REPORT OF THE

JOINT COMMITTEE

ON

CRIMINAL JUSTICE

March 10, 2014

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In June 2013, the Chief Justice established the Joint Committee on Criminal Justice to focus on issues relating to bail and the delays in bringing criminal cases to trial. The Committee is comprised of judges, prosecutors, public defenders, private counsel, court administrators and staff from the Legislature and Governor's office.

The Committee formed three subcommittees: bail, pre-indictment, and post-indictment. Each subcommittee made recommendations that were voted on by the full Committee. As a backdrop to the Committee's report, Appendix A contains an overview of the criminal justice process in New Jersey, which may be helpful to the reader.

I. EXECUTIVE SUMMARY

Among other important precepts, our criminal justice system stands on two bedrock principles: that individuals accused of a crime are innocent until proven guilty, and that they are entitled to a speedy trial. Yet many defendants are detained in jail before and during trial -- while they are presumed innocent -- because they cannot post bail; and all too often defendants have to wait far more than a year to see their day in court. To address those serious problems, the Committee recommends significant changes to the current approach to bail as well as the enactment of a speedy trial law.

A. SUPERVISED PRETRIAL RELEASE

New Jersey's present system of pretrial release is, to a large extent, based on a defendant's ability to post money bail to secure his or her release after arrest.[1] Because the system is dependent upon one's financial resources, it is likely to have an especially adverse impact upon poor defendants and members of racial and cultural minority groups.[2] A recent study found that approximately 12% of New Jersey's county jail population remained in custody because they could not post a bail of $2,500 or less[3] and that more than two-thirds of indigent defendants were members of racial and cultural minority groups.[4]

Research during the past half century has clearly and consistently demonstrated that being incarcerated before trial can have significant consequences: defendants detained in jail

[1] Throughout this report, the term "resource-based" is used to refer to systems that rely on a defendant's ability to post money bail to secure his or her release after arrest.

[2] Report of the Supreme Court Task Force on Minority Concerns, Subcommittee on Bail, 125 N.J.L.J. 109, 113 (Jan. 11, 1990).

[3] Marie VanNostrand, Ph.D., New Jersey Jail Population Analysis (March 2013) (hereinafter "Jail Population Survey" or "JPS") at 13.

[4] JPS, supra, note 3 at 9, documenting that 71% of inmates were reported as either Black or Hispanic.

while awaiting trial (1) plead guilty more often; (2) are convicted more often; (3) are sentenced to prison more often; and (4) receive harsher prison sentences than those who are released during the pretrial period. Those outcomes hold true even when other factors are taken into account, such as current charge, prior criminal history, and community ties.[5] A study in Kentucky found that defendants detained for the entire pretrial period were over four times more likely to be sentenced to jail, and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial. Their sentences were also significantly longer: nearly three times as long for defendants sentenced to jail and more than twice as long for those sentenced to prison.[6]

In addition, New Jersey's present system for pretrial release fails to protect the community from defendants awaiting trial who may commit additional crimes or seek to obstruct justice through witness intimidation or retaliation. Because the New Jersey Constitution mandates that bail be set for all defendants, judges have no authority to detain even the most dangerous, violent individuals. Although courts may condition pretrial release on nonmonetary provisions that are designed to protect the public, such as a "no contact" restriction that bars a defendant from contacting an alleged victim, there are no mechanisms in place to supervise or enforce compliance.

In short, the current system presents problems at both ends of the spectrum: defendants charged with less serious offenses, who pose little risk of flight or danger to the community, too often remain in jail before trial because they cannot post relatively modest amounts of bail, while other defendants who face more serious charges and have access to funds are released even if they pose a danger to the community or a substantial risk of flight.

For those reasons, the Committee recommends a statutory change from our present "resource-based" system. In its place, we recommend a system that employs an objective, "risk-based" method of analysis to assess a defendant's risk of failure to appear and danger to the community.[7] A risk-based instrument would consider objective factors such as current charge, prior arrests and convictions, history of failure to appear and substance abuse, amount of time at current residence, and employment status. It would aid judges as they craft conditions of release

[5] Pretrial Justice Institute, Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process (March 2012), at 2.
[6] Laura and John Arnold Foundation (LJAF) Pretrial Criminal Justice Research at 3.
[7] Throughout this report, we refer to this type of system as a "risk-based" system.

-- like electronic monitoring, house arrest, and reporting -- to address the risk level each defendant presents.[8]

The Committee recognizes that in order for a risk-based system to be effective, it will be necessary to supervise a large number of defendants who are released in the community pending trial. Thus, as part of our recommendation, we propose that a system of supervised pretrial release be established with pretrial services officers who will monitor defendants and track their compliance with nonmonetary conditions of release. The system must include an effective way to enforce penalties for noncompliance with those conditions.

A risk-based system is fairer than the current one because it is based on objective factors unrelated to wealth, race, or ethnicity. It will promote defendants' liberty interests by significantly reducing the number of defendants held in jail before trial. And it will reduce costs for local government.

Implementation of a risk-based approach in New Jersey will require a significant allocation of new resources. While counties that house fewer defendants in jail before trial will save money, there will be added costs to supervise defendants, to develop information-technology systems that keep track of defendants in the community, and to resolve cases in court more quickly.

B. PREVENTIVE DETENTION

For some defendants, no condition or combination of conditions can reasonably ensure either the safety of the community or their appearance in court. In a resource-based system, judges sometimes impose extremely high money bails on those defendants based on sub rosa considerations of dangerousness. But this approach can result in the release of affluent defendants who can afford to post bail but still present unmanageable safety risks.

A risk-based system, however, promotes public safety by expressly permitting judges to consider danger to the community while deciding whether to release or detain a particular defendant. If a judge determines that no conditions of release will protect the community, he or she may order a defendant detained pending trial. The Committee recommends that statutory authorization for a risk-based program of release must also provide for preventive detention of offenders who cannot safely be released into the community or pose a serious risk of flight.

[8] The Committee is not recommending the abolition of monetary conditions of bail.

Implementation of a risk-based approach in New Jersey will require constitutional and statutory amendments. The Committee believes that a properly designed and appropriately funded risk-based system, along with pretrial detention, would promote both the accused's liberty interests and the community's safety. The recommendations for a risk-based system of bail and pretrial detention are interdependent and should not be considered individually.

C. SPEEDY TRIAL

A defendant has a right to a speedy trial.[9] New Jersey has adopted the four-prong test set forth in Barker v. Wingo, 407 U.S. 514 (1972), to determine whether a defendant's right to a speedy trial has been violated. See State v. Szima, 70 N.J. 196, 200-01 (1976). The four factors are (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right; and (4) prejudice to the defendant. To assess whether a defendant's constitutional right to a speedy trial has been violated, courts engage in a balancing process, subject to the specific facts and circumstances of each case. Under this system, defendants can wait years between arrest and trial for their day in court, and it can be difficult to predict when a constitutional violation has occurred.

A majority of states[10] have chosen a different approach. Thirty-eight states have adopted specific time frames in which the prosecution must bring a defendant to trial. Most states – twenty-one in all – have proceeded by statute. Seventeen have adopted court rules to address the problem.

Delays in getting to trial exacerbate the problem of pretrial incarceration. Defendants who are incarcerated, even for a short period of time, often lose their jobs or other means of support. They are frequently unable to access needed medications and are separated from their families. Also, incarcerated defendants face certain practical pressures. They are more likely to plead guilty than those released pretrial because they know that a guilty plea could mean immediate release if they have already served a significant amount of time in jail.[11] The reality

[9] U.S. Const., amend.VI; N.J. Const. art. I, ¶ 10.

[10] The District of Columbia and the Federal system have also adopted specific time frames by statute.

[11] See Barker v. Wingo, 407 U.S. at 533 n. 35 (citing Wald, Pretrial Detention and Ultimate Freedom: A Statistical Study, 39 N.Y.U.L. Rev. 631 (1964)).

is that defendants who are detained pretrial receive longer sentences and less attractive plea bargains, and are more likely to "reenter" the criminal justice system in the future.[12]

The Committee recommends that the Legislature enact a speedy trial act that sets forth time frames in which defendants must be indicted and brought to trial. The Committee recommends the following: first, that the permissible time periods from a issuance of a complaint or arrest to indictment be no more than 90 days for defendants held in jail and 180 days for defendants on bail; and, second, the permissible time periods from indictment to trial be no more than 180 days for defendants held in jail and 365 days for persons released on bail. The Committee recommends periods of excludable time for pretrial motions, time to conduct a competency hearing, other pending proceedings, consent of the parties, and various other circumstances. If a case is not indicted within the specified period of time, the defendant would be released after 90 days of incarceration. If the defendant has been released pretrial, the complaint against that person would be dismissed without prejudice to it being refiled at a later time. After indictment, if a case is not tried within 180 days, an incarcerated defendant would be released. The indictment would be dismissed with prejudice after 365 days if the defendant is not in custody. The Committee acknowledges that there may be rare cases that require additional time, when strict compliance would result in substantial injustice.

D. RESOURCES

The Committee's recommendations - - which include the adoption of an objective, risk-based system to set bail, a program for supervised pretrial release, a constitutional amendment that allows for pretrial detention of defendants who pose a substantial risk of flight and danger to the community, and the enactment of a speedy trial law -- are intended to improve our State's criminal justice system. The proposed changes would result in fewer defendants being held in jail before trial; the vast majority can safely be released and monitored pretrial. At the same time, preventive detention would provide a straightforward way for judges to detain defendants who should be held pending trial. And all defendants -- as well as victims of crime and the public -- would benefit from the prompt resolution of cases.

These historic recommendations represent the strong consensus of judges, prosecutors, public defenders, and private attorneys. The Committee members are equally united in their

[12] See, e.g., John Goldkamp, Two Classes of the Accused: A Study of Bail and Detention in American Justice (1979); Malcom M. Feeley, The Process is the Punishment: Handling Cases In a Lower Criminal Court (1992); Jeffrey Manns, Liberty Takings: A Framework for Compensating Pretrial Detainees, Harvard Law School, (2005).

view that we not take these bold steps forward unless the State can allocate sufficient resources to ensure their successful implementation. The literature and experiences from other states tell us that a broader program of pretrial release will not succeed in New Jersey unless pretrial services officers supervise released defendants. Similarly, a speedy trial act will only succeed if there are sufficient judges, prosecutors, and public defenders to prepare and try cases in a timely fashion. Otherwise, cases may be dismissed or defendants released pretrial -- when that should not happen -- because of inadequate resources.

We recognize that a collaborative effort by all three branches of government will best be able to address these important concerns.

E. OTHER RECOMMENDATIONS

The Committee also proposes a series of other recommendations to improve the way that cases are handled pre-and post-indictment. Some of these require that all three branches of government act collectively; others can be addressed by the Judiciary through its rule-making authority.

Pre-Indictment, the Committee proposes that all first appearances for indictable offenses be held in a central location. For incarcerated defendants, the appearance should take place within 72 hours of arrest; for defendants not held in jail, first appearances should occur no later than 60 days after issuance of a complaint. The Committee also proposed changes to streamline the process for appointment of counsel, to inform defendants earlier about diversionary programs and drug court, and for prosecutors to inform the court of their screening decisions at the first appearance. In addition, the Committee recommends that a pre-indictment program must be developed by every county to facilitate early case management and disposition.

Post-Indictment, the Committee recommends that court events be streamlined to make them more meaningful and reduce time to trial. In that regard, the Committee proposes that all available discovery be provided at the time of indictment, except in extraordinary cases. This discovery would contain any plea offer. The Committee also proposes that the current pre-arraignment conference and arraignment/status conference be merged into one event and that this new conference be held 14 days after indictment. The Committee also proposes that there be a limit to the number of status conferences before the pretrial conference and a reduction in the number of peremptory challenges. These recommendations are intended to streamline the process. Finally, in a closely divided vote, the Committee proposes that Rule 3:9-3(g), the so-

called plea cutoff rule, which as written does not allow a plea bargain to be accepted after the date of the pretrial conference, be changed from mandatory to permissive.

II. TABLE OF RECOMMENDATIONS

BAIL RECOMMENDATIONS

RECOMMENDATION 1. **New Jersey should move from a largely "resource-based" system of pretrial release to a "risk-based" system of pretrial release.**

RECOMMENDATION 2. **A statute should be enacted requiring that an objective risk assessment be performed for defendants housed in jail pretrial, using an assessment instrument that determines the level of risk of a defendant.**

RECOMMENDATION 3. **Nonmonetary conditions of release that correspond to the level of risk should be established.**

RECOMMENDATION 4. **A supervision mechanism should be developed to ensure compliance with release conditions.**

RECOMMENDATION 5. **A mechanism for effective enforcement of noncompliance should be established.**

RECOMMENDATION 6. **The Constitution should be amended and a preventive detention statute should be enacted as a component of recommendations 1-5.**

RECOMMENDATION 7. **Recommendations 1-6 should not be considered individually but rather as an interdependent proposal for change to New Jersey's system of pretrial release.**

RECOMMENDATION 8. **Recommendations 1-6 should not be enacted without sufficient funding to ensure their success and community safety.**

RECOMMENDATION 9. **Resources for technological applications to assist in both determining risk and providing supervision must also be provided.**

SPEEDY TRIAL RECOMMENDATIONS

RECOMMENDATION 10. **A speedy indictment proposal should provide time limits that state when a defendant must be indicted: (1) defendants held in custody must be indicted within 90 days of arrest; and (2) defendants not in custody must be indicted within 180 days of the issuance of a complaint or arrest. The maximum time from complaint to indictment shall not exceed 180 days.**

RECOMMENDATION 11. **A speedy indictment or trial proposal should provide for exclusion of time in appropriate circumstances.**

RECOMMENDATION 12. **Speedy indictment and trial provisions should apply to all defendants.**

RECOMMENDATION 13. **The remedy for failure to indict within the required time frames should be: (1) release from confinement for incarcerated defendants held for a total of 90 days; and (2) dismissal of the complaint without prejudice for all defendants if not indicted within 180 days of issuance of a complaint.**

RECOMMENDATION 14. **A speedy trial provision with specific time frames within which a defendant must be tried that includes excludable time with appropriate remedies for noncompliance should be enacted. Specifically, defendants cannot be held in custody for more than a total of 180 days after indictment without a trial. The remedy for noncompliance shall be release from custody. Defendants not in custody must be tried within 365 days of indictment. The remedy for noncompliance shall be dismissal with prejudice. Any speedy trial provision must recognize that there will be cases that may require additional time; however, any provision allowing additional time must be limited to the extraordinary case and a significant showing that an injustice would follow from strict compliance with the relevant remedy.**

RECOMMENDATION 15. **Any speedy indictment and trial proposal should be implemented and adopted by legislation.**

PRE-INDICTMENT RECOMMENDATIONS

RECOMMENDATION 16. **All first appearances for indictable offenses should be made at a Superior Court building or other centralized location, before a judge designated by the Assignment Judge.**

RECOMMENDATION 17. **The first appearance should be held (1) within 72 hours of arrest for incarcerated defendants, and (2) after the prosecutor has screened the case, but no more than 60 days after arrest or issuance of a summons, for non-incarcerated defendants.**

RECOMMENDATION 18. **At the first appearance, the court shall provide to the defendant a 5A form, which the defendant (if then unrepresented) shall complete and submit at that time, and which the court shall process immediately.**

RECOMMENDATION 19. **At the first appearance, the prosecutor must inform the court of a screening decision.**

RECOMMENDATION 20. **At the first appearance, the judge must inform the defendant about the PTI program and the Drug Court program.**

RECOMMENDATION 21. **In order to facilitate early case management and disposition,**

every county must develop a pre-indictment program approved by the Supreme Court. The purpose of this program shall be for the parties to discuss and/or finalize any pre-indictment disposition.

POST-INDICTMENT RECOMMENDATIONS

RECOMMENDATION 22. **The Prearraignment Conference (PAC) should be merged with the Arraignment/Status Conference (AS) and the AS should be held 14 days after indictment.**

RECOMMENDATION 23. **The number of status conferences should be limited to two absent good cause, in which case, a third conference would be allowed at the judge's discretion. The first status conference should be called the Initial Case Disposition Conference (ICDC), the second, the Final Case Disposition Conference (FCDC), and the third, the Discretionary Case Disposition Conference (DCDC).**

RECOMMENDATION 24. **Rule 3:9-3g (Plea Cutoff) should be changed from a mandatory requirement to a permissive requirement at the Pretrial Conference (PTC). The PTC court event should be maintained as the mechanism to set a trial date, including completion of the pretrial memorandum, with a warning to the defendant that the plea *may not* be available at the time of trial.**

RECOMMENDATION 25. **The recommendation of the Supreme Court's Special Committee on Peremptory Challenges and Jury Voir Dire should be endorsed. There should be a reduction of the number of peremptory challenges in criminal trials to eight challenges for a defendant being tried alone, with six challenges permitted to the State. Where there are multiple defendants, each defendant should be permitted four peremptory challenges, with the State permitted three challenges for each defendant.**

RECOMMENDATION 26. **Additional resources should be allocated to the Criminal Division.**

RECOMMENDATION 27. **All available discovery should be made available at the time of indictment with some caveat for extraordinary cases. If a plea offer is tendered, it must be in writing and should be part of the discovery package available at the time of indictment.**

III. BAIL REPORT

A. INTRODUCTION

New Jersey's present system of bail, to a large extent, is resource-based, where a defendant's ability to secure pretrial release is dependent upon his or her ability to post money bail when that defendant is arrested and held in a county jail. Since this ability is dependent upon one's financial resources, it is especially likely to have an adverse impact upon poor defendants and on members of racial and cultural minority groups.[13]

In addition, New Jersey's present system for pretrial release fails to protect the community from defendants awaiting trial who may commit additional crimes or who seek to obstruct justice through witness intimidation or retaliation. Since the New Jersey Constitution mandates that judges must set bail for all defendants, judges have no ability to detain even the most dangerous, violent defendants. While courts may place nonmonetary conditions upon pretrial release that are designed to protect the public, such as a "no contact" condition, there is no mechanism available for supervising compliance with these conditions and no procedures to enforce compliance.

Previous well-intentioned efforts to address these issues have not been fully successful because they were made within the confines of our present resource-based system and our Constitution's "bailable offense" clause. Although the Committee strove to craft recommendations within these confines, we ultimately concluded that these issues can be effectively addressed only through systemic change in our pretrial release and supervision system.

Thus, the Committee recommends a shift from our present resource-based system to a risk-based system of pretrial release. The Committee submits that these recommendations should be adopted because when properly designed, funded and implemented, a risk-based system promotes the societal interests in both the defendant's liberty and the community's safety.

More specifically, a risk-based system is more fair to a defendant because the assessment of risk level is based upon objective factors unrelated to indigency, race or ethnicity. A risk-based system promotes the safety of the community because it expressly permits courts to consider the danger that a defendant poses to the community in determining whether to release or

[13] See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, Commentary at 32 (2007) (hereinafter "2007 ABA Standards"). Accord Pretrial Justice Institute, The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth (2010) (hereinafter "PJI").

detain a defendant, if there is a finding that no release conditions will protect the community. A risk-based system also promotes a defendant's liberty interests as it will result in a significant reduction in the pretrial detainee population.

Implementation of a risk-based approach, as we are proposing in New Jersey, will require constitutional and statutory amendments. It will require a significant allocation of new resources. While there will be savings in costs in housing defendants in jail at the county level, there will be significant costs incurred to supervise defendants and develop information technology systems to track defendants in the community and to more quickly resolve their cases in court.

In Washington, D.C. for example, there are significant costs associated with running their Pretrial Services Program. New Jersey's Juvenile Detention Alternatives Initiative (JDAI), described below, had some costs funded by counties.

In New Jersey, the average number of defendants held in pretrial detention on any one day is estimated to be around 9,000. According to data the Committee has received from the Administrative Office of the Courts (AOC) the average (median) length of stay for pretrial detainees is between 60-90 days. After surveying the county jails, the AOC estimates the average daily cost to house a pretrial detainee is about $100. (This figure is very close to the average ($90) amount of the State contract rate with counties). A conservative projection of a fifty percent (50%) reduction in the number of pretrial detainees housed in county facilities would result in substantial savings.

When properly staffed, funded, and implemented, this risk-based system is fully capable of promoting a society that is freer, fairer and safer.

B. PURPOSE AND METHODOLOGY

The Committee was instructed to place "[p]articular focus" upon "inmates who are unable to make modest amounts of bail in less serious cases and are held in custody for extended periods." Initially focusing upon inmates charged with "less serious" offenses, the bail subcommittee critically analyzed New Jersey's present pretrial release system in its entirety. The subcommittee conducted a document review of pretrial release practices throughout the nation and benefited from appearances by national experts in pretrial justice – Hon. Truman Morrison, Marie Van Nostrand, Ph.D. and Timothy Murray. Two Committee members also observed pretrial release and detention proceedings conducted in the District of Columbia Superior Court.

This analysis led to the conclusion that continued reliance on New Jersey's resource-based pretrial release system will continue to foster custody of those inmates specifically referenced by our Chief Justice due to this system's over-reliance upon money in determining who remains incarcerated while awaiting trial. The Committee reviewed efforts in 1984 and 1994 to address similar concerns regarding indigent inmates, charged with less "serious offenses," who awaited trial in county jails because they were financially unable to post modest bails. Those well-intentioned, but not fully successful, reform efforts were made within the confines of the existing statutory and constitutional framework of our resource-based system.

That framework supporting our resource-based system remains intact today. Similar to the 1984 and 1994 initiatives, the Committee sought to ameliorate the adverse effect of money bail upon the poor while operating within that framework. For example, the Committee examined alternative case processing methodologies[14] and training initiatives.

Ultimately, the Committee concluded that the reform efforts in 1984 and 1994 were not completely successful in addressing the adverse effect of money bail upon the poor precisely because those efforts were made within the existing statutory and constitutional framework of our resource-based system. The Committee's analysis further reveals that this system leaves courts ill-equipped to address the dangers to the community presented by defendants who are released pretrial and then commit additional crimes or obstruct justice through witness intimidation or retaliation because there are no supervision mechanisms funded to monitor conditions of release.

This analysis has resulted in the Committee's unanimous recommendation of systemic change – a shift from our present resource-based system to a risk-based system.[15] The unanimous support for this recommendation is particularly remarkable given the frequently divergent views that Committee members have historically expressed, as advocates for their clients or constituents, concerning other criminal justice issues. The Committee submits that this unanimity arises from the soundness of the recommendation itself. The Committee concluded

[14] See Marie VanNostrand, David Bogard, & Michele Deitch, Camden County, NJ Jail Population Analysis: Strategies to Reduce Jail Crowding While Maintaining Public Safety and the Integrity of the Judicial Process (2009) (hereinafter "VanNostrand Camden Report"); Cf. New Jersey Detention Reform Task Force (hereinafter "DRTF").

[15] This recommendation should not be interpreted to preclude stakeholders from continuing to explore the development of practices and procedures to ameliorate the adverse effect upon the poor inherent in our present resource-based system. The Committee, though, unanimously recommends the systemic change proposed.

that only the recommended systemic change can promote the liberty interests of all defendants who pose a manageable risk of pretrial misconduct, while also protecting community safety.

C. COMMITTEE FINDINGS AND RECOMMENDATIONS

1. Guiding Principles

a. The Committee's recommendations are guided by the often quoted observation that, "[i]n our society liberty is the norm, and detention prior to trial … is the carefully limited exception."[16]

b. This observation is grounded in our Constitution's considerations of fairness as reflected in the presumption of innocence and supported by "best practices."[17]

c. A criminal defendant's pretrial freedom may be legitimately restricted to respond to risks of pretrial misconduct.[18]

d. Pretrial misconduct takes two forms: (1) nonappearance in court when required (hereinafter "flight") and (2) commission of additional crimes, witness intimidation or witness retaliation, while released and awaiting trial (hereinafter "community danger").[19]

e. Risk is inherent in pretrial decision-making. In other words, many defendants present a risk of flight and/or community danger to some degree.[20]

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[16] United States v. Salerno, 481 U.S. 739, 755 (1987).

[17] "Best Practices" in adult pretrial release decision-making as considered by the Committee include the work of Marie VanNostrand as reflected in her appearances before the Committee and at the Rutgers Symposium and as memorialized by her publications including: Marie VanNostrand, Assessing Risk among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment (Virginia Dep't of Criminal Justice Services 2003); Marie VanNostrand & Gena Keebler, Pretrial Risk Assessment in Federal Court (Luminosity, Inc. 2009). Marie VanNostrand & Kenneth Rose, Pretrial Risk Assessment in Virginia (Luminosity, Inc. 2009). "Best Practices" in juvenile pretrial release decision making as considered by the Committee include the work of the Juvenile Detention Alternatives Initiative ("JDAI") as reflected by the work of the New Jersey Juvenile Justice Commission as reflected by the statements of Dr. Gloria Hancock at the Rutgers Symposium and as memorialized by publication including Pathways to Juvenile Detention Reform – The JDAI Story, Annie E. Casey Foundation and Detention Reform Task Force Report Virginia, JDAI as implemented in New Jersey and as memorialized in JDAI publications. "Best Practices" in defining the role of a pretrial services agency in the application of a risk-based system of pretrial release decision-making as considered by the Committee includes the work of the National Association of Pretrial Services Agencies ("NAPSA") and the Pretrial Justice Institute as reflected by the statements of Timothy Murray to the Committee and as memorialized by publications including: NAPSA Pretrial Release Standards and PJI Pretrial Services Program Implementation: A Starter Kit. Persuasive authority in the practical application of pretrial release decision making as considered by the Committee includes its application in the District of Columbia, see D.C. Code §§ 23-1302 – 23-1330, and in the federal system, see 18 U.S.C. §§ 3141 - 3156. These applications are further reflected in the 2007 ABA Standards. The Committee recognized that "Best Practices" are continually evolving based upon knowledge acquired through actual implementation and ongoing social science research. Their implementation invariably requires modifications based upon the needs/requirements of local jurisdictions.

[18] See infra, discussion accompanying notes 240-309.

[19] See infra, discussion accompanying notes 184-202.

[20] See infra, discussion accompanying notes 240-257.

f. The fundamental challenges presented in pretrial decision-making are: (1) identifying the risks of pretrial misconduct posed by individual defendants, and (2) managing those risks.[21]

2. Findings

a. New Jersey's present pretrial release system prohibits managing the risks of pretrial misconduct through the denial of bail. For all defendants charged with a crime, including those crimes that were previously punishable by death, the bailable offense clause of our State Constitution requires a bail to be set or the defendant released.[22]

b. New Jersey's present pretrial release system primarily seeks to address flight risk through the setting of bail conditions, most often, a monetary condition of release.[23]

c. New Jersey's present pretrial release system prohibits addressing the risk of community danger through the setting of bail.[24]

d. New Jersey's present pretrial release system is, to a great extent, resource-based, as a defendant's ability to secure pretrial release is dependent upon his or her ability to post money bail, which, in turn, is dependent upon his financial resources.[25]

e. New Jersey's resource-based system may result in the detention of poor defendants who present manageable risks of pretrial misconduct and may result in the release of more affluent defendants who present more severe and frequently less manageable risks of pretrial misconduct. This is often referred to as the "dual system error" inherent in a resource-based system.[26]

f. New Jersey's present resource-based pretrial release system adversely affects poor defendants and members of racial and cultural minorities.[27]

g. New Jersey's present pretrial release system seeks to address risks of community danger solely through the imposition of nonmonetary conditions of release, such as "no contact" conditions, or through the setting of a high amount of monetary bail.[28]

h. The effectiveness of nonmonetary conditions in protecting the public is dependent upon a defendant's compliance with these conditions.[29]

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[21] See infra, discussion accompanying notes 240-309.
[22] See infra, discussion accompanying notes 39-48.
[23] See infra, discussion accompanying notes 61-66.
[24] See infra, discussion accompanying notes 184-202.
[25] See infra, discussion accompanying notes 79-81.
[26] See infra, discussion accompanying notes 79-81.
[27] See infra, discussion accompanying notes 82-101.
[28] See infra, discussion accompanying notes 184-202.

i. Defendants' compliance with these nonmonetary release conditions, designed to protect the public, are dependent upon mechanisms to supervise compliance with these conditions and procedures to enforce compliance.[30] New Jersey's present pretrial release system does not provide this supervision or any mechanism or procedure to address noncompliance with nonmonetary conditions because such efforts have never been funded.[31]

3. Recommendations

The Committee is making the following recommendations. The reasons for these recommendations will be set forth later in this report.

RECOMMENDATION 1. **New Jersey should move from a largely "resource-based" system of pretrial release to a "risk-based" system of pretrial release.**

RECOMMENDATION 2. **A statute should be enacted requiring that an objective risk assessment be performed for defendants housed in jail pretrial, using an assessment instrument that determines the level of risk of a defendant.**

RECOMMENDATION 3. **Nonmonetary conditions of release that correspond to the level of risk should be established.**

RECOMMENDATION 4. **A supervision mechanism should be developed to ensure compliance with release conditions.**

RECOMMENDATION 5. **A mechanism for effective enforcement of noncompliance should be established.**

RECOMMENDATION 6. **The Constitution should be amended and a preventive detention statute should be enacted as a component of recommendations 1-5.**

RECOMMENDATION 7. **Recommendations 1-6 should not be considered individually but rather as an interdependent proposal for change to New Jersey's system of pretrial release.**

RECOMMENDATION 8. **Recommendations 1-6 should not be enacted without sufficient funding to ensure their success and community safety.**

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[29] See infra, discussion accompanying notes 192-194.
[30] See infra, discussion accompanying notes 192-194.
[31] See infra, discussion accompanying notes 192-194.

RECOMMENDATION 9. Resources for technological applications to assist in both determining risk and providing supervision must also be provided.

D. SIGNIFICANCE OF BAIL DETERMINATION

When a defendant is arrested, our society faces some difficult choices.[32] If defendants remain in jail pending trial, they lose their liberty before they are convicted of anything. They are separated from family members. They are unable to work and may ultimately lose jobs and the ability to support their family in the future. From jail, it is harder for defendants to assist their attorneys in preparing a defense.[33] If defendants are not convicted, they lose the time they have spent locked up awaiting trial for a crime for which they are presumed innocent. Consistent with these observations and the application of constitutional principles, Courts have consistently expressed a preference for pretrial liberty.[34] In the words of Chief Justice Rehnquist, "[i]n our society liberty is the norm, and detention prior to trial … is the carefully limited exception."[35]

If the defendant is released from jail pending trial, then he may not show up for court. This absence often delays the resolution of the case on the merits. This delay impedes the search for the truth, as witnesses' memories fade over time or they otherwise become unavailable. Unless the case is tried without him or her, which rarely occurs, the defendant's absence inconveniences witnesses and jurors who were summoned for trial and counsel who prepared for that trial. It also frustrates victims' need for closure. Thus, defendant's flight obstructs the fair and efficient administration of justice.

In addition to these consequences of flight, defendants released from jail pending trial may also pose a danger to others. As a group, released defendants commit crimes far more

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[32] 2007 ABA Standards supra, note 13 at 29-30. Professor Foote observed that "[s]omeone has to pay a price for the fact that we have to have a pretrial period between accusation and final adjudication. If defendants are kept locked up, the cost is borne by those among them who are innocent or prejudiced by the detention. If they are all released, society pays in those cases where the defendant flees or commits new crimes." Foote, The Coming Constitutional Crisis in Bail; I, 113 U. Pa. L. Rev. 959, 964 (1965). Thus, the goal for any pretrial release system is to properly allocate these costs through an appropriate balance between societal interests in personal liberty and public safety.

[33] See Mary T. Phillips, Bail, Detention, and Non-Felon Case Outcomes, New York City Criminal Justice Agency Research Brief #14, 5 (May 2007) (A recent study of misdemeanor cases in New York City found that the conviction rate of people released prior to the disposition was 50%, whereas the conviction rate for those detained until disposition was 92%).

[34] See Salerno, 481 U.S. at 755. This preference is also expressed in statutes authorizing imposition of the "least restrictive" release conditions. See 2007 ABA Standards supra, note 13. They are also reflected in statutes authorizing pretrial detention only upon a showing that the conditions will not reasonably assure the defendant's appearance or the community's safety. Id. at § 10-5.8.

[35] Id.

frequently than other members of the public. These crimes are all-too-often violent, traumatizing individual victims and undermining the public's sense of security. Released defendants have intimidated witnesses and their loved ones through threats and violent acts, including murder.[36] Through these intimidation efforts, some released defendants have sought to undermine the integrity of our judicial process.

In view of these risks of flight and community danger, it is undisputed that a criminal defendant's pretrial freedom may be legitimately restricted by the imposition of conditions to respond to these risks of pretrial misconduct. It is equally undisputed that risk is inherent in pretrial release decision-making.[37] In other words, many defendants present some risk of flight and/or community danger to some degree. Hence, the fundamental challenges presented in pretrial decision-making are (1) identifying the risks of pretrial misconduct posed by individual defendants and (2) managing those risks.[38]

E. SUMMARY OF NEW JERSEY'S PRESENT PRETRIAL RELEASE SYSTEM

1. Constitutional Right to Bail

In New Jersey, a defendant's constitutional right to bail before conviction arises from (1) the "bailable offense" clause[39] (2) and the "excessive bail" clause[40] of the State Constitution. The "excessive bail" clause guarantees that bail not be in an excessive amount[41] for those offenses that the Legislature has defined as "bailable offenses." The "bailable offense" clause requires courts to set bail for every defendant charged with a non-capital offense.[42] Thus, when the

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[36] State v. Byrd, 198 N.J. 319, 340-41 (2009).

[37] Panel: Pretrial Justice in New Jersey: Considering Bail System Reform, Remarks of Dr. Marie Van Nostrand; Rutgers School of Law, Newark (Apr. 11, 2013) (hereinafter "VanNostrand, at Rutgers").

[38] VanNostrand, at Rutgers. The issues then reduce to (1) how are these risks identified and quantified and (2) what "tools" are available to manage these risks.

[39] N.J. Const. art. I, ¶ 11. Although no similar clause appears in the United States Constitution, a statutory right to bail in noncapital cases was created in the federal Judiciary Act of 1789 which was enacted contemporaneously with the federal Constitution.

[40] U.S. Const. amend. VIII, N.J. Const. art. I, ¶ 12.

[41] "Excessive" amount is determined by the societal objective sought to be advanced and the defendant's ability to pay. See Salerno, 481 U.S. at 754-55 (danger), Stack v. Boyle, 342 U.S. 1, 5 (1951) (flight).

[42] Those offenses for which bail must be set are non-capital offenses. N.J. Const. art I, ¶ 11. In contrast, the federal excessive bail clause does not "accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." Carlson v. Landon, 342 U.S. 524, 545 (1952). This constitutional provision "has not prevented Congress from defining the class of cases in which bail shall be allowed in this country." Id. In New Jersey, however, Article I, paragraph 11 of the New Jersey Constitution imposes this limitation. This constitutional provision limits the Legislature's authority to define the class of cases, or more precisely capital offenses, exempted from the general command that that all persons charged with an offense "be

excessive bail and bailable offense clauses appear together, the Constitution confers an affirmative or "absolute" right to bail.[43] This bail right is "absolute" in the sense that the bailable offense clause confers an affirmative right to have a bail set, and that right does not have to be inferred from the existence of the excessive bail clause.[44] When this "absolute" right to bail exists, the proscription against setting an "excessive" bail cannot be circumvented through a refusal to set bail for a "bailable" offense.[45]

The "bailable offense" clause of the New Jersey Constitution provides that "[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great."[46] In State v. Johnson,[47] our Supreme Court held that this clause requires courts to set a bail for all defendants charged with committing noncapital offenses.[48]

2. Evolution of New Jersey's Focus upon Risk of Flight in Setting the Amount of Bail

In setting bail, New Jersey courts are directed to focus only upon the risk of flight.[49] Our courts are not expressly[50] permitted to consider any danger to the community presented by the defendant when setting his or her bail.[51] In other words, when making this bail decision, New Jersey courts cannot consider the likelihood that the defendant will intimidate witnesses or

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bailable." In all other cases, Article I, paragraph 11 affirmatively requires that a bail be set. Since capital punishment was abolished in 2007, all offenses are "bailable" in New Jersey. P.L. 2007, c. 204 (Dec. 17, 2007).

[43] See Foote, supra, note 32 at 969 (quoted in State v. Johnson, 61 N.J. 351, 355 (1972)).

[44] Foote, supra, note 32 at 970.

[45] See Johnson, 61 N.J. at 355. Accord. Martin v. State, 517 P.2d 1389, 1397 (Alaska 1974).

[46] N.J. Const. art. I, ¶ 11.

[47] 61 N.J. 351 (1972).

[48] Id. at 364.

[49] See AOC Directive 9-05 (May 12, 2005) See Supplement to Directive 9-05 (Dec. 2, 2013) for the most recent bail schedules (hereinafter "Directive #9-05"). See also Rule 3:26-1(a), Rule 7:4-1.

[50] Danger may be addressed indirectly, viewed through the prism of the risk of nonappearance. More specifically, some factors relevant to the nonappearance risk are also relevant to the danger risk, such as criminal history and nature of the crime. See Standards Relating to Pretrial Release, ABA Project on Minimum Standards for Criminal Justice, at 73 (Approved Draft 1968) (hereinafter "1968 ABA Standards"); Jeffrey A. Roth & Paul B. Wice, Pretrial Release and Misconduct in the District of Colombia, at 62 (table 27) (1980) (current charges, pending cases, and criminal history) (hereinafter "INSLAW study"), cited in S. REP. NO. 98-225, 98th Cong., 1st Sess. 9 (1983); JDAI State Screening Subcommittee, Report to the Administrative Office of the Courts Regarding the Development of a Detention Screening Tool and Its Potential Impact on Current Practice, at 4 (Aug. 29, 2006) (hereinafter "RST Report") (AOC approved risk assessment instrument lists "nature of crime" as "dangerousness" factor). Commission of another offense while released increases the nonappearance risk because the additional potential penalty provides an additional motive to flee. See 1968 ABA Standards at 63.

[51] Courts may consider danger in setting nonmonetary release conditions. See infra, discussion accompanying notes184-202.

commit another offense while awaiting trial.[52] [53] This exclusive focus upon flight risk, as set forth in our Constitution, in setting bail arises from the codification in our current court rules of certain language appearing within the Johnson decision.

Regarding factors to be considered in setting the amount of bail, the Johnson Court stated that

> [a] number of factors must be considered in fixing the amount of the bond: (1) the seriousness of the crime charged against the defendant, the apparent likelihood of conviction and the extent of punishment prescribed by the Legislature. It may be recognized that the same urge for flight is not present where the death penalty is not involved. But exposure to a life sentence for murder may well stimulate a substantial urge to flee – even if not as intense as where the accused faces the possibility of death. And the urge may intensify in the future if the recent elimination of the death penalty results in a more restrictive parole policy; (2) the defendant's criminal record, if any, and previous record on bail, if any; (3) his reputation, and mental condition; (4) the length of his residence in the community; (5) his family ties and relationships; (6) his employment status, record of employment and his financial condition; (7) the identity of responsible members of the community who would vouch for the defendant's responsibility; (8) any other factors indicating defendant's mode of life, or ties to the community or bearing on the risk of failure to appear.[54] (emphasis added).

This language has been codified in Rule 3:26-1(a), which provides that

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

[52] The Attorney General has a contrary view on this issue.

[53] The Chief Justice is not participating in aspects of this report that relate to whether a judge setting an amount of bail may consider the threat of danger a defendant poses.

[54] Johnson, 61 N.J. at 364-65 (emphasis added) (hereinafter "Johnson factors") (quoting 1968 ABA Standards supra, note 50 at § 5.1).

discretion the court may order the release of a person on that person's own recognizance.[55] (emphasis added).

Through the use of the word "shall," these rules are mandatory; they require courts to consider only those factors that bear upon the "risk of failure to appear" in setting bail. Similar mandatory language appears in an implementing Directive promulgated by the AOC.[56] The Directive encourages courts to make "individualized" bail decisions, based upon consideration of all the Johnson factors.[57] Seeking to promote consistency in bail setting throughout the state, this Directive contains bail schedules.[58] These schedules set forth bail ranges, corresponding to the offense charged.[59] The bail ranges are starting points from which the trial court may depart, based upon its "individualized" consideration of the Johnson factors as applied to flight risk.[60]

3. Types of Bail

When bail is set, it can be satisfied in the following ways:

a. Cash Bail

(1) Full Cash: Unless the court finds on the record that another form of bail will ensure the defendant's presence in court, there is a presumption for full cash bail to the exclusion of other forms of bail when a defendant is charged with a crime with bail restrictions,[61] and:

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[55] Id. (applies to Superior Court) (emphasis added). Cf. Rule 7:4-1 (applies to Municipal Court) (bail to insure "defendant's presence when required").

[56] Directive 9-05, supra, note 49 which publishes bail schedules. See Supplement to Directive 9-05 for the latest version of the Bail Schedules. (Dec. 2, 2013)

[57] Id. at 2.

[58] Id. See Conference of Criminal Presiding Judges Subcommittee Report on Bail Practices (Oct. 28, 2004) (hereinafter "P.J. Bail Report"). For discussion of the bail schedule use, see text accompanying note116, infra.

[59] Supplement to Directive 9-05, supra, note 49.

[60] Id., quoted at infra, note 116.

[61] Pursuant to N.J.S.A. 2C:162-12a: "Crime with bail restrictions" means a crime of the first or second degree charged under any of the following sections: (1) Murder, N.J.S.A. 2C:11-3, (2) Manslaughter, N.J.S.A. 2C:11-4, (3) Kidnapping, N.J.S.A. 2C:13-1, (4) Sexual Assault, N.J.S.A. 2C:14-2, (5) Robbery, N.J.S.A. 2C:15-1, (6) Carjacking, P.L.1993, c.221, § 1 (N.J.S.A. 2C:15-2), (7) Arson and Related Offenses, N.J.S.A. 2C:17-1, (8) Causing or Risking Widespread Injury or Damage, N.J.S.A. 2C:17-2, (9) Burglary, N.J.S.A. 2C:18-2, (10) Theft by Extortion, N.J.S.A. 2C:20-5, (11) Endangering the Welfare of Children, N.J.S.A. 2C:24-4, (12) Resisting Arrest; Eluding Officer, N.J.S.A. 2C:29-2, (13) Escape, N.J.S.A. 2C:29-5, (14) Corrupting or Influencing a Jury, N.J.S.A. 2C:29-8, (15) Possession of Weapons for Unlawful Purposes, N.J.S.A. 2C:39-4, (16) Weapons Training for Illegal Activities, P.L.1983, c.229, § 1 (N.J.S.A. 2C:39-14), (17) Soliciting or Recruiting Gang Members, P.L.1999, c.160, § 1 (N.J.S.A. 2C:33-28), (18) Human Trafficking, P.L.2005, c.77, § 1 (N.J.S.A. 2C:13-8); …any first or second degree drug-related crimes under chapter 35 of Title 2C; … any first or second degree racketeering crimes under chapter 41 of Title 2C;…. and any crime or offense involving domestic violence … (N.J.S.A. 2C:25-19), where the defendant was subject to a temporary or permanent restraining order issued pursuant to the provisions of the "Prevention of Domestic Violence Act …(N.J.S.A. 2C:25-17 et al.) and is charged with a crime committed against a person protected under the order or where the defendant is charged with contempt pursuant to N.J.S.A. 2C:29-9.

(a) has two other indictable cases pending at the time of the arrest; or
(b) has two prior convictions for a first or second degree crime or for a violation of section 1 of P.L.1987, c.101 (*C.2C:35-7*) or any combination thereof; or
(c) has one prior conviction for murder, aggravated manslaughter, aggravated sexual assault, kidnapping or bail jumping; or
(d) was on parole at the time of the arrest; or
(e) was subject to a temporary or permanent restraining order issued pursuant to the provisions of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (*C.2C:25-17* et al.), was charged with a crime committed against a person protected under that order, including a charge of contempt pursuant to *N.J.S.2C:29-9*, and either: (i) is charged with commission of a domestic violence crime that resulted in serious bodily injury to the victim; or (ii) has at least one prior conviction for a crime or offense involving domestic violence against the same victim or has previously violated a final restraining order protecting the same victim.[62]

(2) Ten-Percent Cash: Except in first or second degree cases and certain crimes, offenses involving domestic violence as set forth in N.J.S.A. 2A:162-12 and unless the order setting bail specifies to the contrary, whenever bail is set pursuant to Rule 3:26-1, bail may be satisfied by the deposit in court of cash in the amount of ten-percent of the amount of bail fixed and defendant's execution of a recognizance for the remaining ninety percent. No surety shall be required unless the court fixing bail specifically so orders.
[Rule 3:26-4(g)].

b. **Corporate Surety Bonds**: A corporate surety bond is usually posted by a bail agent (bondsman) who represents an insurance company that is approved by the Department of Banking and Insurance. The bond is a contract between the court and the insurance company whereby the insurance agency agrees to be responsible for the full amount of the bail should the defendant fail to appear in court.

c. **Property Bonds**: The defendant or a surety posts real property, e.g., a house to satisfy the bail amount.

d. **Released on Own Recognizance (ROR)**: When the court releases the defendant on his/her own recognizance, the court does not set a bail amount. However, the defendant will sign the *New Jersey Bail Recognizance* acknowledging that he/she will appear in court at all

[62] Pursuant to N.J.S.A. 2A:162-12(b), a person charged with a crime with bail restrictions may post the required amount of bail only in the form of: (1) Full cash; (2) A surety bond executed by a corporation authorized under chapter 31 of Title 17 of the Revised Statutes; or (3) A bail bond secured by real property situated in this State with an unencumbered equity equal to the amount of bail undertaken plus $20,000, unless the court determines that the person is deserving of release on their own recognizance in accordance with subsection (e).

> scheduled court appearances, and agrees to the Conditions and Special Conditions in the Bail Recognizance.

4. Limitations upon the Form of Bail

While retaining this focus upon flight risk, our Legislature has imposed several statutory limitations upon the form of bail (as distinguished from the amount of bail). More specifically, the Legislature amended the bail statute in 1994 to eliminate the ten percent (10%) cash alternative for certain "bail restricted" offenses.[63] Thus, under the bail statute as amended in 1994, for "crimes with bail restrictions," bail could be in the form of full cash, a surety bond, or bond secured by real property.[64] In 2003, this statute was further amended to create a presumption favoring full cash bail, rather than a surety bond or bond secured by real property, for "crimes with bail restrictions" allegedly committed by a defendant who, inter alia, "has two other indictable cases pending at the time of the arrest."[65] This presumption can be rebutted by a judicial finding that a surety or real property bond "will ensure" the defendant's "presence in court when required."[66]

5. Nonmonetary Conditions of Release

As previously noted, defendants awaiting trial present two types of risks: nonappearance and community danger. The Supreme Court in Johnson encouraged trial courts to address both of these risks though release on nonmonetary conditions.[67] More specifically, the Johnson Court stated that judges "should impose one or more of the following conditions upon the grant of bail" and then quoted, with approval, section 5.2 of the 1968 ABA Standard which recommends that the court

> (i) release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting him in appearing in court. Such supervisor should be expected to maintain close contact with the defendant, to assist him in making arrangements to appear in court and, where appropriate, to accompany him to court. The supervisor should not be

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[63] See P.L. 1994, c. 144, amending N.J.S.A. 2A:162-12. See also Rule 3:26-4(g) (cash alternative unavailable for certain "bail restricted" offenses). These offenses include certain violent crimes – crimes involving the use or threatened use of force – and certain second-degree drug distribution offenses. Possession of drugs and weapons offenses were omitted from "bail restricted" classification. Id. Significantly, the 10% cash alternative to a surety bond for the full amount of the bond was a reform designed to reduce the adverse effect of the money bail system upon the poor. See INSLAW study, supra, note 50 at 84.

[64] N.J.S.A. 2A:162-12; Rule 3:26-4(g).

[65] N.J.S.A. 2A:162-12(c)(1). Full cash bail requires the accused to post cash in an amount equal to the face value of the bond. Hence, it is the most restrictive form of bail.

[66] N.J.S.A. 2A:162-12(c).

[67] See Johnson, 61 N.J. at 363.

> required to be financially responsible for the defendant, nor to forfeit money in the event he fails to appear in court;
> (ii) place the defendant under the supervision of a probation officer or other appropriate public official;
> (iii) impose reasonable restrictions on the activities, movements, associations and residences of the defendant;
> (iv) where permitted by law, release the defendant during working hours but require him to return to custody at specified times; or
> (v.) impose any other reasonable restriction designed to assure the defendant's appearance.[68]

Significantly, the nonmonetary conditions quoted above in Section 5.2 of the 1968 ABA Standard were specifically crafted to address the risk of nonappearance or flight.[69] In addition to these conditions, in 1968 the ABA Advisory Committee recommended separate sets of nonmonetary conditions, in Sections 5.5 and 5.8, which were specifically crafted to address the risks of pretrial recidivism and witness intimidation.[70] The ABA further recommended a progressive enforcement scheme, empowering courts to enforce a defendant's compliance with

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[68] Johnson, 61 N.J. at 362 (quoting 1968 ABA Standards at § 5.2). Release on these nonmonetary conditions was initially recommended to alleviate the disadvantages that the bail system imposes upon the impoverished defendant. See 1968 ABA Standards supra, note 50 at 1. See also S. REP. NO. 98-225, 98th Cong., 1st Sess. 5 (1983); Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, 69-72, 83-87 (1963) (hereinafter "A.G. Report"); Freid & Wald, Bail in the United States, 7-8, 72 (1964). Significantly, the ABA Advisory Committee partially based its reluctance to recommend preventive detention upon the fact that "[t]he American Court System has never really explored alternatives short of detention in an effort to curb crime while on release...." 1968 ABA Standards, supra, note 50 Commentary at 70. Over the last three decades, much exploration has occurred. In the 2007 ABA Standards, the Advisory Committee noted a 2002 survey of 40 urban areas which revealed that 28% of arrested defendants were released on nonfinancial conditions. 2007 ABA Standards supra, note 13 at 32 n. 6. Forty three (43) states now authorize release on nonmonetary conditions. See Ala. Code § 15-13-190 (2010) (applies to domestic violence only); Alaska Stat. § 12.30.020(a) (2010); Ariz. Rev. Stat. § 13-3967(C) (2010); Cal. Penal Code § 1270(a) and § 1270.1(c) (Deering 2010); Colo. Rev. Stat. § 16-4-105(1) (2009); Conn. Gen. Stat. §§ 54-63d(a)(2) and 54-63d(c) (2010); Del. Code Ann. tit. 11, §§ 2105(a) and 2105(b) (2010); Fla. Stat. §§ 903.046(1) and 903.046(2) (2010); Ga. Code Ann. § 17-6-1.1 (2010); Haw. Rev. Stat. § 804-3(b) (2010); Idaho Code § 19-2904 (2010); 725 Ill. Comp. Stat. Ann. 5/110-4(a) (2010); Ind. Code § 35-33-8-4(b) (2010); Iowa Code § 811.2(1) (2010); Kan. Stat. Ann. § 22-2802(8) (2009); Ky. Rev. Stat. Ann. § 431.064(1) (2010); Me. Rev. Stat. Ann. tit. 15, § 1026(2-A)(D) (2010); Md. Code Ann., Crim. Proc. §§ 5-201(a) and 5-202(c)(2)(i)(2) (2010); Mass. Ann. Laws ch. 276, § 57 (2010); Mich. Comp. Laws Serv. § 765.6b(1) (2010); Minn. R. Crim. P. 6.02(2)(m) (2010); Mo. Rev. Stat. § 544.676 (2010); Mont. Code Ann. § 46-9-301(3) (2010); Neb. Rev. Stat. § 29-901 (2010); Nev. Rev. Stat. § 178.484(11) (2010); N.H. Rev. Stat. Ann. § 597:2(III) (2010); N.C. Gen. Stat. § 15A-534(b) (2010); N.D.R. Crim. P. Rule 46(a)(3)(G) (2010); N.J. Ct. R. 3:26-1; Ohio Rev. Code. Ann. § 2903.212(A)(4) (2010); Okla. Stat. tit. 22, § 1105.3(E)(2) (2010); Or. Rev. Stat. § 135.240(4)(a) (2010); 42 Pa. Cons. Stat. § 5701(2) (2010); R.I. Gen. Laws § 12-13-1.3(b) (2010); S.C. Code Ann. § 17-15-10 (2009); S.D. Codified Laws §§ 23A-43-2 and 23A-43-4 (2010); Tex. Code Crim. Proc. Ann. art. 17.15(5) (Vernon 2010); Utah Code Ann. § 77-20-1(2)(d) (2010); Vt. Stat. Ann. tit. 13, § 7553a (2010); Va. Code Ann. §§ 19.2-120 and 19.2-135(3) (2010); Wash. C.R.R. 3.2(a)(2) and 3.2(d) (2010); Wis. Stat. § 969.01(1) (2010); Wyo. R. Crim. P. 46.1(b) (2010). For a discussion of these nonmonetary conditions, see infra, text accompanying notes 67-78.

[69] See Johnson, 61 N.J. at 362.

[70] See 1968 ABA Standards at § 5.5 (prohibition of wrongful acts pending trial) and § 5.8 (commission of serious crime while awaiting trial).

nonmonetary release conditions through sanctions ranging from the imposition of more rigorous release conditions to the revocation of release and remand back into pretrial detention.[71] Thus, while the Johnson Court maintained its focus upon risk of flight through its quotation of section 5.2, the 1968 ABA Standard upon which it relied sought to address both the risk of flight and danger to the community through its recommendation of the imposition of nonmonetary conditions in sections 5.2, 5.5 and 5.8[72] and the enforcement of these conditions in sections 5.7 and 5.7.[73]

Recognizing that its discussion of these issues is dictum, the Johnson court acknowledged that "[n]either the Legislature nor the trial courts of our State have sought thus far to provide for the imposition of such conditions of pretrial release…," and therefore "[t]here is no specific issue on the subject before us."[74] Through this language, the Johnson Court appeared to be inviting both the judicial and legislative branches to expressly authorize release upon nonmonetary conditions and the enforcement of these conditions. Both branches have accepted this invitation to authorize release upon these conditions, but neither branch has yet authorized corresponding enforcement mechanisms and funding has never been provided for enforcement.

In 1998, the Court amended Rule 3:26-1(a) to authorize courts to release defendants pretrial on their own recognizance or on nonmonetary conditions. More specifically, this Rule provides that "[t]he court may also impose terms or conditions appropriate to release including conditions necessary to protect persons in the community." Presently, there is no corresponding Rule setting forth procedures to enforce these nonmonetary conditions nor are there resources to accomplish this. Based upon her experience as a consultant operating in Camden and other New Jersey counties, Dr. Marie VanNostrand, a national expert on the subject of pretrial release, has opined that this absence of a legal framework to enforce compliance has impeded the frequency and effectiveness of the use of nonmonetary release conditions to promote pretrial justice in New Jersey.[75]

In addition to the discretionary authority to impose nonmonetary pretrial release conditions referenced in Rule 3:26-1(a), the Legislature has enacted or amended several laws

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[71] Id. at § 5.7.
[72] See id.
[73] See 1968 ABA Standards at § 5.7 (revocation for violation of release condition), and § 5.8 (revocation for commission of serious crime while on release).
[74] Johnson, 61 N.J. at 363-64.
[75] See VanNostrand, at Rutgers.

since 1998 which either *require* or permit courts to issue orders imposing nonmonetary release conditions. For example, the Drug Offender Restraining Order Act (DORA) provides that the court "*shall* as a condition of release issue an order prohibiting the person from entering any place…."[76] Nicole's Law provides discretionary authority, providing that the court "may as a condition of release, issue an order prohibiting the defendant from having any contact with the victim…."[77] Similarly, the Prevention of Domestic Violence Act ("PDVA") provides that a court "may as a condition of release issue an order prohibiting the defendant from having any contact with the victim…."[78] Significantly, *none of these statutes sets forth the procedures to enforce these nonmonetary release conditions.* Additionally, there have been no resources provided to the Judiciary or law enforcement to accomplish this.

F. NEW JERSEY'S PRESENT PRETRIAL RELEASE SYSTEM IS, TO A GREAT EXTENT, RESOURCE-BASED

Based upon the testimony of nationally recognized experts and the review of supporting documents, the Committee concludes that New Jersey's present pretrial release system is largely resource-based, in that a defendant's ability to secure release is dependent, in many instances, upon his or her ability to post money bail.[79] It is undisputed that the ability to post money bail is dependent upon a defendant's financial resources. Dr. VanNostrand has concluded that a resource-based system often results in the detention of poor defendants who present manageable risks of pretrial misconduct and often results in the release of more affluent defendants who present more severe and frequently unmanageable risks of pretrial misconduct. This is often referred to as the "dual system error" inherent in a resource-based system.[80]

The adverse effect upon the poor of this resource-based pretrial release system has been recognized in New Jersey for decades. Moreover, the judicial branch has repeatedly sought to address this adverse effect as detailed more fully below. As recently evidenced in part by the New Jersey Jail Population Analysis (March 2013) conducted by Dr. VanNostrand,[81] these well-intentioned efforts to date have not been completely successful. The Committee concludes that the limited effectiveness of these efforts is due, in large part, to their attempt to address the

[76] N.J.S.A. 2C:35-5.7.
[77] N.J.S.A. 2C:14-12.
[78] N.J.S.A. 2C: 25-26.
[79] See VanNostrand, at Rutgers.
[80] See id.
[81] Marie VanNostrand, New Jersey Jail Population Analysis (Mar. 2013) (hereinafter "Jail Population Survey" or "JPS").

adverse effect of money bail upon the poor within the confines of our existing resource-based system. As demonstrated below, the Committee concludes that this adverse effect can be effectively addressed only by shifting from a resource-based system to a risk-based system of pretrial release decision-making.

1. Recognition of the Adverse Effect upon the Poor Imposed Through New Jersey's Resource-Based System

After enumerating the eight factors to be considered in setting the amount of bail, the Johnson Court expressly recognized that "inevitably bail discriminates against the poor…"[82] This recognition was made while the Court was cautioning that "[t]he amount of bail should not be excessive."[83] The defendant's financial condition requires "consideration," but is not the "controlling test" for "excessiveness," according to the Johnson Court.[84] The defendant's financial condition is but one of the eight factors enumerated by the Johnson Court for consideration in determining the amount of the bail.[85] Thus, the right to have bail set does not confer a right to have a bail set in an amount that the defendant has the financial capability to post. In other words, the right to have bail set does not confer a right to be released on bail. This practical operation of the bail system, particularly as applied to the indigent defendant, deeply concerned the Johnson Court.[86]

While expressing these concerns, the Johnson Court extensively quoted with approval the 1968 ABA Standard whose authors observed that

> [t]he bail system as it now generally exists is unsatisfactory.... The requirement that virtually every defendant must post bail causes discrimination against defendants who are poor and imposes personal hardship on them, their families and on the public which must bear the cost for their detention and frequently support their dependents on welfare.[87]
> (Emphasis added).

The authors of the 1968 ABA Standard further observed that, if the defendant is unable to satisfy the financial obligations of bail, then "[t]he consequences of pretrial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivation of jail

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[82] Johnson, 61 N.J. at 365.
[83] Id.
[84] Id.
[85] Id. at 364-65.
[86] Id. at 365.
[87] 1968 ABA Standards supra, note 50 at 1 (emphasis added).

life..."[88] The ABA further observed that a jailed defendant has less access to his attorney, thereby inhibiting the preparation of his defense.[89] Furthermore, the ABA observed that a detained defendant is deprived of a chance to demonstrate his ability to comply with a pretrial release order, and thereby impress the court that he is a good candidate for probation in the event that he is ultimately convicted.[90]

Continuing its criticism of the existing bail system, the Johnson Court shared the ABA Advisory Committee's observation that "inevitably bail discriminates against the poor…"[91] Responding to these concerns, the ABA recommended that "[r]eliance upon money bail should be reduced to minimal proportions. It should be required only in cases when no other conditions will reasonably ensure the defendant's appearance."[92]

This observation -- that bail discriminates against the poor -- has been consistently reaffirmed in the 40 years since Johnson was decided. For example, 18 years after the Johnson decision, the New Jersey Supreme Court Task Force on Minority Concerns (1990) observed that "[t]he effect of money bail falls hardest on the poor and, since minorities are disproportionately poor, disproportionately upon minorities."[93] Similarly, 17 years later, the ABA Advisory Committee concluded, in its 2007 Standard, that bail determinations "are especially likely to have an adverse impact upon poor defendants and on racial and cultural minorities."[94]

The continued adverse effect upon the poor of New Jersey's resource-based system was highlighted by Dr. VanNostrand's Jail Population Survey. Notably, this survey was a "snapshot" of New Jersey's county jail population on one day, October 3, 2012. This survey revealed that 13,003 inmates were housed in county jails on that date and that 9,492 or 73% were awaiting trial in Superior or Municipal Court.[95] Of those inmates awaiting trial, 5,006 inmates (or 39% of the entire population) were legally eligible to be released on bail, as they were not concurrently

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[88] 1968 ABA Standards supra, note 50 at 25. Accord A.G. Report at 58, 74 – 75.
[89] 1968 ABA Standards supra, note 50 at 25.
[90] Id.
[91] Johnson, 61 N.J. at 365; see also A.G. Report supra, note 68 at 69; 1968 ABA Standards supra, note 50 at 1. Congress enacted the Bail Reform Act of 1966, which sought to de-emphasize the use of money bail, because its use "was perceived as resulting in disproportionate and unnecessary pretrial incarceration of poor defendants...." See S. REP. NO. 98-225, 98th Cong., 1st Sess. 3 (1983).
[92] 1968 ABA Standards supra, note 50 § 1.2. Accord 2007 ABA Standards, supra, note 13 § 10-1.4 c.
[93] Report of the Supreme Court Task Force on Minority Concerns, Subcommittee on Bail, 125 N.J.L.J. 109, 113 (Jan. 11, 1990) (hereinafter "Supreme Court Report"). The Task Force's disproportionality finding was based, in part, upon an empirical study of 234 adult defendants who were detained pretrial due to their inability to post a $500 bail. Id. at 112-13. This study revealed that 93% of those defendants were black. Id. at 113.
[94] 2007 ABA Standards, supra, note 13 Commentary at 32. Accord PJI, supra, note 13.
[95] JPS, supra, note 3 at 8, 11.

serving a sentence or otherwise subject to a detainer.[96] These detainers could arise from probation, parole, immigration or extradition proceedings.[97] Although each of the 5,006 inmates had the option to be released upon the posting of bail, they remained in jail because they lacked the financial resources to post bail. Significantly, 1,547 or approximately 12% of the entire county jail population, remained in custody due to their inability to post a bail of $2,500 or less.[98] Many indigent defendants were members of racial and cultural minority groups.[99] Upon reviewing these findings, our Chief Justice observed "that's not a healthy practice for a system of justice."[100] Indeed, in formulating this Committee, our Chief Justice instructed that "[p]articular focus will be placed on inmates who are unable to make modest amounts of bail in less serious cases and are held in custody for extended periods."[101] As previously demonstrated, application of this focus served as a catalyst for the Committee's critical analysis of New Jersey's present pretrial release system and recommendation of systemic change from that resource-based system to a risk-based system.

2. Previous Efforts to Address Adverse Effect upon the Poor Within our Resource-Based System

Since Johnson was decided in 1972, several statutes and Rules Governing the Courts have been amended in efforts to address the adverse effect of money bail upon the poor. In 1984, the Legislature created a presumptive maximum bail for minor offenses.[102] More

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[96] Id. at 13 & Table 11.

[97] See id. at 13.

[98] Id. at 13. To responsibly reduce New Jersey's pretrial jail population, Dr. VanNostrand recommended, inter alia, "expanding alternatives to pretrial detention." Id. at 14.

[99] See JPS, supra, note 3 at 9 (documenting that 71% of inmates were reported as either Black or Hispanic).

[100] Chief Justice Rabner pushes for reforms to N.J. Courts, Newark Star Ledger, May 21, 2013.

[101] Letter from Chief Justice Rabner announcing Committee formation, Jun. 17, 2013.

[102] More specifically, N.J.S.A. 2C:6-1 provides that: "No person charged with a crime of the fourth degree… shall be required to deposit bail in an amount exceeding $2,500.00, unless the court finds that the person presents a serious threat to the physical safety of potential evidence or of persons involved in circumstances surrounding the alleged offense or unless the court finds bail of that amount will not reasonably assure the appearance of the defendant as required. The court may for good cause shown impose a higher bail; the court shall specifically place on the record its reasons for imposing bail in an amount exceeding $2,500.00." Id. (emphasis added). The constitutionality of this statute's authorization of "physical safety" consideration in setting the amount of money bail is an issue now pending before our Supreme Court. See State v. Steele, 430 N.J. Super. 24 (App. Div.), certif. granted, 214 N.J. 233 (2013). Since Steele is pending before our Supreme Court, and some committee members represent each party in that case, nothing in this report should be interpreted as an expression of opinion concerning the merits of that appeal. References to our "present pretrial release system" are references to the Johnson holding (that bail must be set for defendants charged with noncapital offenses) and codification of certain language within the Johnson decision within our present court rules and administrative directives. See Directive 9-05, supra, note 49 at 9-10. In other words, references to our "present pretrial release system" should not be interpreted to express an opinion concerning whether the present exclusive focus upon flight risk is constitutionally derived.

specifically, the Legislature limited bail on fourth-degree crimes and lesser offenses to $2,500.[103] A court may impose a higher bail only upon a finding of "good cause."[104] This statute was enacted to relieve overcrowding "in county jails, which housed many defendants 'charged with minor, nonviolent offenses…unable to make bail.'"[105]

Despite this 1984 statutory amendment, the Supreme Court Task Force on Minority Concerns found that the effect of money bail falls hardest on the poor and disproportionately upon minority groups. To address this effect, the Task Force recommended, inter alia, the release of defendants on nonmonetary conditions.[106] Rule 3:26-1(a) now authorizes a court to release "a person on that person's own recognizance" and to "impose terms or conditions appropriate to release…" Thus, in addition to enumerating the factors that must be considered in setting the amount of bail (monetary conditions), Rule 3:26-1(a) also authorizes release on recognizance and upon nonmonetary conditions.

Continuing its efforts to reduce the adverse effect of bail on the poor, the Supreme Court approved 1994 amendments to Rules 3:3-1(c) and 7:2-2(b) which reduce the frequency for which any monetary bail must be set for relatively minor, non-violent offenses.[107] These revisions

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[103] Id.

[104] Id. This "good cause" is defined within N.J.S.A. 2C:6-1 to require a finding that a higher bail is necessary to assure the defendant's appearance or that the defendant poses "a serious threat to the physical safety of potential evidence or of persons involved in circumstances surrounding the alleged offense[.]"

[105] See Steele, 430 N.J. Super. at 38 (quoting Statement to Senate Bill No. 1461 (June 3, 1982).

[106] Supreme Court Report, supra, note 93 at 113. Subsequently, the Supreme Court reported favorably on this recommendation and referred it to the Court's Criminal Practice Committee. See New Jersey Supreme Court, Statement on the Final Action Plan on Minority Concerns, 32 (1993). The Court then referred this recommendation "to the Criminal Practice Committee to get their expertise in the area of bail." Id. The Criminal Practice Committee thereafter concluded that "much of what the Task Force sought to accomplish" would be achieved through revisions to Rules 3:3-1 and 7:2.2(b). See Criminal Practice Committee 1992-94 Report, 136 N.J.L.J. 603 (Feb. 14, 1994).

[107] See Criminal Practice Committee 1992-94 Report, stating that "much of what the 1990 Task Force sought to accomplish" through its recommendation of nonmonetary conditions could be achieved through revisions of Rules 3:3-1(c) and 7:2.2(b). These rules establish criteria to decide whether a complaint-summons or complaint-warrant should be issued. Id. If a complaint- summons is issued, then the defendant is served and released. See Rule 3:4-1(2). If a complaint-warrant is issued, then bail must be set. Id. The 1994 revisions reaffirmed the presumption created in 1980 for the issuance of a summons, rather than a warrant, in cases involving relatively non-serious offenses allegedly committed by persons without a nonappearance history. See Criminal Practice Committee 1980 Report, quoted in Pressler, Rule 3:3-1, comment 3. More specifically, these revisions specify that this presumption (for the issuance of a summons and immediate release) does not apply for those cases where the defendant is charged with "murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree aggravated assault, aggravated arson, arson burglary, [first or second degree drug offenses], any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes." Rule 3:3-1(c)(1). This presumption also does not apply to defendants with outstanding warrants, for whom there is reason to believe pose a danger to others, or for whom there is reason to believe will not appear in response to a summons. See Rule 3:3-3(c)(3), (c)(4), (c)(6). Thus, these 1994 Rule revisions sought to indirectly respond to the Task Force's concerns by increasing the frequency of release on

function to increase the frequency of release upon a complaint-summons, thereby obviating the need to set monetary bail and decreasing the possibility that the defendant will remain in custody because of an inability to post money bail. The revisions did not directly affect situations when bail must be set, namely, when a complaint-warrant must be issued for defendants who have a history of nonappearance or are charged with more serious offenses.

For those more serious offenses for which a complaint-warrant is required, the 1994 revisions to Rules 3:3-1(c) and 7:2-2(b) do not alleviate the impact of the bail system upon the poor. In fact, the impact may be heightened as a result of subsequent amendments to the bail statute. More specifically, for more serious offenses, a ten percent (10%) cash alternative to a surety bond may not be available and full cash bail may be required. In 1994, the Legislature amended the bail statute to eliminate the ten percent (10%) cash alternative for certain "bail restricted" offenses.[108] Thus, under the bail statute as amended in 1994, for "crimes with bail restrictions," bail could be in the form of full cash, a surety bond, or bond secured by real property.[109] In 2003, the Legislature further amended this statute to create a presumption favoring full cash bail, rather than a surety bond or bond secured by real property, for "crimes with bail restrictions" allegedly committed by a defendant who, inter alia, "has two other indictable cases pending at the time of the arrest."[110] This presumption can be rebutted by a judicial finding that a surety or real property bond "will ensure" the defendant's "presence in court when required."[111]

In 2002, the Conference of Criminal Presiding Judges recommended setting release-upon-own-recognizance (ROR) bail without monetary amounts attached and implementing bail schedules for indictable offenses.[112] These bail schedules are designed to promote consistency in bail setting among vicinages.[113] Both of the recommendations were subsequently adopted via an Administrative Directive.

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summons, thereby obviating the need to set bail and the possibility that the defendant will remain in custody due to his inability to post bail. See Criminal Practice Committee 1992-94 Report.

[108] See P.L. 1994, c. 144 (amending N.J.S.A. 2A:162-12 and Rule 3:26-4(g) (cash alternative unavailable for certain "bail restricted" offenses). See also supra, discussion accompanying notes 62-63.

[109] Id.

[110] N.J.S.A. 2A:162-12(c)(1). Full cash bail requires the accused to post cash in an amount equal to the face value of the bond. Hence, it is the most restrictive form of bail.

[111] N.J.S.A. 2A:162-12(c).

[112] See P.J. Bail Report.

[113] Id.

The use of certain bail schedules was criticized by the ABA, which recommends that "financial conditions…should never be set by reference to a pre-determined schedule of amounts fixed according to the nature of the charge."[114] Such schedules focus upon only one factor, the nature of the charge, and thereby deprive the defendant of an "individualized" bail determination.[115]

This specific ABA criticism does not apply with full force to the "bail schedules" promulgated by the AOC. Most fundamentally, the AOC "bail schedules" are starting points from which the trial court may depart as it sees fit.[116] Moreover, these schedules specifically encourage courts to make "individualized" decisions based upon all of the Johnson factors, including but not limited to the nature of the charge.[117] Unlike schedules criticized by the ABA which assign a specific bail amount for each offense, the AOC's bail schedule sets bail ranges that correspond to the offense charged.[118] Applying the other Johnson factors, the trial court may select a bail amount from within the guideline range or it may depart from that range.[119]

However, given the time constraints under which New Jersey trial courts operate, and the limited availability of verified information concerning the other Johnson factors, the AOC-promulgated bail schedules often function to frame the discussion of "individualized" facts, specific to the case and the defendant, in terms of where within the guideline range bail should be set.[120] In other words, the schedules function to "frame" counsel's arguments, thereby affecting the court's ultimate bail determination as to where within the applicable range bail should be set. Since the ranges correspond to a charged offense, the practical application of the AOC bail schedules has the potential to encourage overemphasis on the charged offense, especially when bail is initially set.

Despite rule revisions promoting the release, without the posting of any bail, of defendants charged with relatively minor offenses, New Jersey has retained its resource-based

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[114] 2007 ABA Standards, § 10-5.3(3).

[115] See 2007 ABA Standards, § 10-5.3(3).

[116] More specifically, Directive 9-05 provides that "It should be emphasized that these bail schedules contain general bail ranges that are meant to be advisory in nature. Each case is fact sensitive. Bail must not be assessed solely by determining the degree of the charged offense, since many crimes within the same degree are significantly different with respect to the seriousness of the criminal conduct, the harm to the victim, and the danger to the community."

[117] See Directive 9-05, supra, note 49 at 2, interpreted in Steele, 430 N.J. Super. at 38 (observing that Directive's factors are drawn from Johnson).

[118] See Directive 9-05, supra, note 49 at 6-25.

[119] See id. at 2.

[120] See Panel: Pretrial Justice in New Jersey: Considering Bail System Reform, Remarks of Hon. Martin G. Cronin; Rutgers School of Law, Newark (Apr. 11, 2013) (hereinafter "Cronin, at Rutgers").

system which continues to have an adverse effect upon indigent defendants.[121] This adverse effect is more pronounced for defendants charged with more serious "bail restricted" offenses for which more recent statutory amendments render a ten percent (10%) cash alternative unavailable and may require the posting of full-cash bail.

3. Consequences for Defendants Who Remain in Jail

The Committee identified the benefits from releasing certain defendants on conditions rather than having them sit in jail at great cost to the taxpayers. There are ramifications from keeping defendants in jail pretrial. Research over the past half century clearly and consistently demonstrates the relationship between being incarcerated pending trial and subsequent incarceration. See PJI, Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process at 2. The research revealed that defendants detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period. Ibid. Further, these relationships hold true when taking into account other factors, such as the current charge, prior criminal history and community ties. Ibid.

A similar study conducted with more than 60,000 defendants arrested in Kentucky in 2009-2010 found that defendants detained for the entire pretrial period were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial. See LJAF, Pretrial Criminal Justice Research at 3. Additionally, their sentences were also significantly longer: nearly three times as long for defendants sentenced to jail and more than twice as long for those sentenced to prison. Ibid.

LJAF analyzed more than 153,000 defendants jailed in Kentucky in 2009-2010. The study found that low-risk defendants who were detained pretrial for more than 24 hours were more likely to commit new crimes not only while their cases were pending but also years later. Id. at 4. In addition, they were more likely to miss their court date. Ibid. Conversely, for high-risk defendants, there was no relationship between pretrial incarceration and increased crime. Ibid. These findings suggest that high-risk defendants can be detained before trial without compromising, and in fact enhancing, public safety and the fair administration of justice. Ibid.

[121] VanNostrand, at Rutgers. See supra, discussion accompanying notes 79-81.

Similar results were found in another LJAF study, which analyzed 66,014 cases in which the defendants were released at some point before trial and found that even very small increases in detention time are correlated with worse pretrial outcomes. Ibid. The study found that when held for 2-3 days, low-risk defendants were almost 40% more likely to commit new crimes before trial than equivalent defendants held for no more than 24 hours. The study indicated that the correlation generally escalates as the time behind bars increases: low-risk defendants who were detained for 31 days or more offended 74% more frequently than those who were released within 24 hours. A similar pattern held for moderate-risk defendants, though the percentage increase in rates of new criminal activity was smaller. For high-risk defendants, there was no relationship between pretrial detention and increased new criminal activity. In other words, there is no indication that detaining high-risk defendants for longer periods before trial will lead to a greater likelihood of pretrial criminal activity. Id. at 5.

Moreover, this same pattern emerged for failures to appear. Low-risk defendants held for 2-3 days were 22% more likely to fail to appear than similar defendants -- in terms of criminal history, charge, background, and demographics -- held for less than 24 hours. The number jumped to 41% for defendants held for 15-30 days. For low-risk defendants held for more than 30 days, the study found a 31% increase in failure to appear. Again, detention was found to have no impact on high-risk defendants' rates of missing court, and for moderate-risk defendants, the effect was minimal. Ibid.

G. "LESSONS LEARNED" FROM OTHER JURISDICTIONS WHICH HAVE SOUGHT TO ADDRESS THE ADVERSE EFFECT OF A RESOURCE-BASED SYSTEM UPON THE POOR

Complying with our instruction,[122] the Committee analyzed responses by other jurisdictions that have also sought to address the adverse effect of money bail upon the poor. The Committee reviewed compilations of surveys of pretrial release practices among the 50 states and our federal government.[123] We researched the pretrial release practices in Kentucky and Virginia more rigorously due, in part, to their progress in implementing key components of a risk-based system – risk assessment instruments to identify risk (both Virginia and Kentucky) and pretrial supervision and detention (when appropriate) to manage that risk (Virginia only).

[122] See supra, discussion accompany notes 13-14 (primary focus).
[123] See National Conference of State Legislatures Report on Pretrial Release Eligibility (2013) (hereinafter "NCSL Report").

Noting the concurrent reduction in detention population with maintenance of public safety achieved through the complete implementation of risk-based systems in the District of Columbia (for adults)[124] and here in New Jersey (for juveniles),[125] the Committee extensively examined the pretrial release practices in those jurisdictions and, to a lesser extent those in the federal system, which is modeled after the District of Columbia system.

1. District of Columbia

The Committee researched the evolution and present implementation of pretrial release practices in the District of Columbia. The jurisdiction is nationally recognized as a leader in the development of pretrial release practices which balance the societal interests in the accused's liberty and the community's safety. Their procedures have been nationally recognized as "best practices," as they have been substantially adopted by the American Bar Association in its Standards Relating to Pretrial Release. These ABA Standards, in turn, have been extensively relied upon by other jurisdictions that have revised their pretrial release practices. The subcommittee benefited from appearances by Senior Judge Truman Morrison and former Pretrial Services Director Timothy Murray, who have devoted a substantial portion of their careers to the development and implementation of pretrial release practices in the District of Columbia.

The 1966 pretrial release practices in the District of Columbia were remarkably similar to the present pretrial release practices in New Jersey. They both were essentially resource-based systems which lacked any authorized mechanism to address community danger. The evolution of pretrial release practices in the District of Columbia, therefore, is particularly instructive to issues we now face in New Jersey.

a. 1966 D.C. Act –Addresses adverse effect of bail on the poor, but not danger to the community

In 1966, Congress enacted the D.C. Bail Agency Act[126] and the federal bail reform act.[127] These statutes were enacted to address the adverse effect of money bail upon the poor. They permitted consideration of flight risk as the sole factor in deciding whether to release a defendant on his or her own recognizance or in setting the amount of money bail. They encouraged release ROR or setting the amount of money bail at the lowest amount reasonable calculated to secure

[124] See infra, discussion accompanying notes 126-155.
[125] See infra, discussion accompanying notes 207-239.
[126] P.L. 89-519 (1966).
[127] 18 U.S.C. § 3148 (1966).

the defendant's appearance at trial. These statutes expressly prohibited consideration of danger to the community, posed through pretrial recidivism or witness intimidation/retaliation, in deciding to release the defendants pretrial or in setting the amount of money bail. Neither statute addressed danger to the community nor authorized preventive detention.

Eight months after enactment of the 1966 D.C. Bail Act, United States District Court Judge George L. Hart cautioned that, "[t]he good citizens of the District of Columbia had better take cover."[128] Cover was needed, in Judge Hart's estimation, because "except in capital cases and after conviction, judges cannot consider danger to the community as a factor in no-bail proceedings."[129] Rearrest rates of defendants released under the 1966 D.C. Act amply supported Judge Hart's concern. More specifically, court records established that "[d]uring the period between July, 1966, and June 1967, 35 percent of the defendants indicted for robbery and released prior to trial in the District of Columbia were reindicted for subsequent felonies. In 1968, when 557 persons were indicted for robbery, nearly 70 percent of those released prior to trial were rearrested and charged with a subsequent offense."[130] Moreover, the commission of index offenses in Washington D.C. more than tripled during the three (3) years following passage of the 1966 D.C. Bail Act.[131] While the causes of this rise in crime remains in dispute, the legislative history of the 1970 D.C. detention statute reflects that, "[t]he significant fault of the [1966] Bail Reform Act was the specific omission of danger to the community as a criteria for determining conditions of release."[132]

In 1968, a commission chaired by Judge Hart studied implementation of the 1966 D.C. Bail Act and operation of the D.C. Bail Agency.[133] This commission recommended, inter alia, that the Bail Agency's responsibilities should be expanded to "provide … supervision of defendants...."[134] This lack of supervision was viewed as a contributing factor to the pretrial recidivism rate.[135]

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[128] Criminal Justice: Bugs in Bail Reform, Time (Feb. 3, 1967).
[129] Id.
[130] H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 82-83 (1970).
[131] Id. at 81.
[132] Id. at 94.
[133] See PJI, supra, note 13 at 3.
[134] Id.
[135] See id.

Notwithstanding the wording of the 1966 D.C. Bail Act, "financial bond continued to be used as a means of detaining high risk accused."[136] Congress later acknowledged that this continued use of money bond resulted from the "agonizing decision" that the 1966 DC Bail Act presented to a trial court before whom stood "an obviously dangerous defendant."[137] "[B]y totally eliminating dangerousness as a criterion to be considered in setting conditions for pretrial release…", Congress observed, "the [1966 D.C. Bail Reform Act] ignored the rationale behind 700 years of legal practice. Today, Federal judges are faced with an agonizing decision when an obviously dangerous defendant stands before them. They must either disregard the compelling mandate of the new law by setting bail beyond the defendant's means, or they must shut their eyes to community danger. One course perpetuates hypocrisy; the other course is irrational."[138]

The lack of transparency inherent in the sub rosa consideration of danger in setting the amount of money bail also drew Congress' ire; "for centuries, courts have been detaining persons charged with crime by the simple expedient of setting high bond. This sham frequently served the purpose of protecting the community from dangerous defendants, but it also imprisoned people who posed no threat. When the issue of dangerousness silently appeared, there were no set standards or due process safeguards to protect the defendant under suspicion; and since there was no visible determination of dangerousness, there was little or nothing for a court to review."[139]

b. 1970 D.C. Bail Act – Seeks to also address danger, but rarely used

In 1970, Congress adopted most of the Hart Commission's recommendations, repealed the 1966 D.C. Bail Act, and enacted the 1970 D.C. Bail Act.[140] The legislative history of the 1970 Act acknowledges that "[t]he fundamental purpose of the Bail Reform Act of 1966 was to terminate the invidious discrimination between rich and poor inherent in the bail bond system."[141] To achieve this purpose, Congress "did not resolve the issue of preventive detention... [in 1966 because] reform of the bail system to eliminate discrimination against the

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[136] Id.
[137] H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 85 (1970).
[138] Id. at 85-86.
[139] Id. at 83 (emphasis added).
[140] See PJI, supra, note 13 at 3; see also D.C. Code § 23-1322 (1970) (hereinafter "1970 D.C. Bail Act").
[141] H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 88 (1970).

poor, resulting in unjust detention, demanded an immediate solution."[142] Evaluating the consequences of addressing the discriminatory effect of money bail separately from the danger to the community posed by defendants released pretrial, Congress concluded that:

> Since its enactment, the Bail Reform Act of 1966 has achieved this fundamental purpose. Most defendants are now released prior to trial on nonfinancial conditions of release. But, while this Act has thus had the desirable effect of eliminating the detention of poor defendants unable to pay a money bond premium who pose no danger to the community and are not likely to flee, the Bail Reform Act has also had the disastrous effect of mandating the release prior to trial of defendants charged with noncapital crimes no matter how much danger the release of the individuals posed to the community.[143]

Responding to this "disastrous" effect, Congress enacted the 1970 D.C. Bail Act which expressly permitted courts to consider danger to the community in setting release conditions and contained a preventive detention provision. This was the first preventive detention statute enacted in the United States.

A fundamental criticism of preventive detention was the unproven accuracy of social science mechanisms designed to predict future criminality.[144] This criticism was one of the major reasons why the ABA did not recommend preventive detention in 1968.[145] Although the accuracy of these predictive techniques sufficiently improved to support the ABA's recommendation of preventive detention in 1978, the ABA maintained an understandable concern that extensive use of pretrial detention would deprive defendants of their pretrial liberty beyond that necessary to protect the public or assure defendant's appearance.[146] Accordingly, the ABA imposed procedural requirements, in addition to those which were constitutionally required, to the initial preventive detention decision.[147] These procedural requirements, including elevated burdens of persuasion, were imposed to "emphasize the deliberately limited scope of using secure detention."[148]

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[142] Id. at 90 (emphasis added).
[143] Id. at 88 (emphasis added).
[144] See 1968 ABA Standards, § 5.5, commentary at 68-70.
[145] See id., commentary at 69.
[146] See 2007 ABA Standards, commentary at 127.
[147] See id.
[148] Id. at 127. Accord 1968 ABA Standards, Appendix C, commentary at 84 ("The problem of inadequate standards for predicting dangerousness is sought to be met by the requirement that the prosecution present evidence of specific and anticipated harm.").

In 1968, the ABA predicted that "[c]ertainly a system of preventative detention would require vastly more effective judicial machinery than is now available at the lower court level…. Defendants would have to be provided with investigative assistance, and counsel would need time to prepare. The hearing would have to be conducted with all of the safeguards of a full scale trial except perhaps a jury. No such procedure exists and would add greater burdens to an already strained judicial system."[149] This increased administrative burden was one of the reasons why the ABA did not recommend preventive detention in 1968.[150] Subsequent judicial decisions have clarified that the due process clause does not require "mini-trials" for pretrial detention, notwithstanding the ABA's dire prediction in 1968.[151]

The ABA's reliance upon rigorous procedures to limit the frequency of pretrial detention was codified in the 1970 D.C. Bail Act. In this statute "[t]he judicial officer must find a substantial probability that the defendant committed the offense charged. The purpose of this… finding is to minimize so far as practicable the possibility of detaining defendants prior to trial who are innocent of the charge lodged against them."[152] Referring to procedural safeguards, including the "substantial probability" burden of persuasion, "the Committee is convinced that his legislation incorporated standards far above the minimum necessary to avoid any possible conflict with the due process clause."[153]

The 1970 D.C. Bail statute also imposed a rigid sixty (60) day trial requirement for all detained defendants.[154] This 60-day requirement represented a modest relaxation from the 30-day requirement appearing in the "model preventive detention statute" appended to, although not recommended by, the 1968 ABA Standard.[155]

c. 1984 Federal Act – Seeks to address danger through "workable" procedures

As previously mentioned, the 1970 D.C. Bail statute required the state to establish a "substantial probability" that the defendant committed the predicate offense for preventive

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[149] 1968 ABA Standards, § 5.5, commentary at 69 (emphasis added).
[150] Id.
[151] See Lynch v. United States, 557 A.2d 580, 582 (D.C. 1989) (upholding reliance upon proffer and hearsay). Accord. United States v. Edwards, 430 A.2d 1321, 1336 (D.C. 1981) (en banc) (rejecting due process challenge to 1970 D.C. Bail Act), cited with approval in, Salerno, 481 U.S. at 752 (rejecting due process challenge to the 1984 federal Bail Reform Act).
[152] H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 182 (1970). (emphasis added).
[153] Id. at 193.
[154] See id. at 184.
[155] See 1968 ABA Standards, Appendix C. § 1.8.

detention.[156] At the time that this statute was enacted, Congress expressly recognized that these procedures exceeded what our Constitution required.[157] Because of these "fairly elaborate due process procedures," this statute was "infrequently used."[158] The government moved to preventively detain less than 1% of all defendants who were charged with committing qualifying offenses.[159] Referencing prosecutor interviews in 1978, Roth and Wice commented that "[t]he reason frequently suggested for the rare use and present dormant status of the preventive detention provision is the range of procedural guarantees, which prove to be a critical addition to an already overworked and understaffed court system. The increase in manpower, time and space necessary to administer the pretrial detention hearings has made such hearings impractical in all but a few cases…."[160] In contrast, the authors noted that others "attribute the dormancy of preventive detention to the prosecutor's assumption that judges will use high financial bond to detain dangerous defendant unofficially, saving both the court and the prosecutor the burden of a preventive detention hearing."[161]

After reviewing the implementation of the 1970 D.C. statute, the drafters of the federal Bail Reform Act of 1984 sought to craft a statute that "will be sufficiently workable, as a practical matter, that it will be utilized to any significant degree."[162] Congress noted that the 1970 DC statute "rarely used" and that "the burden of meeting the substantial probability standard was the principal reason cited by prosecutors for the failure, over much of the last ten years, to request pretrial detention hearings under that statute."[163] The congressional effort to craft a "workable" statute also responded to concerns that stringent financial conditions would be used to avoid the procedural requirements of preventive detention.[164] Accordingly, Congress expressly rejected the "substantial probability" requirement contained within the 1970 D.C. statute and explained that "while the substantial probability requirement might give some additional measure of protection against the possibility of allowing pretrial detention of defendants who are ultimately acquitted, the Committee is satisfied that the fact that the judicial

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156 See H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 93 (1970).
157 Id.
158 See INSLAW study, supra, note 50 at 3-4.
159 Id. at 4, 12 (1,500 eligible; moved to detain 40; 34 detained).
160 Id. at 4-5.
161 Id.
162 See S. REP. NO. 98-225, 98th Cong., 1st Sess. 7-8 (1983); Accord 2007 ABA Standards, commentary at 29-30.
163 See S. REP. NO. 98-225, 98th Cong., 1st Sess. 18 (1983).
164 Id. at 18-19.

officer has to find preventive detention will assure the validity of the charges against the defendant, and that any additional assurance provided by a substantial probability is outweighed by the practical problems in meeting this requirement at the stage at which the pretrial detention hearing is held. Thus, this chapter contains no substantial probability finding."[165]

d. 1992 D.C. Bail Act – Confers a right to bail that defendant can afford and relaxes detention procedures

As previously noted, in 1984 Congress noted the infrequent use of preventive detention and the "significant use of money bail in cases of defendants who were eligible for detention" under the 1970 D.C. Bail Act.[166] These practices continued into the 1990s.[167] In 1990, while 29% of defendants were statutorily eligible for detention in the D.C. local courts, hearings were held for only 5% and approximately 2% were actually detained.[168] Money bond was set for approximately two-thirds of the 29% eligible for detention, resulting in "many of …these potentially dangerous defendants [being] able to purchase their release."[169] Significantly, defendants released on money bond were not supervised by the D.C. Bail agency.[170] Violent crimes, including drive-by shootings, committed by some of these unsupervised defendants released on money bond, precipitated a reevaluation of the District of Columbia's pretrial release procedures. This reevaluation resulted in two significant reforms. First, the 1992 D.C. Bail Act "expanded the scope of pretrial detention and included several rebuttable presumptions for detention."[171] Second, this statue authorized courts to set money bail in an amount "that does not result in the preventive detention of the person."[172] This latter provision was interpreted to mean that "you have a right to bail that you can meet."[173] While the first of the 1992 D.C. reforms resulted in an increase from 2% to 15% of defendants preventively detained, the second reform resulted in an increase to 80% of defendants released on nonmonetary conditions.[174]

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[165] Id. at 18.
[166] See supra, note 163 and accompanying text.
[167] See PJI, supra, note 13 at 4.
[168] Id.
[169] Id.
[170] Id. at 3.
[171] Id. at 5.
[172] D.C. Code § 23-1321(c)(3).
[173] PJI, supra, note 13 at 5 (comments of Judge Morrison).
[174] Id. at 2.

District of Columbia Senior Judge Truman Morrison commented, with particular force and conviction, on the critical linkage between a "workable" preventive detention statute and a reduction upon sub rosa reliance upon money bail to address dangerousness:

> [u]nless judges are given an open, rational way to deal with community safety, they will sometimes, I think understandably see danger where it actually may not exist…and much of bail setting becomes infused, not in a sinister way, but in an inchoate but real and important way, with perceptions of possible danger in many of the wrong people. This contributes in way too many people sitting in jail because they are poor.
>
> It is my conviction that judges here, like in the rest of America, need what I am blessed with as I grapple with pretrial decisions about bail: a fair, due process – laden, workable preventive detention scheme that everyone buys into. That scheme portends freedom for judges…once they have openly addressed the issue of community safety within their dockets, they can begin to intellectually relax and with clearer eyes focus upon what Justice Rehnquist told us to do:…to figure out ways to release most everybody.
>
> That is why I now am a fervent advocate of a workable, fair limited preventive detention provision in every state code.[175]

Upon first impression, Judge Morrison's observation may appear to be counterintuitive -- courts must be expressly authorized to detain some (dangerous) defendants in order to (safely) release everyone else. However, in view of the possible sub rosa consideration of danger in setting bail, the Committee agrees with Judge Morrison's observation as it reflects the practical realities encountered by all courts operating within a resource-based system.

Significantly, to safely achieve the desired release of "everybody else," the risks posed by all defendants awaiting trial must be identified, so that those "dangerous" defendants who cannot be safely released are identified and managed through detention. This universal identification of risk and management of risk are centerpieces of the risk-based system of pretrial release.[176] Hence, Judge Morrison's insightful observations greatly assisted the Committee in reaching our recommendation for a systemic shift to the risk-based system of pretrial release.

Regarding the rigid 60-day trial requirement of the 1970 D.C. Bail Act, Congress later observed that "no matter how efficiently a busy urban court may operate, with all of the

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[175] See Panel: Pretrial Justice in New Jersey: Considering Bail System Reform," Remarks of Hon. Truman Morrison; Rutgers School of Law, Newark (Apr. 11, 2013). (hereinafter "Morrison, at Rutgers").

[176] See VanNostrand, at Rutgers; 2007 ABA Standards, supra, note 13; PJI, supra, note 13. See also infra, discussion accompanying notes 258-272.

discovery motions, preliminary hearings, grand jury proceedings, suppression motions, and preparation of transcripts, trials cannot be expected to occur within less than sixty days."[177] Accordingly, the District of Columbia statute guarantees a speedy trial to a detained defendant in a considerably more "workable" manner.[178] More specifically, this statute places a detained defendant on an "expedited calendar" which "consistent with the sound administration of justice" requires an indictment within 90 days and a trial within 100 days thereafter.[179] Defendants may waive this statutory speedy trial right. Moreover, the statute confers the Court with broad authority to grant one or more 20-day extensions for "good cause," upon application of the Government.[180] Furthermore, certain time periods, such as those required to perform competency evaluations, are excluded from these time computations.[181] Presently, New Jersey does not have a speedy trial statute.[182] This issue is being addressed in Section IV of the Committee's Report.

2. Kentucky

With regard to the right to bail, Ky. Const. § 16 provides that

> [a]ll prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great.

Additionally, Ky. Const. § 17 provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted."

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[177] H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 90 (1970).
[178] See D.C. Code § 23-1322(d)(2).
[179] Id. Compliance with these speedy trial requirements in the District of Columbia is facilitated by judicial resources far exceeding those currently available in New Jersey. For example, the caseloads of New Jersey judges responsible to try defendants charged with offenses that would be subject to the District of Columbia speedy trial state is more than three times larger than the caseloads of their judicial counterparts in the District of Columbia. See Caseload Statistics on file with the Committee. In the District of Columbia these cases are heard by one of the six "Felony One" judges. In July 2013, the active caseloads of these judges ranged from thirty-three (33) to fifty-six (56) defendants with an average of 46.5. In New Jersey these types of cases would be heard by Superior Court judges assigned to the Criminal Part. During July 2013, there were ten (10) judges assigned to Essex County. The active caseloads for these judges ranged from 169 to 263 with an average of 217. Essex is one of New Jersey's twenty-one counties.
[180] Id. § 23-1322(h)(1).
[181] Id. § 23-1322(h)(4).
[182] In New Jersey, constitutional protections from preindictment delay arise from the due process and speedy trial clauses. See U.S. Const. amends. XIV and VI. Sixth Amendment protections against post indictment delays are governed by the four-part, fact-sensitive test as set forth in Barker v. Wingo, 407 U.S. at 530-33.

For the detention hearing for those charged with a capital offense, Court Rules require the defendant to submit an application for pretrial release. See Ky. RCr Rule 4.02(2). All other defendants shall be considered for pre-trial release without making an application." Ibid.

Pursuant to KRS § 431.525,

> (1) The amount of bail shall be:
>
> (a) Sufficient to insure compliance with the conditions of release set by the court;
> (b) Not oppressive;
> (c) Commensurate with the nature of the offense charged;
> (d) Considerate of the past criminal acts and the reasonably anticipated conduct of the defendant if released; and
> (e) Considerate of the financial ability of the defendant.
>
> (2) When a person is charged with an offense punishable by fine only, the amount of the bail bond set shall not exceed the amount of the maximum penalty and costs.
>
> (3) When a person has been convicted of an offense and only a fine has been imposed, the amount of the bail shall not exceed the amount of the fine.
>
> (4) When a person has been charged with one (1) or more misdemeanors, the amount of the bail for all charges shall be encompassed by a single amount of bail that shall not exceed the amount of the fine and court costs for the one (1) highest misdemeanor charged. This subsection shall apply only to misdemeanor offenses not involving physical injury or sexual contact.
>
> (5) When a person has been convicted of a misdemeanor offense and a sentence of jail, probation, conditional discharge, or sentence other than a fine only has been imposed, the amount of bail for release on appeal shall not exceed double the amount of the maximum fine that could have been imposed for the one (1) highest misdemeanor offense for which the person was convicted. This subsection shall apply only to misdemeanors not involving physical injury or sexual contact.
>
> (6) The provisions of this section shall not apply to a defendant who is found by the court to present a flight risk or to be a danger to others.
>
> (7) If a court determines that a defendant shall not be released pursuant to subsection (6) of this section, the court shall document the reasons for denying the release in a written order.

Moreover, a person charged with an offense shall be ordered released on his or her personal recognizance or upon the execution of an unsecured bail bond under KRS § 431.520.

In particular, KRS § 431.520 provides:

> Any person charged with an offense shall be ordered released by a court of competent jurisdiction pending trial on his personal recognizance or upon the execution of an unsecured bail bond in an amount set by the court or as

> fixed by the Supreme Court as provided by KRS 431.540 [authorizes uniform bail schedules], unless the court determines in the exercise of its discretion that such a release will not reasonably assure the appearance of the person as required, or the court determines the person is a flight risk or a danger to others.
>
> (1) Place the person in the custody of a designated person or organization agreeing to supervise him;
>
> (2) Place restrictions on the travel, association, or place of abode of the person during the period of release;
>
> (3) Require the execution of a bail bond:
>
> (a) With sufficient personal surety or sureties acceptable to the court; in determining the sufficiency of such surety or sureties, the court shall consider his character, his place of residence, his relationship with the defendant, and his financial and employment circumstances; or
>
> (b) With the ten percent (10%) deposit as provided in KRS 431.530; provided that if the defendant is permitted to earn credit toward bail pursuant to KRS 431.066, that credit shall be applied to the ten percent (10%) deposit; or
>
> (c) With the deposit of cash equal to the amount of the bond or in lieu thereof acceptable security as provided in KRS 431.535.

The standards on setting the amount of bail have been incorporated in Ky. RCr Rule 4.16, which states that

> (1) The amount of bail shall be sufficient to insure compliance with the conditions of release set by the court. It shall not be oppressive and shall be commensurate with the gravity of the offense charged. In determining such amount the court shall consider the defendant's past criminal acts, if any, the defendant's reasonably anticipated conduct if released and the defendant's financial ability to give bail.
>
> (2) If a defendant is charged with an offense punishable by fine only, the amount of bail shall not exceed the amount of the maximum penalty and costs.
>
> (3) Amount of bail may also be set in accordance with the uniform schedule of bail prescribed for designated misdemeanors and violations in Appendix A, Uniform Schedule of Bail, of these rules.

In Abraham v. Commonwealth of Kentucky, 565 S.W.2d 152 Ky. Ct. App. (1977), an appeal of the trial court's denial of the defendant's motion to reduce bail, the Court of Appeals in interpreting the standards for setting bail in KRS § 431.525(1) and Ky. RCr Rule 4.16(1),

reversed and remanded the case back to the trial court. Id. at 158. In particular, the appellate court stated that the trial court made no finding that releasing the defendant on his own recognizance or upon unsecured bail bond would not reasonably assure his appearance at trial as required in KRS § 431.520. Id. at 157. Moreover, the order reflected that the trial court considered only the nature of the offenses in fixing the amount of bail. Ibid.

The court further observed that

> under KRS § 431.525(1) and Ky. RCr Rule 4.16(1), the trial court is also required to consider the defendant's past criminal record, his reasonably anticipated conduct if released, and his financial ability to give bail. In the present case the order… does not reflect that the trial court considered … length of residence in Kentucky and at his present address, his marital status, his employment record, the date and nature of his prior criminal record, or his ability to raise $75,000.00 in bail.
> [Id. at 157-58.]

3. Virginia

The Committee also studied Virginia, another jurisdiction with a risk-based system and pretrial detention. Pursuant to Va. Code Ann. § 19.2-120A,

> [a] person who is held in custody pending trial or hearing for an offense, civil or criminal contempt, or otherwise shall be admitted to bail by a judicial officer, unless there is probable cause to believe that:
> 1. He will not appear for trial or hearing or at such other time and place as may be directed, or
> 2. His liberty will constitute an unreasonable danger to himself or the public.

As to the crimes eligible for detention for which there is a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public, Virginia's list is far more extensive than Washington, D.C.[183] For the detention hearing, Va. Code Ann. § 19.2-120E provides as follows:

[183] Va. Code Ann. § 19.2-120B provides that there is a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public if the person is currently charged with: 1. An act of violence as defined in § 19.2-297.1; 2. An offense for which the maximum sentence is life imprisonment or death; 3. A violation of § 18.2-248, 18.2-248.01, 18.2-255, or 18.2-255.2 involving a Schedule I or II controlled substance if (i) the maximum term of imprisonment is 10 years or more and the person was previously convicted of a like offense or (ii) the person was previously convicted as a "drug kingpin" 18.2-248; 4. A violation of § 18.2-308.1, 18.2-308.2, or 18.2-308.4 and which relates to a firearm and provides for a mandatory minimum sentence; 5. Any felony, if the person has been convicted of two or more offenses described in subdivision 1 or 2; 6. Any felony committed while the person is on release pending trial for a prior felony under federal or state law or on release pending imposition or execution of sentence or appeal of sentence or conviction; 7. An offense listed in subsection B of § 18.2-67.5:2 [sexual assault of minor] and the person had previously been convicted of an

> The court shall consider the following factors and such others as it deems appropriate in determining, for the purpose of rebuttal of the presumption against bail … whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of the public:
>
> 1. The nature and circumstances of the offense charged;
> 2. The history and characteristics of the person, including his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, membership in a criminal street gang as defined in § 18.2-46.1, and record concerning appearance at court proceedings; and
> 3. The nature and seriousness of the danger to any person or the community that would be posed by the person's release.

Unlike Washington, D.C., Virginia does not specify the time frame within which the detention hearing must be held. Rather, the statute simply provides that the court must give notice to the Commonwealth's Attorney before setting bail for a defendant that meets the presumption for no bail.

H. ADDRESSING COMMUNITY DANGER WITHIN NEW JERSEY'S PRESENT PRETRIAL RELEASE SYSTEM

As previously noted, pretrial misconduct takes two forms: (1) nonappearance in court when required; and (2) commission of additional crimes, witness intimidation, or witness retaliation, while released and awaiting trial. Presently, *New Jersey Courts are ill-equipped to address the latter form of pretrial misconduct that endangers the community because there are no supervision mechanisms funded to monitor conditions of release*.[184]

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offense listed in § 18.2-67.5:2…. and the judicial officer finds probable cause to believe that the person who is currently charged with one of these offenses committed the offense charged; 8. A violation of § 18.2-374.1 or 18.2-374.3 [Child Pornography] where the offender has reason to believe that the solicited person is under 15 years of age and the offender is at least five years older than the solicited person; 9. A violation of § 18.2-46.2 [Gang-related crimes], 18.2-46.3, 18.2-46.5, or 18.2-46.7 [Terrorism]; 10. A violation of § 18.2-36.1 [Involuntary Manslaughter], 18.2-51.4 *[*DWI with serious bodily injury], 18.2-266 or 46.2-341.24 [DWI] and the person has, within the past five years of the instant offense, been convicted three times on different dates of a violation of any combination of these Code sections; 11. A second or subsequent violation of § 16.1-253.2 or 18.2-60.4 [Violating Protective Order]; 12. A violation of subsection B of § 18.2-57.2 [Assault & Battery]; or 13. A violation of subsection C of § 18.2-460 [Obstructing Justice] charging the use of threats of bodily harm or force to knowingly attempt to intimidate or impede a witness. In addition, there is a rebuttable presumption, that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public if the person is being arrested pursuant to § 19.2-81.6 [illegal alien].

[184] See Cronin, supra, note 120, at Rutgers.

New Jersey Courts cannot address these risks of danger to the community through the denial of bail. In Johnson, our Supreme Court held that our Constitution's "bailable offense" clause requires courts to set a bail for every defendant charged with a noncapital offense. The sole exception to this constitutional mandate is for defendants charged with committing a "capital offense."[185] Johnson confirmed that "capital offenses" are those offenses that are punishable by death under the criminal laws in effect at the time that the trial court must make the bail decision.[186]

When the "bailable offense" clause first appeared in the 1844 New Jersey Constitution, capital offenses included treason, murder (including felony murder), aiders and abettors for escape of persons convicted of capital offenses, and second offenders of manslaughter, sodomy, rape, arson, burglary, robbery or forgery.[187] Thus, if the "proof [was] evident or presumption great," New Jersey courts could deny bail to persons accused of these crimes. Since the death penalty was repealed on December 17, 2007,[188] there are no capital offenses in New Jersey. Accordingly, all offenses are now "bailable," including all of those violent offenses that were previously excluded when the "bailable offense" clause was originally ratified and for which courts could previously deny bail.

Present New Jersey Court Rules and Administrative Directives prohibit consideration of the risk of community danger in setting bail.[189] Judicial adherence to this prohibition of danger consideration facilitates the second of the "dual system failures" inherent in a resource-based system. More specifically, this failure arises from the release of more affluent defendants who may present unmanageable risks of pretrial misconduct while less affluent defendants, who may

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[185] N.J. Const. art. 1, ¶ 11 (emphasis added).
[186] See Johnson, 61 N.J. at 355.
[187] Laws of the State of New Jersey, Feb. 17, 1829, and March 7, 1839. The colonial right to bail, as first recognized in the 1641 Massachusetts Body of Liberties, was limited by the offense charges, as it did not extend to capital offenses or contempts of court. See William F. Duker, The Right to Bail: A Historical Inquiry, 42 Alb. L. Rev. 1139, 1177 (1977). For these classes of offenses, colonial Massachusetts courts could continue in the English tradition by refusing to set bail. As Professor Foote cautioned, "the theoretical liberality of that 1641 bail statute should not be overdrawn…" because Massachusetts punished with death, and therefore made nonbailable, offenses ranging from homicide and rape to cursing one's parents and adultery. See Foote, supra, note 32 at 981. Indeed, "if one considers the large number of capital crimes of that time, it is evident that the freedom loving colonies were not willing to release on bail any person whom they considered dangerous." Meyer, Constitutionality of Pretrial Detention, 60 Geo. L. Rev. 1139, 1162-63 (1972).
[188] P.L. 2007, c. 204 (Dec. 17, 2007).
[189] For a discussion of R. 3:26-1(a), R. 7:4-1 and AOC Directive 9-05, see supra, notes 49-55 and accompanying text.

present manageable risks, remain in custody because they cannot afford to post a money bond.[190] Conversely, perceptions of judicial non-compliance with this express prohibition of danger consideration is the source of the public perception, referenced by Judge Morrison, that judges consider danger sub rosa, through elevated estimation of flight risk, to impose a de facto form of preventive detention through the use of exorbitantly high money bond.[191] Such perceptions may contribute to a decrease of public confidence in the integrity of the judicial process.

Similar to the pretrial release systems operating in many other jurisdictions, New Jersey Court Rule 3:26-1(a) authorizes the imposition of nonmonetary conditions designed to protect persons within the community.[192] However, unlike many of these other jurisdictions, there is no corresponding Rule, statute, or administrative directive setting forth procedures to enforce compliance with these nonmonetary conditions in New Jersey.[193] Moreover, unlike other jurisdictions with pretrial release systems, there is no mechanism available for supervising defendant compliance with nonmonetary conditions in New Jersey[194] because no resources have ever been provided for such supervision.

Theoretically, nonmonetary conditions of release, designed to protect persons in the community, may be included as a condition of a surety bond and enforced through bail forfeiture proceedings.[195] Although upholding the forfeiture of bail for violation of a "no contact" condition within a surety bond, the New Jersey Supreme Court in State v. Korecky 169 N.J. 365 (2001) observed that "although our rules allows for the imposition of conditions other than appearance, appearance conditions remain the primary emphasis of the bail system."[196] Accordingly, the Court in Korecky expressly cautioned trial court judges "to exercise the authority to forfeit a bond for a breach of such a condition sparingly."[197] The Korecky Court cited with approval the ABA Standard which, in turn, discourages inclusion of bond conditions

[190] VanNostrand, at Rutgers.
[191] See supra, text accompanying note 175.
[192] See VanNostrand, at Rutgers; NCSL Report, supra, note 123 (analyzing other states).
[193] See D.C. Code § 23-1329; 18 U.S.C. § 3148. Accord. 2007 ABA Standards, supra, note 13, § 10-5.6; Cronin, at Rutgers, supra, note 120.
[194] See 18 U.S.C. § 3153; D.C. Code § 23-1303; Cronin, at Rutgers.
[195] See State v. Korecky, 169 N.J. 365, 372-73 (2001) (interpreting Rule 3:26-1(a), which authorizes nonmonetary release conditions unrelated to appearance) and Rule 3:26-6 (bail forfeiture)).
[196] Id. at 376, citing with approval, American Bar Association Standards for Criminal Justice, Pretrial Release Standards, § 10-5.3(b) (1988) (hereinafter "1988 ABA Standards').
[197] Korecky, 169 N.J. at 384.

unrelated to appearance because they increase the risks assumed by the surety, thereby increasing the bond premium and adverse effect upon the indigent defendant seeking pretrial release.[198]

Rather than forfeiting bail for violation of release conditions unrelated to appearance, this ABA Standard recommends an alternative enforcement mechanism: the modification of pretrial release conditions or the revocation of pretrial release.[199] This approach has been adopted by our federal government,[200] the District of Columbia,[201] and several other states.[202]

I. RECOMMENDATION – SHIFT FROM A RESOURCE-BASED TO A RISK-BASED SYSTEM OF PRETRIAL RELEASE

The Committee is making the following recommendations, which are being repeated here for ease of reference.

RECOMMENDATION 1. **New Jersey should move from a largely "resource-based" system of pretrial release to a "risk-based" system of pretrial release.**

RECOMMENDATION 2. **A statute should be enacted requiring that an objective risk assessment be performed for defendants housed in jail pretrial, using an assessment instrument that determines the level of risk of a defendant.**

RECOMMENDATION 3. **Nonmonetary conditions of release, that correspond to the level of risk, should be established.**

RECOMMENDATION 4. **A supervision mechanism should be developed to ensure compliance with release conditions.**

RECOMMENDATION 5. **A mechanism for effective enforcement of noncompliance should be established.**

RECOMMENDATION 6. **The Constitution should be amended and a preventive detention statute should be enacted as a component of recommendations 1-5.**

RECOMMENDATION 7. **Recommendations 1-6 should not be considered individually but rather as an interdependent proposal for change to New Jersey's system of pretrial release.**

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[198] Id. at 375.
[199] See 2007 ABA Standards, supra, note 13 at § 10-5.6(c), interpreted in, State v. Ayala, 222 Conn. 331, 349 (1992) (rejecting constitutional "bailable offense" clause challenge to revocation of pretrial release).
[200] See 18 U.S.C. § 3148.
[201] See D.C. Code § 23-1329.
[202] See, e.g., NCSL Report, supra, note 123.

RECOMMENDATION 8. Recommendations 1-6 should not be enacted without sufficient funding to ensure their success and community safety.

RECOMMENDATION 9. Resources for technological applications to assist in both determining risk and providing supervision must also be provided.

As demonstrated above, application of New Jersey's present resource-based system of pretrial release adversely impacts poor defendants and members of racial and cultural minority groups,[203] and is ill-equipped to protect the community.[204] Fortunately, there is an alternative.

In the more than four decades since the seminal Johnson decision, advances in social science and experience acquired by criminal justice practitioners have resulted in the revision of "best practices" to embrace risk-based systems of pretrial release. These revised "best practices" expressly authorize courts to consider danger to the community in releasing defendants upon the least restrictive of nonmonetary conditions. To release these defendants in a manner that reasonably assures public safety and court appearance, these best practices further recommend an objective risk assessment, crafting nonmonetary release conditions that correspond to the risk level, supervision of compliance with release conditions, and effective enforcement of noncompliance with release conditions.[205] This enforcement extends from the imposition of more restrictive release conditions to the revocation of release, resulting in a remand back into pretrial custody. If the court initially determines that there are no conditions that reasonably assure the appearance of the defendant or the safety of the community, then these "best practices" authorize preventive detention.[206]

1. Juvenile Detention Alternatives Initiative (JDAI)

There is successful precedent for risk-based assessment in New Jersey in the juvenile justice system. A description of that program shall follow.

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[203] See supra, discussion accompanying notes 82-101.
[204] See supra, discussion accompanying notes 50-51.
[205] See, e.g. 18 U.S.C. § 3148; D.C. Code § 23-1329; NAPSA Article; 2007 ABA Standards. These best practices are further reflected by the publications of Dr. Marie VanNostrand, which are cited throughout this report and which were set forth during the April 11, 2013, Rutgers Symposium.
[206] Since the bailable offense clause requires courts to set a bail in all cases, application of a preventive detention statute would probably violate our present "bailable offense" clause. See Johnson, supra, 61 N.J. at 364; see also supra, discussion accompanying notes 54-55. Accordingly, preventive detention would probably require a corresponding amendment to our constitution's "bailable offense" clause.

With the enactment of the current Code of Juvenile Justice in 1983, public protection joined rehabilitation[207] as an equally important goal of the juvenile justice system in New Jersey.[208] This statute was part of a nationwide response to the perceived high rate of recidivism among juveniles.[209] To address this danger to the community,[210] the New Jersey Legislature expressly authorized preadjudication detention of a juvenile if "[t]he physical safety of persons or property of the community would be seriously threatened if the juvenile were not detained."[211]

In response to the then growing problem of juvenile detention overcrowding, the New Jersey Detention Reform Task Force ("DRTF") was formed in 1996.[212] The DRTF sought to assure court appearance, promote public safety, and "help reduce detention crowding and minority presence in secure detention."[213] The DRTF's recommendations were largely modeled after the "best practices" developed in other jurisdictions through their participation in the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative ("JDAI").[214]

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[207] Under the doctrine of parens patriae, parental control of the juvenile delinquent is replaced by public control. See Ex Parte Newkosky, 94 N.J.L. 314, 316 (1920). Accordingly, New Jersey juvenile courts have traditionally sought to preserve and protect the welfare of the child. Id. Application of this doctrine resulted in focus upon the rehabilitation of the juvenile and supported detention only to protect the juvenile from the consequences of his own delinquent conduct. Id. In Schall v. Martin, 467 U.S. 253, 266 (1984), the Supreme Court noted that these consequences may arise "both from potential physical injury which may be suffered when a victim fights back or when a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child."

[208] See N.J.S.A. 2A:4A-21 (1983); State v. R.G.D., 108 N.J. 1, 9, 13 (1987) (citing State in the Interest of B.C.L., 82 N.J. 362, 378 (1980) (recognizing public protection as a goal of juvenile justice system)).

[209] See R.G.D., 108 N.J. at 8-9; accord Schall, 467 U.S. at 264-65. In the year preceding passage of this statute, federal statistics revealed that juveniles under the age of 16 accounted for 7.5 % of all arrests for violent crimes and 19.9% of all arrests for serious property crimes. Id.

[210] The Code also addresses this danger by easing the requirements for involuntary waiver to adult court for juveniles charged with certain serious, violent offenses. R.G.D., 108 N.J. at 9-10 (interpreting N.J.S.A. 2A:4A-26). Through this waiver, jurisdiction is transferred from the juvenile court (Superior Court, Chancery Division, Family Part) to the adult court (Superior Court, Law Division, Criminal Part). Id. Although danger can be considered in detaining a juvenile in the juvenile court, that same danger cannot be considered in adult court when setting bail for that same defendant on more serious adult criminal charges arising from the same criminal incident. Compare Rule 3:26-1(a) (adult) with N.J.S.A. 2A:4A-34(c)(2) (juvenile).

[211] N.J.S.A. 2A:4A-34(c)(2).

[212] Detention Reform Task Force, Final Report, at i (Mar. 11, 1999) (hereinafter "DRTF Report"). The DRTF was part of "a 'research-driven' initiative, utilizing empirical findings to guide subsequent policy debate on decisions." Id.

[213] Id. at i, I.

[214] See id. at 3, 28-29. In response to the dramatic increase in the number of juveniles held in secure detention nationwide, the JDAI began in December of 1992. Paul DeMuro, Pathways to Juvenile Detention Reform: Consider the Alternatives; Planning and Implementing Detention Alternatives, at 4-5 (2005). From 1985 to 1994, this juvenile detainee population increased 72%. Id. In 1993 the JDAI began designing and testing reform strategies in five jurisdictions. Id. at 8. By the end of 1998, only three of these "model" jurisdictions continued as JDAI participants – Cook County, Illinois, Multnomah County, Oregon, and Sacramento California. Id. The DRTF recommendations reflect "best practices" derived from these original JDAI "model" jurisdictions.

To assist in the pretrial release decision-making process, the DRTF developed a Risk Assessment Instrument ("RAI").[215] A RAI utilizes objective factors that empirical research has demonstrated to be predictive of rearrest and nonappearance.[216] This RAI was approved by the New Jersey Supreme Court on June 9, 2009, and is currently applied in determining whether to release or detain a juvenile preadjudication and, if released, what conditions should be imposed. If the RAI reflects that the juvenile presents a sufficiently "high risk" of pretrial misconduct, then the recommendation to the judicial officer may be detention. As applied to defendants who are not "high risk," courts have increasingly relied upon nonmonetary conditions of release to manage this risk.

A "critical" recommendation made by both the DRTF and the JDAI was the development of a continuum of pre-adjudication alternatives to secure detention.[217] Data from the initial "model" jurisdictions outside of New Jersey which chose to implement JDAI's recommended detention reforms reflects that detention populations declined dramatically and that public safety indicators improved modestly.[218] Thus, while detention populations declined in these model jurisdictions by 34% and 66%, the re-arrest rates also declined by 8% and 24%, respectively.[219] These lower recidivism rates were achieved even though the released population presumably included numerous juveniles who would have remained in detention but for the JDAI reforms.

Applying these strategies in New Jersey, the availability of nonmonetary alternatives to preadjudication detention has reduced the population of the Essex County Youth Detention

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[215] DRTF Report, supra, note 212 at ii-iii.

[216] See id. at 17.

[217] DRTF Report, supra, note 212 at 28; DeMuro, supra, note 214 at 12. Once again modeled after the JDAI, these alternatives included home detention ("Class B"), home detention with electronic monitoring, evening reporting center, and non-secure residential detention (i.e., shelter) programs. DRTF Report, supra, note 212 at 28. Many of these alternatives are identical to the non-monetary conditions of release recommended by the ABA and endorsed by the Johnson Court. See supra, discussion accompanying notes 67-74.

[218] These reductions in detention population and pretrial misconduct are summarized as follows:

	Cook County (Illinois)		Multnomah County (Oregon)	
	Pre JDAI	2003	PreJDAI	2003
Re-arrest Rate	24%	16%	33%	9%
Failure to Appear Rate	39%	13%	7%	7%
Detention Population	100%	66%	100%	34%

Annie E. Casey Foundation, The Juvenile Detention Alternatives Initiative: A Report on Results, at 2 (Mar. 2004).

[219] Id.; During 1994-1997, the JDAI reported that juveniles released from secure detention to selected detention alternatives programs both appeared in court and remained arrest free at the following compliance rates: 96% for nonsecure detention (shelter beds), 91% for home detention ("class B") and 90% for the evening reporting center. See DeMuro, supra, note 214 at 18-23. These rates reflect only specific programs offered with the model jurisdictions. As reflected by the 16% re-arrest rate in Cook County and the 9% re-arrest rate in Multnomah County, overall compliance rates are lower.

Center by more than 70%.[220] Similar reductions have been realized throughout the State.[221] While members of racial or cultural minority groups remain disproportionately represented within the juvenile detainee population, a dramatic decrease in the total number of minority juvenile detainees was achieved through the use of nonmonetary release conditions.

When compliance is properly supervised and enforced, release on nonmonetary conditions[222] can be substantially more effective in protecting the public than release exclusively on financial conditions.[223] Pretrial recidivism rates for adults released on monetary conditions (bail) range between 13% and 21%.[224]

In early 2004, New Jersey began implementing the DRTF's recommendations in five "pilot" counties – Atlantic, Camden, Essex, Hudson, and Monmouth. From June 2004 through March 2012, the successful completion rates in New Jersey ranged from 70% to 89%.[225] As compared to pre-DRTF levels, reductions in detention populations for these counties are summarized as follows:

	Atlantic	Camden	Essex	Monmouth
2003 (pre DRTF)	34.1 (100%)	94.6 (100%)	243.6 (100%)	40 (100%)
2006	24.8 (73%)	47.6 (50%)	115.1 (47%)	22.2 (56%)
2009	16.3 (48%)	46.7 (49%)	113.2 (46%)	25.7 (64%)
2012	13.8 (40%)	39.8 (42%)	70.6 (28%)	8.5 (21%)
2013 YTD	13.1 (38%)	49.3 (52%)	67.7 (27%)	9.9 (24%)
YDC Capacity	27	98	242	40

Before the DRTF recommendations were implemented, the detention populations in both Atlantic and Essex exceeded their authorized capacity. Monmouth's population was at its authorized capacity. In Essex County, the recidivism rate has modestly declined from 13.3% in

[220] See Jennifer LeBarron, JDAI Quarterly Data Report-1ST Quarter 2010, at Tables 20-23 (May 2013) (hereinafter "JDAI Data Report").
[221] Id.
[222] Standard nonmonetary conditions of release include requirements (1) that defendant shall attend all court appearances as ordered and (2) that defendant shall not commit any criminal offense. See 2007 ABA Standards, supra, note 13 § 10-5.2(a); 18 U.S.C. § 314(c). The release order would also include those least restrictive conditions imposed to ensure the defendant's appearance and to protect the public (e.g., home detention with electric monitoring, "no contact" with victim or witnesses). See 2007 ABA Standards, supra, note 13 § 10-5.2(a)(i-ix). For a discussion of enforcement procedures, see infra, text accompanying notes 294-297.
[223] The DRTF expressly acknowledged that their "[d]etention alternative programs should provide the level of *supervision* necessary to *enforce* conditions of release, ensure adherence to program rules and assist in holding youth accountable for violating program conditions. (emphasis added). See DRTF report, supra, note 212 at iii.
[224] See JDAI Data Report, supra, note 220 at Table 7.
[225] Id. at Tables 20-23.

2005 to 6.5% in 2012.[226] While any recidivism adversely affects public safety, these rates compare favorably to adult pretrial recidivism rates of 13% to 21%.[227] Moreover, these recidivism rates were declining in Essex County during the same time period that the number of juveniles being held in secure detention was decreasing by more than 70%.[228] Similar reductions in recidivism and detention population were realized in the three other "pilot" counties. Thus, release on nonmonetary conditions can be substantially more effective in protecting the public than release solely on monetary conditions.

It is well-established that community based supervision costs significantly less than secure detention.[229] As previously noted, implementation of detention alternatives has reduced the average daily population ("ADP") of the ECYDC 73%.[230] These reductions provided enough room for neighboring Passaic County to house its approximately 90 juvenile detainees at the ECYDC.[231] It should be noted that implementation also required an implementation of resources.

Although implementing a system of detention alternatives requires new funding to support increased information gathering, community supervision and enforcement support services,[232] the ABA Advisory Committee predicted that the "savings that will result from reducing jail construction and operation eventually should substantially outweigh the cost of

[226] Id. at Table 7. During the first quarter of 2013, the rearrest rate in Essex increased to 13.1%. Id. The present state average for new arrests is 5.2%.
[227] See Bureau of Justice Statistics, Special Report: Pretrial Release of Felony Defendants in State Courts, at 8 (Nov. 2007).
[228] See JDAI Data Report, supra, note 220 at 2-3 (average daily population (ADP) for each county).
[229] See DeMuro, supra, note 214 at 23-26. While the average cost of detaining a federal defendant is $19,000 per year, the average cost of community based supervision ranges from $3,100 to $4,600 depending upon the supervision level. See Pretrial Risk Assessment in the Federal Court, at 6. Similarly, the cost of housing a juvenile in the Essex County Youth Detention Center ("ECYDC") is approximately $225 per day. Cf. Ryan Hutchins, Deal on Juveniles Could Enrich County Coffers, Newark Star Ledger, Oct. 5, 2010 ($225 cost in Union County). The cost (staffing and equipment) of administering a nonresidential detention alternative, such as home detention with electronic monitoring, is less than $40 per day. See DeMuro, supra, note 214 at 24. Therefore, as compared to secure detention, community based supervision saves approximately $185 a day per juvenile!
[230] See JDAI Data Report, supra, note 220 at Tables 20-23. The ADP decreased from 243.6 in 2003 to 115.1 in 2006.
[231] Editorial, Fewer and Better, Newark Star Ledger, Feb. 16, 2009, at 19. This merger permitted Passaic County to close its youth house in April of 2009. At that time, County officials estimated that this closure would save Passaic County approximately $10,000,000 a year, even after it pays Essex County approximately $4,000,000 a year for housing Passaic's juvenile detainees.
[232] See Recommendation 8, supra, p. 51.

[community supervision]."[233] The reduction in New Jersey's juvenile detainee population provides support for the ABA's prediction of long-term cost savings.

Based upon this review of "best practices," the Committee recommends a shift from a resource-based system to a risk-based system of pretrial release. The limited success of the 1984 and 1994 reform efforts in New Jersey further reveal the futility of attempting to address the effect of poverty and community danger within the confines of a resource-based system of pretrial release.[234] Only through a systemic shift to a risk-based system, the Committee concludes, can these issues be addressed in a manner that promotes the societal interests in both personal liberty and public safety. More specifically, when properly designed, funded and implemented, application of a risk-based system does not adversely affect the poor, authorizes courts to directly address both risks of flight and community danger, and enables courts to reduce the pretrial detainee population without adversely affecting flight or recidivism rates.[235]

Decades of experience reveals that implementation of any risk-based approach requires the services of public officials specifically entrusted with the responsibility of providing "critically important information gathering and supervision functions."[236] These public officials are frequently referred to as "pretrial services officers (PSO)."[237] By 2003, pretrial services agencies were operational in more than 300 jurisdictions in the United States.[238] The functions traditionally performed by these agencies have been described as follows:

> Pretrial services agencies and programs perform functions that are critical to the effective operation of local criminal justice systems by assisting the court in making prompt, fair, and effective release/detention decisions, and by monitoring and supervising released defendants to minimize risks of nonappearance at court proceedings and risks to the safety of the community and to individual persons…. [T]he agency collects and presents information needed for the court's release/detention decision prior to first appearance, makes assessments of risks posed by the defendant, develops strategies that can be used for supervision of

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[233] 2007 ABA Standards, supra, note 13 at 53.

[234] See supra, discussion accompanying notes 79-111.

[235] See supra, discussion accompanying notes 80-81.

[236] See 2007 ABA Standards, supra, note 13 Introduction, at 34.

[237] This report identifies the functions that must be performed by pretrial service officers. In the federal system, and in many state and local jurisdictions, these functions are performed by a pretrial services agency. In other jurisdictions, these functions are performed by probation officers or other employees or existing public agencies. The identity of the public officer who performs these functions is a matter of discretion to be allocated among the three branches of government. It is a matter beyond the scope of this report. For purposes of convenience only, the public officers that perform this function will be referred to as pretrial services officers.

[238] See PJI, supra, note 13 at 16-17. (citing Bureau of Justice Statistics Findings). Since the majority of pretrial release programs are run at the county or multi-county level rather than statewide, there has never been a census of all 3,000 plus counties in the country to have an exact total.

> released defendants, makes recommendations to the court concerning release options and/or conditions in individual cases, and provides monitoring and supervision of released defendants in accordance with conditions set by the court. When defendants are held in detention after first appearance, the agency or program periodically reviews their status to determine possible eligibility for conditional release and provides relevant information to the court. When released defendants fail to comply with conditions set by the court, the pretrial services agency or program takes prompt action to respond, including notifying the court of the nature of the noncompliance.[239]

2. Risk-Based Approach

As previously noted, the risk-based approach recommended by the Subcommittee consists of interrelated steps.[240] Each of these interrelated steps, together with the critical role of pretrial services officers in their implementation, will be addressed seriatum.

a. Use an objective risk assessment instrument

A risk assessment instrument ("RAI") is utilized to calculate the risk of re-arrest and nonappearance.[241] When Johnson was decided 40 years ago, RSTs did not exist.[242] They are now used for juveniles[243] in New Jersey, and for both juveniles and adults throughout the country, as

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[239] See National Association of Pretrial Services Agencies, Standards on Pretrial Release, 3d ed., (Oct. 2004), at Standard 3.1. The Commentary to this Standard recognizes that not all pretrial services agencies or programs perform all of these functions; rather, this Standard is "meant to serve as a general guide or 'mission statement' outlining what should be accomplished by pretrial services agencies or programs in all jurisdictions."

[240] See supra, Recommendations, at 16-17. Each of these steps is explained infra, in text accompanying notes 241-300.

[241] Dr. Marie VanNostrand, Pretrial Risk Assessment in Virginia, 3 (May 2009); DRTF report, supra, note 212, at 29-30. An RST is also referred to as a "pretrial risk assessment instrument" or "RAI." An RAI uses objective factors which empirical research has demonstrated to be predictive of rearrest and nonappearance. Id. These factors include current charges, pending charges, criminal history, court appearance history, employment and residence stability, community ties, and substance abuse history. Each of these factors may be considered under Rule 3:26-1(a).

[242] See Johnson, supra, 61 N.J. at 362 (relying upon 1968 ABA Standards, § 5.5, commentary at 69 (too little is now known about techniques to predict future criminality)).

[243] See De Muro, supra, note 214 at 31-33. New Jersey's experience illustrates the gradual process of RAI development and acceptance. Based upon JDAI "best practices" and a limited analysis of less than 200 juvenile detainees, the DRTF developed a draft "risk assessment instrument." DRTF Report, supra, note 212 at 17-19. Initially, there was a lack of consensus concerning the draft RAI's utility. Criticisms included a concern that use of the RAI would result in an increase in detention population, due to the lack of available openings within the various detention alternative programs. Id. at 21. This was addressed, in part, through federal and private foundation grants that defrayed some of the cost. Concern was also expressed that the RAI would limit judicial discretion. Id. This concern was unfounded because only judges could order detention. Moreover, the RAI protocols were later clarified to provide that all release recommendations were subject to judicial "override." See JDAI State Screening Subcommittee, Report to the Administrative Office of the Courts Regarding the Development of a Detention Screening Tool and Its Potential Impact on Current Practice, at 2 (Aug. 29, 2006) (hereinafter "RAI Report"). However, over time, consensus emerged. When New Jersey became a JDAI participant in 2004, the DRTF's development of a RAI was continued by the JDAI risk assessment instrument subcommittee. See RAI Report at 2-3. The RAI in the form as refined by the JDAI subcommittee, and as finally approved by the Administrative Office of

an integral part of risk-based pretrial decision-making.[244] In the pretrial decision-making process, "while statutes and court rules tell judicial officers what factors they are supposed to consider in making a pretrial release decision, they say nothing about the weight to be given to each individual factor."[245]

Based upon the ongoing research of social scientists, RSTs have been statistically validated as applied to adult criminal defendants.[246] An RST uses research-based objective criteria to calculate the risk of re-arrest and nonappearance.[247] This calculation is based upon objective factors that empirical research has demonstrated to be predictive of danger to the community and failure to appear in court.[248] The existing research further establishes that "while pretrial risk assessments cannot predict individual behavior, it is possible to group defendants into categories of risk in such a way as to predict the probability that persons assigned to each group will appear in court and remain law abiding."[249]

There are generally 8 to 12 factors included on pretrial risk assessment instruments.[250] The most common factors are current charge, pending criminal charges, prior arrests, prior convictions, history of failure to appear, prior incarceration, length of time at current residency, employment status, and history of substance abuse.[251] This list is neither definitive nor exhaustive. For example, ongoing research has refined these broadly phrased factors to more

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the Courts in 2007, contained substantial revisions to the draft RAI as proposed by the DRTF in 1999. Compare DRTF Report, supra, note 212 at 19 (DRTF draft RAI) with RAI Report at 16 (AOC approved RST).

[244] See VanNostrand, at Rutgers. Eleven states require courts to consider a risk assessment when making pretrial release decisions. See NCSL Report, supra, note 123 at 8-9. While the term "risk assessment instrument" or "RST" is used in reference to juveniles in New Jersey, the term "risk assessment instrument" or "RAI" will be used throughout in reference to the subcommittee's present recommendations.

[245] See PJI, supra, note 13 at 27 (emphasis added).

[246] See Dr. Marie VanNostrand, Pretrial Risk Assessment in Virginia, 11-12 (May 2009). Dr. VanNostrand is presently assisting the federal government in developing an RAI. See Marie Van Nostrand, Pretrial Risk Assessment in the Federal Court, 1-2 (Apr. 2009). Applications of a validated RAI produce unbiased objective classifications which reduce detention population. See supra, notes 217-233 and accompanying text.

[247] Dr. Marie VanNostrand, Pretrial Risk Assessment in Virginia, 3 (May 2009). DRFT Report, supra, note 212 at 29-31. Since this is a research driven process, predictive validity has improved over time. Compare RAI of DRTF with form approved by AOC. This research driven process also assists supervising agencies in allocating their resources. Dr. Marie Van Nostrand, Pretrial Risk Assessment in Virginia, 5 (May 2009).

[248] See Dr. Marie VanNostrand, Pretrial Risk Assessment in Virginia, 3 (May 2009); 1968 ABA Standards at 73; RAI Report, supra, note 243 at 4; INSLAW study, supra, note 50 at 62 (Table 27).

[249] See PJI, supra, note 13 at 27.

[250] VanNostrand, at Rutgers. Accord Dr. Marie VanNostrand, Pretrial Risk Assessment in Virginia, 3 (May 2009); see also 2007 ABA Standards, supra, note 13 at 57.

[251] Id.

specific ones with greater predictive validity.[252] Moreover, promising ongoing research suggests that these tools have been sufficiently refined to predict the likelihood not only of future criminal conduct, but more specifically future violent criminal conduct.[253] Based upon their relative predictive strength as determined by statistical analysis, each risk factor is attributed a point value.[254]

Application of the RAI "produce[s] unbiased classifications of risk across sex, race, and income groups."[255] Moreover, a RAI applies objective factors, and "[p]rograms that assess risks of pretrial misconduct in an exclusively subjective manner are more than twice as likely to have a jail population that exceeds its capacity than those programs that assess risk exclusively through an objective risk assessment instrument."[256] Reduction in pretrial detainee populations for juveniles in New Jersey, and adults in the District of Columbia and other states, amply support this conclusion.[257]

b. Gather information about the alleged offender and offense

In order to apply the RAI to an individual defendant, a pretrial services officer must perform a critical information gathering function.[258] This information pertains to both the

[252] Compare Dr. Marie VanNostrand, Assessing Risk Among Pretrial Defendants in Virginia, 6-7 (Apr. 2003) (lists 9 risk factors, including outstanding warrants) with Dr. Marie Van Nostrand, Pretrial Risk Assessment in Virginia, 12-13 (May 2009) (applies 8 risk factors, excluding outstanding warrants).

[253] See LJAF, Developing a National Model for Pretrial Risk Assessment, at 4-5 (Nov. 2013). See also Fed Probation at 2 (citing District of Columbia instrument).

[254] Dr. Marie VanNostrand, Assessing Risk Among Pretrial Defendants in Virginia, 6-7 (Apr. 2003); Dr. Marie VanNostrand, Pretrial Risk Assessment in Virginia, 9 (May 2009). Current research reveals that there are certain factors in the risk assessment instrument that are weighed more heavily because they are more predictive of future behavior than others. For example, prior incarceration is often weighted higher than prior conviction. Having a pending charge is very predictive of failure to appear. The likelihood of a new arrest is more likely for those charged with drug offenses than theft offenses. Those charged with property offenses are more likely to not appear in court.

[255] Dr. Marie VanNostrand, Assessing Risk Among Pretrial Defendants in Virginia, 14 (Apr. 2003).

[256] Dr. Marie VanNostrand, Pretrial Risk Assessment in Virginia, 3 n. 3 (May 2009) (quoting National Institute of Justice, Pretrial Services Programs: Responsibilities and Potential, at 46 (Washington, D.C.: U.S. Department of Justice, Office of Federal Detention Trustee, 2009)). These percentages were 56% and 27% respectively. Id. It was further observed that "[f]orty-seven percent of programs that add subjective input to an objective instrument are jurisdictions with overcrowded jails." The ultimate pretrial release decision is a matter of judicial discretion which is not exclusively based upon objective factors reflected in an RAI. More specifically, this decision involves a judicial assessment of the nature and circumstances of the case and the weight of the evidence. See supra, discussion accompanying notes 209-211. However, an RAI can provide an objective starting point from which the court can embark on the required subjective assessments.

[257] See supra, section III(G)(1) (District of Columbia), III(G)(2) (Kentucky), III(G)(3) (Virginia), and III(I)(1) (New Jersey juveniles).

[258] Dr. Marie VanNostrand, Asssessing Risk Among Pretrial Defendants in Virginia, 17-18 (April 2003).

suspected offender and charged offense. The application of this offense and offender specific information to the risk assessment instrument provides an "individualized" assessment of risk.

To obtain this "individualized" information, pretrial services officers review the charging document and conduct computerized searches for criminal and bench warrant history.[259] Historically, pretrial services officers have also interviewed defendants to obtain information from them regarding employment and residence, and have sought to verify this information through independent sources.[260] A recent study examined whether a risk assessment instrument could include readily accessible factors pertaining solely to criminal charges and criminal history and eliminate demographic factors (such as employment, drug use, and residency) which require a costly and time consuming interview with the defendant.[261] In this study, the non-interview risk assessment was used to evaluate more than 190,000 defendants who had already been evaluated through the interview-based assessment. The results were that the non-interview risk assessment was just as predictive as the interview-based one.[262]

The methods used to collect the relevant information is a matter left to the discretion of the implementing jurisdiction. While the ongoing research suggests that defendant interviews will increase administrative costs, they may not increase predictive validity. Nevertheless, regardless of the method of acquisition utilized, this step requires that any risk factors applicable to the case and defendant must be identified to implement the risk-based approach.[263]

c. Apply this individualized information to the risk assessment instrument and determine a risk level

Once the corresponding point values are calculated, the aggregate point value determines the applicable risk level or risk score number.[264] This function is typically performed by a PSO.

By calculating the risk level, RAIs are designed to assist courts in crafting release conditions that reasonably assure that the defendant will neither flee nor reoffend.[265] Once

[259] Id. More recent research reveals that defendant interviews may not be necessary to perform a risk assessment as the variables may be obtained through reference to the court records. See Arnold research by Dr. VanNostrand.
[260] See, e.g., D.C. Code § 23-1303.
[261] See LJAF, Developing a National Model for Pretrial Risk Assessment, at 3 (Nov. 2013). These interviews are very labor intensive and are conducted under severe time limitations, as some jurisdictions require this assessment to be conducted no later than twenty-four hours after arrest. Due to these time constraints, which often preclude verification of this demographic information, this research examined whether this demographic information is sufficiently reliable to increase the predictive validity of the risk assessment instrument.
[262] See id.
[263] Dr. Marie VanNostrand, Assessing Risk Among Pretrial Defendants in Virginia, 17-19 (Apr. 2003).
[264] See DRTF Report, supra, note 212 at 17-19.

completed, the pretrial services officer forwards the RAI, together with any release condition recommendation, to the court.[266] The RAI does not attempt to address all factors relevant to release, such as the nature and circumstances of the case and the weight of the evidence.[267] These are determined by the court based upon information provided by the attorneys at the initial appearance.

d. To assist the court in managing this risk, provide the court with a continuum of release conditions that function as alternatives to pretrial detention

The fundamental challenges presented in pretrial release decision-making are: (1) identifying the risk of pretrial misconduct posed by individual defendants and (2) managing those risks. Steps 1 through 3 above address this first challenge. In order to address the second challenge, courts must be provided with "tools" to manage this risk.

A critical component of New Jersey's successful reduction in its juvenile detention population has been the development of a continuum of pre-adjudication alternatives to secure detention.[268] These detention alternatives include, for example, electronically monitored house arrest.[269] These alternatives are, in effect, nonmonetary release conditions that the ABA has recommended for decades because they provide an alternative to money bail, thereby lessening its adverse effect upon the poor.[270] Conditions can also be crafted to address the risk of community danger by imposing "reasonable restrictions on the activities, movements, and residences of the defendant."[271] The availability of such release conditions has also contributed to substantial reductions in the adult pretrial jail population in the District of Columbia, other states, and New Jersey juveniles (JDAI).[272] It is important to note that the Committee is not recommending the abolition of monetary conditions of bail. But it is anticipated that money bail will be imposed with far less frequency.

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[265] Id.
[266] Dr. Marie VanNostrand, Assessing Risk Among Pretrial Defendants in Virginia, 3, 21, 24 (Apr. 2003); 2007 ABA Standards, supra, note 13 § 10-1.10(b).
[267] Dr. Marie VanNostrand, Asssessing Risk Among Pretrial Defendants in Virginia, 1 (Apr. 2003).
[268] See supra, note 215 and accompanying text.
[269] Significantly, electronic monitoring is statutorily authorized for adult defendants in twenty-two states. See NCSL Report, supra, note 123 at 5-6.
[270] See supra, discussion accompanying notes 87-89 (quoting 1968 Standards, § 5.2).
[271] See 1968 ABA Standards, supra, note 50 § 5.2(iii). The inclusion of such nonmonetary conditions is presently authorized by Rule 3:26-1(a).
[272] See supra, section III(G)(1) (District of Columbia), III(G)(2) (Kentucky), III(G)(3) (Virginia), and III(I)(1) (New Jersey juveniles).

e. Preventively detain the limited group of defendants for whom there are no release conditions, or combination of conditions, which would reasonably assure the presence of the defendant and the safety of the community

At least 26 states, plus the District of Columbia, and the federal system have statutes or constitutional provisions authorizing detention without bail in non-capital cases.[273] These states expressly recognize that there are some defendants for whom no conditions or combination of conditions can reasonably assure either the safety of the community or court appearance.[274]

The imposition of preventive detention allows courts to address the second of the "dual system errors" inherent in a resource-based system.[275] More specifically, this error is the release of sufficiently affluent defendants who can afford to post bail, but who present unmanageable risks of pretrial misconduct.[276] In a risk-based system, these defendants may be preventively detained. The availability of preventive detention eliminates the incentive, inherent in any resource-based system, to address the unmanageable risks of such pretrial misconduct through the sub rosa consideration of danger in setting an unaffordably high money bail.[277] As eloquently synthesized by Judge Morrison, the availability of a "workable" preventive detention statute is essential to the decoupling of any perceived link between money and danger.[278]

f. For all other defendants, release them subject to least restrictive release conditions that correspond to their risk level

Once those defendants who present unmanageable risks of pretrial misconduct are identified and the preventive detention statute is applied, every other defendant is released pretrial in a risk-based system. This release is always conditional. Standard conditions contained within the judicial order authorizing pretrial release include obligations (i) to appear in court as required and (ii) to refrain from committing additional offenses while awaiting trial.[279] Thus, these standard conditions expressly prohibit the principal forms of pretrial misconduct.[280]

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[273] See PJI, supra, note 13 at 32. However, the predicate crimes eligible for detention and procedures applicable to a detention hearing vary by jurisdiction. Subject to constitutional limitations, the specifics of these detention statutes is a matter of legislative discretion.
[274] See id.
[275] See supra, text accompanying note 80.
[276] Id.
[277] See supra, discussion accompanying notes 175-176.
[278] Id. See supra, discussion accompanying notes 126-182 for evolution of "workable" detention statute in District of Columbia. Adoption of the other 8 interrelated steps would further contribute towards this "decoupling."
[279] See 2007 ABA Standards, § 10-5.2(a), 18 U.S.C. § 3142, D.C. Code § 23-1321.
[280] See supra, discussion in section III(A).

In addition to these standard conditions, courts may include conditions of release specifically crafted to address the risks of flight and danger presented by the individual defendant. Applying the preference for pretrial liberty, these conditions should be the least restrictive to reasonably address particular risks of pretrial misconduct. The risk level assists courts in crafting these release conditions.[281] For example, under the Virginia System, low-risk adult defendants (level 1) are released into the community with limited or no conditions pending trial.[282] The risk presented by moderate- and higher risk defendants (levels 2-4) is addressed through use of appropriate release conditions and community resources.[283] High-risk defendants (level 5) may be recommended for preventive detention which is available in Virginia.[284]

The prudent use of risk levels in the management of conditions enables courts to avoid "over-conditioning" defendants.[285] Such "over-conditioning" is inconsistent with the principle that pretrial release shall be subject to the least restrictive conditions that reasonably address the risks of pretrial misconduct. Moreover, recent research reveals that "over-conditioning" may actually increase the likelihood of certain pretrial misconduct by "low-risk" defendants.[286]

An objective risk assessment should be performed for defendants soon after they are housed in county jail. Defendants who post bail with their own resources, or with resources provided by family or friends, should have the opportunity to request that a risk assessment be done at a later time. The purpose of that risk assessment would be to seek to have non-monetary conditions imposed instead of monetary bail.

g. Supervise compliance with these release conditions

The ABA Advisory Committee cautions that "[t]he policy favoring pretrial release...is inextricably tied to explicit recognition of the need to supervise safely large numbers of

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[281] See DRTF Report, supra, note 212 at 17-19.
[282] See Dr. Marie VanNostrand, Pretrial Risk Assessment in Virginia, 4-5 (May 2009). Accord Vera Institute of Justice, Evidence-Based Practices in Pretrial Screening and Supervision, at 4.
[283] Dr. Marie VanNostrand, Pretrial Risk Assessment in Virginia, 4-5 (May 2009). Accord Vera Institute of Justice, Evidence-Based Practices in Pretrial Screening and Supervision, at 4. Depending upon the individual defendant's needs and the agency's available resources, conditions for higher-risk individuals may include more intensive supervision programs that require more frequent reporting with judiciary staff, drug tests, participation in substance abuse programs. See Vera Institute of Justice, Evidence-Based Practices in Pretrial Screening and Supervision, at 4. These conditions may also extend to more significant restrictions on the defendant's liberty, such as curfews, and electronically monitored house arrest. As previously noted, electronic monitoring is statutorily available in eleven states. See supra, note 217 and accompanying text.
[284] Dr. Marie VanNostrand, Pretrial Risk Assessment in Virginia, 4-5 (May 2009).
[285] See PJI, Issue Brief, Pretrial Risk Assessment 101: Science provides Guidance on Managing Defendants, at 2.
[286] See VanNostrand, at Rutgers; LJAF, Pretrial Criminal Justice Research, at 6.

defendants in the community pending adjudication of their cases. To be effective, these policies require sufficient informational and supervisory services."[287] Similarly, NAPSA emphasizes that the "monitoring and supervision of released defendants is a crucially important part of any pretrial release system."[288] Although varying by jurisdiction, these supervisory services typically include the following components:

> (1) Monitor the compliance of released defendants with assigned release conditions;
>
> (2) Promptly inform the court of facts concerning compliance or noncompliance that may warrant modification of release conditions and the possible arrest of a person released pending trial;
>
> (3) Recommend modifications of release conditions, consistent with court policy, when appropriate;
>
> (4) Maintain a record of the defendant's compliance with conditions of release;
>
> (5) Assist defendants released prior to trial in securing employment and in obtaining any necessary medical services, drug or mental health treatment, legal services, or other social services, which would increase the chances of successful compliance with conditions of pretrial release;
>
> (6) Notify released defendants of their court dates and when necessary assist them in attending court; and
>
> (7) Facilitate the return to court of defendants who fail to appear for their scheduled court dates.

In order to avoid the "disastrous" increases that accompanied the unsupervised release of defendants in the District of Columbia in 1966[289] and to achieve the modest public safety gains that accompanied the supervised release of juveniles under the JDAI,[290] compliance with release conditions must be monitored through community-based supervision.[291] "It is therefore critical that adequate resources be provided to ensure that defendants adhere to the conditions of their

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[287] 2007 ABA Standards, supra, note 13 § 10-1.9.
[288] See NAPSA Article at Standard 3.5(a).
[289] See supra, discussion accompanying notes 128-132.
[290] See supra, discussion accompanying notes 218-223.
[291] See 2007 ABA Standards, supra, note 13 at 53.

release."[292] This critical community-based supervision is provided by pretrial services officers.[293]

h. Progressively enforce compliance with release conditions, including revocation of release and remand into pretrial detention, if appropriate

In a risk-based system, those defendants who present an unmanageable risk of pretrial misconduct may be detained. Every other defendant is conditionally released, subject to the least restrictive conditions crafted to address their individualized risks of flight and danger. The effectiveness of conditions in protecting the public is dependent upon a defendant's compliance with these conditions.[294] The Committee has previously concluded that New Jersey's present resource-based system is ill-equipped to address risks of community danger due, in part, to its lack of any mechanism or procedure to address noncompliance with conditions and the lack of resources to do so. Defendants' compliance with these conditions is dependent upon effective mechanisms to enforce compliance.[295] The Pretrial Justice Institute has observed that "for release conditions to be meaningful there must be a system to address the violations. Such a system will include administrative sanctions (i.e. increasing contact levels) for minor or first time violations, [and] a notification to the court for more serious or ongoing violations."[296] This initial reliance upon administrative sanctions is yet another manifestation of a risk-based system's preference for pretrial liberty. However, in the event that these progressively enforced administrative sanctions are unsuccessful in securing a defendant's compliance, then the revocation of release and remand back into custody may be appropriate.[297]

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[292] Id. Accord A.G. Report supra, note 68 at xiv, 83, 85-86 (effective fact finding and supervision requires adequate staff and budget).

[293] 2007 ABA Standards, supra, note 13 at 33 (citing John Clark & D. Alan Henry, Pretrial Services Programming at the Start of the 21st Century: A survey of Pretrial Services Programs, at 2 (Washington, D.C.: Bureau of Justice Assistance, 2003); see also 2007 ABA Standards, supra, note 13 § 10-1.10(a) (PSO should monitor, supervise, and assist defendants prior to trial).

[294] See supra, discussion accompanying notes 192-194.

[295] Id.

[296] Pretrial Justice Institute, Pretrial Services Program Implementation: A Starter Kit. The development of appropriate responses to violations is a critical component of supervisory function provided by pretrial services officers. programs. See Vera Institute of Justice, Evidence-Based Practices in Pretrial Screening and Supervision, at 7. This requires finding the appropriate balance between reporting every small violation to the court and failing to take appropriate action when noncompliance may have serious consequences. Id.

[297] See 18 U.S.C. § 3158; 2007 ABA Standards, supra, note 13 § 10-5.6(c).

i. Procedures for detention and compliance enforcement shall be both sufficient to protect defendant's constitutional rights and "workable" to avoid overburdening the criminal justice system.

Each defendant awaiting trial has a liberty interest in pretrial freedom which is protected by constitutional guarantees of due process.[298] Accordingly, both preventive detention and pretrial release revocation may be imposed only through procedures that comply with due process guarantees.[299] Implementing statutes may include more elaborate procedures designed to minimize the possibility of detention for defendants posing manageable risks of pretrial misconduct or to advance other policy objectives.[300] While more elaborate procedures may promote legitimate objectives, they may also place additional demands upon an already strained criminal justice system. They may also detract from the enforcement mechanisms' overall effectiveness in addressing the risks of pretrial misconduct. Inclusion of such procedures is a policy matter committed to the legislative and executive branches of our government and is beyond the scope of the Committee's mandate.

It is submitted that the inextricably intertwined nature of each of these steps has been explained.[301] Similarly, the central role of pretrial services officers in the implementation of the risk-based approach recommended has been described.[302] It is further submitted that the Committee's recommendation to shift to a risk-based system is supported by the following findings:

(a) Application of a risk-based system promotes the defendant's liberty interests because it decreases the adverse effect on the poor that arises from the current resource-based system.[303]

(b) If properly designed, funded and implemented, application of a risk-based system promotes the defendant's liberty interests because it results in a significant reduction in the population of pretrial detainees without an increase in pretrial misconduct.[304]

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[298] U.S. Const. amends. V and XIV. While due process language does not appear within the New Jersey Constitution, its protections are a "natural and unalienable right" guaranteed by art. I, ¶ I.

[299] See United States v. Salerno, 481 U.S. 739 (1987) (federal Bail Reform Act of 1984 complies with Due Process Clause.). See Edwards, 430 A.2d 1321 (D.C. App. 1981) (1970 District of Columbia detention statute complies with due process).

[300] See supra, discussion accompanying notes 140-155 regarding the inclusion of heightened burdens of persuasion in the 1970 District of Columbia detention statute. See also supra, discussion accompanying notes 156-165 recommending development of "workable" procedures.

[301] See supra, note 240 and accompanying text.

[302] See supra, discussion accompanying notes 263-267.

[303] See supra, discussion accompanying notes 82-101.

(c) Application of a risk-based system promotes both defendant's liberty interests and community safety because it addresses the dual system error inherent in our present resource-based system, namely the detention of poor defendants who present manageable risks of pretrial misconduct and the release of more affluent defendants who present more severe and frequently less manageable risks of pretrial misconduct. In a risk-based system, the former are released, often subject to nonfinancial conditions, and the latter who pose unmanageable risks are detained.[305]

(d) Application of a risk-based system is more fair to the defendant because assessment of risk level is based upon objective factors (e.g., offense charged; prior criminal record; prior court appearance record; and present status on parole, probation or pretrial release) which are unrelated to indigency, race or ethnicity.[306]

(e) Application of a risk-based system promotes the safety of the community because it expressly permits courts to consider the danger a defendant poses to the community in determining the conditions of the defendant's pretrial release and deciding whether to preventively detain him or her in the event that the Court determines than no such conditions will reasonably assure community safety.[307]

(f) Application of a risk-based system promotes public confidence in the integrity of the judicial process because it is a transparent process. The reasons for pretrial decision-making, based on risk of flight and community safety, are set forth on the record, in open court, and subject to appellate review. This transparency favorably contrasts with sub rosa consideration of danger in setting high money bails for dangerous defendants, thereby imposing a de facto form of preventive detention.[308]

(g) Application of a risk-based system has the potential to reduce taxpayer costs as the system reallocates resources away from housing defendants pretrial in county jails to supervising them in the community. It costs much more to incarcerate than to supervise defendants.[309]

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[304] See supra, note 218 and accompanying text.
[305] See supra, notes 80-81 and accompanying text.
[306] See supra, discussion in section III(A).
[307] See supra, discussion accompanying notes 205-206.
[308] See supra, note 175 and accompanying text.
[309] See supra, notes 229-231 and accompanying text.

J. CONCLUSION

The Committee unanimously recommends systemic change to a risk-based system of pretrial release. Implementation of this recommendation will require constitutional and statutory amendments to several of our statutes. It will require a significant allocation of resources. While there will be savings in costs for housing defendants in jail at the county level, there will be significant costs incurred at the State level to supervise defendants in the community and be able to more quickly resolve their cases in court. While the work ahead may be substantial, the potential societal benefits are enormous. When properly funded, staffed, and implemented, we believe the proposed risk-based system is fully capable of promoting a society that is freer, fairer, and safer.

IV. SPEEDY TRIAL

A. RIGHT TO A SPEEDY TRIAL

The Sixth Amendment of the United States Constitution guarantees the defendant a right to a speedy trial. In Barker v. Wingo, 407 U.S. 514, 522 (1972), the United States Supreme Court noted

> [t]he right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.
> [Id. at 519.]

Defendants suffer when they are incarcerated before trial. When incarcerated for even short periods of time, defendants risk losing their only method of support (whether that is a job or public benefits), are frequently unable to access the medications they need to maintain their physical and mental health, and face significant barriers to maintaining contact with their families. This disadvantage has been acknowledged by the U.S. Supreme Court:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.
> [Barker, supra, 407 U.S. at 532-33.]

The Court also recognized that as a result of their inability to prepare a defense and their desire to be released from jail, individuals subject to pretrial detention are more likely to plead guilty than those who are released pretrial. See Barker, supra, 407 U.S. at 533 n.35 (citing Wald, Pretrial Detention and Ultimate Freedom: A Statistical Study, 39 N.Y.U. L. Rev. 631 (1964)); see also Joseph Lester, Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail, 32 N. Ky. L. Rev. 1, 50 (2005) ("A person in jail is more likely to accept a plea bargain to end his time in jail, especially if probation is offered, than is a person who is out on bail. The same pressures do not apply to a released defendant as to one who is incarcerated."); John Clark

and D. Alan Henry, The Pretrial Release Decision, Judicature, 76-81 (1997) (finding that defendants who were detained before trial were more likely to plead guilty, were convicted more often, and were more likely to receive a prison sentence than defendants who were released before trial).

Other interests are also implicated by pretrial delays. With the passage of time, witnesses' memories fade and evidence may be lost. Also, victims of crime are left to wait longer for cases to be resolved.

In Barker, the Court declined to announce a bright-line rule that required a criminal defendant to be offered a trial within a specified time period. Barker, supra, 407 U.S. at 522. The Court concluded that doing so "would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts." Id. at 523. However, the Court observed as follows:

> We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.
> [Ibid.]

In response to Barker's suggestion for legislative attention, Congress enacted the federal Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174. The Speedy Trial Act generally requires a trial to begin within 70 days of the filing of an information or indictment or the defendant's initial appearance. 18 U.S.C. § 3161(c)(1). But the Act recognizes that federal criminal cases can vary widely and that there may be valid reasons for greater delay in particular cases. To provide the necessary flexibility, the Act includes a detailed list of periods of delay that are excluded in computing the time within which trial must start. 18 U.S.C. § 3161(h).

Thirty-eight states have adopted either a statute or rule defining the right, including the time within which a defendant shall be tried and when the time commences to run. The most common format is a specifically prescribed time period triggered by commencement of the action qualified by a series of exclusions due to delay that the legislative authority deems excusable (such as the pendency of another proceeding, pretrial motions, or time needed to examine the defendant).

In contrast, New Jersey does not have a statute or court rule setting forth a definite time period for how long after arrest the State must bring a defendant to trial. However, the Court has adopted the four-prong analysis test set forth in Barker, supra, for speedy trial claims. See State v. Szima, 70 N.J. 196, 200-01 (1976); see also Cahill, supra, 213 N.J. at 253. The four factors in Barker are (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right; and (4) prejudice to the defendant. See Cahill, supra, 213 N.J. at 270. Due to the lack of a specified time period, courts must engage in a balancing process, subject to the specific facts and circumstances of each case.

While the New Jersey Supreme Court has steadfastly declined to adopt a rigid bright-line try or dismiss rule, it has explained that

> [i]n addition to the Barker analysis, this Court has adopted rules governing the prompt disposition of criminal charges without resorting to a specific deadline. See Rule 3:25-2; Rule 3:25-3. Rule 3:25-2 permits a defendant who has remained in custody after indictment for at least ninety consecutive days to move for a trial date. Rule 3:25-3 permits dismissal for an unreasonable delay in presenting a charge to a grand jury or in filing an accusation against a defendant who has been held on a complaint. Rule 7:8-5 restates the speedy trial principles of Rule 3:25-3 for use in municipal court. We have declined, however, to fix a date certain after which prejudice is presumed or the complaint or indictment must be dismissed, preferring instead to evaluate each claim of denial of a speedy trial on a case-by-case basis.
> [Cahill, supra, 213 N.J. at 269.]

B. HISTORY OF THE SPEEDY TRIAL PROGRAM IN NEW JERSEY

The concept of "speedy trial" is not a new concept in New Jersey. The modern history of the Judiciary's commitment to speedy trial over the last 25 years is replete with Supreme Court Committees whose goals were to reduce the time it takes to dispose of cases, via plea or trial, without compromising the quality of justice provided.

In April 1971, a joint Supreme Court and New Jersey State Bar Association Committee was formed to deal with tremendous increases in the number of criminal cases. The joint committee issued a report containing a series of recommendations entitled Report of the Joint New Jersey Supreme Court and the New Jersey State Bar Association Committee on Expedition of the Criminal Calendar.

In early 1980, the Statewide Advisory Committee on Delay Reduction and Task Force on Speedy Trial issued the Report of the Supreme Court Task Force on Speedy Trial. Thereafter, the Supreme Court announced time goals for disposition of criminal cases and ordered counties to create planning groups to develop a plan to meet the goals.[310] In January 1981, the Chief Justice entered an order suspending the court rules to allow practices and procedures contained in county plans that had been approved by the Supreme Court.[311]

The Supreme Court adopted time goals for disposition of criminal cases, effective January 1, 1981. The goals were meant to act as guidelines for case flow and were intended to create a set of expectations for routine cases only. Complex cases would take longer and would be scheduled on a case-by-case basis according to individual need. The time goals were to be phased in over three years. Cases in which the defendant was in jail were to be given priority.

While considerable progress was made in reducing both backlog and case processing time, the ultimate goals could not be reached in 1983. A review of the Speedy Trial program led to the recommendation, still in effect today, that the time goals remain in effect indefinitely. Those goals are 60 days from arrest to indictment and 120 days from indictment to disposition.[312]

In 1986, the Supreme Court Task Force on Speedy Trial issued its report entitled Report of the Task Force on Speedy Trial 1980-1986, which contained a series of standards pertaining to case management, time goals, case initiation, first appearances, prosecutorial screening, pretrial intervention and early case disposition, arraignments, pretrial conferences, plea dispositions, firm trial lists, sentencing and backlog reduction. Many of those standards were subsequently adopted as Criminal Division Operating Standards in 1992.

In 1991, the Special Committee to Assess Criminal Division Needs issued a Report recommending, among other things, additional judges and implementing a ratio of two public defenders and prosecutors for each judge. The report also recommended setting a dispositional goal of 500 cases per court.

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[310] See Memorandum from Robert D. Lipscher to the Statewide Advisory Committee on Delay Reduction dated July 9, 1980.

[311] See Supreme Court Order dated January 2, 1981.

[312] Over the years, there have been some refinements to the original goals. For instance, time periods during which the case is not in active prosecution are not counted, e.g., defendant's enrollment in the pretrial intervention program or if he or she is a fugitive. In addition, since 1980, while there has always been a goal to move jail cases more quickly than bail cases, it has become common practice to apply the 120-day goal to all cases.

In 1992, the Supreme Court approved the Standards for the Operation of the New Jersey Criminal Division of Superior Court, hereinafter Operating Standards, to reduce backlog. The Operating Standards provided a framework for case processing in the Criminal Division.

In 1995, after the case processing principles set forth in the Operating Standards had been in operation for three years, the Supreme Court, upon recommendation of the Criminal Practice Committee, adopted amendments to Part III of the Rules Governing the Courts, hereinafter Rule Amendments. The Rule Amendments were intended to codify the practices that had been embodied in the Operating Standards. The Rule Amendments set forth a detailed process for handling cases from inception to conclusion. See Pressler, Current N.J. Court Rules, comments to Rules 3:2-1, 3:9-1, 3:9-3(g), and 3:13-3 (1996).

In 2007, the Conference of Criminal Presiding Judges reviewed the post-indictment backlog goal, recognizing that it had been more than 25 years since the goals were established and numerous changes had been enacted that greatly increased both the penal and collateral consequences of criminal convictions. As a result, the Conference noted the following changes in practice that have slowed the case process:

(1) As a result of increases in penalties, plea agreements involving lengthy sentences are difficult to achieve at the early stages of litigation;

(2) Drug cases that were once routine are no longer routine because of school zone and public property enhanced sentences;

(3) It has also become increasingly difficult to secure plea agreements involving sexual offenses because of Megan's Law, parole supervision for life, and possible civil commitment under the Sexually Violent Predator Act after service of a lengthy prison term;

(4) As a result of enhanced enforcement of federal immigration laws, even the simplest State criminal cases are now often delayed because of the potential impact on citizenship applications and or the risk of deportation after conviction;

(5) More severe penalties and the "scarlet letter" consequences of sexual assault convictions have caused criminal defense litigation to become more aggressive;

(6) The pretrial motion practice has increased dramatically;

(7) The courts are increasingly forced to deal with pro se motions and demands even though defendants are represented by counsel;

(8) In public defender cases, inordinate delays result from the reported severe lack of investigative resources. The simple interview of two witnesses can sideline movement of a case up to six weeks or more;

(9) Use of expert witnesses to dispute scientific evidence and to address mental health issues has increased. Public Defender cases are also delayed because of the centralized approval needed to retain expensive expert witnesses and services;

(10) DNA and other forensic evidence can delay a case for six to nine months while results from testing are pending;

(11) More aggressive law enforcement techniques; i.e., electronic surveillance; multi-agency cooperative investigations; have increased the number of multi-defendant indictments which by their nature are difficult to dispose of by way of negotiated pleas;

(12) Increased use of interpreters has lengthened many court proceedings;

(13) Applications for Pre Trial Intervention and Drug Court and the subsequent appeals from the rejections of these applications have added considerable delay to the early stages of case management;

(14) Drug Court in particular has changed the criminal process since the majority of counties found it necessary to assign an existing criminal court judge to Drug Court, thereby effectively reducing the judges available for trials and other duties.

Many of the above concerns apply with equal force today.

C. PRE-INDICTMENT REPORT

1. Introduction and Guiding Principles

The goal of this report is to craft proposals that will reduce the amount of time between arrest and indictment. In pursuing that goal, the Committee was guided by the following principles and limitations: (1) the proposals could not unduly burden the resources of the courts, prosecutors, or defense counsel; (2) the proposals could not conflict with, or be incompatible with, existing court rules and structures; (3) no proposal shall be designed to confer tactical advantage on prosecutors or defense counsel; (4) the proposals should not merely push delay from pre-indictment to post-indictment; (5) the proposals must take account of and, to the extent possible, be coordinated with the proposals contained in the Bail and Post-Indictment Reports; and (6) all proposals must be accompanied by appropriate allocation of funding, personnel and resources.

2. Recommendations

a. Background and rationale

The Committee is making two overarching recommendations: (1) adoption of a comprehensive proposal requiring indictment within certain prescribed time limits after the issuance of a complaint (hereinafter, "speedy indictment proposals"), and (2) adoption of new rules governing the initial appearance after the issuance of a complaint or arrest, designed to promote speedy appointment of counsel and, where possible, early disposition.

b. Speedy Indictment

i. Introduction

The Committee has reached a unanimous consensus that some form of speedy indictment system is necessary, and that speedy indictment requirements would substantially promote the core goal of moving cases from arrest to indictment more quickly. New Jersey currently has no statute requiring indictment of cases within any set number of days after arrest. The federal system, by contrast, requires indictment within 20 or 30 days of arrest (depending on whether a defendant is incarcerated), subject to extensions by consent of the parties.

Rule 3:25-3 is designed to provide relief when there has been an unreasonable delay in presenting a charge to a grand jury. The rule, however, has proven to be ineffective. The Supreme Court's recommended time parameter for indictment, which labels cases in "backlog" if they are not indicted within 60 days of arrest, also has been used to promote speedy

indictment. While a court or a prosecutor might be somewhat motivated to avoid the "backlog" label, no meaningful consequences attach to "backlog" status. Indeed, the "backlog" goal, standing alone, does little to push cases to indictment. While the statistics vary month-to-month and county-to-county, AOC data generally shows that it takes an average of approximately 120 days for a case to move from issuance of an indictable complaint to indictment in New Jersey (although it takes approximately 30 days on average for a case to move from issuance of an indictable complaint to pre-indictment disposition).

The Committee has crafted a speedy indictment proposal that would expedite indictment without producing unjust results or imposing undue burdens on the courts, prosecutors, or defendants. Speedy indictment of defendants will create benefits for all interested parties. Speedy indictment will help courts relieve backlog and move cases towards trial. Speedy indictment similarly will promote efficient use of prosecutorial resources, and will keep cases from stagnating (which usually inures to the detriment of the prosecution, as witnesses' memories fade). And speedy indictment will promote the defendant's right to have his case heard and disposed of as quickly as possible -- particularly defendants who are incarcerated before trial. Further, speedy indictment will have spillover benefits for other facets of the criminal justice system. For example, the more quickly defendants are indicted, the more quickly cases will move to trial, thereby relieving at least to some extent overpopulation of county jails by pre-trial detainees.

With these principles in mind, the Committee recommends a speedy indictment system with the following fundamental features.

RECOMMENDATION 10. A speedy indictment proposal should provide time limits that state when a defendant must be indicted: (1) defendants held in custody must be indicted within 90 days of arrest; and (2) defendants not in custody must be indicted within 180 days of the issuance of a complaint or arrest. The maximum time from complaint to indictment shall not exceed 180 days.

The Committee recommends limits of 90 days from arrest to indictment for defendants who remain in custody after arrest, and 180 days from complaint to indictment for defendants who have been released before trial. Both limits would be subject to certain exclusions of time, discussed below. As discussed above, AOC data shows that the average case in New Jersey takes approximately 120 days from complaint to indictment. This recommendation will ensure

that, except in circumstances requiring exclusion of time, the new maximum from arrest to indictment will be 90 days in cases in which the defendant remains in jail after arrest, and 180 days in cases in which the defendant has made bail.

The Committee further recommends that, except for exclusions of time, the maximum time from complaint to indictment shall not exceed 180 days. So for example, in cases in which the defendant makes bail or is otherwise released after spending a period of time in jail, the State would not have an *additional* 180 days after the defendant's release to obtain an indictment. Rather, the State would be required to obtain an indictment within the 180-day period that began when the defendant was arrested on that charge.

These limits undoubtedly will place pressure on prosecutors to move cases promptly to indictment. The Committee's view is that prosecutors can and should make necessary internal adjustments to meet these deadlines (plus exclusions of time where necessary and appropriate, as discussed below). Among other things, prosecutors should explore and develop procedures for obtaining police reports and other discovery promptly, and for screening cases more efficiently. The Committee also recognizes that these limits, if adopted, will require development of a tracking mechanism to monitor compliance.

RECOMMENDATION 11. A speedy indictment or trial proposal should provide for exclusion of time in appropriate circumstances.

The Committee recommends that the speedy indictment clock be subject to certain categories of excluded time. Examples of potential categories of excludable time might include some or all of the following: (1) where both parties consent; (2) at the defendant's request; (3) on the prosecutor's request, if a case is shown to be uncommonly large or complex; (4) where a material witness or other evidence is unavoidably unavailable, with a reasonable expectation that that witness or evidence will become available; (5) where a defendant has filed a pending motion for PTI or admission to drug court; (6) during the pendency of competency hearings; (7) while a defendant is unavailable (due to incarceration on another case or otherwise), incapacitated or incompetent to stand trial; or (8) other periods of delay not specifically enumerated but only if the court finds good cause.

These potential exclusions provide necessary flexibility where the circumstances truly require an extension of time, or where the parties or the court require such an extension in the interests of justice. At the same time, the exclusions should be carefully delimited to prevent the

exclusions from swallowing the rule and rendering any time limit a mere formality.

RECOMMENDATION 12. Speedy indictment and trial provisions should apply to all defendants.

The Committee recommends that any pre-indictment speedy trial provisions be applicable to all defendants. While the Committee unanimously agrees that incarcerated defendants should be the priority under any speedy trial system, a majority of the Committee believes that any speedy trial law should also apply to defendants who are released before trial because their liberty is also curtailed. Conditions of release can, for example, bar defendants from entering their homes; forbid them from contacting their spouses, children or other family members; or prohibit them from associating with friends or frequenting certain businesses. Other conditions may ban or severely limit travel; impose a curfew; or require the defendant's participation in an electronic monitoring program. The Committee believes that these defendants also have a right to have their cases resolved expeditiously, and should not have complaints hanging over their heads indefinitely. Also, because the vast majority of criminal defendants are not incarcerated pretrial, any proposal to limit speedy trial requirements to incarcerated defendants would only affect a small percentage of cases. Finally, the Committee notes that it is recommending moving towards a system of conditional pretrial release, in which more defendants would be released pending trial and fewer would remain incarcerated. If that proposal is implemented, the pool of incarcerated defendants would become even smaller, and any rules that applied only to incarcerated defendants would have an even smaller impact on the criminal justice system. Consequently, the Committee believes that speedy trial provisions should apply to all defendants, not just those who remain incarcerated pending trial.

RECOMMENDATION 13. The remedy for failure to indict within the required time frames should be: (1) release from confinement for incarcerated defendants held for a total of 90 days; and (2) dismissal of the complaint without prejudice for all defendants if not indicted within 180 days of issuance of a complaint.

The Committee agrees that the remedy for a failure to indict within the required time frames must be sufficiently severe to spur compliance. Therefore, the Committee recommends that the remedy for failure to indict any defendant who has been incarcerated for 90 days should be release of the defendant from incarceration. This remedy would apply whether a defendant has been incarcerated for 90 continuous days or for a total of 90 non-continuous days.

Regardless, once a defendant reaches his 90th day of pre-indictment incarceration on that charge (subject to exclusions of time), that defendant would be released. This remedy will provide prosecutors with a substantial incentive to indict within the required time frame. Experience in the federal system teaches that prosecuting offices will, as a rule, require that incarcerated defendants be indicted within required time limits in order to prevent a defendant's release. Consequently, the Committee believes that, given the potential remedy, New Jersey prosecutorial agencies will similarly adopt internal policies requiring that all incarcerated defendants be indicted within the set time limits to prevent the release of even a single incarcerated defendant.

The Committee also recommends that the remedy for a failure to indict any defendant, incarcerated or released, within 180 days should be dismissal of the complaint without prejudice. The Committee believes that this remedy also will provide prosecutors with sufficient incentive to indict applicable cases within the required time frame. The Committee is also confident that, as noted above, prosecuting agencies will develop internal policies to ensure compliance with the 180-day time frame and avoid having complaints dismissed. Dismissal without prejudice does not prevent a prosecutor from refiling a charge. The Committee notes that there are a number of counties that already employ the practice of dismissing cases without prejudice in cases that have gone over speedy trial goals

RECOMMENDATION 15. Any speedy indictment and trial proposal should be implemented and adopted by legislation.

The Committee recommends that the proposed speedy indictment system be implemented by legislation. Given that the proposal would impact fundamental rights of defendants, and would carry significant implications for allocation of judicial and prosecutorial resources, the Committee recommends enlisting legislative support for and passage of this proposal. The Committee further recognizes that a proposed speedy indictment system necessarily would impact, and be impacted by, proposed bail reform and post-indictment measures, and would impact all three branches of state government. As part of the legislative process, stakeholders would have an opportunity to explain the additional costs associated with implementing this reform. Further, the Committee stresses that any such legislative adoption must be accompanied by necessary funding and allocation of resources.

A dissent on this recommendation is contained at page 109.

c. First appearance and expansion of Central Judicial Processing

The Committee has reached a strong consensus that it often takes too long for indigent defendants to apply for counsel, and for courts to assign counsel to such defendants. In many instances, defendants are given a 5A form -- which is used to determine whether a defendant is indigent and thus eligible for representation by the Public Defender -- at their first court appearance. However, they do not actually have counsel appointed until a subsequent court appearance, which often occurs weeks (or months) after the initial appearance. This gap in the system contributes to pre-indictment delay. During the time that a charged defendant does not have counsel, that defendant cannot meaningfully review discovery or engage in plea negotiations. In short, every day a defendant is without representation is a day of unnecessary pre-indictment delay. Further, in multiple defendant cases, even where some of the defendants have retained counsel, the entire case often will be delayed until all defendants have counsel, including indigent defendants who need 5A representation.

The Committee has studied programs designed to facilitate early appointment of counsel. For example, in April 2013, the Atlantic and Cape May County Municipal Courts began a "5A Pilot Program" designed to speed the appointment of counsel to indigent defendants. Under the 5A Pilot Program, defendants making their first appearances in Municipal Courts received written notices to appear the following week in Superior Court for appointment of counsel. Approximately 12% of defendants who received the 5A notices in Municipal Court appeared in Superior Court the following week for appointment of counsel. While the Atlantic/Cape May vicinage found these results somewhat disappointing, 12% is nonetheless better than the status quo (0%). The Committee has considered potential ways to spread the 5A Pilot Program to other counties, and/or to generate higher rates of compliance within the Program. For example, the original 5A Pilot Program in Atlantic and Cape May Counties required defendants to return to a different courthouse during the week after their first appearance in Municipal Court. The Program likely would generate far better results if defendants could be assigned counsel on the same day, and in the same courthouse, as the first appearance.

Incorporating some of the lessons of the Atlantic/Cape May 5A Pilot Program, the Committee sees substantial promise in the expansion of the principles behind Central Judicial Processing ("CJP"). The fundamental features of the proposed Rule revisions are discussed below.

RECOMMENDATION 16. All first appearances for indictable offenses should be made at a Superior Court building or other centralized location, before a judge designated by the Assignment Judge.

This recommendation is consistent with current Supreme Court policy. On April 29, 2013, Chief Justice Rabner issued an Order relaxing and supplementing the provisions of Rule 3:26-2 to permit a Municipal Court judge to set bail in all cases, except for homicides and extradition proceedings, when the Assignment Judge has assigned that judge to preside over a formalized vicinage first appearance court, including a CJP court. That Order superseded the previous relaxation Order, issued on October 25, 1993, which limited that authorization to Municipal Court Presiding Judges. This matter has since been forwarded to the Criminal Practice and Municipal Court Practice Committees to consider rule amendments that would preclude the need for a long-term relaxation order.

It is the Committee's understanding that Chief Justice Rabner's Order was intended to provide Assignment Judges with more flexibility in assigning judges to preside over CJP or similar first appearance courts. The Committee also understands that in a number of vicinages, CJP is held in a designated Municipal Court building, rather than in a Superior Court facility. This recommendation therefore recognizes that there must be sufficient flexibility to allow Assignment Judges to implement CJP in a manner that makes the best use of vicinage resources.

RECOMMENDATION 17. The first appearance should be held (1) within 72 hours of arrest for incarcerated defendants, and (2) after the prosecutor has screened the case, but no more than 60 days after arrest or issuance of a summons, for non-incarcerated defendants.

In Recommendation 19, the Committee recommends that prosecutors be required to inform the court and defendant of their screening decisions at the defendant's first appearance. This recommendation is designed to provide prosecutors with sufficient time before the defendant's first appearance to make their screening decisions. In cases in which the defendant is incarcerated, the first appearance, pursuant to Rule 3:4-2, currently must be held within 72 hours of arrest. This recommendation would not change that requirement. For non-incarcerated defendants, Rule 3:4-2 currently requires that first appearances be held "[w]ithout unnecessary delay." This recommendation would require that first appearances for these defendants, who generally face less serious changes and are therefore more likely to have their initial charges downgraded or dismissed, be held within 60 days after arrest or the issuance of a summons. The

Committee believes that requiring first appearances to be held much earlier in these cases would result in the waste of time and resources, particularly the time spent reviewing and processing 5A applications for Public Defender representation, if the case is subsequently downgraded or dismissed. AOC data shows that of the 108,456 indictable complaints resolved during court year 2013, 56,149 (approximately 52%) resulted in either downgrade (41%) or dismissal (11%). It is the Committee's intent that by allowing prosecutors ample time to screen certain cases, the overwhelming majority of these cases will be screened out before the defendant's first appearance, thus precluding the need to devote judicial staff and resources to reviewing and processing 5A applications in those cases.

RECOMMENDATION 18. At the first appearance, the court shall provide to the defendant a 5A form, which the defendant (if then unrepresented) shall complete and submit at that time, and which the court shall process immediately.

As discussed above, a primary lesson from the 5A pilot program is that defendants are far more likely to complete and file a 5A form if that form is provided to them at the same time, and in the same location, as the initial appearance. It is largely a matter of common sense: if the system requires a defendant to come back to a different building, at a different date, in order to fill out and file a 5A form, then far fewer defendants are likely to complete the form in a timely manner, if at all. By making the 5A form available -- and indeed requiring its completion and filing at the time and place of the first appearance -- this recommendation will significantly promote the speedy assignment of counsel which, in turn, will facilitate pre-trial negotiation and potential disposition. Streamlining the process for appointment of counsel will jumpstart the pre-indictment process, in particular any negotiations for pre-indictment disposition.

Where a defendant has retained counsel, and where that defendant is not incarcerated, that defendant and his counsel may elect to waive the first appearance.

RECOMMENDATION 19. At the first appearance, the prosecutor must inform the court of a screening decision.

This recommendation is designed to require prosecutors to inform the court and defendant of screening decisions at the defendant's first appearance, which will promote prompt case review and, where appropriate, will facilitate downgrades and dismissals earlier in the process. As noted above, where the defendant is incarcerated, the first appearance is to be held within 72 hours of arrest. This is consistent with the Committee's position that incarcerated

defendants must be the priority under any speedy trial procedures. For non-incarcerated defendants, the first appearance would occur no more than 60 days after arrest or the issuance of a summons. Prosecutors therefore must inform the court and the defendant of screening decisions within these time frames.

The Committee notes that more efficient and more accurate prosecutorial case screening will reduce pre-indictment delay, and will promote the same goals as the proposed revisions to Rule 3:4-2, discussed above. First, if prosecutors screen cases more quickly, then pre-indictment delay will be reduced. Further, if prosecutors screen cases more accurately, then problematic cases will be weeded out and dismissed within the first few days after arrest, rather than lingering for months before indictment or dismissal. Case screening processes vary widely county-to-county. Some counties -- notably Somerset -- require that all cases be screened by a prosecutor prior to charging. Since 1980, Somerset County has operated under a pre-complaint screening procedure which was part of a special pilot program approved by the Supreme Court. In addition, since the inception of that program, Municipal Courts in Somerset County do not receive indictable complaints, set bail, or conduct arraignments or any other proceedings in indictable cases. As a result, Somerset County has the shortest time between arrest and indictment of any county in the state, and the lowest "fallout rate" of downgrades and dismissals. The Committee recognizes that case screening procedures are not one-size-fits-all, and that case screening procedures are deeply ingrained and particularly localized by county. The Committee recommends that prosecutors need to explore and aggressively pursue new methods to promote more efficient case screening. Adoption of the recommended proposals will expedite and catalyze such efforts at reforming and improving prosecutorial case screening practices.

RECOMMENDATION 20. At the first appearance, the judge must inform the defendant about the PTI program and the Drug Court program.

To the extent a defendant is eligible for diversionary programs like PTI or Drug Court, it is in the interests of all parties for defendants to be informed about these programs as early as possible. The earlier a defendant applies for and is accepted into such programs, the less systemic waste of time and resources. This recommendation would amend Rule 3:4-2(b)(6), which currently requires judges to notify defendants about PTI at the first appearance, to require that judges also inform defendants about Drug Court at that time.

RECOMMENDATION 21. In order to facilitate early case management and disposition, every county must develop a pre-indictment program approved by the Supreme Court. The purpose of the program shall be for the parties to discuss and/or finalize any pre-indictment disposition.

This recommendation would require that every county create and implement a pre-indictment program. Currently, most, but not all, counties have such programs. The Assignment Judges of each vicinage would be required to submit outlines of their pre-indictment programs to the Supreme Court for approval.

Prompt pre-indictment dispositions serve the interests of all. This recommendation is designed to bring all interested parties together -- physically, at the courthouse -- for the specific purpose of discussing and considering pre-indictment disposition in appropriate cases. For every pre-indictment disposition, there will be one less case proceeding to indictment and causing backlog between indictment and trial. The Committee recommends that the initial conference be staffed by experienced judges, prosecutors, and defense lawyers to promote early disposition of cases whenever possible.

A concurring statement on this recommendation is contained at page 108.

d. Conclusion

The Committee recommends adoption of the proposals described above. First, the Committee recommends adoption of a robust speedy indictment system, which will move cases from complaint to indictment more quickly, without compromising the rights of or overburdening courts, prosecutors, defense lawyers, or defendants. Second, the Committee recommends adoption of the first appearance rules described above, which are designed to ensure that first appearances after arrest become meaningful opportunities for appointment of counsel and for movement towards early disposition of cases. The Committee believes that these recommendations -- particularly if adopted together -- will promote and improve the efficiency and fairness of our criminal justice system.

D. POST-INDICTMENT REPORT

1. Introduction and Guiding Principles

The Committee's charge was to identify points in the post-indictment process where delays occur and recommend solutions for problem areas. The Committee thoroughly reviewed the post-indictment process and identified some aspects of current pretrial procedure that are not functioning as originally envisioned. The Committee discussed the various points in the process where obstacles to movement of cases appear most often and where the Committee believed changes should be made. As a result, the Committee proposes a number of recommendations revising pretrial case management procedures in the criminal justice system. One of the goals is the setting of a meaningful trial date much earlier in the process than occurs now. We acknowledge that many of the proposed revisions will require a change in the culture and mindset of all parties.

2. Recommendations

a. Speedy Trial Provisions

RECOMMENDATION 14. A speedy trial provision with specific time frames within which a defendant must be tried that includes excludable time with appropriate remedies for noncompliance should be enacted. Specifically, defendants cannot be held in custody for more than a total of 180 days after indictment without a trial. The remedy for noncompliance shall be release from custody. Defendants not in custody must be tried within 365 days of indictment. The remedy for noncompliance shall be dismissal with prejudice. Any speedy trial provision must recognize that there will be cases that may require additional time; however, any provision allowing additional time must be limited to the extraordinary case and a significant showing that an injustice would follow from strict compliance with the relevant remedy.

The Committee urges legislative action to effectuate this recommendation recognizing that it should be tied to the proposed reform for our system of bail. There is also a recognition by the Committee that this recommendation, along with others, will require additional judicial, prosecutorial and defense resources.

A defendant has a constitutional right to a speedy trial. That right has little meaning without time frames within which someone must be tried. In thirty-eight states, the District of Columbia and the federal system, there are established speedy trial statutes or court rules. Currently, in New Jersey there are no statutes or court rules setting out speedy trial time frames; rather, there are dispositional time goals that were approved by the Supreme Court more than 25

years ago. The goal, also referred to as when a case falls into backlog status, is 120 days from indictment to disposition.

Adoption of an effective speedy trial provision needs to take into account a number of factors including pre-indictment practices, discovery and excludable time. A specific time frame is dependent on such variables, especially in relation to any changes made in our system of bail and any recommendations for a "speedy indictment" provision.

The Committee discussed whether time frames should apply only to defendants in jail, but a majority of the Committee was concerned that would lead to further delay in those cases where the defendant is released on bail. Additionally, those defendants, while not incarcerated, may also have significant restrictions on their liberties awaiting trial with an indictment "hanging over their head." These might include suspension from a job or restrictions on travel, not to mention the personal stress of awaiting a trial on a criminal offense. As such, the Committee is recommending speedy trial provisions and remedies for noncompliance for both categories of defendants.

The Committee strongly believes that any remedy for noncompliance with the recommended speedy trial time frame must "have teeth" in order to be effective and get the results desired by this Committee. There is precedent in the federal system and other states for the remedies of release from custody and dismissal of an indictment with prejudice. It should be noted that an extensive list of guidelines for excludable time has been provided below which clearly covers any case where some type of "extenuating circumstances" arise that might push the possible disposition of a case past the time limit.

While there is disagreement about whether these provisions should be codified by statute or court rule, it is understood that any speedy trial provision for those defendants in jail must be part and parcel of any bail reform statute. It is expected, based on experience from other states, that bail reform and supervised pretrial release will lead to a significant reduction in the number of defendants held in jail pretrial. That will make this provision easier to implement.

As stated earlier, the Committee recommendation regarding speedy trial time limits is tied to there also being an excludable time provision in the statute. Initially, this would have to be captured and calculated manually, similar to the federal system, because currently, there is no technological solution. Manual tracking will be extremely resource intensive so it will be imperative that a technological solution be developed. The Committee recommends that the

following list be considered as guidelines for excludable time as part of any speedy trial provision:

1. Competency hearings and the period during which a defendant is incompetent to stand trial.

2. The filing and disposition of a defendant's application for the Pre-Trial Intervention (PTI) program or Drug Court.

3. The filing, until final disposition, of pretrial motions by a defendant, such as motions to suppress evidence, motions to dismiss the indictment, motions for severance, motions for change of venue (only the motion, not the time for the other jurisdiction to "get up to speed" on the case), evidentiary motions, and interlocutory appeals.

4. The filing, until final disposition, of pretrial motions by the State, such as evidentiary motions and interlocutory appeals, if granted.

5. A continuance granted at the request of the prosecuting attorney, without consent of the defendant, if (a) the continuance is granted because of the unavailability of material evidence, when the State has exercised due diligence to obtain the evidence and there are reasonable grounds to believe that it will be available at the later date, or (b) the continuance is granted to allow the State additional time to prepare its case and additional time is justified because the case is complex due to the number of defendants or the nature of the prosecution.

6. The detention of a defendant in another jurisdiction provided the State has been diligent and has made reasonable efforts to obtain the defendant's presence.

7. When severance of codefendants which permits only one trial to commence within the time period of the rule.

8. When the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause (some jurisdictions define good cause) for not granting a severance.

9. A period for delay resulting from exceptional circumstances such as a defendant's sudden unavoidable unavailability, the sudden unavoidable unavailability of a State's witness (this possibly could cover the situation where there has been witness intimidation or tampering), or a natural disaster.

10. A defendant's failure to appear for a court proceeding.

11. Other periods of delay not specifically enumerated but only if the court finds that they are for good cause.[313]

[313] For example, this could cover a request by a defendant, or the State with the consent of the defendant, if there was good cause.

12. The failure to provide timely and complete discovery shall not be considered excludable time unless such discovery only became available after the time set for discovery.

13. Requirements contained in a statute or court rule.

14. Disqualification or recusal of a judge.

The Committee believes that there should be a specific time frame within which a motion should be decided but that additional study is required before such a recommendation can be made.

The Committee further recommends that, except for exclusions of time and extraordinary cases, the maximum time from indictment to trial *should* not exceed 365 days. Additionally, a release from custody would not toll the time from continuing to run. For example, in cases in which the defendant makes bail, or is otherwise released after spending a period of time in jail, the State would not have an *additional* 365 days after the defendant's release to try the case. Rather, the State would be required to try the case within the 365-day period that began when the indictment was returned.

The Committee also recommends that the speedy trial provision address the extraordinary case, where there has been a significant showing that an injustice would follow from strict compliance with the relevant time period. For those extraordinary cases, the Committee recommends that judges be given the discretion to add additional time within which a case must be tried.

A dissent on this recommendation is contained at page 118.

b. Prearraignment Conference and Arraignment/Status Conference

RECOMMENDATION 22. The Prearraignment Conference (PAC) should be merged with the Arraignment/Status Conference (AS) and the AS should be held 14 days after indictment.

The current structure of the rule provides for the PAC within 21 days of the indictment and the AS no later than 50 days after indictment. The reason the PAC/AS structure was established was to (1) identify defendants who need an attorney as early as possible when an attorney was not assigned or retained pre-indictment (2) provide discovery, and a plea offer, to defense counsel in advance of the date of the AS, (3) require that attorneys meet with their clients and the prosecutor to discuss discovery and the plea offer prior to the AS, and (4) have meaningful discussion at the AS about the offer and needs of the case.

In many counties, the PAC event is not working as intended. The PAC has always been within the responsibility of the criminal division manager. However, over time, it has become more of just an administrative proceeding as many PACs are waived without the prerequisites for waiving the conference being present and there is no judicial involvement. In fact, most counties have moved up the AS to 28 days after indictment, due to the fact that many attorneys are not ready at the point of the AS to discuss the case. They are not ready either because they have not received discovery or a plea offer, or because they are meeting with their clients for the first time, often because they did not or were unable to meet with them beforehand.

Moving the AS to 14 days after indictment, when coupled with a proposed change to the discovery rule, ensures that a defendant will have counsel and discovery within 14 days of indictment. If there are any discovery issues, they can be dealt with quickly after indictment at the AS held before a judge.

The Committee's proposal that the PAC be eliminated is contingent upon there being some pre-indictment event to ensure that the indigency application (5A), pretrial intervention application and fingerprinting occur. The Committee feels strongly that as much as possible must be completed on the "front end" of a case. The recommendation for a statewide Central Judicial Processing (CJP) and a pre-indictment event, made in the Pre-Indictment report, would satisfy the need to get attorneys in cases earlier. It should be also noted that the Committee only agrees to this recommendation based on assurances from the State Public Defender that his staff will provisionally represent defendants who appear at the AS without an attorney, upon completion of the 5A. This commitment must be tied to any rule change as personnel changes occur over time.

c. Status Conferences

RECOMMENDATION 23. The number of status conferences should be limited to two absent good cause, in which case, a third conference would be allowed at the judge's discretion. The first status conference should be called the Initial Case Disposition Conference (ICDC), the second, the Final Case Disposition Conference (FCDC), and the third, the Discretionary Case Disposition Conference (DCDC).

The Committee unanimously agrees that there are too many status conferences held, and the result is that cases "churn." There is a lack of purpose or urgency at many status conferences and then additional status conferences are repeatedly scheduled. This is clearly a cause of delay and takes up a large amount of a judge's time. To illustrate, of the 2,302 defendants whose cases

were disposed of during the month of October 2013, 1,021 defendants, or 44%, had more than three status conference events, and of those, 778, or 38%, had more than five status conference events.

It was decided that the time frames in which the first, second and any further discretionary case disposition conferences are scheduled should be brief, but with discretion left to the judge about how long. However, they must be scheduled within any speedy trial time frames established, taking both the needs of the case and the backlog goals into account. While a second status conference should be provided for in the rule, the presumption should be that after two, the case moves on to a Pretrial Conference (PTC). A basic principal of case management is that it is imperative to move to the PTC in order to set a firm and meaningful trial date.

Additionally, it was determined that the "status conference" should be termed something different to set each one apart from others. As such, it is recommended that new or revised PROMIS/GAVEL codes be developed for the ICDC, the FCDC and the DCDC.

There must be a clear indication by the court to the assistant prosecutor and defense counsel of what they need to do before the first status conference, and the court must hold their feet to the fire if they do not get it done. To take this step would be one way to regain control of what has become unwieldy case management.

Due to the longstanding practice of scheduling multiple status conferences, this recommendation will require not only a change in the culture but a transition period in which additional training for judges in conducting effective status conferences will be required. It is also noted that if a speedy trial provision is enacted, judges and attorneys will be forced to work within that time frame when they are scheduling each status conference event.

d. Plea Cutoff

RECOMMENDATION 24. <u>Rule</u> 3:9-3g (Plea Cutoff) should be changed from a mandatory requirement to a permissive requirement at the Pretrial Conference (PTC). The PTC court event should be maintained as the mechanism to set a trial date, including completion of the pretrial memorandum, with a warning to the defendant that the plea *may not* be available at the time of trial.

The rule currently requires that after the pretrial conference has been conducted and a trial date set, the court *shall not* accept negotiated pleas absent the approval of the Criminal Presiding Judge based on a material change of circumstance, or the need to avoid a protracted trial or a manifest injustice. This amendment ultimately leaves it up to the prosecutor whether a

plea will be offered on the trial date and removes the court's ability to not take a plea simply because the plea cutoff is in place.

The Committee engaged in heated discussions on this issue and ultimately recommended a permissive rule. It is clear that, in most counties, this rule is honored in the breach and there is unwillingness on the part of all parties to bring issues in a case to closure. It was acknowledged that the rule is not enforced and neither the prosecution nor the defense believes that they will be held to any plea cutoff imposed. There is strong sentiment that it should be the prosecutor's discretion on the day of trial whether and when to offer a plea and not the judge who decides whether an offer can be accepted. However, there is also strong belief that the court must control its own calendar and that if there is a rule, it should be enforced.

Despite the proposed amendment, the Committee members agree that the Pretrial Conference event is extremely effective when the judge explains the defendant's exposure, that the plea may or may not be available, and gives the Hudson warning—"the talk" as some have referred to it.

A dissent on this recommendation is contained at page 111.

e. Peremptory Challenges

RECOMMENDATION 25. The recommendation of the Supreme Court's Special Committee on Peremptory Challenges and Jury Voir Dire should be endorsed. There should be a reduction of the number of peremptory challenges in criminal trials to eight challenges for a defendant being tried alone, with six challenges permitted to the State. Where there are multiple defendants, each defendant should be permitted four peremptory challenges, with the State permitted three challenges for each defendant.

Numerous reports have noted that New Jersey has the highest number of peremptory challenges in the country and the Committee remains steadfast in the belief that jury selection, specifically the voir dire, takes a prolonged amount of time, albeit for various reasons. The Committee discussed the fact that there is inconsistency across the state on how long it takes to pick juries for a number of reasons, including but not limited to local problems such as facilities, e.g., small courtrooms. It was also noted that in the past, more days were available to be used for trial; however, today, the volume of cases along with motions and other responsibilities such as PCRs, etc., usually allow for only three days per week being allotted for trials. There is also

some thought that given the expanded voir dire, it should no longer be necessary to have as many peremptory challenges.

As many will recall, the expanded voir dire and the reduction in peremptory challenges were intended to be companion recommendations. However, the Court approved the expanded voir dire without any reduction in the number of peremptory challenges.

While the data does not support it, there is a perception on the part of the bench that attorneys use all their challenges because they believe to do otherwise would subject them to an appeal or ineffective assistance of counsel claims. The State Public Defender did indicate that he would educate his lawyers on this issue.

It should also be noted that the length of jury selection could become a real issue, particularly if the number of trials does increase due to anticipated approved recommendations by this Committee.

Finally, the Committee recommends that in the absence of an adoption of a court rule or statute to alter the number of peremptory challenges, the Court should consider alternatives to speed up the jury selection process such as using magistrates or special masters to select juries. Therefore, this recommendation should be referred to the Supreme Court's Special Committee on Peremptory Challenges and Jury Voir Dire for consideration.

A dissent on this recommendation is contained at page 118.

f. Staffing for the Criminal Division

RECOMMENDATION 26. Additional resources should be allocated to the Criminal Division.

While the Committee unanimously agrees that additional resources are needed, exactly what those resources are must be explored further. Adequate resources need to be provided to the criminal justice system to ensure that a defendant's right to a speedy trial is possible. The lack of resources is clearly an issue in our system, and the Committee felt strongly that the shortage of judges cannot be ignored and that a fully-staffed criminal bench is necessary. Staffing of the courts, however, includes not just judges, but the team supporting the court such as the prosecutors and public defenders. For example, caseloads vary greatly amongst judges and both the prosecutors and public defenders across the state have significant caseload disparity. In one county, a public defender may carry a caseload of 100; in another the public defender may carry a caseload double that. The paradigm established almost 25 years ago by the Special

Committee to Assess Criminal Division Needs (Pashman/Belsole Committee) is broken and just like that committee reviewed staffing at that time, it is time for it to be looked at again.

Also, in order to be serious about addressing system needs, consideration must be given to a review of the current performance measures. The five performance measures established in the Criminal Division Best Practices Report are calendar clearance, 500 dispositions per judge per year, 30% backlog goal, 25 trials per judge per year and a six-week time limit from disposition to sentence. The Committee has addressed this under Additional Recommendations and Issues Considered.

Without sufficient resources, many of the changes proposed will be only cosmetic in nature.

g. Discovery

RECOMMENDATION 27. All available discovery should be made available at the time of indictment with some caveat for extraordinary cases. If a plea offer is tendered, it must be in writing and should be part of the discovery package available at the time of indictment.

The timely preparation and receipt of both discovery and reciprocal discovery continues to be a problem in many counties across the state. Incomplete discovery affects the status conference(s) and is the most often-cited reason for needing additional status conference events. Data for the month of October 2013 demonstrates this. Of 11,400 status conference events held during that month, 6,943 were postponed and of those postponed, 4,058 or 58.5% were postponed for incomplete discovery. Specifically, 47.8% were adjourned due to incomplete discovery from the State and 10.7% from the defense.

In January 2013, Rule 3:9-1(a) was amended to require that the indictment and discovery be available to defense counsel within 7 days of the return or unsealing of an indictment, rather than 14 days as was previously mandated. Now that the Committee has recommended moving the arraignment up to 14 days from indictment, discussion commenced about when discovery and a plea offer should be available or turned over to defense counsel. It was decided that discovery should be available at the time of indictment and if a plea offer is going to be made, it should be included in the discovery package. In the average case, handing over discovery at indictment should not be an issue. The prosecutor will have already provided discovery at the pre-indictment event being proposed. All that will be required at indictment is any additional discovery that was not handed over pre-indictment.

Additionally, electronic discovery (eDiscovery) remains a problem in many counties in that some media formats continue to be unreadable by defense counsel. It is also imperative that the Department of Corrections and county jails provide a mechanism for inmates to be able to review eDiscovery either with or without their attorney.

3. Additional Recommendations and Issues Considered

a. Performance Standards

The Committee recommends the formation of a special committee to review and revise the current judicial performance standards and to consider development of performance standards for the prosecution and defense counsel.

The Committee recommends that this special committee conduct a comprehensive review of all of the judicial performance standards and appropriate revisions be made. Raised by the Acting Attorney General in the context of escalating plea policies, the Committee discussed performance standards and the impact they have on case processing. Under the current system, a disposition by plea is given the same value as a disposition by way of a three-week trial. The current expectation is that judges reach 500 dispositions per year and also try 25 cases a year. As a result, there is a perception, not shared by judges, that these standards cause judges to encourage prosecutors to reduce plea offers as cases are about to go to trial, which contradicts any escalating plea offer policy.

The Committee, seeing the utility of a broader inquiry, expanded the discussion to include a review of not only the plea versus trial disposition, but all judicial performance standards and consideration of performance standards for the prosecution and defense counsel.

Consideration should be given to "weighted" dispositions and evaluating whether performance should be measured in terms of efficiency and timeliness, and not just the number of final dispositions. As such, it is also extremely important that the Attorney General and County Prosecutors develop and implement plea negotiation policies and practices that encourage early disposition, including reasonable initial plea offers. The Attorney General has committed to working with the County Prosecutors to ensure this is accomplished.

b. Judge Involvement in Plea Negotiations

The question of whether to permit a judge to participate in plea negotiations without first getting the consent of the parties was considered by the Committee. The current rule calls for the prosecutor and defense attorney to engage in discussions relating to pleas and sentences but, except as authorized, the judge is to take no part in such discussions unless the parties invite the

judge's participation. Historically, proposals for allowing judge involvement in plea negotiations have been rejected; however, the concept of a judge being permitted into the conversation at a certain point, for example, at the pretrial conference event, has not been considered previously and was considered by the Committee. Additionally, the idea of recommending a permissive rather than a mandatory rule, left to a judge's individual discretion, was considered. The Committee voted and, although it was very close, decided that the court rule as currently written should remain as is and no recommendation is being made.

V. CONCLUSION

The Committee, through its three subcommittees, has thoroughly reviewed the present system of bail and both the pre- and post-indictment processes. In order to promote and improve the fairness and effectiveness of our criminal justice system, the Committee recommends a number of important changes:

(1) a shift from the current resource-based system of pretrial release to an objective, risk-based system that assesses the level of risk an individual defendant poses and imposes appropriate conditions of pretrial release;

(2) appropriate supervision of defendants released pretrial, by pretrial services officers who will monitor compliance with nonmonetary conditions of release;

(3) a constitutional amendment and enabling statute to allow for pretrial detention of defendants for whom no condition or combination of conditions can reasonably assure either the safety of any other person or the community or the defendant's appearance in court;

(4) a legislatively enacted speedy trial act to ensure that criminal cases are indicted and brought to trial more promptly, for the benefit of the accused, victims of crime, and the public as a whole; and

(5) sufficient additional resources in the form of pretrial service officers, judges, prosecutors, and public defenders to implement the above changes and enable them to succeed.

Some of these changes will require constitutional and statutory changes, and many are interdependent upon one another. Their implementation will rest on collaborative efforts by all three branches of government. The Committee has also made recommendations for certain systemic changes that can be achieved by the Judiciary under its rule-making authority, such as a reduction in the number of pretrial status conferences, more meaningful first appearances, earlier exchanges of discovery, and a change to the plea cutoff rule, among other recommendations.

The Committee believes the proposed changes will promote a system of criminal justice that is freer, fairer, and safer.

Respectfully Submitted,

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Honorable Greta Gooden Brown, J.S.C. (Passaic)
Honorable Philip S. Carchman, J.A.D. (Retired on Recall)
Honorable Jeanne Covert, Chair, Conf. of Criminal Presiding Judges (Burlington)
Honorable Gerald J. Council, Criminal Presiding Judge (Mercer)
Honorable Martin G. Cronin, J.S.C. (Essex)
Honorable Georgia M. Curio, Assignment Judge
Kevin Drennan, Executive Director, NJ Senate Majority Office
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APPENDIX A

THE CRIMINAL JUSTICE PROCESS IN NEW JERSEY

This portion of the report will describe the basic steps a criminal case will follow from the initial filing of charges through the disposition, by plea or trial, of those charges.

A. PRE-INDICTMENT

The pre-indictment phase of criminal case processing encompasses all actions taken in relation to the case from the filing of the initial charges through presentation of the case to a grand jury.

1. Complaint

The criminal process normally begins with the filing of a complaint at the Municipal Court level. The process can also begin with an arrest without a warrant or by the return of an indictment. The complaint is a written statement accusing a specific person of committing an offense and citing the essential facts constituting the offense. Complaints are normally made by police officers, but all citizens have the right to lodge complaints. The Court Rules *require* that the court clerk or deputy clerk, municipal court administrator or deputy court administrator accept for filing complaints made by any person. See Rule 3:2-1(a). The Rules require that the complaint be made upon oath or by certification before a judge or other person, e.g. municipal court administrator, authorized by N.J.S.A. 2B:12-21 to take complaints.

2. Summons or Warrant upon Complaint

The procedure after a complaint is made depends on who is making the complaint and/or whether a complaint-summons or complaint-warrant is being sought. If a private citizen is making the complaint, or a law enforcement officer is seeking an arrest warrant once a complaint is filed, a judicial officer (judge, municipal court administrator or deputy court administrator) makes a determination of whether there is probable cause to believe an offense has been committed and that the defendant may have committed it. If a judge reviews a complaint and does not find probable cause, the complaint is dismissed. If a judicial official other than a judge finds no probable cause, then the procedure contained in Rule 3:3-1(d) is utilized to dismiss the complaint. If probable cause is found, a judicial officer must determine whether a summons or warrant should be issued. A summons will be issued unless a judicial officer finds that one of the conditions set forth in Rule 3:3-1(c) exists. The conditions for issuing

a warrant are: (1) the accused is charged with a serious crime; (2) the accused has previously failed to respond to a summons; (3) the accused is dangerous to self, other persons, or property; (4) there is an outstanding warrant against the accused; (5) the identity or address of the accused is unknown or (6) there is reason to believe the accused will not respond to a summons. If one or more of these conditions exist, the judicial officer must issue a warrant, as opposed to a summons.

If the law enforcement officer decides to issue a summons, that officer may do so without a prior determination of probable cause.

a. Summons

A summons is the process by which a defendant is ordered to appear before the Court on a certain date. If a summons is used, a Court Disposition Report – 1 (CDR-1) is filled out and a copy is handed to the defendant, who is then released. These reports are forwarded to the State Police and are used to create an offender's computerized criminal history (CCH) commonly referred to as a rap sheet.

b. Arrest Pursuant to a Warrant

An arrest warrant is a document that orders the police to arrest a defendant and bring him before the court issuing the warrant. If an arrest warrant is used, a CDR-2 is filled out and bail is set. If bail is posted the defendant is set free. If bail is not posted, the defendant is detained pending a first appearance, which is normally held in Municipal Court. However, in some counties first appearances are centralized before the presiding judge of the Municipal Courts or a Superior Court judge.

c. Arrest without a Warrant

In many instances, the criminal process actually begins with an arrest by a police officer where no formal papers, i.e. complaint, have been filed with the court. Where this occurs, the accused is arrested, brought to police headquarters where a complaint is prepared. The matter is then brought before a judicial officer, who determines whether there is probable cause that an offense has been committed by the accused and determines whether a summons or warrant will be issued. See Rule 3:4-1. If the judicial officer issues a summons, the defendant is given the complaint-summons (CDR-1) and told to appear at a later date. If the judicial officer issues a complaint-warrant (CDR-2), the defendant is remanded to jail unless bail is posted. Simultaneous with making of the probable cause determination, the judicial officer should also set bail, or the conditions under which the defendant may be released from jail

pre-trial, such as Released on his/her own Recognizance (R.O.R.), no contact with victim, or cash bail. The present Court Rules allow for the setting of bail by a municipal court administrator or deputy court administrator in the absence of a judge at the judge's discretion. There is also statutory authority for this responsibility. See N.J.S.A. 2B:12-21c.

d. Indictable Complaints

Where the complaint alleges an indictable offense, the complaint, and all investigative reports, are required to be forwarded to the prosecutor within 48 hours. The Municipal Court is to forward the complaint to the Criminal Division Manager's Office within 48 hours. See Rule 3:2-1(b).

e. Authority to Set Bail

A Superior Court judge may set bail for a person charged with any offense. Bail for any offense except murder, kidnapping, manslaughter, aggravated manslaughter, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, a person arrested in any extradition proceeding or a person arrested under N.J.S.A. 2C:29-9b for violating a restraining order may be set by any other judge, or in the absence of a judge, by a Municipal Court administrator or deputy court administrator. In most cases, bail is set initially in Municipal Court by a Municipal Court judge. See Rule 3:26-2(a). This Rule was supplemented and relaxed by order dated April 29, 2013 "to permit a Municipal Court judge to set bail in all matters other than homicide cases or extradition proceedings when that judge is assigned by the Assignment Judge or preside as judge of a formalized vicinage first appearance court, including a Central Judicial Processing (CJP) court or similar court."

f. When Bail is Set

Bail is initially set either contemporaneously with the issuance of an arrest warrant, subsequent to the issuance of a warrant but prior to the first appearance, or at the first appearance. However, if bail was not set when an arrest warrant was issued, the person who is arrested on that warrant shall have bail set without unnecessary delay, and no later than 12 hours after arrest. See Rule 3:4-1(b).

g. Review of Initial Bail Set

1. Informal Review

Any person unable to post bail shall have his or her bail reviewed by a Superior Court judge no later than the next day, that is not a Saturday, Sunday, nor a legal holiday. See Rule 3:26-2(c). In most counties, the Superior Court judge reviews the bail shortly after the offender

reaches the county jail by reviewing the complaint, usually in chambers, but in some instances with a Criminal Division probation officer or investigator who has interviewed the offender in jail. In some counties, an assistant prosecutor is present during the review. This procedure was started largely as a response to jail overcrowding and provides a quick method of reviewing bail.

2. Formal Review

The Court Rules only provide for a bail review via motion. Under Rule 3:26-2(d), bail reduction motions are to be heard no later than seven days after the motion is filed. In some counties, the full seven days is required before a motion to reduce bail is heard while in others these motions are scheduled in less than seven days. However, in order to alleviate jail overcrowding and reduce the volume of work created by the filing of motions, most counties do not require the filing of a motion for this review. These counties automatically schedule a review for any new defendant that remains in custody unable to post bail. However, a motion is required for any subsequent bail review requested by defense counsel.

f. First Appearance

The first appearance is, generally, the first time a defendant appears before a judge. If the defendant is in custody, the first appearance is to be conducted within 72 hours, excluding holidays. If the defendant is released on bail, the first appearance is to occur without unnecessary delay. See Rule 3:4-2(a). At the first appearance the judge informs the defendant:

- of the charges and furnishes a copy of the charges;
- of the right not to make a statement as to the charge. The defendant also is informed that any statement he or she makes may be used against him or her;
- of the right to counsel or, if indigent, the right to have counsel furnished without cost.

If the defendant is charged with an indictable offense, the judge also informs the defendant:

- of the existence of the PTI program and how to apply for admission to the program;
- of the right to indictment by grand jury;
- of the right to a trial by jury;
- of the right to have a hearing as to probable cause.

Rule 3:4-3 provides that if a defendant does not waive a hearing as to probable cause, one shall be held. As a practical matter, once such a hearing is requested, an indictment normally occurs prior to the hearing thus averting the need for such a hearing. At this first appearance, the court also reviews bail if the defendant is incarcerated. See Rule 3:4-2. The first appearance can take place in front of either a Municipal Court judge or a Superior Court judge. In some

instances it occurs at a pre-indictment event such as CJP or PIP.

3. Pre-indictment Event

One of the clearest messages from the experiences of speedy trial programs during the 1980s was that it is important to assess cases early. Doing so saves valuable system resources and promotes a just resolution of cases. In that vein, most counties have moved to bring the judge, attorneys and Criminal Division staff together pre-indictment. Many counties hold a formal in-court event, such as Central Judicial Processing (CJP) or Pre-indictment Program (PIP). At this event, the prosecutor screens the case to determine whether to remand the case to Municipal Court, to administratively dismiss the case or to proceed to indictment. For those cases that will proceed to indictment, the pre-indictment event is also used as a vehicle for early diversion into the Pretrial Intervention Program (PTI) or to plea to an accusation; to resolve issues regarding defense representation, e.g., indigency; to screen for eligible Drug Court candidates; and to complete the uniform defendant intake report (UDIR). Other counties hold a less formal event that is normally scheduled after the prosecutor has screened the case. Staff from the criminal division meet with the defendant and the UDIR is completed and counsel is identified, or if the defendant does not have counsel, an application for a public defender is completed and indigence is determined. The defendant is also told he or she can apply for PTI. If the defendant wishes to do so, a PTI application is taken.

4. Grand Jury

If a complaint is not resolved pre-indictment, it is presented to a grand jury for action. The right to have charges presented to a grand jury is guaranteed by the New Jersey Constitution. See N.J. Const. art. I ¶ 8. The function of the grand jury is to investigate criminal complaints, with the goal of either bringing charges against those responsible for criminal conduct, or refusing to bring charges where prosecution is unwarranted.

A grand jury consists of no more than 23 members, randomly selected from the general public. The assignment judge appoints one juror to be foreperson and another deputy foreperson. Each county must have a grand jury at all times. The deliberations of the grand jury are secret. An assistant prosecutor presents the State's case to the grand jury. Neither the defendant, nor his or her attorney attend grand jury proceedings unless the defendant asks to testify before the grand jury. If 12 or more members of the grand jury find that charges are warranted, the panel renders an indictment, which is called a "True Bill." If the grand jury finds charges are unwarranted, it returns a "No Bill." If a case is "No Billed," the grand jury, through the

foreperson, reports this in writing to the assignment judge, who, if the defendant is in jail, will order the defendant's release unless there are other charges pending for which detention is required.

B. POST-INDICTMENT

1. Indictment

An indictment is a written statement of the essential facts constituting the crime charged. The Court Rules require that the indictment be signed by the prosecuting attorney and endorsed by the foreperson of the grand jury as a True Bill. The indictment must also state the official statutory citation for the crime charged. See Rule 3:7-3. Once an indictment has been returned, it is filed with the court, either by returning it to the assignment judge, or, with his approval, any other Superior Court judge. Rule 3:6-8(a). Once returned, the assignment judge can order that the indictment be kept secret, i.e. sealed, until the defendant is arrested or the indictment is ordered unsealed by the court. When an indictment is sealed it is usually at the request of the prosecutor who may not want an on-going investigation to be compromised by public knowledge of the indictment or if there is concern that the defendant who may not have been arrested on the underlying charges may flee the jurisdiction of the court before being arrested.

2. Pre-arraignment Conference

The first post-indictment event is a pre-arraignment conference, which is conducted by the Criminal Division of the Superior Court. This conference occurs within 21 days after indictment. At this conference, defense representation is confirmed, discovery[314] is available, and the uniform defendant intake form is completed. If the defendant has not previously applied for PTI, and asks to do so, an application is taken. The court can also screen for eligible Drug Court candidates. The purpose of this conference is to insure routine matters, which need not take up valuable judicial resources, are resolved prior to the arraignment/status conference. This allows the first court event, the arraignment/status conference, to be used as a tool to dispose of cases or to set firm dates for motions, future conferences and trials. The arraignment/status conference is scheduled to occur a few weeks after the pre-arraignment

[314] Discovery is the facts and information that will be relied upon in trial and is provided to the opposing party. A copy of discovery is required to be delivered to the Criminal Division Manager's Office or available at the Prosecutor's Office, within 14 days of indictment. Defense counsel is required to obtain discovery no later than 28 days after the return or unsealing of the indictment. See Rule 3:9-1(a).

conference, by which time defense counsel should have reviewed discovery and discussed a negotiated plea with the state. Giving the parties time to review discovery prior to the arraignment/status conference provides a better opportunity to discuss a realistic plea bargain,[315] diversion or dismissal, or, if the case is going to proceed to trial, to discuss the specific needs of the case, e.g., motions, and to set realistic dates to meet these specific case needs. No pre-arraignment conference is required where the defendant has obtained counsel and the Criminal Division Manager's Office has established to its satisfaction that (1) an appearance has been filed under Rule 3:8-1; (2) discovery has been obtained, and (3) the defendant and counsel have obtained a date, place and time for the arraignment/status conference. See Rule 3:9-1(a).

3. Arraignment/Status Conference

The first in-court event after indictment is the arraignment/status conference. The arraignment/status conference, which occurs within 50 days of the return of the indictment, is held in Superior Court and consists of the judge advising the defendant of the substance of the charges against him or her, as contained in the indictment, confirming that the defendant has reviewed the indictment and discovery with counsel, and asking him or her to enter a plea to the charges. If the plea is not guilty, counsel is to report to the judge on the status of plea negotiations. At the arraignment/status conference, the dates for hearing motions and a further status conference are set. See Rule 3:9-1(c).

4. Status Conference

The status conference is the next scheduled event after the arraignment/status conference and is required to be held in open court with the defendant present. A number of things can occur at the status conference and listing a manageable number provides counsel and the judge with the time necessary to devote to each individual case. Further status conference, if necessary, are to be scheduled according to the differentiated needs of each case. At the status conference the case may be disposed of by way of a guilty plea, dismissal or entrance into the Pretrial Intervention Program (PTI). See Rule 3:9-1(c)

5. Pre-trial Conference

At the arraignment/status conference, motion dates and a date for a future status

[315] A plea bargain is an offer by the State to the defendant, which gives the defendant some consideration or benefit in return for his or her plea of guilty. Sometimes the bargain is for a plea in exchange for a reduction or dismissal of charges (charge bargain). Other times the bargain is for a plea in exchange for a recommendation of reduced sentence (sentence bargain). Still other times the bargain is for both a reduction or dismissal of charges and for a reduced sentence (charge and sentence bargain).

conference are set. All motions are heard prior to the last status conference. The last status conference is the pre-trial conference. The court conducts a conference when there are no motions pending, discovery is complete, all reasonable attempts to dispose of the case prior to trial have been made and it appears that further negotiations or an additional status conference will not result in either the disposition of a case or progress towards the disposition of a case. The pre-trial conference is conducted in open court with the defendant, defense counsel and prosecutor present. At the pre-trial conference, unless objected to by a party, the judge will ask the prosecutor to describe the case. The judge then addresses the defendant and advises the defendant of the State's final plea offer and the authorized sentence for the offenses charged. The defendant is also advised of a plea cutoff, which means that ordinarily a negotiated plea will not be accepted after the conference and after a trial date has been set. The judge also advises the defendant of his or her right to trial. If the defendant wishes to proceed to trial, a trial memorandum is prepared and reviewed on the record and a trial date is set. No dispositive motions should normally heard after this event and a plea cutoff is in effect. A plea cutoff means that, after the last status conference, the State's plea offer is withdrawn and the defendant must either proceed to trial or enter a plea to the indictment without a recommendation from the State. Negotiated pleas shall not be accepted absent the approval of the Criminal Presiding Judge based on a material change of circumstance, or the need to avoid a protracted trial or manifest injustice. See Rule 3:9-3(g).

6. Trial

a. Right to Trial by Jury

If a defendant decides to contest guilt, the defendant is entitled, by both the United States and New Jersey Constitutions,[316] to a trial by a jury. The right to a jury trial generally applies to all criminal acts where the penalty for the offense exceeds six months in confinement. The right to a jury trial can be waived by the defendant if the court approves. The defendant also needs the approval of the prosecutor to waive a jury trial in the sentencing phase of a capital case. If the judge grants such a request, the judge alone hears the case. See Rule 1:8-1(a). This is known as a bench trial. In addition to the right to a jury trial, the defendant has the right to be present at every stage of a trial, including jury selection. See Rule 3:16.

[316] U.S. Const. art. III, 2; U.S. Const. amend. VI; N.J. Const. art. I, 9.

b. Selection of a Jury

In criminal cases a jury consists of 12 persons, unless the parties agree that the jury may consist of fewer than 12. Normally, 14 persons are selected who sit and hear the case, with two designated as alternate jurors at the end of the trial. In many cases judges will empanel alternate jurors in the event that one of the twelve jurors cannot finish the trial, e.g., due to sickness. The alternate jurors are available for deliberations if one of the 12 deliberating jurors becomes ill or otherwise cannot continue to serve. Jurors are drawn from a merged list of registered voters, licensed drivers, filers of state gross income tax returns, and filers of home state rebate application forms in the county where the case will be tried. The jury is selected after the judge questions prospective jurors about their backgrounds or the answers provided on the juror questionnaire. If the court allows, counsel may be permitted to personally question jurors or offer questions for the court to ask of jurors. This process is known as jury voir dire. This process seeks to determine whether jurors have a bias or prejudice which would render them unable to objectively evaluate all testimony and render a fair and impartial verdict. During this process, both the defense and the prosecution are given what are known as peremptory challenges. In criminal cases upon indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by N.J.S.A. 2C:21-1(b), or perjury, the defendant is entitled to 20 peremptory challenges if tried alone and to 10 such challenges when tried jointly; and the State is entitled to have 12 peremptory challenges if the defendant is tried alone and six peremptory challenges for each 10 afforded defendants when tried jointly. In other criminal actions each defendant is entitled to 10 peremptory challenges and the State 10 peremptory challenges for each 10 challenges afforded defendants. When the case is to be tried by a foreign jury, each defendant shall be entitled to five peremptory challenges, and the State five peremptory challenges for each five peremptory challenges afforded defendants. See Rule 1:8-3(d). These challenges allow the parties to exclude prospective jurors who are being considered for selection to the jury without giving a reason for excluding them. Of course, the court will always exclude jurors for cause, such as where a juror has personal knowledge of the case.

c. Trial

Once all 12 jurors and any alternates have been selected, the jury is sworn and is considered impaneled. If there are no pre-trial motions, the trial begins. The trial begins with opening statements by the prosecutor. Defense counsel may then choose to give an opening statement. After opening statements are complete, both sides present their evidence to the jury. The State presents its case first. When both sides have finished presenting their evidence, each side presents closing arguments to the jury. After closing arguments are finished, the judge charges the jury as to the applicable law. The jury then deliberates and eventually returns a verdict of guilty or not guilty. In order to return a guilty verdict the jury must be unanimous. If the jury is unable to arrive at a unanimous verdict ("hung jury"), the judge can declare a mistrial.

Concurrence to Recommendation 21

By Elie Honig, Dale Jones, and Geoffrey Soriano

Committee members Elie Honig, Dale Jones, and Geoffrey Soriano submit the following concurrence, which is applicable in particular to Recommendation 21, above. The listed Committee members concur in Recommendation 21, and would add the following:

The listed Committee members believe that, in an effort to promote prompt and fair dispositions, it is vital that prosecutors tender timely and reasonable pre-indictment plea offers (which now come with discovery, as per Rule 3:13-3(a). Many prosecutors' offices -- including the Division of Criminal Justice, which supervises all County Prosecutors -- have adopted and now aggressively enforce escalating plea policies designed in part to disincentivize defendants from dragging cases out until the eve of trial in hopes of receiving a better plea offer. Prosecutors must recognize that if plea offers are to escalate, then initial plea offers -- in particular pre-indictment offers -- must be eminently fair and reasonable. On the flip side, defense attorneys must properly advise their clients of the significance of escalating plea policies -- namely, that plea offers will get higher, not lower, as trial approaches -- and accordingly should advise their clients that a pre-indictment plea offer will, in all likelihood, be the most favorable plea offer. Similarly, judges must not undermine the functioning of such an escalating plea negotiation process by demonstrating a willingness to undercut the prosecution's plea offer on the eve of trial. If all parties work towards the same goals, then the systemic incentives will be reversed: rather than stringing out a case and hoping for a lowball plea on the eve of trial, defendants will properly understand that the earliest plea offer is, in fact, the best plea offer. This benefits all parties, and the public.

Dissent to Recommendation 15

By Dale Jones

I respectfully dissent from the Committee's recommendation that calls for the proposed speedy indictment rules to be implemented by legislation as well as the Committee's stressing that "… any such legislative adoption must be accompanied by necessary funding and allocation of resources." I adhere to my view that our recommendation be implemented by court rule and that the implementation of that rule ought not to be impeded by any further delay that may be involved in obtaining additional resources or in reallocating resources that may already be available within all three branches of state government but which are presently directed elsewhere, perhaps inappropriately, by reason of misperceived priorities.

Dismissal for unreasonable delay in presenting a matter to the grand jury is presently governed by court rule (Rule 3: 25-3) and has not previously been governed by legislation in New Jersey. Whether or not a defendant has suffered from pre-indictment delay has always been a matter of judicial determination in New Jersey. See State v. Szima, 70 N.J. 196 (1976). To depart from those practices by seeking further "support" from the legislature by petitioning that branch of government to enact speedy trial legislation, runs an unnecessary risk to the independence and authority of the Judiciary.

Moreover, in my view, calling upon the legislature to enact speedy trial legislation is an abdication by the Judiciary of its function to both interpret and enforce the federal and state constitutional provisions governing speedy trial; indeed, the proposed judicial cession of authority to the legislature with respect to the creation of rules governing speedy trial in New Jersey is without precedent in our court's jurisprudence and it does not seem in the interest of the litigants on either side, at least to my way of thinking, to yield to the legislature the right to determine the meaning of Article I, paragraph 10 of the State Constitution.

With respect to the issue of additional resources, I am not satisfied that, at least at this juncture, that there has been placed before the Committee, sufficient data to suggest that the implementation of a speedy trial rule that contains a "ninety-day indict or release" rule would place any greater strain on the system than as it is now presently configured. While there has been speculation that more resources would be required to meet that goal, it has been just that—speculation; further, no differentiation has been made as to what category of cases might be given priority by law enforcement in the decision to indict, i.e., whether or not the prosecuting authority might determine to permit the release of less serious offenders and indict at a later date.

As was certainly acknowledged at the second plenary meeting of the Committee, all stakeholders would welcome more resources but that does not mean that they are available or, that even if they were, that they would be dedicated to the criminal justice system. The state budget is a zero-sum game. Waiting and hoping for the legislature to solve the problem of speedy trial does not strike me as a vigorous, meaningful approach to addressing this issue whether waiting for them to enact a rule or, worse still, waiting for them to set aside funding to implement that and related rules.

Dissent from Recommendation 24 to Change the Plea Cutoff Rule

I must dissent from the recommendation of the Committee that Rule 3:9-3(g), hereinafter referred to as the Plea Cutoff Rule, be changed from mandatory to permissive. Simply stated, to do so will hand complete control of the court's calendar to the prosecution and defense. That runs counter to well established principles of court management that the court must control its own calendar.

BACKGROUND

In 1991 Chief Justice Wilentz asked the Criminal Presiding Judges to review the various innovations developed during the course of the Speedy Trial program to determine what innovative approaches had proven effective over time. This review resulted in a recommendation for standards for operation of the Criminal Division. On October 20, 1992 the Supreme Court approved the Standards for the Operation of the New Jersey Criminal Division of Superior Court, hereinafter Operating Standards. The Operating Standards arose from an exhaustive review of the overall experience in the Criminal Division during the course of the Speedy Trial Program in the 1980's. The Operating Standards were proposed by the Criminal Presiding Judges after debate which included the private bar, the Public Defender and county prosecutors. The Operating Standards included provisions including: individual calendars after indictment, a pre-indictment event to facilitate early case management, an intake by court staff followed by an arraignment, scheduling of court events according to the differentiated needs of the case, a pretrial conference (PTC) after discovery was exchanged and necessary motions decided, a plea cutoff rule and credible trial lists.

In 1994 the Criminal Practice Committee issued a report entitled Criminal Practice Committee Recommendations on Rules Necessary to Implement the Criminal Division Operating Standards (April 20, 1994), hereinafter Operating Standard Rules. The report proposed rule changes regarding how cases were handled and set forth time parameters for how cases should move through the criminal justice process from arrest through disposition. An amendment to Rule 3:9-3 did not contain a proposal for implementation of a plea cutoff rule because a majority of the Criminal Practice Committee opposed such a rule. Rather, Plea Cutoff Rule was contained in a dissent by 10 judges and a private counsel member of the Committee. This dissent's inclusion of a plea cutoff rule was unanimously endorsed by the Criminal Presiding Judges and a clear consensus of all 100 judges sitting in the Criminal Division at that

time at a conference in March 1994. Rule 3:9-3(g), the rule amendment adopted by the Supreme Court is now referred to as The Plea Cutoff Rule.

The reasons raised by the dissent for adoption of the Plea Cutoff Rule were that:

(1) the Plea Cutoff Rule was part of a package of rules developed to implement the Operating Standards and counties that fully implemented the Operating Standards disposed of 145% more cases;

(2) judges were responsible for the timely delivery of quality justice and must control their own calendars to be able to do so;

(3) an enforceable time limitation, administered by a judge, was an essential tool in an effort to discharge that responsibility;

(4) trial lists are shorter and dates more credible in counties that employ a case management intensive plea cutoff; and

(5) exceptions to strict enforcement of a Plea Cutoff Rule would be necessary to prevent too rigid an application of the Plea Cutoff Rule.

As proposed by the dissent, some common examples of exceptions to the Plea Cutoff Rule would be:

(1) new charges filed after plea cutoff was imposed;

(2) change of attorney for legitimate reasons;

(3) Witness unavailability where such unavailability was unforeseen;

(4) Sexual assault cases where the victim is a child;

(5) A mistrial or hung jury occurs;

(6) Some newly discovered evidence that was not known and could not have been known at the time plea cutoff was imposed and that substantially changes either party's position;

(7) A very long, multi-week trial might be avoided.

The dissent espoused the position that a Plea Cutoff Rule would result in a evenhandedness and speedier disposition of cases.

Ultimately the Supreme Court adopted the position of the dissent but Rule 3:9-3(g) as adopted was modified by the Court and the rule contained a Supreme Court Commentary as to the definitions of certain terms contained in the rule. The rule and Supreme Court Commentary, as adopted, reads as follows:

> (g) Plea Cut Off. After the pretrial conference has been conducted and a trial date set, the court shall not accept negotiated pleas

absent the approval of the Criminal Presiding Judge based on a material change of circumstance, or the need to avoid a protracted trial or a manifest injustice.

SUPREME COURT COMMENTARY

A "material change of circumstance" means a change occurring after the pretrial conference that strengthens or weakens the case of either the prosecution or the defense sufficiently to warrant a change in their plea-bargaining position. It may be either a change in fact or in the knowledge of counsel. Some typical examples that may constitute material change of circumstance are when new charges are filed after the plea cut-off has been imposed, a justifiable change of attorney has occurred, a witness becomes no longer available, a mistrial or hung jury occurs, or some evidence is newly discovered. However, a change that would ordinarily have been anticipated by a reasonably competent prosecutor or defense attorney, including some of the foregoing examples, is not material, nor is a change that results from counsel's lack of ordinary diligence. A "protracted trial" is one that will probably last two weeks or more. One example of manifest injustice is a sexual assault case in which the victim is a child: if the trial is likely to have a substantial adverse impact on the child, the court may grant waiver. "Manifest injustice" does not exist simply because the parties are able and willing to enter into a plea bargain on or before the date of trial.

A plea cut-off rule was recommended by twelve members of the Supreme Court Criminal Practice Committee in a dissent filed with the 1992-94 Criminal Practice Committee Recommendations on Rules Necessary to Implement the Criminal Division Operating Standards. See 137 N.J.L.J. 54, 76-77. That recommendation was adopted and further modified by the Supreme Court as set forth above.

CASE AGAINST PLEA CUTOFF

The main arguments that have been raised against the Plea Cutoff Rule are that: (1) the current rule is enforced so infrequently as to be a sham; (2) enforcement of the rule hurts defendants: (3) willing parties should be able to arrive at a plea bargain whenever they can in the process; (4) the criminal calendar is so backlogged that judges should be allowed to take any plea at any stage in the process it is offered and accepted; (5) human nature being what it is defendants will wait until the last moment possible to plead guilty.

1. The infrequent enforcement of the rule makes it a sham.

The argument here is that the Plea Cutoff Rule is honored more in the breach than it is enforced. While there is no dispute that the plea cutoff rule is enforced less than it is enforced, that is not the same as saying it is never enforced or enforced improperly. What it means is that judges are using it sparingly. That's not necessarily a bad thing. The fact is that if one looks at the exceptions to the Plea Cutoff Rule cited by the dissenting members of the Criminal Practice Committee one will see that those exceptions were quite broad.

2. Enforcement of the Plea Cutoff Rule hurts defendants.

The argument here is that if a prosecutor wants to offer a lesser plea on the date of trial than he or she previously offered it is the defendant that is hurt by not allowing that plea to be taken. The purpose of the rule is not to hurt defendants. It is to establish trial date certainty so that cases that need to be tried can get tried, i.e. provide defendants with their day in court. Allowing prosecutors to wait until the date of trial to prepare their case, e.g. talk to witnesses, underminds the whole structure of the rules governing criminal. The rules envision that this should happen before, or at, the Pretrial Conference (PTC), not on the date of trial. To do otherwise makes the PTC, and the scheduling of a trial date at that conference, meaningless. If the Plea Cutoff Rule was more rigorously enforced, and prosecutors knew it, they would be forced to prepare their cases earlier or risk trying a case they know they will lose.

3. Willing parties should be able to arrive at a plea bargain whenever they can in the process.

The argument here is that, like civil cases, when there are two parties ready to agree on a deal, the Plea Cutoff Rule should not stand in the way of doing so. While this argument may be intuitively appealing, it fails to recognize that criminal and civil cases are quite different. In civil, there are two parties largely arguing over money. In criminal cases, a defendant stands accused of a criminal violation for which he or she lose their liberty, or have it significantly curtailed. Additionally, there is most often a victim embroiled in the process. The plea cutoff rule doesn't seek to stand in the way of two parties agreeing, it just says you must do so up until a trial date is scheduled (at the PTC). In that regard, all it does is move up the date that the parties have to make their decision. It seeks to change the culture and not allow parties to waste everyone's time. It must be remembered that on the date of trial, in addition to the parties and the judge being present, any victims and witnesses have to be present.

4. The criminal calendar is so backlogged that judges should be allowed to take a plea at any stage in the process it is offered and accepted.

While there is no doubt that the criminal calendar is very seriously backlogged, it does not follow that taking any plea on the trial of trial will lead to backlog reductions. If that were the case the current backlog would be less because Plea Cutoff Rule is applied sparingly. In fact, a change to the Plea Cutoff Rule will more than likely lead to greater backlog, as cases that currently plead before the date of trial because of the threat of plea cutoff, will wait until the date of trial to plead. Additionally, this argument is an allusion. In fact, the plea cutoff rule, if properly enforced, would not cause additional backlog but will go a long way to prevent it. The judge who was the author of the plea cutoff rule was fond of saying that if you force parties to try a case that no one wants to try, the message will get around that you are serious about plea cutoff and having trial date certainty. This will lead to prosecutors and defendants bargaining before the date of the PTC because they will know after the PTC they will not be able to do so.

5. Human nature being what it is defendants will wait until the last moment possible to plead guilty.

The argument here is that human nature is such that people will always wait until the last moment to do things. Here, that moment is on the date of trial. The plea cutoff rule merely moves the "drop-dead" date to the date of the PTC. If plea cutoff was more rigorously enforced, the word would get around and prosecutors and defendants would know what the cutoff date for plea bargaining was, i.e. at the PTC not on the date of trial.

CONTINUED CASE FOR THE PLEA CUTOFF RULE

The positions espoused by the dissenting members of the Criminal Practice Committee are as valid today as when written in 1994. The bottom line is that the Judiciary must control the criminal calendar. To hand over control to one, or both, parties will not lead to a better quality of justice or trial date certainty. On the contrary, it will lead to greater trial date uncertainty, as the threat of a plea cutoff will not be present and defendants will know there is NO threat. Right now there is at least an uncertainty that there may be a plea cutoff imposed.

I continue to believe that if the Operating Standard Rules were fully implemented, as designed, the state of the Criminal Division would be better. In fact, a national expert appeared before members of the Judiciary a few years ago and said that the design of New Jersey's system was a model. The flaw has been in the implementation.

There has been a de facto alliance between judges, prosecutors and defense that has prevented that complete implementation. Judges have not been strong enough in ensuring that

court events are meaningful by making sure prosecutors and defense counsel are ready. Adjournments or "rolls" are too easily granted, often without questioning as to why they are necessary. The Plea Cutoff Rule has become the exception, not the rule, in part due to an inadequate number of judges in the Criminal Division, leading to judges wanting to take any plea to reduce their backlogged calendars. Prosecutors have been less than diligent in providing complete discovery as early in the process as possible and in knowing their cases and interviewing victims and witnesses before the PTC. One of the prime reasons there are so many exceptions to plea cutoff is because prosecutors inadequately prepare their cases before the PTC, thus leading to reduced plea offers on the date of trial. Defense counsel seek to delay cases because they know the longer cases are delayed the more likely memories of witnesses become too cloudy. They also know, more than not, prosecutors will fold on the date of trial resulting in a lesser plea for their clients. And both prosecutors and defense attorneys are all too often unprepared to hold meaningful court events. All of this leads not to a just, even-handed system but a dysfunctional one sorely in need of change. It must always be the judge that maintains control of the calendar, not the parties.

I support meaningful change and much of what the Committee is proposing because I believe those changes, when coupled with an effective Plea Cutoff Rule, will lead to a speedier resolution of cases. The Plea Cutoff Rule is not a demon whose head must be excised lest some great injustice occur. Quite the contrary, how the rule is currently used speaks to the fact that judges use it when they deem it appropriate to do so. The Plea Cutoff Rule is just one tool, albeit a major one, in a judges' arsenal aimed at disposing of more cases at the PTC and establishing greater trial date certainty. To take this valuable tool away from judges, vesting total control of the calendar to prosecutors, is a step backwards into an unsuccessful past where prosecutors had control of the calendar. Finally, I must point out that the Criminal Presiding Judges, at a recent meeting, near unanimously supported retaining the Plea Cutoff Rule in its current mandatory form which contains exceptions. Additionally, all members of the Judiciary, except one, present and voting when this recommendation was adopted voted against this recommendation.

Respectfully submitted,

Joseph J. Barraco, Esq.
Asst. Director for Criminal Practice
Administrative Office of the Courts

The following Committee members have joined in this dissent:

Honorable Glenn A. Grant, J.A.D., Acting Administrative Director
Honorable Philip S. Carchman, J.A.D. Retired on recall
Honorable Georgia M. Curio, A.J.S.C.
Honorable Lawrence M. Lawson, A.J.S.C.
Honorable Jeanne T. Covert, P.J. Cr.
Honorable Gerald J. Council, P.J.Cr.
Honorable Thomas V. Manahan, P.J.Cv.
Honorable Louis J. Belasco, Presiding Judge Municipal Court
Howard Berchtold, TCA
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MEMORANDUM

To: Chief Justice Rabner and Members of the Joint Committee on Criminal Justice
From: Joseph E. Krakora, Public Defender
Re: Joint Committee on Criminal Justice Report
Date: March 4, 2014

I write separately to express my disappointment in and, to some extent, my disagreement with the report of this Committee. Our Committee is making a number of recommendations designed to shorten the time between indictment and trial. Everyone agrees that the setting of a meaningful trial date earlier in the process is essential to alleviating pretrial delay. To the extent that these recommendations help achieve that goal, I obviously support them. My disappointment is that the Judiciary will not endorse a speedy trial provision in the court rules as opposed to merely recommending legislative action. There is currently no such thing as a right to a speedy trial in NJ and unless New Jersey adopts a real speedy trial provision that will not change. Our research indicates that 38 States, the District of Columbia, and the federal system have specific time frames in either a court rule or a statute.

Although I am strongly in favor of eliminating the plea cut-off rule in its current form as recommended by our Committee, I would go further and eliminate the Pretrial Conference as well. I agreed to the change from using mandatory to permissive language at the PTC as part of a compromise that would eliminate the Court's authority to order a trial even though the parties had agreed to a plea (unless of course the plea itself was deemed not to be in the interests of justice). I believe the Court should simply set a trial date at the proposed Final Case Disposition Conference as a mechanism to move up the trial date. A couple of members of our Committee changed their positions on the plea cut-off rule after I decided to make that compromise in my thinking.

Finally, the Committee's recommendation to reduce the number of peremptory challenges is misplaced in this report. It is a non-issue when it comes to the issue of pretrial delay because there are so few cases actually being tried. There is no data of which I am aware that would support the proposition that reducing the number of peremptory challenges would have any impact whatsoever on pretrial delay.