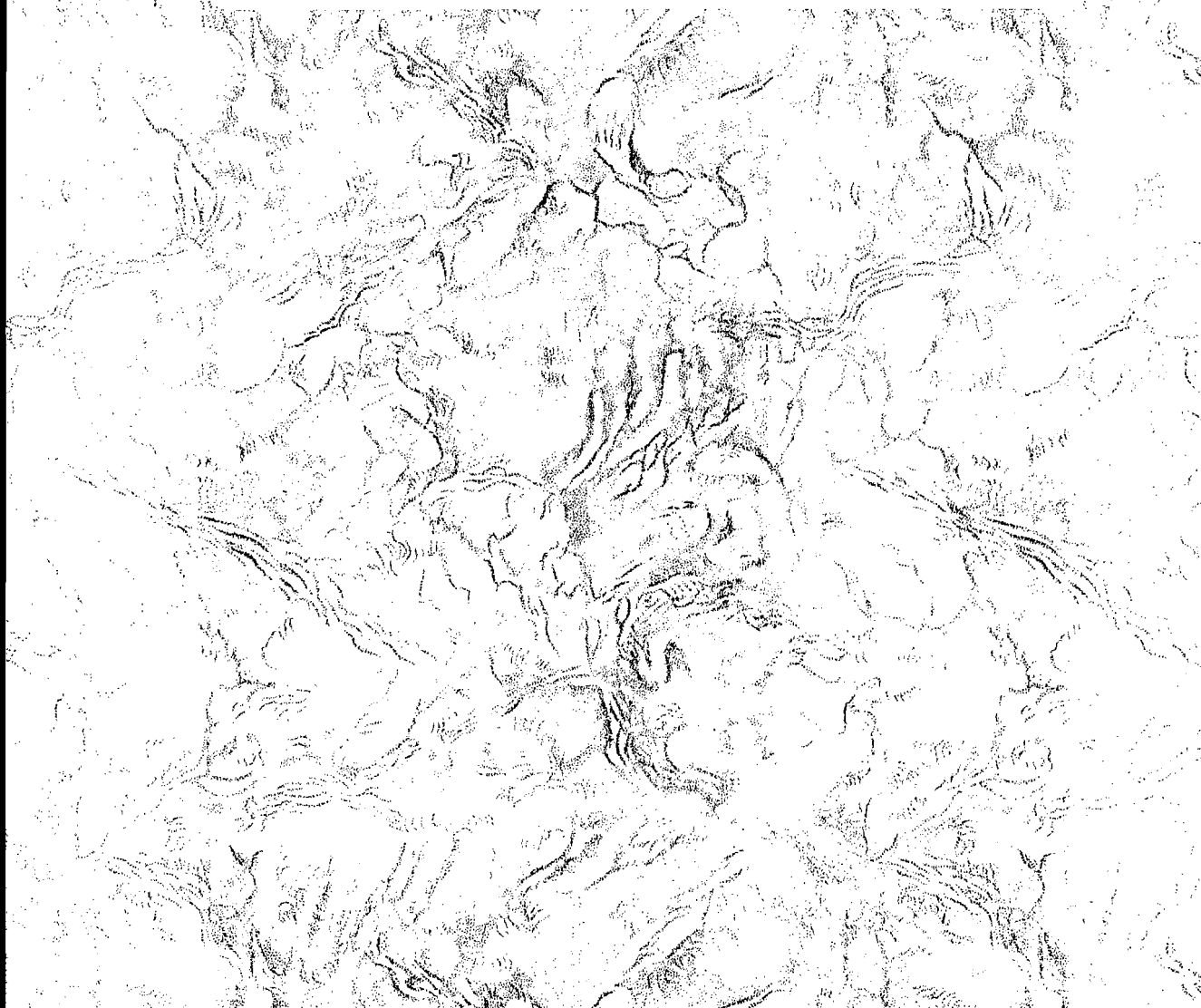
Report of the Supreme Court Committee on Criminal Practice

(1982)



REPORT OF THE SUPREME COURT

COMMITTEE ON CRIMINAL PRACTICE

1982

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I. PROPOSED RULE AMENDMENTS RECOMMENDED

1. R. 1:8-3 (Peremptory Challenges)

The Committee considered a suggestion that the rule be amended to permit an equal number of peremptory challenges for the State and defense when choosing a jury. A subcommittee was appointed to study the proposal. The subcommittee recommended rule and statutory amendments equalizing the number of peremptory challenges in criminal cases. The Committee review of the suggestion centered upon whether or not the State and the defense be afforded an equal number of challenges, whether or not the total number of challenges should be reduced and whether or not certain crimes should merit a higher number of challenges. The Committee concluded that there should be parity in the number of challenges afforded the state and the defense. For instance, in a case involving three defendants, the state would have the same number of challenges as the three defendants combined. Further the Committee concluded that the number of challenges for all types of cases and for each party shall be ten. Presently, certain offenses merit additional challenges. Thus, in the three defendant example given above, the state would have thirty challenges to match the ten provided for each of the three defendants. Further, the proposed rule also deletes the reference to challenges in cases tried by a foreign jury. The Committee recommends adoption of the following rule:

1:8-3. Examination of Jurors; Challenges

(a) ... no change

(b) ... no change

(c) ... no change

(d) Peremptory Challenges in Criminal Actions. [If the offense charged is kidnapping, murder, aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary if it constitutes a crime of the second or third degree as defined by N.J.S.A. 2C:18-2b, robbery, forgery if it constitutes a crime of the third degree as defined by N.J.S.A. 2C:21-1b, or perjury, the defendant shall be entitled to 20 peremptory challenges if tried alone and to 10 such challenges when tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defendants when tried jointly. In other criminal actions e]Each defendant shall be entitled to 10 peremptory challenges and the State shall have 10 peremptory challenges for each 10 challenges afforded each defendant[s]. [When the case is to be tried by a foreign jury each defendant shall have 5 peremptory challenges and the State shall have 5 peremptory challenges for each 5 peremptory challenges afforded defendants.]

Although the Committee recommends a rule amendment, it recognizes that such an amendment cannot be effective without statutory change. N.J.S.A. 2A:78-7 specifies the number of peremptory challenges. The Committee, therefore, recommends that the Supreme Court consider recommending amendment of the statute to conform to this proposed rule amendment.

2. R. 3:6-6, R. 3:13-3 (Grand Jury)

The Committee recommends amendments to R. 3:6-6 and R. 3:13-3 for the purpose of implementing recently enacted legislation pertaining to the recordation of comments and colloquy between grand jurors and the prosecuting attorney. See c. 475, P.L. 1981 (S224), effective January 12, 1982.

The amendments to R. 3:6-6 provide for the stenographer to remain in the grand jury room at all times while the prosecutor is present. The amendments to this rule also require that the stenographer record all comments and colloquy between the prosecutor and grand jurors pertaining to any case or investigation before the grand jury. The amendments to R. 3:13-3(a)(3) provide for the discovery by the defense of all grand jury proceedings recorded pursuant to R. 3:6-6.

These rule amendments are not, however, to be construed in any way as expanding or limiting heretofore judicially recognized grounds for the dismissal of an indictment based upon the comments or conduct of the prosecutor before the grand jury. See e.g. State v. Hart, 139 N.J. Super. 568, 569 (App. Div. 1976).

The Committee therefore recommends adoption of the following rule:

3:6-6. Who May be Present; Record and Transcript

(a) Attendance at Session. No person other than the jurors, [T]the prosecuting attorney, the clerk of the grand jury, the witness under examination, interpreters when needed and, for the purpose of [taking the evidence] recording the proceedings, a stenographer or operator of a recording device may be present while the grand jury is in session [, but n]No person other than the jurors, the clerk, [and] the prosecuting attorney and the stenographer or operator of the recording device may be present while the grand jury is deliberating. The grand jury, however, may request either (1) the prosecuting attorney and the stenographer or operator or (2) [or] the clerk to leave the jury room during its deliberations.

(b) Record; Transcript. A stenographic record or sound recording shall be made of all testimony [taken] of witnesses, comments by the prosecuting attorney, and colloquy between the prosecuting attorney and witnesses or members of the grand jury, before the grand jury, but a transcript thereof shall be made only at the prosecutor's request or upon an order

of the Assignment Judge or other judge designated by him entered pursuant to a motion authorized by R. 3:13-3. Such order shall designate the portion or portions of the [evidence] proceedings to be transcribed and the person or persons to whom such transcript is to be furnished.

(c) ... no change

3:13-3. Discovery and Inspection

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

(1) ... no change

(2) ... no change

(3) grand jury [testimony] proceedings recorded pursuant to R. 3:6-6;

(4) ... no change

(5) ... no change

(6) ... no change

(7) ... no change

(8) ... no change

(9) ... no change

(10) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) ... no change

3. R. 3:13-1 (Pretrial Hearings)

The Committee considered a suggestion to amend the rule to permit the hearing of certain motions, either well in advance of trial or in another venue, in cases likely to generate a significant amount of publicity. The Committee concluded that problems which arise concerning extensive publicity can be dealt with adequately under existing rules, through a change in venue and other methods.

Nevertheless, the Committee decided to recommend amendment of the rule for the purpose of expediting the conduct of the trial and facilitating the early entry of guilty pleas. Committee members noted that the types of questions categorized in the rule, those concerning admissibility of defendants' statements, pretrial identifications, sound recordings and other evidentiary questions, can often be held far in advance of trial. The present rule encourages such questions to be determined "immediately" before trial. Most members were of the opinion that it would be more efficient if evidentiary questions could be disposed of in advance of trial rather than waiting until just before jury selection. Further, because a defense position will often turn upon the determination of such questions, their disposal in advance of trial may lead to an early entry of a guilty plea. The Committee therefore recommends the following rule amendment:

3:13-1. Pretrial Procedure

(a) ... no change

(b) Pretrial Hearings. Hearings to resolve issues relating to the admissibility of statements by defendant, pretrial identifications of defendant and sound recordings may be held

[immediately prior to jury selection] and, upon a showing of good cause, hearings as to admissibility of other evidence may also be so held.

4. R. 3:21-10(a) (Reduction or Change of Sentence)

The Committee considered a suggestion that the rule be amended to delete the provisions which permit reconsideration of a sentence after the judgment of the appellate court has been rendered. The Committee by a vote of 11 to 8 concluded that the present rule was unnecessary due to adoption of R. 3:21-10(d) which permits a trial court to reconsider a sentence during the pendency of an appeal. Certain members, however, argued that the present rule is valuable because it can be used to make application for sentence modification in cases where a defendant had made strong efforts at rehabilitation. The rule presently allows a motion for change of sentence to be made within 20 days after the direct appeal has been decided. The historic reason for permitting application for resentencing after appeal was not to allow a later sentence review but rather to eliminate a procedural quandry into which appellate rules placed defense counsel. R. 3:21-10 and its antecedants -- see State v. Robinson, 140 N.J. Super. 459 (Law Div. 1976), rev. 148 N.J. Super. 278 (App. Div. 1977) -- permitted the motion to reconsider a sentence to be filed within 60 days after judgment of conviction. If the defendant wished to appeal the conviction, his appeal had to be filed within 45 days. R. 2:4-1. If the

notice of motion for reconsideration of sentence was timely filed, there was no guarantee that it would be decided before the time for appeal expired. This, a notice of appeal, with all of its attendant expenses, had to be filed. Of course, in most cases, if the motion was successful, the appeal would be dismissed.

However, once the notice of appeal was filed, R. 2:9-1(a) provided that the trial court was thereupon deprived of jurisdiction to act in the matter, including making a determination of the motion for reconsideration of sentence. Thus, the filing of a notice of appeal automatically deprived the trial court of jurisdiction to decide his motion to reconsider. It was for that reason that R. 3:21-10 was first amended to allow the motion to be filed within 20 days after the appeal was decided.

Now, however, the former procedural difficulties have been undone by the adoption of R. 3:21-10(d) effective September 14, 1981, which provides that notwithstanding R. 2:9-1(a), the trial court may reconsider a sentence during the pendency of an appeal upon notice to the Appellate Division.

Thus, a defendant may now forego his appeal and still have 60 days to file his motion to reconsider. Or, he may file his notice of appeal and still have his motion to reconsider heard by the trial court. Therefore, the Committee recommends adoption of the following rule:

3:21-10. Reduction or Change of Sentence

(a) Time. Except as provided in paragraph (b) hereof, a motion to reduce or change a sentence shall be filed not later than 60 days after the date of the judgment of conviction [or, if a direct appeal is taken, not later than 20 days after the date of the judgment of the appellate court]. The court may reduce or change a sentence, either on motion or on its own initiative, by order entered within 75 days from the date of the judgment of conviction [or, if a direct appeal was taken, within 35 days of issuance of the judgment of the appellate court] and not thereafter.

(b) ... no change

(c) ... no change

(d) ... no change

5. R. 3:23-8 (Hearing on Appeal)

The Committee considered a suggestion to amend the rule to permit a Superior Court judge to reverse and remand matters heard on appeal from municipal court. As R. 3:28-8(a) is now written the Superior Court Judge at the County level has no power to reverse and remand. The rule requires that "there shall be a plenary trial de novo without a jury." This deficiency may create problems where the transcript indicates clearly that the defendant's constitutional rights have been violated. This is also the case where the rights of either party have been prejudiced by a substantially unintelligible record. In short, the rule requires that the court to which the appeal has been taken must conduct the new trial. See State v. Telada, 134 N.J. Super. 463 (App. Div. 1975). The Committee concluded that there is no reason why the Superior Court Judge should not have the discretion to

reverse, remand and make the municipal court judge try the case in which he has either committed clear error or where the record is deficient. The Committee therefore recommends adoption of the following rule:

3:23-8. Hearing on Appeal

(a) Plenary Hearing; Hearing on Record; Correction or Supplementation of Record; Transcript for Indigents. If a verbatim record or sound recording was made pursuant to R. 7:4-5 in the court from which the appeal is taken, the original transcript thereof duly certified as correct shall be filed by the clerk of the court below with the county clerk, and a certified copy served on the prosecuting attorney by the clerk of the court below within 20 days after the filing of the notice of appeal or within such extension of time as the court permits. In such cases the trial of the appeal shall be heard de novo on the record unless it shall appear that the rights of either party may be prejudiced by a substantially unintelligible record or that the rights of defendant were prejudiced below in which event [there shall be] the court to which the appeal has been taken may either reverse and remand for a new trial or conduct a plenary trial de novo without a jury. The court may also supplement the record and admit additional testimony whenever (1) the municipal court erred in excluding evidence offered by the defendant, (2) the state offers rebuttal evidence to discredit supplementary evidence admitted hereunder, or (3) the record being reviewed is partially unintelligible or defective. If the appellant, upon application to the court appealed to, is found to be indigent, the court shall order the transcript of the proceedings below furnished at the county's expense if the appeal involves violation of a statute and at the municipality's expense if the appeal involves violation of an ordinance. If no such record was made in the court from which the appeal is taken, the appeal shall operate as an application for a plenary trial de novo without a jury in the court to which the appeal is taken.

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) ... no change

6. R. 7:5-2

The Committee considered a request that the rule be amended to permit municipal courts to retain bail money until action by a grand jury. The principal reason for the suggestion is to relieve the municipality and the county of the administrative expense incurred in processing and forwarding bail money. Presently, municipal courts forward bail money to the county clerk in all indictable cases. The money is returned to the municipal court if the case is downgraded and remanded. The Committee concluded that county retention of bail money permitted county court officials to be aware of criminal complaints and provided for uniform handling of bail monies.

The Committee concluded that the present system be continued, but that R. 7:5-2 should be deleted or relaxed and a directive issue which would permit the development of specific procedures to fit the needs of the individual counties.

II. OTHER RECOMMENDATIONS

1. Jury Instructions

The Committee considered the report of the Joint Subcommittee on Jury Instructions. The subcommittee comprised of members of the Criminal Practice and Civil Practice Committees considered proposals pertaining to written jury instructions, pretrial comments by judges, juror notetaking, and post-trial media contacts. The Committee discussed all of these points and concluded as follows:

a. Written Instructions - The Committee was of the nearly unanimous view that a rule should not be promulgated permitting judges to provide jurors with written copies of the jury charge. While the Committee members recognized that written instructions may be beneficial in certain complex cases, they concluded that the problems created by written instructions outweighed that limited benefit. Specifically, members cited problems of delay in having a charge properly typed and copied as well as such an effort being a burden on the judge and his staff. It was also noted that if a judge's oral instructions are clear and comprehensible, no written charge would be necessary. Since a court reporter is available to read back any portion of the charge, it was felt that written instructions are really not necessary. A significant number of members stated that they did not perceive any current problem existing concerning juror's understanding of judge's charges which might justify a change to permit written instructions.

b. Preliminary Instructions - The Committee unanimously concluded that present law and practice permits a judge in his discretion to preliminarily instruct jurors prior to opening remarks by counsel on general legal issues which may surface during trial. Many of the members of the Committee have experienced this practice. Thus, the Committee concluded that no directive or rule was necessary and that the question of the use of preliminary instructions is one for a judge to utilize in the appropriate case.

c. Juror Notetaking - The Committee considered whether or not judges should have the discretion to permit juror notetaking where deemed appropriate. The Committee concluded that judges should have such discretion; however, notetaking should be discouraged except in special circumstances and should not be permitted without express permission of the Court. All Committee members consider that a juror's primary task is to keep alert during trial, listening and watching the proceedings. Members felt that if permitted to take notes, jurors may miss certain testimony or actions of a witness or defendant which may help in judging credibility. It was also suspected that notetaking could lead to a jury being influenced by another juror who was particularly competent at notetaking and whose views might as a result therefore prevail in the jury room. Notetaking was also suggested to be unnecessary because of the presence at trial of the court reporter, available to read back any testimony which the jurors might question. The Committee noted that notetaking is permissible under present New Jersey law but that the practice should be used with extreme caution and only in extraordinary cases.

d. Media Contact - The Committee considered whether or not further restrictions should be placed on jurors concerning contact with the media both during and after trial. The Committee concluded that present restrictions are sufficient to deter media contact during trial and that no further direction in this area is necessary. The Committee further concluded that jurors should be strongly discouraged from post-trial contact with the media but that due to First Amendment guarantees,

post-trial contact could not be totally prohibited. The report of the Joint Subcommittee is attached hereto as appendix "A."

2. Plea Forms

The Committee considered a suggestion that an additional question be placed on Plea Forms LR-27 and LR-28. By a majority vote the Committee determined to recommend the addition of the question: "Are you presently on parole or probation for any other offense?"

III. PROPOSED RULE AMENDMENTS REJECTED

1. R. 3:3 (Summons/Warrant Rule)

The Committee considered whether or not a pilot project should be established in a particular municipality which would test the feasibility of requiring police officers to specify reasons for the issuance of a warrant. The Committee discussed whether or not such a project was necessary and, if so, whether the judicial officer issuing a warrant, rather than a police officer, should be the one to designate the reasons. A survey of prosecutors and public defenders was conducted in an effort to determine whether current problems existed with the application of the rule which might justify the need for a pilot project. The survey revealed that there existed no problems with the current rule. Committee members concurred with this finding and concluded that a pilot project was unnecessary.

2. R. 3:4-2 (Post-complaint Procedures)

The Committee considered an inquiry from municipal court judges concerning their responsibility, if any, to ensure

that all defendants complete post-arrest identification procedures. Recently enacted legislation requires all persons charged with indictable and drug offenses, upon the complaint of a law enforcement officer, to undergo fingerprinting, c. 411, P.L. 1981. The inquiry asked whether, in cases involving citizen complaints, municipal judges should take steps to ensure fingerprinting. The Committee concluded that such action would be unnecessary because complaints charging serious offenses are almost always filed by, or quickly come to the attention of, law enforcement authorities. After both arrest and indictment on such charges a defendant would be fingerprinted. The Committee also concluded that involvement of judges in ensuring completion of the identification process would lead to the appearance that the judges were acting as an arm of law enforcement. Therefore, the Committee decided that no rule or directive on this question was appropriate.

3. R. 3:9-1 (Guilty Plea)

The Committee considered a request that the rule be amended to permit entry of a not guilty plea without requiring the personal appearance of a defendant or his attorney, as required in the present rule. It was suggested that the rule be amended to permit a defendant to plead not guilty by filing, at or before the time of arraignment, a written statement, signed by the defense, certifying that defendant has received a copy of the indictment, had read it or had it explained to him by counsel, understands it and pleads not guilty. The written statement would contain a certification as to defendant's

current address and telephone number. The Committee concluded that whatever convenience may be gained by allowing pleas by mail were outweighed by the benefits of the present practice of counsel appearing personally. The Committee noted that a personal appearance serves to make a defendant aware of the seriousness of the charges, permits quicker access to discovery, and is generally beneficial to the court and all parties involved. By a vote of 17-2, the Committee determined to not recommend any change in the present rule.

4. R. 3:26-1 (Bail)

The Committee considered a suggestion that the rule be amended to require bail to be set within 48 hours of arrest and reviewed by a Superior Court judge within 7 days of arrest. Committee members suggested that the proposed rule might restrict the flexibility needed to handle bail applications, particularly in light of present jail overcrowding. Many members questioned whether any problems existed with current procedures which would justify amendment. Adoption was urged by certain members because current shortages of staff resources in many counties has resulted in delays in the processing of bail applications. The Committee, by a vote of 11 to 7, rejected the proposed rule amendment. However, the Committee decided to reconsider whether or not bails set by municipal courts should be reviewed mandatorily by the Superior Court. Further review of this subject will be undertaken.

5. R. 3:26-4 (Cash Bail)

The Committee considered a request that it decide whether or not a county can retain, as an administrative cost, a portion

of a 10% cash bail deposit. The Committee determined that this question was not within its jurisdiction and that action by the Legislature may be necessary to permit such action by a county. We note that a modest processing fee, $12, is already charged as part of the 10% and other bail programs.

6. Special Interrogatories

At the request of the Supreme Court, the Committee considered whether, in light of State v. Simon, 79 N.J. 191 (1979), there should be a rule providing for special interrogatories in criminal cases. A subcommittee was formed to study the matter, and while the subcommittee did not recommend adoption, it drafted a proposed rule for Committee consideration.[1] The rule drafted by the subcommittee would have permitted special interrogatories, in the discretion of the

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1. The rejected proposal states:

3:19-3. Special Interrogatories

After the general verdict is returned and before the jury is discharged, the trial court [in its discretion] may propound to the jury written interrogatories upon one or more issues of fact the decision of which was necessary to support its verdict of guilty [as to any count, or counts, of the indictment] [if doing so will facilitate its exercise of sentencing discretion, aid the appellate court in its resolution of the case should an appeal be taken], [or otherwise serve the interests of justice].

NOTE: Bracketed language suggests various alternatives.

court, to be propounded following the return of the general verdict. The interrogatories would be upon one or more issues of fact necessary to support the guilty verdict. Following discussion of the rule, a majority of the Committee concluded that a rule providing for special interrogatories should not be adopted. The Committee concluded that special interrogatories would be employed extremely rarely, would create difficult legal problems pertaining to the exact basis for the verdict and have few compensating benefits. All members of the Committee are in agreement that State v. Simon, pertaining to structuring of the jury analysis, creates insurmountable problems with respect to special interrogatories. The only manner in which these problems can be obviated is through the use of a bifurcated procedure. Specifically, special interrogatories could be answered, constitutionally, by the jury following the general verdict only, as outlined above. This procedure was considered, and rejected by the Committee last year; the Committee reiterates this position.

7. Psychiatric Evaluations

The Committee considered a suggestion that there be created a procedure permitting "simultaneous" evaluations of defendants by opposing psychiatrists. Such a procedure would permit examination of a defendant by both state and defense psychiatrists at the same time. The goal of such an examination procedure would be to reduce the chance of biased reports submitted in court. The Committee concluded that such a procedure would be impractical because in most cases where a

psychiatric evaluation is necessary the examination is completed prior to indictment. Further, the Committee felt that present procedures had not resulted in problems which justify a rule change.

8. State Police Lab Reports

The Committee discussed the impact of two proposed changes in procedures concerning State Police forensic lab reports and procedures. The first would permit allowing lab reports into evidence upon written certification. The Committee was advised that a bill on this subject had been drafted by the Attorney General's Office and would be introduced in the Legislature. Moreover, it was noted that the Evidence Rules Committee would be considering amendments to the hearsay rule which may permit admission of such reports following written certification. The second change concerns permitting testimony by the lab supervisor in certain circumstances. The Committee noted that this may be done under present rules.

The Committee concluded that neither proposal presented a problem which needed to be dealt with by rule promulgation or amendment. The Committee expressed general support for the Attorney General's legislation except for the provision therein which would require defense counsel to furnish objections to admissibility prior to trial.

IV. PROPOSALS RETAINED FOR FUTURE CONSIDERATION

1. Bail Review

As part of a suggestion to amend R. 3:26 to provide for specific time limits for the setting and review of bail, it

was proposed that all bail set in municipal court be subject to review in Superior Court. The Committee asked that certain information be provided concerning the number, and amount of bails set in municipal courts. Final consideration of the matter is deferred pending receipt and review of such data.

2. PTI Extension

The Committee considered suggestions that Pretrial Intervention be extended to cover non-indictable offenses. The Committee reviewed the report of the Committee on Pretrial Intervention which considered this question and recommended extension in counties where it would be financially feasable. Prior to voting whether to concur in this recommendation, the Committee asked to be furnished with existing data concerning the financial impact of PTI extension. Final consideration is deferred until receipt and review of this information.

3. Extended Terms of Imprisonment

a. The Committee received a suggestion that a procedure be adopted by rule for establishing criteria for an extended term of imprisonment. The matter was deferred for future consideration.

b. The Committee received a suggestion that it consider amending R. 3:21-4(d) to make clear that it does not apply to murder cases and to further provide that in cases disposed of by plea that the prosecutor indicate if an extended term is to be sought. The matter was deferred for future consideration.

ATTACHMENT "A"

REPORT

Joint Subcommittee on Jury Instructions

Hon. Paul Thompson, Chairman
Hon. David Baime
Hon. Martin L. Haines
Hon. Edward S. Miller
Gerald Eisenstat, Esq.
Theodore Fishman, Esq.
Francis Hartman, Esq.
Carl Poplar, Esq.
Joseph Rodriquez, Esq.
Cornelius Sullivan, Esq.

At the request of the Supreme Court a joint subcommittee comprised of members of the Civil Practice and Criminal Practice Committees was formed to make recommendations pertaining to jury deliberations and instructions. The subcommittee discussed four specific questions, set forth as follows:

1. Should jurors be supplied with written copies of the judge's instructions or charge for use during deliberations?

2. Should judges instruct the jury, prior to opening remarks by counsel, on the general legal issues which may surface during the trial?

3. Should jurors be permitted to take notes during the course of a trial?

4. Should jurors be restricted from contact with the news media both during and after trial?

1. WRITTEN INSTRUCTIONS

The subcommittee concludes that a rule should be promulgated which would permit, but not require, a judge to furnish a jury with written copies of his instructions or charge. It is the consensus of the members that this option may be especially valuable in complex cases as a tool which may better enable jurors to competently complete their duties. Given the quantity of evidence presented in a complex case and the intricacy of the law involved, it is felt that a jury will benefit greatly from being able to refer to a written instruction. A jury with a slight misunderstanding or gap in their recollection of the instructions may return an incorrect verdict; use of a written instruction may help decrease this possibility. The subcommittee further concludes that the rule should contain provisions for counsel to make application for the furnishing of a written charge and for counsel to examine any charge prior to submission to the jury. In all instances the complete charge should be submitted.

It is suggested the rule read as follows:

1:8-8. Papers, Exhibits, Written Instructions, etc. to Jury.

(a) The jury may take into the jury room the exhibits received in evidence, and if the court so directs in a civil action, a list of the claims made by the parties and of the defenses to such claims, a list of the various items of damage upon which proof was submitted at the trial and a list of the verdicts that may be properly found by the jury. Any such list may be prepared by an attorney or the court, but before delivery to the jury, it shall be submitted to all parties.

(b) If the court so directs, or upon application of counsel, the jury may be furnished for use during its deliberations, with typed copies of the judge's instructions on the law. The copies provided jurors shall contain the entire instruction given and counsel shall be given the opportunity to examine the copies prior to submission to the jury.

2. JUROR NOTE-TAKING

The consensus, but not unanimous, view of the subcommittee is that judges should have the discretion to permit juror note-taking where they deem appropriate. The minority view of the subcommittee is that note-taking would be a distraction and should not be permitted under any circumstances. It must be noted that in the only reported New Jersey case on the subject, the Appellate Division found nothing improper in a juror taking notes during trial. Wigler v. City of Newark, 125 N.J. Super. 179 (App. Div. 1973). Further, research indicates that only five jurisdictions specifically prohibit juror note taking, 3 Newsletter of the Center for Jury Studies 4 (1979) Again, the advantages offered by this option, particularly in complex cases, are felt by the majority to outweigh potential dangers. In all cases where note-taking is to be permitted however, a cautionary instruction should be given indicating the supplementary nature of note-taking and the need for jurors to pay close attention to all trial testimony and remarks of counsel. The subcommittee concludes that this recommendation should not be implemented by way of court rule but that the model jury charge containing preliminary and cautionary instructions be amended.

3. PRELIMINARY INSTRUCTIONS

The subcommittee is in favor of judges being permitted, on a limited basis, to instruct juries on general legal issues which might surface during trial. However, it is felt that this practice be limited to a discussion of general principles rather than an exhaustive review of applicable law. Most members are of the opinion that any detailed discussion would be impractical because important issues may arise during the course of a trial which might not have been initially recognized. Further, it is noted that the research and mechanics of putting such an instruction together would be unduly burdensome for the trial judge.

A limited general instruction is considered the most practical way of informing jurors of legal issues which might arise during trial. Members of the subcommittee noted that certain judges presently make such preliminary remarks as a matter of course.

The subcommittee recommends that this proposal be implemented by administrative directive rather than by rule. The directive would make it clear that the use of preliminary instructions is discretionary.

4. MEDIA CONTACT

The subcommittee considered whether or not more severe restrictions should be placed on jurors concerning contact with the media both during and after trial. The subcommittee concludes that although jurors should continue to be prohibited from any contact with the media during the course of a trial, post-trial contact cannot be broadly curtailed due to constitutional strictures.

R. 1:16-1 prohibits attorneys and parties, either personally or through an investigator, from questioning jurors concerning a case except by leave of court. The purpose of the rule is to protect jurors against disclosure of their communications and to preserve freedom of debate in the jury room. See State v. LaFera, 42 N.J. 97 (1964). The subcommittee perceives no present difficulties with the operation of R. 1:16-1 which may justify its amendment.

The subcommittee notes that R. 1:16-1 and LaFera primarily concern the questioning of jurors for the purpose of probing a verdict and gathering information with which to seek a new trial. The subcommittee does not believe that the rule should be used to restrict contact between individual jurors and members of the media, nor should a new rule or jury instruction be fashioned for this purpose. As the Court noted in LaFera, there has never been a prohibition against post-trial disclosures by a juror of his own views. Presently, the Model Jury Charge used in New Jersey makes it clear that a juror has a right to expect that his or her communications with other juror

will remain confidential. Further, the charge states that a juror is "not required" except by leave of court to discuss the deliberations with anyone. The charge does not, however, specifically prohibit and individual juror from a post-trial discussion of his views concerning a verdict.

As recent federal cases highlight restrictions on post-trial juror contact with the media may clash with First Amendment protections. In U.S. v. Sherman, 581 F.2d 1358 (9 Cir. 1978) a trial court order prohibiting news media contact with jurors was struck down on constitutional grounds as a clear restraint on the media's efforts to gather news. The court declared that a 6th Amendment "fair trial" question was not presented because the trial had concluded. The court noted, however, that appropriate action may be taken should instances of juror harassment arise. A U.S. District Court in Florida in Barnes v. Schwartz (No. 80-1145) vacated a protective order which had been entered prohibiting jurors who had returned a guilty verdict from discussions with the press until a jury was chosen for a co-defendant's trial. The court found the order to be overly restrictive of the First Amendment rights of the press, public and jurors.

In view of the possible constitutional infirmities inherent therein, the subcommittee declines to offer any proposal containing a broad restriction on post-trial juror contact with the media.