of the general panel of petit jurors shall be made available by the clerk of the court to any party requesting the same at least 10 days prior to the date fixed for trial. [In cases where the death penalty may be imposed, the list shall be made available to any party requesting it at least twenty days prior to the date fixed for trial.]

Source-R.R. 3:7-2(a). Amended July 16, 1979 to be effective September 10, 1979; amended September 28, 1982 to be effective immediately[.]; amended to be effective .

COMMENTARY

The Committee is proposing that the language in the last sentence of the rule be deleted. The source rule, R.R. 3:7-2(a), provided that at least three days before trial a jury list be furnished to defendants in capital cases, whether or not requested, and to defendants who requested the list and were charged with other crimes. See Pressler, Current N.J. Court Rules, comment on R. 1:8-5 (1984). The 1969 version of the rule amended this language to provide that the petit jury list be made available to any party requesting it at least 10 days prior to the trial date.

Following the adoption of the rule, the death penalty was repealed and effective September 10, 1979, the reference to the death penalty was deleted from the rule. The rule was amended again, effective September 1982, as part of the amendments to address the statutory restoration of the

death penalty, see L. 1982, c. 111 (N.J.S.A. 2C:11-3). The 1982 amendment to the rule required that in cases where the death penalty may be imposed, the petit jury list shall be made available to any party requesting it at least 20 days prior to trial.

The Committee recommends that since the death penalty has been repealed the Rule be amended to delete references to death penalty trials.

2:2-1. Appeals to the Supreme Court from Final Judgments

(a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State; (2) in cases where, and with regard to those issues as to which, there is a dissent in the Appellate Division; (3) [directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases; (4)] in such cases as are provided by law.

(b) . . . No Change.

Note: Source-R.R. 1:2-1(a) (b) (c) (d) (e). Paragraph (a)(2) amended February 28, 1979 to be effective immediately[.]; paragraph (a) amended , to be effective .

COMMENTARY

Paragraph (a)(3) allows appeals to the Supreme Court from trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in those cases. That paragraph was added while the prior death penalty law was in effect, but was never deleted after that prior law was declared unconstitutional in Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), as accepted in State v. Funicello, 60 N.J. 60, 66-67 (1972), cert. denied by, New Jersey v. Presha, 408 U.S. 942, 92 S.Ct. 2849, 33 L.Ed.2d 766 (1972). The Committee

recommends that since the death penalty has been repealed the Rule should be amended to delete paragraph (a)(4).

2:2-2. Appeals to the Supreme Court from Interlocutory Orders

Appeals may be taken to the Supreme Court by its leave from interlocutory orders:

[(a) Of trial courts in cases where the death penalty has been imposed.

(b)](a) Of the Appellate Division when necessary to prevent irreparable injury;

[(c)](b) On certification by the Supreme Court to the Appellate Division pursuant to R. 2:12-1.

Note: Source-R.R. 1:2-3(a); amended July 17, 1975 to be effective September 8, 1975; amended September 28, 1982 to be effective immediately[.]; former paragraph (a) deleted, former paragraph (b) redesignated paragraph (a) and former paragraph (c) redesignated paragraph (b) , to be effective .

COMMENTARY

Paragraph (a) allows appeals to the Supreme Court from interlocutory orders of trial courts in cases where the death penalty has been imposed. That paragraph, in a slightly different form, was added while the prior death penalty law was in effect, but was never deleted after that prior law was declared unconstitutional in Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), as accepted in State v. Funicello, 60 N.J. 60, 66-67 (1972), cert. denied by, New Jersey v. Presha, 408 U.S. 942, 92 S.Ct. 2849, 33 L.Ed.2d 766 (1972). The

Committee recommends that since the death penalty has been repealed the Rule should be amended to delete paragraph (a).

2:5-1. Notice of Appeal; Order in Lieu Thereof; Case Information Statement

(a) . . . No Change.

(b) . . . No Change.

[(c) Service in Capital Cases. In criminal actions in which the death penalty has been imposed the defendant's attorney shall forthwith serve upon the principal keeper of the state prison a copy of the notice of appeal, certified to be a true copy by the clerk of the Supreme Court.

(d)](c) Service in Juvenile Delinquency Actions. If the appeal is from a judgment in a juvenile delinquency action, a copy of the notice of appeal shall be served, within 3 days after the filing thereof, upon the county prosecutor, who shall appear and participate in the appellate proceedings.

[(e)](d) Service and Filing in Administrative Proceedings. An appeal to the Appellate Division to review the decision, action or administrative rule of any state administrative agency or officer is taken by serving copies of the notice of appeal upon the agency or officer, the Attorney General and all other interested parties, and by filing the original of the notice with the Appellate Division. Service on the Attorney General shall be made pursuant to R. 4:4-4(a)(7). On an appeal from the Division of Workers' Compensation the Division shall not be considered a party to the appeal, and the notice of appeal shall not be served upon the Attorney General unless representing a party to the appeal.

[(f)](e) Contents of Notice of Appeal and Case Information Statement; Form; Certifications.

1. *Form of Notice of Appeal.* A notice of appeal to the Appellate Division may be in the form prescribed by the Administrative Director of the Courts as set forth in Appendix IV of these Rules. The use of said form shall be deemed to be compliance with the requirements of subparagraphs 2 and 3 hereof. A notice of appeal to the Supreme Court shall meet the requirements of subparagraph 3(i), (ii) and the portions of (iii) that address service of the notice and the payment of fees. [Notices of appeal in capital causes shall also include the appropriate attorney's certification in respect of transcripts.] The notice of appeal to the Appellate Division shall have annexed thereto a Case Information Statement as prescribed by subparagraph 2 of this rule.

2. *Form of the Case Information Statement; Sanctions.* The Case Information Statement shall be in the form prescribed by the Administrative Director of the Courts as set forth in Appendix VII and VIII of these Rules (civil and criminal appeals, respectively). The appellant's Case Information Statement shall have annexed to it a copy of the final judgment, order, or agency decision appealed from except final judgments entered by the clerk on a jury verdict. In the event there is any change with respect to any entry on the Case Information Statement, appellant shall have a continuing obligation to file an amended Case Information Statement on the

prescribed form. Failure to comply with the requirement for filing a Case Information Statement or any deficiencies in the completion of this statement shall be ground for such action as the appellate court deems appropriate, including rejection of the notice of appeal, or on application of any party or on the court's own motion, dismissal of the appeal.

3. *Requirements of Notice of Appeal.*

A. Civil Actions. In civil actions the notice of appeal shall set forth the name and address of the party taking the appeal; the name and address of counsel, if any; the names of all other parties to the action and to the appeal; and shall designate the judgment, decision, action or rule, or part thereof appealed from, the name of the judge who sat below, and the name of the court, agency or officer from which and to which the appeal is taken.

B. Criminal, Quasi-Criminal and Juvenile Delinquency Actions. In criminal, quasi-criminal and juvenile delinquency actions the notice of appeal shall set forth the name and address of the appellant; the name and address of counsel, if any; a concise statement of the offense and of the judgment, giving its date and any sentence or disposition imposed; the place of confinement, if the defendant is in custody; the name of the judge who sat below; and the name of the court from which and to which the appeal is taken.

C. All Actions. In addition to the foregoing requirements, the notice of appeal in every action shall certify service of a copy thereof on all parties, the Attorney General if necessary, and the trial judge, agency or officer. In all appeals from adult criminal convictions the notice of appeal shall certify service of a copy thereof and of a copy of the Case Information Statement upon the appropriate county prosecutor and the New Jersey Division of Criminal Justice, Appellate Section. In all actions the notice of appeal shall also certify payment of filing fees required by N.J.S.A. 22A:2. The notice of appeal shall also certify compliance with R. 2:5-1(f)(2) (filing of Case Information Statement), affixing a copy of the actual Case Information Statement to the notice of appeal. In all actions where a verbatim record of the proceedings was taken, the notice of appeal shall also contain the attorney's certification of compliance with R. 2:5-3(a) (request for transcript) and R. 2:5-3(d) (deposit for transcript), or a certification stating the reasons for exemption from compliance. Certifications of compliance shall specify from whom the transcript was ordered, the date ordered, and the fact of deposit, affixing a copy of the actual request for the transcript to the notice of appeal.

[(g)]<u>(f)Order in Lieu of Notice of Appeal</u>. An order of the appellate court granting an interlocutory appeal or, on an appeal by an indigent, waiving the payment of filing fees and the deposit for costs shall serve as the notice of appeal if no notice of appeal has been filed, and, except as

otherwise provided by R. 2:7-1, the date of the order shall be deemed to be the date of the filing of the notice of appeal for purposes of these rules. Within 10 days of the entry of such order, the appellant must file and serve the prescribed Case Information Statement in accordance with these rules. Upon the entry of such order the appeal shall be deemed pending, and the appellant, or the clerk of the appellate court if the appellant appears pro se, shall forthwith so notify all parties or their attorneys; the clerk of the court or state administrative agency or officer from which the appeal is taken; the trial judge if the appeal is from a judgment or order of a trial court sitting without a jury or if in an action tried with a jury, the appeal is from an order granting or denying a new trial or a motion for judgment notwithstanding the verdict; and the principal keeper of the state prison if the appeal is in a criminal action in which the death penalty has been imposed. The trial judge shall file an opinion or may supplement a filed opinion as provided in paragraph (b) of this rule.

[(h)](g) Attorney General and Attorneys for Other Governmental Bodies. If the validity of a federal, state, or local enactment is questioned, the party raising the question shall serve notice of the appeal on the appropriate official as provided by R. 4:28-4 unless he or she is a party to the appeal or has received notice of the action in the court below. The notice shall specify the provision thereof that is challenged and shall be mailed within five days after the filing of the notice of appeal, but the

appellate court shall have jurisdiction of the appeal notwithstanding a failure to give the notice required by this rule.

Note: Source - R.R. 1:2-8(a) (first, second and fifth sentences) (b) (c) (d) (h), 1:4-3(a) (second sentence), 4:61-1(d), 4:88-8 (second sentence), 4:88-10 (second, third and fourth sentences), 6:3-11(b), 7:16-3. Paragraph (f) amended and paragraph (h) adopted July 7, 1971 to be effective September 13, 1971; paragraphs (a), (b), (e) and (f) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended October 5, 1973 to be effective immediately; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraphs (b) and (f) amended July 29, 1977 to be effective September 6, 1977; paragraph (f) amended July 24, 1978 to be effective September 11, 1978; paragraph (e) amended and paragraph (f)(1) adopted and (f)(2) amended July 16, 1981 to be effective September 14, 1981; paragraph (d) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a), (f) and (g) amended March 22, 1984, to be effective April 15, 1984; caption, paragraphs (a), (b), (e), (f)(1) and (f)(2) amended November 1, 1985 to be effective January 2, 1986; paragraphs (f)(1) and (f)(2) amended November 7, 1988 to be effective January 2, 1989; paragraph (h) amended July 14, 1992 to be effective September 1, 1992; paragraphs (b), (e) and (f)(3)(i)(ii) and (iii) amended July 13, 1994 to be effective September 1, 1994; paragraphs (f)(2) and (f)(3)(i) amended June 28, 1996 to be effective September 1, 1996; paragraph (f)(1) amended July 5, 2000 to be effective September 5, 2000; caption of paragraph (f)(2) amended, paragraphs (f)(3)(i), (ii) and (iii) redesignated (f)(3)(A), (B) and (C), and paragraph (h) amended July 27, 2006 to be effective September 1, 2006[.]; former paragraph (c) deleted and former paragraph (d) redesignated paragraph (c), former paragraph (e) redesignated paragraph (d), former paragraph (f)(1) amended and former paragraph (f) redesignated paragraph (e), former paragraph (g) redesignated paragraph (f), and former paragraph (h) redesignated paragraph (g) , to be effective .

COMMENTARY

The Committee is proposing that paragraph (c) be deleted. The text of paragraph (c) of this Rule was adopted as part of the 1969 revision.

This change to the source Rule limited its applicability to cases in which the death penalty was actually imposed. This paragraph concerning the category of crimes punishable by death was never deleted or amended after the death penalty law was declared unconstitutional in Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), as accepted in State v. Funicello, 60 N.J. 60, 66-67 (1972), cert. denied by, New Jersey v. Presha, 408 U.S. 942, 92 S.Ct. 2849, 33 L.Ed.2d 766 (1972), nor after the restoration of the death penalty by L. 1982, c. 111. In addition, the language in paragraph (c) was not amended after the Supreme Court, by Administrative Directive #6-89 (revised July 2, 2002), developed procedures for the initiation and processing of appeals in capital cases. The Committee recommends that since the death penalty has been repealed this Rule should be amended to delete paragraph (c).

The Committee is also proposing that the sentence in paragraph (f)(1) that "notices of appeal in capital causes shall also include the appropriate attorney's certification in respect of transcripts" be deleted. This language was added to the Rule, effective January 1986, to require the necessary transcript certification in capital cases. This sentence has not been amended since then. The Committee recommends that since the death penalty has been repealed this Rule should be amended to delete this sentence in paragraph (f)(1).

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

[(a) Death Penalty. Unless the Supreme Court by leave granted otherwise orders, a sentence of death shall be stayed only as follows:

(1) during the pendency of defendant's direct appeal to the New Jersey Supreme Court and, on the affirmance of defendant's conviction and sentence, during the period allowed for the timely filing of a petition for a writ of certiorari to the United States Supreme Court and, if filed, while that petition is pending disposition;

(2) during the pendency of a first petition for post-conviction relief that is filed within thirty days after the United States Supreme Court's disposition of defendant's application under paragraph (a)(1), and, on the denial or dismissal of that petition for post-conviction relief, during the pendency of defendant's appeal to the New Jersey Supreme Court and, on the affirmance of defendant's conviction and sentence, during the period allowed for the timely filing of a petition for a writ of certiorari to the United States Supreme Court and, if filed, while that petition is pending disposition; and

(3) during the pendency of a timely first petition for a writ of habeas corpus in the United States District Court and, if the petition is denied or dismissed, during the pendency of a timely appeal to the Third Circuit and petition for a writ of certiorari to the United States Supreme Court for review of the disposition of the habeas petition.

The State shall notify defendant and defense counsel, the judge authorized to issue the death warrant pursuant to N.J.S.A. 2C:49-5, and the New Jersey Supreme Court forthwith on the expiration of any stay of the death sentence provided for herein or on the expiration of a stay ordered pursuant to this Rule.

(b)](a) Imprisonment. A sentence of imprisonment shall not be stayed by the taking of an appeal or by the filing of a notice of petition for certification, but the defendant may be admitted to bail as provided in R. 2:9-4.

[(c)](b) Fine; Probation. A sentence to pay a fine and an order placing the defendant on probation may be stayed by the trial court on appropriate terms if an appeal is taken or a notice of petition for certification is filed. If the court denies a stay, it shall state its reasons briefly, and the application may be renewed before the appellate court. Pending the appellate proceedings, the court may require the defendant to deposit, in whole or part, the fine and costs with the official authorized by law to receive the same in the county in which the conviction was had, or may require a bond for the payment thereof, or may require the defendant to submit to an examination of assets, and may make an appropriate order restraining the defendant from dissipating any assets.

[(d)](c) Stay Following Appeal by the State. Notwithstanding paragraphs [(b)](a) and [(c)](b) of this rule, execution of sentence shall be stayed pending appeal by the State pursuant to N.J.S.A. 2C:44-1(f)(2). 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 on the ground that execution has commenced.

[(e)](d) Stay of Order of Enrollment in a Pretrial Intervention Program. An order of the trial court enrolling a defendant into a pretrial intervention program over the objection of the prosecutor shall be automatically stayed for fifteen days following the date of its entry, and if the prosecutor files a notice of appeal within said fifteen-day period, during the pendency of the appeal.

[(f)](e) Court to Which Motion Is Made. Pending appeal or certification to the Supreme Court respecting a judgment of the Appellate Division, application for a stay pending review shall be first made to the Appellate Division.

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 July 28, 2004 to be effective September 1, 2004[.]; former paragraph (a) deleted and former paragraph (b) redesignated paragraph (a), former paragraph (c) redesignated paragraph (b), former paragraph (d) amended and redesignated paragraph (c), former paragraph (e) redesignated paragraph (d), and former paragraph (f) redesignated paragraph (e), , to be effective .

COMMENTARY

As originally written, paragraph (a) simply required that unless the court ordered otherwise, a death sentence was to be stayed during the taking of an appeal. Paragraph (a) was added while the prior death penalty law was in effect, but it was not deleted after that prior law was declared unconstitutional in Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), as accepted in State v. Funicello, 60 N.J. 60, 66-67 (1972), cert. denied by, New Jersey v. Presha, 408 U.S. 942, 92 S.Ct. 2849, 33 L.Ed.2d 766 (1972).

In 2002, in conjunction with the issuance of the Revised Supreme Court Directive on Capital Cause Appeal and Post-Conviction Relief Procedures (dated 7/2/02), paragraph (a) was extensively revised by the addition of subparagraphs (1), (2) and (3), which specified the various appeals for which a death sentence would be stayed. In addition, other revisions made to paragraph (a) provided that a death sentence would be

stayed unless the Supreme Court ordered otherwise, and that the State was to notify the defendant, defense counsel, the trial court judge, and the Supreme Court when the stay expired.

The Committee recommends that since the death penalty has been repealed, the Rule should be amended to delete paragraph (a).

2:9-4. Bail after Conviction

Except as otherwise provided by R. 2:9-5(a), the defendant in criminal actions shall be admitted to bail on motion and notice to the county prosecutor pending the prosecution of an appeal or proceedings for certification only if it appears that the case involves a substantial question that should be determined by the appellate court, that the safety of any person or of the community will not be seriously threatened if the defendant remains on bail and that there is no significant risk of defendant's flight. Pending appeal to the Appellate Division, bail may be allowed by the trial court, or if denied, by the Appellate Division, or if denied by the Appellate Division, by the Supreme Court. Following disposition in the Appellate Division and pending proceedings in the Supreme Court, bail may be allowed by the Appellate Division or if denied by it, by the Supreme Court. A copy of an order entered by an appellate court granting bail shall be forwarded by the clerk of the appellate court to the sentencing court and clerk of the trial court. A trial court denying bail shall state briefly its reasons therefor. A judge or court allowing bail may at any time revoke the order admitting to bail. [In no case shall a defendant who has received a sentence of death be admitted to bail.]

Note: Source-R.R. 1:4-3(e), 1:4-4. Amended June 29, 1973 to be effective September 10, 1973. Amended July 17, 1975 to be effective September 8, 1975; amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998[.];amended , to be effective .

COMMENTARY

The last sentence of this Rule states that once a person has received a sentence of death that person shall not be admitted to bail. That sentence, in a slightly different form, was added while the prior death penalty law was in effect, but was never deleted after that prior law was declared unconstitutional in Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), as accepted in State v. Funicello, 60 N.J. 60, 66-67 (1972), cert. denied by, New Jersey v. Presha, 408 U.S. 942, 92 S.Ct. 2849, 33 L.Ed.2d 766 (1972). The sentence in its present form was added in 1973. The Committee recommends that since the death penalty has been repealed the Rule should be amended to delete the sentence.

[2:9-12. Proportionality Review in Capital Cases

All hearings conducted by the Standing Master appointed by the Supreme Court to oversee data collection for the proportionality review of death sentences shall be confidential. The transcripts of such hearings, the written and oral submissions of the parties, and the records maintained for proportionality review by the Administrative Office of the Courts shall be confidential. The arguments or representations of counsel at or in contemplation of such hearings shall not be used for any purpose other than proportionality review.]

Note: Adopted July 5, 2000 to be effective September 5, 2000[.]; deleted , to be effective .

COMMENTARY

In his *Report to the New Jersey Supreme Court: Proportionality Review Project* (April 28, 1999), Appellate Division Judge David S. Baime made several recommendations for improving and streamlining the death penalty proportionality review process. Among those recommendations was that in order to promote the parties' cooperation and the exchange of information, all proportionality review hearings should be confidential and their transcripts sealed. Id. at 33. Judge Baime's recommendation concerning the confidentiality of proportionality review hearings was subsequently approved by the Court in In re Proportionality Review Project

(I), 161 N.J. 71, 85 (1999). Thereafter, the Trial Judges Committee on Capital Causes, with input from the Attorney General and Public Defender, drafted R. 2:9-12. As drafted, the rule made not only the proportionality review hearings and transcripts confidential, but also the materials submitted by the parties and the records maintained by the Administrative Office of the Courts. The Criminal Practice Committee submitted the rule to the New Jersey Supreme Court and it was adopted on July 5, 2000, to be effective September 5, 2000.

L. 2007, c. 204, enacted December 17, 2007, repealed the death penalty and the requirement for proportionality review. See N.J.S.A. 2C:11-3(e) (repealed by L. 2007, c. 204). The Committee has been told that, at the instruction of the Court, the Administrative Office of the Courts has ceased data collection and that no hearings will be held in the future. Given that proportionality review is no longer necessary, the Committee recommends that this rule be deleted, with the understanding that all hearings, transcripts of those hearings and arguments or representations of counsel made at those hearings be kept confidential.

3:7-2. Use of Indictment or Accusation

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

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

COMMENTARY

The Committee is proposing that the first sentence and the word "other" in the next sentence be deleted. The text in this Rule was adopted as part of the 1969 revision to simplify the transfer and retransfer practice by requiring accusations to be filed and proceeded upon in the county court. This distinction between the Superior Court and county court was rendered obsolete by their merger in 1978 by constitutional amendment. Subsequently, minor revisions were made in the language of this Rule. These amendments did not affect the first sentence. Further, the first

sentence concerning the category of crimes punishable by death was never deleted or amended after the death penalty law was declared unconstitutional in Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), as accepted in State v. Funicello, 60 N.J. 60, 66-67 (1972), cert. denied by, New Jersey v. Presha, 408 U.S. 942, 92 S.Ct. 2849, 33 L.Ed.2d 766 (1972), nor after the restoration of the death penalty by L. 1982, c. 111. The Committee recommends that since the death penalty has been repealed this Rule should be amended to delete the first sentence and the word “other” in the next sentence.

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

(a) . . . No Change.

(b) Indictment for Murder. Every indictment for murder shall specify whether the act is murder as defined by N.J.S.A. 2C:11-3(a)(1), (2) or (3) and whether the defendant is alleged: (1) to have committed the act by his or her own conduct or (2) as an accomplice to have procured the commission of the offense by payment or promise of payment, of anything of pecuniary value or (3) to be the leader of a drug trafficking network, as defined in N.J.S.A. 2C:35-3, and who, in furtherance of a conspiracy enumerated in N.J.S.A. 2C:35-3, commanded or by threat or promise solicited the commission of the offense[.] or (4) to have committed the murder during the commission of the crime of terrorism or (5) to have murdered a law enforcement officer while that officer was performing his official duties or because of his status as a law enforcement officer or (6) to have murdered a person less than 14 years old and the murder occurred during the commission of aggravated sexual assault, sexual assault, aggravated criminal sexual contact or sexual contact.

(c) Specification of Aggravating Factors. In addition to the requirements in paragraph (b) of this rule, every indictment or supplemental indictment for a crime punishable by [death]a term of life imprisonment without eligibility for parole pursuant to N.J.S.A. 2C:11-3(b)(4) shall specify any

aggravating factors as set forth in [N.J.S.A. 2C:11-3(c)(4)]N.J.S.A. 2C:11-3(b)(4) that the State intends to prove.[at the penalty phase.]

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

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

COMMENTARY

In 1982, in order to conform with L. 1982, c. 111, which reinstated capital punishment in New Jersey, paragraph (b) was amended to require that the indictment specify the type of murder that the person was being charged with and whether the murder was committed by his own conduct or procured by payment or promise of payment of anything of pecuniary value. Paragraph (b) was further amended to conform with L. 1993, c. 27, which included leaders of narcotics trafficking networks who ordered or solicited murder in furtherance of a drug trafficking conspiracy among those eligible for the death penalty.

Although N.J.S.A. 2C:11-3c was later amended again by L. 2002, c. 26, § 10, which provided that murders that occurred during the crime of terrorism were death-eligible, the corresponding change was not made to paragraph (b). Nor was paragraph (b) amended after two other laws were passed. L. 1996, c. 115 became effective January 9, 1997. That law provided for a special penalty of life imprisonment without parole for the murder of a law enforcement officer killed while performing his or her official duties or murdered because of his or her status as a law enforcement officer. L. 1997, c. 60 became effective April 3, 1997. That law provided for a special penalty of life imprisonment without parole for the murder of victim who was less than 14 years old at the time of the offense where the act was committed in the course of the commission of a violation of N.J.S.A. 2C:14-2 (Sexual Assault, Aggravated Sexual Assault) or N.J.S.A. 2C:14-3 (Aggravated Criminal Sexual Contact, Criminal Sexual Contact). The death penalty repealer, L. 2007, c. 204, makes a purposeful of knowing murder committed: by his own conduct, as an accomplice who procured the murder, as a leader of a drug trafficking network or during the crime of terrorism, eligible for life without parole if a jury find the existence of an aggravating factors. The Committee recommends that paragraph (b) be retained, but that it be amended to include murders during the course of terrorism, murder of a law enforcement officer or murder of a person under 14 during a sexual assault. The Committee also recommends that

paragraph (b) be amended to include those who, as an accomplice, procure murders by payment or promise of payment of anything of pecuniary value. This change would more closely track the current murder statute. See N.J.S.A. 2C:11-3(b)(4).

In State v. Fortin, 178 N.J. 540, 649 (2004), the Court held that aggravating factors in capital cases must be submitted to the grand jury and specified in the indictment. The Court also noted that in capital cases that had not yet been tried, the State could present the aggravating factors to the grand jury and seek a supplemental indictment specifying the factors that the defendant would face at a penalty trial. Id. at 650. Subsequently, on March 14, 2005, paragraphs (c) and (d) were added to the rule to codify the Court's holdings in Fortin. Paragraph (c) provided that aggravating factors must be specified in the indictment in capital cases, while paragraph (d) specified that, except for good cause, any supplemental indictment must be returned no later than 90 days after the return or unsealing of the original indictment. The Committee now recommends that paragraph (c) be amended to delete the reference to the death penalty and replace it with a sentence of life without parole; to include the new statutory cite for the aggravating factors; and to delete the reference to the penalty phase. As with the recommendations for paragraph (b), the suggested recommendations for paragraph (c) would reflect the changes made to the murder statute by L. 2007, c. 204.

The Committee also recommends that paragraph (d) be deleted. The Committee felt that supplemental indictments were intended to be a temporary remedy for cases (1) in which the defendant had already been indicted for capital murder at the time Fortin was decided; or (2) in which evidence supporting the presence of a statutory aggravating factor was discovered after the original date of indictment. As paragraph (d) required that any supplemental indictments must be returned no later than 90 days after the return or unsealing of the original indictment, the Committee felt that the time for any county prosecutors to seek supplemental indictments had long since expired. The Committee also believed that if similar circumstances arose today, the prosecutor would seek a superseding, rather than a supplemental, indictment.

3:9-2. Pleas

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

accepting a plea of guilty, the court shall require the defendant to complete, insofar as applicable, and sign the appropriate form prescribed by the Administrative Director of the Courts, which shall then be filed with the criminal division manager's office.

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

COMMENTARY

With regard to the death penalty, the 1969 version of this rule provided that a defendant may plead only non-vult or not guilty to an indictment for a crime punishable by death.

In North Carolina v. Alford, 400 U.S. 25, 27 L.Ed.2d 162 (1970), the United States Supreme Court held that an admission of guilt need not be constitutionally required prior to sentencing. In the wake of North Carolina v. Alford, the Administrative Director of the Courts issued an Administrative Memorandum setting forth the Supreme Court's general policy for acceptance of guilty pleas, which was published in the January 7, 1971 issue of the New Jersey Law Journal, see Administrative Memo – Re: Guilty Pleas, 94 N.J.L.J. 1 (1971). This memo reaffirmed that:

> [A] plea of guilty shall be refused if a defendant insists on his innocence. Accordingly, the plea procedures prescribed by R. 3:9-2 shall continue to be observed and, notwithstanding the recent

> decision in North Carolina v. Alford, __ U.S. __ (decided December 23, 1970) *except in capital cases, a plea shall not be accepted from a defendant who does not admit commission of the offense.*
> [94 N.J.L.J. 1 (1971) (emphasis added)].

In this Administrative Memorandum, the Supreme Court made it clear that North Carolina v. Alford, supra, would not be followed in New Jersey, except in capital cases. This determination was consistent with the Court's holding thirteen years earlier in State v. Reali, 26 N.J. 222 (1958), which was cited in the Memorandum.

The decision to follow North Carolina v. Alford, supra, only in capital cases was addressed at length in State v. Funicello, 60 N.J. 60 (1972), cert. denied, 408 U.S. 942 (1972), which set aside death sentences as mandated by the United States Supreme Court in Funicello v. New Jersey, 403 U.S. 948, 29 L.Ed.2d 859 (1971). In his famous concurring opinion, New Jersey Supreme Court Chief Justice Weintraub, voiced his assumption that the U.S. Supreme Court's disposition "…not only empties the death house in our state but should do the same in every state if . . . every state with capital punishment has some technique, formalized or not, whereby a defendant can avoid the risk of death by pleading guilty to some charge." State v. Funicello, supra, 60 N.J. at 81 (Weintraub, C.J., concurring).

The Committee recommends that since the death penalty has been repealed the Rule be amended to delete the reference to guilty pleas when a defendant is charged with a crime punishable by death.

The rule was amended in 1982 as part of the legislative restoration of the death penalty, see L. 1982, c. 111 (N.J.S.A. 2C:11-3). The 1982 rule amendment eliminated the non-vult plea in capital cases. This amendment also added the language to the rule in its present form that "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." The purpose of this language was to avoid forcing defendants exposed to the death penalty to state anything that can support an "aggravating factor" if the plea is to a capital offense requiring a hearing as the penalty. State v. Simon, 161 N.J. 416, 453 (1999) (quoting State v. Jackson, 118 N.J. 484, 489 (1990)).

With regard to the factual basis for a plea for defendants exposed to the death penalty, the 1982 rule amendment provided that if the plea is offered to avoid the death penalty following negotiations between the prosecutor and defense counsel, the court would have to be satisfied that the recommended disposition is in the interest of justice, whether or not the

defendant denies guilt. There is no federal constitutional requirement of a "factual basis" from defendants in these circumstances.

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

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

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

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

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

COMMENTARY

This rule was adopted in September 1982 in order to conform with L. 1982, c. 111, which reinstated capital punishment in New Jersey. The Committee Comment noted:

> The rule requires that the prosecutor provide an accused charged with a capital offense an itemization setting forth the aggravating factors he intends to prove at the sentencing hearing. The rule also mandates that all "discovery" bearing on these factors be made available. Under the rule, the prosecutor would be compelled to specifically designate the aggravating factors upon which he relies and provide full discovery including documents, tangible objects and other materials in that regard. The rule specifically requires the prosecutor to disclose all "discovery" he may have in his possession relevant to the existence of mitigating factors. Subsection "b" is intended to insure reciprocal discovery.
>
> The amendment requires the prosecutor to make such discovery available on the date of the arraignment unless such period is "enlarged for good cause." This practice would serve to avoid needless delays often occasioned by the failure to provide discovery in a timely fashion. Such a practice has the added advantage of allowing increased time to fully investigate and analyze the aggravating and mitigating circumstances said to be present in a given case. Pursuant to the amendment, the defendant's reciprocal obligation with respect to discovery would commence "forthwith upon a verdict of guilty or a plea of guilty to a crime punishable by death." In such a way, the defense would not be required to disclose information which might prejudice him with respect to guilt or innocence having a bearing only upon the appropriate sentence. Subsection "c" of the rule provides that the duty to disclose discovery is a continuing one.

See Pressler, Current N.J. Court Rules, Comment on R. 3:13-4 (1984).

In State v. Fortin, 178 N.J. 540, 649 (2004), the Court held that aggravating factors in capital cases must be submitted to the grand jury and specified in the indictment. The Court also noted that in capital cases that had not yet been tried, the State could present the aggravating factors to the grand jury and seek a supplemental indictment specifying the factors that the defendant would face at a penalty trial. Id. at 650. Subsequently, in March 2005, paragraph (a) of the rule was revised to account for the Court's holdings in Fortin.

L. 2007, c. 204 replaced the death penalty with a sentence of life imprisonment without parole if a jury finds beyond a reasonable doubt that any of the aggravating factors set forth in the statute exist. See N.J.S.A. 2C:11-3(b)(4). L. 2007, c. 204 also deleted the statutory mitigating factors that the defendant could allege to weigh against imposition of the death penalty. See N.J.S.A. 2C:11-3(c)(5) (repealed by L. 2007, c. 204).

While L. 2007, c. 204 contains the same aggravating factors and "triggers" that were formerly part of the capital murder statute, the Committee felt that discovery in homicide cases involving a possible sentence of life without parole would not be governed by this rule. Rather, the Committee believed that, as with any other non-capital crime, discovery in such cases would be governed by R. 3:13-3. In addition, the

Committee felt that supplemental indictments were intended to be a temporary remedy for cases (1) in which the defendant had already been indicted for capital murder at the time Fortin was decided; or (2) in which evidence supporting the presence of a statutory aggravating factor was discovered after the original date of indictment. It was the Committee's opinion that the time for county prosecutors to seek supplemental indictments had long since passed, and that if similar circumstances arose today, the prosecutor would seek a superseding, rather than a supplemental, indictment. As a result, the Committee believes that there is no longer a need for this rule, and that it should be deleted.

3:21-2. Presentence Procedure

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

(b) . . . No Change.

(c) . . . No Change.

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

COMMENTARY

The last sentence of paragraph (a) currently states that the requirement that a presentence report be prepared before sentencing does not apply to counts on which the death penalty shall be imposed. That

sentence was added to paragraph (a) in 1982 to conform with L. 1982, c. 111, which reinstated capital punishment in New Jersey. It originally provided that there was no requirement for a presentence report in "cases" where the death penalty would be imposed – because the sentence in those cases would have already been determined by the jury or judge. The sentence was later amended in 2004 to specify that it was intended to apply only to the capital count of the indictment, and that a presentence report would still be required for the non-capital counts.

L. 2007, c. 204, enacted December 17, 2007, repealed the death penalty and replaced it with a sentence of life imprisonment without parole in certain circumstances. See N.J.S.A. 2C:11-3(b)(2), (3) and (4). The Committee therefore recommends that since the death penalty has been repealed, the last sentence of paragraph (a) should be deleted.

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

Except for good cause shown, [W]where the defendant has been convicted of, or has entered a plea of guilty to, N.J.S.A 11-3(a)(1) or N.J.S.A 2C:11-3(a)(2) and where the provisions of [N.J.S.A. 2C:11-3(c)] N.J.S.A. 2C:11-3(b)(4) [applies] apply, a separate [sentencing hearing] proceeding shall be conducted [pursuant to N.J.S.A. 2C:11-3(c)] immediately thereafter.[, except for good cause shown.] At the [sentencing hearing] proceeding the jury, or the court if there is no jury, shall complete a special verdict form.

Adopted September 28, 1982 to be effective immediately[.];amended , to be effective .

COMMENTARY

L. 2007, c. 204, enacted December 17, 2007, repealed the death penalty and the requirement that there be a separate sentencing proceeding. See N.J.S.A. 2C:11-3(c)(1) (repealed by L. 2007, c. 204). The death penalty repealer established a sentence of life imprisonment without parole if a jury finds beyond a reasonable doubt that any of the aggravating factors set forth in the statute exist. See N.J.S.A. 2C:11-3(b)(4).

The Committee debated, at length, whether to recommend that a mandatory separate proceeding be held to determine the existence of aggravating factors, or whether to remain silent on the issue and leave the

matter to the discretion of the trial judges. The majority believed that it was incumbent upon the Committee to take a position on whether a separate or sequential proceeding should be required in future homicide trials in which the State seeks to prove the existence of at least one aggravating factor in order to enhance sentence.

The Trial Judges Committee on Capital Causes was formed in 1982 to advise trial judges regarding capital trials. Through the years the Committee has provided invaluable assistance to trial judges regarding the difficult subject of trying capital cases. The Trial Judges Bench Manual for Capital Causes was devised for exactly this purpose, and the Committee has been told that it has been of enormous benefit to the Bench and bar and has facilitated the trial of these cases. Indeed, it has been cited numerous times by the Supreme Court in the course of its opinions.

In the past the Committee has not hesitated to give opinions and make suggestions on how best to try these cases because it believed that its suggestions would be helpful to trial judges who, in the final analysis, had the discretion to follow, or not to follow, its suggestions. Taking novel approaches and providing opinions or assistance in areas that have not yet been litigated has not deterred the Committee, and does not deter it from following the same course at this late date as it approaches the end of its existence.

Some examples of the Committee developing documents or charges can be found in the Appendices to the Manual. Among its contributions set forth therein are:

> Guiding Principles When Conducting Voir Dire;
> Charge before Voir Dire;
> Suggested Juror Questionnaire;
> Suggested Jury Charges;
> Suggested Verdict Forms;
> Suggested Charge at Commencement of Penalty Phase;
> Suggested Charge at Conclusion of Penalty Phase;
> Suggested Form of Judgment of Capital Conviction;
> Suggestions regarding the right of allocution;
> Suggested plea colloquy in capital prosecution.

The Committee has also recommended amendments to the rules, even when there have been statutes to the contrary, when it deemed it better to do so. Compare R. 3:13-4 (the prosecutor shall provide discovery regarding aggravating factors at the arraignment/status conference) with N.J.S.A. 2C:11-2(e) (repealed by L. 2007, c. 204) (the prosecutor can provide notice of aggravating factors prior to the commencement of the sentencing proceeding or at such time as he has knowledge of the existence of any aggravating factor).

Moreover, the Committee has not hesitated to make recommendations to trial judges in the body of the Manual before cases have settled the law and has done so since the Manual was first issued. The Committee believes it would be abdicating its responsibility if it did not make a recommendation on this issue.

When the Committee first considered this issue, a number of members expressed the opinion that in most cases evidence regarding the presence of the aggravating factor would come in during the trial and there would be no reason to conduct separate or sequential trials in those cases.

The Committee has strong confidence in the jury system and believes that a jury is very capable of performing the most difficult task of finding the facts, and, in criminal trials, determining whether the State has proven its case beyond a reasonable doubt. Judges, however, have a responsibility to simplify the jury's task as best they can. In the majority of cases, that can best be accomplished by focusing the jury's attention on the question of guilt in the initial phase, and by not introducing sentencing issues that are completely extraneous to the guilt determination and that could influence or taint the jury's decision. Only if the jury finds a defendant guilty of murder would it then consider the sentencing issues of "triggers" and the existence of any aggravating factors. In the subsequent sequential proceeding the jury would focus exclusively on aggravating factors, and need not consider the guilt issues at all. Having a trial on the issue of guilt or innocence that is followed by a proceeding to determine the presence of any aggravating factors would result in a shorter charge in each phase, with less potential to confuse. This process should make it easier for the jury to understand and retain these abstract legal principles they would probably be hearing for the first time in their lives.

The Committee understands the concern that sequential trials may lack credibility because it is simply wrong to wait until after the return of a guilty verdict to tell jurors that its task is not complete. There is some merit to that argument. The Committee also notes, however, that sequential proceedings are required in other cases where doing otherwise could impact the defendant's right to a fair trial. See State v. Chenique-Puey, 145 N.J. 334 (1996) (trial courts should sever and try sequentially charges of contempt of a domestic-violence restraining order and of an underlying criminal offense when the charges arise from the same criminal episode). See also State v. Ragland, 105 N.J. 189, 194 (1986) (where defendant is charged with N.J.S.A. 2C:39-7 and another crime, charges need to be tried separately for the protection of the defendant).

Another benefit of holding sequential proceedings is that it would lessen the harm caused by any reversible errors committed while determining the appropriate sentence. If a reversible error were committed in the sentencing phase of a sequential proceeding, it would presumably necessitate retrial of just the sentencing phase. If the same error occurred in a unified proceeding, however, the entire trial would have to be retried.

In addition, while L. 2007, c. 204 repealed the death penalty and the requirement that there be a separate sentencing proceeding to find the presence of aggravating and mitigating factors, N.J.S.A. 2C:11-3j, which permits a photograph of the victim to be displayed "[i]n a sentencing

proceeding conducted pursuant to this section," was neither repealed nor amended. Under the prior statute, the victim's photograph was displayed during the penalty phase of a capital murder trial. Consequently, the consensus of the Committee was that by not repealing or amending that subsection, the Legislature intended that there be a separate sentencing proceeding when the State sought a sentence of life without parole. The Committee felt that the clear intent of N.J.S.A. 2C:11-3j was to get the photo before the fact-finder, i.e., the jury; and introducing it during a single, unified proceeding would be extremely prejudicial to the defendant. As a photo of the victim would more than likely be introduced in every case, the Committee felt that the best way to avoid prejudicing the defendant was to hold sequential proceedings and display the photo in the "sentencing" phase, after guilt had already been determined.

The Committee does not see a downside to conducting the proceedings in this fashion. While it might makes the proceedings more time consuming, they will only be marginally longer. In the Committee's opinion, conducting the proceedings in this fashion is less confusing and will lead to a fairer result. That benefit far outweighs any perceived detriment in slightly prolonging the proceedings. After all, fairness and a reliable proceeding should be our polestar, not a concern caused by a slightly lengthier proceeding.

Finally, the defendant might want to present evidence rebutting an aggravating factor but presenting such rebuttal may not be in his or her best interest in terms of the jury's determination of guilt or innocence. In a single proceeding, a defendant might have to choose whether or not to present such evidence. Having sequential proceedings allows him or her to present the rebuttal evidence without having to consider its impact on the jury's determination of guilt or innocence.

The Committee therefore recommends that except for good cause shown, there should be a presumption in favor of holding a separate or sequential proceeding in murder cases in which the State seeks a sentence of life imprisonment without parole. An example of "good cause" in this context would be a case in which the evidence supporting the presence of the aggravating factor does not obviously prejudice the defendant, such as the murder of a single victim under the age of fourteen, or perhaps, depending on the facts of the case, a murder committed during one of the enumerated felonies. In those cases, there would be no reason to conduct separate or sequential trials because the evidence supporting the aggravating factor would come in during the trial. In just about all other cases, however, the Committee believes that the preferred practice would be to hold sequential proceedings.

3:21-5. Judgment

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

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

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

COMMENTARY

Paragraph (a) sets forth the procedures for transmitting the judgment of conviction, and any amended judgment that includes the sentences for non-capital convictions, to the Clerk of the Supreme Court in cases in which the death sentence is imposed. Paragraph (a), along with the caption for paragraph (b), was added in 2002 to conform with the procedures detailed in the Revised Supreme Court Directive on Capital Cause Appeal and Post-Conviction Relief Procedures (dated 7/2/02). As the death penalty has been repealed by L. 2007, c. 204, the Committee recommends that both paragraph (a) and the caption to paragraph (b) be deleted.

3:22-12. Limitations

[(a) General Time Limitations.] A petition to correct an illegal sentence may be filed at any time. No other petition shall be filed pursuant to this rule more than 5 years after rendition of the judgment or sentence sought to be attacked unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect.

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

Note: Source-R.R. 3:10A-13. Caption added and text designated as paragraph (a), and new paragraph (b) added July 12, 2002 to be effective September 3, 2002[.]; caption and designation of former paragraph (a), and former paragraph (b), deleted , to be effective .

COMMENTARY

Paragraph (b) sets forth the deadline for filing petitions of post-conviction relief in cases in which the death penalty has been imposed. Paragraph (b), along with the caption for paragraph (a), was added in 2002 to conform with the procedures detailed in the Revised Supreme Court Directive on Capital Cause Appeal and Post-Conviction Relief Procedures (dated 7/2/02). As the death penalty has been repealed by L. 2007, c. 204, and Governor Corzine has commuted the death sentences of the

eight death row inmates to life without parole, there is no longer a need for paragraph (b). The Committee therefore recommends that both paragraph (b) and the caption for paragraph (a) be deleted.

3:26-1. Right to Bail Before Conviction

(a) Persons Entitled; Standards for Fixing. All persons[, except those charged with crimes punishable by death when the prosecutor presents proof that there is a likelihood of conviction and reasonable grounds to believe that the death penalty may be imposed,] shall be bailable before conviction on such terms as, in the judgment of the court, will ensure their presence in court when required. The factors to be considered in setting bail are: (1) the seriousness of the crime charged against defendant, the apparent likelihood of conviction, and the extent of the punishment prescribed by the Legislature; (2) defendant's criminal record, if any, and previous record on bail, if any; (3) defendant's reputation, and mental condition; (4) the length of defendant's residence in the community; (5) defendant's family ties and relationships; (6) defendant's employment status, record of employment, and financial condition; (7) the identity of responsible members of the community who would vouch for defendant's reliability; (8) any other factors indicating defendant's mode of life, or ties to the community or bearing on the risk of failure to appear, and, particularly, the general policy against unnecessary sureties and detention. In its discretion the court may order the release of a person on that person's own recognizance. The court may also impose terms or conditions appropriate to the defendant's release including conditions necessary to protect persons in the community.

(b) . . . No Change.

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

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

[(e)](d) Extradition Proceedings. Where a person has been arrested in any extradition proceeding, that person may be admitted to bail.[except where that person is charged with a crime punishable by death.]

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

COMMENTARY

This Rule was adopted while the prior death penalty law was in effect, but the provisions regarding the death penalty then contained in paragraphs (b) and (d), which have since been redesignated as paragraphs (c) and (e), were not deleted after the prior law was declared

unconstitutional in Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), as accepted in State v. Funicello, 60 N.J. 60, 66-67 (1972), cert. denied by, New Jersey v. Presha, 408 U.S. 942, 92 S.Ct. 2849, 33 L.Ed.2d 766 (1972).

In 1982, in order to conform with L. 1982, c. 111, which reinstated capital punishment in New Jersey, the first sentence of paragraph (a) was amended to authorize the denial of bail when the prosecutor shows both a likelihood of conviction and reasonable grounds to believe that the death penalty may be imposed. See Pressler, Current N.J. Court Rules, Comment on R. 3:26-1 (1984). Paragraph (c) currently allows a Superior Court judge to grant bail for a person charged with a crime punishable by death if the person has not been indicted within three months after being jailed, while paragraph (d) provides that a person arrested in an extradition proceeding may not be admitted to bail if he or she has been charged with a capital offense.

L. 2007, c. 204, enacted December 17, 2007, repealed the death penalty. Consequently, the Committee recommends that paragraph (c), and the references to the death penalty in paragraphs (a) and (e), be deleted. The deletion of paragraph (c) would require that paragraph (d) be redesignated as paragraph (c), and that paragraph (e) be redesignated as paragraph (d).