

**SECOND SUPPLEMENTAL
REPORT
OF THE
SUPREME COURT COMMITTEE
ON
CRIMINAL PRACTICE
2017 – 2019 TERM**

MARCH 29, 2018

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I. Rule Amendments Recommended for Adoption

A. R. 3:28-1. Eligibility for Pretrial Intervention

It was recently brought to the Committee's attention that there are inconsistencies between the proposed Rules and the 2015 statutory amendments to the Pretrial Intervention (hereinafter PTI) statute (N.J.S.A. 2C:43-12), as well as internally within the proposed Rules for: (1) non-indictable offenses involving domestic violence, and (2) prior first and second degree convictions. After further review, the Committee is proposing additional amendments to Rule 3:28-1 to conform with the statutory amendments for (1) persons charged with disorderly persons offenses or petty disorderly persons offenses involving domestic violence, and (2) persons charged with prior convictions. In addition, modifications are also proposed to conform with the 2017 statutory amendments to the PTI statute for persons participating in the Veterans Diversion Program, which is codified at N.J.S.A. 2C:43-23 et seq.

The purpose of these additional recommendations for changes to R. 3:28-1 is to harmonize the rules with the statute. In other words, this proposal reflects the Committee's belief that the court rules should conform with the statute.

1. Background

During the 2013-2015 term, the Criminal Practice Committee proposed ten new Rules 3:28-1 through -10 to govern the PTI program in its *Report of the Supreme Court Committee on Criminal Practice 2013-2015*. See 219 N.J.L.J. 498 (2015). Those recommendations were designed to align the Rules with the actual practices that had developed over the years in implementation of the PTI program. That proposal

incorporated current R. 3:28 and relevant provisions of the Guidelines for Operation of Pretrial Intervention in New Jersey (hereinafter Guidelines) in those rules.

The Supreme Court approved the proposed PTI rules subject to consideration at the September 2, 2015 Judicial Conference in accordance with N.J.S.A. 2C:43-15. Prior to that Judicial Conference being held, statutory changes were enacted by L. 2015, c. 98, effective August 10, 2015, that amended the PTI statute in several significant ways. Due to those statutory amendments, the proposed rules were withdrawn from consideration at the Judicial Conference. *See Notice to the Bar*, 221 N.J.L.J. 585, 687 (2015).

In response to the legislative enactment, the Supreme Court requested that the Committee conduct a limited review of the proposed rules to address any conflicts between the statutory amendments and the rules previously approved by the Court. The Committee was also instructed not to review the rules that were not affected by that enactment.

After completion of its review, the Committee recommended modifications to five of the proposed PTI Rules in its 2015-2017 Report issued on February 7, 2017. *See* 223 N.J.L.J. 705, 767 (2017). Those rules were approved by the Court last summer pending consideration at the Judicial Conference. The new PTI Rules 3:28-1 through -10 were presented at the September 6, 2017 Judicial Conference. Subsequently, on September 15, 2017, the Supreme Court adopted the PTI Rules pursuant to N.J.S.A. 2C:43-14 through 2C:43-17 with an effective date of July 1, 2018. *See* 223 N.J.L.J. 2857, 2924 (2017).

Proposed Amendments to R. 3:28-1

During the Committee's discussion of the proposed amendments to R. 3:28-1, one member expressed strong concerns against permitting persons charged with certain non-

indictable offenses and those with prior convictions to be eligible for PTI, regardless of the statutory amendments. That member asserted that the Judiciary developed this program in the early 1970's, and it was not until 1978 that the Legislature enacted the Pretrial Intervention statute. Accordingly, that member believed that the court rules should not be amended to permit persons charged with non-indictable offenses to be admitted to PTI because this program had always been limited to defendants charged with indictable offenses. Additionally, the PTI program was developed for first time offenders, and not for defendants with prior convictions.

The Committee ultimately determined that additional amendments to R. 3:28-1 should be proposed so that the Rules would be consistent with the statutory amendments to N.J.S.A. 2C:43-12. No changes are proposed to paragraphs (a), (b), and (e) in R. 3:28-1, as adopted by the Court in 2017.

a. Paragraph (c) – Persons Ineligible to Apply for Pretrial Intervention

The Committee is proposing the following additional revisions concerning eligibility for PTI to R. 3:28-1.

Paragraph (c)(1) -- Prior Diversion

Pursuant to N.J.S.A. 2C:43-12(g)(1), supervisory treatment is to occur only once, and that if the defendant has previously received treatment in one of the enumerated programs the person is ineligible for PTI. The programs enumerated under this statutory provision were amended, effective December 1, 2017, to include a new program entitled the Veterans Diversion Program (N.J.S.A. 2C:43-23 et seq.) Consistent with the statutory language, the Committee is proposing that paragraph (c)(1) be revised to add that persons

who have been granted a dismissal due to successful participation in the Veterans Diversion Program are ineligible to apply to PTI.

Paragraph (c)(2) -- Non-Criminal Matters

As currently written, proposed R. 3:28-1(c)(2) provides that persons charged with disorderly persons offenses and petty disorderly persons offenses, as well as those charged with ordinance, health code, and similar violations, are ineligible to apply to PTI. This paragraph was intended to clarify current PTI Guideline 3(d), which provides that those charged with “minor violations” should not be enrolled in PTI. It was also drafted to conform with the current practices for admission to this program, which were limited to defendants charged with indictable crimes.

However, the 2015 statutory amendments implicitly acknowledge that those charged with certain disorderly persons offenses and petty disorderly persons offenses can apply because the amendments: (1) impose a presumption against admission for those charged with a “crime or offense involving domestic violence” (N.J.S.A. 2C:43-12(b)(2)(b)), (emphasis added), and (2) require a guilty plea to be admitted by those charged with a “disorderly persons or petty disorderly persons offense involving domestic violence.” (N.J.S.A. 2C:43-12(g)(3)(d)).

The Committee in its 2017 recommendations incorporated the 2015 statutory changes in two of the proposed Rules. Specifically, R. 3:28-1(e)(2) contains the presumption against admission for a person charged with a crime or offense involving domestic violence if: (a) it was committed while the defendant was subject to a temporary or permanent domestic violence restraining order, or (b) it involved violence or the threat

of violence. Similarly, R. 3:28-5(b)(2)(iv) sets forth the statutory requirement in N.J.S.A. 2C:43-12(g)(3)(d) that a defendant charged with a disorderly persons offense or petty disorderly persons offense involving domestic violence must enter a guilty plea, if the offense was committed while the person was subject to a temporary or permanent domestic violence restraining order.

In contrast, paragraph (c)(2) in proposed R. 3:28-1 prohibits persons charged with a disorderly persons offense or petty disorderly persons offense from even applying to PTI. Thus, the proposed Rules are internally inconsistent on the issue of the availability of PTI for those charged with domestic violence related non-indictable offenses.

Recommendation: To fully conform with the 2015 statutory amendments, the Committee recommends adding an exception to permit persons charged with domestic violence related non-indictable offenses to apply to PTI. It should be noted that the Legislature specifically excludes these defendants from the conditional dismissal program. (N.J.S.A. 2C:43-13.1(b)(1)(d)). Thus, defendants charged with non-domestic violence related disorderly persons offenses and petty disorderly persons offenses will continue to be eligible to apply to other diversionary programs, for example, the conditional dismissal program (N.J.S.A. 2C:43-13.1) or the conditional discharge program (N.J.S.A. 2C:36A-1).

Paragraph (c)(3) -- Prior Convictions

The 2015 statutory amendments implicitly permit applications from persons with a prior first or second degree conviction by requiring entry of a guilty plea as a condition for admission to PTI. (N.J.S.A. 2C:43-12(g)(3)(b)). Consistent with this statutory language, the Committee recommended including this requirement in R. 3:28-5(b)(2)(ii) in its 2017

Report. The proposed rule was subsequently approved by the Court. However, similar to the inconsistency noted above for non-indictable offenses involving domestic violence, persons with a prior first or second degree conviction would be prohibited from even applying to PTI under proposed R. 3:28-1(c)(3). Thus, these provisions are also internally inconsistent.

Recommendation: The Committee recommends that paragraph (c)(3) be deleted in its entirety. While only clause (i) contains the language barring applications by persons with a prior first or second degree conviction, deleting only that clause and retaining clause (ii) would result in those with a less serious record being barred from consideration.

b. Paragraph (d) -- Persons Ineligible for Pretrial Intervention without Prosecutor Consent to Consideration of the Application

Consistent with its recommendations to delete paragraph (c)(3), the Committee is proposing conforming amendments to paragraph (d). This paragraph was originally structured to require the prosecutor's initial consent to consider applications in cases that raised serious issues, but yet were not serious enough to warrant an outright restriction against eligibility in paragraph (c). In light of the Committee's recommendation to delete paragraph (c)(3) concerning the more serious prior convictions, paragraph (d), if unchanged, would result in consent only being required in the less serious cases. Thus, the Committee is recommending the following amendments to paragraph (d).

Paragraph (d)(1) – Certain Crimes

The Committee is proposing amendments in paragraph (d)(1) to delete the language concerning persons who have “not previously been convicted of an indictable or felony

offense.” The requirement that prosecutors must initially consent to consider applications where the current charges carry a presumption of incarceration or a mandatory minimum period of parole ineligibility remains unchanged.

Paragraph (d)(2) – Prior Convictions

The Committee recommends deleting the references to the degree of the crime and the sentence previously imposed for defendants with a prior criminal conviction. Instead, the prosecutor’s initial consent to consider the application would be required for a defendant with any prior criminal conviction.

The proposed amendments to R. 3:28-1 follow. *Note:* The underscored language in this rule proposal represents new language that would be added to the rule as adopted by the Supreme Court in its September 15, 2017 Order, (effective July 1, 2018), and the bracketed language represents deletions from that version. For ease of reference, the changes have been highlighted in the proposed rule.

3:28-1. Eligibility for Pretrial Intervention

(a) ... no change.

(b) ... no change.

(c) Persons Ineligible to Apply for Pretrial Intervention.

(1) Prior Diversion. A person who has previously been enrolled in a program of pretrial intervention; previously been placed into supervisory treatment in New Jersey under the conditional discharge statute pursuant to N.J.S.A. 24:21-27 or N.J.S.A. 2C:36A-1, or the conditional dismissal statute, N.J.S.A. 2C:43-13.1 et seq., or was granted a dismissal due to successful participation in the Veterans Diversion Program pursuant to N.J.S.A. 2C:43-23 et seq.; or enrolled in a diversionary program under the laws of any other state or the United States for a felony or indictable offense, shall be ineligible to apply for admission into pretrial intervention.

(2) Non-Criminal Matters. A person who is charged with a disorderly persons offense, a petty disorderly persons offense, an ordinance or health code violation or a similar violation shall be ineligible to apply for pretrial intervention, except a person who is charged with a disorderly persons offense or a petty disorderly persons offense involving domestic violence may apply for pretrial intervention.

[(3) Prior Convictions. A person who previously has been convicted of (i) any first or second degree offense or its equivalent under the laws of another state or the United States, or (ii) any other indictable offense or its equivalent under the laws of another state or the United States for which the person was sentenced to a state prison,

institution or other state facility shall be ineligible to apply for admission into pretrial intervention.] [paragraph to be deleted]

(d) Persons Ineligible for Pretrial Intervention Without Prosecutor Consent to Consideration of the Application.

The following persons who are not ineligible for pretrial intervention under paragraph (c) shall be ineligible for pretrial intervention without prosecutor consent to consideration of the application:

(1) Certain Crimes. A person who [has not previously been convicted of an indictable offense in New Jersey, and who has not previously been convicted of an indictable or felony offense under the laws of another state or the United States, but who] is charged with a crime, or crimes, for which there is a presumption of incarceration or a mandatory minimum period of parole ineligibility.

(2) Prior Convictions. A person who has previously been convicted of [a third or fourth degree] an indictable offense in New Jersey, or its equivalent under the laws of another state or of the United States [, and who was not sentenced to a term of imprisonment for that prior offense].

(e) ... no change.

Note: Adopted September 15, 2017 to be effective July 1, 2018[.]; paragraphs (c)(1) and (c)(2) amended, paragraph (c)(3) deleted, and paragraphs (d)(1) and (d)(2) amended to be effective.

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