SUPPLEMENTAL REPORT

OF THE

SUPREME COURT COMMITTEE

ON

CRIMINAL PRACTICE

2015 – 2017 TERM

MAY 15, 2017

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I. Rule Amendments Recommended for Adoption

A. R. 3:4-2. First Appearance After Filing Complaint

The Committee reviewed paragraph (f) of R. 3:4-2 because pursuant to the Criminal Justice Reform Law, effective January 1, 2017, only defendants who are charged on a complaint-summons may waive the first appearance.

Defendants charged for an initial charge on a complaint-warrant involving an indictable offense who are arrested on or after January 1, 2017, i.e., an eligible defendant, are remanded to the county jail pending the determination on pretrial release or pretrial detention. These defendants would not be eligible for the waiver option because incarcerated defendants are barred from waiving the first appearance under current paragraph (f).

The Committee is proposing that paragraph (f) be amended to clarify that the option to waive the first appearance is available only to a defendant "charged on a complaint-summons for an indictable offense."

Consistent with the Supreme Court Order, effective December 15, 2016, mandating that attorneys file all documents in criminal matters (with limited exceptions) in *eCourts Criminal*, paragraph (f) would be amended to require that the waiver form be electronically filed and notification be provided to the County Prosecutor or, if applicable, the Attorney General.

The Committee is also proposing new subparagraphs (f)(6) and (f)(7) to make the content of the defense attorney's waiver certification consistent with the

information the defendant would have received from the court at the first appearance as required under subparagraph (c)(7), as amended effective September 1, 2016.

New subparagraph (f)(6) would require that the attorney, before filing the waiver, obtain from the court the date of the mandatory pre-indictment disposition conference and certify that the defendant has been advised of that date. The last sentence of the current Rule, which requires the court to contact the defense attorney to provide this date, would be deleted.

Similarly, new subparagraph (f)(7) would be added to ensure that the attorney certifies that the defendant has been advised of the drug court program and where and how to apply for it.

The proposed amendments to R. 3:4-2 follow.

3:4-2. First Appearance After Filing Complaint

(a) … No change

(b) … No change

(c) … No change

(d) … No change

(e) … No change

(f) Waiver of First Appearance By Written Statement. Unless otherwise ordered by the court, a defendant charged on a complaint-summons (CDR-1) for an indictable offense and who is represented by an attorney and is not incarcerated may waive the first appearance by electronically filing, at or before the time fixed for the first appearance, a written statement in a form prescribed by the Administrative Director of the Courts, signed by the attorney, certifying that the defendant has:

(1) … No change

(2) … No change

(3) … No change

(4) been informed that there is a pretrial intervention program and where and how an application to it may be made; [and]

(5) been informed of the right to have a hearing as to probable cause, the right to indictment by the grand jury and trial by jury, and if applicable, that the offense charged may be tried by the court upon waiver of indictment and trial by jury, if in writing and signed by the defendant[.];

(6) been informed of the date of the pre-indictment disposition conference held pursuant to Rule 3:4-6, which shall occur no later than 45 days after the date of the first appearance; and

(7) been informed that there is a drug court program and where and how to make an application to that program.

[At the time the] The written statement waiving the first appearance shall be electronically [is] filed with the court, and notification [a copy of that written statement shall be provided to the Criminal Division Manager's office and] provided to the County Prosecutor or the Attorney General, if the Attorney General is the prosecuting attorney. [The court shall also notify counsel of the date of the pre-indictment disposition conference, which shall occur no later than 45 days after the date of the first appearance.]

Note: Source – R.R. 3:2-3(b), 8:4-2 (second sentence). Amended July 7, 1971 effective September 13, 1971; amended April 1, 1974 effective immediately; text of former Rule 3:4-2 amended and redesignated paragraphs (a) and (b) and text of former Rules 3:27-1 and -2 amended and incorporated into Rule 3:4-2, July 13, 1994 to be effective January 1, 1995; paragraphs (a) and (b) amended June 28, 1996 to be effective September 1, 1996; paragraph (b) amended January 5, 1998 to be effective February 1, 1998; caption amended, paragraphs (a) and (b) deleted, new paragraphs (a), (b), (c), and (d) adopted July 5, 2000 to be effective September 5, 2000; new paragraph (e) adopted July 21, 2011 to be effective September 1, 2011; paragraph (a) amended, new paragraph (b) added, former paragraphs (b), (c), and (e) amended and redesignated as paragraphs (c), (d), and (f), and former paragraph (d) redesignated as paragraph (e) April 12, 2016 to be effective September 1, 2016; paragraphs (a) and (b) amended, subparagraph (c)(1) amended, new subparagraphs (c)(1)(A) and (c)(1)(B) adopted, subparagraphs (c)(9) and (c)(10) amended, new subparagraph (c)(11) adopted, subparagraphs (d)(3) and (d)(4) amended, and new subparagraph (d)(5) adopted August 30, 2016 to be effective January 1, 2017; paragraph (a) amended December 6, 2016 to be effective January 1, 2017; subparagraph (c)(1) amended May 10, 2017 to be effective immediately; paragraph (f) amended and new subparagraphs (f)(6) and (f)(7) adopted to be effective .

B. R. 3:7-8. Issuance of Warrant or Summons upon Indictment or Accusation

The Committee reviewed R. 3:7-8 to address technological issues arising when a direct indictment is returned or an accusation is filed for persons who were not previously charged on a complaint-warrant (CDR-2) or a complaint-summons (CDR-1).

An essential component of Criminal Justice Reform is the linkage of the LiveScan electronic fingerprinting system with the Computerized Criminal History (CCH) System maintained by the New Jersey State Police. This linkage is initiated by law enforcement for the processing of the complaint in the Electronic Court Disposition Reporting (eCDR) system. It provides a quick means of identifying criminal defendants by connecting an arrest record and the State Bureau of Identification (SBI) number to the complaint. This linkage with LiveScan and the complaint also initiates the preliminary Public Safety Assessment (PSA). The PSA interface in turn pulls the defendant's criminal history and case records from various computerized databases.

In the case of a direct indictment or the filing of an accusation, these fundamental processes do not occur because the defendant was not previously charged on a complaint-warrant or complaint-summons. Therefore, the proposed revisions to R. 3:7-8 specify that a law enforcement officer or prosecutor will prepare a complaint-warrant or complaint-summons after an indictment is returned or an accusation is filed for a person who has not previously been charged on a complaint-warrant or a complaint-summons.

Consistent with this change, the caption of this Rule would be revised to emphasize that issuance of a complaint-warrant or complaint-summons is required where the defendant has not been previously charged.

The Committee also proposes changing the Rule to require that the form of complaint-warrant or complaint-summons be presented to the Assignment Judge (or any other Law Division judge in the Assignment Judge's absence) rather than the criminal division manager. This proposed change addresses concerns raised about the secrecy of the grand jury process, e.g., where the indictment is sealed. Pursuant to R. 3:6-8(a), the indictment is required to be returned to the "Assignment judge or, in the Assignment Judge's absence, any Superior Court judge assigned to the Law Division in the county."

The proposed amendments to R. 3:7-8 follow.

3:7-8. Issuance of a Complaint-Warrant or Complaint-Summons upon Indictment or Accusation Where Defendant has not been Previously Charged

Upon the return of an indictment or the filing of an accusation a complaint-summons (CDR-1) or complaint-warrant (CDR-2) form shall be [issued] prepared by a law enforcement officer or the prosecutor for issuance by the Assignment Judge or a designated Superior Court judge or, in their absence, to any Superior Court judge assigned to the Law Division in the county in accordance with R. 3:3-1 [by the criminal division manager as designee of the deputy clerk of the Superior Court in the manner provided by law] for each defendant named in the indictment or accusation who has not been previously charged in the matter. [The criminal division manager as designee of the deputy clerk of the Superior Court, upon request, shall issue more than one warrant or summons for the same defendant.] If the defendant fails to appear in response to a summons, a bench warrant shall issue.

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

Source-R.R. 3:4-9. Amended July 22, 1983 to be effective September 12, 1983; amended July 13, 1994 to be effective January 1, 1995; amended August 30, 2016 to be effective January 1, 2017; amended to be effective .

C. R. 3:7-9. Form of Warrant and Summons

Rule 3:4-1(b), effective January 1, 2017, requires that a defendant charged on a complaint-warrant who is thereafter arrested "be remanded to the county jail pending a determination of conditions of pretrial release or a determination regarding pretrial detention if a motion has been filed by the prosecutor." The Committee recommends amending the provisions of R. 3:7-9 regarding the form of a post-indictment or post-accusation warrant to include language identical to the provisions of R. 3:4-1(b) to ensure that a defendant arrested on a complaint-warrant issued pursuant to R. 3:7-8 is treated the same as a defendant arrested on a warrant pursuant to R. 3:4-1(b).

The portion of the Rule regarding the form of summons would be revised to indicate that a "bench" warrant will be issued when a defendant fails to appear at the arraignment. This proposed change would conform the Rule to the distinction adopted by the Court in R. 3:2-2, effective January 1, 2017, that a "bench" warrant (as distinct from an "arrest warrant") will be issued when a defendant fails to appear at the rescheduled first appearance.

The proposed amendments to R. 3:7-9 follow.

3:7-9. Form of Warrant and Summons

The warrant shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty, shall describe the offense charged in the indictment or accusation and shall command that the defendant be arrested and [brought before a judge authorized to set conditions of pretrial release pursuant to R. 3:26-2] remanded to the county jail pending a determination of conditions of pretrial release or a determination regarding pretrial detention if a motion has been filed by the prosecutor. [Conditions of pretrial release shall be fixed by the court and endorsed thereon, and in such case the sheriff or warden may take any monetary bail.]

The summons shall be in the same form as the warrant except that it shall be directed to the defendant and require the defendant to appear to plead before the court at a stated time and place. The summons shall also state that if the defendant fails to so appear, a bench warrant for defendant's arrest shall issue.

Source-R.R. 3:4-10(a) (b); amended July 13, 1994 to be effective January 1, 1995; amended August 30, 2016 to be effective January 1, 2017; amended to be effective .

D. R. 3:26-9. Disclosures to Pretrial Services Program: Confidentiality

The Committee is proposing new Rule 3:26-9 to address disclosures between the defendant and Pretrial Services Program pursuant to the Order of the Supreme Court issued December 6, 2016, which relaxed and supplemented the Part III and Part VII Court Rules for development of conforming rule amendments.

The Supreme Court in its Order dated December 6, 2016 stated in pertinent part:

> WHEREAS the Criminal Justice Reform Law (P.L. 2014, c. 31) will take effect on January 1, 2017, which substantially reforms New Jersey's system of pretrial release, and which specifically provides for the adoption of Rules of Court to implement the Criminal Justice Reform Law; and …
>
> WHEREAS court staff will have frequent contact with defendants, access to sensitive personal information and disclosures from the defendant, and where the Pretrial Services Program's success will in part rely on defendants' candor with Pretrial Services staff;
>
> IT IS ORDERED pursuant to N.J. Const. (1947), Art. VI, §2, par.3, that effective January 1, 2017, and until further order…
> (4) The Part III and Part VII Rules are relaxed and supplemented such that no statement or other disclosure, written or otherwise, made or disclosed by the defendant to the Pretrial Services Program may be used at any stage of the matter for any purpose, except (a) for purposes specifically provided for under the Rules of Court, or (b) in the prosecution of fraudulently obtaining pretrial release or the services of the Public Defender.
> [See Supreme Court Order (December 6, 2016), 222 N.J.L.J 3985, 4061 (2016).]

At the outset the Committee acknowledged the emphasis in the Supreme Court Order that the "Pretrial Services Program's success will in part rely on defendants' candor with Pretrial Services staff…" To preserve this relationship, the rule would need to balance the defendant's interests in keeping certain information from being used against him and

the need for a candid relationship with Pretrial Services staff; otherwise, the court would be deprived of accurate information needed for its decisions on pretrial release or detention or subsequent decisions on modification of conditions or revocation of release.

1. Discussion

Paragraph (a)

Paragraph (a) sets forth the general prohibition against disclosures that "no statement or other disclosure, written or otherwise, made by a defendant to the Pretrial Services Program may be used to prove any crime or offense alleged in the pending case."

In drafting this prohibition on the use of this information in the "pending case," the Committee turned to the Supreme Court's decision, In re Subpoena Duces Tecum, 214 N.J. 147 (2013). In Subpoena Duces Tecum, the Court addressed the confidentiality of the financial information a criminal defendant who was indicted for financial crimes had reported on the Uniform Defendant Reporting System[1] (UDIR) form in light of an allegation that the financial information disclosed on the 5A form[2] to obtain the services of a public defender was false. The Supreme Court held that the defendant's financial disclosures on the UDIR form may not be used by the prosecution to prove the pending case, even if the defendant's finances are relevant to the pending charges. Id. at 168. To

[1] The UDIR consists of a package of forms used for purposes of intake, bail, pretrial intervention, and sentencing. See Directive #03-13 Revised Uniform Defendant Reporting System (May 29, 2013).

[2] The 5A form asks for certain information, such as employment and financial information, and is used to determine a defendant's eligibility for a public defender, if requested. All defendants must sign the form to affirm that their statements about their finances are true and that they are aware that they could be subject to punishment.

protect against the use of this information in the pending trial, and to guard against improper accusations of abuse, the Court required that a "separate team of prosecutors and investigators – who are not involved with the pending case – should be assigned to any new investigation relative to the contents of the UDIR form." Id. at 168-69.

Consistent with the Supreme Court's decision, the Committee is proposing that no statement or other disclosure to the Pretrial Services Program may be used against the defendant to prove any crime or offense alleged in the "pending" case.

The Committee recommends paragraph (a) for adoption by the Court.

Paragraph (b)

This paragraph provides that (except as provided in paragraphs (c) or (d)), "all statements or other disclosures, written or otherwise, made by a defendant to the Pretrial Services Program shall be used only for the purposes of (1) making recommendations to the court concerning the release or detention of the defendant, (2) monitoring or enforcing any nonmonetary release conditions, or (3) determining the defendant's eligibility for the services of the Office of the Public Defender, and shall otherwise remain confidential."

This paragraph is consistent with the overall responsibilities of the Pretrial Services Program provided under the Criminal Justice Reform (hereinafter CJR) Law (N.J.S.A. 2A:162A-15 et. seq.). Additionally, this provision recognizes that Pretrial Services staff may assist the defendant in completing the 5A form used in determining the defendant's eligibility for representation by a public defender.

The Committee recommends paragraph (b) for adoption by the Court.

Paragraph (c)

This paragraph provides that "Nothing in paragraphs (a) or (b) shall be construed to limit the use of any such disclosures in any subsequent prosecution for: (1) fraudulently obtaining pretrial release, (2) fraudulently obtaining the services of the Public Defender, or (3) Contempt of court."

Paragraphs (c)(1) and (c)(2)

The provisions in these two subparagraphs permitting the disclosure of information to be used in any subsequent prosecution for "fraudulently obtaining pretrial release" or "fraudulently obtaining the services of the public defender" conform with the exceptions in the Supreme Court's December 6, 2016 Order.

The Committee is proposing subparagraphs (c)(1) and (c)(2) for adoption by the Court.

Paragraph (c)(3)

This subparagraph permitting information to be used in a subsequent prosecution for contempt of court was the subject of extensive discussion.

The Committee attempted to put into context the nature of the information from the defendant that might fall within the scope of interactions with the Pretrial Services Program. The Committee also discussed what communications might be at issue. It was recognized that the type of information that might come from interaction between a defendant and Pretrial Services staff is obviously broad and may vary widely.

The following is a list of examples discussed for illustrative purposes, and is not intended to be complete. The information at issue could include: (1) information relevant

to potential violations of pretrial conditions of release, (2) information regarding electronic monitoring, either real-time data used to facilitate investigation of potential violations of electronic monitoring conditions or historic information regarding electronic monitoring, or a (3) defendant's admissions that are relevant to potential options sought for treatment or rehabilitation.

Some members expressed strong opposition to permitting these disclosures to be used in contempt proceedings, as well as proposed provisions permitting such disclosures for purposes of impeachment or perjury. Those members believed that these provisions were outside the scope of the Supreme Court's Order, and thus should not be included in a court rule. Moreover, those members noted that the Criminal Justice Reform Law did not specify that violations of a pretrial release order could be prosecuted as a criminal contempt or that a defendant's statements could be used for impeachment purposes or perjury proceedings.

Those in favor of the provisions responded that the provisions do not conflict with the Court's Order because the information will not be used to prove the defendant's guilt for the crime or offense alleged in the pending case. Additionally, these members believe that having the defendant potentially subject to enforcement proceedings through criminal contempt would promote the court's overall efforts to manage the risks of pretrial misconduct. According to these members, without these provisions, the defendant would have no incentive to provide accurate information to Pretrial Services staff, and the court would then not be able to rely upon that information in making decisions on pretrial release

or pretrial detention or subsequent decisions on modification of conditions or revocation of release.

Members opposed pointed out that contempt proceedings can take two forms and that neither should apply to defendants in the Pretrial Services Program: (1) R. 1:10-1 proceedings regarding contempt that occurs in the presence of the court or (2) prosecution for contempt under N.J.S.A. 2C:29-9, which encompasses purposely or knowingly disobeying a judicial order or a protective order. Those members believed that the remedy for disobeying or violating a condition of release was provided for under the Criminal Justice Reform Law, and that including a specific provision on contempt in this rule was not appropriate. See N.J.S.A. 2A:162A-24 (prosecutor can file a motion to revoke release) or R. 3:26-2(c)(2), providing for review of conditions of pretrial release for a material change in circumstances. See also State v. Williams, 234 N.J. Super. 84 (App. Div. 1989) (contempt of court should not be superimposed as an additional remedy for a violation of a condition of probation; the proper consequences for a violation of a condition of probation are specifically provided for in N.J.S.A. 2C:45-3(a)). Id. at 90-91. A member responded that the Court in State v. Gandhi, 201 N.J. 161, 190-91 (2010), held that violations of a no-contact order ordered as a condition of bail could be prosecuted via contempt.

It was also recognized that the District of Columbia permits a prosecution for contempt to be brought where a person violates a condition of pretrial release, in addition to being subject to revocation of release and detention. See D.C. Code § 23-1329(a). Additionally, ABA Standards for Criminal Justice, "Pretrial Release" (Third Edition)

(2007), Commentary to Standard 10-5.5[3], also recognizes that a willful violation of pretrial release conditions may be prosecuted by criminal contempt. Id. at 115-16.

Members responded that use of these statements undermines the integrity of the Pretrial Services Program and will only serve to deter defendants from being forthright.

The Committee ultimately decided to approve the use of disclosures in any subsequent prosecution for contempt of court.

The Committee recommends the adoption of subparagraph (c)(3) by the Court.

Paragraph (d)

This paragraph provides that "Nothing in paragraphs (a) or (b) shall be construed to limit the use of any such disclosure: (1) In pretrial release modification or revocation proceedings; (2) In any proceeding for the purpose of impeachment, or (3) For the purpose of compiling presentence reports.

Paragraph (d)(1)

This provision permitting use of this information in pretrial release modification or revocation proceedings is consistent with the responsibilities for the Pretrial Services Program. See N.J.S.A. 2A:162-25d.

The Committee recommends the adoption of subparagraph (d)(1) by the Court.

[3] ABA Standard 10-5.5 (2007) "Willful failure to appear or to comply with conditions" states in pertinent part "The judicial officer may order a prosecution for contempt if the defendant has willfully failed to appear in court or otherwise willfully violated a condition of pretrial release."

Paragraph (d)(2)

As with the Committee's discussion on contempt, this provision was also the subject of conflicting views.

Members in support noted that the District of Columbia permits this information to be used for impeachment purposes. Specifically, D.C. Code § 23-1303(d) provides that "Any information contained in the agency's files, presented in its report, or divulged during the course of any hearing shall not be admissible on the issue of guilt in any judicial proceeding, but such information may be used in … perjury proceedings, and for the purposes of impeachment in any subsequent proceeding."

It was also recognized that federal courts have interpreted the federal statute (18 U.S.C. § 3153(c))[4] governing the use of pretrial services information to permit defendant's statements to pretrial services staff to be used to impeach the defendant's credibility. See United States v. Griffith, 385 F.3d 124, 126-27 (2d Cir. 2004) (plain language of 18 U.S.C. § 3153(c)(3) poses no bar to the admissibility of the defendant's statements to pretrial services for the purpose of impeaching the defendant's credibility).

Members also noted that R. 3:4A(b)(2) prohibits the defendant's testimony at the detention hearing to be used on the issue of guilt, but permits its use for certain limited

[4] 18 U.S.C. § 3153(c) provides in pertinent part:

> (1) Except as provided in paragraph (2) of this subsection, information obtained in the course of performing pretrial services functions in relation to a particular accused shall be used only for the purposes of a bail determination and shall otherwise be confidential…
>
> (3) Information made confidential under paragraph (1) of this subsection is not admissible on the issue of guilt in a criminal judicial proceeding unless such proceeding is a prosecution for a crime committed in the course of obtaining pretrial release or a prosecution for failure to appear for the criminal judicial proceeding with respect to which pretrial services were provided.

circumstances, such as "any subsequent perjury proceedings, and for the purpose of impeachment in any subsequent proceedings." See also R. 3:26-2(d)(2) (permitting use of the defendant's testimony from the hearing on a violation of conditions of release in any subsequent perjury proceeding and for the purpose of impeachment in any subsequent proceeding).

ABA Standard 10-4.2(b)(iv) (2007) also provides that "voluntary information provided by the defendant during the pretrial services interview may be used in prosecutions for perjury or for purposes of impeachment." The Commentary to this Standard explains that it "is intended to discourage defendant from lying or withholding information in hopes of gaining pretrial release, and thus enhance the integrity of the interview." Id. at 89.

Members opposed questioned how such statements or disclosures could be used against the defendant for impeachment, i.e., would the prosecutor need to interview Pretrial Services staff for their version of events, which would then create an adversarial relationship. Those members also questioned whether a statewide policy would need to be implemented to require recording all interactions with the defendant. In contrast, the defendant's testimony at a detention hearing would be under oath and recorded.

Members in support responded that if the defendant lied to Pretrial Services staff, those statements would go to the weight of the evidence against the defendant. An example raised concerned a defendant who initially provides a version of events to Pretrial Services staff, and then later in court at the detention hearing under oath the defendant provides a different explanation. The different version would be relevant if the defendant lied to

Pretrial Services staff. The different statements would be evidential to prove the materiality and falsity of the statements made under oath.

The Committee ultimately decided to include the provision that this information could be used in any proceeding for the purpose of impeachment.

The Committee recommends subparagraph (d)(2) for adoption by the Court.

Paragraph (d)(3)

This provision permits Pretrial Services information to be used to compile presentence reports as a means to facilitate the timely and accurate preparation of this report. This provision was modeled after the federal provision that permits probation officers to use pretrial services information for the purpose of "compiling presentence reports." See 18 U.S.C. § 3153(c)(2)(C). See also National Association of Pretrial Services Agencies (NAPSA) "Standards on Pretrial Release" (Third Edition) (October 2004), Commentary to Standard 3.8(b) recognizing that the basic information collected by pretrial services in connection with the initial release/detention decision is typically the same information collection by probation for presentence investigation reports, and thus "can provide a foundation for the presentence report." Id. at 79. The Commentary further provides that as to "defendants who are on pretrial release for an extended period prior to sentencing for an offense, their record of compliance with conditions – maintained by the pretrial services agency or program – can be helpful to the judge in determining what sentence to impose." Id. at 78.

The Committee is proposing subparagraph (d)(3) for adoption by the Court.

Paragraph (e)

Members believed that this provision limiting the use of an authorized disclosure to the "minimum information necessary to facilitate the authorized use" was essential to preserve the relationship between Pretrial Services and the defendant. See also National Association of Pretrial Services Agencies (NAPSA) supra, Commentary to Standard § 3.8(b), recognizing that "while information in the files of the pretrial program might be useful to law enforcement agencies for a wide range of investigative and data base development purposes, making the information readily available would be likely to undermine the pretrial services agency's ability to obtain useful information from defendants and from persons contacted for purposes of verification." Id. at 78.

Additionally, members thought it was equally vital that the information from Pretrial Services should not be used if it is "available from another source." See State v. Cusick, 219 N.J. Super. 452, 457 (App. Div.) certif. denied, 109 N.J. 54 (1987) (denying the defendant's request for complete access to Division of Youth and Family Services records because it was not essential and that most, if not all, of the information could be obtained from other sources through diligent investigation).

The Committee recommends the adoption of paragraph (e) by the Court.

Paragraph (f)

This paragraph requires that Pretrial Services staff advise the defendant at his or her "initial interview of the permissible uses of any statements or disclosures made to the Pretrial Services Program." The Committee believed that it was important for these defendants to be advised at the outset just as the Supreme Court required the disclaimer

language on the 5A form to avoid any possible confusion about the scope of confidentiality that the UDIR form affords defendants. See In re Subpoena Duces Tecum, supra, 214 N.J. at 167-68.[5]

It should be noted that the initial proposal considered by the Committee required this warning to be given to the defendant before eliciting any disclosures to Pretrial Services staff. Members expressed strong concerns about staff resources if this warning was required at each interaction with the defendant. In some vicinages, defendants often contacted Pretrial Services staff for purposes not related to questions on a pending court date or a particular condition of release. Thus, requiring this warning at every interaction would only serve to add more time to a conversation that may be unrelated to the Program's responsibilities. A member responded that this warning could be a reminder that the defendant had previously been warned of the permissible uses of statements or disclosures instead of repeating the same warning in each conversation.

Other members did not see any disadvantages to requiring this warning at the beginning of every discourse with the defendant. It could be limited to a standard script that could be read to the defendant before each interaction.

Several members believed that this practice would be better addressed in the *Pretrial Services Manual* rather than codified in a court rule because it relates to the manner in which employees are expected to perform their assigned job responsibilities as Pretrial

[5] Specifically, the Supreme Court required that the 5A form include the following warning "At the direction of the Assignment Judge acting on his or her own initiative, or in response to a valid grand jury subpoena with the approval of the Assignment Judge, this page (UDIR-3) may be produced to a grand jury and a prosecutor." See In re Subpoena Duces Tecum, supra, 214 N.J. at 167-68.

Services staff. Members expressed concerns that challenges might be made to prevent the prosecution from using a statement if the warning had not been provided by judicial personnel, or a formal notation could not be offered into evidence to prove that it had been given.

One member expressed strong reservations that, by including the requirement in a Court Rule, it might lead to arguments that the disclaimer could be analogized to a *Miranda* warning, and thus be subject to some suppression remedy, even though there was no police misconduct. Other members responded that such arguments are undermined by federal cases holding that disclosures to pretrial services officers are not subject to *Miranda* warnings, particularly when defendants are otherwise advised of the permissible use of their disclosures. See, e.g., United States v. Reyes, 908 F.2d 281 (2nd Cir. 1990); United States v. McLaughlin, 777 F.2d. 388, 391-92 (8th Cir. 1985); Cf. Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990) (defendants' statements regarding "biographical data necessary to complete booking or pretrial services" are not subject to *Miranda*).

An extensive discussion then ensued ranging from whether these conversations would have to be recorded and whether the defense attorney would need to be present for all interactions with Pretrial Services staff. In addition, some members worried that if the defense attorney was not present there could be claims of ineffective assistance of counsel. Another question was whether notice should be provided to defense counsel each time the defendant is scheduled to contact Pretrial Services, with the option for counsel to be present or participate via conference call.

Members acknowledged that the standard guidance by defense counsel had always been to instruct their clients not to speak to the court or court staff without counsel being present. This new emphasis on "candor" between the defendant and Pretrial Services conflicted with that longstanding advice, especially the monitoring of defendant's compliance with pretrial release conditions.

An example discussed was where a defendant on electronic monitoring is subject to a curfew condition of release, and an electronic monitoring alert is issued for a time outside that curfew. Defendant later admits to Pretrial Services that he was in a location where criminal activity allegedly occurred. The question raised was whether this falls under the definition of a disclosure that could be used against the defendant. The Committee acknowledged that a specific definition for what qualified as a "disclosure" would be developed through litigation.

Another example raised was where a defendant released on the non-monetary condition to refrain from drug use subsequently admits to drug use or possession of controlled dangerous substances to Pretrial Services staff. The question is whether those statements could be used to demonstrate the need to modify conditions or, if the prosecution is informed of the statements, result in a motion to revoke release. A member pointed out that the Supreme Court in In re Subpoena Duces Tecum, supra, 214 N.J. at 153, recognized the confidentiality of the defendant's personal information, such as the medical, mental health, and substance abuse history information on the UDIR. Other members responded that the Court expressly noted that information contained in the UDIR "can be used by the court without restriction for the purpose of setting bail,…" See In re Subpoena

Duces Tecum, supra, 214 N.J. at 161. Moreover, the Court's concern that defendants' UDIR disclosures would be used in pending cases is fully addressed concerning pretrial services disclosures proposed in R. 3:26-9(a). The use of such pretrial disclosures to enforce non-monetary release conditions is expressly authorized in R. 3:26-9(b)(2).

A suggestion was offered to only require the warning be provided to the defendant at the initial interview or the intake interview, which is conducted by Pretrial Services staff following the pretrial release decision. This interview is not the consultation at which the defendant's information is collected for the indigency determination on the 5A form for representation by the Office of the Public Defender. Additionally, this interview is only for defendants who are released on non-monetary conditions, and thus would be subject to pretrial monitoring by the Pretrial Services Program. Defendants who are released on their own recognizance (ROR), or detained pending trial are not subject to this interview.

The Committee believed that this intake interview would be the appropriate time for this warning. It is at this interview that Pretrial Services staff get contact information, provide upcoming court dates, review court-ordered pretrial release conditions and pretrial monitoring reporting requirements, advise of the possible consequences of failing to comply with conditions, including reporting violations to the court, and answer questions posed by the defendant.

The Committee recommends the adoption of paragraph (f) to require this warning on the permissible uses of any statements or disclosures made to the Pretrial Services Program be provided at the initial interview. In addition, the Committee recommends that a standard script for Pretrial Services staff to read to the defendant should be promulgated

by a Directive or memorandum from Acting Administrative Director of the Courts, Glenn A. Grant, J.A.D.

2. Provisions Rejected by the Committee

(a) Perjury

The original proposal reviewed by the Committee also included a separate provision permitting the use of any disclosure in any subsequent prosecution for "perjury" in paragraph (c), which stated the following in pertinent part:

> Nothing in paragraph (a) or (b) shall be construed to limit the use of any such disclosure in any subsequent prosecution for….
> Perjury.

Members who supported this provision did so for the same reasons that were raised during the prior discussion in paragraph (d)(2) regarding the use of disclosures for the purpose of impeachment.

Members opposed to this provision noted that a prosecution for perjury under N.J.S.A. 2C:28-1 requires a false statement under oath or equivalent affirmation made at an official proceeding. Those members opined that statements made to Pretrial Services staff are not under oath and do not qualify as being made at an official proceeding. The Model Jury Charge (Criminal) "Perjury" (March 30, 1993) states that an "official proceeding is intended to include any type of proceeding where the taking of testimony under oath is authorized." Id. at 2.

The Committee agreed with these concerns and did not approve this provision.

(b) For purpose of avoiding harm to any person or property

The original proposal also included another separate provision permitting the use of disclosures "For the purposes of avoiding harm to any person or property" in paragraph (d), which stated:

> Nothing in paragraphs (a) or (b) shall be construed to limit the use of any such disclosure…
> For the purpose of avoiding harm to any person or property.

Members in support believed that there is an affirmative obligation to share information that the defendant threatened to commit a crime or hurt the victim and that this provision would facilitate the timely warning of persons whom there was reason to believe the defendant may intend to harm them or their property.

One member noted that this provision was similar to the crime fraud exception in other evidentiary privileges, which does not extend to a communication that is relevant to commission of a crime or a fraud.

Members who opposed this provision noted that nothing prevents Pretrial Services from reporting a credible threat by a defendant to harm another person. It would be expected that there would be statewide procedures or a protocol for Pretrial Services staff that would account for such circumstances. e.g., inform the supervisor or law enforcement where appropriate. Those members did not believe this exception was necessary nor appropriate in a court rule.

The Committee agreed with these concerns and did not approve this provision.

(c) Good Cause Exception

The original proposal also included another separate provision permitting the use of disclosures "For any purpose upon a judicial determination of good cause" in paragraph (d), which stated:

> Nothing in paragraphs (a) or (b) shall be construed to limit the use of any such disclosure…
> For any purpose upon a judicial determination of good cause.

This provision was intended to facilitate disclosures for "exceptional circumstances" if the court determines good cause. A member in support noted that there would need to be a fact-specific balancing of criteria, similar to the Supreme Court's Order to supplement and relax R. 1:38-6 to permit the "Administrative Director of the Courts the authority to exchange information" with other government entities "when the public benefit of such disclosure outweighs the need for confidentiality." See Supreme Court Order dated July 15, 2014.

Strong concerns were raised that this "good cause" exception was essentially a catch-all provision that would "gut" the rule of any certainty with regards to the protections it affords defendants. Members opposed believed that this would essentially serve to deter defendants from providing any information to Pretrial Services staff and eliminate any chances for the "candor" between the defendant and Pretrial Services staff that the Supreme Court noted in its December 6, 2016 Order is important to the success of the program.

The Committee agreed with these concerns and did not approve this provision.

3. Proposed R. 3:26-9

The Committee recommends adoption of new R. 3:26-9, which follows.

R. 3:26-9. Disclosures to Pretrial Services Program: Confidentiality

(a) No statement or other disclosure, written or otherwise, made by a defendant to the Pretrial Services Program may be used by the prosecution to prove any crime or offense alleged in the pending case.

(b) Except as provided in paragraph (c) or (d), all statements or other disclosures, written or otherwise, made by a defendant to the Pretrial Services Program shall be used only for the purposes of (1) making recommendations to the court concerning the release or detention of the defendant, (2) monitoring or enforcing any nonmonetary release conditions, or (3) determining the defendant's eligibility for the services of the Office of the Public Defender, and shall otherwise remain confidential.

(c) Nothing in paragraphs (a) or (b) shall be construed to limit the use of any such disclosure in any subsequent prosecution for:

(1) Fraudulently obtaining pretrial release,

(2) Fraudulently obtaining the services of the public defender, or

(3) Contempt of court.

(d) Nothing in paragraphs (a) or (b) shall be construed to limit the use of any such disclosure:

(1) In pretrial release modification or revocation proceedings,

(2) In any proceeding for the purpose of impeachment, or

(3) For the purpose of compiling presentence reports.

(e) To the extent that paragraphs (b), (c), or (d) authorize the use of a disclosure, such disclosure shall be limited to the minimum information necessary to facilitate the authorized use and shall not be used if the information is available from another source.

(f) At the defendant's initial interview by the Pretrial Services Program, the defendant shall be advised of the permissible uses of any statements or disclosures made to the Pretrial Services Program.

Adopted to be effective .

II. Matters Previously Sent to the Court and Referred Back

A. Presentence Investigation Report

In its 2007-2009 Report, the Committee submitted a package of recommendations to the Supreme Court addressing presentence investigation (hereinafter PSI) reports, including recommendations to develop a uniform protocol when challenges by the defendant to a criminal history or court history record are made to entries in the PSI report to ensure that the amendments approved by the court are incorporated in a revised PSI and that the revised PSI report is then forwarded to the parties and appropriate entities. See *Report of the Supreme Court Committee on Criminal Practice* 2007-2009, 195 N.J.L.J. 553, 589 (2009).

The Committee also recommended adding "disclaimer" language to the "Offense Circumstances" section of the PSI report to clarify that this section includes descriptions of charges for which the defendant may not have been found guilty by a jury or may not have pled guilty to, and that it should be read in conjunction with the final charges and the defendant's version of the offense.

The Supreme Court considered these recommendations and requested that the Committee further consider the following:

1. Develop a procedure to ensure that a defendant's challenge to a criminal or court history record is resolved, memorialized and forwarded to the appropriate parties and entities.
2. Reconsider the recommendation to add "disclaimer" language to the offense circumstances section of the PSI report, in that it may not sufficiently address the impact upon the use of PSI reports by outside agencies and during post-sentencing proceedings, where PSI reports are relied upon in subsequent hearings to determine the actual facts of the case.

To address these two referrals, the Committee is proposing new recommendations that address each separately.

1. Referral to Develop Procedures to Address Court-Approved Changes to the PSI Report and Distribution

(a) Background on Prior Recommendations on Changes or Challenges to the PSI

During its 2007-09 term, the Committee recognized that when challenges or changes to the entries in the PSI report occur during the sentencing proceeding, the modifications approved by the court were often not incorporated by court staff, unless the court formally requested those changes be included in the final version of the report.

As a result, neither the parties nor other agencies that received the PSI report, such as the Department of Corrections, the Probation Division and the State Parole Board, would have the report with the court-approved changes. Thus, those entities that rely on the PSI for various purposes could be basing decisions concerning the defendant on incorrect information.

To address that concern, the Committee recommended the following in its 2007-2009 Report:

RECOMMENDATION 1: Refer to the Conference of Criminal Division Managers to develop a protocol to provide notations on the PSI of whether or not an arrest or criminal history entry or court history entry is verified by a fingerprint comparison.

RECOMMENDATION 2: A defendant challenging an entry in the PSI has the burden to provide documentation showing that the entry in the report is incorrect. This includes challenges to court history or criminal history entries, jail credits or other substantive or administrative entries.

RECOMMENDATION 3: Court approved changes to the PSI must be made in the automated Judiciary database.

RECOMMENDATION 4: If changes are made to previously distributed copies of the PSI, revised copies of the PSI will be distributed to all parties, including the prosecutor and defense counsel and to interested agencies, including the Probation Division, the State Parole Board and the Department of Corrections, depending upon the sentence imposed.

See *Report of the Supreme Court Committee on Criminal Practice* 2007-2009, supra, 195 N.J.L.J. at 589.

(b) Requirements for the Presentence Investigation Report

Pursuant to N.J.S.A. 2C:44-6(a), "The court shall not impose sentence without first ordering a presentence investigation of the defendant and according due consideration to a written report of such investigation when required by the Rules of Court." The presentence investigation report is required to "include an analysis of the circumstances attending the commission of the offense" in addition to other enumerated requirements. See N.J.S.A. 2C:44-6(b).

R. 3:21-2(a), which governs presentence procedures, requires that:

> 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 shall report to the court. The report shall contain all presentence material having any bearing whatever on the sentence….

For custodial sentences, the presentence report is required to be transmitted to the institution within 15 days. See R. 3:21-2(c).

(c) Discussion on Changes to the PSI Report

The Committee expressed similar concerns to those identified above regarding challenges or corrections to the entries in the PSI that are not raised by the defendant until the sentencing proceeding. Consequently, when the court approved changes in the PSI report at that proceeding, often, those changes or challenges were not incorporated in an

amended PSI report unless the court formally requested court staff to make those changes in the final version.

Several members pointed out that the presentence investigation reports were initially intended only to aid the court during sentencing, but were now used for far different purposes by the State Parole Board, the Probation Division and the Department of Corrections (DOC). The Committee's 2009 Report identified how the PSI report was used post-sentencing by those entities. For instance, the Parole Board used the PSI report when it considered whether to release a particular defendant on parole. The DOC often relied on the information in the PSI report for classification purposes and various other decisions concerning the defendant. Incorrect information contained in the PSI report could also affect the Probation Division if it was relying on that information to develop a case plan or supervision strategy for the defendant. See *Report of the Supreme Court Committee on Criminal Practice* 2007-2009, supra, 195 N.J.L.J. at 589.

Members identified the following common areas where substantive challenges and/or corrections were made to the PSI report: (1) jail credits (although the Committee did not believe that this was a significant problem); (2) facts of the offense; and (3) prior arrests or convictions in the court history section of the PSI report. Additionally, administrative corrections were sometimes made, for example, changes to telephone numbers and addresses.

In reviewing its prior recommendations, the Committee agreed that the first recommendation for the use of fingerprints to verify the defendant's criminal or court history was no longer a concern due to the linkage of the *LiveScan* electronic fingerprinting

system with the Computerized Criminal History (CCH) System maintained by the New Jersey State Police. This linkage with *LiveScan* and the complaint in the Electronic Court Disposition Reporting (eCDR) system also initiates the preliminary Public Safety Assessment (PSA), which in turn pulls the defendant's criminal history and case records from various computerized databases. Verification of the defendant's criminal and court history is one of the primary responsibilities of the Pretrial Services Program in making pretrial release recommendations to the court for eligible defendants.

The Committee did not believe that Recommendation 2, which placed the burden on the defendant to provide documentation to prove an inaccurate entry in the PSI report, was a practical solution to this problem. When this recommendation was proposed in the 2007-2009 term, several Committee members, including representatives from the Office of the Public Defender, objected to a defendant having the burden to provide documentation that an entry in the PSI is inaccurate. Those members were of the view that this requirement places an unreasonable burden on defendants to challenge court history entries in the PSI. See *Report of the Supreme Court Committee on Criminal Practice* 2007-2009, supra, 195 N.J.L.J. at 589.

The Committee decided that its former concerns that changes to the PSI report should be incorporated in the automated database were assuaged when it learned that the Judiciary was exploring the development of a protocol for an amended PSI report in the automated Judiciary database. These changes would require that only the amended PSI report would be accessible to the outside agencies in the Judiciary database. Additionally, enhancements were being considered for the *eCourts Criminal* electronic filing system that

would permit the PSI report to be provided electronically to the appropriate parties. The Committee agreed that those technological enhancements alleviated the necessity for its prior recommendation.

(d) Proposed Recommendations on Procedures to Address Court-Approved Changes to the PSI Report and Distribution

The Committee strongly believes that to maintain the credibility of the presentence investigation process, it is imperative that corrections or changes to entries in the PSI report that are approved by the court be memorialized in a revised PSI report before it is distributed to the outside agencies.

To implement this practice, the Committee proposes the following:

(1) To ensure that a defendant's challenges to a criminal or court history record are resolved, memorialized and forwarded to the appropriate parties, modifications or changes to the entries in the PSI report that are approved by the court must be included in the PSI report by court staff before the JOC is finalized.

(2) The PSI report with the court-approved modifications should be distributed to the parties, and that report will be the version available for the appropriate agencies, such as the DOC, State Parole Board and the Probation Division depending upon the sentence imposed.

The Committee decided that implementation of these recommendations did not require any amendments to the presentence procedures in R. 3:21-2.

2. Referral to Reconsider the "Disclaimer" Language in the "Offense Circumstances" Section of the PSI Report

(a) Background on the Prior Recommendation on the "Disclaimer"

During its 2007-2009 term, the Committee also considered which version of the facts should be included in the "Offense Circumstances" section of the PSI. See *Report of the Supreme Court Committee on Criminal Practice* 2007-2009, supra, 195 N.J.L.J. at 589. The Committee recognized that the description of the offenses contained in the "Offense Circumstances" section could vary from county to county. Some counties included the information in the police report verbatim. Other counties included a recitation of information contained in the indictment. Some counties used a variety of sources, such as the facts in the police report, the indictment, and witness statements contained in the discovery package. As a result, the facts described in the "Offense Circumstances" section can be vastly different from the evidence adduced at the trial or the facts the defendant admits to when pleading guilty.

In an effort to address the concerns that outside agencies were relying on information that may be different than the factual basis set forth in the guilty plea and/or the charges for which the defendant is convicted, the prior Committee recommended the use of the following disclaimer to alert recipients to this difference:

> These offenses include descriptions of charges of which the defendant may not have been found guilty by a jury or may not have plead guilty to. This section should be read in conjunction with the Final Charges and the "Defendant's Version."

(b) Discussion on "Offense Circumstances" Section

The Committee expressed the same concerns identified above on the use of the information in the "Offense Circumstances" section by outside agencies for post-sentencing proceedings.

Members recognized that court staff used the information provided in the State's discovery packet in the "Offense Circumstances" section. Several members had concerns with including the defendant's original charges in this section when the focus should be on the defendant's conviction and the charges for which there was a guilty plea or a finding of guilt. Other members responded that removing the original charges would not preclude other agencies from learning of them by requesting the police report from the prosecutor's office or by reviewing the complaint, which is a public document.

A member suggested changing the caption of this section to "Summary of State's Allegations" to alert recipients that this information was taken from the State's discovery packet and not provided by the defendant. A member responded that the suggested caption "Summary of State's Allegations" would attribute this information to the State even though the information contained in this section may not actually be the State's version of the facts or the statements presented by the prosecutor at trial. Moreover, in the case of a conviction after trial or the entry of a guilty plea, the jury and/or the judge has accepted certain findings of fact and it is no longer "accurate" to refer to the summary as "allegations."

Another suggestion offered was that this section should summarize those facts adduced at the proceeding. Members expressed practical concerns about the Criminal Division staff resources that would be needed to prepare such a summary in every case

being sentenced. Also noted were timing issues for the parties and the court since the summary would need to be completed before the PSI could be finalized. Additionally, this could create even more delays if the parties disagreed with the summary of the facts. Finally, there is the possibility that, long after sentencing, a defendant could allege that the summary was inconsistent with the plea, leading to further litigation.

Similar concerns were expressed when a suggestion was made to require court staff to listen to the guilty plea on *CourtSmart* and input that information in the PSI report. Members raised strong concerns that the timeframes for sentencing would be further extended if this became the standard protocol for staff to complete the PSI. A similar suggestion had been rejected for the same practical reasons in the Committee's prior Report.

(c) Proposed Recommendations to Change the Caption and Revise the Language in the "Disclaimer"

To address the Supreme Court's second referral concerning the use of the information in the "Offense Circumstances" section by outside entities for post-sentencing proceedings, the Committee is proposing the following recommendations for this section.

(1) Change the caption from "Offense Circumstances" to "Summary of State's Allegations." The Committee believes that this amendment will sufficiently alert recipients that the factual basis in this section is derived from information provided in the State's discovery packet and not by the defendant.

(2) Include a caption in the "Summary of State's Allegations" section that would be located above the Disclaimer that would read "Disclaimer for Use in Post-Sentence Proceedings."

(3) Consistent with the Supreme Court's decision to discourage inferences of guilt from dismissed charges, additional language has been included in the disclaimer to address concerns that outside agencies may be using information on dismissed charges that could negatively affect defendants. See State v. K.S., 220 N.J. 190 (2015) (negative inferences should not be drawn from dismissed charges included in a defendant's pretrial intervention application).

(4) The last sentence has been revised to strengthen the requirement that the "Summary of State's Allegations" section "must" rather than "should" be read and considered along with the final charges and the "Defendant's Version" section of the PSI report.

The Committee proposes the following additional revisions to the previously recommended language in the "Disclaimer."

> Disclaimer for Use in Post-Sentence Proceedings:
>
> [These offense circumstances] This Summary of the State's Allegations includes descriptions of charges of which the defendant may not have been found guilty by a jury or may not have pled guilty to. No inference of guilt or wrongdoing should be drawn from dismissed charges. This section [should] must be read in conjunction with the Final Charges and the "Defendant's Version."