REPORT AND RECOMMENDATIONS

RELATING TO MATERIAL WITNESSES

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NEW JERSEY LAW REVISION COMMISSION
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INTRODUCTION

The New Jersey material witness statute authorizes a judge to detain a person believed to be a material witness to a crime.[1] The statute, enacted in 1898, is not written in plain English and does not address the problems posed by the arrest and confinement of material witnesses who are often innocent witnesses to crimes. The material witness statute implicates the right of citizens to remain free from unreasonable arrest, and the state's need to prosecute crime. The present material witness statute does not protect either the citizen's or the state's interest as the decision in State v. Misik discussed below makes clear. The right of innocent citizens to remain free, as well as the need to prosecute crime, are serious matters requiring fair and well-balanced legislation. The New Jersey Law Revision Commission recommends the repeal of the present material witness statute and the adoption of its proposed statute.

In State v. Misik, 238 N.J. Super. 367 (Law Div. 1989), the court found that a warrant issued under the material witness statute violated the Fourth and Fourteenth Amendments of the United States Constitution, and article 1, paragraph 1 of the New Jersey Constitution, because the statute failed to require a pre-deprivation hearing and to prescribe other procedural safeguards to enforce due process requirements.[2] The court prescribed guidelines to implement the statute consistent with the federal and New Jersey constitutions. The court recommended that the Supreme Court promulgate rules or that "the legislature enact additional statutory provisions in order to carry out the mandate of the Due Process Clause of both the federal and state constitutions." Id. at 385.

The Supreme Court Committee on Criminal Practice is considering the issue, but has not yet recommended a rule.[3] Because the guidelines that would make the material witness statute meet constitutional concerns raise issues of substantive law, the legislature, not the Supreme Court, is the proper forum to establish the guidelines. The rule-making power of the Supreme Court is limited to procedural issues. N. J. Const. art. IV, º II, Ã 3. Even if the court rule deals with some matters of substance, it cannot treat

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1 The term "material witness statute" refers to N.J.S. 2A:162-2, N.J.S. 2A:162-3 and N.J.S. 2A:162-4. The key provision, N.J.S. 2A:162-2, provides: "Every judge and magistrate shall, when in his judgment the ends of justice so require, bind by recognizance with sufficient surety, any person who shall declare against another person for any crime punishable by death or imprisonment in state prison, or any person who can give testimony against any person so accused of any such crime, whether the offender be arrested, imprisoned, bailed or not." N.J.S. 2A:162-3 mainly concerns the conditions of confinement; N.J.S. 2A:162-4 requires the county to pay the witness a fee of $3 per day of confinement.

2 The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

The fourteenth amendment provides in pertinent part that "nor shall any State deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV.

Article 1, paragraph 1 of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N. J. Const. art. 1, Ã 1.

3 The existing court rule, R. 3:26-3, merely reiterates the broad language of N.J.S. 2A:162-2.

the range of substantive issues or employ the range of remedies available to legislation. Moreover, to rely on the Supreme Court Committee on Criminal Practice to amend the existing court rule on material witnesses to rectify the constitutional defects of a statute is an abdication of legislative responsibility.

The Commission identified several procedural and substantive problems in the material witness statute: N.J.S. 2A:162-2 through N.J.S. 2A:162-4. First, N.J.S. 2A:162-2 does not specify whether a criminal action must be pending before the state may apply for a warrant to arrest a person alleged to be a material witness. The failure of the statute to specify the preconditions for a warrant have engendered uncertainty as to when the statute is applicable. Second, the statute does not contain procedural safeguards to make certain that the arrest and detention of the witness comply with federal and state constitutional due process requirements. Third, while 2A:162-3 forbids lodging the material witness in an ordinary jail, it does not require the court to impose the least restrictive constraint to detain the witness. Fourth, 2A:162-4 sets the payment of an unreasonably low fee of $3 per day for detained witnesses. The material witness statutes do not deal with other issues such as warrantless arrests, finality of the order for purposes of appeal and the effects of taking the witness's deposition.

The Commission examined the material witness statutes of other states, the case law in New Jersey and the scholarly literature. None of the foreign material witness statutes addressed all important issues. The Commission thus drafted a comprehensive statute to regulate judicial orders directing the appearance or detention of a material witness. The proposed statute has three objectives: (1) to strike a balance between the need of the law enforcement community to prosecute crime and the right of the citizen not charged with a crime to remain free from arrest, (2) to resolve the inconsistencies in the common law, and (3) to establish the payment of a reasonable fee for confined witnesses and create other procedural rules to effectuate the interests of the law enforcement community and material witnesses.

The statute affords both the state and the defendant the right to apply for material witness orders if three threshold requirements are met: (1) an indictment, accusation or complaint for a crime is pending, or a criminal investigation before a grand jury is pending (2) the alleged witness has information material to the pending criminal action and (3) the alleged witness is unlikely to respond to a subpoena. The proposed statute specifies the content of the application for a material witness order, and lists the rights that must be afforded to a witness during a material witness hearing. In addition, the proposed statute establishes standards of review for the issuance of material witness orders, and sets the conditions of release and of confinement. The statute permits police officers to arrest an alleged material witness without a warrant in emergencies, but requires them to bring the witness before a judge immediately after arrest. Finally, the proposed statute increases to $40 per day the fee paid to detained witnesses, and gives material witnesses additional rights such as the right to appeal and to modify the material witness order.

Background

a. Material witness: definition and foreign law.

A material witness is "a witness whose testimony is crucial to either the defense or prosecution." Black's Law Dictionary 826 (5th ed. abridged 1983). "In most states, he may be required to furnish bond for his appearance and, for want of surety he may be confined until he testifies." Id. A material witness often is an innocent observer of a crime who happens to be in the wrong place at the wrong time. For example, a tourist from California who witnesses a crime in Newark by chance and gives a report to the police is a potential material witness in New Jersey. One court has observed that a material witness is "an innocent citizen whose right to the full enjoyment of liberty is threatened solely because of his potential usefulness as a witness for the government ... the deprivation of liberty, although temporary by definition, can be measured in weeks or even months." Application of Cochran, 434 F. Supp. 1207, 1213 (D. Neb. 1977).

Material witness statutes authorize the arrest and detention of alleged material witnesses. Carlson, Jailing the Innocent: The Plight of the Material Witness, 55 Iowa L. Rev. 1 (1969). "Nearly all states and the federal government have enacted provisions dealing with pretrial confinement of material witnesses." Carlson and Voelpel, Material Witness and Material Injustice, 58 Wash. U. L. Q. 1, 21 (1980). Witness laws are justified under the concept that every citizen has a duty to testify. Hurtado v. United States, 410 U.S. 578, 589 (1973). Most material witness statutes are old. For example, the New Jersey material witness statutes derive from 1898. "[W]hen dusted off and put into operation, these archaic statutes result in innocent citizens spending weeks -- even months -- in custody." Carlson and Voelpel, Material Witness and Material Injustice, 58 Wash. L. Q. 1 (1980).

Several states have developed modern legislation in the area of material witness detention. E.g. Ariz. Rev. Stat. Ann. sec. 13-4083(b) (1989) (deposition of detained witness requires discharge); Hawaii Rev. Stat. sec 835-2 (1988) (detention system based on material witness order); and N.Y. Crim. Pro. Law sec. 620.20 (McKinney 1984) (detention system based on material witness order). However, notwithstanding this legislative activity, most state statutes contain little or no procedural or substantive protection for detained witnesses. Carlson and Voelpel, supra at 27. None of the newer state statutes address the constitutional concerns raised in State v. Misik, or resolve the procedural and substantive problems identified by the Commission. Thus none of the material witness laws of foreign states provides a model to follow.

The federal material witness law also does not constitute a model law. The federal law is not a single comprehensive statute. Rather, the federal material witness law consists of a matrix of statutes and rules. 18 U.S.C. 3144 (1989)(release or detention of a material witness); 18 U.S.C. 3142 (1989)(release or detention of a defendant pending trial); 28 U.S.C. 1821 (1989)(witness fees); 18 U.S.C. 3006(a) (1989) (assignment of counsel rule); Fed. R. Crim. P. 46 (release from custody); and Fed. R. Crim. P. 15 (deposition of detained witness). In addition to being unduly complicated, the federal statutes and rules fail to authorize the arrest of material witnesses. The judiciary had to

infer the power to arrest from the federal material witness statute. Bacon v. United States, 449 F. 2d 933, 937 (9th Cir. 1971).

b. New Jersey law and State v. Misik

In Misik, a Superior Court judge issued a warrant for the arrest of Janos Misik as a material witness pursuant to N.J.S. 2A:162-2 based on the ex parte application of a detective of the New Jersey State Police. State v. Misik, 238 N. J. Super. at 371. The application alleged that Misik had information concerning the commission of environmental crimes and that his arrest was necessary because he would not be available for service by subpoena. Id.

The affidavit in support of the application contained the following allegations: (1) Misik had knowledge that his employer, Petro King Terminal Corporation, released petroleum products into the Hackensack River, (2) Misik, though initially cooperative with the police, had missed an appointment, (3) Misik was a foreigner suspected of being an illegal alien because he once failed to produce his "green card" to the police, (4) Misik lived on a boat displaying a "for sale" sign, (5) Misik did not give the police the exact location of his boat in the marina and (6) Misik had a criminal record for drug offenses. State v. Misik, 238 N. J. Super. at 371. No criminal action or proceeding against Petro King Terminal Corporation was pending when the State applied for the arrest warrant.

The court held an in camera discussion with an assistant prosecutor concerning the State's authority to obtain an ex parte arrest warrant of Misik. The assistant prosecutor maintained that the State had authority to arrest Misik without a warrant. State v. Hand, 101 N. J. Super. 43, 55-56 (Law Div. 1968) holds that a peace officer may arrest without a warrant when he has a reasonable basis or probable cause to believe a person is a material witness. The court then issued the warrant which authorized the police to arrest Misik. The warrant required the police to bring Misik before the court immediately after his arrest so that the court could inform Misik of his rights and the nature of the proceedings.

The police arrested Misik the day the arrest warrant was issued and, contrary to the court's order, brought Misik to the prosecutor's office, not the court. State v. Misik, 238 N. J. Super. at 372. The police subjected Misik to a lengthy custodial interrogation and detained him overnight in jail where he was treated like a prisoner contrary to N.J.S. 2A:162-3. The next morning Misik was brought to court handcuffed and in prison garb. State v. Misik, 238 N. J. Super. at 372. Misik's attorney objected to the procedures adopted by the court to issue the arrest warrant and requested leave to file a brief challenging the constitutionality of the material witness statutes. The court released Misik on his own recognizance, subject to the condition that he report weekly to the prosecutor's office for one month. Id. The court informed the prosecutor that if the State did not convene a grand jury investigation of Petro King Terminal Corporation within one month, the court would vacate the reporting requirement. Id. The court further

granted leave to Misik's attorney to file a brief challenging the constitutionality of the material witness statute. Id. at 373.

At the hearing, the court held that the federal and New Jersey constitutions require that an alleged material witness be provided with notice and an opportunity to be heard before being detained under the New Jersey material witness statute. State v. Misik, 238 N. J. Super. at 388. The court also held that a criminal action must be pending against an accused before a person may be apprehended or detained as an alleged material witness. Id. In support of its holding, the court found that the "express language of the statute compels the conclusion that a criminal action must be pending against an accused before a court may sanction the detention of a person believed to be a material witness." Id. at 375. The court also noted that "it is well-established that our Rules do not give a prosecutor any pre-trial subpoena power independent of the grand jury." Id. at 376. Consequently, Misik was free to refuse to cooperate with the police. Because the prosecutor could not compel Misik's appearance by subpoena absent a grand jury investigation, the court found that the prosecutor had misused the material witness statute to detain and arrest Misik. Id. at 377.

The court also found that Misik was deprived of his constitutional rights under both the federal and New Jersey constitutions. The judge stated that "Misik was arrested without prior notice and an opportunity to be heard before he was arrested and committed to jail", and thus found that the arrest and detention violated the due process requirements of the Fourteenth Amendment of the United States Constitution and article 1, paragraph 1 of the New Jersey Constitution. State v. Misik, 238 N. J. Super. at 377. The court also stated that "it was patently unreasonable under the Fourth Amendment of the United States Constitution to have arrested and detained Misik because of his refusal to cooperate with the police." Id. While the court found that the procedures followed to arrest Misik violated the federal and New Jersey constitutions, the court did not hold that the New Jersey material witness statute (N.J.S. 2A:162-2) was unconstitutional. Id. at 384.

Because the statute is silent as to constitutional safeguards, the court looked to federal and foreign state legislation for guidance. E.g. 18 U.S.C. º 3142 (e) and (f) and º 3144 (detention subject to clear and convincing evidence standard); N.Y. Crim. Pro. Law. º 620.30 (McKinney 1984) (order directs alleged material witness to appear at pre-deprivation hearing); Neb. Rev. Stat. º 29-507 (1989) (specifies the conditions of release for material witnesses). The court, deciding the New Jersey statute could be rehabilitated if procedural safeguards were established, then set forth a list of guidelines to fill the gap. State v. Misik, 238 N. J. Super. at 385-86.

Most important, the court held that a person could not be arrested or detained as a material witness unless the justification for the arrest or detention was based on probable cause. The judge stated, "This court believes that at the very least a heavy burden of proof should be imposed upon the State whenever it decides it is necessary to seek detention of an innocent person, not even a suspect, much less an accused." Id. at 383. The court cited Addington v. Texas, 441 U.S. 418 (1979) in support of its position. In

Addington, the United States Supreme Court established the "clear and convincing" standard of proof to commit a person for mental care on an involuntary basis. The United States Supreme Court stated, "The function of a standard of proof, as that concept is embodied in the Due Process and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Addington v. Texas, 441 U.S. at 423 (citation omitted). The court in Misik found that the interests at stake in material witness proceedings are the liberty interests of an innocent citizen and the State's need to gather evidence of crimes. The clear and convincing standard allocates the risk of error to the state and thus minimizes the risk of erroneous decisions. It also "reflects the value society places on individual liberty." Id. at 426 [quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)]. The court in Misik thus held that the "clear and convincing" standard is constitutionally compelled for the arrest and detention of material witnesses.

Prior to Misik, the two principal decisions on New Jersey material witness law were State v. Price, 108 N. J. Super. 272 (Law Div. 1970) and State v. Hand, 101 N. J. Super. 43 (Law Div. 1968). When read together, Price, Hand and Misik do not constitute a coherent statement of law on material witnesses, and therefore do not provide clear guidelines to the court, prosecutor or defendant. The inconsistencies concern primarily the right of the police to arrest a material witness without a warrant, and the necessity of a pending criminal action to detain a material witness.

For example, the court in Price indicated that the police may not hold a potential witness unless there is a pending criminal action against an accused. State v. Price, 108 N. J. Super. at 280-281. To the contrary, the court in Hand sanctions the detention of a person believed to be a material witness despite the absence of any formal charges against an accused. State v. Hand, 101 N. J. Super. at 56. The court in Misik held that a pending criminal action is necessary to obtain a material witness order. State v. Misik, 238 N. J. Super. at 385. In addition, the court in Hand authorizes the warrantless arrest of potential material witnesses. State v. Hand, 101 N. J. Super. at 56. The court in Misik prohibits the warrantless arrest of potential material witnesses. State v. Misik, 238 N. J. Super. at 388. The court in Misik stated that "under no circumstances may a person be arrested or detained without court process ...." Id. The decisions in Misik and Hand thus directly contradict one another on this issue. Because Price, Hand and Misik are law division opinions, each decision has equivalent legal weight and thus the inconsistencies generated by them unsettle the law on material witnesses.

PROPOSED STATUTE

2C:104-1. Definitions

a. A material witness is a person who has information material to the prosecution or defense of a crime.

b. A material witness order is a court order fixing conditions necessary to secure the appearance of a person who is unlikely to respond to a subpoena and who has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury.

Source: New

COMMENT

This section defines a material witness and a material witness order. A material witness is a person who has information crucial to the prosecution or defense. A material witness order is a court order finding that a person is a material witness, and commanding the person to appear before the court. A material witness order may not issue unless the court finds that: (1) a person is a material witness, (2) the person is unlikely to respond to a subpoena and (3) there is a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury. The material witness statute therefore does not apply to offenses that are not crimes. See, N.J.S. 2C:1-4(a) and 1-14(k). The inclusion of definitions cures the defect noted by State v. Misik that the former statute did not define a material witness or material witness order. State v. Misik, 238 N. J. Super. 367, 374 (Law Div. 1989)

2C:104-2. Application for material witness order

a. The Attorney General, county prosecutor or defendant in a criminal action may apply to a judge of the Superior Court for an order compelling a person to appear at a material witness hearing, if there is probable cause to believe that (1) the person has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, and (2) the person is unlikely to respond to a subpoena. The application may be accompanied by an application for an arrest warrant when there is probable cause to believe that the person will not appear at the material witness hearing unless arrested.

b. The application shall include a copy of any pending indictment, complaint or accusation and an affidavit containing: (1) the name and address of the person alleged to be a material witness, (2) a summary of the facts believed to be known by the alleged material witness and their relevance to the pending criminal action or investigation, (3) a summary of the facts supporting the belief that the person possesses information material to the pending criminal action or investigation, and (4) a summary of the facts supporting the claim that the alleged material witness is unlikely to respond to a subpoena.

c. If the application requests an arrest warrant, the affidavit shall set forth why immediate arrest is necessary.

Source: 2A:162-2

COMMENT

Subsection (a) substantially changes the source section, which merely established the power to bind material witnesses. Subsection (a) allows the Attorney General, county prosecutor or defendant to

apply to the Superior Court for a material witness order. The present statute does not give defendants the right to apply for material witness orders. Subsection (a) gives defendants the right to secure the testimony of witnesses to balance the powers of the State and defendants in criminal proceedings. The federal statute and the laws of several foreign jurisdictions provide defendants the right to obtain material witness orders. 18 U.S.C. 3144 (1989); Hawaii Rev. Stat. sec. 835-2(a)(1988); N.Y. Crim Pro. Law sec. 620.20 (1) (McKinney 1984); and N.C. Gen. Stat. sec. 15A-803(a)(1990).

The Superior Court may issue a material witness order when there is probable cause to believe that: (1) there is a pending indictment, accusation, or complaint for a crime, or a criminal investigation before a grand jury, (2) a person possesses information material to the pending criminal action and (3) the person is unlikely to respond to a subpoena. These requirements derive from the guidelines prescribed by State v. Misik, 238 N. J. Super. at 385-386.

However, the requirements of this subsection differ in one important respect from the Misik guidelines. Misik limits applications for material witness orders to situations where a complaint, indictment or accusation is pending. Subsection (a), in addition, allows applications where a grand jury is conducting an investigation. The addition recognizes that a witness's testimony may be necessary to determine the identity of the person to be indicted. To the extent that the present statute may not allow the use of material witness orders in aid of grand jury investigations this section represents a change in the law. See, State v. Price, 108 N. J. Super. 272, 280-281 (Law Div. 1970).

Subsection (b) requires the party making an application for a material witness order to provide facts to the court establishing the need for the material witness order. The affidavit must contain a summary of the facts believed to be known by the alleged material witness and their relevance to the pending investigation. The affidavit also must contain a summary of facts showing that the person is unlikely to respond to a subpoena, and a summary of facts supporting the affiant's belief that the person is a material witness. The requirements of subsection (b) are intended to provide a court with information needed to make an independent judgment on the application. Mere conclusory allegations do not satisfy these requirements. When applicable, subsection (b) requires the application to include a copy of the pending indictment, accusation or complaint.

Subsection (c) governs the special situation where the applicant seeks the arrest of the alleged material witness. In this event, the application must establish that, without the arrest, the material witness will not be available as a witness.

2C:104-3. Order to appear

a. If there is probable cause to believe that a material witness order may issue against the person named in the application, the judge may order the person to appear at a hearing to determine whether the person should be adjudged a material witness.

b. The order and a copy of the application shall be served personally upon the alleged material witness at least 48 hours before the hearing, unless the judge adjusts the time period for good cause, and shall advise the person of: (1) the time and place of the hearing and (2) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one.

Source: New

COMMENT

Subsection (a) identifies the standard of review governing an application for a material witness order. The standard of review is the probable cause standard. To issue a material witness order, the judge must find that it is more probable than not that the facts set forth in the application are true.

Subsection (b) requires the party who obtains a material witness order to serve a copy of the order and application upon the person named in the application. Service must take place at least 48 hours before the hearing unless the judge enlarges or contracts the prescribed time period. The judge may alter the prescribed time period if the party making the application for a material witness order demonstrates that exigent circumstances justify a deviation from the prescribed time period. The order to appear informs the alleged material witness of the time and place of the hearing and of the right to counsel.

2C:104-4. Arrest With Warrant

a. If there is clear and convincing evidence that the person named in the application will not be available as a witness unless immediately arrested, the judge may issue an arrest warrant. The arrest warrant shall require that the person be brought before the court immediately after arrest. If the arrest does not take place during regular court hours, the person shall be brought to the emergency-duty Superior Court judge.

b. The judge shall inform the person of: (1) the reason for arrest, (2) the time and place of the hearing to determine whether the person is a material witness, and (3) the right to an attorney and to have an attorney appointed if the person cannot afford one.

c. The judge shall set conditions for release, or if there is clear and convincing evidence that the person will not be available as a witness unless confined, the judge may order the person confined until the material witness hearing which shall take place within 48 hours of the arrest.

Source: 2A:162-2

COMMENT

Subsection (a) establishes the standard of review that the judge applies to an application for an arrest warrant. The standard of review is the "clear and convincing" evidence standard. State v. Misik, 238 N. J. Super. at 386. The "clear and convincing" standard is the intermediate standard of proof located between the preponderance of the evidence and reasonable doubt standards. Addington v. Texas, 441 U.S. 418, 423 (1979). While it is difficult to define the term "clear and convincing" evidence precisely, it denotes a rigorous level of proof. The "clear and convincing" standard of proof minimizes the risk of erroneous decisions and reflects the value society places on individual liberty. Id. at 425 [quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)].

Subsection (a) also directs that the person be brought before the court immediately after arrest. If the arrest takes place outside of regular court hours, the person must be brought before the emergency-duty Superior Court judge. The purpose of this requirement is to make certain that the arrested person has an immediate judicial review of the arrest. The statute does not specify a penalty for noncompliance with the requirement to bring the arrested person before the court immediately after arrest, since a violation of a court order is a contempt of court.

Subsection (b) requires the judge at this first appearance to inform the arrested person of the time and place of the material witness hearing and the right to counsel.

Subsection (c) requires the judge to release the arrested person with appropriate conditions unless confinement is the only method to secure the appearance of the witness. When the judge orders the person confined, the judge must hold the material witness hearing within 48 hours of the person's arrest.

2C:104-5. Arrest Without Warrant

a. A law enforcement officer may arrest an alleged material witness without a warrant only if the arrest occurs prior to the filing of an indictment, accusation or complaint for a crime, or the initiation of a criminal investigation before a grand jury, and if the officer has probable cause to believe that:

(1) a crime has been committed,

(2) the alleged material witness has information material to the prosecution of that crime,

(3) the alleged material witness will refuse to cooperate with the officer in the investigation of that crime, and

(4) the delay necessary to obtain an arrest warrant or order to appear would result in the unavailability of the alleged material witness.

b. Following the warrantless arrest of an alleged material witness, the law enforcement officer shall bring the person immediately before a judge. If court is not in session, the officer shall immediately bring the person before the emergency-duty Superior Court judge. The judge shall determine whether there is probable cause to believe that the person is a material witness of a crime and, if an indictment, accusation or complaint for that crime has not issued or if a grand jury has not commenced a criminal investigation of that crime, the judge shall determine whether there is probable cause to believe that, within 48 hours of the arrest, an indictment, accusation or complaint will issue or a grand jury investigation will commence. The judge then shall proceed as if an application for a warrant has been made under 2C:104-4.

COMMENT

This subsection settles the law regarding the right to arrest material witnesses without a warrant. Compare State v. Hand, 101 N. J. Super. at 56 (allowing warrantless arrests) with State v. Misik, 238 N. J. Super. at 388 (forbidding warrantless arrests). Subsection (a) allows the warrantless arrest of alleged material witnesses under precisely defined circumstances. The warrantless arrest power applies in exigent circumstances such as the encounter between a law enforcement officer and a witness at the scene of a crime. As a result, the power to arrest without a warrant ceases to exist subsequent to the filing of an indictment, accusation or complaint for a crime or the initiation of a criminal investigation before a grand jury.

Subsection (b) follows the procedure set forth in 2C:104-4 regarding arrests upon warrant. The law enforcement officer must bring the arrested person before a judge immmediately after arrest so that the judge may review the propriety of the arrest and set appropriate conditions of release. The failure of the law enforcement officer to comply with the requirement to bring the arrested person before a judge immediately after arrest makes the arrest unlawful thereby providing the wrongfully arrested person with remedies for an unlawful arrest.

2C:104-6. Material witness hearing

a. At the material witness hearing, the following rights shall be afforded to the person: (1) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one, (2) the right to be heard and to present witnesses and evidence, (3) the right to have all of the evidence considered by the court in support of the application, and (4) the right to confront and cross-examine witnesses.

b. If the judge finds that there is probable cause to believe that the person is unlikely to respond to a subpoena and has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, the judge shall determine that the person is a material witness and may set the conditions of release of the material witness.

c. If the judge finds by clear and convincing evidence that confinement is the only method that will secure the appearance of the material witness, the judge may order the confinement of the material witness.

d. The judge shall set forth the facts and reasons in support of the material witness order on the record.

Source: 2A:162-2

COMMENT

Subsection (a) establishes the rights afforded to the alleged material witness at the hearing. The alleged material witness has the full panoply of rights afforded to a person at an adversarial hearing. Among the rights granted is the right to know the evidence used by the court as the basis for grant of the application. If disclosure of particular evidence would obstruct the ongoing criminal investigation, the court may exclude that evidence from consideration in deciding whether to grant the application. Cf. State v. Kunz, 55 N. J. 128 (1969) and R. 3:21-2(a).

Subsections (b) and (c) distinguish conceptually between the finding that a person is a material witness and the decision to impose restraints to assure the appearance of the witness. Subsection (b) identifies the standard of review for determining that a person is a material witness and to impose non-custodial restraints on the witness. The standard of review is the probable cause standard. Subsection (c) identifies the standard of review for ordering the confinement of the witness. The judge may order the confinement of the material witness only when the judge finds by clear and convincing evidence that no other form of restraint will assure the appearance of the material witness. The clear and convincing standard is used to indicate that confinement is a last resort. The clear and convincing standard protects the constitutional right of the person to be free from arbitrary seizure. State v. Misik, 238 N. J. Super. at 387.

Subsection (d) requires that the judge set forth facts and reasons in support of the order. The requirement to set forth facts and reasons furnishes a record for appeal.

2C:104-7. Conditions of release; confinement

a. A confined person shall not be held in jail or prison, but shall be lodged in comfortable quarters and served ordinary food.

b. The conditions of release for a material witness or for a person held on an application for a material witness order shall be the least restrictive to effectuate the appearance of the material witness. A judge may: (1) place the witness in the custody of a designated person or organization agreeing to supervise the person, (2)

restrict the travel of the person, (3) require the person to report (4) set bail or (5) impose other reasonable restrictions on the material witness.

c. A person confined shall be paid $40 per day, and when the interests of justice require it, the judge may order additional payment not exceeding the actual financial loss resulting from the confinement. The party obtaining the material witness order bears the cost of confinement and payment unless the party is indigent.

Source: 2A:162-3, 2A:162-4

COMMENT

Subsection (a) identifies the conditions of detention, and is substantially identical to the requirements of N.J.S. 2A:162-3. A material witness, if confined, cannot be treated like a prisoner because the material witness has not comitted a crime. Rather, the state or defendant must provide comfortable lodging and ordinary food to a confined material witness.

Subsection (b) requires the judge to impose the least restrictive restraint upon a non-confined material witness to secure the appearance of the material witness. The list of alternatives is designed to guide the judge in the decision making process, but is not meant to exhaust the range of possible and appropriate alternatives. Subsection (b) permits the judge to exercise discretion in setting the appropriate restraints.

Subsection (c) substantially departs from present law which provides for payment of $3 for each day the person is "committed or detained in jail." N.J.S. 2A:162-4. Subsection (c) requires the payment of $40 for each day the material witness is confined. The amount of payment is the same as that provided by federal law. 28 U.S.C.A. º 1821(b). In addition, this subsection allows a court to order additional payment not to exceed actual financial losses, if the additional payment would serve the interests of justice.

N.J.S. 2A:164-2 required the board of chosen freeholders of the county where the confinement occurs to pay the costs of confinement regardless of the entity seeking the confinement. Subsection (c) reflects the fact that the county is not always responsible for the costs of prosecution when the prosecution is brought by the State. Cf. 2A:73A-9. The effect of subsection (c) is that the prosecution, whether county or State, bears the cost of a material witness confined on its behalf. Likewise, a defendant obtaining the material witness order requiring confinement is obligated to pay the cost of confinement, plus additional payment if ordered, unless the party is indigent.

2C:104-8. Deposition

A material witness may apply to the Superior Court for an order directing that a deposition be taken to preserve the witness's testimony. After the deposition is taken, the judge shall vacate the terms of confinement contained in the material witness order and impose the least restrictive conditions to secure the appearance of the material witness.

Source: New

COMMENT

This section gives a material witness a statutory right to apply to the Superior Court for an order requiring the taking of a deposition pursuant to court rules to preserve the testimony of the witness. Deposition as an alternative to continued confinement is now allowed by court rule. R. 3:13-2. The federal rules and other state laws take a similar approach. E.g. Fed. R. Crim. P. 15; Ariz. Rev. Stat. Ann. º 13-4083(b) (1989). The taking of a deposition to preserve testimony vacates the confinement terms of the

material witness order and requires the judge to modify the material witness order to assure that the least restrictive conditions of release remain imposed on the material witness.

2C:104-9. Orders appealable

A material witness order shall constitute a final order for purposes of appeal, but, on motion of the material witness, may be reconsidered at any time by the court which entered the order.

Source: New

COMMENT

This section makes a material witness order a final order for purposes of appeal entitling the material witness to file an appeal without leave of the Appellate Division. In the absence of the statute it would be unclear whether a material witness order is interlocutory or final. The Superior Court which entered the order retains jurisdiction when an appeal is taken to enable the witness to apply to the court for a modification of the original order.

TABLE OF DISPOSITIONS

SECTION	DISPOSITION
2A:162-2	2C:104-2, 4 and 6
2A:162-3	2C:104-7
2A:162-4	2C:104-7