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REPORT OF THE

NEW JERSEY SUPREME COURT

COMMITTEE ON CRIMINAL PROCEDURE

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DATED: March 20, 1973

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE NEW JERSEY SUPREME COURT

The Supreme Court Committee on Criminal Procedure has made the following reports and recommendations:

I. Issuance of Arrest Warrants by Court Officials Other Than a Judge (R. 3:3-1)

The Supreme Court has requested that this committee review that aspect of Rule 3:3-1 which allows a court clerk or other court official, other than a judge, to issue an arrest warrant.

Rule 3:3-1 in its present form reads in pertinent part as follows:

> "An arrest warrant may be issued by a judge of a court having jurisdiction in the municipality in which the offense is alleged to have been committed or in which the defendant may be found, or by the clerk or a deputy clerk of that court, if it appears to such judge, clerk or deputy clerk from the complaint, or from an affidavit or deposition taken under oath, that there is probable cause to believe that an offense has been committed and that the defendant has committed it. . . ."

The Fourth Amendment commands that "no Warrants shall issue, but upon probable cause. . .". And as stated in Wong Sun v. United States, 371 U.S. 471, 481-482 (1963):

> "The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be imposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause."

The twofold question raised by Rule 3:3-1, in determining whether it satisfies in its present form the guarantee of the Fourth Amendment, is whether a municipal court clerk and deputy clerk are

detached, neutral judicial officers, and if so, whether they are competent to make a determination of probable cause.

These specific questions were answered in the affirmative by our Supreme Court in State v. Ruotolo, 52 N.J. 508 (1968). In finding a municipal court clerk and deputy clerk to be neutral and detached court officials, the court stated:

> "In New Jersey, a municipal court clerk or deputy clerk is completely independent of any agency charged with the aprehension and prosecution of offenders. Pursuant to its power as set forth in Art. VI, § 2, par. 3 of the New Jersey Constitution, this Court promulgated R.R. 1:25C restricting the activities of court personnel. By R.R. 1:25C(a)(7), clerks and deputy clerks, as members of the judicial branch of government 'shall not hold any elective public office, nor be a candidate therefor, shall not engage in partisan political activity, and shall not, without prior approval of this court, hold any other public office or position.
>
> In furtherance of this rule, this Court has instructed all municipal courts that 'no municipal court employee or other employee assigned to serve a municipal court may have any connection with the police department.' Municipal Court Bulletin Letter No.68, p.2, September 29, 1961." 52 N.J. at 512-513

The Court went on to note that although clerks and deputy clerks are appointed by governing municipal authorities, they are responsible to the judiciary.

The court next discussed whether a decision on probable cause is exclusively the function of a member of the judiciary. The court responded in the negative, saying:

> "But we believe that the background in the law, although desirable, is not a requirement imposed by the Constitution on a determination of probable cause. After all, probable cause is a standard which is designated to be applied by laymen. A policeman may make an arrest without a warrant where there is probable cause, i.e., where there are facts which would lead 'a man of reasonable caution' to believe a crime has been or is being committed." 52 N.J. at 514

The court also adopted the definition of probable cause as stated in Brinegar v. United States, 338 U.S. 160, 175 (1949) that:

> "In dealing with probable cause,. . .as the very name implies, we are dealing with probabilities. These are not technical; they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians act."

The court held municipal court clerks and deputy clerks sufficiently insulated from the business of law enforcement to impartially determine probable cause as above defined and concluded:

> "By its very nature probable cause is a standard which can be applied by laymen, so long as they exercise reasonable caution. It is a practical, non-technical concept, not requiring the complex weighing of factual and legal considerations which is the judge's daily task. In issuing arrest warrants permitted by N.J.S. 2A:8-27 and R.R. 8:3-2, clerks and deputy clerks possess the neutral status and qualifications necessary to comport with the requirements of the fourth amendment." 52 N.J. at 515

The committee has concluded that there is no empirical evidence before it which would warrant a departure from Ruotolo. Clearly, a court clerk and deputy clerk are neutral officers detached from law enforcement and are no less competent to decide probable cause than a juror deciding upon guilty beyond

a reasonable doubt. It might be suggested that despite the titular independence of the clerk and deputy clerk, both are likel to succumb to the urging of the local law enforcement officers. It is fair to say that this evil confronts any "judicial officer" before whom a warrant is sought. A safeguard against such pressur should exist if the issuing officer recognizes his responsibility to arrive at an independent determination of probable cause based upon the evidence before him. He should further recognize that by his execution of the warrant he is attesting to having undertaken such an evaluating process.

A contrary view of the constitutional permissibility of allowing municipal clerks to issue warrants was adopted in State v. Paulick, 151 N.W.^{2} 591 (Minn. Sup. Ct. 1967). In finding clerk unqualified to act as judicial officers, the court said:

> ". . .the United States Supreme Court has stressed the need for imposing a judicial officer between the police and the accused. . .However conscientious and impartial may be the clerk. . .who supervised the execution of the complaint and issued the warrant. . ., his background and experience we can assume are not in the law. It is highly improbable that he was qualified to determine whether the complaint and warrant met constitutional standards. It is with the greatest difficulty we envision his refusing to issue a warrant upon the complaint of a state highway patrolman. There are functions which the judiciary cannot delegate, since they require both a knowledge of the law and the authority to grant or refuse the request of law enforcement officers to initiate criminal procedures."
> 151 N.W.^{2} at 598

The court should not follow the factually unsupported conclusion of the court in Paulick and exclude clerks and deputy clerks from the issuance of arrest warrant without some factual basis indicating either their lack of neutrality or their inability to properly decide probable cause. This is especially the case in view of the practical problems that may be engendered if only a municipal magistrate is entitled to issue an arrest warrant. The expeditious prosecution of a crime, which commences initially with the arrest of the offender, requires that a judicial officer be available at all times to hear the evidence offered in support of an application for an arrest warrant. If only a municipal magistrate is competent to hear such evidence, his unavailability retards the law enforcement process. The benefit, if any, derived from having a municipal magistrate determine probable cause is outweighed by the risk of his unavailability when the need for a warrant is at hand.

Moreover, the court should assess the desirability of concluding that the thought process required to evaluate and determine such legal standards as probable cause is beyond the competence of the layman. Law enforcement begins on the street. And in this arena the lay policeman decides daily whether that observed "warrant[s] a man of reasonable caution in the belief" that a crime has been committed. Carroll v. United States, 267 U.S. 132, 162 (1925). It should not now be suggested that a decision on this standard, made uncountable times by a layman, now lies beyond his mental competence.

It is the recommendation of this committee that Rule 3:3-1 be retained in its present form. Alternatively, if the Court feels that the rule in its present form has spawned problems where clerks or deputy clerks have failed repeatedly in their task of remaining neutral or are repeatedly inaccurate in deciding probable cause, the committee recommends that the rule be restudied after data is obtained by the administrative office of the courts. This information should establish the frequency with which municipal court clerks and deputy clerks issue warrant as compared with the number issued by the municipal magistrate, the reason for their issue by the clerk rather than the magistrate, the number of municipalities having their own magistrate and his general availability, the nature of the influence, if any, exercised over municipal court clerks by law enforcement agencies and the number of warrants issued by clerks which have been struck down as improvidently issued.

It is further recommended by the committee that the administrative office of the courts circulate to all municipalities a brief outline of the probable cause standard to be employed by municipal court clerks and deputy clerks in determining whether to issue arrest warrants. While the committee has not devised such an outline at this time, it will do so if the court requests it.

II. Right of a Defendant to Appear Pro Se

The committee was asked to examine the right of a defendant to appear pro se in the light of three recent California cases and other authorities. The committee feels that the considerations in determining whether a defendant may represent himself are a matter of substantive law and not an appropriate topic to be embodied in a rule. Moreover, the subject does not appear to have generated any substantial problem in New Jersey, possibly because of the guidelines set out in State v. Sinclair et al, 49 N.J. 525, 551-552 (1967) and State v. Davis, 45 N.J. 195, 198-199 (1965). Accordingly, the committee recommends against adoption of a rule on the subject.

III. Review of the New Jersey Comparative Analysis of the A.B.A. Standards of Criminal Justice

The committee reviewed Professor Robert Knowlton's Comparative Analysis with a view towards recommending any changes in rules or statutes as would be appropriate. The committee decided that no changes were necessary due to the fact that most of the standards set by the American Bar Association are already in force in New Jersey. The committee noted that areas which might raise questions of interest, sentencing review and the new Penal Code, were to be discussed in detail in separate reports by the committee.

IV. Proposed Revision of the Criminal Discovery Rule (R. 3:13-3)

R. 3:13-3. Discovery and Inspection

[(a) Materials Discoverable by Defendant as of Right. Upon motion made by a defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant]

(a) Discovery by the Defendant. Upon written request by the defendant, the prosecuting attorney shall permit defendant to inspect and copy or photograph any relevant

(1) [designated] books, tangible objects, papers or documents obtained from or belonging to him;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof;

(3) [defendant's] grand jury testimony;

(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are [known by the prosecuting attorney to be] within [his] the possession, custody or control [;] of the prosecuting attorney;

(5) reports or records of prior convictions of the defendant[.];

(6) books, papers, documents or tangible objects, buildings or places or copies thereof which are within the possession, custody or control of the State;

(7) names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information including a designation by the prosecuting attorney as to which of those persons he may call as witnesses;

(8) record of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior convictions of such persons;

(9) police reports which are within the possession, custody, or control of the prosecuting attorney;

(10) warrants, which have been completely executed, and the papers accompanying them including the affidavits, transcript or summary of any oral testimony, return and inventory.

[(b) Materials Discoverable by Defendant in the Court's Discretion--Books, Papers and Tangible Objects. Upon motion made by a defendant, which shall be as specific as possible under the circumstances, absent a showing of good cause to the contrary the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of the State.]

[(c) Materials Discoverable by Defendant in the Court's Discretion--Witnesses' Names and Statements. Upon motion made by a defendant, which shall be as specific as possible under the circumstances, absent a showing of good cause to the contrary the court shall order the prosecuting attorney

(1) to disclose to the defendant the names and addresses of any person whom the prosecuting attorney knows to have relevant evidence or information, and to indicate which of those persons he may use as witnesses;

(2) to permit the defendant to inspect and copy or photograph any relevant records of statements, signed or unsigned, by such persons or by codefendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior convictions of such persons if known to the prosecuting attorney;

(3) to permit the defendant to inspect and copy or photograph any relevant grand jury testimony of such persons or codefendants.]

[(d)] (b) Discovery by the State. [If the court grants discovery or inspection to a defendant

(1) pursuant to R. 3:13-3(a) (4) or (b), it may condition its order by requiring the defendant to permit the State to inspect, copy or photograph any material within the scope of such paragraphs which the defendant intends to use at trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the State's case and that its request is reasonable.

(2) pursuant to R. 3:13-3(c), it may condition its order by requiring the defendant to disclose to the prosecuting attorney the names and addresses of those persons, known to defendant, whom he intends to use as witnesses at trial and their written statements, if any.] A defendant who seeks discovery shall permit the State to inspect and copy or photograph

(1) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of defense counsel;

(2) any relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of defense counsel;

(3) the names and addresses of those persons known to defendant whom he intends to call as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements.

[(e)] (c) Documents Not Subject to Discovery. [Except as heretofore specifically provided, this rule does not authorize discovery by a party of reports, memoranda or internal documents made by any other party, his attorneys or agents in connection with the investigation, prosecution or defense of the matter or discovery by the State of records of statements, signed or unsigned, by a defendant made to defendant's attorney or agents.] This rule does not require discovery of a party's work product consisting of internal reports, memoranda or documents made by that party or his attorney or agents, in connection with the investigation, prosecution or defense of the matter nor does it require discovery by the State of records or statements, signed or unsigned, of defendant made to defendant's attorney or agents.

[(f) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection and such terms and conditions as the interest of justice requires.]

[(g)] (d) Protective Orders.

(1) Grounds. Upon motion and for good cause shown the court may at any time order that the discovery or inspection sought pursuant to [R. 3:13-3(b) (c) or (d)] this rule be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; protection of confidential relationships and privileges recognized by law; any other relevant considerations.

(2) Procedure. The court may permit the showing of good cause to be made, in whole or in part, [to be made] in the form of a written statement to be inspected by the court alone, and if the court thereafter enters a protective order, the entire test of the [State's] statement shall be sealed and preserved in the records of the court, to be made available only to the appellate court in the event of an appeal.

[(h) Time of Motions. A motion under R. 3:13-3 shall be made after the indictment or accusation and within 30 days after the entry of a plea or at such reasonable later time as the court permits. The motion shall include all relief sought under this rule. Additional relief may be granted upon a subsequent motion only on a showing of good cause.]

(e) Time. Defendant's request for discovery shall be made within 10 days of the entry of the plea and the prosecutor shall respond within 10 days of the receipt by him of the defendant's request. Defendant, without request therefor, shall provide the State discovery as provided in this rule within 20 days of compliance with the defendant's discovery request.

[(i)] (f) Continuing Duty to Disclose; Failure to Comply. If subsequent to the compliance with [an order issued pursuant to R. 3:13-3] a request by the prosecuting attorney or defense counsel or with an order issued pursuant to the within rule and prior to or during trial[,] a party discovers additional material or witnesses previously requested or ordered subject to discovery or inspection, he shall promptly notify the other party or his attorney [or the court] of the existence thereof. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate.

Committee Comment:

The proposed amendment of R. 3:13-3 encompasses substantial changes in the presently existing pre-trial discovery rules in criminal cases. The philosophy behind the proposed rules may be summarized by the phrase "automatic discovery"; it is the general view of the Committee that -- with the exception of areas involving work product, confidentiality, identity of informers, and the like -- a defendant should be permitted to inspect all relevant documents in the files of the prosecutor. In addition, the State should be granted a limited reciprocal privilege of automatic discovery, conditioned only upon whether or not the defendant seeks discovery from the State. The proposed amendment, moreover, places the burden upon the prosecutor to seek a protective order if he deems it necessary.

Despite the present rule requiring a motion prior to obtaining discovery, the Committee feels that the current practice throughout the State is in fact automatic discovery. In at least four counties, for example, the Assignment Judges have issued blanket orders for discovery in cases in which the defendant is represented by the Public Defender. The proposed amendment, then, is an effort to bring the discovery rules into harmony with existing practices.

The present rule requires the defendant to move the court to order discovery in every case -- even though he has a right to the discovery of certain items. R. 3:13-3(a). Under the proposed amendment, however, the defendant has 10 days from the entry of the plea to request of the prosecutor discovery of the items to which he is entitled; the prosecutor has 10 days from such request within which to comply. While the time periods provided are not long, a majority of the Committee feels that these 10-day limits would enable the defendant to have in his hands the material he needs to make those motions required to be filed within 30 days of the plea. R. 3:10-5. These time limits, moreover, would cut down on the time normally lost due to pre-trial discovery.

The proposed amendment greatly enlarges the items which a defendant may discover as of right. The proposed amendment retains from the present rule those provisions which enable the defendant to discover as of right his own books, tangible objects, papers and documents, his own records of statements and confessions,

his own grand jury testimony, records of his prior convictions, and the results of physical and mental examinations and scientific tests and experiments. In addition, the proposed amendment allows to the defendant automatic discovery of the following:

(a) He may discover all grand jury testimony, whether of the defendant or of others. Existing practice provides for the discoverability of grand jury testimony of persons other than the defendant only upon motion. The Committee rejects this practice in favor of allowing discoverability as of right. It is felt that a danger might exist -- particularly in the more populous counties -- of inadvertent disclosure of material which the prosecutor might wish to keep confidential. The Committee concluded, nevertheless, that the risks were well worth the benefits in terms of the fairness to the defendant and the savings of time to both parties. A prosecutor may always seek a protective order in an appropriate case.

(b) All material presently set forth in R. 3:13-3(b) and R. 3:13-3(c) would be discoverable as of right by the defendant. These items include relevant books, papers, documents and tangible objects of persons other than the defendant, the names and addresses of persons known to the prosecution to have relevant information, a list of witnesses and records of their statements, and records of statements of co-defendants and their prior convictions. Under the present rule, these items are discoverable by the defendant

upon motion if good cause is not shown to the contrary.

(c) The proposed amendment makes an important change with respect to police reports. It would allow discovery of " . . . police reports which are within the possession, custody, or control of the prosecuting attorney" and which are not subject to the provisions of subsection (c) (i.e., work product) of the rule.

The present rule does not explicitly provide for the discovery of such reports. In the recent case of State v. Harrison, 118 N.J. Super. 299 (Law Div. 1972), aff'd. 119 N.J. Super. 1 (App. Div. 1972), cert. den. 60 N.J. 513 (1972), it was held that a defendant may discover police reports of those policemen designated by the prosecutor as witnesses. This holding has never been approved or disapproved by the Supreme Court; nevertheless, the proposed amendment goes even farther than the holding of the Law Division in Harrison by permitting the automatic discovery of all police reports (other than work product), both of witnesses and non-witnesses. The Committee has concluded that such a rule reflects the actual practice among prosecutors throughout most of the State and that, rather than accord the defendant any unfair advantage over the State, the proposed rule would tend to promote legitimate guilty pleas.

(d) Apart from the present rule and the Committee's proposed amendment, a defendant is entitled to disclosure of all evidence which tends to exculpate him, no matter what the source.

Brady v. Maryland, 373 U.S. 83 (1963); D.R. 7-193(B). In addition, he is entitled to disclosure of the statements and reports of witnesses at the trial for use on cross-examination. State v. Hunt, 25 N.J. 514 (1958).

Another significant change envisioned in the proposed amendment is automatic discovery by the State. The proposed amendment allows such discovery, however, only if the defendant first seeks such discovery from the State. The items discoverable by the State include reports of physical or mental examinations and scientific tests and experiments, relevant books, papers, documents, tangible objects, buildings and places. Also included are the names and addresses of defense witnesses and their written statements or summaries thereof.

This last item is not as broad as the discovery allowed to the defendant. The defendant may discover the " . . . names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information . . ."; the State, however, is limited to the names and addresses of witnesses. In addition, the State may discover statements (or summaries of statements) of defense witnesses. This portion of the rule is in accordance with State v. Montague, 55 N.J. 387 (1970), which held that such statements do not fall under the definition of work product.

The Committee also considered a proposal which would have allowed the State to discover the defenses which the defendant

intends to present at trial. The present rules provide for notice to the prosecutor of the defenses of alibi (R. 3:11) and of insanity (R. 3:12). The Committee has rejected the proposal, concluding that to go beyond the disclosure provisions of R. 3:11 and R. 3:12 would raise serious constitutional problems.

The final major change envisioned by the proposed amendment is in the definition of "work product". The present rule excludes work product from the classes of items discoverable; it does not define the term, except to note that it includes " . . . reports, memoranda or internal documents made by any other party, his attorneys or agents in connection with the investigation, prosecution or defense of the matter . . ."

The Committee has retained this definition, recognizing, however, that it is still vague. Nevertheless, by withdrawing police reports from the definition of work product, a major uncertainty surrounding the "work product" concept may be resolved. The Committee has concluded, moreover, that any remaining problems can best by handled on a case by case basis -- through motions for protective orders and by resort to case decisions, such as Hickman v. Taylor, 329 U.S. 495 (1947) and State v. Montague, 55 N.J. 387 (1970).

Committee Supplemental Comment:

As a result of the publication of the supplemental report of this Committee pertaining to the rule affecting discovery in criminal cases (R. 3:13-3) a number of comments have been submitted by the bench and bar. Those comments have been reviewed by the committee as presently constituted and there follows this committee's evaluation of the comments submitted.

It was the view of the committee that though all of the comments received were pertinent and thoughtful, no one of them provided a basis for amending the recommendations of last year's committee.

Suggestions relating to police reports, work product, revelation of defenses by defendants, and time limits were all specifically considered in the comment contained in the committee's report. Comments pertaining to the reciprocal nature of discovery and defendant's request as the generating factor were considered by both last year's committee and the present committee and rejected on the basis that the rule as offered was the best accommodation of the competing interests of the State and the defendant.

Concern was expressed in several instances with regard to the cost of reproduction of discoverable items. It was the view of the committee that the "inspect and copy or photograph" language of the rule makes it clear that the costs of discovery should be born by the party seeking it and that there is no need for any

further clarification in the rule. Where there is confusion as to the proper ordering of transcripts, the committee's view is that this problem is best left to local practice and judicial direction rather than contended with in rule language.

Finally, significant comment was directed at the language of the rule providing that discovery shall be of material in the "possession, custody, or control" of the prosecuting attorney or counsel for the defense. The commentators would have substituted language making discoverable material which is known or which should be known to be in the possession of the attorney for either side. Last year's committee debated that issue at great length as did the present committee to a lesser degree. Both committees recognized the possible difficulties but concluded that the language proposed in the rule provided an adequate basis for the trial judge to fairly dispose of any problems arising because of lateness or failure in providing discovery. This is particularly true in light of the provisions establishing a continuing duty to disclose provided for elsewhere in the rule.

R. 3:5-6. Filing[; Confidentiality]

The judge who issued the warrant shall attach thereto the return, inventory and all other papers in connection therewith, including the affidavits and a transcript or summary of any oral testimony, and file them with the county clerk of the county wherein the property was seized. [Thereafter the warrant, affidavit and testimony shall be confidential but on order of the Superior Court or a county court they shall be made available, on application and notice to the county prosecutor, to a

person claiming to be aggrieved by an unlawful search and seizure.]
All warrants, which have been completely executed, and the papers accompanying them including the affidavits, transcript or summary of any oral testimony, return and inventory, shall be available for inspection and copy by a defendant as provided in R. 3:13-3 and by any person claiming to be aggrieved by an unlawful search and seizure upon notice to the county prosecutor for good cause shown.

Committee Comment:

Under the present R. 3:5-6 returned search warrants and the papers accompanying them are confidential unless an order is entered making them available to a "person aggrieved by an unlawful search and seizure." The rule, as proposed, makes the materials in question automatically discoverable by a defendant in a post-indictment situation. This is in accord with the proposed revisions of the criminal discovery rule (R. 3:13-3). An additional circumstance is provided for whereby "any person claiming to be aggrieved" may be allowed to inspect and copy completely executed warrants "upon notice to the county prosecutor for good cause shown." That provision is not, by its terms, limited to post-indictment situations.

The use of the phrase "completely executed" is intended to cover the situation where there are multiple defendants. Its purpose is to preclude discovery by any one defendant until the warrant has been executed as to all defendants.

V. Proposed Revision of R. 3:28

R. 3:28. [Defendant's Employment Program] Diversionary Programs

(a) In counties where there exists a defendant's employment or counselling program or other diversionary program including drug or alcoholic detoxification programs, approved by the Supreme Court for operation under the rule, the Assignment Judge shall designate a judge or judges to act on all matters pertaining to the program.

(b) Where a defendant charged with a penal or criminal offense has been accepted by the program, the designated judge may, on the recommendation of the program director and with consent of the [prosecutor] prosecuting attorney and the defendant, postpone all further proceedings against said defendant on such charges for a period not to exceed 3 months.

(c) At the conclusion of such 3-month period, the designated judge shall make one of the following dispositions:

(1) On recommendation of the program director and with consent of the [prosecutor] prosecuting attorney and the defendant, dismiss the complaint, indictment or accusation against the defendant, such a dismissal to be designated "matter adjusted----complaint (or indictment or accusation) dismissed"; or

(2) On recommendation of the program director and with consent of the [prosecutor] prosecuting attorney and the defendant, further postpone all proceedings against such defendant on such charges for an additional period not to exceed 3 months; or

(3) Order the prosecution of the defendant to proceed in the ordinary course.

(d) Where proceedings have been postponed against a defendant for a second period of 3 months as provided in paragraph (c) (2), at the conclusion of such additional 3-month period the designated judge may not again postpone proceedings but shall make a disposition in accordance with paragraph (c) (1) or (3).

Committee Comment:

Two diversionary programs are presently operating in New Jersey under Supreme Court approval: The Newark Defendant's Employment Project and the Hudson County Pre-Trial Intervention Project. Both of these employment-related programs have been approved for operation under Rule 3:28 by the Supreme Court. However, R. 3:28 in its present reference to a "defendant's employment or counselling program" may not be broad enough in application to include other types of diversion programs.

Due to the availability of LEAA funds, many communities are considering organizing and implementing a variety of diversionary programs to deal with specialized criminal offenses, including diversionary programs to select out and treat persons committing drug-related offenses as well as persons arrested for alcoholic intoxification-related offenses. Where these diversionary programs are not authorized by specific statute (for example, certain offenses entitled to diversionary treatment under NJSA 24:21-27), Supreme Court approval is necessary to in any way suspend the ordinary judicial process or dismiss charges due to successful completion of rehabilitative treatment. The proposed amendment of R. 3:28 eliminates any ambiguity that might otherwise arise as to whether future proposals of diversionary programs are covered by the rule.

VI. Waiver of Presentence Reports (R. 3:21-2)

R. 3:21-2. Presentence Investigation

Before the imposition of sentence or the granting of probation the probation service of the court shall make a presentence investigation and report to the court [which]. The defendant may waive the requirement of a presentence investigation, if the court and the prosecuting attorney approve. The report, when made, shall first be examined by the sentencing judge so that matters not to be considered by him in sentencing may be excluded. The report, thus edited, shall contain all presentence material having any bearing whatever on the sentence and shall be furnished to the defendant. If a custodial sentence is imposed, the probation service of the court shall, within 10 days thereafter, transmit a copy of the presentence report to the person in charge of the institution to which the defendant is committed. The sentencing judge may include with such transmittal a statement of the reasons for the sentence imposed by him.

Committee Comment:

The proposed rule change permits a waiver of presentence reports when requested by a defendant and consented to by the court and the prosecuting attorney. The prior Rule and State v. Alvardo, 51 N.J. 375, 240 A.2d 677 (1968) had required presentence investigations in all indictable offenses be they heard in the Superior or County Court or in the municipal court on a waiver. The waiver is not dissimilar to the waiver of jury trial under R. 1:8-1 although no requirement of a waiver by writing is incorporated in this revised rule. It is felt that the R. 3:21-4(c) requirement of filing a transcript of the sentence would protect against claims that no waiver was requested by the defendant. The prosecuting attorney is permitted an input into the decision-making

because it is felt that he may wish to bring to the court's attention facts adverse to the defendant which ought to be documented. The ultimate determination however rests with the court.

An expression of a need for the change can be found in the letter from Judge John A. Marzulli, J.C.C. dated April 13, 1973:

> . . . There are many cases, especially those in which 1st and 2nd offenders are involved, or in which the Prosecutor has recommended a non-custodial sentence, which I feel do not require the time, effort, and money necessary to expend for the preparation of the pre-sentence report. . . .
>
> To the best of my knowledge, it is the policy of most Judges prior to accepting a plea based on a plea bargain for a non-custodial sentence, to look at the prior criminal record of the defendant to determine whether the Judge might go along with the plea bargain. The Judge also has that prior record at his disposal.
>
> It would appear to me that in view of the above circumstances, there would be a substantial savings in both time and money if judges were permitted, in proper cases, to waive pre-sentence reports at their discretion.

In addition to saving unnecessary effort, waiver of the presentence requirement also effectuates the policy of R. 3:21-4(a) by imposing sentence without unreasonable delay. The period of uncertainty and anxiety which a defendant suffers during the time between conviction and sentence is thus eliminated. Hopefully the rehabilitation process will begin more quickly.

Rule 7:4-6 governing the practice in the municipal court requires mandatory presentence investigation in all indictable

offenses over which that court has jurisdiction after an appropriate waiver has been signed. Although the underlying policy as set forth in the change to R. 3:21-2 would apply equally to R. 7:4-6, no specific recommendation is made. It is felt that such a change ought first be considered by the Supreme Court's Municipal Court Committee.

VII. Appeal from Guilty Plea After Denial of Motion to Suppress

R. 2:3-2. Appeal by Defendant and Others in Criminal Actions

In any criminal action, any defendant, his legal representative, or other person aggrieved by the final judgment of conviction entered by the Superior Court or a county court, including a judgment imposing a suspended sentence and including a judgment predicated upon a plea of guilty pursuant to R. 3:5-7(c), or by an adverse judgment in a post-conviction proceeding attaching a conviction or sentence or by an interlocutory order or judgment of the trial court, may appeal or, where appropriate, seek leave to appeal, to the appropriate appellate court.

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

(a) ... (No change)

(b) ... (No change)

(c) Appeal upon Denial of Motion. If a motion made pursuant to this rule is denied, the order denying such motion may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. If the order is reversed by the appellate court, the judgment of conviction shall be set aside and the defendant shall be permitted to withdraw his plea of guilty and enter a plea of not guilty.

[(c)] (d) Consequences of Failure to Move

... (No change)

[(d)] (e) Effect of Irregularity in Warrant

... (No change)

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

The defendant, his legal representative or other person aggrieved by a judgment of conviction, [(] including a judgment imposing a suspended sentence [)] and including a judgment predicated upon a plea of guilty pursuant to R. 3:5-7(c), entered by a court of limited jurisdiction shall appeal therefrom to the county court of the county in which such court of limited criminal jurisdiction is located. The appeal shall be taken by filing a notice of appeal with the clerk of the court below within 10 days after the entry of judgment. Within 5 days after the filing of the notice of appeal, one copy thereof shall be served upon the prosecuting attorney, as hereinafter defined, and one copy thereof shall be filed with the county clerk together with the filing fee therefor and an affidavit of timely filing of said notice with the clerk of court below and service upon the prosecuting attorney (giving his name and address). On failure to comply with each of the foregoing requirements, the appeal shall be dismissed by the county court without further notice or hearing. The county court, however, may upon a showing of good cause and the absence of prejudice extend the time for the filing of the notice of appeal for a period not exceeding 20 days.

Committee Comment:

In the past the Committee has recommended that appeals from the denial of certain motions to suppress should be heard even following a plea of guilty. Such recommendations have not been approved by the Court. In view of the pressure of the increasing volume of criminal matters on court calendars in the

state, the committee recommends that the Court reconsider its position with respect to appeals from the denial of motions to suppress, especially in questions of search and seizure. If such appeals were to be made available following a plea, the taking of pleas would be facilitated, and presumably fewer criminal matters would proceed to trial. Such appeals would be made applicable to judgments of conviction entered in the municipal courts by the amendment of 3:23-2 and to judgments of conviction entered in the Superior and County Courts by the amendment of R. 2:3-2.

The Committee further recommends the limitation of interlocutory appeals by a defendant pending final determination of his case so that all matters to be appealed can be heard in one proceeding.

* * * * * *

In addition to the reports and recommendations herein submitted, the Committee has several projects of importance pending before it. Upon their completion, a Supplemental Report will be filed with the Court.

Respectfully submitted,

Melvyn H. Bergstein
David S. Baime
John F. Crane
Soloman Forman
Hugh P. Francis
Geoffrey Gaulkin
Joseph Hillman, Jr.
Sanford M. Jaffe
Evan Wm. Jahos
Robert E. Knowlton
Patrick J. McGann, Jr.
Max Mehler
David M. Satz, Jr.
Bruce M. Schragger
Joseph B. Sugrue
Stanley C. Van Ness
J. Gilbert Van Sciver, Jr
Charles S. Joelson, CHAIR

IMPORTANT - Please bring this report with you to the Judicial Conference. Additional copies will not be available

SUPPLEMENTAL

REPORT OF THE

NEW JERSEY SUPREME COURT(S)

COMMITTEE ON CRIMINAL PROCEDURE

Melvyn H. Bergstein
David S. Baime
John F. Crane
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Stanley C. Van Ness
J. Gilbert Van Sciver, Jr.
Charles S. Joelson, CHAIRMAN

DATED: April 25, 1973

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES
OF THE NEW JERSEY SUPREME COURT

The Supreme Court Committee on Criminal Procedure supplements its general report of March 20, 1973 with the following reports and recommendations:

I. Committee Comment on the Report Concerning the Atlantic County 10% Cash Bail Project

The Committee on Criminal Procedure has reviewed the report submitted to the Supreme Court by Herbert Horn, A.J.S.C., summarizing operations of the Atlantic County 10% cash bail project for the period February 14, 1972 to February 14, 1973, which report includes certain conclusions and recommendations.

This Committee has not been requested to make a general study of the 10% cash bail concept or of the Atlantic County project, but only to offer such comments on the report of Judge Horn as it deems appropriate.

The unanimous conclusions of the Committee are as follows:

1. The 10% cash bail concept is beneficial to the community and to the criminal justice system and should be encouraged.
2. R. 3:26-1(a) presently authorizes judges to fix 10% cash bail in such cases as they may deem appropriate
3. Mandatory and uniform imposition of the 10% cash bail system, and mandatory and total abandonment of the surety bond system, however, should not be effected

at this time but should await further study and evaluation with respect to the following matters:

(a) Whether a mandatory 10% cash bail system operating in a more populous county with a higher volume of criminal activity would yield results comparable to those reported in Atlantic County;

(b) Whether and to what extent the public treasury is additionally burdened with apprehension and extradition costs by reason of the elimination of surety bond forfeitures; and

(c) Whether and to what extent the elimination of surety bond forfeitures results in a reduction in the number of defendants apprehended or extradited, or in revision of prosecutorial standards with respect to extradition.

4. In order to expand and further study the present experiment, a mandatory program should be established in an urban northern county; the program in that county should incorporate Judge Horn's recommendation that 1% of the bond (i.e., 10% of the

cash deposit) be retained by the clerk to meet costs of apprehension and extradition, as well as administrative costs; and any such further experiment should be supported by funds and personnel of the Administrative Office to assure that the necessary statistical and fiscal information is extracted from the experiment.

The report of Judge Horn was as follows:

ATLANTIC COUNTY TEN PERCENT CASH BAIL PROJECT
February 14, 1972 - February 14, 1973

Background

In 1971 our Supreme Court authorized for Atlantic County an experimental ten percent cash bail program. The sole restriction was that all money posted be returned upon compliance by the accused with the terms of the bond, contrary to the Illinois system under which 90 percent is remitted.

The objective of the experiment was to endeavor to eliminate the punitive and often-times abuse laden corporate surety bond system. Under this system which has grown up, an accused was immediately penalized, regardless of guilt or innocence by an obligation to purchase a surety bond at a cost of at least ten percent of the principal amount, whether the bond was required for a long or a short term. Among the abuses observed were that no part of such premiums were returned by reason of the term, bondsmen were known to "steer" clients to favored attorneys, policemen were reported to "steer" prisoners to favored bondsmen, with the overall victims being the accuseds who most often could ill afford the premiums, the bar at large and, of course, the public.

Thus the experiment, though successful in other juris-

dictions, was promulgated with the view of extending it, if warranted.

In order to accomplish the salutary purposes of the project, forms and directives had to be prepared and mandated in anticipation of attempts to circumvent the program objectives. For example, it would be self-defeating to permit third parties to post the cash bail for a fee. A review of these forms and directives will demonstrate how this was done.

The statistics which were compiled are not as broad, territorially, as desired because of manpower shortage. However, they are, to our minds, sufficient to arrive at appropriate conclusions which are favorable to the new system.

One disadvantage has been observed. The cash bail system requires a cash deposit. Some parties cannot raise the cash through their own means or the aid of friends and relatives. There are some commercial bondsmen who would post a bond on credit. This has been eliminated. However, we find this to be a minor drawback in that, as can well be imagined, the credit advancing commercial bondsmen are few in number and their credit receiving clients are even fewer.

The Atlantic County Ten Percent Cash Bail Program was based upon the findings of both the Washington, D. C. Bail Agency and the procedures of the Illinois Bail Survey of 1964.

The individual bond program of Washington, D. C. arose as a result of the Bail Reform Act of 1966 passed by the Congress of the United States. Subsequently, the District of Columbia Bail Agency was created as an agency separate from the courts to provide R.O.R. for persons arrested.

In January of 1968 the Executive Committee of the Circuit Court of Cook County initiated a ten percent cash bail program. Excluded from the program are defendants charged with more serious offenses. Defendants eligible for the program are interviewed extensively and investigations are completed to determine the accuracy of the statements by the defendants. Cook County has found that this program continues to be a viable alternative to incarceration in all cases pending trial.

The Illinois system was set up with the initial purpose of eliminating the inequities of the bondsman procedures, the surety bondsman. Judge Bakakos of the Illinois bail project indicated in late March of 1973 that no bondsmen were currently active in providing bail in those cases where bond was set under the ten percent program, inasmuch as they had no incentive. All refunds under the ten percent program are returned by mail to the address of the defendant. A release order is prepared upon conclusion of the obligation of the defendant to the court, at which time he leaves his receipt with the clerk. Their data does

not provide for fugitive rates; however, the record of forfeitures under their failure to appear rate is about ten to 13 percent. He would estimate that ultimately lost to the system would be a much smaller percentage of about six percent. They have a very high income of about $750,000.00 which is presented to the treasury and the minimum deposit of $25.00 cash covers most fines; however, they do have a sliding scale of standard bail. All of their bonds are ten percent. Of those written, 27,000 were recognizance bonds; 115,000 ten percent. Cash bonds are so minimal that they do not keep track of them. Mostly cash bonds that are written are for motor vehicles. They do issue warrants on fugitives in municipal ordinance cases.

A discussion with Mr. Dennis Moran of the Philadelphia Bail Agency indicates that their program is very successful. Every person is admitted to bail under the ten percent program. They exclude non-residents as surety so that every person who puts up a bail must have a surety within the State of Pennsylvania. Income from the one percent of the total bond that is kept will soon provide the support for the bail agency and it is also anticipated it will provide the support for the R.O.R. program within a year. There is an effort being made now to identify those persons whose bail surety goes into judgment in an effort to eliminate them from the opportunity of writing bail. They have

as yet not provided for a certificate of non-remuneration to be placed by the surety. Persons may put up their own bail. Eighty to 90 percent are put up by a third party.

ATLANTIC COUNTY
INDICTABLES - PRESENTED
NINE MONTH PERIOD - FEB. 14 - NOV. 14

	1971	1972	% Change
Total Cases Received (Persons) (by Pros.)	1520	1403	-7.7%
Persons No Billed	487	529	
Persons Indicted	1033	874	
Direct Presentments (not arrested not bailed)	84=8%	101=12%	+4%
Persons Jailed	125=12%	124=14%	+2%
Persons Bailed (exclude ROR)	622=60%	547=62%	+2%
Bench Warrants Issued on Bailed	126=20%	121=22%	+2%
Surety Bonds	570	18	
Skips	124=22%	1	
Cash Bonds	23	2	
Skips	2	1	
Freehold Bonds	29	1	
Skips	-	-	
10% Bonds	-	526	
Skips	-	119=23%	
ROR Bonds	202=20%	102=12%	-8%
Skips	33=16%	21=20%	

PLEASANTVILLE MUNICIPAL COURT
DISORDERLY PERSON AND MUNICIPAL ORDINANCES
NINE MONTH PERIOD FEB. 14 - NOV. 14

	1971	1972	% Change
Total Persons	209	283	
Persons Bailed	149	228	
Bonds Forfeit	9=6%	6=2.6%	-3.4%
Persons Jailed	60=28%	55=19%	-9%
Surety Bonds	48	0	
Skips	0	0	
Cash Bonds	69	5	
Skips	9=13%	0	
Freehold Bonds	2	7	
Skips	0	0	
ROR Bonds	30	24	
Skips	0	0	
10% Bonds	0	192	
Skips	0	6=3.5%	

MARGATE MUNICIPAL COURT
DISORDERLY PERSON AND MUNICIPAL ORDINANCES
NINE MONTH PERIOD FEB. 14 - NOV. 14

	1971	1972	% Change
Total Persons	396	503	
Persons Bailed	380	492	
Bonds Forfeit	60=15.7%	72=14.6%	-1.1%
Persons Jailed	8=2%	5=1%	-1%
Surety Bonds	163	2	
Skips	15=9%	-	
Cash Bonds	134	5	
Skips	44=33%	1=20%	
Freehold Bonds	69	28	
Skips	-	-	
ROR Bonds	14	23	
Skips	1	1	
10% Bonds	-	434	
Skips	-	70=16%	
Other (Presented to Court Upon Arrest)	8	6	

ATLANTIC CITY MUNICIPAL COURT
DISORDERLY PERSON AND MUNICIPAL ORDINANCES
NINE MONTH PERIOD FEB. 14 - NOV. 14

	1971	1972
Total Persons	1358	1394
Dismissed, Ancora, etc.	272=20%	279=20%
Bailed or Jailed	1086	1115
Forfeited	259=24%	348=31%

County Court

A careful review of the Atlantic County Prosecutor's records reveals that the indictables during the nine-month periods between February 14 and November 14, 1971 and during the same period in 1972 made no changes in the number of persons jailed, bailed or forfeiting. The increase of two percent of persons bailed reflects the fact that in some cases an individual is not able to acquire the amount of bond required upon initial arrest. It has been found that many of these people who are jailed are released within a day or two. Our records were unable to reflect this on account of the time and manpower allotment required.

In evaluating the figures presented, the two most important figures to be compared are the number of bench warrants issued with the number of persons bailed and the number of surety bond forfeitures with the number of ten percent bond forfeitures. An increase in the number of bench warrants issued from 20 to 22 percent is an insignificant increase. In a direct comparison between surety bond forfeitures of 22 percent and the ten percent bond forfeitures of 23 percent, it shows an even closer comparison of the two methods. The 18 surety bonds that were written were written in error by clerks early in the test

period and that practice was eliminated.

The one significant change in the data that is available is the reduction by eight percent of the number of R.O.R. bonds issued. These statistics were kept separate, inasmuch as a different procedure is followed. In releasing a person under R.O.R. an investigation is made by a probation officer who submits the results to the Assignment Judge. He then reviews the interview form and determines whether R.O.R. should be granted and then forwards that recommendation to the Prosecutor who makes a further analysis. That the percentage of skips under the R.O.R. system is as high as under the surety bond and ten percent systems indicates that even careful scrutiny will not deter some persons from skipping.

For further study and analysis in the ten percent program, it would be advisable to consider requiring a third party who is a resident of the State of New Jersey to post the bond and also sign a certificate of non-remuneration. This would provide for a reference source in case a person skips and also provide a second address for reference to send notice, contact the person in case of forfeiture and provide for forfeiture proceedings by the county counsel.

The most significant problem to be resolved between the surety and the ten percent bail programs would appear to be the expenses incurred by the county in locating returning fugitive

defendants. To press forfeiture charges against an indigent or welfare person is generally a fruitless venture.

Another significant problem is the added book work that is required by the county offices, including the Prosecutor and the Clerk as well as the municipal courts and police departments upon initial intake. It is recommended that the Illinois system of maintaining one percent of the entire bond for management expenses would be a wise procedure. A $3.00 filing fee and a $3.00 discharge fee are already charged by the County Clerk's office on each bond posted with the County Clerk. The largest expense in the program is the apprehension of criminal defendants who leave the state following their release on bond. Currently there is no provision in the county budget for apprehension of these persons. It is suggested that this one percent fee would also help to cover apprehension of persons who have left the state.

Municipal Courts

At the municipal level, three municipalities were studyed: Atlantic City to indicate a high crime area; Margate to give data on a resort area that has a large summer population; and Pleasantville which is a suburban bedroom community with a stable population. Due to the bookkeeping system in Atlantic City, only rough data was available. The indication is that there was a significant increase in the percentages of forfeitures

between 1971 and 1972. However, the method of posting cash bonds and the attitude of the court that a cash bond was as good as a fine led to a very high percentage of forfeitures in this area. Also, a significant number of cases were unavailable for complete documentation as to the method of procedure, whether jailed or bailed and, if so, what kind of bail. Therefore, although the dispositions are complete, the jail and bail proceedings are not.

In Margate Municipal Court the significant percentage changes are in the number of bonds forfeited with a decrease of one percent in the number of forfeitures. The low percentage of nine percent of surety bonds forfeited against 16 percent of ten percent bonds forfeited is offset by the change in cash bonds.

In Pleasantville Municipal Court there has been a reduction also in the bonds forfeited and the persons going to jail. In this suburban municipality there is a concerted effort on the part of the court clerk to follow up every individual case and make sure that all persons are notified of pending forfeitures. This accounts for the low number of surety bond skips as well as cash bond and ten percent.

At the municipal level, the observations are that there were no glaring problems in the ten percent system as against the surety system. The biggest difference is that the court now handles more money, thus making more paper work and

extensive bookkeeping.

The loss of the revenue to the city has been a significant political factor in various municipalities. In resort areas there is a large turnover of persons going through the court during the summer and some municipalities depend upon the income from bond forfeitures.

Another significant problem is the great number of out-of-state persons who post the ten percent bond, then consider that this fulfills their obligation of a fine and, consequently, never reappear. Under most conditions it is impossible to set a bail high enough to meet the minimum fine under the ten percent system of some municipal ordinances. It has been determined by the Assignment Judge that for out-of-state residents a minimum cash bail be set that would equal the minimum fine for the particular offense.

The county clerk's office has taken in $197,484.00 in ten percent cash deposits on indictable offenses during the first year of operation. This money is placed in interest-bearing accounts in a local bank at six and 3/8 percent interest. During the six month period of deposit, $2,457.00 in interest was realized.

It is anticipated that about $16,000.00 could be derived as income to the county if the one percent fee were charged on the total amount of each bond.

To date, 115 forfeited bonds representing $197,000.00 have been forwarded to the county counsel for collection. It is anticipated that most of the bonds are uncollectible, inasmuch as low-income persons or the defendant himself signed the bond. However, under the surety bond system in 1971, $13,382.00 was collected and in 1972 after a concerted effort, $72,900.00 was collected, with respect to bonds posted in 1971 and earlier.

Conclusions

1. There are no significant changes in the rate of forfeiture under the ten percent system.

2. That the ten percent system is an asset to the community.

3. Funds must be provided for extradition.

4. Out-of-state residents are a high risk and must have local surety or higher bail to meet the minimum fine.

5. Local government will be able to collect fewer bonds upon forfeiture.

6. One percent of the bond should be kept by the clerk to help meet costs of apprehending defaulting parties and the additional paper work entailed.

7. Low-income defendants and their families do not lose their deposit upon completion of their obligation to the court.

8. Office procedures are more complicated in that more money is handled by the court and refunds must be delivered to the proper person.

9. Though the system is an experiment over the surety bond system, the degree of success and efficiency varies with the efficiency of the administering personnel.

10. It eliminates abuses which formerly existed under the old system.

11. Except in a certain few catagories of offenses, no bail of any kind should be required for disorderly persons offenses and ordinance violation offenses.

12. The cash bail system be recognized as a success and be extended to all jurisdictions of the state.

Appendix A

TO: Atlantic County Court Judges
Atlantic County Prosecutor
Atlantic County Public Defender
Atlantic County Clerk
Atlantic County Sheriff
All Municipal Court Judges and Municipal Court Clerks in Atlantic County
All Atlantic County Police Departments

FROM: Herbert Horn, Assignment Judge, Superior Court

SUBJ: Ten Percent Cash Bail Program

DATE: January 31, 1972

Gentlemen:

Effective February 14, 1972, an experimental ten percent cash bail project will be implemented throughout Atlantic County, pursuant to authorization by the New Jersey Supreme Court. The project will be carried out in accordance with the attached guidelines, which may be amended as dictated by experience.

The purpose of the project is to eliminate the punitive effect of the present bail system, under which defendants posting surety bond customarily pay in excess of ten percent of the bail, a payment which is lost thereafter to the defendant regardless of his compliance with his obligations to appear when required, and regardless of the ultimate disposition of the charge.

The program is promulgated in the hope of ameliorating part of the criminal process which requires an unrecoverable payment for bail, which may constitute a severe and unfair hardship upon an accused, as well as upon his family or dependants.

Under this system, bail will be set as it has been heretofore. Once the amount is set, however, the defendant shall be permitted to post directly an amount of ten percent of the bail, and shall execute a recognizance bond for the full amount.

Upon compliance with the terms of the bond, and on the ultimate disposition of the case, the person posting the bail deposit shall be reimbursed in the full amount of the deposit.

You will note in reviewing the attached guidelines that the new system will result in a substantial increase in the cash which will be handled by court and police personnel. You are advised to review your recording and receipting procedures accordingly, and, where appropriate, to improve administrative safeguards.

Although the system is based upon the experiences of the Federal and the Illinois programs, it is new to our jurisdiction. To resolve any difficulty which may arise, and to prepare the program for eventual extension throughout the State, I ask all personnel who have comments, criticisms, suggestions or ideas on the system to forward them as they arise, in writing, to my Court Administrator, Mr. Wayne Blacklock, at Room 713, Guarantee Trust Building, Atlantic City, N.J. 08401.

Each municipality, and the County, shall have a supply of forms printed based on the model forms attached, but bearing thereon the name, address, and telephone number of the appropriate Court. Pending the availability of printed forms, typewritten or mimeographed forms may be used.

I am sure that your cooperation in this program will do much to insure its success.

Herbert Horn, A.J.S.C.

ATLANTIC COUNTY

TEN PERCENT CASH BAIL PROGRAM

I. APPLICABILITY

A. These guidelines shall apply to all persons admitted to bail in Atlantic County.

B. Nothing herein shall in any way replace or restrict the posting of freehold security as heretofore or shall prohibit or restrict the release on their own recognizance of any persons who would otherwise be so released.

C. Any person authorized by statute, or rule, to admit to bail or to take bail shall do so in compliance with these guidelines on and from February 14, 1972, and until further notice. No person hitherto authorized to admit to bail or to take bail shall be prohibited from doing so hereafter by reason of these guidelines.

II. PROCEDURE

A. Any person for whom bail shall be set shall be advised, at the time the bail is set, of the existence and terms of this program.

B. Any person for whom bail has been set may at his option execute either a freehold bond as heretofore or a bail bond without surety and deposit with the official admitting to bail a sum of money (hereinafter "bail deposit") equal to 10% of the bail, or $25, whichever is greater.

C. Any person, organization, or association may post the bail deposit set forth above provided, however, that in no case may any fee, or charge of any kind whatsoever be charged for the posting of bail by any person or entity, and an Affidavit of Non-Remuneration shall be filed with each bail posted hereunder.

D. Upon the deposit of 10% of the bail, or $25, whichever is greater, and the execution of the bail bond and of the Affidavit of Non-Remuneration hereinafter prescribed, the accused shall be released from custody subject to the conditions of the bail bond.

E. Deposits for bail under this program shall be in the form of cash, or certified checks, cashiers checks, or money orders, made payable to the court in which appearance is to be made.

F. Each person posting a bail deposit shall be given a receipt therefore, which receipt shall set forth the name of the Court, the amount of the bail as set forth in the bail bond, the amount of the sum deposited, the date of the deposit, and the name of the person or organization posting the bail deposit. (See Form # 1)

G. The person or organization posting bail shall sign and file with the bail deposit an Affidavit of NonRemuneration setting forth the name and affiliation of the person or organization posting the bail deposit and certifying that the bail deposit is posted with no interest, fees, charges, costs, or compensation payable to any party. (See Form # 2)

H. Once bail has been posted and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original bail in that court, subject to review on proper application to increase or decrease the amount.

I. The clerk of the court in which the case is pending or to which it is transferred shall provide a written notice to defendant setting forth the date, time, and place of any appearance required of him. (See Form # 3). It shall be the continuing duty of the accused to inform the clerk of the court in which the case is pending of any change in his address or his telephone number.

J. When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause, and upon the surrender of the cash bail receipt, the clerk of the court shall refund to the depositor of the cash bail a check for the cash deposit made payable to his or its order.

K. After conviction the court may order that the original bail stand pending appeal or deny, increase, or reduce bail, pursuant to law.

L. If the accused does not comply with the conditions of the bail bond ,the court shall proceed in accordance with the provisions of R. 3:26-6, provided, however, that a copy of any notice of forfeiture forwarded by the clerk to the county counsel or municipal attorney shall be forwarded to the accused at his last known address by ordinary first class mail.

M. Each Judge shall, at the conclusion of the session of Court, order the clerk to call the names of any persons not theretofore answering the call. The Court shall consider the appearance of the accused, albeit late, in determining whether the bail shall be forfeit.

N. In the event of forfeit, the bail deposit shall be applied first to the payment of court costs and to the reasonable expenses of apprehending the accused, if such expenses have been incurred. If any amount of such deposit remains after the payment of costs and expenses, it shall be applied to payment of the judgment in accordance with statute and rules. Nothing herein shall be taken to limit or restrict the applicability of contempt or criminal proceedings provided under either statute or rules.

III. RECORDS, REPORTS, AND EVALUATIONS.

A. The clerk of the court in each municipality, or the clerk of the county court where appropriate, shall forward to the Court Administrator of the Assignment Judge (hereinafter Administrator) by Friday of each week a list of all persons admitted to bail, up to and including Sunday of the preceding week, which list shall include thereon the names, addresses, and telephone numbers of all persons admitted to bail, the amount of bail, the amount of deposit, the nature of the charge, and the name and address of the person or organization in whose name the bail receipt was issued.

B. The clerk of the court in each municipality in which persons shall be admitted to bail (including releases on own recognizances), or the clerk of any court to which the case has been transferred or in which the case is pending shall transmit to the Administrator each week a list of all persons who have jumped bail, (including those released on their own recognizance) setting forth the names, addresses, and telephone numbers of the persons, the nature of the charges, the amounts of bail, the amounts of bail deposits, the places in which bail was originally posted, and the dates of the notices of forfeiture sent in accordance with Section II L hereof. This list shall set forth in a separate section all of the above information relating to persons who have had judgments entered against them for the amount of the bond, together with the date of that judgment.

C. For the purposes of insuring prompt and adequate modification of this program as may be required, all persons having comment or suggestions as to same shall communicate same in writing to the Administrator. Should questions arise requiring prompt reply, the Administrator will be available by telephone at 345-5923.

IV. FORMS

A. The forms set forth below shall be used for the Receipt of Cash Bail Deposit, Affidavit of Ownership and NonRemuneration, and Notice to Appear for Hearing. These forms shall be modified to permit the insertion of the name of the appropriate municipality or court, together with the telephone number thereof.

B. A copy of the Affidavit of Ownership and Non-Remuneration shall be provided to the person released on bail at the time of his initial release.

Appendix B

February 24, 1972

MEMORANDUM TO: Atlantic County Court Judges
Atlantic County Prosecutor
Atlantic County Public Defender
Atlantic County Clerk
Atlantic County Sheriff
All Municipal Court Judges and Municipal Court Clerks in Atlantic County
All Atlantic County Police Departments

SUBJECT: Ten Percent Cash Bail Program

Sam Mastrangelo at the Atlantic County Jail revised the enclosed form, with a few revisions as suggested by some of you, which seems to be more efficient than the three that we originally issued for use with the ten percent cash bail program. If it meets your needs feel free to adapt it to your program and make any changes that you find necessary.

After talking with the County Clerk and the Sheriff's Department, I find that the following procedures will be most effective.

When a person is arrested and taken to the municipal court, bail is set and he may be released on payment of ten percent cash, pending a hearing in the municipal court on the charge for which arrested. At the date of the municipal hearing, if the charge is such as can be disposed of on a municipal level, the return of the cash bail is taken care of at the municipal level. If the defendant is charged on an indictable offense and is held for the Grand Jury, the ten percent cash bail and bond put up by the defendant in the municipal court should be forwarded forthwith (within 24 hours) to the County Clerk's Office for filing in the manner prescribed by law. A filing fee of $3 for the County Clerk should also accompany the ten percent cash bail and bond. At this time, the police file, including the police reports and the complaint of the municipal court, shall be forwarded forthwith (within 24 hours) to the Prosecutor's Office. R. 3:4-3. The Prosecutor prefers that these reports come in together, but it is the responsibility of each to forward his file.

Persons committed to the Atlantic County Jail may post bail at the Jail. The Sheriff will forthwith send the bail and bond to the County Clerk.

MEMORANDUM February 24, 1972

Upon receipt of bail and bond the County Clerk will notify the Prosecutor by forwarding a recognizance notice on each bond, as heretofore, and file the original bond in the Clerk's Office.

Upon final disposition of the case, the Prosecutor will provide for the defendant an Order to Discharge Recognizance, which shall be signed by the Prosecutor and the Judge. The discharge of recognizance must contain a recognizance number, signatures of the Prosecutor and of the Judge, and must contain the name of the legal recipient, before the Clerk will refund the money. The defendant then presents the discharge of recognizance, together with the $3 filing fee, to the County Clerk.

It is recommended that a supply of discharge of recognizance forms be maintained by the Clerk in the courtroom facilities, to be available for the Prosecutor to expedite the refund of bail.

The ten percent cash bail procedure applies to all persons to be released from Atlantic County detention, including releases for out of county or out of state people. If this works a hardship on other counties or states, they should pick up the accused or provide for release through their own state or county.

Here are the answers to some questions that some of you have asked:

1. In accordance with the original notice, no surety bonds by professional bail bondsmen may be accepted.

2. Money loaned to defendants by others must be loaned without fee.

3. It is the responsibility of the Clerk of each municipality and of the Sheriff of the County Jail to forward the weekly reports to my office. I will devise a form within the next week or two that should incorporate all the requirements. If you have suggestions. please advise.

4. I have enclosed rules and statutes which set forth requirements of who may admit a person to bail. If you have further questions or desire clarification, I am still in contact with the Administrative Director of the Courts regarding specific details. Please call for further clarification.

5. Bail for cases on appeal will still be on the ten percent plan.

6. Those who have posted bail prior to February 14th may surrender themselves and renew the bail on the ten percent cash plan.

7. It is the responsibility of the Clerk to mail notification of trial dates to the defendants. R. 7:5-3.

8. The Police Departments may still accept bail as they have in the past, according to rule.

9. When a person is incarcerated for more than 48 hours, it is the responsibility of the Municipal Court Judge to have a hearing forthwith. Some of the Police Departments I have talked with have notified judges in instances of extended incarceration.

10. When a man is incarcerated and spends time in jail, Judge Horn recommends that jail credit of at least $10 per day be allotted against any fine subsequently imposed.

WAYNE L. BLACKLOCK
Court Administrator

WLB:dta:encs.

ATLANTIC COUNTY _____ Rec. No.

_____ COURT

_____ Phone Number

THE STATE OF NEW JERSEY :

vs. : TEN PERCENT CASH BAIL

: RECEIPT AND CERTIFICATE

_____ Defendant

_____ Amount of Bail

_____ 10% Cash Deposit

STATE OF NEW JERSEY: SS
COUNTY OF ATLANTIC :

Defendant _____ who resides at _____, Phone No. _____, Atlantic County, New Jersey, as principal, and _____ who reaides at _____, Atlantic County, New Jersey, as surety, acknowledge themselves to be indebted to the State of New Jersey in the sum of $_____, each, to be levied and made on their real and personal property, respectively, if default be made in the follcwing condition, to wit:

The condition of this recognizance is such that if said defendant _____ shall personally appear before _____ Court, to be held at _____, in the County of Atlantic and State of New Jersey, on the _____ day of _____ next, at _____ P.M. A.M., and as required thereafter, to answer the charges of _____, (W or S No.) _____, as preferred against said defendant, and not depart from said Court, and fulfill the other pertinent orders of the Court, then this recognizance shall be void, otherwise to remain in full force and effect.

_____
Defendant's Signature

The cash bail deposit is made with funds owned by _____ Tel. No. _____, of _____ in the City of _____ and State of _____.

The said cash bail deposit I am posting is so posted without charge, interest, cost, fees, or remuneration of any kind having been paid, or to be paid, in any manner to myself, to the owner of the funds, or to any other party.

Cash taken and certificate acknowledged before me on _____ 19 .

_____
Signature of Surety or Depositor

_____
Official's Signature

_____
Signature of Surety or Depositor

NOTICE: IT IS YOUR DUTY TO NOTIFY THE COURT OF ANY CHANGE OF ADDRESS OR TELEPHONE NUMBER.

YOU SHOULD CONTACT YOUR ATTORNEY AT ONCE IN ORDER TO PREPARE FOR YOUR APPEARANCE.

NOTIFICATION OF COURT APPEARANCES WILL BE BY ORDINARY MAIL.

HOLD THIS RECEIPT UNTIL FINAL DISPOSITION OF THE ABOVE CASE, THEN PRESENT SAME FOR REFUND.

AFFIDAVIT OF SURETY

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.

.....,

being duly sworn, says that ..... resident of the County of .....,

State of New Jersey; that ..... the surety on the within bond; that ..... the

owner of real property at .....

in the County of ....., in the State of New Jersey, in ..... own

right of the value of .....

Dollars, and that ..... worth .....

Dollars, over and above all ..... indebtedness, and over and above any contingent liability by reason

of being bail, surety, endorser or guarantor

.....

.....

Subscribed and sworn to before

me this .....

day of ..... A. D. 19

.....

Notary Public of New Jersey

Appendix C

November 9, 1972

MEMORANDUM TO: Municipal Court Judges of Atlantic County

SUBJECT: 10% Cash Bail Program (problem with out-of-state residents)

Many of you have indicated to me your dissatisfaction with the particular aspect of out-of-state residents in the 10% cash bail program. I have had some research done by the Legal Staff of the Administrative Director of the Courts in Trenton. They have given me some information that I think will be helpful in setting bail for out-of-state residents.

The primary purpose of bail is to insure the defendant's presence at a trial. Inasmuch as municipal court judges have indicated that the 10% program has produced a definite increase in nonappearances by out-of-state residents, we have reviewed the pertinent cases. Justice Francis recently reviewed bail requirements in State v. Johnson, 61 N.J. 351 (1972). He indicates that there are two major considerations in the setting of bail for out-of-state residents, with all other things being equal. One is that excessive bail should not be set as a means of confining the defendant prior to trial and, secondly, bail should not be set to insure the receipt of a certain level of income by the municipality in the event of forfeiture.

Despite the strictures placed on the courts, nowhere is it stated that nonresidents should have bail set at the same level as residents of New Jersey. To the contrary, residence has always been a valid factor for consideration. Therefore, while nonresidents are as much a part of the 10% program as residents, they may be called upon to post greater sums to insure their presence in court, keeping in mind the negative considerations outlined above.

Using the recommended bail schedule merely as a guide, and it is not to be considered a mandate, and taking into consideration the past record, the home ties, and the residence of the defendant, we recommend that you set the bail accordingly.

We trust that the 10% project will be as effective for out-of-state residents as it has been for local residents. If there is anything we can do to help in this project, please feel free to call upon us at any time.

WLB:dta
cc:Mun. Ct. Clerks Atl. Co.

WAYNE L. BLACKLOCK
Court Administrator

II. The Committee reviewed Professor Lewis Katz's Analysis of Pretrial Delay in Felony Cases - A Summary Report in order to make such recommendations as it deemed appropriate. Most of the issues discussed by Professor Katz did not in the opinion of the Committee, raise any questions as to New Jersey practice. Certain topics of interest such as pretrial discovery, bail, and plea bargaining were separately considered by the Committee and were not to be included in this comment.

The only topic covered by Professor Katz that remains for study is the grand jury. Challenges to the continued existence of that system have been growing rapidly in recent years. Accordingly, the Committee recommends that the Supreme Court initiate an in-depth study on the continued use of the grand jury. This study should include examination of present practices and recommendations as to the expansion of a prosecutor's accusatory powers.

III. R. 2:5-1. Notice of Appeal; Order in Lieu Thereof

(a) Service and Filing in Judicial Proceedings. An appeal from the final judgment of a court or a judge sitting as statutory agent is taken by serving a copy of a notice of appeal upon all other parties who have appeared in the action and by filing the original [with the appellate court] and a

copy with the court from which the appeal is taken. In criminal matters, the original and the copy shall be filed with the sentencing judge. The original in all matters shall be then forwarded to the appellate court.

(b) ... No change

(c) ... No change

(d) ... No change

(e) ... No change

(f) ... No change

(g) ... No change

(h) ... No change

COMMITTEE COMMENT

After sentencing in a criminal matter, bail pending an appeal may be fixed by the trial judge but only after the Notice of Appeal has been filed (R. 2:9-4). An appeal is taken by filing the original of the Notice of Appeal with the Appellate Court and a copy with the Court from which the appeal is taken (R. 2:5-1(a)). This creates problems for the attorney for defendant wishing to appeal his sentence, because it necessitates filing the Notice of Appeal with the Clerk of the Appellate Division in Trenton (or with one of the available Appellate Division Judges) before making the application to the trial judge to fix bail. By the time all of that is done the defendant is usually on his way to the State Institution. On the other hand, the trial judge is loathe to set bail merely on the representation of the attorney for the

defendant that the Notice of Appeal will be filed. There have been cases in which this was done and in which it later turned out that no notice was ever filed. Under the former criminal Appellate Practice (R.R. 1:2-8(a)), the original and copy of the Notice of Appeal were filed with the Clerk of the Trial Court (County Clerk). The revision to the rules changed that, as indicated above.

We recommend that the problem be met by changing the rule for filing the Notice of Appeal to provide that filing be with the judge who imposed the sentence. He would stamp the filing date on the original and copy of the Notice of Appeal and be responsible for forwarding the original to the Appellate Division.

Respectfully submitted,

Melvyn H. Bergstein
David S. Baime
John F. Crane
Soloman Forman
Hugh P. Francis
Geoffrey Gaulkin
Joseph Hillman, Jr.
Sanford M. Jaffe
Evan Wm. Jahos
Robert E. Knowlton
Patrick J. McGann, Jr.
Max Mehler
David M. Satz, Jr.
Bruce M. Schragger
Joseph B. Sugrue
Stanley C. Van Ness
J. Gilbert Van Sciver, Jr.
Charles S. Joelson, CHAIRMAN