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INTRODUCTION

The County Prosecutor is the chief law enforcement official in his jurisdiction and therefore occupies a critical position in New Jersey's criminal justice system. Significantly, the tasks of the public prosecutor have become infinitely more complex in recent years. This evolution in the nature of the office reflects the rising expectations of our citizens with respect to the criminal law and the ability of public officials to faithfully execute its commands. The expanded responsibility of the prosecutor requires the development and application of expertise in social disciplines not traditionally within the realm of law enforcement and increasingly demands exercise of reasoned discretion in the performance of his duties. The prosecutor stands in a fiduciary relationship to the people whom he serves. As such, he is under an inescapable obligation to serve the public with the highest fidelity. The prosecutor is thus vested with broad discretion and authority in the processing and disposition of criminal cases. Equally important is his responsibility to effectively coordinate and allocate law enforcement resources in his county. Suffice it to say, this is an enormous task.

To assist in this endeavor, the Attorney General and the County Prosecutors Association established a task force charged with the responsibility of defining and codifying standards and guidelines pertaining to prosecutorial practices and procedures. These efforts were in keeping with the

recommendations of the National Advisory Commission on Criminal Justice Standards and Goals, the National District Attorneys Association and the Governor's Adult and Juvenile Advisory Committee. More specifically, each of these eminent authorities suggested preparation by prosecutors of written statements pertaining to office policies and procedures.

We perceive that a standard office manual will serve several salutary purposes. First, a comprehensive statement of policies and practices will foster public respect and confidence in the ability of government to protect its citizens against criminal attack. Most citizens lack proper understanding of the prosecutor's functions and responsibilities. Public ignorance in this respect is extremely unfortunate since the ability of the law enforcement community to prevent, detect and prosecute criminal behavior depends largely upon the willingness of citizens to assist in this endeavor. In short, prosecutors can ill afford public apathy with respect to enforcement of the law. By making visible the prosecutor's role and the parameters of his authority, public confidence in the criminal justice system will be enhanced. Second, effective enforcement of the criminal law will benefit by the promulgation of uniform standards. Such guidelines will undoubtedly constitute an important protection against abuse of authority. If properly implemented, such standards will provide better protection against improper exercise of the discretion historically conferred upon prosecutors in New Jersey. A third benefit attributable to the adoption of a standard office manual pertains to uniformity. The emphasis must be to insure that

prosecutors' assistants and investigative personnel perform in a manner consistent with uniform policies. Similarly situated defendants should be treated in a like manner. Prosecutorial recommendations pertaining to such diverse subjects as plea negotiations, sentences, immunity, joinder and severance, should be based upon uniform and standardized guidelines. A fourth benefit accruing to the development of the office manual will be the effective orientation and training of new personnel. It is to be observed that many prosecutors' offices experience significant changes in personnel. Written explanation of policies and office procedures to newly appointed assistant prosecutors, detectives and investigators will serve as an extremely valuable reinforcement to oral instruction. A further benefit expected from adoption of a standard office manual will be the improvement in the knowledge and technical proficiency of present staff members.

In preparing this Manual the task force has comprehensively surveyed and reviewed the procedures and policies presently being utilized by prosecutors' offices in New Jersey and other states. From this survey we have provided a module for procedures and policies to be utilized by prosecutors throughout the State. Our efforts have been designed to describe and effectuate the best standards and guidelines presently extant and not merely to weed out the worst.

Obviously, some flexibility is necessary. Plainly, prosecutors continue to be free to adapt priorities and policies to the needs of the community which they serve. In short,

individual prosecutors will always continue to have the right and the responsibility to establish their own policies on a local level. In addition, it will be necessary for prosecutors to supplement the Manual with respect to matters pertaining to office structure and organization, personnel and career plans, promotion, salary, sick leave, vacation, statistical reports, data systems and security.

The Manual is divided into four sections. Part I describes comprehensively the ethical obligations of the prosecutor and his assistants. Matters pertaining to the prosecutor's official responsibilities before, during and following a trial, as well as his outside activities, are discussed. Part II pertains to the prosecutor's relations with the public and other governmental institutions. Among the subjects reviewed are the prosecutor's relations with the Division of Criminal Justice, local police agencies, the media, complainants, witnesses and victims. Part III concerns case management procedures. These include case screening, administrative dispositions, pretrial intervention programs, implementation of New Jersey's impact crime strategy, immunity considerations, procedures to be utilized in presenting matters to the grand jury, joinder and severance and plea negotiations and sentencing. Finally, miscellaneous matters are set forth in Part IV. Specifically, standards have been developed pertaining to extradition, pretrial release, post-trial bail and surrender, and the retention and disposition of evidence including firearms and contraband.

We note that the Manual has been published in loose leaf form. This format was utilized in order to accommodate changes in the law and resulting modifications to policies and practices. It is envisioned that prosecutors will periodically review the contents of this manual to insure that they remain abreast of changing policies and procedures.

This Manual was made possible through the dedication of persons assigned to this project, and the willingness of individual county prosecutors to devote the necessary resources for the development of this important endeavor. The project was supervised and coordinated by Burlington County Prosecutor Cornelius P. Sullivan, Assistant Attorney General David S. Baime, Deputy Attorney General John De Cicco and former Deputy Attorney General Edwin H. Stern. The task force was comprised of the following individuals:

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Robert Farkas, First Assistant Prosecutor, Mercer County
Peter Gilbreth, Assistant Prosecutor, Essex County
Arnold Golden, Assistant Prosecutor, Camden County
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Godfrey Harper, Assistant Prosecutor, Burlington County
Edgar Holmes,Assistant Prosecutor, Cape May County
Arthur Lash, Assistant Prosecutor, Middlesex County
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Thomas McCormick, Assistant Prosecutor, Burlington County
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PART I

ETHICAL OBLIGATIONS OF A PROSECUTOR

CHAPTER I

ETHICAL OBLIGATIONS OF A PROSECUTOR

1. GENERAL STANDARD

TO ENSURE THE HIGHEST ETHICAL CONDUCT AND MAINTAIN THE INTEGRITY OF THE PROSECUTION AND THE LEGAL SYSTEM, IT IS INCUMBENT UPON A PROSECUTOR TO KNOW AND BE GUIDED BY THE HIGHEST STANDARDS OF PROFESSIONAL CONDUCT INCLUDING THOSE SET FORTH IN THE DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY ADOPTED BY THE NEW JERSEY SUPREME COURT.

2. ASSURING HIGH STANDARDS OF PROFESSIONAL SKILL

a. COMPETENCE

COUNTY PROSECUTORS AND THEIR ASSISTANTS SHOULD DEVOTE THEIR FULL TIME TO THEIR PUBLIC AND PROFESSIONAL RESPONSIBILITIES. SELECTION AND RETENTION OF INDIVIDUALS FOR THESE POSITIONS SHOULD BE ON THE BASIS OF PROFESSIONAL COMPETENCE AND WITHOUT REGARD TO PARTISAN POLITICAL INFLUENCE.

b. COMPENSATION

COUNTY PROSECUTORS AND THEIR ASSISTANTS SHOULD BE COMPENSATED IN A MANNER COMMENSURATE WITH THE HIGH RESPONSIBILITIES OF THEIF OFFICES. IN ORDER TO ATTRACT AND RETAIN ATTORNEYS OF HIGH QUALITY, SUCH REMUNERATION SHOULD BE COMPARABLE TO THAT RECEIVED BY THEIR PEERS IN THE PRIVATE SECTOR.

3. CONFLICTS OF INTEREST AND IMPROPRIETIES

COUNTY PROSECUTORS AND THEIR ASSISTANTS SHOULD AVOID BOTH THE APPEARANCE AND REALITY OF A CONFLICT OF INTEREST OR OTHER IMPROPRIETY WITH RESPECT TO THE PERFORMANCE OF THEIR OFFICIAL DUTIES.

4. PROHIBITED POLITICAL ACTIVITY

NO COUNTY PROSECUTOR, ASSISTANT PROSECUTOR, DETECTIVE, INVESTIGATOR OR OTHER PERSON EMPLOYED IN THE OFFICE OF THE COUNTY PROSECUTOR MAY ENGAGE IN ANY POLITICAL ACTIVITY AT ANY TIME, EXCEPT THAT HE OR SHE MAY (1) MAKE POLITICAL CONTRIBUTIONS AND PURCHASE TICKETS TO POLITICAL AFFAIRS WHERE THE AGGREGATE AMOUNT DOES NOT EXCEED $100 ANNUALLY AND A RECEIPT IS OBTAINED, AND (2) ATTEND AFFAIRS HELD FOR POLITICAL PURPOSES.

5. TRIAL CONDUCT

a. COURTROOM DECORUM

A PROSECUTOR SHOULD SUPPORT THE AUTHORITY OF THE COURT AND THE DIGNITY OF THE TRIAL COURTROOM BY STRICT

ADHERENCE TO THE RULES OF DECORUM AND BY MANIFESTING AN ATTITUDE OF PROFESSIONAL RESPECT TOWARD THE JUDGE, OPPOSING COUNSEL, WITNESSES, DEFENDANTS, JURORS AND OTHERS. PROPER CONDUCT INCLUDES, BUT IS NOT LIMITED TO, (1) ADDRESSING THE COURT RATHER THAN OPPOSING COUNSEL ON ALL MATTERS RELATING TO THE CASE, (2) REFRAINING FROM INJECTING PERSONALITIES INTO THE PROCEEDINGS, (3) COMPLYING WITH ALL ORDERS AND DIRECTIVES OF THE COURT, (4) MAKING OBJECTIONS IN A RESPECTFUL MANNER, AND (5) BEING PUNCTUAL IN ATTENDANCE IN COURT, AND IN THE SUBMISSION OF ALL MOTIONS, BRIEFS AND OTHER PAPERS.

b. RELATIONS WITH JURORS

A PROSECUTOR MAY NOT COMMUNICATE PRIVATELY WITH PERSONS SUMMONED FOR JURY DUTY OR IMPANELED AS JURORS CONCERNING THE CASE PRIOR TO OR DURING THE TRIAL. HE SHOULD AVOID BOTH THE APPEARANCE AND THE REALITY OF ANY SUCH IMPROPER COMMUNICATION. HE SHOULD TREAT JURORS WITH DEFERENCE AND RESPECT, BUT AVOID THE REALITY OR APPEARANCE OF UNDUE SOLICITUDE FOR THEIR COMFORT OR CONVENIENCE. FOLLOWING THE VERDICT, HE MAY NOT COMMUNICATE WITH JURORS CONCERNING THE CASE WITHOUT APPROVAL FROM THE COURT.

c. SEQUESTRATION

A PROSECUTOR MUST EXERCISE EXTREME CARE IN IMPLEMENTING SEQUESTRATION ORDERS. HE MUST AVOID BOTH THE APPEARANCE AND REALITY OF VIOLATION OF SUCH ORDERS.

d. OPENING STATEMENT

IN HIS OPENING STATEMENT A PROSECUTOR SHOULD CONFINE HIS REMARKS TO THE EVIDENCE HE INTENDS TO OFFER WHICH HE IN GOOD FAITH BELIEVES WILL BE AVAILABLE AND ADMISSIBLE. HIS OPENING STATEMENT MAY INCLUDE AN ANALYSIS OF THE ISSUES TO BE RESOLVED.

e. PRESENTATION OF EVIDENCE

A PROSECUTOR MAY NOT KNOWINGLY, AND FOR THE PURPOSE OF BRINGING INADMISSIBLE MATTER TO THE ATTENTION OF THE JUDGE OR JURY, OFFER INADMISSIBLE EVIDENCE, ASK LEGALLY OBJECTIONABLE QUESTIONS OR MAKE OTHER IMPERMISSIBLE COMMENTS OR ARGUMENTS IN THE PRESENCE OF THE JUDGE OR JURY. HE MAY NOT DISPLAY ANY TANGIBLE EVIDENCE UNTIL TESTIMONY IS INTRODUCED CONCERNING IT. NOR MAY HE TENDER SUCH EVIDENCE FOR IDENTIFICATION OR ADMISSION UNLESS HE HAS REASONABLE GROUNDS TO BELIEVE THAT IT IS ADMISSIBLE. WHERE THERE IS A DOUBT CONCERNING THE ADMISSIBILITY OF SUCH EVIDENCE IT SHOULD BE TENDERED BY AN OFFER OF PROOF AND A RULING OBTAINED.

f. EXAMINATION OF WITNESSES

A PROSECUTOR SHOULD CONDUCT HIS INTERROGATION OF WITNESSES FAIRLY, OBJECTIVELY, AND WITH DUE REGARD FOR THE DIGNITY

AND LEGITIMATE PRIVACY OF THE WITNESS. HE SHOULD NOT SEEK TO INTIMIDATE OR HUMILIATE THE WITNESS UNNECESSARILY. HE SHOULD NOT MISUSE THE POWER OF CROSS-EXAMINATION OR IMPEACHMENT TO DISCREDIT OR UNDERMINE THE TESTIMONY OF A WITNESS IF HE KNOWS THE WITNESS IS TESTIFYING TRUTHFULLY. HE MAY NOT CALL A WITNESS WHO HE KNOWS WILL CLAIM A VALID PRIVILEGE FOR THE PURPOSE OF IMPRESSING UPON THE JURY THE REFUSAL OF THE WITNESS TO TESTIFY.

g. ARGUMENT TO JURY

A PROSECUTOR MAY ARGUE ALL REASONABLE INFERENCES FROM EVIDENCE IN THE RECORD, BUT MAY NOT INTENTIONALLY MISSTATE THE EVIDENCE OR MISLEAD THE JURY AS TO INFERENCES IT MAY PROPERLY DRAW. HE SHOULD NOT EXPRESS HIS PERSONAL BELIEF OR OPINION AS TO THE TRUTH OR FALSITY OF ANY TESTIMONY OR EVIDENCE OR OF THE GUILT OF THE DEFENDANT. HE SHOULD NOT USE ARGUMENTS CALCULATED TO INFLAME THE PASSIONS OR PREJUDICES OF THE JURORS, AND HE SHOULD REFRAIN FROM ARGUMENT WHICH WOULD DIVERT THE JURY FROM ITS DUTY TO DECIDE THE CASE ON THE EVIDENCE PRESENTED.

h. FACTS OUTSIDE THE RECORD

A PROSECUTOR SHOULD NOT REFER TO, OR ARGUE ON THE BASIS OF, FACTS OUTSIDE THE RECORD, WHETHER AT TRIAL OR ON APPEAL, UNLESS SUCH FACTS ARE MATTERS OF COMMON PUBLIC KNOWLEDGE BASED ON ORDINARY HUMAN EXPERIENCE OR MATTERS OF WHICH THE COURT MAY TAKE JUDICIAL NOTICE.

i. COMMENTS AFTER VERDICT

A PROSECUTOR SHOULD NOT MAKE PUBLIC COMMENTS CRITICAL OF A VERDICT, WHETHER RENDERED BY JUDGE OR JURY.

6. DISCLOSURE OF EVIDENCE AND DISCOVERY

A PROSECUTOR SHALL DISCLOSE TO THE DEFENSE AT THE EARLIEST FEASIBLE OPPORTUNITY ANY EVIDENCE WHICH WOULD TEND TO NEGATE THE GUILT OF THE ACCUSED OR MITIGATE THE DEGREE OF PUNISHMENT. HE SHOULD ALSO COMPLY IN GOOD FAITH WITH DISCOVERY PROCEDURES UNDER APPLICABLE LAW. HE SHOULD NOT INTENTIONALLY AVOID PURSUIT OF EVIDENCE BECAUSE HE BELIEVES IT WILL DAMAGE THE STATE'S CASE OR AID THE ACCUSED.

7. DUTY TO IMPROVE THE LAW

A PROSECUTOR SHOULD CONTINUALLY SEEK TO REFORM AND IMPROVE THE ADMINISTRATION OF JUSTICE. WHEN INADEQUACIES OR INJUSTICES IN THE SUBSTANTIVE OR PROCEDURAL LAW COME TO HIS ATTENTION, HE SHOULD STIMULATE EFFORTS FOR REMEDIAL ACTION.

COMMENTARY

The prosecutor is an officer of the Court. He is an attorney, a public official and a law enforcement officer. He holds an important position in the community and should command respect. Obviously, the manner in which he conducts his practice should engender this respect. If he acts unfairly or illegally he demeans himself and his office. In short, the conduct of a prosecutor's office should be above reproach. The Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association, as adopted and supplemented by our Supreme Court,[1] were intended to govern the conduct of all attorneys. The prosecutor, as an attorney, is of course subject to the ethical code and accordingly it is uncumbent upon him to be familiar with its precepts and apply them in everyday practice. Indeed, considering his critical function in the criminal justice system, a prosecutor has a greater obligation to abide by the Code than other attorneys. This ethical responsibility lies in the prosecutor's dual role as both an administrator of justice and an advocate. The oft-quoted maxim that a prosecutor's duty is to seek justice, not merely to convict,[2] should be demonstrated on a daily basis by prosecutors, and not relegated to memory as a passive platitude.

It is important to note that the responsibilities and duties of the prosecutor have greatly expanded during the past

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1 R. 1:14.

2 State v. Farrell, 61 N.J. 99, 104 (1972). See also ABA Standards, "The Prosecution Function," §1.1; Governor's Adult and Juvenile Justice Advisory Committee, Standards and Goals for the New Jersey Criminal Justice System: Final Report, 1977, §5.1; NDAA, National Prosecution Standards §25.1.

decade. Suffice it to say, the prosecutor's role involves much more than the mere ministerial processing of cases for trial. In many ways, the prosecutor acts in a "semi-judicial" fashion determining not merely whether a particular defendant has committed an offense, but also whether he should be so charged or diverted to a rehabilitative program. Decisions of this nature require the highest competence, both in the form of legal skills and general fairness and impartiality. It is our belief that these responsibilities can best be fulfilled by full time prosecutors. In the majority of New Jersey's counties, prosecutors and assistants now serve in a full time capacity.[3] County prosecutors are appointed for a five-year term by the Governor with the advice and consent of the Senate.[4] Assistants are appointed by the county prosecutor and hold their positions at his pleasure.[5]

As noted, we are of the view that prosecutors and their assistants should devote full time to their public responsibilities. Further, their selection and retention should be on the basis of professional competence and without regard to partisan political influence. To attract capable and competent individuals to serve in the prosecutorial role, compensation should reflect prevailing levels of remuneration in the private sector. We have thus recommended that prosecutorial salaries be commensurate with those received in the private sphere.

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3 See N.J.S.A. 2A:158-1, N.J.S.A. 2A:158-1.1, N.J.S.A. 2A:158-15.1, N.J.S.A. 2A:158-15.1a.

4 N.J.S.A. 2A:158-1.

5 N.J.S.A. 2A:158-15.

Standard 3 recognizes the principle set forth in Canon 9 of the Code of Professional Responsibility which mandates that an attorney should avoid even the appearance of professional impropriety. We emphasize that in order to develop and to maintain public confidence in the Bar and in the criminal justice system, it is necessary to avoid not only professional impropriety, but also its appearance.[6] As guardians of the public trust, both the appearance and reality of integrity on the part of prosecutors are essential to the preservation of a free and democratic society. A consequent obligation is to maintain the highest standards of ethical conduct.

Our government is one of laws, not of men. Nevertheless, its operations are necessarily conducted by men and women. Insulation of the prosecutorial process from partisan politics is of the greatest importance. Accordingly, certain political activity is statutorily circumscribed for all county prosecutors and their assistants.[7] Standard 4 codifies the more stringent regulations adopted by the New Jersey County Prosecutor's Association which encompasses detectives, investigators and other personnel as well as prosecutors. We note, however, that prohibited political activity under the standard does not include making political contributions and purchasing tickets to political affairs where the aggregate amount does not exceed $100 annually and a

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6 "Integrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of a justice a doubt or distrust of its integrity." Erwin M. Jennings Co. v. DiGenova, 107 Conn. 491, 141 A. 866, 868 (Sup.Ct. 1928).

7 See N.J.S.A. 2A:158-21.

receipt for the same is obtained. So too, attending affairs held for political purposes is not proscribed by the standard. With respect to the latter exception, however, the participant should refrain from sitting on the dais, or taking other action which unnecessarily calls attention to the individual's presence.

Prohibited political activity does include, but is not limited to,[8] the following:

(1) Any candidacy for elective public or political office,

(2) Any holding of an office in or employment with or any work actively performed on behalf of any political party, organization or club,

(3) Any participation in any political campaign.

(4) Any exhibiting of signs concerning political candidates on one's person, vehicle or home,

(5) Any use of one's name in connection with any political material,

(6) Any sale or distribution of tickets to any affair held for any political purpose whatsoever (this prohibition includes but is not limited to any affair held by or on behalf of any candidate for, or incumbent of, any public or political office or by or on behalf of any political party, organization or club),

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[8] Governor's Adult and Juvenile Justice Advisory Committee, Standards and Goals for the New Jersey Criminal Justice System: Final Report, 1977, §5.6.

(7) Any soliciting or accepting of any contribution either directly or through a third person to or on behalf of any candidate for public office, or to or on behalf of any political organization, or for any other political purposes whatsoever,

(8) Any use of one's official office to influence the political action of another, and

(9) Any working at the polls during election time or as an election official at any time.

The propriety of prosecutorial conduct is, of course, most visible in relation to the performance of official duties. In this regard, the trial of a criminal case presents many situations in which it is necessary to consider whether actions are ethical or otherwise proper. While many trial practices are not per se unethical, they may raise grave questions of propriety and may seriously prejudice the State's ability to achieve a fair, successful prosecution. These situations may arise in preparing witnesses to testify, in opening to a jury, in the course of eliciting testimony during trial, and in summation.

1. Trial Preparation: The initial step in a jury trial is generally the preparation of witnesses. This occurs both before and after jury selection and may continue through the testimonial portion of the case. In most criminal cases, an order of sequestration will be requested and entered by the court. Where this occurs, the prosecutor must exercise extreme care to avoid both the appearance and the reality of a violation of the order. When such an order exists, it is improper for the prosecutor to interview witnesses in the presence of each other.

Separation of prospective witnesses should therefore be accomplished prior to interview. Further, interviews should whenever possible, be conducted in private, out of the possible view of jurors.[9]

Another improper action to be avoided is the interviewing of a witness during a recess when that witness is on the stand. A witness should be sufficiently prepared to testify so as to avoid the need to discuss anything related to the case during a break in his or her testimony.

Each witness should be instructed at the time of his or her pretrial interview of the existence of the sequestration order and its meaning. The witness should also be informed that conversations with the prosecutor should be conceded if asked by defense counsel and that the witness should indicate that he told the prosecutor all that he knew concerning the case.

2. Openings: The opening is the initial statement by the attorneys to the jury. A prosecutor generally utilizes the opening to outline to the jury the nature of the charges against the defendant. Different techniques are employed in opening by individual prosecutors, and the general guidepost in determining the propriety of referring to potential evidence is the good faith belief that such evidence will be admitted.[10] While opinions differ, it is submitted that a prosecutor should generally refrain from mentioning a confession in his opening

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[9] State v. Tillman, 122 N.J.Super. 137 (App.Div. 1973).

[10] State v. McAllister, 41 N.J. 342 (1964).

unless a prior determination of its admissibility has been made. Though the good faith standard might allow such mention where the prosecutor has reason to believe that a ruling allowing the confession into evidence would be forthcoming, caution dictates that such references not be made. A prosecutor should never refer to a grand jury determination to indict as grounds for the petit jury to believe the defendant guilty. This type of opening remark is totally improper and will often lead to a mistrial or reversal on appeal.

3. The Testimonial Portion of Trial: The portion of a trial in which the testimony of witnesses is elicited raises several areas in which improprieties can occur and which should be avoided whenever possible. A common example is the proffer by a prosecutor of a question which requires an answer dealing with an out of court identification or confession. When the defense has failed to request a voir dire hearing on admissibility, the prosecutor may be tempted to delve into such an area without giving the defense a last chance to make an objection. Often the defense attorney, unaware as he is of the exact sequence of questions to be posited by the prosecutor, will be caught off guard. While a practical advantage may be gained, it is submitted that the proper procedure is a more cautious one. Prior to the opening of any questioning dealing with the subjects of out of court identification or confession, the prosecutor should request a side bar conference. At such a meeting, he should inform the court on the record of his intention to enter into the particular area of questioning and should ask defense counsel, through the

court, whether a hearing is requested.[11] This method avoids any question of surprise and also prevents testimony from reaching the jury which may prejudice the State's case if it is later determined to be inadmissible.

It is not correct to ask questions which counsel knows to be improper in themselves or which call for clearly improper, inadmissible answers. It is highly improper to question a defendant as to his refusal to make statements to the police or prosecutor prior to trial.[12] It is also not proper to question a witness as to a prior conviction when the prosecutor knows none to exist or where he has no actual knowledge of its existence.[13]

4. Summations: No area of a trial presents more opportunity for prosecutorial comment and is as fraught with danger as that of summation. While the courts have long held that the prosecutor is entitled to strenuously argue his case during these closing remarks and may comment freely on the evidence and its reasonable implications, care is essential to be sure that excessive zeal does not lead to a mistrial, reversal of a conviction or worse.[14] The courts of New Jersey have expressed growing concern

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[11] Rule 8, New Jersey Rules of Evidence.

[12] See e.g., State v. Deatore, 70 N.J. 100 (1976). State v. Jefferson, 101 N.J.Super. 519 (App.Div. 1968).

[13] State v. Cooper, 10 N.J. 532 (1953).

[14] State v. Johnson, 31 N.J. 49 (1960) (graphic, forceful summation proper); State v. Dent, 51 N.J. 428 (1968); State v. Hippleworth, 33 N.J. 300 (1960) (wide latitude allowed in summation).

and outrage at improper comments by prosecutors in summation and have not hesitated to reverse where necessary.[15]

A review of the decisions in this area would require an extremely lengthy dissertation. Reference should be made to the article which appeared in the Criminal Justice Quarterly entitled "Limits on the Scope of Prosecutorial Comments and Tactics," 1 Crim. Justice Quarterly 18 (1973). The article catalogues the court decisions and refers to the specific objectionable comments. References to items not in evidence, name calling (brutes, butchers, bums, punks, animals), references to specific jurors by name, implications of knowledge of defendant's guilt other than from evidence adduced at trial, appeals to prejudice, and improper comments relating to the failure of defendant to testify are all generally improper and should always be avoided.

Standard 6 specifies the requirements of DR7-103(B) and calls attention to the prosecutor's obligations under Brady v. Maryland, 373 U.S. 83 (1963), and under the discovery rules, R. 3:13-3. Failure to abide by these obligations will lead to a reversal of an otherwise valid conviction.[16] Further, the errant prosecutor is subject to disciplinary proceedings.

Standard 7 imposes an affirmative duty upon prosecutors to improve the quality and efficiency of the criminal justice

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15 See State v. Spano, 64 N.J. 566 (1974); State v. Johnson, 65 N.J. 388 (1974); State v. Farrell, 61 N.J. 99 (1973).

16 State v. Carter, 71 N.J. 348 (1976).

system. A prosecutor's day-to-day contact with the administration of criminal justice places him in a unique position to influence the development and improvement of the law. He should not only strive to do this within the law enforcement community, but also in cooperation with the defense bar, and through such activities as participation in the criminal law sections of the organized bar and joint seminars on criminal law and procedure. Reforms and improvements will more readily come about if they are the work product of a joint effort by legislative bodies, the public, the defense bar and the law enforcement community. Prosecutors should take advantage of the new climate of concern by assuming a leadership role in order to realize needed reforms and improvements.

PART II

RELATIONS WITH THE PUBLIC AND OTHER GOVERNMENTAL INSTITUTIONS

CHAPTER 2

RELATIONS WITH THE ATTORNEY GENERAL'S DIVISION OF CRIMINAL JUSTICE

1. SHARING OF RESOURCES AND SUPERSESSION

a. SHARING OF RESOURCES

IN APPROPRIATE CIRCUMSTANCES, THE COUNTY PROSECUTOR AND THE DIVISION OF CRIMINAL JUSTICE SHALL PROVIDE EACH OTHER WITH NECESSARY ASSISTANCE. SUCH ASSISTANCE MAY TAKE THE FORM OF MANPOWER, EXPERTISE AND EQUIPMENT.

b. SUPERSESSION IN PARTICULAR CASES BY REQUEST OF A PROSECUTOR

(1) MATTERS IN WHICH A COUNTY PROSECUTOR CONSIDERS THAT A CONFLICT OF INTEREST EXISTS SHOULD BE FORWARDED TO THE DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE WITH A WRITTEN EXPLICATION OF THE PARTICULAR MATTER. THE CONFLICTS ENVISIONED ENCOMPASS TWO DISTINCT AREAS:

(a) CONFLICTS BASED UPON ETHICS OPINIONS AND DISCIPLINARY RULES AND,

(b) CONFLICTS INVOLVING AREAS OF PARTICULAR SENSITIVITY, SUCH AS POLITICAL OR PERSONAL RELATIONS BETWEEN STAFF MEMBERS AND POTENTIAL DEFENDANTS.

(2) THE COUNTY PROSECUTOR SHOULD INFORM THE DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE WITH RESPECT TO INVESTIGATIONS HAVING BROAD STATEWIDE IMPLICATIONS. IN ADDITION, THE COUNTY PROSECUTOR MAY REQUEST THE DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE TO SUPERSEDE IN SUCH INVESTIGATIONS. ILLUSTRATIONS OF THE INVESTIGATIONS CONTEMPLATED BY THIS PARAGRAPH ARE:

(a) INVESTIGATIONS WHERE SUBSTANTIAL CRIMINAL ACTIVITY HAS OCCURRED BEYOND THE BORDERS OF A SINGLE COUNTY,

(b) INVESTIGATIONS INVOLVING LEGAL QUESTIONS THE RESOLUTION OF WHICH WILL HAVE BROAD STATEWIDE SIGNIFICANCE, AND

(c) THOSE MATTERS WHERE THE COUNTY PROSECUTOR REQUESTS THE DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE TO SUPERSEDE.

(3) THE DIVISION OF CRIMINAL JUSTICE WILL CONSIDER ALL SUCH REQUESTS AND DETERMINE WHETHER OR NOT THE PARTICULAR CIRCUMSTANCES WARRANT SUPERSESSION. A WRITTEN RESPONSE SHALL BE SUPPLIED SO THAT THE COUNTY PROSECUTOR CAN RETAIN THIS COMMUNICATION IN HIS FILE.

c. SUPERSESSION IN PARTICULAR CASES BY THE DIVISION OF CRIMINAL JUSTICE IN ABSENCE OF REQUEST

(1) THE ATTORNEY GENERAL IS DUTY BOUND TO DISCHARGE THE STATUTORY RESPONSIBILITY OF SUPERSESSION WHEN CIRCUMSTANCES WARRANT. SEE N.J.S.A. 52:17B-105, 106, 107. HOWEVER, AS A MEANS OF DEFINING THE WORKING RELATIONSHIP BETWEEN THE COUNTY PROSECUTORS AND THE DIVISION OF CRIMINAL JUSTICE, THE ATTORNEY GENERAL WILL GENERALLY CONSIDER SUPERSESSION IN PARTICULAR CASES IN THE ABSENCE OF A REQUEST FROM A COUNTY PROSECUTOR ONLY IN THE FOLLOWING INSTANCES:

(a) WHEN AN INVESTIGATION, PROSECUTION OR MATTER HAS AN OVERRIDING STATE INTEREST -- FOR EXAMPLE, WHERE A PARTICULAR INVESTIGATION AT THE COUNTY LEVEL IS ONLY A PART OF A BROADER INQUIRY BEING CONDUCTED BY THE DIVISION OF CRIMINAL JUSTICE OR WHERE A MATTER HAS STATE WIDE IMPLICATIONS.

(b) WHEN A MATTER WHICH INVOLVES THE ACTUAL INVESTIGATION OF A COUNTY PROSECUTOR'S OFFICE OR STAFF AND INQUIRY BY ANOTHER AGENCY WOULD BE DESIRABLE FROM AN INVESTIGATIVE AND/OR PUBLIC STANDPOINT; AND

(c) WHEN A MATTER IS BEING HANDLED IN A CORRUPT OR OTHERWISE IMPROPER MANNER BY A PROSECUTOR.

(2) IN ALL SUCH INSTANCES INVOLVING SUPERSESSION, THE MATTER WILL BE DISCUSSED WITH THE PARTICULAR PROSECUTOR INVOLVED PRIOR TO THE ASSUMPTION OF RESPONSIBILITY BY THE DIVISION OF CRIMINAL JUSTICE.

d. DISCRETIONARY SUPERSESSION

(1) THE DIVISION OF CRIMINAL JUSTICE SHOULD BE CONSULTED AS TO SUPERSESSION CASES INVOLVING COUNTY OFFICIALS WHERE IT MAY BE INADVISABLE OR INAPPROPRIATE FOR THE PROSECUTOR TO HANDLE THE MATTER.

(2) COUNTY PROSECUTORS' OFFICES HAVE THE MANPOWER AND THE EXPERTISE TO ADEQUATELY PROSECUTE GAMBLING AND NARCOTICS INVESTIGATIONS. UNLESS A PARTICULAR CASE HAS THE OVERTONES OF GOVERNMENTAL CORRUPTION OR IMPROPER POLICE INVOLVEMENT, OR IS MULTI-COUNTY IN SCOPE, THIS TYPE OF PROSECUTION SHOULD BE HANDLED BY THE

COUNTY PROSECUTOR. IN INSTANCES IN WHICH THE DIVISION OF CRIMINAL JUSTICE IS AWARE OF GAMBLING AND NARCOTICS OFFENSES WHICH DO NOT HAVE THE INDICIA NOTED ABOVE, THE DIVISION OF CRIMINAL JUSTICE MAY REQUEST THE COUNTY PROSECUTOR TO HANDLE THE MATTER.

(3) THE DIVISION OF CRIMINAL JUSTICE SHOULD HANDLE CASES INVOLVING STATE INSTITUTIONS, AGENCIES OR OFFICIALS. INVESTIGATIONS OF MATTERS INVOLVING INDUSTRIES AND AGENCIES CLOSELY REGULATED BY THE STATE, SUCH AS RACETRACKS, UTILITY AUTHORITIES AND MOTOR VEHICLE AGENCIES, SHOULD ALSO BE REFERRED TO THE DIVISION OF CRIMINAL JUSTICE.

2. COMMUNICATION BETWEEN COUNTY PROSECUTORS AND THE DIVISION OF CRIMINAL JUSTICE IN PARTICULAR TYPES OF CASES.

IN ORDER TO AVOID DUPLICATION OF EFFORT, TO ENCOURAGE COOPERATIVE INVESTIGATIONS, AND TO AVOID POSSIBLE EMBARRASSMENT, COMMUNICATIONS BETWEEN THE COUNTY PROSECUTORS AND THE DIVISION OF CRIMINAL JUSTICE HAVE BEEN FORMALLY ESTABLISHED IN THE FOLLOWING AREAS:

(a) THE DIVISION OF CRIMINAL JUSTICE WILL NOTIFY THE COUNTY PROSECUTOR OF A STATE GRAND JURY INDICTMENT WHICH RELATES IN ANY WAY TO THE JURISDICTION OF THE PARTICULAR PROSECUTOR AT OR PRIOR TO THE TIME OF THE RETURN OF SUCH INDICTMENT.

(b) THE COUNTY PROSECUTOR WILL INFORM THE DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE OF ANY INVESTIGATION WHICH INVOLVES A STATE EMPLOYEE, OFFICER OR AGENCY.

(c) A COPY OF A COURT ORDER, AND THE SUPPORTING APPLICATION THEREFORE, PERMITTING ELECTRONIC SURVEILLANCE WILL BE MAILED IN A CONFIDENTIAL ENVELOPE TO THE DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE BY THE COUNTY PROSECUTOR UPON ENTRY OF THE ORDER. THE DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE SHALL DESIGNATE A SPECIFIC DEPUTY ATTORNEY GENERAL TO REVIEW SUCH MATERIAL.

(d) CONSONANT WITH THE OBJECTIVES OF THE CRIMINAL JUSTICE ACT OF 1970, IN ORDER TO SECURE THE BENEFITS OF A UNIFORM AND EFFICIENT ENFORCEMENT OF THE CRIMINAL LAW, THERE SHOULD BE AN EXCHANGE OF INFORMATION BETWEEN EACH COUNTY PROSECUTOR AND THE DIVISION OF CRIMINAL JUSTICE IN THE AREAS OF ORGANIZED CRIME AND POLITICAL CORRUPTION.

THEREFORE, WHERE AFTER PRELIMINARY INQUIRY INTO ALLEGATIONS OF ORGANIZED CRIMINAL ACTIVITIES OR POLITICAL CORRUPTION, IT APPEARS THAT THERE IS SUFFICIENT SUBSTANCE TO THE CHARGES TO WARRANT INVESTIGATION AND THE CASE IS A MATTER OF SOME SIGNIFICANCE AND PROMINENCE (EITHER BECAUSE OF THE INDIVIDUAL OR INDIVIDUALS INVOLVED OR THE IMPORTANCE OF THE INVESTIGATION, OR THE LIKE) THE COUNTY PROSECUTOR SHALL SO ADVISE THE DIVISION OF CRIMINAL JUSTICE. THEREAFTER THE DIVISION SHALL ACT AS A CLEARING-HOUSE WITH RESPECT TO SUCH INFORMATION, AND SHALL ADVISE THE COUNTY PROSECUTOR OF ANY ADDITIONAL INFORMATION THEN POSSESSED, OR LATER OBTAINED, WHICH MAY ASSIST IN THE SUCCESSFUL COMPLETION OF THE INVESTIGATION. FURTHER, IN APPROPRIATE CASES, THE DIVISION OF CRIMINAL JUSTICE SHALL APPRISE THE COUNTY PROSECUTORS OF RELEVANT OR PARALLEL INVESTIGATIONS RELATING TO THE SUBJECT MATTER UNDER INVESTIGATION AND SHALL GENERALLY COORDINATE LAW ENFORCEMENT ACTIVITIES IN THIS REGARD. IN ADDITION TO ITS VALUE IN THE AREA OF COORDINATION AND COMMUNICATION, THE ENTIRE FOREGOING PROCEDURE WILL ASSIST IN AVOIDING POSSIBLE DUPLICATION OF EFFORT AND MULTIPLE ATTENTION TO THE SAME OR SOME UNITARY PROBLEM. THIS EXCHANGE OF INFORMATION SHALL OCCUR ONLY WHERE THE INTEGRITY OF THE INVESTIGATION OR PROSECUTION WILL NOT BE JEOPARDIZED.

IN BOTH CORRUPTION AND ORGANIZED CRIME MATTERS, THE INFORMATION CALLED FOR ABOVE SHALL BE EXCHANGED ONLY BETWEEN THE DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE (OR HIS DEPUTY DIRECTOR DESIGNEE) AND THE PARTICULAR COUNTY PROSECUTOR INVOLVED. THESE CHANNELS OF COMMUNICATIONS ARE ESTABLISHED AT THE HIGHEST LEVEL TO INSURE THAT THE CONFIDENTIAL NATURE OF INVESTIGATIONS WILL NOT BE COMPROMISED. NONETHELESS, THE EXISTENCE OF THIS HIGH ECHELON CHANNEL OF COMMUNICATION SHOULD NOT INTERFERE WITH, OR REPLACE, THE USUAL AND EXISTING WORKING RELATIONSHIPS OF STAFF MEMBERS AMONG AND BETWEEN THE OFFICES INVOLVED.

3. ORGANIZED CRIME INVESTIGATION RESOURCES

WE ACKNOWLEDGE AT THE OUTSET THAT THE ORGANIZED CRIMINAL ACTIVITIES ARE NOT CONFINED WITHIN RECOGNIZED MUNICIPAL, COUNTY OR EVEN STATE BOUNDARIES. RATHER, ORGANIZED CRIME IS CARRIED ON CAUTIOUSLY AND FURTIVELY AND IN AS MANY DIFFERENT WAYS AND BY AS MANY CONCEIVABLE METHODS AS HUMAN INGENUITY CAN DEVISE. CORRESPONDINGLY, THESE COMPLEXITIES DEMAND A COORDINATED EFFORT ON THE PART OF ALL LAW ENFORCEMENT AGENCIES TO COPE WITH THE DIRTY REALITIES OF SYNDICATED CRIME. TOWARD THIS END, THE COUNTY PROSECUTORS, IN COOPERATION WITH THE DIVISION OF CRIMINAL JUSTICE AND THE STATE POLICE, HAVE ESTABLISHED AN ORGANIZED CRIME POLICY BOARD. THE BOARD CONSTITUTES

AN ADMINISTRATIVE MECHANISM TO INSURE THE POOLING OF EXISTING LAW ENFORCEMENT RESOURCES IN A CONCERTED ACTION BY THE STATE'S PROSECUTORIAL COMMUNITY TO COMBAT AND ATTACK ORGANIZED CRIME. THE BOARD'S FUNCTIONS INCLUDE COMPREHENSIVE PLANNING, THE SHARING OF INTELLIGENCE INFORMATION (AND STANDARDS FOR ITS COLLECTION) AND THE ESTABLISHMENT OF AGREED UPON PRIORITIES. THE GOAL IS TO ENCOURAGE MAXIMUM COOPERATION AND COMMUNICATION BETWEEN PROSECUTORIAL AGENCIES OF THIS STATE TO INSURE EFFECTIVE ENFORCEMENT OF THE LAW.

4. INTERNAL INVESTIGATIONS

a. THERE SHOULD BE KEPT A REGISTER FOR RECORDING ALL COMPLAINTS CHARGING OFFICIAL DERELICTIONS AGAINST MEMBERS OF THE PROSECUTOR'S STAFF. THE REGISTER SHOULD INDICATE THE NATURE OF THE COMPLAINT, THE NAME(S) OF THE COMPLAINANT(S) AND THE ACCUSED, THE TIME AND DATE RECEIVED, THE INVESTIGATOR(S) ASSIGNED, AND THE FINAL DISPOSITION. AT THE INSTITUTION OF AN INVESTIGATION AND WITHIN NO LATER THAN FIVE (5) DAYS, THE DIVISION OF CRIMINAL JUSTICE SHOULD BE INFORMED AS TO ALL OF THE ABOVE ENUMERATED PARTICULARS UP TO AND INCLUDING THE INVESTIGATOR ASSIGNED AND THE ANTICIPATED COMPLETION DATE OF INVESTIGATION. ALL COMPLAINTS OF A CRIMINAL NATURE, ETHICS CHARGE OR ANY OTHER COMPLAINT WHICH THE PROSECUTOR DEEMS SIGNIFICANT SHOULD BE REFERRED TO THE DIVISION OF CRIMINAL JUSTICE. CONVERSELY, ALL ALLEGATIONS AND COMPLAINTS MADE AGAINST MEMBERS OF A PROSECUTOR'S OFFICE DIRECTLY TO THE DIVISION OF CRIMINAL JUSTICE SHALL BE BROUGHT TO THE ATTENTION OF THE PROSECUTOR IN THE SAME MANNER AS DESCRIBED ABOVE.

b. THE COUNTY PROSECUTOR, AS CHIEF LAW ENFORCEMENT OFFICER OF THE COUNTY, SHOULD REQUIRE THAT EACH POLICE DEPARTMENT NOTIFY HIS OFFICE IN A SIMILAR MANNER AS DESCRIBED ABOVE AS TO ALL COMPLAINTS AND ALLEGATIONS OF CRIMINAL COMPLAINTS, NON-CRIMINAL COMPLAINTS, ETHICAL COMPLAINTS AND/OR MAJOR DISCIPLINARY COMPLAINTS AGAINST A MEMBER OF THE LOCAL POLICE DEPARTMENT WITHIN THE COUNTY JURISDICTION. THE COUNTY PROSECUTOR MAY THEN CHOOSE TO EITHER SUPERSEDE THE LOCAL POLICE DEPARTMENT OR RELY UPON ITS INTERNAL AFFAIRS UNIT FOR INVESTIGATIVE ASSISTANCE. GENERALLY, THE BETTER POLICY IS THAT THE PROSECUTOR'S OFFICE SHOULD HANDLE ALL CRIMINAL ALLEGATIONS, AND, AT THE DISCRETION OF THE PROSECUTOR, THESE MAY BE THE SUBJECT OF SUPERSESSION BY THE DIVISION OF CRIMINAL JUSTICE (SEE SECTION ON SUPERSESSION). ALL OTHER MATTERS SHOULD BE HANDLED BY THE LOCAL POLICE DEPARTMENT.

c. WHENEVER A COMPLAINT OR ALLEGATION IS MADE DIRECTLY TO THE DIVISION OF CRIMINAL JUSTICE CONCERNING A LOCAL POLICE DEPARTMENT, THE MATTER SHOULD BE REFERRED TO THE COUNTY PROSECUTOR. IF THE ALLEGATION IS CRIMINAL IN NATURE, THE COUNTY PROSECUTOR MAY, IN HIS DISCRETION, PROCEED WITH A REQUEST FOR SUPERSESSION BY THE DIVISION OF CRIMINAL JUSTICE.

d. WHENEVER COMPLAINTS OR ALLEGATIONS ARE MADE DIRECTLY TO THE DIVISION OF CRIMINAL JUSTICE REGARDING A PROSECUTOR OR A MEMBER OF HIS STAFF, THE PROSECUTOR SHALL BE NOTIFIED IN THE MANNER PRESCRIBED ABOVE, UNLESS HE IS THE SUBJECT OF THE ALLEGATION OR WHERE SUCH NOTIFICATION WOULD BE OTHERWISE INAPPROPRIATE. IF THE MATTER IS CRIMINAL IN NATURE, IT SHALL BE HELD FOR INVESTIGATION BY THE DIVISION OF CRIMINAL JUSTICE.

e. WHENEVER COMPLAINTS OR ALLEGATIONS ARE MADE DIRECTLY TO THE DIVISION OF CRIMINAL JUSTICE REGARDING MEMBERS OF THE JUDICIARY, THE MATTER WILL BE REFERRED TO THE ADMINISTRATIVE OFFICE OF THE COURTS WITH A COPY TO THE RELEVANT ASSIGNMENT JUDGE AND PROSECUTOR IF IT IS A NON-CRIMINAL MATTER. IF THE MATTER IS CRIMINAL IN NATURE, THE DIVISION OF CRIMINAL JUSTICE SHALL CONDUCT AN INVESTIGATION AND SHALL NOTIFY THE PROSECUTOR OF THE PARTICULAR COUNTY WHEREIN THE JUDGE SITS.

f. WHENEVER COMPLAINTS OR ALLEGATIONS ARE MADE TO A PROSECUTOR REGARDING MEMBERS OF THE JUDICIARY OF HIS COUNTY, HE SHALL NOTIFY THE DIVISION OF CRIMINAL JUSTICE IN THE MANNER PRESCRIBED ABOVE. IF THE MATTER IS CRIMINAL IN NATURE, HE SHALL REFER THIS MATTER TO THE DIVISION OF CRIMINAL JUSTICE FOR SUPERSESSION. IN ALL OTHER CATEGORIES OF COMPLAINTS, THE PROSECUTOR SHALL DIRECT SAME TO THE ADMINISTRATIVE OFFICE OF THE COURTS WITH A COPY TO THE ASSIGNMENT JUDGE OF HIS COUNTY.

g. WHENEVER COMPLAINTS OR ALLEGATIONS ARE MADE AGAINST MEMBERS OF THE DIVISION OF STATE POLICE, THE PROSECUTOR SHOULD REFER THEM DIRECTLY TO THE SUPERINTENDENT OF STATE POLICE, WITH NOTIFICATION TO THE DIRECTOR OF THE DIVISION OF CRIMINAL JUSTICE.

COMMENTARY

The tasks of the public prosecutor have become infinitely more complex in recent years. This evolution in the nature of the office reflects the rising expectations of

our citizens with respect to the function of the criminal law. The expanded responsibility of the prosecutor requires the development of expertise in social disciplines not traditionally within the realm of law enforcement and increasingly demands the exercise of reasoned discretion in the performance of his duties.

Equally significant is the vast change in the nature of crime itself. No longer is criminal behavior confined within municipal, county or even state boundaries. The growing sophistication of those who violate the law requires the adoption of new procedures and methods to cope with the dirty realities of criminal conduct. Correspondingly, these complexities demand that prosecutors engage in a coordinated effort to fulfill their public obligations. As law enforcement officers it is incumbent upon prosecutors to establish clear criminal justice priorities and to work together to attain common objectives.

To meet this challenge, the county prosecutors and the Division of Criminal Justice have pooled resources to establish law enforcement priorities and to implement a unified common plan of action. While such cooperative endeavors are not new, during the past several years a concerted effort has been mounted to ensure a cohesive statewide approach to common law enforcement problems.

It must be emphasized that the public prosecutor can ill-afford to make decisions in a vacuum. Therefore, communication between law enforcement agencies must be implicit in the term "coordination." Simply stated, additional channels of communication are essential to any coordinated effort against

crime. Too often, criminal investigations have proceeded in such secrecy as to result in duplication of effort, waste of valuable resources and the appearance of competition between law enforcement agencies. This inevitably tarnishes the image of prosecutors as public servants and sometimes prevents effective discharge of their duties. Granting the need for confidentiality, secrecy should not become an obsession. For example, the beneficial results attained by the Organized Crime Policy Board, which was recently developed, indicates that prosecutors should expand their efforts to incorporate other areas of common investigative concern.

Cooperation is not to be restricted only to the exchange of information. Rather, at times resources can best be utilized by encouraging cooperative investigations, whereby personnel and equipment are pooled. By sharing personnel, the development of individual expertise in various types of investigations can be fostered. In this way, experts in numerous fields of criminal investigation and detection can be utilized by all. This concept may well form the basis for the establishment of inter-county task forces with recognized proficiency.

Working together has fostered a spirit of unity and has prompted the accomplishment of tasks which would have been impossible to achieve singly. The cumulative impact of these joint efforts is truly awesome. Nevertheless, prosecutors must guard against utilizing their resources to aggrandize respective organizations or individual offices. Rather, we must

articulate standards which will hopefully ensure that prosecutors act reasonably and not arbitrarily. These self-imposed limitations, coupled with efforts to professionalize law enforcement, form the best guarantee against prosecutorial excesses.

The standards enunciated in this chapter are designed to promote coordination of law enforcement resources. These standards make it abundantly clear that the Attorney General and members of his staff, and prosecutors and members of their staffs, are to cooperate to ensure the best allocation of criminal justice resources.

CHAPTER 3

RELATIONS WITH LOCAL POLICE

1. THE RELATION OF THE COUNTY PROSECUTOR TO THE LOCAL POLICE

   a. THE PROSECUTOR IS THE CHIEF LAW ENFORCEMENT OFFICER IN THE COUNTY AND IS CHARGED WITH THE DUTY OF FAITHFULLY EXECUTING THE LAW. HIS POSITION DEMANDS COMPLETE COOPERATION BY ALL LOCAL LAW ENFORCEMENT AGENCIES WITHIN HIS JURISDICTION. HE MUST STRIVE TO ESTABLISH RESPECT FOR HIS OFFICE AND COMPLIANCE WITH HIS POLICIES, DIRECTIVES AND GUIDELINES.

   b. IT IS ESSENTIAL FOR EFFECTIVE LAW ENFORCEMENT THAT THE COUNTY PROSECUTOR ESTABLISH A STRONG RELATIONSHIP BETWEEN HIS OFFICE AND ALL LOCAL LAW ENFORCEMENT AGENCIES. TO THAT END, HE SHOULD ESTABLISH AN ASSOCIATION CONSISTING OF THE COUNTY PROSECUTOR OR HIS REPRESENTATIVE AND EACH LOCAL CHIEF OF POLICE. THE ASSOCIATION SHOULD BE CHARGED WITH THE RESPONSIBILITY OF FACILITATING COOPERATION AND ASSISTING AND DISCUSSING MATTERS OF MUTUAL CONCERN.

2. ASSURING PROFESSIONALISM BY LOCAL POLICE OFFICERS

   a. THE COUNTY PROSECUTOR MUST INSURE THAT THE LOCAL POLICE THOROUGHLY AND CONSISTENTLY ATTEMPT TO DETECT, INVESTIGATE, APPREHEND AND CHARGE OFFENDERS OF THE LAW SO THAT A PROPER DISPOSITION WILL RESULT.

   b. WITHIN THE LIMITATIONS OF HIS OFFICE, THE COUNTY PROSECUTOR SHOULD ASSIST AND SUPPLEMENT LOCAL LAW ENFORCEMENT AGENCIES WHEN NECESSARY WITH PERSONNEL AND INVESTIGATIVE EXPERTISE.

   c. THE COUNTY PROSECUTOR SHOULD INFORM ALL LOCAL LAW ENFORCEMENT AGENCIES OF HIS POLICIES REGARDING DETERMINATION OF CHARGES, DOWNGRADING OF OFFENSES, ADMINISTRATIVE DISMISSALS, PRE-TRIAL INTERVENTION CRITERIA, PLEA NEGOTATION AND OTHER CASE DISPOSITIONS.

   d. THE COUNTY PROSECUTOR SHOULD INFORM EACH LOCAL LAW ENFORCEMENT UNIT OF THE DISPOSITION OF ALL CASES INVOLVING THAT AGENCY.

   e. THE COUNTY PROSECUTOR SHOULD PERIODICALLY REVIEW AND ISSUE FORMS FOR LOCAL LAW ENFORCEMENT AGENCIES REGARDING POLICE REPORTS, SEARCH WARRANTS, STATEMENTS AND OTHER PRE-TRIAL CRIMINAL PROCEDURES.

3. POLICE LEGAL TRAINING

a. THE COUNTY PROSECUTOR SHOULD ENCOURAGE, COOPERATE AND ASSIST IN POLICE TRAINING. HE SHOULD URGE ANNUAL PARTICIPATION IN APPROPRIATE POLICE TRAINING.

b. THE COUNTY PROSECUTOR SHOULD ENCOURAGE, COOPERATE AND ASSIST IN REGIONAL AND STATE TRAINING OF ALL LOCAL LAW ENFORCEMENT OFFICERS.

c. THE COUNTY PROSECUTOR SHOULD PERIODICALLY FORWARD WRITTEN INFORMATION AND GUIDELINES TO EACH LOCAL LAW ENFORCEMENT AGENCY CONCERNING RECENT COURT DECISIONS, PROCEDURAL AND SUBSTANTIVE CHANGES IN THE LAW AND POLICIES AND DIRECTIVES ISSUED BY HIS OFFICE. THIS COULD BE ACCOMPLISHED BY REGULARLY ISSUED NEWSLETTERS.

4. POLICE LIAISON OFFICER

a. THE COUNTY PROSECUTOR SHOULD DESIGNATE AN ASSISTANT PROSECUTOR TO ACT AS A POLICE LIAISON OFFICER WITH EACH LOCAL LAW ENFORCEMENT AGENCY. THE POLICE LIAISON OFFICER SHALL PROVIDE LEGAL ADVICE UPON REQUEST AND INSURE COMMUNICATION BETWEEN THE COUNTY PROSECUTOR AND ALL LOCAL LAW ENFORCEMENT AGENCIES.

b. ALL AFFIDAVITS PREPARED BY LOCAL POLICE OFFICERS IN SUPPORT OF APPLICATIONS FOR SEARCH WARRANTS AND ELECTRONIC SURVEILLANCES SHALL BE REVIEWED BY THE COUNTY PROSECUTOR OR THE POLICE LIAISON OFFICER PRIOR TO THEIR SUBMISSION TO THE JUDICIARY FOR CONSIDERATION.

COMMENTARY

Americans have historically been ambivalent in their attitudes toward the law enforcement community. Citizens rightfully expect immediate and forceful police response when victimized by criminal conduct. However, the police, by virtue of their authority, often engender fear in those whom they are obliged to protect. Individuals place their ultimate reliance on the police for protection against the deepest injuries that human conduct can inflict. By the same token, police agencies

govern the strongest force society permits to bear upon the individual. The promise of law enforcement as an instrument of public safety is matched only by its power to destroy.

We all recognize that government's primary mission is to protect against criminal attack. That obligation is the very reason for government, as the preamble to the federal Constitution plainly says. In this context, it would be well to observe that the police officer is the shield of the community against the use of violence and other lawless acts. He is the prinicipal and the most visible representative of government in combatting criminal conduct.

It is against this backdrop that these standards have been developed. Surely, one of the most important obligations of the prosecutor is to assist the police in performing their important public duties. The day has long gone by when the prosecutor could justifiably merely try cases. In a very real sense, he is the commander of all law enforcement resources in his county. As such, it is incumbent upon him to insure proper allocation of enforcement resources toward the end that the public will be effectively protected against criminal attack.

New Jersey historically has recognized the unique authority the county prosecutor possesses. Our Supreme Court succinctly summarized his powers in State v. Winne, 12 N.J. 152, 168-169 (1953):

> It is a matter of common knowledge that the local law enforcement authorities from the chance man on his beat to the chief of police and beyond him to the

> director of public safety are responsive to the county prosecutor's concept of law enforcement on pain of possible indictment if they do not cooperate with him in enforcing the law. He does not stand alone. He is in a position to command the cooperation of all the law enforcing authorities in the county.

Since the fight against crime requires unified organization with effective leadership, it is mandatory that the county prosecutor have the loyalty, respect and cooperation of all supporting local law enforcement agencies.[17] Standard 1a sets forth the guiding principle pertaining to the relations between the prosecutor and the local police. As chief law enforcement officer in his jurisdiction, the prosecutor must insure proper utilization of resources. Standard 1b recognizes that the county prosecutor's legal authority must be accompanied by a cooperative working relationship with all local police officers and agencies within the county. Obviously, the criminal justice system can not operate successfully unless all persons, from the patrolman to the prosecutor, function in harmony. A county association of all local chiefs of police and the prosecutor should facilitate implementation of this mutual objective. The exchange of ideas by these law enforcement leaders should aid in resolving common problems. Since crime is not

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17 ABA Standards,"The Prosecution Function,"§1.1(a); Governor's Advisory Committee on Juvenile and Adult Criminal Justice Standards and Goals, §5.1, 5.4; N.J.S.A. 2A:158-1, 4 and 5; State v. Josephs, 79 N.J.Super. 411, 415 (App.Div. 1963); State v. Eisenstein, 16 N.J.Super. 8, 12-13 (App.Div. 1951), aff'd o.b. 9 N.J. 347 (1952).

limited to municipal boundaries, the experiences of some may assist others in anticipating, preventing and detecting violations of the law.[18]

Frequently, it is assumed that a county prosecutor's obligations are limited solely to prosecuting violations of the criminal law. However, his office requires that he review and supervise all phases of law enforcement within the county. The public's demand for professionalism, efficiency and prompt processing of cases mandates effective leadership. The prosecutor should not conceive of his role as limited to the mere prosecution of criminal cases. It is incumbent upon him to develop effective enforcement policies. Standard 2a recognizes the prosecutor's supervisory role with regard to law enforcement.[19]

As part of his obligation to fully and fairly prosecute violations of law, the county prosecutor must assist and supplement local law enforcement agencies with personnel and investigative expertise in specified cases. Electronic surveillances and organized crime activities are but two of many potential areas which may require the county prosecutor's

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[18] These principles have been recognized by numerous law enforcement authorities. See Resources: Task Force Report: The Police (1967) at 17; N.D.A.A., National Prosecution Standards, §20.1(A) and Commentary; LaFave, Arrest: The Decision to Take a Suspect into Custody (1965) at 515-516.

[19] See ABA Standards, "The Prosecution Function,"§2.7(a), 3.1(a); Governor's Advisory Committee on Juvenile and Adult Criminal Justice Standards and Goals, §5.1, 5.4; Municipal Police Administration (1971) at 125-126.

assistance.[20] Standard 2b recognizes the obligation of the prosecutor to assist local law enforcement agencies when possible and appropriate.

An effective means of maintaining the respect and cooperation of all local law enforcement agencies is to insure their familiarity with the county prosecutor's policies concerning offenders and offenses. Specifically, local police agencies should be informed of the prosecutor's policies pertaining to the determination of charges, downgrading of offenses, administrative dismissals, pre-trial intervention criteria, plea negotiations and other dispositions. These policies provide a framework within which local police officers may intelligently perform their duties.[21]

Similarly, local police officers should be routinely informed concerning the disposition of cases forwarded to the county prosecutor's office. Standard 2d recognizes the value of case "feedback" which insures that police rightfully recognize their role in a unified law enforcement effort.

Standard 2e states that the county prosecutor should assist in the preparation of appropriate forms to be utilized by local police departments. Development of such forms will reflect the prosecutor's experience with respect to the trial of criminal cases. Establishment of uniform forms will undoubtedly obviate many problems pertaining to the admissibility of evidence. This standard recognizes the important role of the prosecutor

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[20] Governor's Advisory Committee on Juvenile and Adult Criminal Justice Standards and Goals, §5.3, ABA Standards, "The Prosecution Function," §3.1(a).

[21] ABA Standards, "The Prosecution Function," §3.4(a) and (b); Standards and Goals, §§8.3, 8.9, 8.10 and 9.3; Task Force Report: The Police (1967) at 30.

in this regard.

It is well established that effective enforcement of the criminal law necessitates qualified police officers who have been and continue to be properly trained. The county prosecutor possesses the unique ability to assist in an important phase of that training by utilizing qualified members of his staff as instructors. Prosecutors should encourage and assist in the education of local police officers. Instruction pertaining to New Jersey's criminal justice system, penal statutes, judicial decisions, proper pre-trial procedures, the organization of the county prosecutor's office, New Jersey's rules of evidence and proper courtroom testimony and demeanor should be highlighted by the prosecutor.

As chief law enforcement officer in the county, the prosecutor should encourage every local police officer to participate annually in some phase of police training. This necessarily includes not only new or "trainee" police officers but also career police officers.[22]

Wholly apart from formal training, police officers must keep abreast of developments and changes in the criminal law. Indeed, it is the responsibility of the police officer to insure proper enforcement of the law. The Attorney General's office publishes the Criminal Justice Quarterly and the Essex County Prosecutor distributes the Enforcer. Both publications are extremely helpful in educating the police. Nevertheless, the prosecutor should issue newsletters containing

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[22] ABA Standards,"The Prosecution Function," §2.7(b); NDAA, Prosecution Standards, §§20.2(A), (B) and Commentary; Governor's Advisory Committee on Juvenile and Adult Criminal Justice Standards and Goals, §5.3, ABA Standards,"The Prosecution Function," §3.1(a).

information concerning recent changes in the criminal law. Since many laws and court decisions take effect immediately, any delay may result in police officers unknowingly engaging in improper or even unlawful activity. Hence, it is incumbent upon the prosecutor to insure that police officers in his or her county are knowledgeable as to the penal laws.[23]

The vast responsibilities of a county prosecutor often impair his ability to communicate on a daily basis with local law enforcement agencies. Therefore, it is suggested that an assistant prosecutor be designated as a police liaison officer. Such an individual would be responsible for providing sound legal advice. Designation of a police liaison officer will ensure that the county prosecutor is consulted on important decisions.[24] Numerous authorities have advocated such a procedure.

Among his responsibilities, the police liaison officer should provide assistance by reviewing and approving all affidavits submitted by local police officers in support of applications for search warrants and electronic surveillances prior to submission to the judiciary for consideration. He should also consider the sufficiency of evidence in specific cases and review potential charges against offenders. This review process also serves as a valuable educational tool.

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23 NDAA, Prosecution Standards, §20.2(B); Task Force Report: The Police (1967) at 17. 24

24 See ABA Standards, "The Prosecution Function," §2.7(a); ABA Standards, "The Urban Police Function," §§7.12, 7.13 and 7.14; Governor's Advisory Committee on Juvenile and Adult Criminal Justice Standards and Goals, §5.9, NDAA, National Prosecution Standards, §20.3, 20.4 and Commentary.

CHAPTER 4

RELATIONS WITH THE MEDIA

1. GENERAL STANDARD

EACH PROSECUTOR'S OFFICE SHOULD ESTABLISH A PROCEDURE FOR THE RELEASE OF INFORMATION THAT IS EXPECTED TO BE DISSEMINATED TO THE NEWS MEDIA, AND THAT PROCEDURE SHOULD COMPLY WITH THE STATEMENT OF PRINCIPLES AND GUIDELINES FOR REPORTING OF CRIMINAL PROCEDURES PROMULGATED BY THE NEW JERSEY SUPREME COURT.

2. DISCIPLINARY RULES

THE SUPREME COURT HAS ADOPTED THE FOLLOWING DISCIPLINARY RULES GOVERNING THE PROSECUTOR'S RESPONSIBILITIES PERTAINING TO THE MEDIA:

a. PRIOR TO THE FILING OF A COMPLAINT, ACCUSATION OR INDICTMENT, A PROSECUTOR SHALL NOT MAKE OR PARTICIPATE IN MAKING AN EXTRA-JUDICIAL STATEMENT THAT HE EXPECTS TO BE DISSEMINATED BY MEANS OF PUBLIC COMMUNICATION AND THAT DOES MORE THAN STATE WITHOUT ELABORATION:

(1) INFORMATION CONTAINED IN A PUBLIC RECORD RELATING TO THE MATTER.

(2) THAT THE INVESTIGATION IS IN PROGRESS.

(3) THE GENERAL SCOPE OF THE INVESTIGATION INCLUDING A DESCRIPTION OF THE OFFENSE AND, IF PERMITTED BY THE LAW, THE IDENTITY OF THE VICTIM.

(4) A REQUEST FOR ASSISTANCE IN APPREHENDING A SUSPECT OR ASSISTANCE IN OTHER MATTERS AND THE INFORMATION NECESSARY THERETO.

(5) A WARNING TO THE PUBLIC OF ANY DANGERS.

b. A PROSECUTOR SHALL NOT MAKE OR PARTICIPATE IN MAKING AN EXTRA-JUDICIAL STATEMENT THAT HE EXPECTS TO BE DISSEMINATED BY MEANS OF PUBLIC COMMUNICATION AND THAT RELATES TO:

(1) THE CHARACTER, REPUTATION, OR PRIOR CRIMINAL RECORD (INCLUDING ARRESTS, INDICTMENTS, OR OTHER CHARGES OF CRIME) OF THE ACCUSED.

(2) THE POSSIBILITY OF A PLEA OF GUILTY TO THE OFFENSE CHARGED OR TO A LESSER OFFENSE.

(3) THE EXISTENCE OR CONTENTS OF ANY CONFESSION, ADMISSION, OR STATEMENT GIVEN BY THE ACCUSED OR HIS REFUSAL OR FAILURE TO MAKE A STATEMENT.

(4) THE PERFORMANCE OR RESULTS OF ANY EXAMINATIONS OR TESTS OR THE REFUSAL OR FAILURE OF THE ACCUSED TO SUBMIT TO EXAMINATIONS OR TESTS.

(5) THE IDENTITY, TESTIMONY, OR CREDIBILITY OF A PROSPECTIVE WITNESS.

(6) ANY OPINION AS TO THE GUILT OR INNOCENCE OF THE ACCUSED, THE EVIDENCE, OR THE MERITS OF THE CASE.

c. THESE RULES DO NOT PRECLUDE A PROSECUTOR FROM ANNOUNCING:

(1) THE NAME, AGE, RESIDENCE, OCCUPATION, AND FAMILY STATUS OF THE ACCUSED.

(2) IF THE ACCUSED HAS NOT BEEN APPREHENDED, ANY INFORMATION NECESSARY TO AID IN HIS APPREHENSION OR TO WARN THE PUBLIC OF ANY DANGERS HE MAY PRESENT.

(3) A REQUEST FOR ASSISTANCE IN OBTAINING EVIDENCE.

(4) THE IDENTITY OF THE VICTIM OF THE CRIME WHEN NOT PROSCRIBED BY LAW.

(5) THE FACT, TIME, AND PLACE OF ARREST, RESISTANCE, PURSUIT, AND USE OF WEAPONS.

(6) THE IDENTITY OF INVESTIGATING AND ARRESTING OFFICERS OR AGENCIES AND THE LENGTH OF THE INVESTIGATION.

(7) AT THE TIME OF SEIZURE, A DESCRIPTION OF THE PHYSICAL EVIDENCE SEIZED, OTHER THAN A CONFESSION, ADMISSION OR STATEMENT.

(8) THE NATURE, SUBSTANCE, OR TEXT OF THE CHARGE.

(9) QUOTATIONS FROM OR REFERENCES TO PUBLIC RECORDS OF THE COURT IN THE CASE.

(10) THE SCHEDULING OR RESULT OF ANY STEP IN THE JUDICIAL PROCEEDINGS.

(11) THAT THE ACCUSED DENIES THE CHARGES MADE AGAINST HIM.

d. DURING THE SELECTION OF A JURY OR THE TRIAL OF A CRIMINAL MATTER, A PROSECUTOR SHALL NOT MAKE OR PARTICIPATE IN MAKING AN EXTRA-JUDICIAL STATEMENT THAT HE EXPECTS TO BE DISSEMINATED BY MEANS OF PUBLIC COMMUNICATION AND THAT RELATES TO THE TRIAL, PARTIES, OR ISSUES IN THE TRIAL OR OTHER MATTERS THAT ARE REASONABLY LIKELY TO INTERFERE WITH A FAIR TRIAL, EXCEPT THAT HE MAY QUOTE FROM OR REFER WITHOUT COMMENT TO PUBLIC RECORDS OF THE COURT IN THE CASE.

e. AFTER THE COMPLETION OF A TRIAL OR DISPOSITION WITHOUT TRIAL OF A CRIMINAL MATTER AND PRIOR TO THE IMPOSITION OF SENTENCE, A PROSECUTOR SHALL NOT MAKE OR PARTICIPATE IN MAKING AN EXTRA-JUDICIAL STATEMENT THAT HE EXPECTS TO BE DISSEMINATED BY PUBLIC COMMUNICATION AND THAT IS REASONABLY LIKELY TO AFFECT THE IMPOSITION OF SENTENCE.

3. REVIEW OF DISSEMINATED INFORMATION

THE COUNTY PROSECUTOR'S OFFICE MAY ACT AS A CLEARINGHOUSE FOR ALL INFORMATION CONCERNING EXISTING OR POTENTIAL INVESTIGATIONS AND PROSECUTIONS DISSEMINATED TO THE MEDIA BY LAW ENFORCEMENT AGENCIES WITHIN ITS JURISDICTION, AND THE COUNTY PROSECUTOR OR A DESIGNATED SENIOR ASSISTANT PROSECUTOR SHOULD REVIEW ALL MATERIAL BEFORE IT IS DISSEMINATED.

4. RELATIONSHIP WITH THE MEDIA

THE RELATIONSHIP BETWEEN THE PROSECUTOR'S OFFICE AND THE MEDIA SHOULD BE OPEN AND CORDIAL, BUT THE REALITY OR APPEARANCE OF COLLABORATION BETWEEN THEM IS TO BE AVOIDED.

COMMENTARY

As is often the case, one constitutional right will be in tension with the obligation of another. This is surely true with respect to the need of the public to obtain information and the media's right to publish it and the obligation of government to afford the accused a fair trial.[25] In short, a balance must be struck between the venerated First Amendment guarantee which insures the freedom of the press and the equally compelling constitutional obligation which requires protection of the rights of one charged with criminal conduct. The liberty to report on public events, properly conceived, is deeply rooted

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25 State v. Allen, 73 N.J. 132 (1977).

in our constitutional system. So too, safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights and form the very reason for government, as the preamble to the federal Constitution plainly says. Respect for both of these indispensable elements of our organic law "presents some of the most difficult and delicate problems" confronting our criminal justice system.[26]

A free press "lies at the very heart of our democracy and its preservation is essential to the survival of liberty."[27] Deeply ingrained in American jurisprudence is the concept that freedom of expression "is essential to the preservation of the rights of every individual, his life, property and character...." Open access to information is the lifeblood of democracy, for it insures an informed citizenry able to reach intelligent decisions regarding vital public issues. As aptly observed by Mr. Justice Holmes, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[28] Free speech and free press assure public dialogue through which

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26 Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 914-20 (1950).

27 Craig v. Harney, 331 U.S. 367, 383 (1947) (Separate opinion of Mr. Justice Murphy).

28 E.g., Emerson, "Toward a General Theory of the First Amendment," 72 Yale L. J. 877, 879, et seq. (1963); Meiklejohn, Free Speech and Its Relation to Self-Government (1948) at pp. 1-10; Meiklejohn, "The First Amendment is an Absolute," 1961 Sup.Ct.Review 245, 246-56.

political and social changes may be made in a peaceful manner. As recent events have demonstrated, the constitutional guarantee of freedom of the press is an important bulwark against governmental abuses. Perhaps it bears repeating that our Constitution guarantees government by the people. It does not, however, necessarily insure good government. Built into our system is the capacity to commit error and the ability to correct it. Freedom of the press which encourages the free interplay of ideas is thus essential to our democratic government.

The First Amendment interest must be balanced against the State's constitutional obligation to afford a fair trial to an individual accused of criminal conduct.[30] No doubt, a free press is indispensable to a free society. Further, it

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[29] Therefore, the traditional role of the press in preserving individual rights is to educate the people to abuses of power. The people can rectify the abuses by altering the composition of government, and, infrequently, by altering fundamental organic laws. Likewise, the free press reports and evaluates confrontations between individuals and governments. See, e.g., Time Inc. v. Firestone, ___ U.S. ___, 96 S.Ct. 958, 965-66 (1976); Gerty v. Robert Welch, Inc., 418 U.S. 323, 339-41 (1974); Rosenbloom v. Metromedia Inc., 403 U.S. 29 (1971) (no majority opinion); Monitor Patriot Co. v. Ray, 401 U.S. 265, 266-67 (1971); Time Inc. v. Pape, 401 U.S. 279, 283-285 (1971); Greenbelt Cooperative Publ. Co. v. Brewster, 398 U.S. 6, 9 (1969); St. Armant v. Thompson, 390 U.S. 81 (1967); Curtis Publ. Co. v. Batts, 388 U.S. 130, 134 (1967); New York Times v. Sullivan, 376 U.S. 254, 269-78 (1964). See also, e.g., Emerson, "Toward a General Theory," supra, 72 Yale L. J. at 907 et seq.; Frantz, "The First Amendment in the Balance," 71 Yale L.J. 1424 (1962); Meiklejohn, Free Speech, supra, at 21-26; 1961 Sup.Ct.Rev. at 247-48. See e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (194).

[30] See, e.g., Bridges v. California, 314 U.S. 52 (1941). On the public interest in trial publicity, see, e.g., The Special Committee on Radio, Television and the Administration of Justice of the Association of the Borough of the City of New York: Freedom of the Press and Fair Trial: Final Report with Recommendation (1967), at p. 11 (generally against direct limitation on the press); Warren and Abell, "Free Press and Fair Trial: The 'Gag Order', A California Aberration," 45 S.Cal.L.Rev. 51, 74-85 (1972).

has been said that "[w]hat transpires in the court room is public property."[31] Surely, there is no "special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it."[32] Freedom of the press, however, is not an end in itself. "The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied."[33] The right of the people to have a free press is a vital one, "but so is the right to have a calm and fair trial free from outside pressures and influences."[34] Every other right including the right to a free press itself, may depend on the ability to obtain a judicial hearing as dispassionate and impartial as the weakness in man will permit.[35] Plainly, the independence of judicial proceedings is no less of a means to a free society.

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31 Craig v. Harney, supra, 331 U.S. at 374.

32 Id.

33 Pennekamp v. Florida, supra, 328 U.S. at 354 (concurring opinion of Mr. Justice Frankfurter)

34 Craig v. Harney, supra, 331 U.S. at 394-395 (dissenting opinion of Mr. Justice Jackson).

35 Id.

Especially in the administration of the criminal law, that most awesome aspect of government, "society needs independent courts of justice."[36] Public safety and the security of the innocent alike "depend upon wise and impartial criminal justice."[37] "Misuse of its machinery may undermine the safety of the State and deprive the individual of all that makes a free man's life dear."[38]

Our Supreme Court has thus adopted guidelines and disciplinary rules designed to alleviate the tension between the public's right to know and the government's obligation to afford a fair trial to the accused. Although the guidelines are not legally binding with respect to the media, prosecutors are ethically obliged to comply. The guidelines have been embodied in the Disciplinary Rules, DR 7-107, and failure to comply with them may lead to ethics proceedings by our Supreme Court, or alternatively, may delay a trial or jeopardize a successful prosecution.

Therefore it is essential that the prosecutor and his staff be familiar with the guidelines and exercise control over the dissemination of information relating to a criminal case. This includes control over dissemination of information to the media by law enforcement agencies within the county prosecutor's jurisdiction. This principle requires that the county prosecutor familiarize local police agencies with guidelines and direct them to adopt policies to ensure compliance.

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[36] Pennekamp v. Florida, supra, 328 U.S. at 356 (concurring opinion of Mr. Justice Frankfurter).

[37] Id. at 357.

[38] Id.

CHAPTER 5

PROSECUTOR'S RELATIONS WITH COMPLAINANTS, VITIMS AND WITNESSES

1. CITIZENS' COMPLAINTS

EACH COUNTY PROSECUTOR SHOULD HAVE A DESIGNATED ASSISTANT PROSECUTOR TO EVALUATE CITIZEN COMPLAINTS THAT ARE FORWARDED DIRECTLY TO HIS OFFICE.

2. VICTIM-WITNESS ASSISTANCE UNIT

PROSECUTORS SHOULD ESTABLISH VICTIM-WITNESS ASSISTANCE UNITS WITHIN THEIR OFFICES TO PROVIDE FOR CONTACT WITH AND ASSISTANCE TO VICTIMS OF AND WITNESSES TO CRIMES.

3. INTIMIDATION OF VICTIMS AND WITNESSES

PROSECUTORS SHOULD PROMPTLY AND THOROUGHLY INVESTIGATE CASES OF ALLEGED OR SUSPECTED INTIMIDATION OF VICTIMS OR WITNESSES.

4. WITNESS INTERVIEW

A PROSECUTOR SHOULD INTERVIEW ALL WITNESSES BEFORE CALLING THEM TO GIVE TESTIMONY IN A PROCEEDING. A PROSECUTOR SHOULD, HOWEVER, BE AWARE OF ETHICAL OR TACTICAL CONSIDERATIONS WHICH MAY PRECLUDE OR RESTRICT THE SCOPE OF SUCH INTERVIEWS.

5. PROPERTY RETURN

EACH PROSECUTOR'S OFFICE SHOULD ESTABLISH PROCEDURES TO FACILITATE THE PROMPT RETURN OF CONFISCATED OR RECOVERED PROPERTY TO ITS RIGHTFUL OWNER.

COMMENTARY

It cannot be gainsaid that many significant prosecutions are initiated based upon complaints or information received from private citizens. Although oftimes inarticulately presented, such complaints are worthy of our careful scrutiny. Therefore, it is recommended that each prosecutor's office designate an individual to respond to citizen complaints. The initial function of the prosecutor assigned will be to determine whether there has been a violation of the criminal law upon the facts presented.

If inadequate facts are presented, independent investigation may be necessary to make this determination. If facts are elicited which are sufficient to warrant a criminal complaint, then it must be determined whether the complaint ought to be referred to the local police department, the Division of Criminal Justice, or retained for handling. As a general rule, complaints that do not deal with public corruption or other matters more suited to investigation by the Prosecutor's Office or the Division of Criminal Justice should be referred to the local police department.

The prosecutor handling citizen complaints should compile a list of local, state and federal agencies to which a citizen may be referred in appropriate situations. Clearly, referral should be in the form of a suggestion rather than a directive. As a general rule, no legal advice regarding civil matters should be rendered by the prosecutor.

Witnesses and victims are expected to cooperate with criminal justice agencies, but these agencies often are unable to insure that such persons are treated with consideration. Only a small effort is made to help minimize a person's loss from the criminal act, or the costs incurred from participation in the apprehension and conviction of offenders. Victims are unlikely to recover damages directly from the criminal. Witnesses are forced to disrupt personal plans, and perhaps lose pay for the time spent while testifying or on call to testify. Finally, witnesses are forced to wait in the courthouse for many hours, often in dingy and uncomfortable areas.

In addition to their individual problems, victims and witnesses also share common difficulties. It should be noted that the

individual who is both a victim and a witness to the same crime experiences particularly great difficulties. First, both witnesses and victims may, in rare cases, be intimidated by threats from the defendant or defendant's friends. More commonly they will at least fear that retaliation is likely. Secondly, unless the case actually goes to trial, both the witness and the victim will often have no information or understanding of whether and how the criminal justice system has dealt with the violator. Thus, their efforts to obtain satisfaction and justice through the criminal justice process may seem to have been a waste of time and energy. This problem is common due to the fact that 75% to 90% of cases are disposed of prior to trial.

Not only does the callous treatment of victims and witnesses result in the dissatisfaction of persons who might hope and expect to receive some consideration, it also decreases the future effectiveness of the criminal justice system. The cooperation of the victim and witness is often essential to successful prosecution. Yet, where the victim or witness feels dissatisfied with his experience with the system, he will be apathetic, and reluctant to get involved in the future, either as a witness, or in assisting a police officer in distress. Surveys have revealed the presence of such displeasure with the victim/witness treatment by the prosecuting attorney, and have demonstrated its natural result -- a serious problem with victims and witnesses who refuse to cooperate in the efforts to apprehend and convict law violators.

County prosecutors can do much to alleviate these problems by the establishment of a victim-witness assistance

unit within their respective offices. These units would provide support to victims and witnesses of crimes. The responsibilities of the unit would include:

a. Notification of victims and witnesses as to actions in the case in which they were associated,

b. Investigating and prosecuting cases of alleged or suspected intimidation of witnesses or victims,

c. Presentation to victims and witnesses of orientation materials, and

d. Supervision of victims' and witnesses' waiting areas.

In addition, the unit may perform various other functions, such as referral of victims in need of social services to appropriate agencies, including the Violent Crimes Compensation Board. Also, the unit may provide both victims and witnesses with appropriate information concerning such subjects as property return.

Ideally, the unit should be responsible for notifying each victim of a crime of any significant event pertaining to the criminal proceedings. Information which may be transmitted to the victim might include:

a. Acceptance or rejection of a case by Prosecutor's Office screening unit;

b. The return of an indictment;

c. Approval or denial of pre-trial release for the suspect;

d. Pre-trial disposition of the case through diversion, acceptance of a plea (reduced or as charged), or dismissal;

e. Initial scheduling of case for trial and any later

rescheduling, and

f. Result of trial, and sentence imposed, if applicable.

Where the prosecuting attorney determines that the case should not be prosecuted, that charges should be reduced, that the defendant should be diverted, or that a reduced charge or sentence should be agreed to, appropriate information ought to be related to the victim and/or complaining witness. In addition, a mechanism should be provided by which victims and witnesses can request further clarification, including personal interviews with a member of the prosecutor's office.

The unit should also be responsible for providing orientation for victims and witnesses regarding court procedures. In short, these individuals should be fully advised as to what they might reasonably expect to confront. This orientation would be in addition to the prosecutor's pre-trial conference with his witnesses. We have provided a model letter which might be utilized for this purpose.

> You, are a witness in a forthcoming criminal trial and have a very important function. A jury is charged with making a correct and wise decision, and it must have all of the evidence put before it truthfully.
>
> You are already familiar with the requirement that you take an oath in court to tell the truth. However, even while telling the truth, the jury may doubt you if your testimony is halting, stumbling or hesitant. A confident and straightforward presentation makes the jury have more faith in your testimony. Your contribution to a just result will be enhanced by giving your testimony in this way.
>
> In order to assist you, we have prepared a list of time-proven hints and aids which, if followed, will make your testimony as effective as possible.

1. As a witness in a criminal case, try to think about your testimony before the trial. Close your eyes and try to re-create the situation -- picture the scene, the objects, the people, the distances and what occurred.

2. Although you should think about your testimony before trial, do not memorize what you are going to say. The jury may think a witness is lying if his testimony seems too "pat" or memorized.

3. If you have any questions about your testimony, make sure that you ask the Assistant Prosecutor before you appear in court.

4. Wear clean clothes in court. Dress neatly and conservatively.

5. Do not chew gum while appearing in court.

6. Stand up straight when taking the oath. Pay attention to the oath and say I do" clearly.

7. Be serious at all times. Avoid laughing and talking about the case in the halls, restrooms or any place in the courthouse. You never know when a juror may be in a position to see or hear you.

8. When you are testifying, talk to the members of the jury. Look at them most of the time and speak to them frankly and openly as you would to any friend or neighbor. Do not cover your mouth with your hand. Speak clearly and loudly enough so that the farthest juror can hear you easily.

9. Listen carefully to the questions asked of you. Make sure you understand a question before you attempt to answer it; have it repeated if necessary. Make sure you give thoughtful, considered answers; do not give snap answers without thinking. You are permitted a reasonable time to pause and consider your response to a question. However, you should not have to take so much time to answer each question that the jury would think you were making up an answer.

10. Explain your answers if necessary. If a question cannot be truthfully or completely answered with a "yes" or "no," you have a right to explain the answer.

11. Answer directly and simply only the question asked, and then stop until another question is asked. You should answer a question in your own words, but do not volunteer information not actually asked.

12. If an answer you give is wrong, correct it immediately. If an answer you give is unclear, clarify it immediately.

13. The court and jury only want facts, not hearsay or your conclusions or opinions. You usually cannot testify about what someone else told you. Generally, limit your testimony to what you personally saw, said or did.

14. In response to a question, do not say, "That's all of the conversation," or "Nothing else happened." Instead say "That's all I recall," or "that's all I remember happening." It may be that after more thought or after another question you will remember something important.

15. Be polite always, especially to the other attorney. Do not be overbearing or too self-confident. This will lose you the respect of the judge and jury.

16. You are sworn to tell the truth. Tell it. Do not try to judge whether your answer will help or hurt your side. Just answer the questions to the best of your recollection.

17. Don't try to answer a question by trying to remember what you said in a prior statement. When a question is asked, try to visualize what you actually saw, said and did and answer from that.

18. Give positive, definite answers when at all possible. Avoid saying "I think," "I believe," or "In my opinion." If you do not know the answer to a question, say so; do not make up an answer, exaggerate or guess. You can be positive about the important things that you naturally would remember. If asked about little details that you do not remember, it is best to say that you do not remember. If the question is about speeds, distances or time, and your answer is only an estimate, be sure that you say that it is only an estimate.

19. Stop instantly when the judge interrupts you, or when the other attorney makes an objection. Do not try to "sneak" your answer in.

20. Do not expect help from the Assistant Prosecutor or the judge in answering a question. If the question is improper, the Assistant Prosecutor will object. If the judge then says to answer it, do so. If there is no objection to a question, you must answer it whether you wish to or not. So do not ask the judge whether you should answer.

21. Do not "hedge" or argue with the other attorney.

22. Do not nod your head for a "yes" or "no" answer. Speak out clearly, because both the jury and the court reporter must hear.

23. Do not lose your temper while testifying. Being on the witness stand is tiring, and being tired may cause you to become cross, nervous or angry. You may also tend to give careless answers or be willing to say anything in order to get off the witness stand. If you start to feel these symptoms, try to overcome them. Remember that some attorneys on cross-examination may try to wear you out until you lose your temper and say things that are incorrect or that will hurt you or your testimony. Don't let this happen.

24. When you leave the witness stand after testifying, try to look confident, not unhappy.

25. There are several questions that are known as "trick" questions. If you answer them the way the other attorney hopes you will, he can make your answer sound bad to the jury. Here is one of the most common:

> Have you talked to anybody about this case?" If you say "No," the jury knows that is not correct because good lawyers always talk to a witness before they testify. If you say "Yes," the lawyer may try to infer that you were told what to say. The best thing to do is to say very frankly that you have talked to whomever you have -- police, lawyer, etc. -- and that you were just asked what the facts were. All you do is tell the truth.

26. Try not to be nervous. There is nothing to fear if you are telling the truth as you honestly remember it.

27. Go back now and reread these suggestions so that you will have them firmly in your mind. We hope that they will help. They are not to be memorized. Please ask about anything you do not understand. You will find there is really no reason why you should be nervous while testifying. You will find there is really no reason why you should be unduly nervous while testifying.

The victim-witness unit also should be responsible for developing procedures to limit the necessity of multiple appearances by victims and witnesses at trial or pre-trial hearings. Victims and witnesses ought to be notified as soon as possible of any required appearance. Subpoenas should to the greatest extent possible be drawn so as to accurately reflect the approximate date and time of their appearance. Procedures must also be developed to insure that victims and witnesses can be reached on short notice on the day that their testimony is actually required, thus minimizing unnecessary waiting.

The victim-witness unit should insure that witnesses and victims are provided with a comfortable and secure waiting room for use when their presence at trial is not required. Separate areas should be set aside for prosecution and defense witnesses.

Reasonable efforts should be undertaken to assist witnesses and victims. Witnesses encountering difficulties in securing release from work in order to testify should be encouraged to advise the Prosecutor's Office. In such cases the Prosecutor's Office should contact the employer directly to urge that the employee not be penalized.

Finally, victims of violent crimes or their dependents should be specifically informed of their right to seek compensation under the Criminal Injuries Compensation Act.[38] That statute provides for compensation where personal injury or death results from an attempt to prevent the commission of a crime or to arrest a suspected criminal or in aiding or attempting to aid a police officer in doing so. The act is also applicable where personal injury or death results from the commission or attempt to commit an assault constituting a high misdemeanor; mayhem; threats to do bodily harm; lewd, indecent, or obscene acts; indecent acts with children; kidnapping; murder; manslaughter; rape; or any other crime involving violence. It is recommended that each office prepare and utilize a form letter advising the victim of his rights under the Act.

A primary duty of criminal justice agencies is to insure the prompt return of recovered property to its rightful owner. While it is true that some evidence must, of necessity, be retained during the trial and appellate stages, much can be returned at an earlier date. Certainly, there is no excuse for failing to return the property after the trial and appeal processes have been concluded.

Problems pertaining to the retention and disposal of evidence are in many instances peculiar to each county prosecutor's office. Therefore, this subject may not be amenable to uniform guidelines. Nevertheless, each Prosecutor's Office should develop its own evidentiary procedures. It is recommended that in developing these procedures the prosecutor should analyze existing rules for property return. Procedures should be designed

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[38] N.J.S.A. 52:4B-1 et seq.

to expedite property return. These procedures should include better control and record keeping, notification to agencies having custody of property with regard to its disposal and the use of photographic reproduction of property at trial in lieu of the item itself. Present case law supports the use of photographs as evidence in stolen property cases. However, the prosecutor must lay a sufficient foundation to establish that the photographs accurately depict the subject property at a time relevant to the issues involved in the prosecution.[39] Testimony from an investigating officer who was present when the photographs were taken is usually sufficient to admit them into evidence.[40] Where serial numbers or other identifying marks are present, it is wise to photograph them. Failure to do so will not necessarily preclude less descriptive photographs from being admitted into evidence, but it may cause their exclusion on "best evidence rule" grounds where articles can only be identified through the use of identifying marks or numbers.[41]

An additional caveat should be noted in the area of criminal discovery. In addition to a post-indictment right to examine relevant material in the State's possession under R. 3:13-3,

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39 State v. Polito, 146 N.J.Super. 552, 558 (App.Div. 1977).

40 State v. Murphy, 85 N.J.Super. 391, 398-399 (App.Div. 1964), aff'd 45 N.J.36 (1965).

41 Id. But see State in the Interest of A.C., 115 N.J.Super. 77, 81 (App.Div. 1971).

a defendant has a pre-indictment right to inspect stolen property he is alleged to have unlawfully possessed prior to the State's returning the property to its rightful owner.[41a] Defendant must give notice to the prosecutor of his desire to inspect the property and a general request is sufficient. Once the State has been put on notice, it is the affirmative duty of the prosecutor to comply with the request within a reasonable time. A failure to honor the request may lead to suppression of both the primary evidence and secondary evidence relating to it.

[41a] State v. Polito, supra, at 556.

PART III

CASE MANAGEMENT PROCEDURES

CHAPTER 6

CASE-SCREENING AND ADMINISTRATIVE DISPOSITIONS

1. PROSECUTORS SHOULD ESTABLISH A SCREENING PROCEDURE IN WHICH AN ATTORNEY REVIEWS THE COMPLAINT AND SUPPORTING POLICE REPORTS OF EVERY CASE WHICH IS REFERRED TO THE PROSECUTOR'S OFFICE IMMEDIATELY UPON RECEIPT OF SUCH DOCUMENTS. PROSECUTORS SHOULD DETERMINE WHETHER THE COMPLAINT OUGHT TO BE REFERRED TO THE GRAND JURY, RECOMMENDED FOR DIVERSION, DOWNGRADED AND RETURNED TO MUNICIPAL COURT FOR TRIAL, ADMINISTRATIVELY DISMISSED, OR REFERRED FOR OTHER NON-CRIMINAL DISPOSITION.

2. CRIMINAL PROCEEDINGS SHOULD BE TERMINATED IF THERE IS NOT A REASONABLE LIKELIHOOD THAT THE ADMISSIBLE EVIDENCE WOULD BE SUFFICIENT TO OBTAIN A CONVICTION AND SUSTAIN IT ON APPEAL.

3. CRIMINAL PROCEEDINGS SHOULD BE TERMINATED WHEN SOCIETY WOULD BENEFIT MORE BY VIRTUE OF ANOTHER FORM OF DISPOSITION. AMONG THE FACTORS WHICH A PROSECUTOR MAY PROPERLY CONSIDER IN EXERCISING HIS DISCRETION ARE:

   a. THE PROSECUTOR'S REASONABLE DOUBT THAT THE ACCUSED IS IN FACT GUILTY,

   b. THE INSUFFICIENCY OF ADMISSIBLE EVIDENCE TO SUPPORT A PRIMA FACIE CASE,

   c. THE SERIOUSNESS OF THE OFFENSE,

   d. THE EXTENT OF HARM CAUSED BY THE OFFENSE,

   e. THE POSSIBLE DETERRENT VALUE OF PROSECUTION,

   f. THE EXCESSIVE COST OF PROSECUTION IN RELATION TO THE SERIOUSNESS OF THE OFFENSE,

   g. THE VALUE OF FURTHER PROCEEDINGS IN FOSTERING THE COMMUNITY'S SENSE OF CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM,

   h. THE ATTITUDE OF THE VICTIM,

   i. THE POSSIBLE IMPROPER MOTIVES OF THE COMPLAINANT,

   j. ANY DANGER TO THE VICTIM OR TO OTHERS WHICH MIGHT ARISE IF THE CASE IS ADMINISTRATIVELY DISMISSED,

k. THE RELUCTANCE OF THE VICTIM OR OTHERS TO TESTIFY,

l. THE ATTITUDE OF THE DEFENDANT,

m. THE DEFENDANT'S PAST CRIMINAL CONDUCT,

n. COOPERATION OF THE ACCUSED IN THE APPREHENSION OR CONVICTION OF OTHERS,

o. THE IMPACT OF FURTHER PROCEEDINGS UPON THE DEFENDANT AND THOSE CLOSE TO HIM, ESPECIALLY THE LIKELIHOOD AND SERIOUSNESS OF FINANCIAL HARDSHIP OR FAMILY DISRUPTION,

p. THE AVAILABILITY OF ALTERNATIVES INCLUDING DIVERSION AND CONDITIONAL DISCHARGE,

q. ANY PROVISIONS FOR RESTITUTION,

r. ANY MITIGATING CIRCUMSTANCES,

s. THE AVAILABILITY AND LIKELIHOOD OF PROSECUTION BY ANOTHER JURISDICTION,

t. THE PROLONGED NON-ENFORCEMENT OF A STATUTE, WITH COMMUNITY ACQUIESCENCE,

u. THE DISPROPORTION OF THE AUTHORIZED PUNISHMENT IN RELATION TO THE PARTICULAR OFFENSE,

v. THE AGE OF THE CASE,

w. DEFENDANT'S CONDUCT WAS WITHIN CUSTOMARY LICENSE OF TOLERANCE, NEITHER EXPRESSLY NEGATED BY THE PERSON WHOSE INTEREST WAS INFRINGED NOR INCONSISTENT WITH THE PURPOSE OF THE LAW DEFINING THE OFFENSE,

x. DEFENDANT'S CONDUCT DID NOT ACTUALLY CAUSE OR THREATEN THE HARM OR EVIL SOUGHT TO BE PREVENTED BY THE LAW DEFINING THE OFFENSE OR DID SO ONLY TO AN EXTENT TOO TRIVIAL TO WARRANT THE CONDEMNATION OF CONVICTION, OR

y. DEFENDANT'S CONDUCT PRESENTS SUCH OTHER EXTENUATIONS THAT IT CANNOT REASONABLY BE REGARDED AS ENVISAGED BY THE LEGISLATURE IN FORBIDDING THE OFFENSE.

4. WRITTEN GUIDELINES SHOULD BE FORMULATED BY EACH PROSECUTOR TO STRUCTURE THE EXERCISE OF PROSECUTORIAL DISCRETION AND IDENTIFY SPECIFIC FACTORS TO BE CONSIDERED IN SCREENING DECISIONS.

5. WHERE PRACTICABLE, AN ASSISTANT PROSECUTOR SHOULD BE PRESENT IN MUNICIPAL COURT AT PROBABLE CAUSE HEARINGS, SINCE THE SCREENING DECISION SHOULD BE MADE AT THE EARLIEST POSSIBLE POINT IN TIME AND OBSERVATION OF WITNESSES AT THE PROBABLE CAUSE HEARING CAN BE VALUABLE IN THIS REGARD. INITIALLY, ARRANGEMENTS SHOULD BE MADE TO APPEAR IN THOSE MUNICIPAL COURTS GENERATING THE LARGEST NUMBER OF INDICTABLE COMPLAINTS UNTIL CIRCUMSTANCES ALLOW APPEARANCE AT ALL PROBABLE CAUSE HEARINGS. ASSISTANT PROSECUTORS APPEARING IN MUNICIPAL COURT MUST SECURE ALL OF THE WRITTEN REPORTS REQUIRED PRIOR TO THE SCHEDULED DATE OF THE PROBABLE CAUSE HEARING.

6. AFTER THE PROBABLE CAUSE STAGE, ONCE A DECISION HAS BEEN MADE THAT NO FURTHER ACTION SHOULD BE TAKEN AND THAT A CRIMINAL PROSECUTION SHOULD BE TERMINATED, A MEMORANDUM SHOULD BE PREPARED RECITING THE FACTS AND EXPLAINING THE REASONS SUPPORTING SUCH A CONCLUSION. THE MEMORANDUM SHOULD THEN BE FORWARDED TO THE PROSECUTOR OR HIS DESIGNEE FOR FURTHER REVIEW. IF THE PROSECUTOR OR HIS DESIGNEE APPROVES THE RECOMMENDATION TO ADMINISTRATIVELY TERMINATE PROSECUTION, HE SHOULD ENDORSE THE MEMORANDUM AND INSURE THAT IT IS PLACED IN THE FILE. IN THE SITUATION WHERE A COMPLAINT HAS BEEN FILED, THE PROSECUTOR, IN ADDITION TO A MEMORANDUM TO THE FILE, SHOULD: (1) NOTIFY THE ASSIGNMENT JUDGE, AND (2) ADVISE THE ATTORNEY FOR THE DEFENDANT OR THE DEFENDANT IF HE DOES NOT HAVE COUNSEL. SEE R. 3:25-1. ONCE NOTIFICATION HAS BEEN MADE, ACTION CAN BE TAKEN WITH REFERENCE TO THE RELEASE OF THE DEFENDANT IF INCARCERATED AND THE RETURN OF BAIL MONIES IF POSTED. IF THE PROSECUTOR OR HIS DESIGNEE DISAPPROVES OF THE RECOMMENDATION, HE SHOULD SO ADVISE THE ASSISTANT PROSECUTOR HANDLING THE MATTER. THE CASE SHOULD THEN RECEIVE APPROPRIATE ACTION TO INSURE EXPEDITIOUS DISPOSITION.

7. IF THE PROSECUTOR ADMINISTRATIVELY DISMISSES A COMPLAINT, NOTIFICATION SHOULD GENERALLY BE GIVEN TO THE COMPLAINANT OR VICTIM AND THE POLICE.

8. WHEN INDICTABLE CHARGES PENDING AGAINST DEFENDANTS IN PRETRIAL CONFINEMENT ARE DOWNGRADED, THE DISORDERLY PERSONS OFFENSES RESULTING MAY BE LITIGATED IN THE SUPERIOR COURT, WHERE POSSIBLE, IN ORDER TO EXPEDITE THE FINAL DISPOSITION.

9. APPLICATION SHOULD BE MADE TO THE COURT TO DISMISS INDICTMENTS WHICH, UPON REVIEW, ARE NO LONGER PROSECUTABLE OR ARE INCONSISTENT WITH THE POLICIES IN FORCE FOR ACCEPTING A CASE FOR PROSECUTION. REVIEW OF ALL INDICTMENTS (INCLUDING INACTIVE CASES) ON FILE FOR 12 MONTHS OR MORE SHOULD BE CONDUCTED AT LEAST ANNUALLY.

10. ECONOMICAL UTILIZATION OF PROSECUTORIAL AND JUDICIAL RESOURCES DICTATES THAT ALL POSSIBLE CHARGES BE DISPOSED OF IN A SINGLE COURT TRANSACTION. ACCORDINGLY, WHEN FEASIBLE, CHARGES PENDING AGAINST THE DEFENDANT IN MUNICIPALITIES WITHIN THE COUNTY AND IN OTHER COUNTIES WITHIN THE STATE SHOULD BE DISPOSED OF IN A SINGLE RETRACTION HEARING. See R. 3:25-1; R. 3:25A-1.

COMMENTARY

Screening refers to the structured decision-making process by which a prosecutor determines to discontinue all further prosecution against the defendant, or alternatively decides to embark upon a course of criminal prosecution or "voluntary" diversion. The screening process is the prosecutor's primary tool for determining whether or not a particular defendant should be indicted and if not, what is the appropriate alternative. Alternatives range from return to the municipal court for trial, diversion, referral to other agencies, and dismissal.[42]

The first standard requires that the screening decision be made by an attorney. The complexity of the decision-making process and the ease with which improper considerations can insinuate themselves into the screening decisions require that the person charged with that decision be fully and professionally trained. A screening attorney can benefit from the services of a paralegal assistant. Nevertheless, an attorney is subject to the disciplinary rules of the legal profession and is equipped

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[42] The Prosecutor's Charging Decision: A Policy Perspective, by Joan E. Jacoby (National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, 1977); Pre-Trial Screening in Perspective, by Joan E. Jacoby (National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, 1976).

with an intellectual overview of the criminal justice system. We have thus concluded that an assistant prosecutor must be responsible for this decision under the supervision of the county prosecutor. Timing of the screening decision is also important. The earliest opportunity at which an effective screening decision can be made is when the screening prosecutor is in possession of the CDR 1 or CDR 2 form, as well as the written police reports and statements of the witnesses. If the case is to be returned to municipal court, the sooner that transfer is completed, the more effective will be the resulting disposition.

Standard 2 requires that a realistic assessment of the viability of the case be made at the earliest time. If the prosecutor cannot expect to secure a conviction and to sustain it on appeal, then it is a waste of resources to pursue the matter. In these instances, prosecution should be terminated as soon as possible.

Standard 3 introduces guiding principles which may indicate termination of a prosecution in spite of the fact that a conviction could be obtained. This list is not intended to be exhaustive. It merely attempts to recognize that the screening decision is affected by a complex interplay of factors which are social and governmental in nature, yet critical to the conscientious screening decision.[43]

In 1975, the Attorney General issued a comprehensive opinion setting forth the prosecutor's role with respect to the

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[43] The reader can find an excellent discussion of these factors in the National Advisory Commission on Criminal Justice Standards and Goals Report, Courts (1973), Standard 1.1, p. 20ff.

disposition of criminal cases.[44] In essence, the Attorney General concluded that prosecutors were authorized to administratively dismiss criminal prosecutions without presenting such matters to the grand jury. The Attorney General suggested that the County Prosecutors' Association develop uniform standards to guide its members in the exercise of their discretion. Pursuant to that suggestion, guidelines were promulgated and published in the Criminal Justice Quarterly.[45] Further, uniform procedures were developed pertaining to the maintenance of records and the notification of parties having an interest in such administrative dispositions. Finally, R. 3:25-1 was subsequently altered to require the prosecutor to notify the assignment judge with respect to criminal complaints which have been administratively dismissed.

Certain basic principles should be emphasized in defining the parameters of prosecutorial discretion. Of course, the primary duty of a prosecutor is to prosecute criminal offenders. However, the prosecutor's responsibilities are far-ranging and thus it is incumbent upon him "to see that justice is done."[46] Prosecutorial authorities are bound to exercise discretion based upon their "judgment and conscience ... in accordance with established principles of law."[47] The

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44 Attorney General's Opinion No. 11.

45 See 4 Crim. J. Q. 107 (1977).

46 Canons of Professional Ethics, Canon 5.

47 State v. La Vien, 44 N.J. 323, 327 (1965).

concept of prosecutorial discretion implies conscientious judgment, not arbitrary action. Obviously, personal gain or favoritism are to play no part in decision-making. A prosecutor's range of choices, not unlike those within the judicial domain, depends upon the particular circumstances of each case. Among the factors to be considered in the screening process are those listed in Standard 3.

Standard 4 requires each prosecutor to develop his own written guidelines for screening, which are more concrete and specific than those adopted in national and statewide standards. These guidelines should contain an analysis of the factors which ought to be considered in the charging decision. The local screening manual can also serve as an educational device for attorneys newly assigned to the screening unit, and should promote uniformity of decision-making among the various assistant prosecutors. The guidelines should contain an express explanation that they are intended to serve as general rules. There will be many exceptions, and the guidelines themselves are subject to frequent review and change.

The development of written standards on both the statewide and local levels is essential to the proper functioning of the Prosecutor's Office. As indicated in the NAC Standards, Courts, Commentary on Standard 1.2, at p. 26, the written standards are related to the checks and balances system inherent in our form of government.

> If the suggestions concerning the administrative regularity of the screening decision contained in these standards are implemented, they will provide better

> protection against improper exercise of screening discretion than could be provided by the more traditional remedy of judicial review. Therefore, the Commission favors insulating the prosecutor's decision from judicial scrutiny, but only on the premise that detailed guidelines will be formulated by the prosecutor and their evenhanded application policed within his office.

Failure to develop such standards will result in unnecessary judicial intrusion into the screening decision.

The New Jersey decentralized municipal court system does not promote the appearance of assistant prosecutors at probable cause hearings. In spite of the difficulties created by the local judicial structure, county prosecutors should embark upon a program of appearing at probable cause hearings. At the appearance, the assistant prosecutor charged with making the screening decision will have an opportunity to personally communicate with key witnesses. Thus, he will be in a better position to make a sound screening decision. It is not satisfactory, however, to substitute this personal contact for the written police reports and statements of witnesses which are normally the foundation of a screening decision. Standard 5 assumes that the prosecutor will have obtained such material in advance of the probable cause hearing, and his appearance will be only after full documentation has been received. It can be expected that some police agencies will experience difficulties in submitting the required documentation in a timely manner. These problems must be overcome.

The regionalization of municipal courts may be required before county prosecutors' offices will be able to insure appearance at all probable cause hearings. Nevertheless, much can be accomplished by selection of key municipal courts for initiation of this program.

Standard 6 requires a written statement as to the reasons for terminating prosecution. It also suggests that the interested parties might be informed of the prosecutor's decision to withhold prosecution in a particular case.

Standard 8 recognizes the need for speedy processing of cases. Often a reduction of an indictable charge to a disorderly persons offense will result in the entry of a guilty plea by the accused. Little is gained by transferring paperwork in such cases to the municipal court for the scheduling of such a hearing. Since the county prosecutor's office will have prepared the case and consulted with the defense attorney, if any, the case may often be brought to conclusion by prompt appearance at the county level before a trial judge for plea and sentence. If, in a particular case, the matter could be processed more promptly in municipal court, that forum should be utilized. In certain instances, an actual trial on the merits on a disorderly persons charge may be appropriate in the Superior Court with the trial judge sitting as a judge of the municipal court.

Standard 10 attempts to deal with the fragmentation which occurs when the behavior of a single offender transgresses a multiplicity of penal statutes and crosses jurisdictional lines. It is appropriate for personnel engaged in the screening

process to inventory the charges which are pending against a particular defendant. Often, this information can be extracted from police reports which have been submitted, as well as the defendant's criminal history record. Although such a process will involve greater expenditure of man-hours at the screening stage, the net result will be a reduction in the total amount of prosecutorial, police and judicial man-hours devoted to the final resolution of the case. We are, after all, dealing with the behavior of a single individual and often all the charges relate to a single, underlying propensity of the defendant. The disposition will be made more meaningful to the defendant and beneficial to society if it can be focused in a single court transaction. See R. 3:25A-1.

CHAPTER 7

PRE-TRIAL INTERVENTION

1. PROSECUTORS SHOULD REVIEW PRETRIAL DIVERSION APPLICATIONS IN ACCORDANCE WITH UNIFORM STANDARDS.

2 THE FOLLOWING FACTORS SHOULD BE WEIGHED BY THE PROSECUTOR IN REVIEWING PTI APPLICATIONS:

a. THE NATURE OF THE OFFENSE;

b. THE FACTS OF THE CASE;

c. THE MOTIVATION AND AGE OF THE DEFENDANT;

d. THE DESIRE OF THE VICTIM TO FOREGO PROSECUTION;

e. THE EXISTENCE OF PERSONAL PROBLEMS, CHARACTER TRAITS, ETC., WHICH MAY BE RELATED TO THE DEFENDANT'S CRIME AND FOR WHICH SERVICES ARE UNAVAILABLE WITHIN THE CRIMINAL JUSTICE SYSTEM, OR WHICH MAY BE PROVIDED MORE EFFECTIVELY OUTSIDE THE SYSTEM, AND THE PROBABILITY THAT THE CAUSES OF CRIMINAL BEHAVIOR CAN BE CONTROLLED BY PROPER INTERVENTION;

f. THE LIKELIHOOD THAT THE DEFENDANT'S CRIME IS RELATED TO A CONDITION OR SITUATION, SUCH AS UNEMPLOYMENT OR FAMILY PROBLEMS, THAT WOULD BE CONDUCIVE TO CHANGE THROUGH HIS PARTICIPATION IN THE DIVERSION PROGRAM;

g. THE NEEDS AND INTERESTS OF THE VICTIM AND SOCIETY;

h. THE EXTENT TO WHICH THE DEFENDANT'S CRIME DOES NOT CONSTITUTE PART OF A CONTINUING PATTERN OF ANTI-SOCIAL BEHAVIOR.

i. THE EXTENT TO WHICH THE DEFENDANT DOES NOT PRESENT A SUBSTANTIAL DANGER TO OTHERS;

j. THE DEFENDANT'S CRIME IS NOT OF AN ASSAULTIVE OR VIOLENT NATURE, WHETHER IN THE CRIMINAL ACT ITSELF OR IN THE POSSIBLE INJURIOUS CONSEQUENCES OF SUCH CRIMINAL ACT;

k. THE LIKELIHOOD THAT THE ARREST HAS HAD SUCH A SERIOUS EFFECT ON THE DEFENDANT THAT IT WOULD SERVE AS THE DESIRED DETERRENT AGAINST REPETITIVE CRIMINAL BEHAVIOR;

l. THE PROSECUTION WOULD EXACERBATE THE SOCIAL PROBLEM THAT LED TO THE DEFENDANT'S CRIMINAL ACT;

m. THE HISTORY OF THE USE OF PHYSICAL VIOLENCE TOWARD OTHERS;

n. ANY INVOLVEMENT WITH ORGANIZED CRIME;

o. THE CRIME IS OF SUCH A NATURE THAT THE VALUE OF PRE-TRIAL INTERVENTION WOULD BE OUTWEIGHED BY THE PUBLIC NEED FOR PROSECUTION;

p. THE EXTENT TO WHICH THE SERVICES TO MEET THE DEFENDANT'S NEEDS AND PROBLEMS ARE MORE EFFECTIVELY AVAILABLE THROUGH RESOURCES NOT AVAILABLE TO THE PRE-TRIAL INTERVENTION PROGRAM;

q. WHERE THE DEFENDANT'S INVOLVEMENT WITH OTHER PEOPLE IN THE CRIME CHARGED OR IN OTHER CRIMES IS SUCH THAT THE INTEREST OF THE STATE WOULD BE BEST SERVED BY PROCESSING HIS CASE THROUGH TRADITIONAL CRIMINAL JUSTICE SYSTEM PROCEDURES;

r. WHERE THE HARM DONE TO SOCIETY BY ABANDONING CRIMINAL PROSECUTION WOULD OUTWEIGH THE BENEFITS TO SOCIETY FROM CHANNELING AN OFFENDER INTO A DIVERSION PROGRAM; OR

s. THE DEGREE OF COOPERATION WITH LAW ENFORCEMENT WITH REGARD TO THE APPLICANT'S KNOWLEDGE OR INFORMATION CONCERNING CRIMINAL ACTIVITY.

COMMENTARY

On May 31, 1977, the New Jersey Supreme Court rendered its decision in State v. Leonardis, 73 N.J. 360 (1977). In essence the Court held that the judiciary's power to order diversion without the concurrence of the prosecuting attorney was to be strictly delimited. In short, the court concluded that judicial interference with a prosecutor's refusal to consent to diversion may be had only when the applicant clearly and convincingly establishes that the prosecutor's action constitutes a "patent and gross abuse of discretion." The Court added that in appropriate circumstances, the prosecutor

may legitimately veto diversion based solely upon the nature of the offense charged. Moreover, it was emphasized that judicial review was not to be considered a "trial de novo" on the applicant's admissibility. Indeed, the Court noted that no evidence may be offered in a prosecution to review an applicant's rejection by either the prosecutor or the program director. Thus, the Court must confine the hearing to the issue of whether, based upon the information before the program director and the prosecutor, the applicant's rejection was a patent and gross abuse of discretion. Significantly, the Court stated that the primary responsibility for PTI admissions must be borne by the prosecutor and the program directors, with judicial intervention limited to "only the most egregious examples of injustice and unfairness."

In sum, Leonardis II unequivocally affirms the notion of prosecutorial discretion which originally spawned pre-trial diversionary programs. By firmly disavowing exclusive judicial responsibility for PTI admissions, the Court has made it manifest that prosecutors must formally and systematically participate in screening candidates for diversion. In furtherance of this duty, the Attorney General and County Prosecutors' Association have endorsed the factors set forth in Standard 2 as relevant in assessing PTI applications.

In addition to these standards, the Supreme Court has promulgated guidelines concerning eligibility for diversion.[48]

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[48] See Guidelines for Operation of Pre-Trial Intervention in New Jersey, 99 N.J.L.J. 865 (Sept. 30, 1976), adopted September 8, 1977 (hereinafter referred to as Guidelines).

While these guidelines encompass many of the above criteria, they also enumerate as appropriate factors the applicant's parole or probation status, his previous opportunities for diversion or conditional discharge, and his geographical proximity to treatment facilities. Furthermore, to insure the most judicious allocation of rehabilitative resources, the Supreme Court guidelines provide that defendants whose convictions will probably result in a suspended sentence without probation or a fine should be rejected.

In applying these factors to PTI decisions, several procedural mechanisms should be employed to insure an expeditious and fair determination. The following recommendations are designed to aid in achieving these goals.

1. The Prosecutor's Office should be guided by uniform procedures in reviewing PTI applications. Standardized procedures will assure that each application is reviewed within a uniform framework, thereby insuring an evenhanded application of the law. It would be advisable for the ultimate decision on every PTI application to be made by the same individual or his designee. While obviously this will entail reliance upon the recommendations of others more familiar with the factual details of the case, more evenhanded and consistent screening should result. Indeed, centralized decision-making by prosecutors parallels the requirement of R. 3:28(a) that, except in certain instances, all PTI matters in each county should be handled by a single judge.

2. Pertinent information in the prosecutor's files should be made available to the program director promptly after

each PTI application for his consideration. This should include police reports, statements of witnesses, and any other available documents regarding the circumstances of the offense and the applicant's personal background. Otherwise, the program director's initial evaluation of the accused's suitability for diversion may be based upon inaccurate or incomplete facts. A prosecutor may withhold confidential material which from a law enforcement standpoint he believes should not be disseminated.

3. If the PTI Director rejects the applicant, it should be determined whether the defendant intends to take an appeal. If an appeal is to be taken, it should be listed and resolved expeditiously. The prosecutor should monitor such appeals to ensure that he is afforded a proper opportunity to be heard. If no appeal is to be taken, the case should be listed for grand jury presentation or trial in the normal course. However, where the program director has rejected the application, the prosecutor may nevertheless decide that PTI is a viable alternative and in such instances he may make an independent determination.

With respect to candidates accepted by the program director, the prosecutor's review should be based on the factors noted herein. Based upon such inquiry as deemed appropriate, together with any pertinent data in the file, and the program director's evaluation, a recommendation should be drafted, by the assistant prosecutor designated to handle the matter, to either oppose or consent to diversion. This recommendation

should contain factual references and should incorporate the criteria upon which the author relies. The recommendation should be forwarded to the supervisor as aforesaid.

4. Following a review of this recommendation, the individual responsible for the decision should notify defendant's attorney and the court of the prosecutor's position on the application. If diversion is opposed, a statement of reasons must be incorporated. This statement will include the facts and the criteria relied upon in reaching the decision, and should be as complete as possible.

If, after a hearing, the court overrules the prosecutor's rejection, a prompt determination must be made whether leave to appeal should be sought. As previously noted, judicial review of a prosecutorial veto is governed by an extremely stringent standard. In order to overrule the prosecutor, the court must find a patent and gross abuse of discretion. If this standard is correctly applied, the prosecutor's refusal to consent to PTI should rarely be overturned. Nevertheless, in the event that the court does order admission of a rejected application, a motion for leave to appeal, if this remedy is to be pursued, must be filed within fifteen days of the date the order is entered. R. 2:5-6(a). It is unclear whether the prosecutor may object to a subsequent dismissal of the charges on the basis of an allegedly erroneous admission to the program. An interlocutory appeal should be considered the sole remedy at

this time. Stated somewhat differently, we question whether a direct appeal can be taken by the prosecutor from an order dismissing an indctment or complaint by virtue of successful completion of a PTI program. Therefore, steps should be taken to ensure that interlocutory appeals are taken within the time period set forth above.

One further caveat is in order. It is absolutely critical that the prosecutor seek a stay of the order admitting the defendant into a PTI program when he decides to file a motion for leave to appeal. A motion for leave to appeal does not, by itself, prevent the defendant from commencing his participation in a PTI program. Therefore, it is incumbent upon the prosecutor to seek a stay under these circumstances.

The foregoing recommendations will of course require adaption to the differing circumstances in each county. However, these basic procedures in conjunction with the screening criteria should promote evenhandedness by prosecutors in their disposition of PTI applicants.

CHAPTER 8

IMPACT CRIME PROGRAM

1. EACH PROSECUTOR SHOULD ESTABLISH AN IMPACT CRIME PROGRAM TO INSURE THAT CERTAIN TYPES OF OFFENSES ARE GIVEN PRIORITY AND ARE EXPEDITIOUSLY DISPOSED OF WITHIN THE CRIMINAL JUSTICE SYSTEM.

2 IN ORDER TO ENSURE THE PUBLIC'S RIGHT TO BE FREE FROM CRIMINAL ATTACK, THE CRIMINAL JUSTICE SYSTEM MUST CONCENTRATE ON THOSE CRIMES WHICH POSE THE MOST SERIOUS THREAT TO SOCIETY. THE FOLLOWING PROCEDURES ARE TO BE EMPLOYED TO ENSURE THE RIGHT OF THE PUBLIC TO AN EARLY TRIAL.

a. THE CDR 1 AND CDR 2 FORMS (COMPLAINT AND SUMMONS, COMPLAINT AND WARRANT) SHOULD CONTAIN A COPY MARKED "PROSECUTOR'S COPY." AT PRESENT, COMPLAINTS ARE BEING FORWARDED TO THE PROSECUTOR'S OFFICE ONLY AFTER ALL MUNICIPAL COURT ACTION HAD BEEN COMPLETED. THE FORM SHOULD BE SENT TO THE PROSECUTOR'S OFFICE IMMEDIATELY BY THE MUNICIPAL COURT IN ALL CASES CONCERNING INDICTABLE OFFENSES. THIS PROCEDURE WILL ENSURE THAT THE PROSECUTOR IS NOTIFIED OF PENDING CASES AT THE EARLIEST POSSIBLE TIME. THE ADMINISTRATIVE OFFICE OF THE COURTS HAS DIRECTED ALL MUNICIPAL COURTS TO FORWARD IMMEDIATELY ALL COPIES OF COMPLAINTS TO THE APPROPRIATE COUNTY PROSECUTOR, AND PROSECUTORS SHOULD ENDEAVOR TO HAVE THEIR ASSIGNMENT JUDGES ORDER SAME.

b. COPIES OF POLICE REPORTS IN ALL CASES CONCERNING INDICTABLE OFFENSES SHALL BE SENT TO THE PROSECUTOR'S OFFICE WITHIN SEVEN DAYS OF ARREST. A DIRECTIVE SHOULD BE FORWARDED TO ALL POLICE AGENCIES TO IMPLEMENT THIS OBJECTIVE. UPON RECEIPT OF THE POLICE REPORT, A PROSECUTOR'S FILE SHALL BE PREPARED AND ALL APPROPRIATE CASES SHALL BE MARKED "IMPACT." THIS ACTION SHALL BE TAKEN IRRESPECTIVE OF THE STATUS OF THE CASE. THIS ACTION IS NECESSARY TO ENABLE THE PROSECUTOR TO PREPARE THE CASE AT HIS EARLIEST CONVENIENCE.

c. ALL "IMPACT" CASES SHALL BE DISPOSED OF BY THE GRAND JURY WITHIN 45 DAYS OF ARREST. THIS TIME WILL ALLOW FOR COMPILATION, PREPARATION, PRESENTATION, NECESSARY DELAYS, GRAND JURY CONSIDERATION AND GRAND JURY VOTING.

d. ARRAIGNMENT SHALL TAKE PLACE WITHIN ONE WEEK OF THE RETURN OF AN INDICTMENT. AT THIS STAGE THE PROSECUTOR, WITH THE COOPERATION OF THE COURTS, WILL DESIGNATE ALL APPROPRIATE "IMPACT" CASES. UPON THAT DESIGNATION, A TRIAL DATE CERTAIN WILL BE REQUESTED BY THE PROSECUTOR, AND DEFENSE COUNSEL AND THE DEFENDANT WILL BE INFORMED THAT ALL PLEA NEGOTIATIONS MUST BE COMPLETED WITHIN TWENTY-ONE DAYS OF ARRAIGNMENT. BEYOND THIS TWENTY-ONE DAY PERIOD, ONLY A PLEA TO THE ENTIRE INDICTMENT OR THE MOST SERIOUS OFFENSE WILL BE ACCEPTED. WITH THE AGREEMENT OF THE COURT, THE CASE WILL BE ENTERED ON THE TRIAL LIST AND GIVEN A DEFINITE TRIAL DATE.

e. IN ORDER TO PRESERVE THE POLICY OF EXPEDITING CASES, THE PROSECUTOR WILL MAKE AVAILABLE TO THE DEFENSE ATTORNEY ALL MATERIAL DISCOVERABLE UNDER THE COURT RULES WITHIN FOURTEEN DAYS OF ARRAIGNMENT IRRESPECTIVE OF REQUEST. BECAUSE THE GRANTING OF DISCOVERY WITHOUT REQUEST DOES NOT ENTITLE THE PROSECUTOR TO RECIPROCAL DISCOVERY, A "REQUEST" FOR DISCOVERY SHOULD BE OBTAINED FROM DEFENSE COUNSEL WHERE POSSIBLE, BEFORE DISCOVERY IS DELIVERED. IN ANY EVENT, A DEMAND FOR RECIPROCAL DISCOVERY SHOULD BE MADE AT THE TIME DISCOVERY IS MADE AVAILABLE TO THE DEFENDANT.

f. A TRIAL OF AN "IMPACT" CASE SHALL BE COMPLETED WITHIN SIXTY DAYS OF ARRAIGNMENT. THIS IS SUFFICIENT TIME FOR THE DEFENDANT TO PREPARE HIS CASE, TO FILE ANY MOTIONS (WITHIN THIRTY DAYS OF ARRAIGNMENT) AND FOR TRIAL OF THE MATTER.

g. UPON A FINDING OF GUILT ON ANY COUNT DESIGNATED AS AN "IMPACT" OFFENSE, THE PROSECUTOR WILL TAKE A RIGOROUS STAND AGAINST CONTINUATION OF BAIL. THE PRESUMPTION OF INNOCENCE BEING REMOVED BY THE VERDICT, THE PROSECUTOR WILL SEEK STRICT COMPLIANCE WITH BURDENS EMBODIED IN COURT RULE 2:9-4 DEALING WITH APPEALS, WHICH REQUIRES THE DEFENDANT TO SHOW "A SUBSTANTIAL QUESTION WHICH SHOULD BE DETERMINED BY THE APPELLATE COURT..." AND THAT THERE WILL BE NO DANGER TO THE COMMUNITY IF BAIL IS CONTINUED.

h. A SENTENCE SHALL BE IMPOSED WITHIN FOURTEEN DAYS OF CONVICTION. SUCH TIME IS CONSIDERED SUFFICIENT FOR PREPARATION OF THE PRE-SENTENCE REPORT, AND FOR REVIEW OF SAME.

COMMENTARY

The calendar control of modern criminal court dockets is a sophisticated operation constantly buffeted by conflicting

forces. The prosecution's legitimate demands for some stability in the scheduling of criminal cases and the full panoply of rights afforded an accused under our Constitution are constantly in potential or real conflict. A proper balance between competing values must be struck. But all too often, the rights of the prosecution and, to a larger extent, those of the public, have not been fully recognized. The right of the State to prosecute is derived from the obligation of government to protect its citizens from criminal attack. Such an obligation coexists with the right of an accused to defend. Both rights are of constitutional dimension and are of equal dignity. Much has been written with respect to the defendant's right to a speedy trial. Here, we are concerned with society's right to justice. We emphasize that those accused of having committed serious crimes must be expeditiously brought to trial and, if convicted, swiftly asserted. The courts, prosecutors, and the defense bar share in this obligation. We must concentrate our efforts to ensure that the public's right to a speedy trial will be respected in cases involving serious "impact" offenses. We define such "impact" crimes as including homicide, rape and other forcible sex offenses, serious assaults, robbery, and kidnapping.

At the outset, we must recognize that the public and the accused have an equal right to an expeditious determination of guilt or innocence. With this principle in mind, we reach the conclusion that, when a person is arrested for the commission of a serious offense, the criminal justice system should exert

its energies quickly to determine whether the accused actually committed the criminal act. If so, punishment should be imposed accordingly.

In the past, and to a great extent presently, we have experienced widespread delays throughout the criminal justice system. Any attempt to expedite cases in the Prosecutor's Office must be accompanied by an equal, if not greater, effort by all segments of the criminal justice community and the courts. Only by virtue of a cooperative effort can real progress be made in making the system more efficient. As a necessary corollary, such agencies as the Public Defender's Office, laboratory and medical reporting agencies, and the like must also seek to expedite their functions.

In the past, several major conditions have existed which have hampered the movement of cases involving serious crime. These include lack of funds, lack of uniform procedures lack of knowledge as to the facts, and lack of cooperation between the agencies involved. That is not to say that particular localized programs to improve the efficiency of the system have not been successful. On the contrary, we wish to draw on the successes of such programs and ideas in order to achieve some sort of workable plan which can be instituted on a statewide basis.

The program enunciated by these standards requires the cooperation of all law enforcement agencies and other governmental units. The cooperation of the police, for example, is necessary for the expeditious disposition of impact crimes. The police must complete their reports and file a complaint in the municipal

court within one day. The prosecutor should provide a legal advisor to the police to both review the complaint (to avoid future delays), and screen out the "priority" matters from the bulk of the cases.

The prosecutors, depending on their individual offices, should examine the feasibility of a staff allocation to handle such cases marked "impact." Such cases could then be reviewed and processed by a team of individuals. There are growing resources throughout the State to assist prosecutors in this endeavor, and these must be utilized if we are to meet our self-imposed standards. Computer resources, both criminal justice and judicial, are functioning in several areas. More efficient management techniques in the prosecutors' offices themselves can likewise assist in saving time. In short, implementation of the standards set forth in this chapter is not an easy task, but efforts must be made to assure that the public's right to a speedy trial is fully vindicated.

CHAPTER 9

IMMUNITY

1. THE USE OF IMMUNITY AS A TOOL FOR DETECTION OF CRIME IS A PRACTICE OF LONG STANDING IN OUR JURISPRUDENCE. THE DISCRETIONARY ABILITY OF THE PROSECUTOR TO IMMUNIZE PROVIDES A MECHANISM TO OBTAIN EVIDENCE AND CONVICTIONS THAT MIGHT OTHERWISE BE IMPOSSIBLE. THE JUDGMENTS WHICH ATTEND POSSIBLE GRANTS OF IMMUNITY ARE AMONG THE MOST SENSITIVE AND DIFFICULT A PROSECUTOR IS CALLED UPON TO MAKE. GREAT CARE MUST BE EXERCISED TO ENSURE THAT IMMUNITY IS USED IN A PROPER AND EFFICACIOUS MANNER. FOR THAT REASON, A PROSECUTOR MUST BE FAMILIAR WITH THE PRESENT LAW GOVERNING IMMUNITY AS WELL AS THE CRITERIA AND STANDARDS WHICH MUST GUIDE HIM IN PROPERLY UTILIZING THIS VALUABLE INVESTIGATIVE TOOL.

2. PRESENT LAW GOVERNING IMMUNITY

   a. THE CONSTITUTIONAL REQUIREMENTS:

      1 A WITNESS MAY CLAIM THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND REFUSE TO ANSWER QUESTIONS WHICH WILL INCRIMINATE HIM UNLESS HE IS GRANTED USE PLUS FRUITS IMMUNITY. SUCH IMMUNITY IS COEXTENSIVE WITH THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

   b. FORMS AND SCOPE OF IMMUNITY:

      (1) THERE ARE TWO BASIC FORMS OF IMMUNITY - "TRANSACTIONAL" AND "USE PLUS FRUITS" IMMUNITY.

      (2) TRANSACTIONAL IMMUNITY PRECLUDES PROSECUTION FOR ANY CRIMINAL TRANSACTION ABOUT WHICH THE WITNESS TESTIFIES.

      (3) USE PLUS FRUITS IMMUNITY ACTS ONLY TO SUPPRESS IN A CRIMINAL PROSECUTION THE WITNESS'S TESTIMONY AND EVIDENCE DERIVED DIRECTLY OR INDIRECTLY THEREFROM. EVIDENCE OBTAINED INDEPENDENTLY OF IMMUNIZED TESTIMONY MAY SERVE AS A BASIS FOR PROSECUTING THE WITNESS FOR ANY CRIMES, INCLUDING THOSE DETAILED BY THE IMMUNIZED STATEMENTS.

      (4) A WITNESS SHOULD NOT BE GRANTED TRANSACTIONAL IMMUNITY SINCE USE IMMUNITY ADEQUATELY SUPPLANTS THE CONSITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION.

(5) COMPELLED OR IMMUNIZED TESTIMONY MAY BE USED IN CIVIL PROCEEDINGS AGAINST THE WITNESS.

(6) IN A CRIMINAL PROSECUTION OF A WITNESS WHO HAS BEEN GRANTED USE IMMUNITY, THE PROSECUTOR HAS THE AFFIRMATIVE DUTY TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT ANY EVIDENCE HE PROPOSES TO USE IS DERIVED FROM A LEGITIMATE SOURCE WHOLLY INDEPENDENT OF THE COMPELLED TESTIMONY.

(7) AS A MATTER OF POLICY AN IMMUNIZED WITNESS SHOULD NOT BE INDICTED BY THE SAME GRAND JURY WHICH HEARD HIS IMMUNIZED TESTIMONY.

(8) PRESENT LAW DOES NOT ALLOW IMMUNIZED TESTIMONY TO BE USED TO IMPEACH THE WITNESS AT A TRIAL OF THAT INDIVIDUAL.

c. AN ADEQUATELY IMMUNIZED WITNESS MUST TESTIFY:

(1) AN IMMUNIZED WITNESS' FAILURE TO TESTIFY RESULTS IN HIS CONFINEMENT FOR CONTEMPT.

(2) CONFINEMENT OF A CONTUMACIOUS WITNESS MUST BE TERMINATED WHEN IT APPEARS THAT IT HAS LOST ITS COERCIVE POWER.

d. AN IMMUNIZED WITNESS MUST TESTIFY TRUTHFULLY

(1) A GRANT OF IMMUNITY IS GIVEN IN RETURN FOR A WITNESS'S TRUTHFUL TESTIMONY.

(2) AN IMMUNIZED WITNESS WHO TESTIFIES FALSELY COMMITS THE CRIME OF PERJURY OR FALSE SWEARING.

(3) A GRANT OF IMMUNITY DOES NOT PERMIT THE PROSECUTOR TO ASK THE WITNESS QUESTIONS WHICH ARE NOT RELEVANT TO THE SUBJECT MATTER UNDER INVESTIGATION.

(4) THE GRANT OF IMMUNITY IS LIMITED TO RESPONSIVE ANSWERS. A WITNESS MAY NOT VOLUNTEER INFORMATION WHICH GOES BEYOND THE QUESTION POSITED IN AN ATTEMPT TO SEEK UNDUE PROTECTION.

e. THE AUTHORITY TO GRANT IMMUNITY:

(1) THE VALIDITY OF A GRANT OF IMMUNITY IS CONTINGENT UPON STRICT COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF THE IMMUNITY STATUTES.

(2) BASIC STATUTORY IMMUNITY IN NEW JERSEY IS EMBODIED IN N.J.S.A. 2A:81-17.3 (PRIVATE INDIVIDUALS) AND N.J.S.A. 2A:81-17.2(a)(2) (PUBLIC EMPLOYEES)

(a) PRIVATE INDIVIDUALS (N.J.S.A. 2A:81-17.3)

(i) THE WITNESS MUST REFUSE TO RESPOND TO QUESTIONING CLAIMING HIS FIFTH AMENDMENT PRIVILEGE. THEREAFTER, HE IS OBLIGED TO DEMONSTRATE THE VALIDITY OF THE CLAIM AND THAT THE ANSWERS TO THE QUESTIONS PROPOUNDED WOULD TEND TO INCRIMINATE HIM.

(ii) PRIOR TO SEEKING AN ORDER OF IMMUNITY FROM THE COURT, THE PROSECUTOR MUST FULLY INFORM THE ATTORNEY GENERAL REGARDING THE CIRCUMSTANCES OF THE CASE AND THE ATTORNEY GENERAL MUST APPROVE THE PROSECUTOR'S APPLICATION FOR IMMUNITY.

(b) PUBLIC EMPLOYEES (N.J.S.A. 2A:81-17.2(a)(2))

(i) A PUBLIC EMPLOYEE HAS A DUTY TO TESTIFY BEFORE ANY COURT OR GRAND JURY CONCERNING MATTERS DIRECTLY RELATING TO HIS OFFICE, POSITION OR EMPLOYMENT. (N.J.S.A. 2A:81017.2(a)(1))

(ii) IF A PUBLIC EMPLOYEE FAILS OR REFUSES TO TESTIFY AFTER BEING INFORMED OF HIS DUTY TO TESTIFY HE IS SUBJECT TO REMOVAL FROM HIS OFFICE, POSITION OR EMPLOYMENT.

(iii) PUBLIC EMPLOYEE STATUS DOES NOT STRIP AN INDIVIDUAL OF HIS FIFTH AMENDMENT PRIVILEGE AND WHERE THE PRIVILEGE IS AFFIRMATIVELY ASSERTED, USE IMMUNITY IS REQUIRED IN RETURN FOR THE WITNESS'S TESTIMONY.

(iv) WHENEVER A PUBLIC EMPLOYEE ASSERTS THE PRIVILEGE, WHETHER OR NOT HE IS A TARGET, THE PARTICULAR PROSECUTOR SHOULD DISCONTINUE THE QUESTIONING AND FOLLOW THE STANDARD PROCEDURES SET FORTH HEREIN REGARDING THE DECISION TO IMMUNIZE A WITNESS. DISCONTINUANCE OF QUESTIONING IS IMPERATIVE SINCE THE FAILURE TO DO SO WILL RESULT IN AUTOMATIC IMMUNIZATION OF THE TESTIMONY SUBSEQUENTLY ELICITED.

f. THE ROLE OF THE COURT:

(1) THE COURT IS RESPONSIBLE FOR DETERMINING WHETHER STATUTORY PREREQUISITES HAVE BEEN COMPLIED WITH PRIOR TO EXECUTING AN ORDER OF IMMUNITY.

(2) A COURT MAY NOT JUDGE THE WISDOM OF AN IMMUNITY GRANT AND IS WHOLLY WITHOUT POWER TO CONFER IMMUNITY.

(3) A COURT MAY NOT ORDER THE GOVERNMENT TO GRANT IMMUNITY TO A PROSPECTIVE WITNESS FOR A DEFENDANT.

g. THE EFFECT OF ONE SOVEREIGN'S GRANT OF IMMUNITY ON A SUBSEQUENT CRIMINAL PROSECUTION BY ANOTHER SOVEREIGN:

(1) WHEN A WITNESS HAS BEEN GRANTED IMMUNITY BY ONE JURISDICTION, WHETHER IT BE STATE OR FEDERAL, ANOTHER JURISDICTION SEEKING TO PROSECUTE THE WITNESS FOR OFFENSES REVEALED BY HIS COMPELLED TESTIMONY MAY NOT USE THE IMMUNIZED TESTIMONY OR FRUITS THEREOF.

(2) A WITNESS GRANTED FEDERAL TRANSACTIONAL IMMUNITY UNDER THE RECENTLY REPEALED 18 U.S.C.A §6002 MAY NOT BE SUBJECTED TO A STATE PROSECUTION IN NEW JERSEY CONCERNING THE TRANSACTION ABOUT WHICH HE WAS COMPELLED TO TESTIFY.

h. CIVIL IMMUNITY:

(1) THE FIFTH AMENDMENT PRIVILEGE MERELY PROTECTS AGAINST COMPELLED SELF-INCRIMINATION AND SUCH TESTIMONY IS NOT BARRED FROM USE IN A CIVIL ACTION.

(2) A GOVERNMENTAL AGENCY MAY CONFER IMMUNITY FOR USE OF TESTIMONY IN A CIVIL PROCEEDING IN RETURN FOR THE WITNESS'S TESTIMONY BEFORE A GRAND JURY OR COURT.

i. SELF-EXECUTING IMMUNITY AND THE TARGET DOCTRINE (WARNINGS TO WITNESSES):

(1) SELF-EXECUTING IMMUNITY:

(a) WHERE THE STATE COERCES A WAIVER OF THE FIFTH AMENDMENT PRIVILEGE AND COMPELS AN INDIVIDUAL TO TESTIFY THERE IS A SELF-EXECUTING IMMUNITY FROM USE OR DERIVATIVE USE WHICH ATTACHES TO THE INDIVIDUAL'S STATEMENTS.

(b) ABSENT A FORMAL GRANT OF IMMUNITY, SELF-EXECUTING USE IMMUNITY ATTACHES TO ANY TESTIMONY COMPELLED OVER A VALID CLAIM OF PRIVILEGE.

(c) A DEFENDANT WHO TESTIFIES IN SUPPORT OF A MOTION TO SUPPRESS EVIDENCE ON FOURTH AMENDMENT GROUNDS OR A PRISONER WHO TESTIFIES AT A PRISON DISCIPLINARY HEARING IS ENTITLED TO IMMUNITY FROM THE USE OF SUCH TESTIMONY.

(2) THE TARGET DOCTRINE AND WARNINGS TO WITNESSES

NON-TARGET (NON-PUBLIC EMPLOYEE):

(a) A NON-TARGET WITNESS IS ONE WHO IS NOT IDENTIFIED OR REASONABLY IDENTIFIABLE BY THE PROSECUTOR AS AN OBJECT OF THE GRAND JURY INQUIRY OR INVESTIGATION.

(b) IT IS NOT NECESSARY TO ADVISE A NON-TARGET WITNESS OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

(c) WHERE A NON-TARGET WITNESS FAILS TO CLAIM THE PRIVILEGE, HIS TESTIMONY CAN BE USED AGAINST HIM AND CAN EVEN BE THE BASIS OF AN INDICTMENT.

(d) WHEN A NON-TARGET WITNESS, CLAIMING HIS FIFTH AMENDMENT PRIVILEGE, REFUSES TO ANSWER A QUESTION, THE PROSECUTING ATTORNEY MAY CHALLENGE THE VALIDITY OF THE CLAIM OF THE PRIVILEGE.

(e) THE VALIDITY OF THE CLAIM IS DETERMINED BY THE COURT AFTER THE WITNESS HAS BEEN AFFORDED THE OPPORTUNITY TO DEMONSTRATE THE PERIL ATTACHED TO HIS ANSWER TO THE QUESTION.

(f) IF THE COURT DETERMINES THAT THE PRIVILEGE HAS BEEN LEGITIMATELY ASSERTED, THEN THE INQUIRY MUST CEASE. IF, HOWEVER, THE CLAIM IS NOT SUPPORTED BY A GENUINE PERIL THEN THE WITNESS MUST EITHER TESTIFY OR BE HELD IN CONTEMPT.

(3) TARGET (NON-PUBLIC EMPLOYEE):

(a) WHERE THE GRAND JURY PROCEEDING IS NOT A GENERAL INQUIRY BUT ONE DIRECTED AT THE WITNESS WITH THE OBJECT OF RETURNING AN INDICTMENT AGAINST HIM, THE WITNESS IS A TARGET OF THE INVESTIGATION.

(b) UNDER PRESENT NEW JERSEY LAW THE FAILURE TO ADVISE A TARGET WHO APPEARS BEFORE A GRAND JURY OF HIS STATUS AND OF HIS RIGHT NOT TO INCRIMINATE HIMSELF REQUIRES THAT HIS TESTIMONY BE SUPPRESSED AND AN INDICTMENT RETURNED BY THAT GRAND JURY MUST BE QUASHED AS IT RELATES TO THAT WITNESS.

(c) WHEN A TARGET WITNESS INVOKES THE FIFTH AMENDMENT PRIVILEGE, AFTER BEING ADVISED OF HIS STATUS, THE FACTUAL BASIS FOR THE CLAIM MAY NOT BE TESTED BY THE PROSECUTING ATTORNEY AND THE INQUIRY MUST BE TERMINATED.

(4) PUBLIC EMPLOYEES (NON-TARGET):

(a) NO WARNINGS NEED BE GIVEN TO A NON-TARGET PUBLIC EMPLOYEE PRIOR TO HIS APPEARANCE BEFORE OR QUESTIONING BY THE GRAND JURY.

(b) IF A NON-TARGET PUBLIC EMPLOYEE DECLINES, WITHOUT CLAIM OF PRIVILEGE, TO APPEAR OR TO TESTIFY, HE IS TO BE HANDLED AS ANY OTHER WITNESS AND MAY BE SUBJECTED TO THE CONTEMPT PROCESS.

(c) THE PUBLIC OFFICER OR EMPLOYEE WHO FAILS, WITHOUT JUSTIFICATION, TO COOPERATE IN AN INVESTIGATION DIRECTLY RELATED TO HIS OFFICE OR EMPLOYMENT IS SUBJECT TO REMOVAL FROM OFFICE.

(d) IN ORDER TO EFFECTUATE REMOVAL FROM OFFICE, FOR FAILURE TO APPEAR OR TO TESTIFY, IT IS NECESSARY THAT THE PUBLIC EMPLOYEE BE ADVISED OF HIS DUTY TO TESTIFY AND THE CONSEQUENCES OF HIS DECISION.

(e) THE PROSECUTOR MAY CHALLENGE THE FACTUAL BASIS OF A NON-TARGET PUBLIC EMPLOYEE'S CLAIM OF PRIVILEGE.

(f) IF THE PROSECUTOR ELECTS TO COMPEL THE TESTIMONY OF A PUBLIC OFFICER UNDER THREAT OF REMOVAL FROM OFFICE THE PUBLIC EMPLOYEE MUST FIRST ASSERT THE PRIVILEGE AND ANY TESTIMONY GIVEN WILL BE PROTECTED FROM USE OR DERIVATIVE USE AGAINST THE OFFICER IN A SUBSEQUENT CRIMINAL PROSECUTION.

(g) PRIOR TO CONFERRING SUCH IMMUNITY THE PROSECUTOR MUST FOLLOW THE ADMINISTRATIVE PROCEDURES SET FORTH HEREIN FOR GRANTING IMMUNITY GENERALLY.

(5) PUBLIC EMPLOYEE (TARGET WITNESS):

(a) A PUBLIC EMPLOYEE TARGET WITNESS SHOULD BE GIVEN THE TARGET WARNINGS.

(b) IN ALL INSTANCES A WAIVER OF IMMUNITY SHOULD BE PROCURED PRIOR TO THIS INDIVIDUAL'S APPEARANCE BEFORE THE GRAND JURY. IF A WAIVER OF IMMUNITY CANNOT BE SECURED, THE TARGET PUBLIC EMPLOYEE WITNESS SHOULD NOT ORDINARILY BE CALLED BEFORE THE GRAND JURY.

(c) IN THE ABSENCE OF A WAIVER, HOWEVER, THE TESTIMONY OF A PUBLIC EMPLOYEE TARGET CAN BE COMPELLED PURSUANT TO N.J.S.A. 2A:81-17.2(a)(1), PROVIDED THE WITNESS HAS CLAIMED THE FIFTH AMENDMENT PRIVILEGE. SUCH A COURSE OF ACTION, HOWEVER, SHOULD ONLY BE FOLLOWED AFTER CAREFUL CONSIDERATION OF ALL OPTIONS, INCLUDING THE EFFECT OF THE IMMUNIZED TESTIMONY.

(d) OUR COURTS HAVE UPHELD THE VALIDITY OF AN INDICTMENT PROCURED SUBSEQUENT TO AN UNWARNED TARGET PUBLIC EMPLOYEE'S TESTIMONY. THE REMEDY IS MERELY SUPPRESSION OF THE TESTIMONY. HOWEVER, THE BURDEN IS UPON THE STATE TO DEMONSTRATE THAT THE TESTIMONY IS IN NO WAY UTILIZED IN A SUBSEQUENT CRIMINAL PROSECUTION OF THE WITNESS.

(e) WHERE THE PROSECUTOR PERSISTS IN ASKING QUESTIONS AFTER A CLAIM OF PRIVILEGE AND RESPONSIVE ANSWERS ARE GIVEN, USE PLUS FRUITS IMMUNITY WILL RESULT. THEREFORE, IT IS IMPERATIVE THAT THE PROCEDURES FOR CONFERRAL OF IMMUNITY BE SCRUPULOUSLY FOLLOWED.

j. INFORMAL GRANTS OF IMMUNITY:

(1) INFORMAL GRANTS OF IMMUNITY INCLUDING ASSURANCES BY A PROSECUTOR THAT AN INDIVIDUAL WILL NOT BE PROSECUTED IN RETURN FOR CERTAIN COOPERATION ARE A NECESSARY AND VALUABLE TOOL FOR PROSECUTORS.

(2) WHILE NEW JERSEY COURTS HAVE NOT SPECIFICALLY RULED ON THE QUESTION, INFORMAL GRANTS OF IMMUNITY ARE ENTIRELY CONSISTENT WITH THE INHERENT DISCRETION OF A PROSECUTOR TO CHARGE OR NOT TO CHARGE.

(3) THE UTMOST CARE MUST BE TAKEN WITH RESPECT TO DECISIONS TO EXTEND INFORMAL ASSURANCES AND, THEREFORE, IT IS IMPERATIVE THAT PROSECUTORS ENSURE THEIR COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURES AND THE CRITERIA FOR GRANTING IMMUNITY AS SET FORTH IN THESE STANDARDS.

(4) TESTIMONY SECURED FROM A WITNESS WHO WAS INDUCED BY A PROMISE OF INFORMAL IMMUNITY MUST BE SUPPRESSED AS A MATTER OF FUNDAMENTAL FAIRNESS AS IT RELATES TO THAT WITNESS.

3. CRITERIA AND PROCEDURE FOR GRANTING IMMUNITY

a. ALTHOUGH THE CIRCUMSTANCES OF EACH SITUATION MAY DIFFER, IT IS AND MUST BE THE GENERAL POLICY OF THE STATE'S PROSECUTORS TO GIVE UP THE LEAST POSSIBLE CONSIDERATION IN OBTAINING THE COOPERATION OF WITNESSES.

b. IT IS IMPOSSIBLE TO SET FORTH A PRECISE FORMULA BY WHICH THE DECISION TO NEGOTIATE IMMUNITY IS MADE, BUT THERE ARE CERTAIN FACTORS WHICH SHOULD BE WEIGHED WHEN CONSIDERING ANY FORM OF IMMUNITY.

(1) CAN THE INFORMATION BE OBTAINED FROM ANY SOURCE OTHER THAN A WITNESS WHO WANTS TO NEGOTIATE IMMUNITY?

(2) HOW USEFUL IS THE INFORMATION FOR PURPOSES OF CRIMINAL PROSECUTION?

(3) WHAT IS THE LIKELIHOOD THAT THE WITNESS CAN SUCCESSFULLY BE PROSECUTED?

(4) WHAT IS THE RELATIVE SIGNIFICANCE OF THE WITNESS AS A POTENTIAL DEFENDANT?

(5) WHAT IS THE RELATIVE SIGNIFICANCE OF THE POTENTIAL DEFENDANT AGAINST WHOM THE WITNESS OFFERS TO TESTIFY?

(6) WHAT IS THE VALUE OF THE TESTIMONY OF THE WITNESS TO THE CASE?

(7) WHAT IMPACT WILL IMMUNITY HAVE ON THE CREDIBILITY OF THE WITNESS AT TRIAL?

(8) WHAT IMPACT WILL IMMUNITY HAVE ON THE PROSECUTOR'S PERSONAL CREDIBILITY AND THAT OF HIS OFFICE?

b. PROCEDURE:

(1) EACH PROSECUTOR'S OFFICE SHALL DEVISE A FORM FOR REQUESTING IMMUNITY WHICH, ONCE ADAPTED TO THE PARTICULAR OFFICE, SHALL BE UTILIZED IN SITUATIONS INVOLVING IMMUNITY OR OTHER SUBSTANTIAL CONCESSIONS TO A WITNESS IN A GRAND JURY, TRIAL OR OTHER CONTEXT.

(2) THE STANDARD PROCEDURES SET FORTH HEREIN INCLUDING UTILIZATION OF THE IMMUNITY FORM, SHALL BE FOLLOWED IN ALL CASES INVOLVING FORMAL, INFORMAL AND PUBLIC EMPLOYEE IMMUNITY GRANTS.

(3) THE STATUTORY PROCEDURE FOR OBTAINING IMMUNITY IS RECOMMENDED FOR ALL SITUATIONS IN WHICH IMMUNITY IS EITHER PART OR ALL OF THE CONSIDERATION GIVEN A PARTICULAR WITNESS.

(4) THE FACT OF THE WITNESS'S CLAIM OF PRIVILEGE AND THE SPECIFIC INCRIMINATORY QUESTIONS TO WHICH THAT CLAIM WAS ASSERTED SHOULD BE PART OF THE PETITION IN SUPPORT OF THE PROSECUTOR'S APPLICATION.

(5) WITH RESPECT TO IMMUNITY OR OTHER SUBSTANTIAL CONCESSIONS TO A WITNESS, THE OBTAINING OF ALL APPROVALS SHOWN ON THE FACE OF THE STANDARD MEMORANDUM, INCLUDING THAT OF THE PROSECUTOR OR HIS DESIGNEE, CONSTITUTES A PREREQUISITE TO THE GRANTING OF USE PLUS FRUITS IMMUNITY (BOTH IN INFORMAL AND IN THE FORMAL STATUTORY SITUATIONS), DE FACTO TRANSACTIONAL IMMUNITY, CIVIL CONSIDERATIONS OR OTHER SUBSTANTIAL CONCESSIONS TO A WITNESS WHO TESTIFIES IN A GRAND JURY INVESTIGATIVE CONTEXT.

(6) THE ABOVE PROCEDURE SHALL ALSO BE EMPLOYED PRIOR TO SEEKING THE TESTIMONY OF A PUBLIC OFFICIAL PURSUANT TO N.J.S.A. 2A:81-17.2(a)(1) et seq., AND THUS POSSIBLY INVOKING THE STATUTORY IMMUNITY THERE CONFERRED.

(7) WITH RESPECT TO AN INVESTIGATIVE OR FIELD ATTORNEY'S INTERVIEW OF WITNESSES WITHOUT PREJUDICE, AN INFORMAL UNDERSTANDING WITH THE WITNESS THAT AN INTERVIEW WILL BE CONDITIONED ON AN AGREEMENT BY THE PROSECUTOR THAT NOTHING THE WITNESS SAYS OR LEADS THEREFROM SHALL BE USED AGAINST HIM MAY BE MADE AFTER OBTAINING APPROVAL FROM THE PROSECUTOR OR DESIGNATED REPRESENTATIVE.

(8) SUCH AGREEMENTS, WHICH SHALL BE AS CLEAR AND PRECISE AS POSSIBLE IN THEIR TERMS, SHALL BE PROMPTLY REDUCED TO WRITING IN THE FORM OF A MEMORANDUM FROM THE ATTORNEY TO THE PROSECUTOR AND A COPY OF THE MEMORANDUM SHALL BE INCLUDED IN THE CASE FILE.

(9) IN CASES OF EXTREME SENSITIVITY OR SIGNIFICANCE, BEFORE ENTERING SUCH AGREEMENT, THE ATTORNEY SHALL OBTAIN WRITTEN APPROVAL FROM THE PROSECUTOR OR HIS DESIGNEE.

COMMENTARY

The judgments which attend possible grants of immunity and other possible consideration to witnesses are often among the most sensitive and difficult a prosecutor is called upon to make. Great care must be exercised to ensure that rightfully culpable defendants do not escape prosecution and that third parties are not unjustly accused by an actual or potential defendant who seeks personal exoneration at any cost.

On the other hand, immunity -- as a matter of prosecutorial discretion as well as statutory mandate -- is a concept of long standing in our jurisprudence. It is an important

concomitant to Fifth Amendment privileges in the context of the social interest in proper and thorough law enforcement efforts. In short, the concept of immunity provides the prosecutor with a mechanism to obtain evidence that might otherwise be undiscoverable.

> The Fifth Amendment privilege is an exception to the longstanding principle that the public has a right to every man's evidence, a principle which is particularly applicable to grand jury proceedings.... On occasion, however, immunity provisions have for a considerable period of time filled the need of achieving a further balance -- some say implementing the balance -- between the individual's right not to provide information incriminatory of himself and society's need for his information to pursue its investigation of the criminal activity of others. The practice of providing immunity against the use of compelled incriminatory testimony has an unquestioned tradition in English legal history. Certain offenses, such as bribery, are of such a character that the only persons possessing helpful knowledge thereof are oftentimes those who themselves are implicated in the offense. If the investigation of crime is not frustrated in such circumstances, there must be a means of both securing the citizen's privilege against compulsory self-incrimination and obtaining the necessary information.[49]

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[49] Statement of Attorney General Levy before the House Judiciary Committee, Subcommittee on Immigration, Citizenship, and International Law, on Grand Jury Reform, June 10, 1976.

Ideally, of course, our citizenry should be uniformly forthright and willing to come forward at all times with relevant information. This situation would, of course, obviate the need to immunize. Practically speaking, such is obviously not the case. And, as stated above, the nature of many crimes, including the consensual conspiratorial character of criminal conduct in the official corruption and organized crime areas, requires the use of immunity as an investigative tool to identify factually the criminal event and to reach the key participants:

> One might wish that our society were so structured that the investigation of crime would rely solely upon the wholly voluntary cooperation of citizens. But it is not and has never been. If the grand jury is to perform its historic function of investigating crime and returning only well founded indictments, it must have available to it compulsory process and the testimony of witnesses who sometimes are themselves involved in the matters under inquiry. Increasing the rights of witnesses to refuse to comply with a grand jury inquiry, whatever the merits of the suggestion, would seriously hamper the grand jury in its investigative efforts.[50]

Likewise, apart from statutory immunity, other forms of favorable consideration to a witness may also be required in the context of a grand jury inquiry. The sensitivity of all such decisions, as well as their effect on any potential prosecution, is apparent. For that reason, standards governing the procedure to be followed and the criteria utilized in reaching these decisions are required. Thus, the purpose of this section of the manual will be to analyze the present law governing immunity as well as the criteria and standards which may guide a prosecutor in properly utilizing

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50 Id.

this valuable investigative tool.

I. Present Law Governing Immunity

A. The Constitutional Requirements

Immunity from prosecution, both in form and usage, is a concept generally misunderstood by lawyers and laypersons. As noted above, the power to grant immunity and thus compel testimony is a necessary element in the balance between a citizen's right to exercise his Fifth Amendment privilege to remain silent with impunity and society's right to every man's evidence. Simply stated, a citizen's right to refuse to provide evidence against himself necessitates that the executive, whose public mission is enforcement of the law, be empowered to secure that man's testimony in a manner which is inoffensive to the constitutional privilege.[51] The purpose of a grant of immunity is to obtain truthful information, most frequently regarding otherwise undiscoverable offenses. This purpose is accomplished by relieving the witness of exposure to the essence of what the Fifth Amendment protects against, i.e., the cruel

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51 Absent a self-incrimination dilemma every citizen has a duty to testify and that duty cannot be avoided on the ground that his testimony might be embarrassing or cause economic or social injury. In re Bonk, 527 F.2d 120, 124 (7 Cir. 1975). Similarly, In re Daley, 549 F.2d 469, 481-482 (7 Cir. 1977), the court stated:

> [the] Fifth Amendment, immunizes witnesses against use of compelled testimony in any criminal case rather than against all potential opprobrium, penalties or disabilities which occur as a consequence of compelled disclosures. (at 474).

Cf., Napolitano v. Ward, 457 F.2d 279, 284 (7 Cir. 1972) holding that despite the fact that an immunized witness was named as an unindicted coconspirator, he was never subjected to criminal prosecution for "any transaction, matter or thing" arising from the

trilemma of self-accusation, perjury or contempt[52] A witness may refuse to answer questions or to otherwise provide testimony unless he is granted immunity coextensive with the constitutional privilege.[53] Once adequate immunity is conferred, the witness must testify.

B. Forms and Scope of Immunity

There are two basic forms of immunity -- "transactional immunity" and "use immunity." "Transactional immunity" precludes prosecution for any transaction or affair about which a witness testifies. "Use immunity" is a grant with limitations. Rather than barring a subsequent related prosecution it acts only to suppress in such prosecution the witness's testimony and evidence derived directly or indirectly from that testimony. Evidence obtained independently of immunized testimony may serve as a basis for prosecuting the witness for activities and transactions including those covered in his own statements.[54] Clearly, a witness who is

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51 (cont'd)
immunized testimony. However, in New Jersey the practice of naming persons as unindicted coconspirators has been modified. See State v. Porro, 152 N.J.Super. 179 (App.Div. 1977).

52 United States v. Henderson, 406 F.Supp. 417, 428 (D.C.Del. 1975); cf., Jackson v. Denno, 379 U.S. 368 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Spano v. New York, 360 U.S. 315 (1959).

53 United States v. Calandra, 414 U.S. 338, 346 (1974); Kastigar v. United States, 406 U.S. 441, 448 (1972); In re Bonk, supra. Cf. Zicarelli v. N.J. State Comm. of Invest., 406 U.S. 472, 474 (1972); State v. Kenny, 68 N.J. 17, 23 (1975); State v. Gregorio, 142 N.J.Super. 372, 377 (Law Div. 1976).

54 Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F.Supp. 1270, 1274 (D.C.D.C. 1974). See, United States v. Buonacore, 412 F.Supp. 904, 907 (E.D.Pa. 1976). Cf. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Allman v. United States, 337 U.S. 137 (1949); Blair v. United States, 250 U.S. 273 (1919); Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 542 (1892).

compelled to testify would prefer to be granted transactional immunity. In return for his testimony he would be free from prosecution for his involvement in any offense to which the compelled testimony relates. However, our Constitution does not require that a person be released from potential prosecution merely because he is compelled to testify. The doctrine of use immunity adequately supplants the privilege.[55] This is so because a witness granted use immunity has not been compelled to give evidence against himself in a criminal case.

In In re Daley, supra, the court defined "criminal case" for the purposes of the Fifth Amendment privilege. A criminal case is one which may result " in imposition of sanction upon a person as a result of his conduct being adjudged violative of the criminal law." That court held that state bar disciplinary proceedings are not "criminal cases." Therefore, compelled testimony was admissible against the witness in that proceeding. In In re Grand Jury Proceedings, 491 F.2d 42, 45 (D.C. Cir. 1974), it was held that a grant of immunity against the use "in any criminal case" of compelled testimony extends to proceedings in juvenile court. This case also holds that a juvenile is not immune from civil contempt proceedings merely because of minor status. Cf. Manning Engineering Inc. v. Hudson Cty. Park Comm., 74 N.J. 113 (1977).

Use immunity is favored by law enforcement officials because it does not afford broader protection than the Fifth Amendment

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55 United States v. Kastigar, supra. Accord, Baxter v. Palmigiano, 96 S.Ct. 1551 (1976); Lefkowitz v. Turley, 414 U.S. 70, 80 (1973); Uniformed Sanitation Men's Assoc. v. Comm. of Sanitation of New York, 392 U.S. 280, 284 (1968); Gardner v. Broderick, 393 U.S. 223, 278 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967).

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privilege requires. Transactional immunity is not favored because:

> [it] infringes upon both the great common law principle that the public has a right to every man's evidence, and the duty to testify recognized in the Sixth Amendment requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor.... A grant of immunity broader than the Fifth Amendment privilege might also infringe upon the right of another sovereignty, whether the federal government or another state, to enforce its laws.[56]

In addition, transactional immunity is discordant with the just and compelling interest of the government in the prosecution of crime.

The major problem encountered in jurisdictions which utilize use as opposed to transactional immunity is the difficulty attendant to proving that evidence used to subsequently prosecute a witness has not been derived from the compelled testimony. In re Tuso, 73 N.J. 575 (1977); State v. Vinegra, 73 N.J. 484 (1977). Thus, it has been held that:

> an individual accorded use immunity is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities ... the prosecution [has] the affirmative duty to prove that any evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.[57]

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56 United States v. DeDiego, 511 F.2d 818, 821 (D.C.Cir. 1975). The problem of the rights of different sovereignties is discussed infra.

57 Kastigar v. United States, 406 U.S. 441, 453 (1972); In re Buonacore, 412 F.Supp. 904, 907 (E.D.Pa. 1976); Cf. United States v. DeDiego, 511 F.2d 818, 821 (D.C.Cir. 1975). See United States

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In short, jurisdictions like New Jersey which utilize use immunity have placed an affirmative obligation on the prosecutor to prove that any evidence used in a subsequent criminal prosecution of a witness is derived from a wholly independent source. See, In re Tuso, supra; State v. Vinegra, supra. The prosecutor must provide "clear and convincing evidence" that the evidence which he intends to use against the immunized witness is derived from an independent source. State v. Gregorio, 142 N.J.Super. 372, 383 (Law Div. 1976).

Nonetheless, witnesses granted use immunity continually dispute the adequacy of the affirmative obligation placed on a prosecutor to protect their rights. Witnesses subsequently prosecuted have made the argument, denominated the "ball of wax" approach, that the compelled testimony and the prosecutor's use thereof so pervades a case that it is impossible for a court to restore the witness to the position he would have been in had he never testified. United States v. McDaniel, 482 F.2d 305 (8 Cir. 1973); United States v. Dornau, 359 F.Supp. 684 (S.D.N.Y. 1973); Cf. State v. Gregorio, supra. In McDaniel and Dornau the prosecutor, prior to presenting his case to the federal grand jury, had read defendant's testimony given under a grant of immunity before a state grand jury. In each of these cases the court held that the government failed to carry its burden of proving that it made no use of defendant's protected testimony. The courts held that the government was not

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57(cont'd)
v. Kurzer, 534 F.2d 511, 516-517 (2 Cir. 1976), holding that if the fact of prior compelled testimony contributes to a subsequent witness's decision to testify then the motivation of the witness is directly relevant to a determination whether "the witness who gave the immunized testimony is left in substantially the same position as if he had claimed the privilege."

able to prove that the prosecutor, having read defendant's earlier testimony, did not make some use of it in preparing or presenting his case to the federal grand jury. Conversely, in United States v. Henderson, supra at 427, the court rejected the "ball of wax" argument stating that "I think it clear that the presentation to the grand jury would have been substantially the same in this case if there had been no compelled testimony."

A related issue is the presentation of evidence against an immunized witness before the same grand jury which heard his immunized testimony. One line of cases has indicated that where a target of an investigation is compelled to give incriminating evidence before a grand jury, that same grand jury cannot permissibly indict for the offenses to which he has confessed. See e.g., Goldberg v. United States, 472 F.2d 513, 516 (2 Cir. 1973); Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964); United States v. Tane, 329 F.2d 848 (2 Cir. 1964); United States v. Lawn, 115 F.Supp. 674 (S.D.N.Y. 1953), appeal dismissed sub nom. United States v. Roth, 208 F.2d 467 (2 Cir. 1953). For example, the court in Goldberg v. United States, supra, observed that an indictment might be invalid if returned by the same grand jury before whom a defendant was compelled to testify against himself under a grant of immunity, and who actually testified as to incriminating matters. The court applied the rationale of Bruton v. United States, 391 U.S. 123 (1968), to the grand jury setting in finding that under such circumstances "it would be well nigh impossible for the grand jurors to put [defendant's] answers out of their minds." Thus, the very testimony which was compelled by the grant of immunity might be used against him by

the grand jury. Goldberg v. United States, supra at 516.

Notwithstanding the above admonitions the New Jersey Supreme Court held in State v. Vinegra, 73 N.J. 484, 490 (1977), that a public employee target witness may be indicted by the same grand jury which heard his immunized testimony. The Court stated:

> So far as the Fifth Amendment is involved, the United States Supreme Court has consistently held that the receipt by a grand jury of evidence obtained in violation of a person's Fifth Amendment rights does not infect an indictment based on such testimony .... Suppression of such grand jury evidence [and fruits thereof] at trial adequately protects a defendant's Fifth Amendment rights.

Thus, our Supreme Court has specifically held that at least with respect to a public employee testifying pursuant to N.J.S.A. 2A:81-17.2(a)(1) he may be indicted by the same grand jury which heard his immunized testimony. Also implicit in its holding in Vinegra is a recognition that presently a public employee's compelled testimony may be used to obtain an indictment against him. As noted above the theory is that the privilege merely protects one against use in a subsequent criminal prosecution and not against being indicted. Cf. United States v. Henderson, 406 F.Supp. 417 (D.Del. 1975).

Nevertheless, as a matter of policy it is recommended that evidence against an immunized witness be presented to a grand jury other than the panel which heard the immunized testimony. Clearly, an argument can be made that a grand jury proceeding is the initiation of a criminal prosecution. This policy recommendation is based on fairness to the witness as well as

the anticipation of a future holding that this practice may not be constitutionally permissible.

A more recent concern generated by the utilization of the use immunity doctrine is the effect it may have on a witness in a later prosecution. Because of an awareness of his prior incriminating testimony, the witness may be reluctant to take the witness stand in his own defense. Simply stated, the witness would be fearful of a prosecutor attempting to impeach him based on his prior immunized statements. In response to this concern, recent court decisions have indicated that immunized testimony is not available for impeachment purposes. See, United States V. Frumento, 552 F.2d 525, 542 (3 Cir. 1977); State v. Portash, 151 N.J.Super. 200 (App.Div. 1977), certif. den. ___ N.J. ___ (1978).[58]

A witness compelled to testify over a valid claim of privilege is constitutionally entitled to use immunity. Therefore, if that witness is subsequently indicted and prosecuted the State bears the burden of proving through clear and convincing evidence that any evidence which it intends to use at trial is derived from a wholly independent source. Succinctly stated, "use immunity" adequately supplants the Fifth Amendment privilege against self-incrimination.

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[58] Yet another problem, discussed in detail infra, is the dilemma of perjury. In United States v. Housand, 550 F.2d 818 (2 Cir. 1977), the court stated that a witness who testifies falsely under immunity puts himself in peril if at a later proceeding he gives true and thus contradictory testimony. The immunity grant would not protect the witness from prosecution should the government, alerted by the contradiction, uncover extrinsic evidence showing the first testimony's falsity. Thus, that court upheld a privilege claim of a defense-called witness who rebuffed defense counsel's efforts to learn the substance of his earlier immunized testimony. The witness had reasonable cause to fear a false swearing prosecution should he testify truthfully.

C. An Adequately Immunized Witness Must Testify

An immunized witness's failure to testify results in his confinement for contempt. Confinement for contempt in refusing to testify despite a grant of immunity is a coercive measure. Such confinement cannot be used to punish a witness for remaining silent or for any other shortcoming of which he has not been convicted. Thus, confinement of a contumacious witness must be terminated when it appears that it has lost its coercive power and its legal justification thereby ends.

In New Jersey, a witness is entitled to be released upon a showing that there is no substantial likelihood that further confinement would accomplish the coercive purpose of the order on which the confinement is based.[59] Each case is decided on an independent evaluation of all the particular facts, among which age, state of health and length of confinement are factors to be weighed. In short, when a contumacious witness's confinement has ceased to have a coercive effect in that he will not be compelled to testify by its continuation, such confinement becomes punishment which must be abated.

In re Tuso, supra, is illustrative of the absolute duty of an adequately immunized witness to testify. In Tuso, the State sought to compel a witness to testify before a grand jury investigating an alleged coconspirator in the same conspiracy for which the witness was previously indicted and presently awaiting trial. The indicted witness moved to have the immunity order quashed asserting that such an order was "basically unfair, inequitable [and] totally unnecessary." The New Jersey Supreme

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[59] The prime purpose of confinement for contempt is to satisfy the public need for information irrespective of the stubbornness of the witness. "Mere punishment of a recalcitrant witness would not achieve that end." Catena v. Seidl, 68 N.J. 224, 231 (1975).

Court held that the witness must testify or be subjected to confinement for contempt. The Court's decision was buttressed by the precaution the State took in sealing and certifying the record of evidence it proposed to use at the witness's trial and lodging it with the court and also by the plan to use a different prosecutor before the grand jury than the one assigned to try the witness.[60]

D. An Immunized Witness Must Testify Truthfully

Immunity is granted to a witness in return for inculpatory evidence. The bargain struck is conditioned upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the "incriminatory truth" which the Constitution was intended to protect. Thus, the agreement is breached and the testimony falls outside the

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[60] Witnesses raise a myriad of arguments to avoid testifying. For example, in United States v. Doe, 361 F.Supp. 226, 227 (E.D. Pa. 1973), the defendant argued that immunity in the United States in any criminal proceeding would be insufficient because he might be suspected of smuggling guns to the Irish Republican Army and could be prosecuted in Ireland or Great Britain. The Court ordered the defendant to testify because there was no indication of any pending prosecution against the witness in Great Britain or Ireland and there was no showing that he might be answerable in either country for his activities in the United States. In In re Lysen, 374 F.Supp. 1122, 1123 (N.D.Ill. 1974), the defendant argued that testimony compelled pursuant to a grant of use immunity would prejudice his pending appeal and would expose him to certain tax liabilities. The court rejected both claims noting that his appeal is based upon trial errors and that compelled testimony given to a grand jury would be protected by the "veil of secrecy." The court further stated that his claim relating to tax liability was premature. In United States v. Wilson, 488 F.2d 1231 (2 Cir. 1973) the court rejected a claim by a witness who was granted statutory immunity and required to testify in an accomplice's armed robbery trial, even though he had not been sentenced upon his guilty plea to a robbery charge and the sentencing judge was the judge sitting in the accomplice's trial. The court held that the witness must testify and then request a different judge for sentencing. Lastly, even a witness who has been acquitted may be compelled to testify about events at issue in his criminal trial. In re Bonk, supra at 124; In re Liddy, 506 F.2d 1293 (D.C. Cir. 1974).

constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions.[61]

In short, the immunity required by the Constitution does not confer upon the witness the right to perjure himself or to withhold testimony. The very purpose of the granting of immunity is to reach the truth, and when that testimony is incriminatory, it cannot be used against him. If the witness thwarts the inquiry by evasion or falsehood, such conduct is not entitled to immunity. In fact, another crime is thereby committed.[62]

A grant of immunity does not permit the prosecutor to ask questions which are not relevant to the subject matter under investigation. Therefore, a grant of immunity does not give a prosecutor the power to engage in a fishing expedition into the witness's background or activities unrelated to the suspected offenses. Thus, a witness may properly, either at a grand jury investigation or at trial, seek to be relieved from answering a question because relevance to the subject matter

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61 Glickstein v. United States, 222 U.S. 139 (1911); United States v. Tramunti, supra at 1342. Past indiscretions include past perjury. Therefore, the statements could not be used to prosecute past perjury if the witness testified truthfully.

62 United States v. Winter, 348 F.2d 204, 208-209 (2 Cir. 1965), cert. den. 382 U.S. 955 (1965). See United States v. Krough, 366 F.Supp. 1255, 1256 (D.C.D.C. 1973), holding that a federal official concerned with national security matters has no license to testify falsely under oath. Cf. Taylor v. United States, 509 F.2d 1349 (5 Cir. 1975), holding that a witness fearful of reprisals must testify and testify truthfully.

being pursued by the government is absent.[63] Further, a grant of immunity is limited to "responsive" answers. Simply stated, a witness may not volunteer information which goes beyond the question posited in an attempt to seek undue protection. A witness who volunteers "what the State already knows or would likely come upon without the witness's aid" is not protected from the use of these statements.[64]

E. The Authority to Grant Immunity

The authority to extend a formal grant of immunity to a witness is typically contained within a statute.[65] Such statutes delineate standards and guidelines under which a governmental executive or agency may grant immunity to a witness. The validity of a grant of immunity is generally contingent upon strict compliance with the procedural requirements of the immunity statutes.[66]

Basic statutory immunity in New Jersey is embodied in N.J.S.A. 2A:81-17.3 and N.J.S.A. 2A:81-17.2(a)(2).[67] Those

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63 State v. Kenny, 68 N.J. 17, 31 (1975).

64 In re Zicarelli, 55 N.J. 249, 270-271 (1970), aff'd 406 U.S. 472 (1972). Cf. United States v. D'Antonio, 362 F.2d 151 (7 Cir. 1966).

65 See e.g., 18 U.S.C.A. §§6002, 2514; N.J.S.A. 49:3-68, 2A:81-17.2 (a)(2), 2A:81-17.3, 52:9-17. Cf. In re Manna, 124 N.J.Super. 429 (App.Div. 1973).

66 Stevens v. Marks, 383 U.S. 234, 241-242 (1966); December 1968 Grand Jury v. United States, 420 F.2d 1201 (7 Cir. 1970).

67 There are other statutes which govern grants of immunity by agencies empowered to make such grants during investigations. See e.g., N.J.S.A. 52:9-17 empowering the State Commission of Investigation to make such grants and N.J.S.A. 49:3-68 of the Uniform Securities Law providing for grants of immunity in investigations regarding the sale of securities.

statutes respectively provide for conferral of immunity upon private individuals and public employees. As will be discussed below, public employees have a duty to testify regarding their public responsibilities and separate statutory procedures are employed in that regard.

I. Private Individuals

N.J.S.A. 2A:81.17.3 provides:

> In any criminal proceeding before a court or grand jury, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby and if the Attorney General or the county prosecutor with the approval of the Attorney General, in writing requests the court to order that person to answer the question or produce the evidence, the court shall so order and that person shall comply with the order. After complying and if but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, such testimony or evidence, or any information directly or indirectly derived from such testimony or evidence, may not be used against the person in any proceeding or prosecution for a crime or offense concerning which he gave answer or produced evidence under court order. However, he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or failing to answer, or in producing, or failing to produce evidence in accordance with the order. If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as aforesaid, he may be adjudged in contempt and committed to the county jail until such time as he purges himself of contempt by testifying as ordered without regard to the expiration of the grand jury before which he was ordered to testify has been dissolved, he may then purge himself by testifying before the court.

A close reading of the above-quoted statute reveals that the statutory scheme is comprehensive in its treatment of immunity proceedures. Safeguards are specifically enumerated in the law which insure the efficacy of a prosecutor's grant of immunity. Under the statute, the witness must first refuse to respond to questioning. The witness is then obliged to demonstrate before a judge that the answers to the questions propounded would tend to incriminate the witness.[68] An order must be executed by the court granting immunity. Prior to seeking such an order, the Attorney General must be fully informed regarding the circumstances of the case and must approve of the prosecutor's application for immunity.

It bears emphasis that there is no statutory procedure with respect to the methods required for procuring the Attorney General's consent. In essence, the Legislature has given the Attorney General the authority to devise internal procedures regarding the attainment of his approval. The criteria governing an approval are also left to the discretion of the Attorney General. See In re Tuso, supra. This aspect of the legislation reflects an awareness of the unique expertise of the Attorney General in this regard. Once an approval has been secured from the Attorney General the court generally may not question the decision of the prosecutor to immunize the witness, and therefore must sign the order.

ii. Public Employees

As noted above, unlike a private individual, a public

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[68] This measure is intended to prevent spurious claims of the privilege. See In re Addonizio, 53 N.J. 107 (1968).

employee has a duty "to appear and testify upon matters directly related to the conduct of his office, position or employment before any court, grand jury or the State Commission of Investigation." N.J.S.A. 2A:81-17.2(a)(1). If a public employee fails or refuses to testify after being informed of that duty he is subject to removal from his office, position or employment. Id. It is clear, however, that "public employee" status does not strip an individual of his Fifth Amendment privilege. Thus, where a public employee affirmatively asserts the privilege against self-incrimination, use immunity is required in return for the testimony compelled pursuant to the above obligation. State v. Vinegra, 73 N.J. 484, 487, fn. 1 (1977). Accordingly, N.J.S.A. 81-17.2(a)(2) embodies a conferral of such immunity. That statute provides:

> If any public employee, having claimed the privilege against self-incrimination, testifies before any court, grand jury or the State Commission of Investigation after having been informed that his failure to appear and testify would subject him to removal from his office, position or employment, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying.

Simply stated, a public employee in New Jersey may be statutorily compelled to testify regarding matters related to his public employment under the pain of discharge from said employment. New Jersey courts have reasoned that:

> Where the question is between legitimate public interest and accountability of public officers and their right to remain silent, the constitutional right

> against self-incrimination ordinarily prevails, but where self-incrimination is no longer at stake the public's interest is paramount and the officer may subject himself to dismissal from office if he refuses without justification to account for performance of his public trust. Kugler v. Tiller, 127 N.J. Super. 468, 474-475 (App.Div. 1974).[69]

There is no statutory requirement that a public employee witness be given Miranda warnings prior to testifying. However, there are certain circumstances where it is desirable to give such warnings in order that the State's interest in the use of a witness's statements will be protected. The desirability of this procedure depends upon whether the witness is a target of the investigation. As will be discussed infra, the State is never required to give warnings to a non-target witness However, where a witness is a target of the investigation the State is required to inform him of the scope of the investigation and of his right to remain silent. State v. Fary, 19 N.J. 431 (1955); State v. Sarcone, 96 N.J.Super. 501 (Law Div. 1967). Failure to so warn a target witness would apparently result in both dismissal of a resulting indictment and suppression of his grand jury testimony. State v. Vinegra, supra at 488; State v. Williams, 59 N.J. 493, 503 (1971). But see United States v. Wong, ___ U.S. ___, 97 S.Ct. 1823 (1977); United States v. Washington, ___ U.S. ___, 97 S.Ct. 1814 (1977). A witness is a target if the grand jury proceeding is not a general inquiry but one

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69 The definition of "public employee" is of broad scope:

> For the purposes of this act the term "public employee" shall mean any person who occupies any office, position or employment in the government of the State of New Jersey, or the several counties and municipalities thereof, or any political subdivision of the State, or a school district, or any special district, or any authority, commission, board, or any branch

(cont'd)

directed at the witness with the object of returning an indictment against him. State v. Browning, 19 N.J. 424, 427 (1955).

The target doctrine, insofar as it calls for dismissal of the indictment against a target witness, has been modified as to public employees. State v. Vinegra, supra at 489. The statute has the effect of making the common law target doctrine inapplicable to a public employee as it imposes a duty on him to testify upon matters directly related to the conduct of his office. At the same time it seeks to protect his privilege against self-incrimination by giving him use plus fruits immunity. Nonetheless, the privilege against self-incrimination like all constitutional rights, may be waived. Garner v. United States, 424 U.S. 648, 96 S.Ct. 1178 (1976). The Fifth Amendment privilege must be affirmatively asserted by the individual who seeks its protection. Garner v. United States, supra. The lack of an affirmative assertion results in a waiver. A non-target witness who testifies without having been forewarned of his rights has lost the protection of the privilege because there is no requirement that he be so warned. Thus, the State may use any testimony given by that witness in a subsequent criminal prosecution against him. This is true whether the witness is a private citizen or a public employee.

It is axiomatic that a witness may expressly waive the privilege.[70] Thus, a target witness, once warned of his rights,

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69 (cont'd) or agency of the public service. This term shall include, but shall not be limited to, elected and appointed persons. N.J.S.A. 2A:81-17.2(a).

70 A waiver may either be accomplished by the understanding and voluntary signing of a waiver of immunity, State v. Cattaneo, 123 N.J.Super. 167, 171 (App.Div. 1973), or by a defendant admitting statements or documents into evidence himself in a subsequent prosecution. United States v. Keilly, 445 F.2d 1285, 1287 (2 Cir. 1971). A witness may also give truthful and incriminating (cont'd)

may decline to exercise those rights. A forewarned target witness, whether he is a public employee or a private citizen, who fails to exercise the privilege and waives it, opens the door to having his testimony used against him in a subsequent criminal prosecution. In short, a non-target public employee need not be given warnings; however, a target should always be provided such warnings in order that the State may preserve the potential for a waiver.

Finally, it is recommended that whenever a public employee asserts the privilege, whether or not he is a target, a well-reasoned decision should ensue regarding continuation of the questioning and thereby conferring statutory immunity. The particular prosecutor should discontinue the questioning and follow the procedures set forth infra regarding the decision to automatically immunize the witness through further questioning.

F. The Role of the Court

Significantly, courts are generally without statutory power to initiate and grant immunity.[71] It is well established that,

> once the bar of the privilege against self-incrimination has been raised by the witness, the decision whether to confer immunity in order to facilitate

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70 (cont'd)
statements "to obtain an equitable or moral claim for leniency that would not be his due if he had not aided the State in such manner." State v. Edelman, 19 N.J.Super. 350, 353-355 (App.Div. 1952). Cf. Steven v. Marks, 383 U.S. 234 (1966).

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See United States ex rel. Berberian, 300 F.Supp. 8 (E.D. Pa. 1969). Cf. United States v. Housand, 550 F.2d 818 (2 Cir. 1977).

> the government's investigation is the product of the balancing of the public need for particular testimony or documentary information in question against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law. Therefore, the relative importance of particular testimony to ... law enforcement interest is a judgmental rather than a legal determination, one remaining wholly within the competence of appropriate executive officials.[72]

Stated somewhat differently, a court has no inherent discretion to terminate prosecutions and the discretion to prosecute remains with the prosecutor.[73]

The role of the courts of New Jersey in matters related to immunity was recently defined in In re Tuso, supra. There, the Court stated:

> [the immunity] statute ... delegates the function of determining the need [for immunity] ... to the Attorney General ... not the court, conformably with the duty of that officer to attend to the enforcement of the criminal laws. Upon request by the Attorney General ... the court 'shall' order the witness to testify ... the court may not hamstring a prosecuting official in his marshaling of evidence before a grand jury.... The Attorney General must in the public interest be afforded broad authority to decide what avenues to pursue before the grand jury in the investigation and prosecution of crime. [at 579-580]

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72 In re Daley, supra.

73 United States v. DeDiego, supra at 824.

In sum, a court is viewed as a checkpoint for assuring proper compliance with established statutory procedures. A court does not judge the wisdom of granting immunity to witnesses.[74] A court is wholly without power to grant immunity in New Jersey or to interfere with the Attorney General's power in that regard.

An issue related to the power to grant immunity is the power to refuse to grant immunity. The government is generally not required to grant immunity to a prospective witness for a defendant.[75] However, it has been indicated that where the government secures testimony by granting immunity to one eye-witness, it might as a matter of due process be required to grant it to another to make evidence available to the defendant.[76] This situation has not arisen in New Jersey.

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74 Judicial review of whether established statutory prerequisites have been complied with is necessary to ensure that the constitutional rights of an immunized witness are adequately protected. This function comports with the traditional role of the judiciary in law enforcement. For example, current federal law requires that the protection which immunity affords must be coextensive with and provide a complete substitute for the Fifth Amendment privilege. The judiciary is uniquely suited to make this type of determination. Succinctly stated, the ability to render definitive legal decisions is solely within the province of the judiciary just as formulation of qualitative investigatory procedures are reserved to the executive. See United States v. Norton, 277 F.Supp. 1002 (D.N.J. 1967); United States v. Weber, 255 F.Supp. 40 (D.N.J. 1965).

75 United States v. Beasley, 550 F.2d 261, 268 (5 Cir. 1977); United States v. Autista, 509 F.2d 675, 677 (9 Cir. 1975). Cf. People v. Sapia, ___ N.Y. ___ (Ct. App. 1976).

76 Earl v. United States, 361 F.2d 531 (D.C.Cir. 1960).

G. The Effect of One Sovereign's Grant of Immunity on a Subsequent Criminal Prosecution by Another Sovereign

The Fifth Amendment privilege protects state witnesses against incrimination under federal as well as state law, and federal witnesses against incrimination under state as well as federal law.[77] In Kastigar v. United States, supra at 1663-1664, the United States Supreme Court stated:

> A state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him.... This protection coextensive with the privilege is the degree of protection that the Constitution requires even against the jurisdiction compelling testimony by granting immunity.

In Kastigar the court based its holding on the principle that answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony in connection with a criminal prosecution against the person testifying. In short, once a witness has been granted immunity by one jurisdiction, whether it be a state or the federal government, a separate jurisdiction seeking to prosecute the witness for offenses related to his compelled testimony may not use the immunized testimony.

Notwithstanding the use limitation expressed in Kastigar, the New Jersey Supreme Court has held that "transactional immunity" granted by a federal statute affords the witness

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[77] Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

protection from prosecution and conviction of any offenses related to the testimony. State v. Kenny, 68 N.J. 17, 32 (1975). In Kenny the court stated that a witness granted federal transactional immunity may not subsequently be subjected to a State prosecution because of the "transaction" concerning which he was compelled to testify. The court noted that the compelled testimony related substantially to the state prosecution and, therefore, the transactional immunity granted under 18 U.S.C.A. §2514 was applicable.[78] Thus, a separate rule has emerged relative to grants of federal transactional immunity under the recently repealed 18 U.S.C.A. §2514. A review of recent holdings in several states indicates that states are of the view that grants of immunity provided under that statute are applicable to state proceedings.[79]

H. Civil Immunity

It is axiomatic that the Fifth Amendment privilege merely protects against compelled self-incrimination. Therefore, compelled testimony is never constitutionally barred from use in a civil action. Nevertheless, a governmental agency may allow civil immunity in return for testimony. Courts have rejected the notion that a grant of civil immunity gives a witness something of value for his testimony in contravention

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78 Cf. People v. Stievater, 344 N.Y.S.2d 656, 41 A.D.2d 435 (1973); Commonwealth v. Fattizzo, 223 Pa. Super. 378, 299 A.2d 22 (1972).

79 Id. The statute, 18 U.S.C.A. §2514, has been replaced by 18 U.S.C.A. §6002 which provides for use immunity only.

of law.[80]

I. Self-Executing Immunity and the Target Doctrine (Warnings to Witnesses)

i. Self-executing Immunity

There are several circumstances in which immunity is self-executing. Where the State coerces a waiver of the Fifth Amendment privilege and compels an individual to testify there is a self-executing immunity from use or derivative use which attaches to the individual's statements. In Lefkowitz v. Turley, supra at 70, 77, a witness was threatened with discharge from his employment as a governmental licensee if he did not waive his privilege against self-incrimination. The United States Supreme Court stated:

> Be it a statutory inquiry or a criminal prosecution, a witness protected by the constitutional privilege against self-incrimination may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant; absent such protection, if he is nevertheless compelled to answer, his statements are inadmissible against him in a later criminal prosecution.

The Court based its holding on the principle that where a waiver of a constitutional privilege is secured under threat of substantial economic sanction, such a waiver cannot be termed

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[80] United States v. Bennett, 505 F.2d 1091, 1101-1102 (7 Cir. 1974). Cf. Young v. Patterson, 132 N.J.Super. 170, 177-179 (App.Div. 1975). In this regard, note should be taken that the admissibility of compelled testimony in civil proceedings is most important to public employees and others whose occupation is based on a government license.

voluntary.[81] The Lefkowitz holding represents the general proposition that a price may never be exacted for assertion of a constitutional right.

As previously noted, given adequate immunity the State may insist that public employees or governmental licensees either answer questions under oath about the performance of their job or licensed status or suffer loss of employment. See §E. The State may also compel any man's testimony once immunity has been provided. In short, immunity is a prerequisite to testimony compelled over a valid claim of privilege. Therefore, absent a formal grant of immunity, self-executing use immunity attaches to any compelled testimony. Cf. Garrity v. New Jersey, supra; Lefkowitz v. Cunningham, ___ U.S. ___, 97 S.Ct. 2132 (1977).

Moreover, there are situations where immunity from use of statements in a criminal prosecution arises because the individual's need to personally address allegations against him outweighs society's interest in forcing him into a "Catch 22" situation of testifying and incriminating himself or being silent and leaving the allegations unaddressed. For example, when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial.[82] It would be

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[81] Cf. United States v. Robbins, 337 F.Supp. 1050 (N.D. Ohio 1972), holding that where the government induced a defendant to waive his privilege against self-incrimination by ambiguous assurances as to immunity, he was entitled to have his testimony before the grand jury suppressed.

[82] Simmons v. United States, 347 U.S. 62 (1974). However, unlike formally immunized testimony, testimony given in a suppression hearing may be used to impeach the witness should he assume the stand at trial and make an inconsistent statement. Walder v. United States, 347 U.S. 62 (1974).

intolerable if one constitutional right had to be surrendered in order to assert another.[83] Similarly, a prisoner is entitled to testify at a prison disciplinary hearing with immunity. In Avant v. Clifford, 67 N.J 496, 542 (1975), the New Jersey Supreme Court stated:

> The Court recognizes that the threat of an imposition of solitary confinement or the loss of any type of gain time may operate to coerce a waiver of the Fifth Amendment privilege and that, on the other hand, an inmate who chooses to remain silent is stripped of his most valuable defense. In either event, the dilemma is likely to exert such pressure upon an individual as to disable him from making a free and rational choice.[84]

ii. The Target Doctrine and Warnings to Witnesses

In New Jersey the responsibilities of the prosecuting attorney to particular witnesses vary greatly depending upon the status of the witness subpoenaed. As previously noted in §E and as will be discussed in detail at this point, a prosecutor must be extremely sensitive to whether a witness is a target or non-target witness, private individual or a public employee. Under certain circumstances a failure to warn a witness results not only in self-executing use immunity but in the dismissal of an indictment as well. In order to catalogue the duties of the prosecutor, it is necessary to distinguish between the different

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83 Id.

84 See Baxter v. Palmigiano, 96 S.Ct. 1551 (1976). Cf. Lefkowitz v. Cunningham, supra at 2137, stating that the "touchstone" of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.

classes of witnesses.

Non-Target (non-public employee)

A non-target witness is one who is not identified or reasonably identifiable by the prosecutor as an object of the grand jury inquiry or investigation. The prosecutor's good faith determination as to the "status" of a particular witness will prevail, and the burden is on the witness to demonstrate that the inquiry was a "ruse" to induce the witness "to unwittingly give evidence against himself." State v. Cattaneo, 123 N.J.Super. 167, 172 (App.Div. 1973), certif. den. 63 N.J. 324 (1973). See also State v. Vinegra, supra.

It is not necessary to advise a non-target witness of his Fifth Amendment privilege against self-incrimination if he is called to testify before a grand jury conducting a "general investigation." "Where the inquiry is in fact a general investigation not aimed at the witness and the witness fails to claim the privilege, his testimony can be used against him and can even be the basis of an indictment." State v. Fary, 19 N.J. 431 (1955). Thus, the witness need not be advised of his privilege when he is summoned to give testimony before a grand jury if there is only the mere possibility that he may later be indicted. State v. Fary, supra; United States v. Luxemberg, 374 F.2d 241 (6 Cir. 1967).

This general rule does not, however, preclude a witness from claiming his Fifth Amendment privilege against self-incrimination. This privilege extends to all witnesses, whether or not they are targets of the investigation. State v. DeCola, 33 N.J. 335 (1960). The witness must be prepared to demonstrate

a factual basis to the court to justify his claim of privilege. If the question is answered by the witness without claim of privilege, he waives his Fifth Amendment rights. State v. Toscano, 13 N.J. 418, 423 (1953). In short, a non-target witness called before a grand jury need not be warned of his Fifth Amendment right against self-incrimination, and any testimony elicited from him later may be used against him.

When a non-target witness, claiming his Fifth Amendment privilege, refuses to answer a question, the prosecuting attorney may properly challenge whether the witness may validly claim this privilege. This determination must be made by the court, usually the assignment judge, before whom the witness can be brought. The assignment judge cannot accept merely the witness's statement that the requested answer will tend to incriminate him. In re Boiardo, 34 N.J. 599 (1961). See also In the Matter of Carl "Pappy" Ippolito, 145 N.J.Super. 262 (App.Div. 1976), rev'd ___ N.J. ___ (1978). Rather the witness must support his invocation of the privilege by a statement indicating the nature or area of the criminal exposure which he fears. It is necessary for him to pinpoint the area to the extent necessary to support his claim of privilege to the satisfaction of the court. The witness must show sufficient facts to the assignment judge to indicate a legitimate basis for his fear of criminal prosecution. State v. DeCola, 33 N.J. 335 (1960); In re Boyd, 36 N.J. 285 (1962). If, in making this disclosure, factually incriminating material is elicited, the witness is protected against the use of such evidence and its fruits. In re Boyd, supra. If a witness is a "target," he need show no more than that fact in

order to support his Fifth Amendment claim. In re Addonizio, 53 N.J. 107 (1968).

Target (non-public employee)

As noted, when a witness appears before a grand jury, as a general rule, he does not have the status of a defendant in a criminal trial and it is not required that he be informed of the privilege against compulsory self-incrimination. State v. Fary, supra at 435. The failure to warn such a witness of his right to refuse to answer incriminating questions has a bearing on the matter of invasion of his privilege only if the witness was under formal criminal charges at the time and was questioned as to the charges, or, though not under formal charges, the grand jury proceeding was not a general inquiry but one directed at the witness with the object of returning an indictment against him. State v. Browning, supra at 427. See In re Tuso, supra. Such a witness is a target of the investigation.

In State v. Vinegra, supra, the New Jersey Supreme Court provided a detailed discussion of what is referred to in this State as the target doctrine. This doctrine provides that the target of a grand jury proceeding must be advised that he is a target and of his right not to incriminate himself. While not definitively deciding the question, the Vinegra court intimated that under present law a failure to provide such warnings requires that the target witness's testimony be suppressed and an indictment based on his testimony be quashed. State v. Vinegra, supra. Indeed, prior to its decision in Vinegra, the court had upheld the principle of the target rule

in numerous decisions.[85] In short, a target should be given adequate warnings so that any testimony which he gives will not be suppressed or any resulting indictment quashed.

Significantly, the privilege against self-incrimination in New Jersey is a common law privilege as it is not written into the state constitution. It bears emphasis that the common law privilege as expounded in our target doctrine expands the protection provided under the Fifth Amendment to the federal constitution. In Washington v. United States, 426 U.S. 905 (1976), the United States Supreme Court stated:

> There is no requirement that the witness be warned that he is a potential defendant since a target status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination and potential defendant warnings add nothing of value to protection of Fifth Amendment rights.

Simply put, target witnesses in New Jersey are provided greater protection than is required under the federal constitutional amendment. As will be discussed infra, the target doctrine has been modified as it relates to public employees. Cf. United States v. Wong, ___ U.S. ___, 97 S.Ct. 1823 (1977). Moreover, it must be emphasized that when a target witness claims the Fifth Amendment privilege, the factual basis for the claim may not be sought by the prosecuting attorney. In re Addonizio, supra.

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[85] See e.g., State v. Williams, 59 N.J. 493, 503 (1971); In re Addonizio, 53 N.J. 107, 117 (1968). Nonetheless, the Supreme Court refused in Vinegra to "resolve the question whether we should continue to adhere to the target principle as part of our common law privilege against self-incrimination." The defendant in Vinegra was a public employee burdened with a duty to testify. Thus, as discussed infra, the target doctrine was not directly at issue.

Public Employees (non-target)

Every public officer and employee has the obligation to cooperate and to testify in any investigation pertaining to his public office or employment. However, this obligation cannot circumvent the Fifth Amendment protection against self-incrimination.

In the case of a non-target public employee, no warnings need be given prior to his appearance before or questioning by the grand jury. If a non-target public employee declines, without claim of privilege, to appear or to testify, he is to be handled as any other witness, that is by contempt process pursuant to R. 1:10-1 et seq. Moreover, the public officer or employee is subject to removal from office for his failure without justification to cooperate in the investigation. N.J.S.A. 2A:81-12.2(a)(1) et seq.

In order to seek removal for failure to appear or failure to testify, it is necessary that the public employee be advised of the consequences of his decision. See Kugler v. Tiller, 127 N.J.Super. 468 (App.Div. 1974) and discussion infra. In those situations in which the public officer appears but declines to testify, he should be advised on the record of his obligation to testify and the consequence of his refusal.

In those situations in which a non-target public employee appears and claims the Fifth Amendment privilege, his public office does not alter his status vis-a-vis the prosecutor's right to challenge the basis for claiming privilege. See discussion on non-target witness, supra.

If the claim of privilege is upheld, the prosecutor must decide (as in the case of a target public employee) whether to "compel" the testimony of the public officer under threat of removal from office. If the prosecutor elects to "compel" the testimony of the public officer, the testimony given will be protected from use or derivative use against that officer in any subsequent criminal prosecution. In essence, the public officer will have been granted use plus fruits immunity.

If the public officer, "compelled" to testify pursuant to N.J.S.A. 2A:81-17.2(a)(1), et seq., persists in his refusal to testify, having been properly warned of the consequences of his refusal, he may be subject to removal from office. N.J.S.A. 2A:81-17.2(a)(3). If the public officer, while testifying, admits the commission of a crime relating to his public position, he is likewise subject to removal. Id.

Public Employee (Target Witness)

The public employee-target witness situation presents the most complex situation, involving as it does the absolute right of a target to claim the privilege and the conflicting obligation of the public officer to cooperate. In addition, the target doctrine has a modified applicability to public employee targets.

The public officer target should be considered a target first, thereby being warned as described in the "target witness" section. If a waiver of immunity cannot be secured (and after following the procedures for immunity considerations outlined infra), the testimony of the public employee target can

be compelled pursuant to N.J.S.A. 2A:81-17.2(a)(1), et seq., provided the "target-public employee" witness has claimed the Fifth Amendment privilege. The result of such action, that is compelling the public officer to testify, eliminates him as a "target" of the investigation, and immunizes him against the use and derivative use of his testimony. N.J.S.A. 2A:81-17.2 (a)(2). Since there is no court supervision, and since the prosecuting attorney need do no more than to ask questions to grant this "immunity," it is absolutely necessary that each prosecutor understand the nature of the statutory provision (N.J.S.A. 2A:81-17.2(a)(1), et seq.) and the consequences of his actions. See §E, supra.

The target doctrine has been modified relative to public employees. There is no requirement that an indictment premised on a target-public employee's testimony be quashed. His testimony is merely suppressed. In State v. Vinegra, supra at 490, the New Jersey Supreme Court stated:

> Concededly the (public employee) statute in question takes away from a certain class of the citizenry the protection of the target doctrine to the extent it imposes a duty on a public employee to testify upon matters directly related to the conduct of his office. However, it cannot be said that the statutory classification is arbitrary and unreasonable or denies equal protection in the constitutional sense. A public employee attends to the business of government. It is the public's right and in the public interest to require such employee to account for his stewardship. This limitation on the common law privilege is grounded in public policy and is well within the legislative power.

Nonetheless, as previously noted in §E supra, warnings should be provided to a target-public employee to protect the potential for a waiver of the privilege by the witness giving rise to use of his statement in a subsequent criminal prosecution.

In summary, in order for immunity to result, the public officer must first claim the privilege against self-incrimination, thereby putting the prosecutor on notice that the provisions of the Public Employees Immunity Law may come into play. If the prosecutor persists in asking questions after claim of privilege and responsive answers are given, use plus fruits immunity will result.

The key event in the public employee situation is the officer's claim of privilege. Upon that occurrence (assuming the privilege claim is valid), the prosecutor must elect to immunize the witness or to terminate questioning. If the prosecuting attorney elects to continue the inquiry, he must advise the public officer of his duty to testify and of the consequences of a failure to so testify. Moreover, if the public employee is a target of the investigation he should be given target warnings to preserve the potential for a waiver.

J. Informal Grants of Immunity

Informal grants of immunity viz., assurances by a prosecutor to an individual that he will not be prosecuted in return for aid or cooperation, when utilized with careful consideration, are a necessary and valuable tool for prosecutors. Such power when exercised pursuant to a well-reasoned decision to extend such an assurance, is entirely consistent with the

inherent discretion of a prosecutor to charge or not to charge. It bears emphasis that the utmost care should be taken in decisions to extend informal assurances. Undoubtedly, testimony secured from a witness who was induced by a promise of informal immunity must be suppressed in a criminal prosecution of that witness.

The term "discretion" as used in relation to a prosecutor's good faith exercise of sound discretion in performing his duties means a power or right conferred by law upon a prosecutor to act officially upon each separate case according to dictates of his own judgment and conscience uncontrolled by the judgment and conscience of others. State v. Winne, 12 N.J. 152, 172-173 (1953). This discretion must be exercised in accordance with established principles of skill and reason, and such discretion includes the right to choose a course of action or non-action. State v. Winne, supra. Thus, it is well established that a prosecutor need not pursue the maximum charge a factual complex could sustain, but may exercise his discretion. In re Buehrer, 50 N.J. 501 (1967).

Thus, the courts of New Jersey have recognized that a prosecutor is authorized to determine that a "certain plan of action or certain policy of enforcement will be best productive of law enforcement and will best result in general law observance." State v. Winne, supra. Nonetheless, the courts have never specifically ruled on informal grants of immunity.

State v. Compton, 28 N.J.Super. 45, 49 (App.Div. 1953) is most apposite in this regard. In Compton, the prosecutor assured defendant that if he would cooperate and aid the prosecution in clearing up a large number of robberies in the county, defendant would not be prosecuted as a fourth offender. This promise represented a limited grant of immunity. However, unlike other forms of prosecution, multiple offender prosecutions are initiated by the courts. N.J.S.A. 2A:85-13. Therefore, the court in Compton stated that such an agreement has no binding effect upon the court and is not looked upon favorably. Clearly, however, the Compton court should have been bound by the prosecutor's decision unless it could be shown to be arbitrary or an abuse of discretion. Cf. State v. Leonardis, 73 N.J. 360 (1977).

Analogous to the Legislature having reposed exclusive power within the Attorney General to grant statutory immunity, it is submitted that the courts are similarly bound by the expertise of the executive branch in matters regarding informal grants of immunity. See In re Tuso, supra. It should be noted however that this conclusion is based on inferences derived from present law. There is no New Jersey precedent establishing this principle. Of course, it is obvious that immunity from prosecution subsequent to the return of an indictment should be formally obtained where the immunized individual is expected to testify in any related proceeding.

As noted, there is a precedential void relative to the potential effects of the immunity statutes on informal grants of immunity. An argument might be made that our Legislature

preempted the authority of prosecutors to informally grant immunity by enacting N.J.S.A. 2A:81-17.3. However, it is doubtful that this issue would ever be litigated so long as immunized witnesses are not subsequently prosecuted in violation of the agreement which prompted the immunity. Moreover, it should be emphasized that a witness who is promised informal immunity has the same responsibility to provide truthful information as would a witness who is granted statutory immunity. A failure to testify truthfully breaches the immunity agreement and the witness has no grounds to complain of the admission of the evidence into a subsequent criminal prosecution. See Shotwell Manufacturing Co. v. United States, 371 U.S. 283 (1963); Smith v. United States, 348 U.S. 147, 150 (1954). Such a witness should be informed of the consequences of any false testimony prior to testifying.

In sum, informal grants of immunity should be utilized with great care and decisions in this regard must be the product of well-reasoned considerations. Therefore, the procedures set forth in the following section concerning formal immunity are equally applicable to informal grants of immunity. Prosecutors must be mindful that a "good faith exercise of discretion" is a prerequisite to the legality of such grants of immunity.

II. Criteria and Procedure for Granting Immunity

A. Criteria

Granting leniency to an individual in return for his cooperation is a most delicate and complicated matter.

The objectives and interests of thorough and diligent law enforcement must always be considered in the context of dealing fairly and justly with actual or potential defendants.

Although the circumstances of each situation differ widely, it is and must be the general policy of the State's prosecutor to give up the least possible consideration in obtaining the cooperation of witnesses. If a witness will testify truthfully with no immunity at all, he should receive none. The question we must always answer is how much, if anything, are we giving up when we immunize such a potential witness and how does it balance against what we can anticipate obtaining in return from the witness. Also to be considered is the effect of any consideration upon the individual as a witness before a jury. Ultimately, a "bargain" should be struck only after all of its implications have been fully assessed.

To understand how immunity can be used in a limited fashion in order to develop an investigation to a point where final judgments can be made, it is necessary to reiterate the nature of the following forms of agreement between prosecutor and witness: (1) an informal understanding that an interview will be conditioned on an agreement by the prosecutor that nothing said in the course of the interview will be used against the witness; (2) a formal grant of "use plus fruits" immunity by court order; and (3) a commitment by the State that in addition to "use plus fruits" immunity, some degree of leniency will be shown to the witness in connection with the disposition of a criminal or civil right of action against the witness, or

that the witness will be totally insulated from criminal prosecution for the entirety of the criminal episode ("transactional immunity").

The first two categories involve no commitment by the State other than that of the witness's information itself and any leads derived therefrom will not be used against him. Such immunity is not a bar to the prosecution of the witness in the event that evidence derived from the sources independent of the witness's statements is developed. As noted above, the drawback involved, from a prosecutorial standpoint, in using limited immunity, is that if and when the witness is subsequently prosecuted, the State must prove that its evidence was derived from an independent source. In re Tuso, and State v. Vinegra; Kastigar v. United States, 406 U.S. 441 (1972), 32 L.Ed.2d 212, rehearing den. 408 U.S. 931 (1972); Zicarelli v. N.J. State Commission of Investigation, 406 U.S. 472, 32 L.Ed. 234 (1972). Additionally, when employing use plus fruits immunity, we must avoid compelling the witness to testify before a grand jury which might later indict him for an offense other than perjury or false swearing. If proper care is taken in the course of the investigation in anticipation of a subsequent taint hearing, the result of a grant of use plus fruits immunity can be nothing more than the inconvenience of an additional proceeding at the time of trial.

It is impossible to set forth a precise formula by which the decision to negotiate immunity is made, but there are certain factors which should be weighed when considering

any form of immunity.

1. Can the information be obtained from any source other than a witness who wants to negotiate immunity? It should be understood here that it is our policy never to negotiate any form of actual leniency until we have received and evaluated the information being offered. If a potential witness refuses to disclose his information before such negotiations take place, we should attempt to compel his testimony through statutory forms of immunity or abandon efforts to deal with him.

It should again be stressed that use plus fruits immunity (N.J.S.A. 2A:81-17) should be used cautiously and sparingly, even though from a purely legal standpoint prosecution of the individual would not necessarily be foreclosed. There is no question but that legal difficulties will present themselves (i.e., proving an independent basis) if prosecution of the witness is pressed. Moreover, there will be practical difficulties concerning the credibility of the witness in any prosecutions against others.

2. How useful is the information for purposes of criminal prosecution? From time to time law enforcement agencies make various kinds of deals with informants to obtain intelligence type information. Such negotiations are not the subject of this memorandum. We are concerned here with the development of admissible evidence which can be corroborated in the context of a grand jury inquiry or a trial.

3. What is the likelihood that the witness can successfully be prosecuted? When no case exists against

the witness, immunity sacrifices only a vague possibility that one might be developed. If there is little chance of a successful prosecution, or if the case against the witness is relatively minor in nature, the State gives up less than it would if the potential prosecution of the potential witness is solid and significant.

4. What is the relative significance of the witness as a potential defendant? Such a witness must be considered in the broadest possible context of his background, power and influence as well as the severity of the offenses committed and the extent of the potential witness's participation and responsibility.

5. What is the relative significance of the potential defendant against whom the witness offers to testify? Again, this kind of a judgment should not be made in the narrow confines of the case itself. The defendant's importance must be measured by the seriousness of the social harm which will result from not prosecuting him, thereby leaving him free to exercise his power and influence.

6. What is the value of the testimony of the witness to the case? Where the testimony forms the core evidence upon which the prosecution is based, it is of greater value than testimony which is corroborative or merely cumulative.

7. What impact will immunity -- particularly the terms of transactional immunity and consideration in the civil sense -- have on the credibility of the witness at trial? The more the State has given up to obtain the testimony, the more likely it is that the witness will not be believed. We

should make all judgments on consideration with the realization that any negotiations and the final results thereof must be disclosed. In each case there comes a point at which the terms of the immunity agreement are so favorable to the witness or outrageous that a jury will not accept the testimony.

8. What impact will immunity -- again, particularly the terms of any transactional immunity and civil consideration -- have on the prosecutor's personal credibility and that of his office? A prosecutor has an affirmative duty to engage in conduct which will assure the public that his office is being administered in a fair and responsible manner. In weighing the relative significance of potential witnesses and targets of investigations, we must avoid even the appearance of making our judgments on the basis of personal or political motives.

B. Procedure

Each office should construct a form memorandum which, once adapted to a particular prosecutor's office, may be utilized in situations involving immunity or other substantial concessions to a witness in a grand jury, trial or other context. Uniform procedures are imperative to ensure a cohesive and consistent application of the immunity statutes. Uniformity in documenting the details of informal considerations is also necessary to ensure their enforceability with respect to the express terms of the agreement. It bears emphasis that decisions regarding informal consideration should be the product of a detailed analysis of the situation and its consequential effects. In short, in utilizing the form to record information

regarding decisions to grant statutory immunity or to provide an informal assurance, consideration should be given to the evidentiary value of an accurate and detailed explication of factors leading to the decision to extend immunity and to the necessity of a clear statement of the terms of any immunity which is not granted to the immunity statute.

a.

Inasmuch as use plus derivative use immunity is provided as a prosecutorial tool pursuant to N.J.S.A. 2A:18-17.3, the statutory procedure is recommended for all situations in which "immunity" is either part or all of the consideration given a particular witness.

The statute specifies that a petition approved by the Attorney General may be presented to the court for an order compelling the testimony of a particular witness. The petition must set forth the justification for the prosecutor's determination that the witness's testimony ought to be compelled, i.e., the witness has knowledge of particularized crimes.

A prerequisite to the court's compelling the witness's testimony, and as a consequence to granting use plus fruits immunity, is the requirement that a witness validly claim his privilege against self-incrimination (preferably under oath in response to questions before the grand jury). The fact of a witness's claim of privilege and the specific incriminatory questions to which that claim was asserted should be part of the petition in support of the prosecutor's application.

b.

With respect to immunity or other substantial concessions to a witness, the obtaining of all approvals shown on the face of the memorandum, including the prosecutor or his designee, constitutes a prerequisite to the grant of use plus fruits immunity (both in informal and in the formal statutory situations), de facto transactional immunity, civil considerations or other substantial concessions to a witness who testifies in a grand jury or investigative context. In addition, the procedure shall be pursued prior to seeking the testimony of a public official pursuant to N.J.S.A. 2A:81-17.2(a) et seq., and thus possibly invoking the statutory immunity there conferred. Attached to the memorandum, as noted on its face, should be a supplemental memorandum giving a brief background of the case, listing the names of known and potential defendants and discussing the factors referred to in the section of this chapter dealing with the criteria to be utilized in weighing a decision to grant concessions to a witness.

c.

With respect to an investigative or field attorney's interview of witnesses without prejudice, an informal understanding with the witness that an interview will be conditioned on an agreement by the prosecutor that nothing the witness says or leads therefrom shall be used against him may be made after obtaining oral approval from the prosecutor or designated representative. No such agreement should be made by investigators

or detectives without the approval of the appropriate individual. Such agreements which shall be as clear and precise as possible in their terms, shall be promptly reduced to writing in the form of a memorandum from the attorney to the prosecutor and a copy of the memorandum shall be included in the case file. Further, such agreements will always be entered into with extreme caution, and within the prosecutor's discretion, only in situations where it appears to the attorney from the available materials that the witness has valuable information which cannot be obtained from other sources, and where the object of the interview is to obtain facts concerning potential defendants other than the witness himself. In cases of extreme sensitivity or significance, before entering such agreements, the attorney shall obtain written approval from the prosecutor or his designee.

CHAPTER 10

THE GRAND JURY[86]

1. THE PROSECUTOR SHOULD ENSURE THAT THE GRAND JURY IS FULLY APPRISED OF ITS ROLE WITHIN THE CRIMINAL JUSTICE SYSTEM AND ITS PUBLIC DUTIES AND RESPONSIBILITIES. THIS SHOULD BE ACCOMPLISHED DURING THE FIRST MEETING OF THE GRAND JURY. AMONG THE TOPICS THAT SHOULD BE COVERED ARE:

   a. A BRIEF DESCRIPTION OF THE CRIMINAL JUSTICE SYSTEM FROM THE SIGNING OF THE COMPLAINT THROUGH A POSSIBLE APPEAL.

   b. CHOICES AVAILABLE TO THE GRAND JURY INCLUDING TRUE BILL, NO BILL, REMAND TO MUNICIPAL COURT, PRESENTMENT, AND THEIR IMPLICATIONS.

   c. MECHANICS OF VOTING, INCLUDING MOTIONS FOR TRUE BILL, SECONDING THE MOTION, AND REQUIREMENT OF TWELVE AFFIRMATIVE VOTES.

   d. THE MEANING OF A PRIMA FACIE CASE. THE GRAND JURY SHOULD BE ADVISED THAT IT WILL NOT BE NECESSARY TO CALL ALL POSSIBLE WITNESSES IN THE CASE TO PROVE A PRIMA FACIE CASE BUT THAT IT HAS THE RIGHT TO ASK FOR ADDITIONAL TESTIMONY.

   e. THE GRAND JURY SHOULD BE ADVISED THAT IT HAS THE DISCRETION TO NO BILL OR REMAND CASES EVEN WHERE A PRIMA FACIE CASE EXISTS, WHERE, FOR EXAMPLE, THE PROBABILITY OF CONVICTION IS REMOTE. THE PROSECUTOR MAY MAKE SUCH RECOMMENDATION BASED ON HIS EXPERIENCE.

   f. FUNCTIONS OF THE PROSECUTOR, FOREMAN, DEPUTY FOREMAN, COURT CLERK, AND COURT REPORTER.

   g. THE NEED FOR SECRECY OF GRAND JURY PROCEEDINGS.

2. THE ROLE OF THE PROSECUTOR IS TO ACT AS LEGAL ADVISOR TO THE GRAND JURY AND TO PRESENT EVIDENCE. THE PROSECUTOR MAY NOT PARTICIPATE IN ITS DELIBERATIONS, EXPRESS HIS VIEWS ON QUESTIONS OF FACT, OR ATTEMPT TO DIRECT THE GRAND JURY IN ITS FINDINGS. THE PROSECUTOR MAY IN AN APPROPRIATE CASE:

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86 The Attorney General and the County Prosecutors Association prepared and published the New Jersey Grand Jury Manual. The Manual is comprised of sections comprehensively exploring the subject matter of these standards. Thus, this chapter treats questions pertaining to the grand jury in a brief and summary fashion.

a. DESCRIBE THE POSSIBLE CHARGES AND THE CONSTITUENT LEGAL ELEMENTS.

b. BRIEFLY EXPLAIN THE EXPECTED TESTIMONY.

c RECOMMEND NO BILL OR REMAND TO MUNICIPAL COURT IN CASES WHERE HE FEELS THE PROBABILITY OF CONVICTION IS REMOTE OR THERE IS REASONABLE DOUBT AS TO THE DEFENDANT'S GUILT.

d. PREVENT WITNESSES FROM GIVING IRRELEVANT OR OTHERWISE IMPROPER TESTIMONY.

e. CROSS-EXAMINE WITNESSES THAT APPEAR TO BE EVASIVE, INCONSISTENT, HOSTILE, OR UNTRUTHFUL.

f. EXPLAIN TESTIMONY IN THE CONTEXT OF THE LAW GOVERNING THE CASE.

g. DESCRIBE THE OFFENSE IN TERMS OF THE EXTENT OF HARM ACTUALLY CAUSED AND ITS RELATION TO THE AUTHORIZED PUNISHMENT.

h. DISCUSS POSSIBLE IMPROPER MOTIVES OF A COMPLAINANT OR WITNESS.

i. DESCRIBE THE PROLONGED NONENFORCEMENT OF A STATUTE WITH COMMUNITY ACQUIESCENCE.

j. DESCRIBE THE COOPERATION OF THE ACCUSED IN THE APPREHENSION OR CONVICTION OF OTHERS.

k. DESCRIBE THE AVAILABILITY AND LIKELIHOOD OF PROSECUTION BY ANOTHER JURISDICTION.

3. EACH CASE SHOULD BE REVIEWED BY AT LEAST ONE ASSISTANT PROSECUTOR PRIOR TO BEING SCHEDULED FOR THE GRAND JURY. THIS REVIEW IS TO ASSURE THAT THE CASE IS COMPLETE, IDENTIFY THE WITNESSES TO BE CALLED AND ANALYZE THE POTENTIAL CHARGES. THE FOLLOWING MATERIALS SHOULD BE IN THE CASE FILE PRIOR TO GRAND JURY PRESENTATION:

a. COMPLAINT

b. POLICE REPORTS

c. WITNESSES' STATEMENTS

d. RAP SHEETS

e. SCIENTIFIC REPORTS, INCLUDING FIREARMS, DRUGS, OTHER LABORATORY REPORTS, HANDWRITING REPORTS, FINGERPRINT REPORTS, ETC.

f. SEARCH WARRANTS, AFFIDAVITS, AND INVENTORY RETURNS.

g. BUSINESS RECORDS OR RECORDS CERTIFIED BY PUBLIC OFFICIALS SUCH AS MOTOR VEHICLE ABSTRACTS.

h. MEDICAL REPORTS

i. DEMONSTRATIVE EVIDENCE AND AN INDICATION OF THE WITNESSES NECESSARY TO AUTHENTICATE SAME.

j. STATEMENTS MADE BY THE DEFENDANT AND POLICE REPORTS CONCERNING THE CIRCUMSTANCES SURROUNDING THE MAKING OF SUCH STATEMENTS.

k. REPORTS AND DEMONSTRATIVE EVIDENCE CONCERNING ANY PRE-TRIAL IDENTIFICATIONS.

l. EVIDENCE REPORT (A COMPLETE INVENTORY INCLUDING THE LOCATION OF ALL EVIDENCE AND THE PERSONS INVOLVED IN THE CHAIN OF EVIDENCE)

m. A LIST OF ALL POTENTIAL WITNESSES INCLUDING THEIR RESIDENCE, BUSINESS ADDRESS, AND TELEPHONE NUMBERS

n. A SUMMARY OF THE CASE

o. A PRELIMINARY HEARING TRANSCRIPT IF ORDERED BY THE DEFENSE ATTORNEY OR REQUIRED BY THE PROSECUTOR

4. IN SCHEDULING CASES FOR THE GRAND JURY, THE PROSECUTOR SHOULD ASSIGN PRIORITY IN THE FOLLOWING ORDER:

a. JAIL CASES

b. HOMICIDE CASES

c. OTHER IMPACT CRIMES

d. ALL OTHERS

5. IN PREPARING A CASE FOR PRESENTATION TO THE GRAND JURY IT IS THE FUNCTION OF THE PROSECUTOR TO DETERMINE WHAT POTENTIAL CHARGES MAY BE CONSIDERED. THE PROSECUTOR SHOULD CONSIDER THE FOLLOWING FACTORS:

a. THE PROOFS TO BE OFFERED AT TRIAL AND THE POSSIBLE CHARGES THEREUNDER

b. COMPLEXITY OF THE ULTIMATE CHARGE TO THE TRIAL JURY

c. EFFECT OF CHARGES ON POTENTIAL PLEA NEGOTIATIONS

d. MERGER OF OFFENSES

e. LIMITED SENTENCE EXPOSURE FOR LESS SERIOUS CRIMES

6. THE PROSECUTOR SHOULD CONSIDER COMBINING CASES INVOLVING MULTIPLE JURISDICTIONS. THE APPROPRIATE PROSECUTORS SHOULD DETERMINE WHICH COUNTY OUGHT TO PROSECUTE ON THE BASIS OF THE GREATEST CONTACT WITH THE CRIMINAL ACTS, VICTIMS OR WITNESSES AND THE TRUE SITUS OF THE OFFENSE. SEE R. 3:14-1.

7. IT IS NORMALLY ADVANTAGEOUS TO JOIN MULTIPLE OFFENSES FOR TRIAL. THE PROSECUTOR SHOULD THEREFORE ENDEAVOR TO JOIN IN A SINGLE INDICTMENT NOT ONLY THOSE OFFENSES FOR WHICH JOINDER IS MANDATORY (R. 3:15-1), BUT ALSO THOSE FOR WHICH JOINDER IS PERMISSIBLE.

8. TO THE EXTENT POSSIBLE, WITNESSES SHOULD BE INTERVIEWED THOROUGHLY PRIOR TO THEIR APPEARANCE BEFORE THE GRAND JURY.

9. WITNESS EXAMINATION SHOULD BE BRIEF WITH CONCENTRATION ON THE ELEMENTS THAT MUST BE SHOWN TO ESTABLISH A PRIMA FACIE CASE. LEADING QUESTIONS MAY BE APPROPRIATE TO ASSURE THAT THE WITNESS'S TESTIMONY DIRECTLY RELATES TO THE ELEMENTS OF THE POTENTIAL OFFENSE OR OFFENSES.

10. AFTER THE PROSECUTOR HAS CONCLUDED HIS EXAMINATION OF THE WITNESS, THE GRAND JURORS SHOULD BE ASKED WHETHER THEY WISH TO QUESTION THE WITNESS. TO AVOID IMPROPER, IRRELEVANT, OR REPETITIOUS QUESTIONS IT IS RECOMMENDED THAT THE WITNESS BE ASKED TO LEAVE THE ROOM SO THAT THE GRAND JURY'S QUESTIONS MAY BE REVIEWED BY THE PROSECUTOR TO DETERMINE THEIR LEGAL EFFICACY.

11. THE PROSECUTOR SHOULD ENDEAVOR TO ALLOW PUTATIVE DEFENDANTS WHO REQUEST TO BE HEARD BY THE GRAND JURY TO DO SO. IN THE ABSENCE OF SUCH A REQUEST THE PROSECUTOR MAY ALSO CONSIDER INVITING A PUTATIVE DEFENDANT TO APPEAR IN SELECTED CASES. IF A PUTATIVE DEFENDANT WISHES TO APPEAR BEFORE THE GRAND JURY, HE SHOULD BE GIVEN "TARGET" WARNINGS AND A WRITTEN WAIVER SHOULD BE SECURED.

12. WHERE THE PROSECUTOR IS IN THE POSSESSION OF MATERIAL, RELEVANT EXCULPATORY EVIDENCE WHICH MIGHT REASONABLY LEAD THE GRAND JURY TO RETURN A NO BILL, HE SHOULD EITHER PRESENT SUCH EVIDENCE OR INFORM THE GRAND JURY OF ITS EXISTENCE.

13. IN THOSE SITUATIONS IN WHICH POTENTIAL GRAND JURY WITNESSES ARE THE SUBJECT OF CROSS-COMPLAINTS ARISING FROM THE SAME FACTUAL TRANSACTIONS, SUCH PERSONS SHOULD BE SUBPOENAED TO APPEAR BEFORE THE SAME GRAND JURY AND SHOULD BE ADVISED OF THE EXISTENCE OF THE CRIMINAL COMPLAINTS AND GIVEN THEIR TARGET WARNINGS AND APPROPRIATE WAIVERS PROCURED.

14. PROSECUTORS SHOULD, AS A GENERAL RULE, SEEK TO PRESENT ADMISSIBLE EVIDENCE TO THE GRAND JURY. SO TOO, EVIDENTIARY PRIVILEGES SHOULD BE HONORED AT THE GRAND JURY STAGE OF PROCEEDINGS. WHERE A PRIVILEGE IS PERSONAL TO A DEFENDANT OR THE TARGET OF AN INVESTIGATION AND THAT INDIVIDUAL HAS THE RIGHT TO CLAIM THE PRIVILEGE, IT CAN BE ASSUMED THAT THE INDIVIDUAL WILL EXERCISE THE PRIVILEGE. IN ALL OTHER INSTANCES WHERE THE PRIVILEGE IS NOT PERSONAL, CONSIDERATION SHOULD BE GIVEN TO THE NATURE OF THE PRIVILEGE, THE INDIVIDUAL WHO HAS A RIGHT TO EXERCISE IT AND OTHER SURROUNDING CIRCUMSTANCES.

    a. AN EXCEPTION TO THIS GENERAL RULE EXISTS WITH RESPECT TO INVESTIGATIVE GRAND JURIES WHICH MUST SIFT THROUGH ALL AVAILABLE CLUES TO DETERMINE WHETHER A CRIME HAS BEEN COMMITTED.

    b. AN EXCEPTION TO THIS GENERAL RULE EXISTS WITH RESPECT TO EXPERT WITNESSES. WHERE AN EXPERT WOULD MERELY TESTIFY AS TO THE CONTENTS OF HIS REPORT, HIS PRESENCE BEFORE THE GRAND JURY WOULD NOT BE NEEDED.

    c. WITH REGARD TO EXCEPTIONS TO THE GENERAL RULE, THE PROSECUTOR SHOULD CLEARLY INFORM THE GRAND JURY OF THE AVAILABILITY OF BETTER OR FIRSTHAND EVIDENCE SO THAT IT CAN, IF IT WISHES, REQUEST PRESENTATION OF SUCH PROOFS.

15. THE GRAND JURY HAS THE AUTHORITY TO ISSUE SUBPOENAS TO GATHER EVIDENCE. THE PROSECUTOR HAS NO SUCH POWER. TO ASSIST THE GRAND JURY, THE PROSECUTOR MAY ISSUE THE GRAND JURY'S SUBPOENA FOR EVIDENCE GATHERING PURPOSES. THE POWER TO ISSUE GRAND JURY SUBPOENAS IS LIMITED TO THE PROSECUTOR AND HIS ASSISTANT PROSECUTORS. COUNTY DETECTIVES OR INVESTIGATORS OR POLICE OFFICERS HAVE NO SUCH AUTHORITY UNLESS DELEGATED BY THE PROSECUTOR. COUNTY INVESTIGATORS OR POLICE OFFICERS ARE NOT TO BE GIVEN BLANK SUBPOENAS OR THE AUTHORITY TO ISSUE THE SAME BASED ON THEIR OWN DISCRETION. POLICE OFFICERS HAVE NO AUTHORITY TO ISSUE THEIR OWN SUBPOENAS EXCEPT AS PROVIDED BY R. 7:3-3. AS A GENERAL RULE, PROSECUTORS SHOULD DIRECT THAT THE SERVICE OF ALL SUBPOENAS BE AUTHORIZED BY AN ASSISTANT PROSECUTOR. ONCE THE SUBPOENA IS AUTHORIZED, IT CAN BE SERVED BY A POLICE OFFICER OR ANYONE ELSE EIGHTEEN (18) YEARS OLD OR OLDER.

16. THE GRAND JURY SUBPOENA CAN BE USED TO COMPEL A PERSON TO APPEAR AT THE GRAND JURY FOR THE PURPOSE OF OBTAINING HIS FINGERPRINTS, VOICE PRINTS, HANDWRITING EXAMPLARS

AND OTHER TYPES OF NON-TESTIMONIAL EVIDENCE. SUCH EVIDENCE HAS BEEN REGARDED AS NON-TESTIMONIAL IN NATURE AND THEREFORE NOT PROTECTED BY THE FIFTH AMENDMENT. LIKEWISE, PROVIDED THAT THE INQUIRY IS REASONABLE, THE SUBPOENAED MATERIAL IS NOT PROTECTED BY THE FOURTH AMENDMENT SINCE THE SUBPOENA IS NOT A SEIZURE WITHIN THE SCOPE OF THE FOURTH AMENDMENT.

17. UPON THE RETURN OF A "TRUE BILL" BY THE GRAND JURY, THE INDICTMENT MUST BE PRESENTED IN OPEN COURT TO THE ASSIGNMENT JUDGE OR OTHER JUDGE AUTHORIZED BY. R. 3:6-8(a) TO RECEIVE INDICTMENTS. SUCH ACTION MUST BE TAKEN IN THE PRESENCE OF AT LEAST TWELVE MEMBERS OF THE GRAND JURY. THE INDICTMENT IS SUFFICIENT IF IT CONSISTS SIMPLY OF A WRITTEN STATEMENT OF THE ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED AND A CITATION TO THE SPECIFIC STATUTE OR STATUTES ALLEGEDLY VIOLATED. EACH INDICTMENT MUST BE SIGNED BY THE PROSECUTING ATTORNEY AND ENDORSED AS A TRUE BILL BY THE FOREMAN OR, IN HIS ABSENCE, BY THE DEPUTY FOREMAN. R. 3:7-3.

COMMENTARY

New Jersey is one of the most densely populated and highly urbanized states in the nation. Therefore, it is not surprising that our law enforcement officials are continually engaged in combatting the ugly realities of crime. Yet, despite the difficulties of this task, we have maintained a high level of respect for the rights of those accused of criminal wrongdoing. This tradition has been manifested, in large measure, by the safeguards provided those who have become the focus of grand jury inquiries.

The ability of the grand jury to prevent unwarranted prosecutions and to act independently has been the subject of much public debate. Yet, the charge that prosecutors abuse their powers in grand jury proceedings is wholly unsubstantiated in New Jersey. In point of fact, specific instances of prosecutorial misconduct have been rare in our State. We

believe that the success of the New Jersey system is premised largely on our efforts to professionalize law enforcement. Close supervision of well-trained professionals is the best guarantee against prosecutorial excesses.

Toward this end, the Attorney General of New Jersey and the County Prosecutors' Association commissioned a task force consisting of prosecutors and members of the Division of Criminal Justice to prepare a grand jury manual for the use of State and local law enforcement agencies. Our efforts were designed to select the best procedures presently in force as opposed to merely weeding out the worst.

The manual, in its completed form, extensively sets forth recommended practices for prosecuting attorneys in presenting cases to grand juries. It provides for uniformity of prosecutorial conduct in every grand jury in New Jersey. It also constitutes a valuable orientation document for newly appointed Deputy Attorneys General and Assistant Prosecutors.

The manual, the first of its kind, codifies the best practices presently utilized by state and local prosecutors in presenting matters to grand juries. It provides a comprehensive statement of the prosecutor's duties and ethical obligations before the grand jury. The manual addresses such important areas as grand jury orientation, the role of the prosecutor in grand jury proceedings, the rights and duties of witnesses appearing before the grand jury, standards for determining whether immunity should be employed as an investigative tool, guidelines for dissemination

of information to the media, preparation of cases prior to presentation to the grand jury and post-indictment procedures. The textual portion of the Manual has been supplemented with an extensive appendix consisting of model forms for use during the investigative phase of the grand jury function.

In sum, our grand jury manual was the product of a painstaking effort to define the rational bounds of prosecutorial discretion. It seeks to facilitate the need for a flexible system, which ensures individual rights, while permitting prosecutors to have sufficient authority to fulfill their sworn duties. Further, those who deviate from the standards set forth in the manual may be administratively disciplined. Adherence to the articulated standards set forth in the manual will ensure that prosecutors in New Jersey will continue to be solicitous of the rights of defendants and witnesses in grand jury proceedings.

The standards set forth here reflect many of the principles and guidelines described in greater detail in the Grand Jury Manual. We emphasize that while these standards serve as a handy reference guide, all prosecutors and their assistants should carefully review the Grand Jury Manual.

CHAPTER 11

JOINDER AND SEVERANCE

1. R. 3:15-1 WAS RECENTLY AMENDED AND AUTHORIZES JOINDER UNDER THE FOLLOWING CIRCUMSTANCES:

   a. PERMISSIBLE JOINDER. THE COURT MAY ORDER 2 OR MORE INDICTMENTS OR ACCUSATIONS TRIED TOGETHER IF THE OFFENSES AND THE DEFENDANTS, IF THERE ARE 2 OR MORE, COULD HAVE BEEN JOINED IN A SINGLE INDICTMENT OR ACCUSATION. THE PROCEDURE SHALL BE THE SAME AS IF THE PROSECUTION WERE UNDER SUCH SINGLE INDICTMENT OR ACCUSATION.

   b. MANDATORY JOINDER. EXCEPT AS PROVIDED BY R. 3:15-2(b), A DEFENDANT SHALL NOT BE SUBJECT TO SEPARATE TRIALS FOR MULTIPLE INDICTABLE OFFENSES BASED ON THE SAME CONDUCT OR ARISING FROM THE SAME CRIMINAL EPISODE OR TRANSACTION IF SUCH OFFENSES ARE KNOWN TO THE APPROPRIATE PROSECUTING ATTORNEY AT THE TIME OF THE COMMENCEMENT OF THE FIRST TRIAL.

2. IT IS INCUMBENT ON THE PROSECUTOR TO ENSURE THAT:

   a. ALL OFFENSES BASED ON THE SAME CONDUCT OR ARISING FROM THE SAME CRIMINAL EPISODE OR TRANSACTION ARE JOINED IN THE SAME INDICTMENT OR ACCUSATION;

   b. BEFORE RETURNING AN INDICTMENT OR FILING AN ACCUSATION, AND BEFORE MOVING A CASE FOR TRIAL, THE PROSECUTOR MUST CHECK WITH THE PROSECUTOR OF ANY OTHER COUNTY WHERE THE TRANSACTION OCCURRED TO ASCERTAIN HIS INTEREST IN THE MATTER OR THE STATUS OF PENDING CHARGES IN THAT COUNTY; AND,

   c. THAT EACH NON-INDICTABLE OFFENSE RELATED TO THE INDICTABLE (PENDING IN THE MUNICIPAL COURTS) ARE REFERRED TO THE PROSECUTOR'S OFFICE WITH THE INDICTABLE COMPLAINT.

COMMENTARY

In State v. Gregory, 66 N.J. 510 (1975), the Supreme Court adopted a mandatory joinder requirement to prevent separate trials for multiple offenses based on the same conduct or arising

from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court. The Court adopted the mandatory joinder rule of the Model Penal Code (§1.07(2) and (3)), see 55 N.J. at 519, 522, pending the "preparation of the precise contours and details of the compulsory joinder rule" by its Criminal Practice Committee "for ultimate consideration and promulgation" by the Court. State v. Gregory, supra at 522. The new Rule 3:15-1(b) was drafted as the Committee's response to the Supreme Court's request, and it was adopted by the Supreme Court to be effective September 6, 1977.

Rule 3:15-1(a) provides for "permissible joinder." The standard for determining when two or more indictments or accusations may be tried together is actually set forth in R. 3:7-6,[87] to which R. 3:15-1(a) in effect refers when it states that the "procedure shall be the same as if the prosecution were under such single indictment or accusation."[88]

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[87] Rule 3:7-6 entitled "Joinder of Offenses," provides:

> Two or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged, whether high misdemeanors or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. Relief from prejudicial joinder shall be afforded as provided by R. 3:15-2.

[88] Rule 3:15-1(a), through R. 3:7-6(a), will now identify "... the outer limits of permissible joinder of offenses." Commentary to Standard 1.1, ABA Project on Criminal Justice Standards Relating to Joinder and Severance (Approved Draft) page 10. The language of R. 3:15-1 also provides a vehicle for prosecutors to move for joinder not perfected (under R. 3:7-6) in the same indictment or accusation.

Paragraph (b) of Rule 3:15-1 essentially incorporates the language of Section 1.07(c) of the Model Penal Code (Proposed Official Draft 1962) and is entitled "Mandatory Joinder." This distinction between permissible and mandatory joinder of criminal offenses is analogous to that drawn by Standards 1.1 and 1.3 of the A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft).

The new R. 3:15-1(b) is intended to make clear that the mandatory joinder rule applies only with respect to multiple indictable offenses. It does not require joinder of indictable and non-indictable offenses. See e.g., State v. Saulnier, 63 N.J. 199 (1973); State v. McGrath, 17 N.J. 41 (1954). The rule also states that indictable offenses based on the same conduct or arising from the same criminal episode or transaction must be joined if such offenses are known to the appropriate prosecuting attorney at the time of the commencement of the first trial.[89] See State v. Tamburro, 137 N.J.Super. 51 (App.Div. 1975). Thus, the rule

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89 By virtue of relating the rule exclusively to indictables, the reference to prosecuting attorney would exclude municipal prosecutors. The court has, however, recognized the need for strong administrative action to prohibit disposition of non-indictables (at the municipal level) prior to disposition of related indictables. The court has also recognized the need, consistent with R. 3:25-1 and 3:25A, to dispose of the non-indictable, where possible, at the county level at the time of or following disposition of the indictable without remand of the non-indictable to the municipal court. However, the mandatory joinder rules although applying exclusively to indictables, do not address themselves to the problems of double jeopardy, due process or collateral estoppel, see State v. Gregory, supra, which would

on its face imposes no affirmative burden on the prosecutor to investigate the existence of other charges which might be involved in the transaction. (But see fn. 89, supra). The Rule as adopted by the Court does not adopt the language of the Model Penal Code providing that offenses need be joined only if "within the jurisdiction of a single court." The problem caused by the distinctive jurisdictions of the State, county, and municipal courts was eliminated, to the greatest extent possible, by reference in R. 3:15-1(b) exclusively to indictable offenses and elimination of this phrase. See State v. Tamburro, and footnote 89, supra.

The new R. 3:15-1(b) places the burden on the prosecuting attorney to insure that all charges which must be joined are so joined. Some consideration was given to the possibility of placing the burden of moving for mandatory joinder on the defendant. The Model Penal Code provisions place the burden squarely on the prosecuting attorney, but the A.B.A. Standard (§1.3(b)) places it upon the defendant. The Criminal Practice Committee noted that the Supreme Court, in State v. Gregory, supra, clearly recognized this distinction (footnote 4, p. 519) in the course of implementing sections 1.07(2) and (3) of the Model Penal Code. See 99 N.J.L.J. 394 (May 6, 1976).

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89 (cont'd)

apply across county lines as well as within a given county. State v. Davis, 68 N.J. 69, 76 (1975). Such defenses are left for development by case law. See Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed. 2d 435 (1970); Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); State v. Bell, 55 N.J. 239 (1970); State v. Redinger, 64 N.J. 41 (1973).

The Supreme Court adopted the Committee's position in adopting R. 3:15-1(b).

Despite the fact that the rule (1) places no affirmative duty on the prosecutor to investigate other charges which might be involved in the episode or transaction, (2) does not require (or even permit) joinder of non-indictable offenses in an indictment or accusation with an indictable charge and (3) is limited to indictable offenses, and (4) applies, on its face, only "if such offenses are known to the appropriate prosecuting attorney at the time of the commencement of the first trial," we believe that all prosecutors must endeavor to ensure that all non-indictable offenses related to indictables are referred to the prosecutor together with the indictable. Before returning an indictment, filing an accusation, or commencing trial, the prosecutor of the forum county should communicate with the prosecutor of any other county which might have an interest in the criminal transaction to ascertain the status of his investigation into the matter.

This procedure is required by virtue of the decisions involving double jeopardy and collateral estoppel. If the disposition in municipal court or in a foreign county involves either a lesser included offense or an issue of fact necessarily determined, subsequent reprosecution may be barred. See e.g., Harris v. Oklahoma, ___ U.S. ___, 97 S.Ct. 2912 (1977); Brown v. Ohio, __ U.S. ___, 97 S.Ct. 2221 (1977); Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970); Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). See also State v. Redinger, 64 N.J. 41 (1973); State v. Bell,

55 N.J. 239 (1970). See also various cases dealing with merger, e.g., State v. Davis, 68 N.J. 69 (1975), and "election" State v. Godfrey, 72 N.J. 462 (1977). As a result:

1. All complaints related to an indictable charge should be referred to the prosecutor with the indictable. The Administrative Office of the Courts has made clear that, if the indictable offense is no billed, the non-indictable may be remanded for disposition in the municipal courts, but if an indictment or accusation is filed, where possible, the non-indictables should be disposed of as part of a "plea package" in the upper courts, R. 3:9-3; 3:25A-1; or if the indictable is disposed of at trial (without disposition of the non-indictable, see State v. Saulnier, supra), the upper court, after hearing from the parties, should determine whether the double jeopardy clause or doctrine of collateral estoppel requires dismissal in lieu of remand.[90] To effect this standard, an investigator in the Prosecutor's Office, during the case screening process, should contact the municipal court to make sure all non-indictable offenses (referred to in the incident or arrest reports) are referred to the Prosecutor. As a double check, he should communicate with the municipal court clerk to ascertain if the docket index reveals any pending matters against the defendant or the complaining witness. The latter proced

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If the related non-indictable charges other than the defendant, it should be referred to the prosecutor with the indictable so that defendant is not called as a witness at the trial on the non-indictable, thus raising various Fifth Amendment questions. The non-indictable can be remanded for disposition by the prosecutor after disposition of the indictable.

may be avoided where the prosecutor periodically, by letter, reminds municipal court officials to refer all related non-indictables to the prosecutor with the indictable and the prosecutor is assured that the municipal court is doing so.

2. Before returning an indictment, filing an accusation or commencing trial, the prosecutor should communicate with the prosecutor of any other county which might have an interest in the criminal transaction to ascertain the status of his investigation into the matter. As a matter of uniformity, the inquiry should be in writing addressed to the first assistant prosecutor of the foreign county. If the matter requires emergent attention, the inquiry may be made telephonically and confirmed in writing addressed to the first assistant prosecutor. When a matter is disposed of by plea, the prosecutor should also seek the advice of the foreign prosecutor as to disposition of all charges (and particularly those involving the same episode or transaction) pending in the foreign county. R. 3:25A-1.[91] (Failure to communicate with the foreign

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[91] Rule 3:25A-1 permits a judge to dismiss an indictment, accusation or complaint pending in another county. The rule was designed to facilitiate the simultaneous disposition of all charges pending against a defendant and is not limited to offenses involving the same transaction as that being prosecuted in the forum county. While the prosecutor of the foreign county need not consent to such dismissal, his advice absent extraordinary circumstances should be honored by the prosecutor of the forum county. Where the foreign prosecutor participates in shaping a negotiated plea, which involves disposition (by plea or dismissal or both) of charges pending in the foreign county (as well as in the forum county) the consent of the foreign prosecutor should be confirmed in writing. Prosecutors at the time of negotiating pleas should check rap sheets and endeavor to shape pleas which favorably dispose of all charges pending in the State.

prosecutor about transactions which may involve his county could affect his ability to subsequently dispose of the charges). If the matter is to be disposed of following the return of an indictment, it should be noted that county grand juries have statewide jurisdiction, and all offenses involving the same transaction should be joined in a single indictment or accusation. State v. DiPaolo, 34 N.J. 279, 284-287 (1961). Thus, if two or more counties express interest in prosecuting a matter, the prosecutors themselves (or the first assistant prosecutor in the prosecutor's absence) should decide the forum county. The county where the most serious offense or most serious part of the transaction occurred should generally take responsibility, and the decision should be confirmed in writing.

While a defendant may move for severance and/or a change of venue, the objection to joinder should be deemed a waiver of rights to claim double jeopardy or collateral estoppel. Jeffers v. United States, ___ U.S. ___, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977).

Finally, with regard to joinder of defendants, R. 3:7-7 provides:

> Two or more defendants may be charged in the same indictment or accusation if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. The disposition of the indictment or accusation as to one or more of several

> defendants joined in the same indictment or accusation shall not affect the right of the State to proceed against the other defendants. Relief from prejudicial joinder shall be afforded as provided by R. 3:15-2.

Defendants should be joined in the same indictment or accusation in accordance with Standard 1.2 of the A.B.A. Standards Relating to Joinder and Severance. It provides:

> Two or more defendants may be joined in the same charge:
> (a) when each of the defendants is charged with accountability for each offense included;
> (b) when each of the defendants is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
> (c) when, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:
> (i) were part of a common scheme or plan; or
> (ii) were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

See also Standard 2.3, R. 3:15-2 and Bruton v. United States, 391 U.S. 123, 88 S.Ct 1620, regarding severance Rule 3:15-2(a) which places an affirmative burden on the State and provides:

> (a) Motion by State Before Trial. If 2 or more defendants are to be jointly tried and the prosecuting attorney intends to introduce at trial a statement, confession or admission of one defendant involving any other defendant, he shall move before trial on notice to all defendants for a determination by the court, in camera, as to whether such portion of the statement, confession, or admission involving such

> other defendant can be effectively deleted therefrom. The court shall direct the specific deletions to be made, or, if it finds that effective deletions cannot practically be made, it shall order separate trials of the defendants. Upon failure of the prosecuting attorney to so move before trial, the court may refuse to admit such statement, confession or admission into evidence at trial, or take such other action as the interest of justice requires.

Rule 3:15-2 and the cases cited thereunder should be consulted whenever there are codefendants to be jointly tried and the State is in possession of a statement from one or more codefendants.

Joinder of defendants is also important because of the opinion of the Supreme Court in State v. Gonzalez, 75 N.J. 13 (1977) although motions to suppress may be made before indictment, see R. 3:5-7. Simultaneous return of an indictment naming all defendants involved in the same transaction is important in terms of establishing that defendants involved in the same transaction could simultaneously move to suppress. As stated in State v. Gonzalez, supra:

> Our present rule, R. 3:5-7(a), requires a defendant to bring his motion challenging a search and seizure as unlawful within 30 days after the initial plea to the charge unless the court, for good cause, enlarges the time. Henceforth, the Rule shall be deemed amended to require joinder of all such motions by co-indictees for consolidated consideration in a single hearing. Where a defendant makes a convincing showing that he was unable to participate at a prior suppression hearing in which the challenged search was invalidated, as this defendant has done, and the evidence adduced at both hearings is substantially the same, he should be afforded the right to claim the benefits of such a hearing. However, where a defendant resists such joinder or fails without adequate justification to participate

in the consolidated suppression proceeding, a plea of collateral estoppel will be unavailable. In any event, sound practice requires that the same judge who presided over the first suppression hearing should ordinarily hear any later motion arising out of the same transaction.

CHAPTER 12

THE ROLE OF THE PROSECUTOR IN PLEA NEGOTIATIONS AND SENTENCING

1. EACH PROSECUTOR'S OFFICE SHOULD HAVE DEFINITIVE POLICIES REGARDING PLEA NEGOTIATIONS. THE FOLLOWING CRITERIA SHOULD BE CONSIDERED IN DETERMINING WHAT RECOMMENDATIONS ARE WARRANTED:

   a. THE NATURE AND SERIOUSNESS OF THE OFFENSE OR OFFENSES CHARGED, I.E., CRIMES AGAINST THE PERSON, CRIMES AGAINST PROPERTY;

   b. AN EVALUATION OF THE PROOFS;

   c. AN EVALUATION OF THE WITNESSES, I.E., THEIR AVAILABILITY FOR TRIAL, ANY IDENTIFICATION PROBLEMS, CREDIBILITY, RELATIONSHIP TO THE VICTIM, IMPROPER MOTIVES, ETC.;

   d. THE CIRCUMSTANCES OF THE VICTIM, I.E., EXTENT OF BODILY OR OTHER PERSONAL INJURY, PROPERTY RIGHTS, ECONOMIC LOSS INCURRED, AS WELL AS THE FEELINGS AND ATTITUDE OF THE VICTIM, INCLUDING AN EXPRESSED WISH NOT TO PROSECUTE;

   e. THE BACKGROUND OF THE DEFENDANT, INCLUDING HIS AGE, FAMILY STATUS, WORK STATUS, PRIOR ARREST, JUVENILE AND CRIMINAL RECORD, AND ANY RELATIONSHIP BETWEEN THE DEFENDANT AND THE VICTIM;

   f. THE ATTITUDE AND MENTAL STATE OF THE DEFENDANT AT THE TIME OF THE CRIME, THE TIME OF THE ARREST, AND THE TIME OF THE PLEA NEGOTIATION;

   g. ANY UNDUE HARDSHIP CAUSED TO THE DEFENDANT;

   h. THE CIRCUMSTANCES OF THE ARREST, I.E. WHERE AND AT WHAT TIME IT WAS MADE, WAS IT PURSUANT TO A WARRANT AFTER SEVERAL ATTEMPTS TO LOCATE THE DEFENDANT, OR DID THE DEFENDANT VOLUNTARILY SURRENDER;

   i. ANY PAST OR POTENTIAL COOPERATION WITH LAW ENFORCEMENT;

   j. ANY POLICE RECOMMENDATIONS;

   k. THE MORAL CONSEQUENCES IN THE COMMUNITY;

   l. THE POSSIBLE DETERRENT VALUE OF PROSECUTION;

m. THE AGE OF THE CASE:

n. A HISTORY OF NON-ENFORCEMENT OF THE STATUTE VIOLATED;

o. ANY OTHER AGGRAVATING OR MITIGATING CIRCUMSTANCES.

2. EACH PROSECUTOR'S OFFICE SHOULD HAVE DEFINITIVE POLICIES REGARDING THE SENTENCING PROCESS. THE PROSECUTOR'S FUNCTION DOES NOT TERMINATE UPON THE RETURN OF A GUILTY VERDICT OR THE DISPOSITION OF CRIMINAL CHARGES BY VIRTUE OF A PLEA AGREEMENT.

a. THE PROSECUTOR SHOULD MAKE A REASONED JUDGMENT AS TO WHETHER A RECOMMENDATION SHOULD BE MADE IN A PARTICULAR CASE. THE CONSIDERATIONS SET FORTH IN STANDARD 1 ARE EQUALLY APPLICABLE TO THE SENTENCING PROCESS AND INCLUDE:

(1) THE NATURE OF THE OFFENSE

(2) THE EFFECT OF THE CRIME ON THE VICTIM

(3) THE BACKGROUND OF THE DEFENDANT

(4) THE RISK TO THE PUBLIC

(5) THE POSSIBILITY OF REHABILITATION

b. THE PROSECUTOR SHOULD NOT MAKE THE SEVERITY OF SENTENCES THE INDEX OF HIS EFFECTIVENESS. NEVERTHELESS, HE MUST ALWAYS BEAR IN MIND THAT HIS PRIMARY OBLIGATION IS TO PROTECT THE PUBLIC. THE PROSECUTOR, WHO OF COURSE IS FULLY FAMILIAR WITH THE FACTS, IS OBLIGED TO ENSURE THAT THE PUBLIC'S RIGHT TO BE PROTECTED AGAINST CRIMINAL ATTACK IS RESPECTED. TO THE EXTENT THAT HE BECOMES INVOLVED IN THE SENTENCING PROCESS, HE SHOULD SEEK TO ASSURE THAT A FAIR AND INFORMED JUDGMENT IS MADE ON THE SENTENCE AND HE MUST ATTEMPT TO AVOID UNFAIR SENTENCE DISPARITIES.

c. THE PROSECUTOR SHOULD ASSIST THE COURT IN BASING ITS SENTENCE ON COMPLETE AND ACCURATE INFORMATION FOR USE IN THE PRESENTENCE REPORT. HE SHOULD DISCLOSE TO THE COURT ANY INFORMATION IN HIS FILES RELEVANT TO THE SENTENCE. IF INCOMPLETENESS OR ERRORS APPEAR IN THE PRESENTENCE REPORT, HE SHOULD TAKE STEPS TO PRESENT THE COMPLETE AND CORRECT INFORMATION TO THE COURT AND DEFENSE COUNSEL.

COMMENTARY

Plea negotiation has now been accepted as a legitimate and respectable adjunct of the administration of the criminal laws.[92]

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92 R. 3:9-3 codifies certain procedures relating to the plea negotiation process. It provides:

> (a) Plea Discussions Generally. The prosecutor and defense counsel may engage in discussions relating to pleas and sentences, but except as hereinafter authorized the judge shall take no part in such discussions.
>
> (b) Entry of Plea Agreement. Where the prosecutor and defense counsel reach an agreement as to the offense or offenses to which a defendant will plead on condition that other charges pending against the defendant will be dismissed or an agreement as to the sentence which the prosecutor will recommend, such agreement shall be placed on the record in open court at the time the plea is entered.
>
> (c) Disclosure of Agreement to Judge. Upon request of the parties, the judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition of the information in the presentence report at the time of sentence is as has been represented to him at the time of his initial concurrence and supports his determination that the interests of justice would be served by his concurrence. If the agreement is reached without such disclosure or if the judge agrees conditionally to accept the plea agreement as set forth above, the entire plea agreement and concurrence shall be placed on the record in open court at the time the plea is entered.
>
> (d) Agreements involving the right to Appeal. Whenever a plea agreement includes a provision that defendant will not appeal, the court shall advise the defendant that, notwithstanding the inclusion of this provision, the defendant has

Our Supreme Court has recognized that "there is nothing unholy in honest plea (negotiations) between the prosecutor and defendant and his attorney in criminal cases. At times, it is decidedly in the public interest, for otherwise, on occasion the guilty would probably go free...." State v. Taylor, 49 N.J. 440, 455 (1967). So too, the Supreme Court of the United States has noted that "the disposition of criminal charges by agreement between the prosecutor and the accused ... is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge was subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." Santabello v. New York, 404 U.S. 257, 260 (1971).

It is not possible to establish absolute standards on a statewide basis that would dictate the only acceptable plea agreement under a given set of circumstances. Indeed, even within the same office, there are very few plea negotiation principles for which there can be no exceptions. The prosecutor must make certain that each case is determined individually according to its own unique facts and circumstances. The ultimate factor must always be the exercise of good judgment by the negotiating prosecutor.

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92 (cont'd)

the right to take a timely appeal if the plea agreement is accepted, but that if he does so, the plea agreement may be annulled at the option of the prosecutor, in which event all charges shall be restored to the same status as immediately before the entry of the plea.

(e) Withdrawal of Plea. If at the time of sentencing the judge determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel, the defendant shall be permitted to withdraw his plea.

When plea negotiation has been initiated, all files pertaining to the subject defendant should be gathered and considered for possible disposition. If the defendant advises the negotiating prosecutor of new charges which have not yet reached the prosecutor's office or if the criminal history record information indicates any pending charges the prosecutor should contact the local police department or municipal court and request that said charges be forwarded immediately so that they may be included in the plea agreement.[93] This will enable the prosecutor to make a plea offer based on a more accurate assessment of the defendant's criminal proclivity, provide an opportunity to clear the docket of several indictments or potential indictments, and give the sentencing judge a clear picture of the defendant's background. It will also obviate the necessity of repeating the procedure when other charges ripen.

Before plea negotiation has resulted in final agreement, consideration must be given to its effect on codefendants. It should be the goal of the prosecutor conducting negotiations to strengthen, or at least not weaken, his case against codefendants. Where appropriate, he may wish to exact some form of cooperation from the defendant as a condition of the plea agreement. In some cases the prosecutor may wish to elicit certain information from the defendant, on the record, thereby protecting the State's position against codefendants in subsequent trials. Conversely, a defendant who has decided to plead

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[93] If the record information indicates the pendency of a charge in another county, the prosecutor should contact the foreign prosecutor to see if a negotiated plead can be arranged pursuant to R. 2:25A-1.

guilty may wish to take complete responsibility for the criminal act, and thereby exculpate codefendants. The prosecutor would then be in a position to dismiss charges against codefendants.

No plea agreement should be consummated unless the negotiating prosecutor has had an opportunity to review the defendant's complete record of prior criminal involvement. In many cases, since criminal records are often incomplete, a detective should be assigned to determine the final disposition of charges.[94] It should be obvious that a defendant's prior criminal activity is a very significant factor to be considered before entering a plea bargain on current charges.

It is often advisable to contact the police officers who investigated the crime which is the subject of negotiations in order to obtain further information concerning the defendant. A prosecutor's decision to enter a plea agreement is a discretionary act which cannot be forced on him by court or counsel. He is not limited to considering only prior convictions in determining whether or not to exercise his discretionary authority. Information obtained from local authorities that a defendant has engaged in criminal activity which has not resulted in a conviction may be a significant factor to consider.

Where there is a specialized unit within an office with jurisdiction over crimes of the type being considered for a plea negotiation, e.g., homicide, narcotics, gambling, etc., the appropriate member of such unit should be consulted. In

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[94] See also the discussion concerning simultaneous disposition of open charges, supra.

this manner, the negotiating prosecutor may be able to obtain relevant information concerning the defendant, which may not appear in the file. He may also wish to consider the effect of the plea on the overall operation of the specialized unit.

Before consummating a plea agreement in sensitive cases such as rape, assaults on police officers and "police brutality" situations, the victim should be contacted. The victim should be advised by the prosecutor of the latter's reasons for making concessions. The prosecutor should solicit the victim's views and answer all questions concerning disposition of the charges, but should never be in the position of requesting the victim's permission to complete the agreement. So too, although an arresting police officer should in certain cases be consulted, the prosecutor should not yield his authority to enter a plea agreement.

Generally accepted types of agreements may be divided into three categories:

1. Recommendations that separate indictments or counts of the same indictment or of other complaints or indictments be dismissed in return for specified guilty pleas. See R. 3:9-3; R. 3:25-1.

2. Recommendations for specified maximum exposure less than the statutory maximum (or a concurrent sentence). See R. 3:9-3.

3. Recommendations that the crimes charged be downgraded to lesser included offenses, either indictable or disorderly. Prior to indictment the prosecutor can administratively

dismiss or downgrade offenses and remand to the municipal court. After indictment a court order is required, and the indictable offense can be dismissed upon plea to the downgraded offense. See R. 3:25-1.

It is "essential that the terms of the agreement be clear and unequivocal and fully understood by defendant." State v. Brown, 71 N.J. 578, 582 (1976). An agreement may contain concessions by the defendant waiving his right to appeal. See State v. Gibson, 68 N.J. 499 (1975), as to the effect thereof. See also R. 3:9-3(d). If the court rejects the prosecutorial recommendations made as part of a negotiated plea the defendant is entitled to withdraw his plea. R. 3:9-3(e).

The Prosecutor in each county should develop, reduce to writing, and distribute to every member of his staff, his plea negotiation policies which should be broad enough to apply to all cases. This will tend to encourage a consistency of approach in similar situations and to minimize the effects of forceful judges, persuasive counsel and negotiating prosecutors with widely divergent plea negotiation philosophies.

Either the Prosecutor, his First Assistant, or a designated assistant must always be available to discuss and interpret office policy as it applies to a specific set of facts. In order to encourage uniformity and to discourage disparity, the Prosecutor or his designee (such as the First Assistant or the Chief of the Trial Section) should approve all negotiated plea agreements. This

assistant must have a thorough knowledge and understanding of office policy and the requisite authority to accept or initiate offers which constitute exceptions to established policy.

Internal office plea negotiation procedures should concentrate on three essential elements:

1. Preparation of agreements at the earliest possible stage of the proceedings;

2. Documentation of each plea negotiation sought to be entered by means of a written memorandum which would become a permanent part of the file;

3. A multiple review of each plea negotiation prior to consummation. It is imperative to clearly define who in the office has the requisite authority for approving, rejecting or modifying a plea agreement.

Turning now to the subject of sentencing, it is axiomatic that the role of the prosecutor does not terminate upon the return of a guilty verdict or the disposition of criminal charges by virtue of a plea agreement. The prosecutor must recognize that he has an affirmative function with respect to the sentencing process.[95] He may take any appropriate

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[95] Of course if part of a plea negotiation is that the prosecutor will make no recommendation as to sentence, this must be strictly adhered to. State v. Brown, supra. The prosecutor must adhere to the terms of a plea negotiation, however. If a specific recommendation as to sentencing was promised to the defendant, the prosecutor must "meticulously" carry it out. See State v.

(cont'd)

position at sentencing with respect to each case involving either a plea or trial, provided that if a negotiated plea was involved, the terms of that plea must be strictly adhered to. That is not to say that a prosecutor is duty bound to take a position with respect to sentencing in each case. However, his decision to make a recommendation with regard to a sentence should be based upon reasoned judgment.[96] Plainly, the guidelines set forth above with respect to plea bargaining are equally applicable to sentencing recommendations. Stated somewhat differently, the nature of the offense, the effect of the crime on the victim, the background of the defendant, the risk to the public, and the possibility of rehabilitation must be considered.

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95 (cont'd)

Jones, 66 N.J. 524 (1975) for a situation where the prosecutor failed to recommend concurrent sentences pursuant to the terms of a plea negotiation. However, where the plea is not entered pursuant to negotiations, the prosecutor may make any appropriate recommendation upon the entry of a guilty plea. Moreover, the prosecutor may also be heard at sentencing following convictions after trial.

96 As part of a negotiated plea, the prosecutor may recommend incarceration or a maximum exposure or a specific term of years. However, if a judge does not impose the specific term of years, as recommended by the prosecutor, it is not clear the plea can be withdrawn. Cf. State v. Spinks, supra. In connection with sentence recommendations independent of a negotiated plea, the prosecutor can -- and in appropriate circumstances should -- recommend imposition of a custodial term, the place of incarceration, a specific term, a consecutive sentence or any other appropriate action.

PART IV

MISCELLANEOUS PROCEDURES

CHAPTER 13

EXTRADITION

1. EACH PROSECUTOR'S OFFICE SHOULD ADOPT PROCEDURES TO ENSURE THAT EXTRADITION MATTERS ARE HANDLED EXPEDITIOUSLY AND IN ACCORDANCE WITH 18 U.S.C.A. §§3182-3195 AND N.J.S.A. 2A:160-1 ET SEQ.

2. THE DECISION OF WHETHER OR NOT TO SEEK THE RETURN OF A FUGITIVE FROM ANOTHER STATE SHOULD REST IN THE SOUND DISCRETION OF THE PROSECUTOR. IN EXERCISING THIS DISCRETION, THE PROSECUTOR SHOULD TAKE INTO CONSIDERATION CERTAIN CRITERIA, INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING:

   a. THE NATURE OF THE PROCEEDING FOR WHICH THE FUGITIVE'S RETURN IS SOUGHT;

   b. THE EXPENSE INVOLVED IN TRANSPORTATION:

   c. THE LIKELIHOOD OF CONVICTION ONCE THE FUGITIVE IS RETURNED;

   d. THE CURRENT STATUS OF THE FUGITIVE; AND

   e. THE FUTURE EFFECT OF THE PROSECUTOR'S DECISION AS AN INDICATION OF POLICY.

3. COUNSEL SHOULD BE PROVIDED IN ALL EXTRADITION PROCEEDINGS ARISING FROM THE INITIATION OF A CRIMINAL ACTION AGAINST THE ACCUSED, REGARDLESS OF THE DESIGNATION OF THE COURT IN WHICH THEY OCCUR OR THE CLASSIFICATION OF THE PROCEEDING AS CIVIL IN NATURE.

4. IN CASES WHERE THE DEFENDANT IS OUTSIDE OF THE JURISDICTION THE PROSECUTOR SHOULD INSURE THE RIGHT OF THE ACCUSED TO A SPEEDY TRIAL BY PROMPTLY:

   a. UNDERTAKING TO OBTAIN THE PRESENCE OF THE PRISONER FOR TRIAL;

   b. CAUSING A DETAINER TO BE FILED WITH THE OFFICIAL HAVING CUSTODY OF THE PRISONER AND REQUESTING THAT OFFICIAL TO SO ADVISE THE PRISONER OF HIS RIGHT TO DEMAND TRIAL.

5. IF AN OFFICIAL HAVING CUSTODY OF SUCH A PRISONER RECEIVES A DETAINER, HE MUST PROMPTLY ADVISE THE PRISONER OF THE CHARGE AND OF THE PRISONER'S RIGHT TO DEMAND TRIAL. IF AT ANY TIME THEREAFTER THE

PRISONER INFORMS SUCH OFFICIAL THAT HE DOES DEMAND TRIAL, THE OFFICIAL SHALL CAUSE A CERTIFICATE TO THAT EFFECT TO BE SENT PROMPTLY TO THE PROSECUTING ATTORNEY WHO CAUSED THE DETAINER TO BE FILED.

a. UPON RECEIPT OF SUCH CERTIFICATE, THE PROSECUTING ATTORNEY MUST PROMPTLY SEEK TO OBTAIN THE PRESENCE OF THE PRISONER FOR TRIAL.

b. WHEN THE OFFICIAL HAVING CUSTODY OF THE PRISONER RECEIVES FROM THE PROSECUTING ATTORNEY A PROPERLY SUPPORTED REQUEST FOR TEMPORARY CUSTODY OF SUCH PRISONER FOR TRIAL, THE PRISONER SHALL BE MADE AVAILABLE TO THAT PROSECUTING ATTORNEY, SUBJECT TO THE TRADITIONAL RIGHT OF THE EXECUTIVE TO REFUSE TRANSFER AND THE RIGHT OF THE PRISONER TO CONTEST THE LEGALITY OF HIS DELIVERY.

6. EACH PROSECUTOR'S OFFICE SHOULD HAVE A FUGITIVE SQUAD COMPRISED OF AT LEAST TWO INDIVIDUALS TRAINED AND KNOWLEDGEABLE IN EXTRADITION MATTERS. IN ADDITION TO HANDLING EXTRADITION MATTERS, MEMBERS OF THE FUGITIVE SQUAD SHOULD BE REQUIRED TO ASSUME THE FOLLOWING DUTIES: MAINTAIN INDEX FILES ON ALL FUGITIVES; ARRANGE FOR TRANSPORTATION OF FUGITIVE PRISONERS BEING RETURNED TO THIS STATE; RESPOND TO NOTIFICATION THAT A FUGITIVE HAS BEEN FOUND -- WHETHER INTRA-STATE OR OUT-OF-STATE, SECURE GOVERNOR'S WARRANTS IF A FUGITIVE ARRESTED OUT-OF-STATE ELECTS NOT TO WAIVE HIS RIGHT TO AN EXTRADITION HEARING AND FILE APPROPRIATE DETAINERS IF A FUGITIVE IS FOUND IN AN INSTITUTION.

COMMENTARY

Extradition is the surrender by one state to another of an individual accused or convicted of an offense outside its own boundaries and within the territorial jurisdiction of the demanding state.[97] Extradition involves both the demand by one state and the surrender by the asylum state. The return of a fugitive from one state to another is a federal, not a state

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[97] See State v. Sinacore, 151 N.J.Super. 106, 111-112 (Law Div. 1977).

matter governed by the United States Constitution.[98] The federal provisions are implemented by N.J.S.A. 2A:160-1 et seq. (the Uniform Criminal Extradition Law).[99] Extradition from New Jersey is governed by N.J.S.A. 2A:160-10 to 30. That statutory scheme reflects the provisions of the Uniform Criminal Extradition Act and applies to all signatory states. Therefore, the analysis which follows is equally applicable to situations in which New Jersey prosecutors are seeking to extradite fugitives present in other states.

Consistent with the provisions of the Uniform Criminal Extradition Act and the United States Constitution, it is the duty of the Governor to have arrested and deliver to the executive authority of another state any person charged with a crime in that state, who has fled from justice and is found in New Jersey. N.J.S.A. 2A:160-10. Extradition is permitted not only when an accused has fled from the demanding state. It is also authorized when the accused has committed an act in any jurisdiction intentionally resulting in a crime in the demanding state.[100] N.J.S.A. 2A:160-11 describes the documentation needed to support a demand for extradition. Specifically, the demand must be in writing and allege that the accused was present in the demanding state at the appropriate time (except in cases arising under N.J.S.A. 2A:160-14) and must

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98 U.S. Const., Art. IV, sec. 2, Ch. 2 and 18 U.S.C.A. §§3182-3195.

99 State v. Phillips, 62 N.J.Super. 70, 74 (App.Div. 1960), aff'd 34 N.J. 63 (1961); Foley v. State, 132 N.J.Super. 154, 157 (App.Div. 1954).

100 N.J.S.A. 2A:160-14.

be:

> accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. (N.J.S.A. 2a: 160-11).

If so requested by the Governor, the Attorney General or County Prosecutor should investigate the matter. A report should be submitted to the Governor regarding the circumstances relating to the accused. The report should set forth the prosecutor's conclusion as to whether the accused ought to be surrendered.[101] The guilt or innocence of the fugitive regarding the crime of which he is accused may not be questioned except as it may be involved in identifying the person held as the individual charged.[102] There is no obligation on the Governor to conduct a hearing for the benefit of the accused before ordering his removal. The accused has no constitutional right to be heard before the Governor.[103] If the Governor decides to comply with the requisition demand, he must issue

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101 N.J.S.A. 2A:160-12.

102 N.J.S.A. 2A:160-28; In re Cohen, 23 N.J.Super. 209, 216 (App. Div. 1952), aff'd o.b. 12 N.J. 362 (1953).

103 Id. at 214-215.

an arrest warrant (also referred to as an extradition warrant or rendition warrant) containing recitals of the facts necessary to the validity of its issuance.[104] Upon arrest, and prior to being delivered to the duly authorized agent of the demanding state, the accused must be brought before a court and advised of his rights (including his right to counsel). He must also be afforded the opportunity to test the legality of his arrest if he so desires.[105]

An accused can be arrested before a formal requisition is made either on a fugitive warrant[106] or without a warrant upon information that he is charged with a crime in another state punishable by imprisonment for more than one year and a complaint under oath is made.[107] Individuals so arrested are to be arraigned before the appropriate municipal or county judge who must commit the accused to the county jail for a period of 30 days.[108] The accused may be

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104 N.J.S.A. 2A:160-15.

105 N.J.S.A. 2A:160-18.

106 N.J.S.A. 2A:160-21.

107 N.J.S.A. 2A:160-22.

108 N.J.S.A. 2A:160-23.

held for an additional 60 days if the appropriate Governor's warrant is being processed by the demanding state.[109] The demanding state should be notified as soon as practicable following the apprehension of the fugitive. Until such time as a Governor's warrant is issued, a person arrested may be admitted to bail unless he is charged with an offense punishable by death or life imprisonment in the demanding state.[110] Once the Governor's warrant is issued, the defendant may not be admitted to bail in the asylum state.[111]

A fugitive may voluntarily consent to return to the demanding state hence obviating the need to pursue formal extradition procedures. The Prosecutor should ascertain whether a fugitive will waive extradition as soon as practicable after his apprehension. If so, a waiver should be obtained pursuant to N.J.S.A. 2A:160-30, and the demanding state notified.

If a fugitive desires to test the legality of his arrest (pursuant to a Governor's extradition warrant), he shall be given sufficient time to apply for a writ of habeas corpus.[112] The scope of inquiry in an interstate rendition

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109 N.J.S.A. 2A:160-25.

110 N.J.S.A. 2A:160-24.

111 Matter of Lucas, 136 N.J.Super. 24 (L. Div. 1975), aff'd 136 N.J.Super. 460 (App.Div. 1975), certif. den. 69 N.J. 378 (1975).

112 N.J.S.A. 2A:160-18.

hearing (extradition proceeding) is limited to (1) the validity of the extradition hearing, (2) the identity of the accused as the person named in the requisition and rendition warrant and (3) whether the accused is a fugitive from justice. This last inquiry requires a determination that a crime was committed and that the accused was within the demanding state at the time of its commission.[113] The demanding authority's warrant is presumptive evidence of the accused's presence in that state. The accused bears the burden of overcoming this prima facie evidence by clear and convincing proof that he was in fact absent.[114] The guilt or innocence of the accused may not be challenged.[115] Moreover, the asylum state has no authority to adjudge the technical sufficiency of the indictment, the motives underlying the proceedings, the merits of the trial or whether the accused's constitutional rights were violated.[116] However, Sixth Amendment speedy trial protections are applicable to extradition proceedings, and this constitutional issue is cognizable at the extradition hearing.[117]

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113 State v. Phillips, supra; Foley v. State, supra; In re Cohen, supra.

114 Id.

115 N.J.S.A. 2A:160-28.

116 State v. Phillips, supra; In re Cohen, supra; State v. Wilson, 135 N.J.L. 398 (Sup.Ct. 1947); Frank v. Naughright, 1 N.J.Super. 242 (App.Div. 1949).

117 State v. Diffenbach, 137 N.J.Super. 531 (L. Div. 1975).

If a decision is made to return a fugitive, and he will not waive his right to extradition the procedural steps in N.J.S.A. 2A:160-32 must be followed. Specifically:

> a. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made and certifying that, in the opinion of the said prosecuting attorney, the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.
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> b. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

> c. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by 2 certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecutor officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he or it shall deem proper to be submitted with such application. One copy of the application, with the action of the governor indicted by endorsement thereon, and 1 of the certified copies of the indictment, complaint, information, and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

Particular care should be taken to insure that the appropriate documentation is furnished.

The Interstate Agreement on Detainers, N.J.S.A. 2A:159A-1 et seq. , was adopted to expedite the disposition of criminal charges pending against a person in one state who is serving a term of imprisonment in another state, or on the initiative of the state lodging the detainer under Article IV (N.J.S.A. 2A:159A-4). State v. Thompson, 133 N.J.Super. 180, 187 (App.Div. 1975). The Prosecutor should make use of the provisions of this Act in order to secure the presence of defendant incarcerated in a foreign jurisdiction.

CHAPTER 14

PRE-TRIAL RELEASE

1. NEW JERSEY'S CONSTITUTION GUARANTEES THE RIGHT TO BAIL EXCEPT IN CAPITAL CASES. THE LAW GENERALLY FAVORS RELEASE OF A CRIMINAL DEFENDANT PENDING DETERMINATION OF GUILT OR INNOCENCE. THE PURPOSE OF BAIL IS TO ASSURE PRESENCE OF THE ACCUSED AT ALL PROCEEDINGS. THE PROSECUTOR SHOULD CONFER WITH THE PROBATION DEPARTMENT AND OTHER GOVERNMENTAL AND PRIVATE AGENCIES IN MAKING RECOMMENDATIONS PERTAINING TO THE AMOUNT OF BAIL OR OTHER CONDITIONS OF PRE-TRIAL RELEASE. AMONG THE FACTORS TO BE CONSIDERED ARE:

   a. SERIOUSNESS, APPARENT LIKELIHOOD OF CONVICTION AND PUNISHMENT OF OFFENSE CHARGED;

   b. DEFENDANT'S CRIMINAL RECORD AND PRIOR BAIL RECORD;

   c. REPUTATION AND MENTAL CONDITION;

   d. LENGTH OF RESIDENCE IN THE COMMUNITY;

   e. FAMILY TIES AND RELATIONSHIPS;

   f. EMPLOYMENT STATUS, HISTORY AND FINANCIAL CONDITION;

   g. MEMBERS IN THE COMMUNITY WHO WOULD VOUCH FOR DEFENDANT'S RELIABILITY;

   h. ANY OTHER FACTORS INDICATING DEFENDANT'S MODE OF LIFE OR TIES TO THE COMMUNITY OR BEARING ON THE RISK OF FAILURE TO APPEAR.

2. PROSECUTORS SHOULD PROVIDE WRITTEN GUIDELINES TO THE POLICE TO ASSIST THEM IN DETERMINING WHETHER TO ISSUE A SUMMONS IN LIEU OF A WARRANTLESS ARREST PURSUANT TO R. 3:3-1(a).

3. IF THE DEFENDANT FAILS TO APPEAR AT ANY PROCEEDING REQUIRING HIS PRESENCE, THE PROSECUTOR SHOULD IMMEDIATELY REQUEST A BENCH WARRANT AND THE FORFEITURE OF BAIL, AND TAKE APPROPRIATE ACTION TO INSURE THE INCARCERATION OF THE ACCUSED.

COMMENTARY

At the outset we emphasize that the law favors non-custodial treatment of criminal defendants pending determination of guilt or innocence.[118] New Jersey has a general policy against unnecessary sureties and detention.[119] R. 3:26-1(a). Policy considerations aside, our State Constitution guarantees the right to bail except in capital cases.[120]

Preliminarily we note that New Jersey permits law enforcement officers to issue a summons in lieu of a warrantless arrest. R. 3:3-1(a). The test for issuance of a summons rather than execution of an arrest warrant is whether the officer "has reason to believe that the defendant will appear in response thereto, or if the defendant is a corporation."[121] Of course, the magistrate or other court officer may also issue

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118 N.J. Constitution, Art. 1, 5, 11:

> All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great."

N.J. Constitution, Art. 1, 12:

> Excessive bail shall not be required ...

A.B.A. Standards for the Administration of Criminal Justice, "Pre-Trial Release," 1.1.

119 Id.

120 Id. There does not appear to be a federal constitutional right to bail, only the right that bail, if imposed, shall not be excessive. U.S. Constitution, 8th Amendment. State v. Johnson, 61 N.J. 351, 355 (1972).

121 R. 3:3-1(a).

a summons rather than a warrant.[122] The officer in charge of the station house or the judge may also release the defendant with a summons to appear in court. N.J.S.A. 2A:8-27 and R. 3:4-1. The Prosecutor's role is not defined by the rules of court. Whether to issue an arrest warrant or summons is entirely discretionary.[123] Therefore, it is recommended that prosecutors provide written guidelines to police officers in the county in order to assist them in determining whether a summons should be issued pursuant to R. 3:3-1(a).

Apart from R. 3:3-1(a), individuals accused of offenses are generally released by a judicial officer. Upon arrest, our rules provide that the suspect must be taken before the nearest committing magistrate without delay if the custody is effected without a warrant. R. 3:4-1. If the arrest is pursuant to a warrant, the arrestee must be taken before the court designated in that document. If a prosecutor is present at the first appearance or subsequent probable cause hearing, he should attempt to obtain relevant information pertaining to pre-trial release.[124] In so doing, the prosecutor shall confer with the Probation Department or other agency as to any bail report which will be submitted to the court. Standard

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122 Id.

123 A.B.A. "Pre-Trial Release" 3.2 requires summons rather than arrest in many instances. Note that there appears to be no limitation on the authority of the police officer to issue a summons either in terms of the nature of the crime or the rank of the officer. R. 3:3-1(a). Cf. AOC Bulletin 3/4-77 which recommends that personnel employ the summons complaint more often.

124 A.B.A. "Pre-Trial Release," 4.3 (f), "The Prosecutor's Function" 3.10.

sets forth the factors to be considered.[125] They include:

1. Seriousness, apparent likelihood of conviction and punishment of offense charged.
2. Defendant's criminal record and prior bail record.
3. Reputation and mental condition.
4. Length of residence in the community
5. Family ties and relationships.
6. Employment status, history and financial condition.
7. Members in the community who would vouch for defendant's reliability.
8. Any other factors indicating defendant's mode of life or ties to the community bearing on the risk of failure to appear.

It should be observed that the court in State v. Johnson, 61 N.J. 351 (1972), held that the fact of a person's indigency, although requiring consideration, does not outweigh the nature of the crime.[126] Although bail is presently allowed for all crimes by virtue of the holding in Johnson,[127] dictum in that opinion indicates that bail may be denied in certain cases.[128]

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[125] State v. Johnson, 61 N.J. 351 (1972). The factors are numerically set forth at pp. 364-365.

[126] Id. p. 365.

[127] Johnson relies on State v. Funicello, 60 N.J. 91972), cert. den. sub nom. New Jersey v. Presha, 92 S.Ct. 2849 (1972) which eliminates the death penalty, in concluding a constitutional mandate for bail irrespective of the offense.

[128] "If however the court is satisfied from the evidence presented on the application for bail that regardless of the amount of bail fixed the accused if released will probably flee to avoid trial, bail may be denied." State v. Johnson, supra at 360.

In appropriate cases, the Prosecutor may submit Grand Jury transcripts or other affidavits ex parte, in camera in order to support the amount of bail fixed.[129]

It is to be noted that cash bail is not the sole method of securing pretrial release. The following are forms of pre-trial release which may be utilized in appropriate cases:[130]

A. ROR or CPO. This release is in the defendant's own or Chief Probation Officer's recognizance[131] and is premised upon a promise to appear.

B. Personal Recognizance Bail. This release is similar to ROR except that the Court sets the cash amount the person is personally liable to forfeit. Although no security is required, the person must execute a bond.

C. Co-Signed Unsecured Appearance Bond. This occurs when an individual, other than the defendant, becomes obligated on the bond in the event of default although no security is required.

D. Released in Custody of Specified Individual. This individual is required to report to court if the defendant defaults.

E. 10% Cash Bail - R. 3:26-4(a). Defendant may post

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129 State v. Campisi, 64 N.J. 120 (1973).

130 The numerous types of pre-trial release are roughly equivalent to R. 46 of the Federal Rules of Criminal Procedure (Practice Comment) concerning release from custody.

131 Terms and conditions may be imposed upon a defendant when he is released ROR but there is no rule or statute dealing with what the conditions would be. Cf. A.B.A. Pre-Trial Release, §5.6.

10% cash bail in those counties where assignment judge institutes this program.

F. Bail Bond. This is the most common form of bail and usually provides for corporate sureties for a 10% premium.

G. Real Property Bond. Defendant is required to provide the County Clerk with the appropriate deed.

H. Personal Property Bond. Defendant pledges bank book, stocks and bonds which are deposited with the clerk of the court.

I. Cash.[132] R. 3:26-4(f).

It must be emphasized, however, that there is no presumption that a defendant be released in his own recognizance. Rather, the requirement is that there shall be no unnecessary sureties and detention. Since the primary purpose of bail is to assure the presence of the accused at trial,[133] it is incumbent upon the court to fix bail in an amount commensurate with the risk of flight.

If the defendant fails to appear at any proceeding requiring his presence, the Prosecutor should seek a bench warrant

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132 Under R. 3:26-4(f), if the cash is deposited by someone other than the defendant, the defendant must supply an affidavit as to ownership.

133 Johnson, supra at p. 359. Note that the Johnson court did not adopt "preventive detention" i.e. likelihood of serious crime or interference with administration of justice as factors for bail. (p. 362). But compare ABA Pre-Trial Standards, §5.1.

and bail should be revoked and forfeited. R. 3:3-1. Although it is the court clerk's duty to insure the issuance of the bench warrant, the prosecutor should request a copy for his records. A copy should be forwarded to the sheriff. A system should be developed to record the costs of locating and returning fugitives.[134] Under no circumstances should the prosecutor unilaterally consent to the vacating of bail forfeiture or reinstatement of bail absent the appearance and consent of the county counsel or the appropriate municipal attorney.[135] R. 3:26-6.

Bail may also be in issue with respect to material witnesses. Pursuant to N.J.S.A. 2A:162-2, 2A:162-3 (commonly referred to as the Material Witness Statute) and R. 3:26-3, any judge may require that a witness to any crime punishable by imprisonment in State Prison be held for the purpose of securing his appearance. A material witness is, however, entitled to be bound "by recognizance with sufficient surety." Of course, whether to bind such a witness is a matter resting within the discretion of the court. The court must be satisfied

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134 R. 3:26-6(c). State v. Hyers, 122 N.J.Super. 177 (App.Div. 1973).

135 County counsel has the duty to collect bail on indictable offenses once the forfeiture order has been entered by the court. Any money received goes to the county. The factors to be used by the court in determining if any bail should be remitted are:

1. Nature of applicant i.e., defendant, surety, commercial surety, etc
2. Diligence of surety, if any, in carrying out his obligation to the court.
3. Prejudice to State occasioned by the delay.
4. Expense in returning defendant.
5. Intangible element of injury to the public interest.
6. Exhaustion by surety of available legal remedies (against principal).

that the witness is necessary and material. The court must also be satisfied that if the witness is not bound by sufficient surety he might become unavailable to service by subpoena.

CHAPTER 15

POST-CONVICTION BAIL AND SURRENDER STANDARDS

1. IT IS THE DUTY OF A PROSECUTOR AFTER THE IMPOSITION OF SENTENCE TO INSURE THAT A DEFENDANT IS INCARCERATED UNLESS AND UNTIL BAIL PENDING APPEAL IS GRANTED.

2. A PROSECUTOR MUST INSIST THAT A DEFENDANT BEAR THE BURDEN OF DEMONSTRATING HIS ELIGIBILITY FOR BAIL OR A STAY PENDING APPEAL BY ESTABLISHING BOTH THAT THE QUESTION ON APPEAL IS SUBSTANTIAL AND THAT HIS ADMISSION TO BAIL WILL NOT SERIOUSLY THREATEN THE SAFETY OF THE PERSON OR OF THE COMMUNITY.

3. A PROSECUTOR MUST MAKE CERTAIN THAT SENTENCE IS EXECUTED UNLESS STAYS OF SENTENCE, PROBATION OR FINE ARE SECURED PURSUANT TO THE RULES OF COURT.

4. A PROSECUTOR MUST RESPOND TO MOTIONS FOR BAIL PENDING APPEAL IN A TIMELY FASHION AND WHERE APPROPRIATE SHOULD ESTABLISH THAT THE QUESTION ON APPEAL IS INSUBSTANTIAL AND THAT THE DEFENDANT'S ADMISSION TO BAIL WILL SERIOUSLY THREATEN THE SAFETY OF A PERSON OR OF THE COMMUNITY AT LARGE.

5. AFTER APPELLATE COURT AFFIRMANCE OF THE DEFENDANT'S CONVICTION A PROSECUTOR MUST IMMEDIATELY ISSUE A SURRENDER NOTICE AND MOVE FOR THE ISSUANCE OF A BENCH WARRANT IN THE EVENT THE DEFENDANT DOES NOT SURRENDER. A PROSECUTOR SHOULD NOT ABANDON THOSE EFFORTS UNLESS AND UNTIL AN ORDER ALLOWING FURTHER BAIL PENDING APPEAL HAS BEEN ENTERED BY A COURT.

6. A PROSECUTOR SHOULD ALSO NOTIFY THE PROBATION DEPARTMENT OF ALL APPELLATE DISPOSITIONS (SO THAT SENTENCES INVOLVING PROBATION MAY BE EXECUTED IN THE EVENT OF A STAY)

COMMENTARY

Bail Subsequent To Verdict and Prior To Sentencing

A prosecutor's responsibility regarding post-verdict bail commences the moment that a jury returns a verdict of guilty.

Pursuant to R. 3:21-4(a) the trial judge has three options at that juncture. He may (1) commit the defendant to jail, (2) continue the bail in the amount set before trial or (3) alter the amount and terms of bail. Consequently, a prosecutor should be prepared to take a position at that time respecting bail pending sentence. Obviously, a wide variety of factors must be considered on a case by case basis consistent with the policy of each office.

In cases involving crimes of violence, recidivists or any person who is unlikely to be present for sentence, the trial judge should be urged to commit the defendant pending sentence. It should be emphasized that following conviction, defendant is no longer clothed with the presumption of innocence and that an individual facing a term of incarceration has a greater incentive to flee. In support of the application defendant's current "rap" sheet should be presented. Also, to the extent possible, the court should be informed regarding defendant's background, residence, employment and family status. If the application for commitment is denied by the court, then the prosecutor should request that the bail be increased in amount. Also, where applicable, restrictions upon the defendant's freedom to travel outside the state ought to be imposed.

A different situation is presented, however, by a defendant who has been the beneficiary of a non-custodial sentence recommendation. In that case it is appropriate to indicate non-objection to the continuance of bail pending sentence.

Bail Pending Appeal And Subsequent To Sentence (R. 2:9-4)

Initially, it is emphasized that a custodial sentence is not stayed by the taking of an appeal or by the filing of a notice of petition for certification.[136] The only manner by which a defendant may obtain a stay of his sentence is to apply for and receive admission to bail pending appeal. See R. 2:9-4. Thus, it is the duty of the proescutor after the imposition of sentence to insure that a defendant is incarcerated unless and until bail pending appeal is granted.

The starting point for a defendant seeking bail pending appeal to the Appellate Division is the trial level. At this juncture, it is important to emphasize that the party seeking bail pending appeal shall present the sentencing judge with a copy of the notice of appeal with a certification thereon that the original has been filed with the appellate court.[137] If bail is denied by the trial court, defendant may then apply to the Appellate Division and if bail is denied by that tribunal, he may apply to the Supreme Court.

In each case it must be emphasized that the defendant bears the burden of demonstrating his eligibility for post-trial bail. All too frequently, defendants are wrongly admitted to bail pending appeal due to the trial court's refusal or failure to consider the stringent standards of R. 2:9-4. It is the responsibility of the trial prosecutor to insure that this does not occur. Also, on many occasions trial prosecutors do not vigorously oppose bail pending appeal due either to the

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136 See R. 2:9-3(b).

137 R. 2:5-1(a).

distraction caused by a successful guilty verdict or because of their cordial relationships with defense counsel. Such situations should not occur since, after a finding of guilt, a defendant's cloak of innocence has been removed. More importantly, society's expectations with respect to swift execution of the sentence imposed should not be thwarted absent a fulfillment of the requirements of R. 2:9-4. Moreover, it is widely recognized that the rehabilitative process is enhanced by immediate execution of sentence. Lastly, we must discourage the taking of frivolous appeals by those defendants who utilize the appellate process merely as a means of deferring the inevitable.

R. 2:9-4 provides that the defendant establish both that the question on appeal is substantial and that his admission to bail will not seriously threaten the safety of any person or of the community.[138] With respect to the first criterion it is strenuously recommended that the assistant prosecutor who tried the case or accepted the plea handle the bail motion since that individual is obviously in the best position to persuade the court that the questions on appeal are insubstantial. As for the second criterion the prosecutor must be prepared to demonstrate that the defendant, if admitted to bail, will pose a serious threat to the safety of a specific person or to the community at large. The nature of the crime committed and the defendant's "rap" sheet will be the most persuasive evidence on this issue.

At the trial level bail motions require the attendance of the prosecutor. At the appellate level, both in the Appellate Division and Supreme Court, bail motions are usually decided on the moving papers and the pleadings filed in opposition to the application for bail. Response can be made by letter. It is not

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[138] Cf. In re Manna, 124 N.J.Super. 428, 434 (App.Div. 1973), certif. den. 64 N.J. 158 (1973).

uncommon, however, for defense counsel not to follow the usual motion practice and to seek emergent relief in the appellate courts after being denied bail at the trial level. The prosecutor should insist that he be notified of such applications so that the views of the State are adequately represented. Unfortunately, ex parte applications are often made and granted and prosecutors must discourage this practice.

Although the rule permits a party responding to a motion ten days within which to file papers (R. 2:8-1), it is the practice of the Clerk of the Appellate Division to expedite bail motions and forward them to the court immediately upon receipt. Therefore, bail motions must be answered within several days of receipt. It is important for the assistant prosecutor to notify the motion clerk of the Appellate Division that a response from the State is forthcoming. Otherwise, the court may dispose of the motion without input from the State. Often the motion clerk will request that the State mail a copy of the opposition letter to the judges of the panel of the Appellate Division at their chambers and to forward two copies to the clerk's office.

At the trial level bail motions are handled by the assistant prosecutor. At the appellate level bail motions are handled by the assistant prosecutor or a deputy attorney general from the Appellate Section of the Division of Criminal Justice. Specifically, if defendant's appellate brief has not been served upon the Division of Criminal Justice, the bail motion must be handled by the assistant prosecutor because he/she is in the best position to demonstrate that the questions on appeal are insubstantial and that defendant's admission to bail will seriously threaten the safety of a person or the community at large.

Obviously, prior to receipt of the brief the Appellate Section will have no knowledge of the facts surrounding the conviction or the personal history of the defendant. Once a defendant's brief has been filed with the Division of Criminal Justice a deputy attorney general will handle the bail motion. Thus, upon receipt of a bail motion the prosecutor should immediately contact the Appellate Section and ascertain whether defendant's appellate brief has been filed.

Bail Pending Review By The Supreme Court

After disposition by the Appellate Division and pending proceedings in the Supreme Court, bail may be allowed by the Appellate Division or if denied by it, by the Supreme Court. Of course, the prosecutor shall have automatically initiated surrender procedures which should not be abandoned until a new bail order has been signed. See Surrender, infra. If the Division of Criminal Justice has handled the conduct of the appeal, a deputy attorney general will handle such bail motions, while the prosecutor will remain responsible for surrender.

Stay Of Fine Or Probation

Stays of probation and fines are not automatic. A defendant must make application to the trial judge, who may grant a stay on appropriate terms provided that an appeal has been taken or a notice of petition for certification has been filed.[139] Note that this is a departure from previous practice: prior to September 6, 1977, an order placing a defendant on probation was automatically stayed in such circumstances, but R. 2:9-3(d) which so provided was repealed effective September 6, 1977.

Although R. 2:5-1, which requires that the party seeking bail shall present to the sentencing judge a copy of the notice of

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[139] R. 2:9-3(c) and (d).

appeal, does not by its terms apply to an application for a stay of probationary term pending appeal, the same practice should be followed to the extent that the court must be assured by adequate documentation that an appeal has been filed before a stay pending appeal is granted.

Similarly, the standard for bail pending appeal in R. 2:9-4 (defendant must establish both that the question on appeal is substantial and that his admission to bail will not seriously threaten the safety of any person or of the community) does not by its terms apply to an application for a stay of probationary term pending appeal. It would appear, however, that the same standard should be used on an application for a stay pending appeal. Defendants should bear this burden, particularly because probationary terms are frequently imposed with significant conditions made a part thereof. These probationary terms and conditions are often designed to have an immediate impact (such as through drug or alcoholic treatment) in the absence of which a custodial term might have been imposed or might be more appropriate. In the absence of immediate imposition of the conditions the safety of the community would have to be considered.[14]

With respect to fines, R. 2:9-3(c) provides that they may be stayed pending appeal. The rule further provides that the trial court may require a defendant to deposit the fine and costs with the appropriate county official, or may require him to post bond for payment of the fine and costs, or require a defendant to submit to an examination of assets, or issue an order restraining defendant from dissipating his assets. In those

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140 Cf. R. 2:9-4.

cases where the fine and costs are substantial and there exists serious doubt that the defendant will be able to satisfy the fine and costs after appeal, such a course of action may be feasible.

Monitoring of Bail Cases by Division of Criminal Justice - Appellate Section

The Appellate Section of the Division of Criminal Justice opens an appellate file upon receipt of the notice of appeal and docket notice from the county prosecutor. The transmittal papers must include information concerning defendant's bail status. Also, the transmittal papers must include the following information:

a. The crime with which defendant was charged or of which he was convicted;

b. the sentence, if any;

c. whether defendant is incarcerated;

d. if defendant is not incarcerated, the conditions, if any, controlling his liberty, and

e. the amount of bail fixed and the nature of the bail posted.

That information is now required to be included in every application to the Appellate Division in criminal matters by motion, emergent application or otherwise, seeking a departure from the time periods set by the rules of court, pursuant to a Notice to the Bar promulgated by the Administrative Office of the Courts.

In those cases where defendant is on bail pending appeal, the case is listed in a bail diary and is monitored by a deputy attorney general to insure that defendant files his brief within the time allowed by the rules of court. If defendant fails to do

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so, a motion to dismiss the appeal, or, in the alternative to revoke bail, is filed by a deputy attorney general. If the motion is denied, the case is listed in the bail diary and followed again. If the motion is granted dismissing the appeal or revoking the bail, a copy of that order is sent to the County Prosecutor on the day it is received by the Appellate Section. It is imperative that upon receipt of such an order immediate steps are taken to incarcerate the defendant. A failure to do so, often done as an accommodation to defense counel, is contrary to the order of the court and does not serve the interests of criminal justice.

Revocation of Bail Pending Appeal

By rule a judge or court allowing bail may at any time revoke the order admitting to bail.[141] Thus, upon learning that a defendant has violated the terms or conditions of bail, it may be deemed appropriate to move to revoke bail. A motion for revocation of bail is appropriate where a defendant, free on bail pending appeal, is indicted for another criminal offense. The procedures to be utilized in such situation are clearly set forth in State v. Maccioli, 110 N.J.Super. 352 (Law Div. 1970).

Surrender Procedures

It is imperative that upon receipt of a copy of an Appellate Division or Supreme Court disposition affirming defendant's conviction or receipt of an order of the Supreme Court denying defendant's petition for certification that a prosecutor take immediate steps to determine defendant's bail status. If the defendant is on bail pending appeal or if any stay of

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141 R. 2:9-4.

sentence has been entered, then such bail or stay should be vacated immediately and sentence executed. Specifically, a prosecutor should send out a surrender notice to the defendant or his counsel and move for the issuance of a bench warrant in the event the defendant does not surrender. A prosecutor should never enter into informal agreements with defense counsel regarding surrender. Such practices do not fulfill society's expectations that the sentence imposed will be executed swiftly after completion of appellate review. Also, a delay in execution of sentence does not enhance the rehabilitative process. Moreover, given the problem of recidivism, there is the danger that the defendant will commit another crime during the hiatus between the completion of the appellate process and his surrender.

Post-Appellate Division Disposition

Upon receipt of the copy of the Appellate Division disposition a prosecutor should send out the surrender notice. A prosecutor should not abandon pursuit of surrender unless and until an order allowing bail is signed. R. 2:5-1(a) does not by its terms provide that a party seeking bail pending certification must present to the sentencing judge a copy of the notice of petition for certification with a certification thereon that the original has been filed with the appellate court. Nevertheless, the prosecutor should be certain that a notice of petition for certification has actually been filed before bail pending review by the Supreme Court is granted. Also, after Appellate Division affirmance, it would appear that a further

stay must be obtained from the Appellate Division.

Pursuant to court directive the Trial Court Administrator in each county is required to notify the interested persons (e.g., the Chief Probation Officer) of the Appellate Division disposition if execution of sentence, probation or fine has been stayed. Nevertheless, it is recommended in such cases that a prosecutor also notify the interested persons of the Appellate Division disposition.

Post-Supreme Court Disposition

Upon receipt of the copy of the Supreme Court's order denying certification a prosecutor should send out the surrender notice. Absent a court order a prosecutor should not abandon the surrender process.

CHAPTER 16

RETENTION AND DISPOSITION OF SEIZED, CONFISCATED AND FORFEITED PROPERTY

1. IT IS THE RESPONSIBILITY OF PROSECUTORS TO ESTABLISH UNIFORM PROCEDURES GOVERNING THE RETENTION, DISPOSITION, AND FORFEITURE OF SEIZED OR CONFISCATED PROPERTY AND TO ADHERE TO STATUTORY REQUIREMENTS.

2. RETENTION AND DISPERSAL PROCEDURES: EVIDENCE RETENTION AND DISPOSAL PROCEDURES TO BE UTILIZED BY PROSECUTORS' OFFICES AND LOCAL POLICE AGENCIES MUST BE SET FORTH IN DETAIL IN WRITTEN GUIDELINES AND STRICTLY ENFORCED.

3. A RECORD OF ALL ITEMS INCOMING, IN STORAGE, OR TEMPORARILY OUT OF STORAGE FOR CASE USE MUST BE MAINTAINED. ALSO, A RECORD OF ALL ITEMS RETURNED OR DESTROYED SHOULD BE KEPT.

4. PROPERTY WHICH IS NOT REQUIRED BY LAW TO BE FORFEITED OR DESTROYED SHOULD BE RETURNED TO ITS LAWFUL OWNER AS SOON AS REASONABLY PRACTICABLE.

5. PROPERTY WHICH IS REQUIRED BY LAW TO BE EITHER FORFEITED OR DESTROYED MUST BE MAINTAINED AND DISPOSED OF PURSUANT TO THE TERMS OF APPLICABLE LAW AND UNIFORM PROCEDURES MUST BE ESTABLISHED WITHIN EACH OFFICE TO INSURE STATUTORY COMPLIANCE. THE FOLLOWING ARE STATUTORY REFERENCES TO PERTINENT PROVISIONS GOVERNING FORFEITURE AND DISPOSITION OF PROPERTY:

   a. N.J.S.A. 2A:152-6 - DESTRUCTION OR DONATION OF GAMING APPARATUS.

   b. N.J.S.A. 2A:152-7, et seq. - DISPOSITION OF MONEY SEIZED ON ARREST FOR PLAYING UNLAWFUL GAMES (GAMBLING)

   c. N.J.S.A. 24:21-35 - FORFEITURE AND DISPOSITION OF SUBSTANCES AND PROPERTY, INCLUDING MOTOR VEHICLES AND OTHER CONVEYANCES, RESORTED TO FOR THE UNLAWFUL MANUFACTURE, DISTRIBUTION, DISPENSING, ADMINISTRATION OR USE OF CONTROLLED DANGEROUS SUBSTANCES.

   d. N.J.S.A. 2A:151-16 - FORFEITURE AND DISPOSITION OF FIREARMS UNLAWFULLY POSSESSED, CARRIED, ACQUIRED OR USED.

   e. N.J.S.A. 2A:115-3.7 - DESTRUCTION OF OBSCENE MATTER FOLLOWING THE ENTRY OF A JUDGMENT PURSUANT TO A STATUTORY INJUNCTIVE RELIEF ACTION.

   f. N.J.S.A. 2A:152-5 - DESTRUCTION OF OBSCENE AND INDECENT BOOKS, PAPERS, PICTURES, ARTICLES OR THINGS UPON CONVICTION.

g. N.J.S.A. 2A:130-4 - FORFEITURE OR DESTRUCTION OF CHATTELS, LIQUORS OR OTHER PERSONAL PROPERTY POSSESSED, USED OR INTENDED TO BE USED TO MAINTAIN A NUISANCE.

h. N.J.S.A. 2A:170-17 - DESTRUCTION OF UNLAWFULLY POSSESSED AMMUNITION, EXPLOSIVE MISSILES, FUSES, ETC.

i. N.J.S.A. 2A:123-10 - CONFISCATION OF IMPROPERLY MANUFACTURED WEARING APPAREL.

j. N.J.S.A. 2A:99A-3 - DISPOSITION OF PROPERTY AND MONEY OF DEBT ADJUSTORS

k. N.J.S.A. 33:1-66(a) - SEIZURE, FORFEITURE, REPLEVIN, SALE, ETC., PROCEDURES RESPECTING, CONCERNING THE ALCOHOLIC BEVERAGE LAW.

l. N.J.S.A. 33:2-5 - FORFEITURE, SALE, DESTRUCTION OF SEIZED PROPERTY CONCERNING STILLS AND DISTILLING APPARATUS.

m. N.J.S.A. 40A:14-157 - DISPOSITION OF FOUND OR RECOVERED TANGIBLE PERSONAL PROPERTY.

n. N.J.S.A. 40A:9-58 - DISPOSITION OF PERSONAL PROPERTY OF UNKNOWN DECEDENT.

5. IN THE INTEREST OF UNIFORMITY AND STRICT ACCOUNTABILITY REGARDING ALL WEAPONS CONFISCATED, SURRENDERED OR FORFEITED THE FOLLOWING PROCEDURES SHOULD BE ADHERED TO WITH RESPECT TO ALL FIREARMS WHICH COME INTO THE POSSESSION OF LAW ENFORCEMENT AGENCIES:

a. ANY FIREARM WHICH IS CONFISCATED, SURRENDERED OR FORFEITED BY ANY LOCAL, COUNTY OR STATE AUTHORITY WILL BE INVENTORIED AND SAFEGUARDED BY THE AGENCY HAVING POSSESSION OF THE WEAPON.

b. ALL FIREARMS, TOGETHER WITH RELATED EVIDENCE SUCH AS BULLETS, SHELLS, PELLETS, WADS, CARTRIDGES AND OTHER RELATED ITEMS WHICH ARE CONFISCATED DURING THE COURSE OF AN INVESTIGATION INTO A CRIME INVOLVING THE FIRING OF SUCH WEAPON WILL BE PROMPTLY TRANSMITTED TO THE BALLISTICS LABORATORY WHICH PROVIDES SUCH SERVICE TO THE JURISDICTION (I.E., STATE POLICE BALLISTICS UNIT OR LOCAL BALLISTICS LABORATORY).

c. FIREARMS WHICH ARE CONFISCATED DURING THE INVESTIGATION OF ANY CRIME INVOLVING THE ILLEGAL USE OR POSSESSION OF SUCH WEAPONS WILL BE SUBMITTED TO THE BALLISTICS LABORATORY WHICH PROVIDES SUCH SERVICES TO THE JURISDICTION FOR APPROPRIATE TESTING WITH RESPECT TO OPERABILITY.

d. REQUESTS THAT FIREARMS SUBMITTED TO A BALLISTICS LABORATORY BE COMPARED AGAINST ALL UNSOLVED CRIMES SHOULD NOT BE MADE. HOWEVER, COMPARISONS AGAINST PARTICULAR CRIMES MAY BE REQUESTED AND SPECIAL ATTENTION MAY BE REQUESTED IN CASES WHERE FIREARMS HAVE BEEN CONFISCATED FROM CRIMINALS SUSPECTED OF OTHER SERIOUS CRIMES INVOLVING FIREARMS.

e. FIREARMS CONFISCATED DURING INVESTIGATIONS IN WHICH SUCH WEAPONS WERE NOT INSTRUMENTS OF A CRIME SHOULD NOT ROUTINELY BE SUBMITTED TO BALLISTICS LABORATORIES FOR TESTING PURPOSES.

f. IT SHALL BE THE RESPONSIBILITY OF THE LAW ENFORCEMENT AGENCY TAKING POSSESSION OF ANY FIREARM TO DETERMINE IF THAT WEAPON IS STOLEN PROPERTY OR IS THE PROPERTY OF A THIRD PARTY NOT INVOLVED IN THE CRIMINAL ACTIVITY UNDER INVESTIGATION.

g. FIREARMS WHICH MUST BE RETAINED FOR EVIDENTIARY PURPOSES WILL BE INVENTORIED AND STORED IN THE EVIDENCE VAULT OF THE COUNTY PROSECUTOR SUBSEQUENT TO COMPLETION OF ANY NECESSARY BALLISTICS EXAMINATION. PERIODIC REVIEW OF EACH OFFICE'S RECORD KEEPING SYSTEM SHOULD OCCUR TO ENSURE THAT EACH WEAPON IS ACCOUNTED FOR AND THAT THERE IS SUPPORTING DOCUMENTARY EVIDENCE INDICATING ITS WHEREABOUTS. ACCESS TO SUCH EVIDENCE VAULTS SHOULD BE STRICTLY LIMITED.

h. UPON THE DISPOSITION OF A CRIMINAL CASE, THE FIREARM SHOULD BE RETAINED FOR AT LEAST SIXTY DAYS. IF AN APPEAL FROM THE CONVICTION IS TAKEN, THE WEAPON SHOULD BE RETAINED UNTIL THE APPEAL PROCESS HAS BEEN DEFINITIVELY CONCLUDED. IF NO APPEAL IS TAKEN, THE WEAPON SHOULD BE DISPOSED OF AT THE EXPIRATION OF THE SIXTY DAY PERIOD.

i. THE COUNTY PROSECUTOR WILL BE RESPONSIBLE FOR IMPLEMENTING UNIFORM PROCEDURES FOR THE RETURN OF FIREARMS TO THEIR LAWFUL OWNERS SUBSEQUENT TO THE TERMINATION OF THE CASE. LOCAL LAW ENFORCEMENT AGENCIES ARE NOT TO RETURN SUCH WEAPONS WITHOUT FIRST NOTIFYING THE PROSECUTOR.

j. FIREARMS WHICH ARE RECOVERED AS STOLEN PROPERTY SHOULD BE RETURNED TO THEIR LAWFUL OWNERS AS SOON AS THEY ARE NO LONGER NEEDED FOR EVIDENTIARY PURPOSES.

k. IF IT IS DETERMINED THAT THE WEAPON IS OF NO VALUE FOR LAW ENFORCEMENT PURPOSES THEN THE FIREARM SHOULD BE TRANSPORTED TO THE STATE POLICE BALLISTICS UNIT FOR DESTRUCTION.

l. FIREARMS SHOULD NOT BE RETAINED FOR LAW ENFORCEMENT PURPOSES UNLESS IT HAS BEEN DEMONSTRATED THAT THERE IS AN ACTUAL CURRENT NEED FOR THE UTILIZATION OF SUCH WEAPONS FOR LAW ENFORCEMENT PURPOSES. FIREARMS RETAINED FOR LAW ENFORCEMENT PURPOSES SHOULD BE OF THE CALIBERS, TYPES OR GAUGES NORMALLY USED FOR SUCH PURPOSES AND INDISCRIMINATE RETENTION OF ALL TYPES OF FIREARMS SHOULD NOT BE PERMITTED.

m. IN THE EVENT THAT FIREARMS ARE RETAINED BY LOCAL AGENCIES FOR LAW ENFORCEMENT PURPOSES BOTH THE COUNTY PROSECUTOR AND THE STATE POLICE BALLISTICS UNIT SHOULD BE NOTIFIED IN WRITING AND FURNISHED WITH A FULL DESCRIPTION OF THE WEAPON TO BE RETAINED.

n. IF IT IS DETERMINED THAT A WEAPON RETAINED FOR LAW ENFORCEMENT PURPOSES IS OF NO FURTHER VALUE, THAT WEAPON SHOULD BE IMMEDIATELY FORWARDED TO THE STATE POLICE FOR DESTRUCTION.

o. IN ORDER TO EFFECT UNIFORMITY IN THE DESTRUCTION OF FIREARMS ALL WEAPONS TO BE DESTROYED SHOULD BE DELIVERED TO THE STATE POLICE BALLISTICS UNIT FOR DESTRUCTION WITHIN A REASONABLE PERIOD OF TIME, BUT NO LONGER THAN THIRTY DAYS AFTER THE DETERMINATION THAT THE WEAPON IS TO BE DESTROYED.

COMMENTARY

A primary responsibility of prosecutors is to insure that confiscated or surrendered property is retained and disposed of in conformity with established procedures. Uniformity in the handling of property will insure that (1) evidence is readily available for use at every stage of the criminal proceedings,

(2) property is preserved and safeguarded for eventual return to its rightful owner and (3) contraband is inaccessible to the general public and disposed of according to law at the conclusion of the proceedings. In order to accomplish these goals prosecutors must formulate written uniform standards with respect to evidence retention, forfeiture and destruction.

Evidence retention and disposal procedures in prosecutors' offices must be detailed and strictly enforced. Prosecutors' offices must have sufficient in-house capability to store evidence acquired in the course of case preparation, investigation and trial. A complete record of all items incoming, in storage, or temporarily out of storage must be maintained. Also, such records should reflect the return or destruction of all property. The documentation must be sufficiently detailed in each instance to reflect the exact identity of each item, the criminal event each item pertains to, the necessary witness contact identification and the identity of the defendant each item concerns.

Strict procedures must be established for all instances of movement of evidential property by both the prosecutors' offices and local police agencies. Guidelines should be established by the county prosecutor for the movement or transfer of such evidence by or at the direction of any police agency. Such guidelines may assist in eliminating "chain of custody" arguments at trial or on appeal.[142]

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[142] State v. Farfalla, 113 N.J.Super. 557 (App.Div. 1971), and State v. Brown, 99 N.J.Super. 22 (App.Div. 1968), certif. den. 51 N.J. 468 (1968).

Property, which by law is non-forfeitable or non-destructible, ought to be returned to its rightful owner as soon as practicable subsequent to termination of the proceedings. In State v. Murphy, 85 N.J.Super. 391, 398-399 (App.Div. 1964), aff'd 45 N.J. 36 (1965), the Appellate Division authorized the admission of photographs depicting property at the time of its seizure, as evidence against the defendant in his trial for a violation of N.J.S.A. 2A:119-2.

Property that has been rendered a danger or hazard to safety, health or welfare, should not be returned to its owner until rendered harmless, if possible. Permanently dangerous or hazardous evidence ought to be destroyed in accordance with a court order sought, on notice, by the prosecutor.

Property which is subject to forfeiture must be maintained and disposed of pursuant to the applicable statutory and case law. "Forfeiture" has been defined as an action by which the State seizes and claims proprietary rights in private property without compensation to the owner.[143]

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143 Edwards "Forfeitures -- Civil or Criminal," 43 Temp.L.Q. 191 (1969-70).

Modern forfeiture law has developed basically from two sources: (a) the common law action of deodands, a civil, in rem procedure whereby any object causing the death of a person or animal became the property of the sovereign, and (b) the common law of forfeiture whereby the entire estate of a convicted felon escheated to the crown. In New Jersey, the latter species of forfeiture has been proscribed by N.J.S.A. 2A:152-2 which states that, "No conviction or judgment for any offense against this state, shall make or work a corruption of blood, disinherison of heirs, loss of dower, or forfeiture of estate." The former, in rem, procedure, however, has continued to play an important role in our system of laws.

It is a settled principle of constitutional law that no owner of property has a vested right to use, or to allow the use of such property for purposes injurious to the public health.[144] The ancient action of deodands has developed into a modern procedure by which the State can implement this police power. In The Palmyra, 12 Wheat. (25 U.S.) 1, 14 (1927), the Supreme Court of the United States held that in rem forfeitures can exist solely by virtue of statute. Accordingly, statutory schemes have been enacted authorizing the forfeiture of property which, because of its connections with criminal activity, has been legislatively declared to be contraband. In New Jersey, the statutory procedures regarding the forfeiture of objects related to gambling, narcotics, and weapons offenses have been the subject of some confusion.

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[144] 47 Am. Jur. §51, p. 531. Spagnuolo v. Bonnet, 16 N.J. 516, 556 (1954).

A. Gambling

N.J.S.A. 2A:152-6 provides for the seizure and disposition of gaming devices and apparatus. Inasmuch as such equipment is inherently contraband, i.e., has no possible lawful use, it can be confiscated without giving the owner an opportunity to be heard.[145] Currency, however, is not intrinsically contraband, and can become so only because of the use to which it is put. Due process thus requires that a determination be made as to whether money has been "earmarked and segregated as part of a gambling operation."[146] In recognition of these principles, N.J.S.A. 2A:152-7 et seq. enacted procedures to be utilized when the alleged contraband is cash or currency.

Under N.J.S.A. 2A:152-7, monies seized "in connection with any arrest for violation of or conspiracy to violate any gambling law of this State ... shall be deemed prima facie to be contraband of law as a gambling operation, and it shall be unlawful to return the said money, currency or cash to the person or persons claiming to own the same, or to any other person, except in the circumstances and manner hereinafter provided."[147] "Any gambling law of this state" has been

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145 Spagnuolo v. Bonnet, supra at 556.

146 Spagnuolo v. Bonnet, supra at 559; State v. Link, 14 N.J. 446 (1954); Kenny v. Wachenfeld, 14 N.J.Misc. 322 (Sup.Ct. 1936); Krug v. Board of Chosen Freeholders of Hudson County, 3 N.J.Super. 22 (App.Div. 1949).

147 See State v. McCoy, 145 N.J.Super. 340, 345 (App.Div. 1976)

construed to include municipal gambling ordinances.[148] Moreover, "in connection with any arrest" does not limit the purview of this statute to monies found while actually apprehending the suspect, but rather encompasses currency discovered as a result of any investigation made pursuant to that arrest.[149]

Pending trial or ultimate disposition of any charge or indictment growing out of a gambling arrest in connection with which such money was seized, the money is to be deposited with the county treasurer of the county where the arrest occurred, by and under the supervision of the county prosecutor.[150] If a conviction is entered against the person arrested on such gambling charges, the county treasurer may, after 6 months from the date of such conviction, make application to the county court for an order to show cause why the money seized in connection with the arrest shall not be forfeited to the sole use and gain of the county. The order to show cause shall be served on the person from whom the money was seized. When the order is returned a hearing shall be conducted. At the hearing, proof to the satisfaction of the court shall be established that no action or proceeding, then pending, has been filed in any court of competent jurisdiction against the county treasurer seeking a recovery of the money held in custody. Proof of the conviction of the arrested person

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148 Practico v. Rhodes, 17 N.J. 328 (1955).

149 State v. Link, supra at 454; New Jersey v. Moriarity, 268 F.Supp. 546 (D.N.J. 1967).

150 N.J.S.A. 2A:152-8.

shall be prima facie evidence that the money seized was used in connection with the violation of a gambling law.[151]

If the ultimate disposition of the charges against the arrested person results in an acquittal or otherwise favorable final termination of such proceedings, then the person or persons claiming to own the money may, within two years from the date of such final termination, make application to the county court for an order declaring the money to be returned to him by the county treasurer. The presumption that monies were prima facie contraband does not apply where an acquittal has been entered.[152] At any time after the expiration of two years from the date of acquittal, the county treasurer may apply to the county court for an order to show cause why such money shall not be forfeited to the sole use and gain of the county. As in the proceeding detailed in N.J.S.A. 2A:152-9, the order to show cause is served upon the person from whom the money was taken. Upon the return of the order, a hearing shall be held. At the hearing, proof shall be established that no action or proceeding then pending has been filed in any court of competent jurisdiction seeking recovery.[153]

N.J.S.A. 2A:152-6 directs each county prosecutor to destroy or render useless any illegal gaming device seized by a police officer in that county. However, the statute does

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151 N.J.S.A. 2A:152-9. See State v. Rodriguez, 138 N.J.Super. 575 (App.Div. 1976), aff'd o.b. 73 N.J. 463 (1977).

152 State v. Rodriguez, supra.

153 N.J.S.A. 2A:152-10.

provide an alternative means of disposing of such property. The prosecutor may, in his discretion and subject to rules which may be promulgated by the Attorney General, donate and deliver such devices as may be used for lawful purposes to any institution located within the county where seizure is made and which is under the control and operation of the federal government or of a charitable institution, or to any institution, wherever located, which is under the control and operation of the State of New Jersey or any of its political subdivisions.

An additional procedure for the forfeiture of such funds to the county treasurer is provided by N.J.S.A. 2A:152-9.1 to N.J.S.A. 2A:152-9.5. Whenever any money seized in connection with a gambling arrest has been on deposit with the county treasurer for more than two years from the date of the ultimate disposition of the charges, the county treasurer may make application to the county court for an order forfeiting said money to the sole use and gain of the county. N.J.S.A. 2A:152-9.1. N.J.S.A. 2A:152-9.2 provides that the county treasurer must give pubic notice of such application. A hearing is then held in a summary manner. As in N.J.S.A. 2A:152-9 and N.J.S.A. 2A:152-10, proof must be made to the satisfaction of the court that no action, then pending, has been filed in any court of competent jurisdiction seeking recovery of the money. N.J.S.A. 2A:152-9.3.

B. Narcotics

The forfeiture provisions as they pertain to narcotics are also deserving of special consideration.

N.J.S.A. 24A:21-35 provides for the forfeiture of many specifically enumerated items including all controlled dangerous substances manufactured or acquired in violation of the act, and any raw materials, equipment or containers used or intended for the use in the illegal manufacture of such substances. All conveyances (with the exception of common carriers not privy to the transaction) used or intended to be used to transport controlled dangerous substances will be subject to forfeiture if the criminal transaction in which they were involved was conducted with the knowledge or consent of the owner.[154]

The procedure by which the State can work a forfeiture upon narcotics-related contraband is outlined in N.J.S.A. 24:21-35(g). Notice must be given in accordance with the Rules of Court for an in rem action, and claimants of the property may then contest the seizure. Property determined to be contraband is forfeited to the to the use of the State.[155]

Conspicuously absent from the items specifically enumerated by the statute as contraband is currency. Moreover, the unpublished decision of the Appellate Division in State v. Noumair, Docket No. A-316-72, November 19, 1973, makes clear that the language of the statute is neither broad enough nor general enough to be construed as encompassing

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154 In State v. One (1) Ford Van Econoline, 154 N.J.Super. 326 (App.Div. 1977), rev'd 143 N.J.Super. 512 (Law Div. 1976), the court held that claimant, the registered owner of the vehicle, was not entitled to the exception from forfeiture provided by N.J.S.A. 24:21-35(4)(b), commonly referred to as the "innocent owner" exception. The statutory exception is unavailing where the registered owner allows his motor vehicle to be freely used by another who knowingly permits it to be used or uses it to transport a controlled dangerous substance for purposes of sale, regardless of the owner's innocence. The court further concluded that the 14 month delay between seizure of the vehicle and institution of the forfeiture action constituted a denial of due process of law, which justified a reversal of the judgment of forfeiture.

155 N.J.S.A. 24:21-35(e).

money. However, the court did not order the return of the seized currency. Rather the court held that defendant's motion for the return of the money should be governed by State v. Sherry, 46 N.J. 172 (1965).

In Sherry, defendant was indicted for the crimes of abortion and conspiracy to commit abortion. The abortion charge was dropped upon defendant's entry of a plea of non vult to the conspiracy. Sherry then moved for an order, in the criminal cause, directing Bergen County to return $2,719.50 seized during the search of her apartment. The county resisted the return of $2,500 alleging that the amount had been paid to defendant at the time of the abortion by the father of the pregnant girl. The trial court ordered the county to return the total amount of money which had been seized. The Appellate Division, with one judge dissenting, affirmed. The county thereafter appealed to the Supreme Court as of right.

In the Supreme Court, defendant contended that the money could not be forfeited in the absence of a statute expressly authorizing such a forfeiture, and that no such statute existed. While agreeing with defendant that no statute authorized the forfeiture of these funds, the court nevertheless refused to order the return of the money.

The court viewed the issue not as whether defendant's property could be the subject of a forfeiture because of the illegal use to which it had been put, but instead whether defendant could claim title to the fruit of an illegal act and invoke the court's aid to recover it from the seizing authority. Noting the well-established principle that the judicial process is unavailable to assist a wrongdoer in

reaping the benefits of his lawlessness, the court denied defendant's claim for the return of the money.

With regard to the forfeiture of contraband seized in connection with both gambling and narcotics violations, the question arises as to the effect of a finding that the materials were seized in violation of the Fourth Amendment. While some may interpret One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693 (1965) to hold that contraband may not be retained by the sovereign if seized in violation of the Fourth Amendment [Anno., 8 A.L.R.2d 473, 475 (1966)], case law, including decisions by the New Jersey Supreme Court, does not espouse that view. Rather, One 1958 Plymouth Sedan is read to hold only that evidence improperly seized cannot be used to prove that the objects sought to be confiscated were contraband.[156]

c. Firearms

The unlawful possession, use or acquisition of firearms results in forfeiture of the weapon to the State.[157] The statute provides that firearms so confiscated are to be surrendered to the county prosecutor or local police. The weapons are to be inventoried and destroyed when no longer needed for evidential purposes.

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156 Farley v. §168,400.97, 55 N.J. 31, 48-50 (1969); State v. Sherry, supra at 177-78; John Becall Imports Ltd. v. United States, 412 F.2d 586, 588 (1969). Cf. United States v. Davis, 346 F.Supp. 435, 443 (S.D.Ill. 1972).

157 N.J.S.A. 2A:151-16.

It was recently determined that the procedures utilized by the county prosecutor and the local and state police were in need of formalization. Therefore, the Division of Criminal Justice, in conjunction with the County Prosecutors Association, issued a directive which insures strict accountability with respect to all weapons confiscated in this State. Succinctly, the guidelines provide that in any crime involving the use of a firearm or in which the firearm may be deemed as evidence the State Police Ballistics Unit will conduct a test firing of the weapon. However, those weapons which are confiscated or surrendered and are unrelated to a specific investigation should not be forwarded to the State Police Ballistics Unit. The State Police do not wish, however, to discourage any law enforcement agency from submitting firearms to the laboratory for examination and tests necessary for the proper investigation and prosecution of criminal charges. However, every effort should be made to utilize the ballistics laboratories in Essex and Bergen Counties and Newark.

Firearms which are retained for evidentiary purposes must be inventoried and stored in the evidence vault of the county prosecutor. Periodic review of the office's record keeping system should occur to ensure accountability. Upon disposition of the case the prosecutor will be responsible for implementing uniform procedures either for the return of the firearms to their lawful owners or for their destruction. The State Police will accept all firearms for destruction other than those to be returned to their owners. One exception is the provision which allows law enforcement agencies to retain

weapons if they have a current actual need for utilization of such weapons for law enforcement purposes. However, those firearms which are retained should be of the calibers and types which are normally used for law enforcement purposes. In the event that a local agency determines that the standards for retention have been met, the county prosecutor and the State Police Ballistics Unit should be so notified and provided on a regular basis with a written record of retained firearms.

Adherence to the statutory and regulatory provisions governing disposition, return, forfeiture and retention of property will promote public confidence in law enforcement.

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