REPORT OF THE

SUPREME COURT COMMITTEE ON

MUNICIPAL COURT PRACTICE

2021 - 2023 TERM

JANUARY 20, 2023

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I. Introduction

The Municipal Court Practice Committee ("Committee") recommends that the Supreme Court adopt the proposed rule amendments contained in this report. The Committee also reports on other issues reviewed in which it concluded no rule change was appropriate. Where rule changes are proposed, deleted text is bracketed **[as such],** and added text is underlined **as such**. For context and ease of understanding, the full text of each rule with proposed changes has been provided herein.

II. Proposed Part VII Rule Amendments Recommended for Adoption

A. Proposed Amendments to Guideline 4 (Limitation) of the Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey, (Appendix to Part VII Rules)

The Committee proposes amendments to Guideline 4 (Limitation) of the Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey. Guideline 4 prohibits plea agreements where the defendant is charged with drunk driving or certain drug offenses. Those offenses are: driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50); possession of marijuana or hashish (N.J.S.A. 2C:35-10(a)(4)); being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10(b)); and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).

The Marijuana Decriminalization Law, L. 2021, c. 19 (codified in relevant part at N.J.S.A. 2C:35-23.1 and N.J.S.A. 2C:52-6.1), legalizes and regulates cannabis use and possession for adults 21 years and older, decriminalizes possession of small amounts of marijuana and hashish possession and establishes new, more lenient penalties for the distribution of these substances. The Committee considered how Guideline 4's prohibition on plea bargaining in certain drug offenses should be amended to reflect the changed legal status of marijuana. The Committee considered the Supreme Court's July 1, 2021 Order setting forth

automated processes for the dismissal, vacating, and expungement of certain marijuana and hashish cases involving specified offenses as enumerated in the Marijuana Decriminalization Law that are no longer illegal under state law. As of February 22, 2021, simple possession of 6 ounces or less of marijuana and 17 grams or less of hashish[1] (N.J.S.A. 2C:35-10(a)(4)(b)), being under the influence only for marijuana or hashish (N.J.S.A. 2C:35-10(b)), and possession of drug paraphernalia for marijuana or hashish (N.J.S.A. 2C:36-2) are no longer illegal.

By way of background, in its 2015-2017 Municipal Court Practice Committee Report, the Committee proposed several amendments to Guideline 4. The Report included a historical review of the development of plea bargaining restrictions in the Municipal Courts. The 2015-2017 Committee's proposed amendments were precipitated by the request of the American Civil Liberties Union (ACLU) that the Court reconsider the portions of Guideline 4 that prohibit Municipal Courts from accepting plea agreements in possession of marijuana cases. The ACLU expressed concern over the numerous adverse consequences faced by those convicted of minor possession charges, including both the short and long-term ramifications. The 2015-2017 Committee voted in favor of removing the ban against plea bargaining from Guideline 4 for possession of marijuana or

[1] Possession of more than 6oz of marijuana and more than 17 grams of hashish are fourth degree crimes (N.J.S.A. 2C:25-10(a)(3)(b)).)

hashish as well as related drug offenses. That Committee also recommended the removal of N.J.S.A. 2C:35-10(b) and N.J.S.A. 2C:36-2 offenses from the ban on plea bargaining. However, the Court decided not to act on either recommendation.

During the 2021-2023 term, the Committee also considered whether additional changes to Guideline 4 should be made.

The Committee makes the following recommendations concerning Guideline 4.

1. **Amend Guideline 4, paragraph B. to remove the ban on plea bargaining on possession of marijuana or hashish (formerly N.J.S.A. 2C:35-10a(4)); being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10(b)(1)); and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2)**

The Committee recommends removing Guideline 4's ban on plea bargaining for possession of marijuana or hashish (N.J.S.A. 2C:35-10(a)(4)) in light of the recent decriminalization of marijuana as discussed above.

The Committee also recommends removing the ban on plea bargaining for being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10(b)), and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).

Regarding its recommendation to remove the ban on plea bargaining for the disorderly persons offenses of being under the influence of a controlled dangerous

substance or its analog (N.J.S.A. 2C:35-10(b))[2], and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2)[3], the Committee recognized that these drug offenses, which typically are downgraded to the municipal courts, were not decriminalized under the marijuana legislation. However, the Committee was persuaded by the fact that unlike a DWI charge, these non-marijuana disorderly persons offenses do not involve operation of a vehicle and the attendant safety concerns. In its discussion, the Committee also noted that most N.J.S.A. 2C:36-2 charges are dismissed. Records of the Administrative Office of the Courts show that of the 17,593 disposed cases for use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2 and -2A) from March 2021 through October 2021, 17,214 were dismissed in accordance with the Supreme Court's July 1, 2021 order.

In recommending the removal of the ban on plea bargaining for other non-marijuana offenses involving intent to use or possess drug paraphernalia, the Committee considered that it can be very difficult to prove drug paraphernalia

[2] N.J.S.A. 2C:35-10(b)(1)) makes it unlawful for any person to use or be under the influence of any controlled dangerous substance, or its analog, not including marijuana or hashish, for a purpose other than the treatment of sickness or injury as lawfully prescribed by a physician.

[3] N.J.S.A. 2C:36-2 makes it unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance, controlled substance analog or toxic chemical, other than when used, or possessed with intent to use, for ingesting, inhaling, or otherwise introducing marijuana or hashish into the body.

offenses due to lack of lab results. The Committee also discussed that there are no longer the same concerns over the lack of professionalism in the municipal courts that prevailed decades ago that would call into question the ability of municipal court judges to make appropriate decisions on plea bargains and prosecutors to engage in the plea bargain process.

The Committee also considered whether the ban on plea bargaining DWI cases should be removed from Guideline 4. A majority of the Committee ultimately determined that the ban should remain. A summary of the Committee's discussion and conclusions are found in Section III.A. of this report, infra. The Committee further considered whether Guideline 4 should explicitly include a reference to 'permitting DWI' within the ban on plea bargaining DWI matters, pursuant to the holding in State v. Hessen,145 N.J. 441 (1996). The members determined there was no need to amend the guideline in this fashion. A review of the discussion is included in Section III.B., infra.

2. Remove Guideline 4.B. language that references a judge's discretion (on the recommendation of the prosecutor) to dismiss all remaining Chapter 35 or 36 charges arising from the same factual transaction if the defendant is charged with more than one violation under those chapters arising from the same factual transaction and pleads guilty to one charge or seeks a conditional discharge

The Committee recommends removing the paragraph in Guideline 4.B. that references a judge's discretion (on the recommendation of the prosecutor) to dismiss all remaining Chapter 35 or 36 charges arising from the same factual

transaction if the defendant is charged with more than one violation under those chapters arising from the same factual transaction and pleads guilty to one charge or seeks a conditional discharge.

Since the Committee recommends removing the ban on plea bargaining on certain drug offenses, the language concerning the judge's discretion to dismiss remaining Chapter 35 or 36 charges becomes immaterial and should be removed.

3. Retain the ability to plea bargain in DWI school zone cases but with the modification that cases cannot be plea bargained where there is an accident "with an injury"

Violations for driving while intoxicated in a school zone/school crossing pursuant to subsection (g) of N.J.S.A. 39:4-50 were deleted by amendment, P.L.2019, c.248. Given the statutory change, the Committee considered whether to remove the language in Guideline 4.B. that references a judge's discretion (on the recommendation of the prosecutor) to dismiss a school zone/school crossing violation (N.J.S.A. 39:4-50(g)) if the defendant pleads guilty to a DWI charge (N.J.S.A. 39:4-50(a)), arising out of the same factual transaction, except in cases involving an accident or those that occur when school properties are being utilized was necessary.

The Committee considered that a recommendation to remove the school zone/school crossing language could affect pending cases. If this provision were removed and the defendant pled guilty to a DWI charge, these defendants would

no longer be able to plea bargain their school zone/crossing violation. Although these violations were deleted by legislative amendment, the Committee concluded that removing the language in Guideline 4 that references a judge's discretion to dismiss a school zone/school crossing violation if the defendant pleads guilty to a DWI charge may adversely affect defendants with pending cases. Thus, the Committee recommends retaining the language in Guideline 4.B. referencing a judge's discretion to dismiss a school zone/school crossing violation.

The Committee also considered modifying the exception language (i.e., Except in cases involving an accident or those that occur when school properties are being utilized….") with respect to the type of accident in those cases where the judge does not have the discretion to dismiss the charge. The Committee recommends narrowing the types of accident cases that cannot be plea bargained to include only those accidents with injuries. This modification would allow plea bargaining (with consent of prosecutor), for example, in those minor accident/property damage cases where a person strikes a parked car and there is no injury. In other words, with this modification, cases of this type involving an "accident" would be able to be plea bargained somewhat more broadly than currently, as long as there is no injury.

Therefore, the Committee recommends the following amendments, set forth within the full text of the Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey.

GUIDELINE 4. LIMITATION.

No plea agreements whatsoever will be allowed in [drunken] driving while under the influence of liquor or drugs [or certain drug] offenses (N.J.S.A. 39:4-50).

[Those offenses are:

A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and,

B. Possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4)); being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10b); and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).]

No plea agreements will be allowed in which a defendant charged for a violation of N.J.S.A. 39:4-50 with a blood alcohol concentration of 0.10% or higher seeks to plead guilty and be sentenced under section a(1)(i) of that statute (blood alcohol concentration of .08% or higher, but less than 0.10%).

If a defendant is charged with a second or subsequent offense of driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.4a) arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50 offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge. A refusal charge in connection with a first offense N.J.S.A. 39:4-50 charge shall not

be dismissed by a plea agreement, although a plea to a concurrent sentence for such charges is permissible.

Except in cases involving an accident with an injury or those that occur when school properties are being utilized, if a defendant is charged with driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50(a)) and a school zone or school crossing violation under N.J.S.A. 39:4-50(g), arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50(a) offense, the judge, on the recommendation of the prosecutor, may dismiss the N.J.S.A. 39:4-50(g) charge.

[If a defendant is charged with more than one violation under Chapter 35 or 36 of the Code of Criminal Justice arising from the same factual transaction and pleads guilty to one charge or seeks a conditional discharge under N.J.S.A. 2C:36A-1, all remaining Chapter 35 or 36 charges arising from the same factual transaction may be dismissed by the judge on the recommendation of the prosecutor.]

Nothing contained in these limitations shall prohibit the judge from considering a plea agreement as to the collateral charges arising out of the same factual transaction connected with any [of the above enumerated offenses in sections A and B of this Guideline] driving under the influence of liquor or drugs offense (N.J.S.A. 39:4-50).

The judge may, for certain other offenses subject to minimum mandatory penalties, refuse to accept a plea agreement unless the prosecuting attorney represents that the possibility of conviction is so remote that the interests of justice require[s] the acceptance of a plea to a lesser offense.

Note: Guidelines and Comment adopted June 29, 1990, simultaneously with former Rule 7:4-8 ("Plea Agreements") to be effective immediately; as part of 1997 recodification of Part VII rules, re-adopted without change as Appendix to Part VII and referenced by Rule 7:6-2 ("Pleas, Plea Agreements"), October 6, 1997 to be effective February 1, 1998; Guideline 4 amended July 5, 2000 to be effective September 5, 2000; Guidelines 3 and 4 amended July 28, 2004 to be effective September 1, 2004; Guideline 4 amended June 7, 2005 to be effective July 1, 2005; Guideline 4 amended June 15, 2007 to be effective September 1, 2007; Guideline 3 amended July 16, 2009 to be effective September 1, 2009; Guideline 3 amended July 30, 2021 to be effective September 1, 2021; Guideline 4 amended _____ to be effective _____.

B. Proposed Amendments to R. 7:10-2(g) (Petition to Obtain Relief from an Enhanced Custodial Term Based on a Prior Conviction) as requested by the Court in its referral to the Municipal Court Practice Committee in State v. Konecny, 250 N.J. 321 (2022)

R. 7:10-2(g) governs two types of post-conviction relief (PCR) that can be sought in municipal courts: traditional post-conviction relief set forth in R. 7:10-2(a))[4] and post-conviction relief under State v. Laurick, 120 N.J. 1 (1990), commonly referred to as a "Laurick application." At the request of the Court in State v. Konecny, 205 N.J. 321, 345 (2022), the Committee discussed how R. 7:10-2(g) should be amended to clarify that the relief sought in paragraph (g) is relief pursuant to the Court's decision in Laurick only (i.e., prior uncounseled convictions), and not traditional PCR relief.

1. Overview of State v. Laurick, 120 N.J. 1 (1990) and evolution of Court Rules governing post-conviction relief

In State v. Laurick, 120 N.J. 1 (1990), the Court held that prior **uncounseled** convictions for driving while intoxicated (DWI) cannot be used to enhance a custodial sentence for a *second or subsequent DWI conviction*. A prior **uncounseled** DWI conviction may only establish repeat offender status for purposes of the enhanced penalty provisions of the DWI laws of the State of New Jersey. The Court recognized that the Part VII Court Rules did not explicitly

[4] The provisions of R. 7:10-2(a) were derived from the Criminal Part's corresponding R. 3:22, which set forth the grounds for a petition for PCR relief, e.g., ineffective assistance of counsel.

provide for PCR in municipal court, although they could encompass such a proceeding.

In essence, the Laurick decision initially authorized the traditional post-conviction relief procedure in municipal court currently set forth in R. 7:10-2(a). Thereafter, in 1997, the Court adopted R. 7:10-2, which formally set forth the general procedures for PCR applications in municipal court.[5]

In State v. Hrycak, 184 N.J. 351, 362 (2005), the Court reaffirmed its decision in Laurick holding: "in the context of repeat DWI offenses, the enhanced administrative penalties and fines may constitutionally be imposed but that in the case of repeat DWI convictions based on uncounseled prior convictions, the actual period of incarceration imposed may not exceed that for any counseled DWI convictions."

On June 15, 2007, the Court adopted a new paragraph, R. 7:10-2(g), which specifically governs post-conviction relief under Laurick, commonly referred to as a "Laurick application." With this amendment, R. 7:10-2 now recognized the second type of relief: Laurick relief, capable of being sought in a PCR proceeding in municipal court. See State v. Schadewald, 400 N.J. Super. 350, 355-56 (App. Div. 2007).

[5] 2004-2007 Municipal Court Practice Committee Report

The distinction between traditional PCR relief under R. 7:10-2(a) and Laurick relief under R. 7:10-2(g) is worth noting. Traditional PCR is sought to vacate the prior conviction entirely and return the case back to a plea of not guilty; it may result in a retrial of the entire action, a modification of the sentence, or a reentry of a plea of guilty. Further, traditional post-conviction relief must be filed within five years after the entry of judgment of conviction or imposition of sentence[6], unless it falls under an exception set forth within R. 7:10-2(b). A petition for Laurick relief pursuant to paragraph (g), however, is filed when the defendant is seeking to have an enhanced custodial sentence reduced on a subsequent conviction because the defendant was not advised of the right to counsel or did not properly waive the right to counsel. Laurick relief, which is only available to defendants whose DWI convictions were uncounseled, does not allow for vacating a conviction. Unlike a petition for traditional PCR relief, a Laurick application may be filed at any time. The Court in State v. Patel, 239 N.J. 424, 447(2019) directed the removal of this time constraint via an amendment to subparagraph (g)(2).

The Court in Patel also clarified that *both* indigent and nonindigent defendants who challenge a custodial enhancement from a prior uncounseled DWI

[6] The five-year time bar has been relaxed for defendants convicted in DWI cases under State v. Cassidy, 235 N.J. 482, 498 (2018).

have the burden of proving they were uncounseled but are not required to establish that the outcome would have been different had they been represented. Id. at 443-44, 448.

2. Overview of State v. Konecny, 250 N.J. 321 (2022)

On April 5, 2022, the Court issued its opinion in State v. Konecny, 250 N.J. 321 (2022) where it considered whether Laurick relief also prohibits prior uncounseled DWI convictions from serving as predicates to increase a custodial sentence for a subsequent driving while suspended (DWS) conviction under N.J.S.A. 2C:40-26(b) ("Section 26(b)")[7].

The defendant, Michael Konecny, was convicted of DWI in 1986, and he pled guilty to another DWI offense in 1999. Konecny, 250 N.J. at 327. In 2014, he was arrested and charged with offenses including DWI and one count of refusal to take a breathalyzer test. Id. at 327-328. In 2016, he appeared in municipal court and pled guilty to the refusal charge and his license was suspended for two years. Id. at 328. On three separate occasions during that period of suspension he drove

[7] N.J.S.A. 2C:40-26(b) provides that "It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of [N.J.S.A.] 39:3-40, if the actor's license was suspended or revoked for a second or subsequent violation of [NJSA] 39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a). A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment."

and was stopped by police, resulting in three separate DWS charges under Section 26(b). Ibid.

The defendant then filed PCR motions regarding his 1999 DWI conviction as well as his 2016 Refusal conviction alleging ineffective assistance of counsel. Id. at 328. Two municipal court judges in separate courts signed orders stating that the convictions were not to be used to enhance any subsequent conviction under either N.J.S.A. 39:3-40 (Driving while Suspended)[8] or Section 26(b), pursuant to Laurick. Konecny, 250 N.J. at 329-30. The Superior Court, however, found that Laurick relief was limited to sentencing for DWI convictions and could not be extended to Section 26(b) convictions. Id. at 331. The defendant was sentenced to 180 days' imprisonment and the Appellate Division affirmed. Id. at 330-31. The Court granted certification. Id. at 332.

The Konecny Court held that Laurick relief, and the principles underlying the prohibition against the use of uncounseled DWI convictions, extend to the enhanced sentencing scheme in Section 26(b) DWS convictions. Id. at 337-38, 346. Thus, the Court held that prior uncounseled convictions cannot be used as

[8] N.J.S.A. 39:3-40 provides in part that "No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition. No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation."

predicate to increase a custodial sentence for a Section 26(b) DWS conviction. Id. at 338. The Court explained, however, that defendant Konecny was not entitled to Laurick relief because he had counsel during his prior proceedings. Ibid. The Court emphasized that Laurick relief is available only to defendants who were not represented by counsel and who were not advised of their right to counsel during their DWI-related prosecutions. Id. at 339.

The Court explained: "Although N.J.S.A. 39:3-40 and N.J.S.A. 2C:40-26 are not found within the same title of the Code, they operate in tandem to establish escalating consequences for the same conduct -- driving while suspended -- based on a defendant's number of past DWI or Refusal convictions." Id. at 337. The Court noted that Section 26(b) is not a purely distinct offense as it specifically incorporates N.J.S.A 39:3-40 by reference. Ibid. The Court added, "Although the facts of Laurick dealt with DWI convictions, nothing in the opinion limited its right-to-counsel principles to DWI matters." Id. at 338.

Referencing the 2004-2007 Municipal Court Practice Committee Report, the Court discussed the distinction in R. 7:10-2 between traditional post-conviction relief and Laurick post-conviction relief. In that report, the Municipal Court Practice Committee explained that the nature of the relief sought in a Laurick application is qualitatively different than the relief sought in a conventional post-conviction relief proceeding. In the latter category of applications, the relief

sought is a vacating of the conviction. In a Laurick application, the conviction is left in place, however it may not be used to enhance the custodial component of a sentence related to a future conviction for a violation of the same statute. The Court emphasized that R. 7:10-2(g), adopted in 2007, is specifically reserved for relief pursuant to Laurick for prior uncounseled convictions, not traditional PCR which is subject to the five-year time limitation of R. 7:10-2(b). Konecny, 250 N.J. at 345.

3. Supreme Court's request to Municipal Court Practice Committee in Konecny to propose an amendment to R. 7:10-2(g)

In Konecny, the Court requested the Municipal Court Practice Committee propose an amendment to R. 7:10-2(g) that would clarify that the relief sought in paragraph (g) is relief pursuant to the Court's decision in Laurick only. The Court stated:

> We detail the history of the Rule to make clear that Rule 7:10-2(g) is specifically reserved for relief pursuant to Laurick for prior uncounseled convictions, not traditional PCR which is subject to the five-year time limitation of Rule 7:10-2(b). A plain reading of the current version of Rule 7:10-2(g), however, does not explicitly reference Laurick or note that such relief is limited to situations in which a defendant was completely without counsel and not advised of his or her right to counsel. Such relief, as we have discussed at length, is not the same as a traditional ineffective assistance of counsel PCR claim. To avoid confusion regarding the time limitation applicable to traditional PCR with the ability to file a Laurick petition at any time, we ask the Municipal Court Practice Committee to propose an amendment to Rule 7:10-2(g) that would make clear that the relief

> sought in that section is relief pursuant to this Court's decision in Laurick only, and not traditional PCR.

Konecny, 250 N.J. at 345.

The Committee recognized that the current version of R. 7:10-2(g) does not explicitly reference Laurick or note that such relief is limited to situations in which a defendant was completely without counsel and not advised of his or her right to counsel.[9] The Committee concluded that while paragraph (g) has been interpreted to provide for Laurick relief, clarifying amendments to that paragraph, as requested by the Court, are needed.

4. Proposed Amendments to R. 7:10-2(g) clarifying that Laurick applies only to petitions to obtain relief from an enhanced custodial term based on a prior uncounseled conviction

The Committee recommends several amendments to R. 7:10-2(g) that clarify that this paragraph provides for relief pursuant to the Court's decision in Laurick only, i.e., a conviction in which a defendant was not represented by counsel and not advised of the right to counsel. First, the Committee recommends adding "uncounseled" to the title/caption of R. 7:10-2(g) as follows: "Petition to Obtain Relief from an Enhanced Custodial Term Based on a Prior Uncounseled Conviction".

[9] Gann Law Books, the publisher of the N.J. Court rules, references Laurick in the Comment section of R. 7:10-2.

Second, the Committee recommends clarifying in subparagraph (g)(1) (Venue) that a post-conviction petition to obtain relief from an enhanced custodial term based on a prior conviction is specifically for defendants not represented by counsel and not advised of the right to counsel or, if indigent, the right to have counsel assigned.

The Committee's recommendation to include indigent defendants in subparagraph (g) is based upon the Court's guidance to non-indigent and indigent DWI defendants in State v. Patel, 239 N.J. 424 (2019). As discussed above, in Patel, the Court set forth the requirements that non-indigent and indigent defendants in an earlier uncounseled DWI proceeding must establish to secure relief from an enhanced custodial sentence. Id. at 443-44. With respect to an indigent defendant, the defendant must establish that in the earlier uncounseled DWI proceeding: (1) they were not advised and did not know of their right to appointed counsel, (2) they were entitled to the appointment of counsel under the applicable financial means test, R. 7:3-2(b), and (3) had they been properly informed of their rights, they would have accepted appointed counsel. Ibid.

Thus, the Committee's recommended amendment is as follows: "Venue. A post-conviction petition to obtain relief from an enhanced custodial term based on a prior conviction in which a defendant was not represented by counsel and not

advised of the right to counsel or, if indigent, the right to have counsel assigned shall be brought in the court where the prior conviction was entered."

Third, the Committee recommends adding new subparagraph (g)(4) that describes the grounds required for Laurick relief. The new subparagraph would complement R. 7:10-2(c) (Grounds), which sets forth the grounds for filing a petition for traditional post-conviction relief. New subparagraph (g)(4) would provide as follows: "Grounds. A post-conviction petition to obtain relief from an enhanced custodial term based on a prior conviction is cognizable only where a defendant was not represented by counsel and not advised of the right to counsel or, if indigent, the right to have counsel assigned."

Lastly, the Committee recommends redesignating current subparagraph (4) (Appeal) to subparagraph (5).

In its discussions on recommending rule language that would clarify that R. 7:10-2(g) pertains to Laurick relief only, the Committee also discussed whether the Court wanted the Committee to delineate the specific offenses that carry an enhanced custodial term that would qualify for Laurick relief where the defendant was uncounseled in a prior conviction on those offenses. The Committee questioned whether the broad language in R. 7:10-2(g) could be interpreted to allow a defendant to petition to obtain relief from *any* offense that carries an enhanced custodial term based on a prior conviction. The Committee concluded

that Laurick relief applies only to DWI convictions, and by extension, DWS convictions resulting from a DWI or refusal conviction.

The Committee was of the view that the Court's charge in Konecny was not to expand the application of Laurick relief to other offenses, but rather to clarify that Laurick relief applied to driving while suspended convictions that resulted from a DWI or refusal conviction. Several Committee members noted that in their legal experience they have only seen a Laurick petition in connection with a prior uncounseled DWI conviction to establish repeat-offender status for the purpose of the enhanced penalty provisions of the DWI laws, and not in connection with a prior uncounseled driving while suspended N.J.S.A. 39:3-40 conviction.

The Committee also concluded that paragraph (g) should not specifically refer to prior DWI convictions as the current rule is understood to apply to prior uncounseled DWI convictions only. Thus, the Committee was not in favor of expanding the application of the rule to other offenses that carry increased penalties (i.e., enhanced custodial term) for subsequent offenses.

Therefore, the Committee recommends the following amendments, set forth within the full text of the rule.

Rule 7:10-2. Post-Conviction Relief

(a) Petition for Relief. A person convicted of an offense may, pursuant to this rule, file with the municipal court administrator of the municipality in which the conviction took place, a petition for post-conviction relief captioned in the action in which the conviction was entered.

(b) Limitations and Exclusiveness.

(1) A petition to correct an illegal sentence may be filed at any time.

(2) A petition based on any other grounds shall not be accepted for filing more than five years after entry of the judgment of conviction or imposition of the sentence sought to be attacked, unless it alleges facts showing that the delay in filing was due to defendant's excusable neglect.

(3) A petition for post-conviction relief shall be the exclusive means of challenging a judgment of conviction, except as otherwise required by the Constitution of New Jersey, but it is not a substitute for appeal from a conviction or for a motion incident to the proceedings in the trial court, and may not be filed while appellate review or the filing of a motion in the municipal court is available.

(c) Grounds. A petition for post-conviction relief is cognizable if based on any of the following grounds:

(1) substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of New Jersey; lack of jurisdiction of the court to impose the judgment rendered on defendant's conviction;

(2) imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law; or

(3) any ground previously available as a basis for collateral attack on a conviction by habeas corpus or any other common law or statutory remedy.

(d) Bar of Grounds Not Raised in Prior Proceedings; Exceptions.

(1) The defendant is barred from asserting in a proceeding under this rule any grounds for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of R. 3:22-4, or in any appeal taken in any of those proceedings, unless the court on motion or at the hearing finds that:

(A) the grounds for relief not previously asserted could not reasonably have been raised in any prior proceeding;

(B) enforcement of the bar would result in fundamental injustice; or

(C) denial of relief would be contrary to the Constitution of the United States or of New Jersey.

(2) A prior adjudication on the merits of any grounds for relief asserted in the petition is conclusive, whether made in the proceedings resulting in the conviction or any prior post-conviction proceeding, or in any appeal taken from those proceedings.

(e) Assignment of Counsel. A defendant may annex to the petition a sworn statement asserting indigency in the form (Form 5A) prescribed by the Administrative Director of the Courts, which form shall be furnished by the municipal court administrator. If the court finds that the defendant is indigent as herein provided, and that the original conviction involved a consequence of magnitude, it shall order counsel assigned to represent defendant and shall further order a transcript of testimony of any proceeding shown to be necessary in establishing the grounds of relief asserted. Absent a showing of good cause, which shall not include lack of merit of the petition, the court shall not substitute new assigned counsel. If counsel is assigned, the court shall not thereafter substitute new assigned counsel absent a showing of good cause, which shall not, however, include lack of merit of the petition.

(f) Procedure.

(1) The municipal court administrator shall make an entry of the filing of the petition in the proceedings in which the conviction took place, and if it is filed pro se, shall forthwith transmit a copy to the

municipal prosecutor. An attorney filing the petition shall serve a copy on the municipal prosecutor before filing.

(2) The petition shall be verified by defendant and shall set forth with specificity the facts upon which the claim for relief is based, the legal grounds of the complaint asserted and the particular relief sought. The petition shall include the following information:

(A) the date, docket number and contents of the complaint upon which the conviction is based and the municipality where filed;

(B) the sentence or judgment complained of, the date it was imposed or entered, and the name of the municipal court judge then presiding;

(C) any appellate proceedings brought from the conviction, with copies of the appellate opinions attached;

(D) any prior post-conviction relief proceedings relating to the same conviction, including the date and nature of the claim and the date and nature of disposition, and whether an appeal was taken from those proceedings and, if so, the judgment on appeal;

(E) the name of counsel, if any, representing defendant in any prior proceeding relating to the conviction, and whether counsel was retained or assigned; and

(F) whether and where defendant is presently confined. A separate memorandum of law may be submitted.

(G) In addition, the moving papers in support of such an application shall include, if available, records related to the underlying conviction, including, but not limited to, copies of all complaints, applications for assignment of counsel, waiver forms and transcripts of the defendant's first appearance, entry of guilty plea and all other municipal court proceedings related to the conviction sought to be challenged. The petitioner shall account for any unavailable records by way of written documentation from the municipal court administrator or the custodian of records, as the case may be.

(3) Amendments of the petitions shall be liberally allowed. Assigned counsel may, as a matter of course, serve and file an amended petition within 25 days after assignment. Within 30 days after service of a copy of the petition or amended petition, the municipal prosecutor shall serve and file an answer to the petition or move on ten days' notice for dismissal. If the motion for dismissal is denied, the government's answer shall be filed within fifteen days after entry of the order denying the dismissal.

(4) A defendant in custody shall be present in court if oral testimony is adduced on a material issue of fact within the defendant's

personal knowledge. A defendant in custody may otherwise be present in court only in the judge's discretion.

(5) In making a final determination on a petition, either on motion for dismissal or after hearing, the court shall state separately its findings of fact and conclusions of law and shall enter judgment or sentence in the conviction proceedings and any appropriate provisions as to rearraignment, retrial, custody, bail, discharge, correction of sentence or as may otherwise be required.

(g) Petition to Obtain Relief from an Enhanced Custodial Term Based on a Prior Uncounseled Conviction.

(1) Venue. A post-conviction petition to obtain relief from an enhanced custodial term based on a prior conviction in which a defendant was not represented by counsel and not advised of the right to counsel or, if indigent, the right to have counsel assigned shall be brought in the court where the prior conviction was entered.

(2) Time for Filing. A petition seeking relief under this paragraph may be filed at any time.

(3) Procedure. A petition for post-conviction relief sought under this [section] paragraph shall be in writing and shall conform to the requirements of Rule 7:10-2(f). In addition, the moving papers in support of

such an application shall include, if available, records related to the underlying conviction, including, but not limited to, copies of all complaints, applications for assignment of counsel, waiver forms and transcripts of the defendant's first appearance, entry of guilty plea and all other municipal court proceedings related to the conviction sought to be challenged. The petitioner shall account for any unavailable records by way of written documentation from the municipal court administrator or the custodian of records, as the case may be.

(4) Grounds. A post-conviction petition to obtain relief from an enhanced custodial term based on a prior conviction is cognizable only where a defendant was not represented by counsel and not advised of the right to counsel or, if indigent, the right to have counsel assigned.

[(4)](5) Appeal. Appeals from a denial of post-conviction relief from the effect of a prior conviction shall be combined with any appeal from proceedings involving the repeat offense. Appeals by the State may be taken under R. 3:23-2(a).

Note: Source-Paragraph (a): R. (1969) 3:22-1; paragraph (b)(1),(2): R. (1969) 3:22-12; paragraph (b)(3): R (1969) 3:22-3; paragraph (c): R. (1969) 7:8-1, 3:22-2; paragraph (d)(1): R. (1969) 3:22-4; paragraph (d)(2): R. (1969) 3:22-5; paragraph (e): R. (1969) 3:22-6(a),(c),(d); paragraph (f)(1): R. (1969) 3:22-7; paragraph (f)(2): R. (1969) 3:22-8; paragraph (f)(3): R. (1969) 3:22-9; paragraph (f)(4): R. (1969) 3:22-10; paragraph (f)(5): R. (1969) 3:22-11. Adopted October 6, 1997 to be effective February 1, 1998; new subparagraph (f)(2)(G) and new paragraph (g) adopted June 15, 2007 to be effective September 1, 2007; paragraph (g)(2)

amended July 16, 2009 to be effective September 1, 2009; paragraph (g)(2) amended August 7, 2019 to be effective immediately; paragraph (g) caption amended, subparagraph (g)(1) and (g)(3) text amended, subparagraph (g)(4) redesignated as subparagraph (g)(5), and new subparagraph (g)(4) added_____to be effective_____.

C. Proposed Amendment to R. 7:4-1 to align with the provisions of Administrative Directive #04-22, "Municipal Court Bench Warrants - Immediate Release on Recognizance of Certain Defendants" (May 16, 2022)

1. Administrative Director Glenn A. Grant's referral to the Municipal Court Practice Committee requesting that the Committee consider potential amendments to Part VII Court Rules to align with the provisions of Administrative Directive #04-22

In a June 3, 2022 letter to Committee Chair Judge James Newman, P.J.M.C. Administrative Director Glenn A. Grant requested that the Committee review and offer a recommendation as to whether any Rules of Court should be relaxed or amended to align with Administrative Directive #04-22, "Municipal Court Bench Warrants - Immediate Release on Recognizance of Certain Defendants" (May 16, 2022) or to avoid any perception of inconsistency between the Court Rules and the directive.

Directive #04-22 establishes a uniform, statewide process for handling of individuals with outstanding municipal court bench warrants. It permits all defendants (except those charged with a domestic violence offense) who are subject to (1) municipal court bench warrants of $500 or less and (2) are unable to post bail, or any portion of bail, to either be released on such bail that can be posted or released ROR. The directive does not apply to defendants arrested on a

complaint-warrant (CDR-2) or a bench warrant with a bail amount greater than $500.

Importantly, the directive provides law enforcement officers the authority to effectuate the immediate release of a defendant covered by the directive without the need to contact or receive approval from an authorized judicial officer (judge, authorized municipal court administrator or authorized deputy court administrator).

On May 22, 2022, the New Jersey Attorney General issued Directive No. 2022-6 - Municipal Court Bench Warrants which provides law enforcement with protocols for implementing Directive #04-22. Under the Attorney General's guidance, law enforcement will no longer subject individuals encountered with outstanding municipal court bench warrants with bail amounts of $500 or less to a custodial arrest, a search or handcuffing (subject to limited exceptions). Those individuals will be given notice of a new court date and released on scene, on their own recognizance. Law enforcement must complete the New Jersey Bail Recognizance form immediately. No bail payments may be accepted on scene, even where individuals with qualifying warrants are able to pay bail partially or in full.

2. Proposed Amendment to R. 7:4-1(b)

The Committee recommends amending R. 7:4-1(b) to specifically set forth law enforcement's new authority to release a defendant covered under Directive #04-22 who is unable to post all or a portion of the $500 or less bail amount. The Committee notes that paragraph (a) focuses on Criminal Justice Reform (CJR) defendants, whereas paragraph (b) addresses all other defendant's, i.e., non-CJR defendants charged with a disorderly persons, petty disorderly persons, or other lesser offense or who are brought before the court on a bench warrant for failure to appear. The Committee's proposed amendment, placed after the first sentence of paragraph (b), is as follows: "Additionally, law enforcement officers who encounter defendants on outstanding municipal court bench warrants are authorized to effectuate the immediate release of defendants on defendant's own recognizance pursuant to procedures promulgated by the Administrative Director of the Courts." After discussion, the Committee decided not to include the dollar amount of bail or other specifics in order to provide flexibility, should the policies in this area change in the future. The members felt that it was sufficient to reference the delegation of authority from the Judiciary to law enforcement to effectuate release of defendants on their own recognizance in certain instances.

The Committee considered but rejected adding similar language to the definition section in paragraph (b) after "All other defendants include:..." The

Committee concluded that delineating law enforcement's authority to effectuate the immediate release of defendants ROR in two locations within paragraph (b) would be unnecessary.

3. Discussion of potential amendments to R. 7:4-2 and R. 7:4-3

The Committee discussed whether any amendments should be made to R. 7:4-2(c) (Authority to Take a Recognizance) and R. 7:4-3(a) (Deposit of Bail; Execution of Recognizance) in light of Administrative Directive #04-22. The Committee concluded that no changes to R. 7:4-2(c) and R. 7:4-3 were necessary.

The Committee recommends the following amendments to R. 7:4-1(b), set forth within the full text of the rule.

7:4-1. Right to Pretrial Release

(a) Defendants Charged on Complaint-Warrant (CDR-2) with Disorderly Persons Offenses. Except as otherwise provided by R. 3:4A (pertaining to preventative detention), defendants charged with a disorderly persons offense on an initial Complaint-Warrant (CDR-2) shall be released before conviction on the least restrictive non-monetary conditions that, in the judgment of the court, will reasonably ensure their presence in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, pursuant to R. 3:26-1(a)(1). In accordance with Part III, monetary bail may be set for a defendant arrested on a disorderly persons offense on an initial Complaint-Warrant (CDR-2) only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required. For these defendants the court shall make a pretrial release determination no later than 48 hours after a defendant's commitment to the county jail; the court shall consider the Pretrial Services Program's risk assessment and recommendations on conditions of release before making a release decision.

(b) All Other Defendants. All defendants other than those set forth in paragraph (a) shall have a right to bail before conviction on such terms as, in the judgment of court, will insure the defendant's presence when required, having

regard for the defendant's background, residence, employment and family status and, particularly, the general policy against unnecessary sureties and detention; in its discretion, the court may order defendant's release on defendant's own recognizance and may impose terms or conditions appropriate to such release. Additionally, law enforcement officers who encounter defendants on outstanding municipal court bench warrants are authorized to effectuate the immediate release of defendants on defendant's own recognizance pursuant to procedures promulgated by the Administrative Director of the Courts. All other defendants include: (i) those charged on an initial Complaint-Warrant (CDR-2) with a petty disorderly persons offense or other non-disorderly persons offense within the jurisdiction of the municipal court, and (ii) all defendants brought before the court on a bench warrant for failure to appear or other violation, including defendants initially charged on a Complaint-Warrant (CDR-2) and those initially charged on a summons. Defendants issued a bench warrant who were charged with a disorderly persons offense on an initial Complaint-Warrant (CDR-2) may also be subject to reconsideration of conditions of release pursuant to Rule 7:4-9.

(c) Domestic Violence; Conditions of Release. When a defendant is charged with a crime or offense involving domestic violence, the court authorizing the release may, as a condition of release, prohibit the defendant from having any

contact with the victim. The court may impose any additional limitations upon contact as otherwise authorized by N.J.S.A. 2C:25-26.

(d) Issuance of Restraining Orders by Electronic Communication.

(1) Temporary Domestic Violence Restraining Orders. Procedures authorizing the issuance of temporary domestic violence restraining orders by electronic communication are governed by R. 5:7A(d).

(2) N.J.S.A. 2C:35-5.7 and N.J.S.A. 2C:14-12 Restraining Orders. A judge may as a condition of release issue a restraining order pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") or N.J.S.A. 2C:14-12 ("Nicole's Law") upon sworn oral testimony of a law enforcement officer or prosecuting attorney who is not physically present. Such sworn oral testimony may be communicated to the judge by telephone, radio, or other means of electronic communication. The judge shall contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise the judge shall make adequate longhand notes summarizing what is said. Subsequent to taking the oath, the law enforcement officer or prosecuting attorney must identify himself or herself, specify the purpose of the request, and disclose the basis of the application. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a restraining order. Upon issuance of the restraining order, the judge shall memorialize the specific terms of

the order. That memorialization shall be either by means of a tape-recording device, stenographic machine, or by adequate longhand notes. Thereafter, the judge shall direct the law enforcement officer or prosecuting attorney to memorialize the specific terms authorized by the judge on a form, or other appropriate paper, designated as the restraining order. This order shall be deemed a restraining order for the purpose of N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law"). The judge shall direct the law enforcement officer or prosecuting attorney to print the judge's name on the restraining order. A copy of the restraining order shall be served on the defendant by any officer authorized by law. Within 48 hours, the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission, or by other means of electronic communication, the signed restraining order along with a certification of service on the defendant. The certification of service shall be in a form approved by the Administrative Director of the Courts and shall include the date and time that service on the defendant was made or attempted to be made. The judge shall verify the accuracy of these documents by affixing his or her signature to the restraining order.

(3) Certification of Offense Location for Drug Offender Restraining Orders. When a restraining order is issued by electronic communication pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") where the

law enforcement officer or prosecuting attorney is not physically present at the same location as the court, the law enforcement officer or prosecuting attorney must provide an oral statement describing the location of the offense. Within 48 hours thereafter the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission, or by other means of electronic communication, a certification describing the location of the offense.

Note: Source-R. (1969) 7:5-1, 3:26-1(a). Adopted October 6, 1997 to be effective February 1, 1998.; text designated as paragraph (a), paragraph (a) caption adopted, new paragraphs (b) and (c) adopted July 9, 2013 to be effective September 1, 2013; caption amended, new paragraph (a) adopted, former paragraph (a) redesignated as paragraph (b) and caption and text amended, and former paragraphs (b) and (c) redesignated as paragraphs (c) and (d) August 30, 2016 to be effective January 1, 2017; paragraphs (a) and (b) caption and text amended November 14, 2016 to be effective January 1, 2017; subparagraph (d)(1) amended July 29, 2019 to be effective September 1, 2019; paragraph (b) text amended_____ to be effective_____.

III. Rule Amendments Considered and Rejected

A. Removing the ban on plea bargaining on driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) in Guideline 4, paragraph A

In considering whether to remove the ban on plea bargaining for marijuana offenses and certain other non-marijuana disorderly persons offenses, the Committee discussed whether the ban on plea bargaining on driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) should also be removed. A majority of the Committee concluded that the ban on plea bargaining for N.J.S.A. 39:4-50 offenses should remain.

In reaching its conclusion, the Committee considered the history of the DWI plea bargaining prohibition.[10] In 1974, plea agreements were expressly prohibited in Municipal Courts by the Supreme Court of New Jersey as detailed in Municipal Court Bulletin Letter #3-74. The prohibition was based on a concern about the lack of professionalism and oversight in certain municipal courts. In State v. Hessen, 145 N.J. 441, 446-47 (1996), the Court explained: "The policy underlying that prohibition was the strong concern over the possibility of abuse in the disposition of municipal court offenses, a concern attributable to the part-time

[10] Notice to the Bar, June 15, 2005, "Amendments to Guideline 4 of Guidelines for Operation of Plea Agreements in the Municipal Courts."

nature of the municipal courts and the lack of professionalism in those courts." Ibid. The Court continued: "Inadequate supervision and accountability were also perceived as a serious problem militating against the disposition of municipal court cases through plea agreements…" Id. at 447. The Court explained that in its 1974 determination to ban plea bargaining in municipal courts, "it was especially emphatic that it should extend the prohibition to intoxicated-driving offenses." Ibid.

In 1985, the Supreme Court Task Force on Improvement in the Municipal Courts recommended that plea agreements in all municipal matters be permitted, subject to certain conditions.[11]

In 1988, in response to the 1985 Supreme Court Task Force report, the Supreme Court found that circumstances had changed and authorized a one-year limited test of regulated plea bargaining in Municipal Courts, finding that the:

> [F]ormer lack of professionalism that had permeated most aspects of the municipal courts had significantly changed; that the quality and tradition of the judges had improved; that municipal prosecutors were now in place in most municipal courts and public defenders in some; and that verbatim records of proceedings were being made.

Notice to the Bar, June 15, 2005, "Amendments to Guideline 4 of Guidelines for Operation of Plea Agreements in the Municipal Courts."

[11] Notice to the Bar, June 15, 2005, "Amendments to Guideline 4 of Guidelines for Operation of Plea Agreements in the Municipal Courts."

However, the Court determined that no plea agreement would be allowed in drunken driving or certain drug offenses. Ibid.

On October 31, 1989, the Supreme Court Committee to Implement Plea Agreements in Municipal Courts issued its Final Report evaluating the one-year experiment. That Committee recommended the authorization of plea bargaining in the municipal courts but determined that the prohibition on plea agreements in drunk driving offenses should continue, subject only to the unilateral actions of the municipal prosecutor with regard to dismissals and amendments, as those offenses pose special problems, namely extraordinary emotional and fiscal costs.[12] In its recommendation to keep the ban on plea agreements in drunk driving offenses, the 1989 Supreme Court Committee was mindful of the State's drug and drunk driving reduction initiatives that were designed to hold substance abusers accountable for their illegal conduct. The Supreme Court Committee noted "the public's concern that the process of plea bargaining, as applied to alcohol and drug offenses, might undermine the deterrent thrust of New Jersey's tough laws in these areas." Hessen, 145 N.J. at 449.

On June 29, 1990, the Court issued its Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey (Guidelines), which adopted

[12] 2015-2017 Municipal Court Practice Committee Report

the Committee's recommendation that plea bargaining not be allowed in drunk driving cases. Plea bargaining in other matters was allowed pursuant to R. 7:4-8, in conformity with the Guidelines.[13]

The 2021-2023 Committee also considered the Court's discussion in Hessen regarding the Court's intention in upholding the ban on pea bargaining in drunk driving cases:

> [C]an therefore be seen as an effectuation of the strong legislative and public policy to eliminate drunk driving, by refusing to allow drunk drivers to escape responsibility for their actions, by ensuring accountability of those who cause drunk driving, and by penalizing drinking-and-driving offenses to the fullest extent of the law. The ban is an essential element of a strongly-endorsed and well-articulated policy to eliminate drunk driving by affording offenders 'zero tolerance' in the prosecution of their offenses.

Hessen, 145 N.J. at 458.

The Committee discussed but a majority of members rejected the idea that because egregious charges such as homicide and robbery or other indictables can be plea bargained that DWI charges should also be plea bargained. Most members determined that the ability to plea bargain all indictable charges does not justify expansion of plea bargaining for DWI matters, as DWIs are far more widespread than other offenses such as murder. A majority concluded that removing the ban

[13] Notice to the Bar, June 15, 2005, "Amendments to Guideline 4 of Guidelines for Operation of Plea Agreements in the Municipal Courts."

for DWI offenses would water down the purpose of N.J.S.A. 39:4-50, which is meant to protect the public. Several members noted that penalties are higher for each subsequent DWI offense.

A majority of the Committee also rejected the argument that, currently, when there are proof issues in a DWI matter and the charge is downgraded to reckless driving, the downgrade could be viewed as a circumvention of the ban on plea bargaining and therefore the DWI ban is functionally ineffective and should be removed. The Committee recognized that this is not a circumvention but rather most often a result that the DWI case simply cannot be proved – it does not undercut the effectiveness of the plea bargaining ban.

Several Committee members noted that a consequence of removing the plea bargaining ban on DWI offenses may be that some prosecutors would be less incentivized to pursue more complex, time-intensive prosecutions involved in DWI cases and defendants would be more likely to plead to the lesser charge of reckless driving. As such, it could be that the courts would rarely see another DWI case.

A majority of the Committee was also opposed to the suggestion of allowing judges to use their discretion in plea bargaining certain DWI cases as it could result in inconsistent application across the State.

Given the history of the DWI plea bargaining prohibition, the extraordinary public safety concern that DWI offenses pose to society, the need to hold DWI

offender accountable, and to preserve public confidence that a meritorious DWI offense will not be bargained away, a majority of the 2021-2023 Committee voted that the ban on plea bargaining for driving while under the influence of liquor or drugs offenses should remain. While this Committee recognized that many DWI cases are dismissed, most members were concerned that eliminating the plea bargaining ban for DWI offenses would jeopardize public safety.[14]

The Committee recommends modifying the first sentence of Guideline 4 to align with the Committee's recommendation to retain the ban on plea bargaining for N.J.S.A. 39:4-50 offenses; and replacing "of the above enumerated offenses in Sections A and B of this Guideline" with "driving under the influence of liquor or drugs offense (N.J.S.A. 39:4-50)" in the second to last paragraph of Guideline 4.

B. Adding "Permitting another to drive" while under the influence of liquor or drugs to the Guideline's plea bargaining prohibition for driving while under the influence of liquor or drugs

The Committee considered whether "permitting another to drive" while under the influence of liquor or drugs should be added to the Guideline's plea bargaining prohibition for driving while under the influence of liquor or drugs.

[14] Between October 2019 and October 2021, there were 42,711 disposed N.J.S.A. 39:4-50 cases, of which, 23,497 were found guilty, 1,950 not guilty and 17,242 were dismissed.

In its 2015-2017 term, the Committee recommended amending Guideline 4 to expressly include the holding of State v. Hessen, 145 N.J. 441 (1996), where the Court determined that a ban on plea bargaining on DWI matters in Guideline 4 should also include a ban on plea bargaining for defendants who *permit* an intoxicated person to drive.[15] However, the Court did not act on the Committee's recommendation. In Hessen, the Court noted that the use of the term "driving" in Guideline 4 was not intended as a restriction on the scope of the Guideline and that a person who *permits* an intoxicated driver to drive may be just as blameworthy as the drunken driver. Id. at 458-59.

The Committee revisited this issue in its current term in light of the Committee's recommendation to keep the ban on plea bargaining for DWI N.J.S.A. 39:4-50 offenses. The Committee concluded that "permitting another to drive" while under the influence of liquor or drugs should not be added to the Guideline's plea bargaining prohibitions because "permitting another to drive" is subsumed within Guideline 4's general ban on plea bargaining DWI offenses. The Committee determined that "permitting another to drive" is in and of itself a DWI offense and is thus prohibited from plea bargaining under Guideline 4. The Committee noted that the Court in Hessen treated "permitting" offenses as

[15] 2015-2017 Municipal Court Practice Committee Report

identical to a DWI offense. As such, the Committee concluded that it was not necessary to explicitly state "permitting another to drive" within Guideline 4.

IV. CONCLUSION

The members of the Committee appreciate the opportunity to serve the Supreme Court in this capacity.

Respectfully submitted,

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