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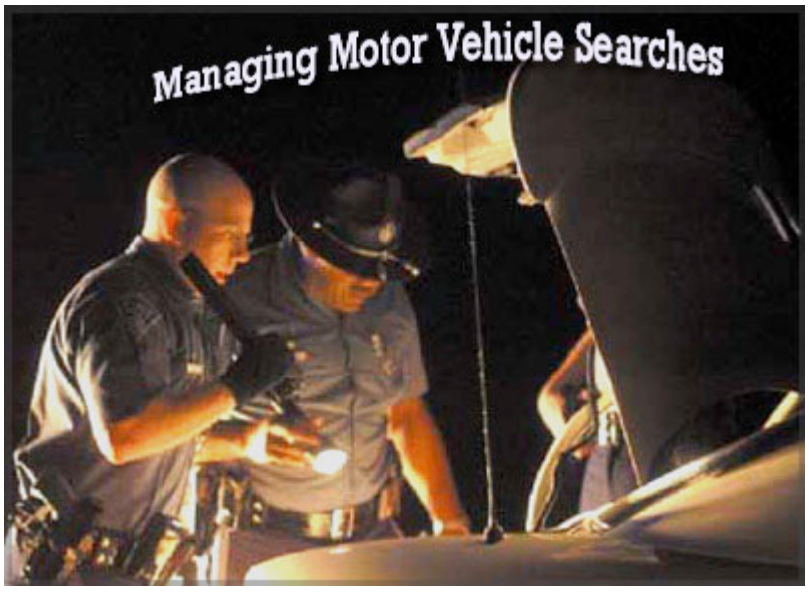

Lesson Plan

Managing Motor Vehicle Searches under New Jersey Law

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1. Introduction: Preliminary Questions & Issues

a. **To what extent, if any, should officer discretion to conduct motor vehicle searches be subject to supervisory control?**
b. **If a search is to be undertaken, what lawful basis will support it?**
c. **What are the factors militating in favor of using an exception to the warrant requirement in a given case?**
d. **What are the factors militating in favor of seeking a telephonic search warrant?**
e. **Who should make the decision?**
f. **What level of resources in terms of time and manpower should be allocated for the purpose of conducting a motor vehicle search?**
g. **Should video and /or audio recording become a routine component of vehicle searches?**

Part 2.

Exigency and the Continuing Development of Pena-Flores

Introduction: Exigency & Pena-Flores

State v. Cooke, 63 N.J. 657 (2000)

We emphasize that there is a constitutional preference for a warrant, issued by a neutral judicial officer, supported by probable cause. "The cautionary procedure of procuring a warrant ensures that there is a reasonable basis for the search and that the police intrusion will be reasonably confined in scope. The automobile exception applies only in cases in which probable cause and exigent circumstances are evident, making it impracticable for the police to obtain a warrant.

State v. Dunlap, 185 N.J. 543 (2006)

In addition, we reject the State's argument that "it would have been unduly burdensome and unreasonably restrictive to require the police to post a guard and repair to the courthouse for a warrant," There were at least ten officers present on the evening in question and even assuming that some were needed for other duties in connection with defendant's arrest and the on-going investigation, the State did not establish that an insufficient number ***1283* would have been left to guard the car. To say that the late hour made access to a judge difficult or unpracticable, is to ignore the procedures in place for emergent duty judges in every vicinage and the existence, since 1984, of the telephonic warrant procedure. *R.* 3:5-3(b). Indeed, it is not without significance that the investigators here had time to call the prosecutor's office at about 10:00 pm and obtain verbal authorization for the consensual recording of defendant's conversation with Tiaa.

One final note. Nothing in this opinion should be viewed as a retrenchment from the well-established principles governing the automobile exception to the warrant requirement. The standards remain the same: probable cause and exigent circumstances, each of which to be determined on a case-by-case basis. Here, the unique facts, particularly the presence of ten officers, fully justified the Appellate Division's conclusion that exigency was absent. Different facts, such as a roadside stop effectuated by only one or two officers, would likely have changed the calculus. Police safety and the preservation of evidence remain the preeminent determinants of exigency.

State v. Johnson, 193 N.J. 528 (2008)

When the circumstances are sufficiently exigent that appearing before a judge to obtain a written warrant is either impossible or impracticable, but not so exigent that there is insufficient time to stabilize the situation and call for a warrant, police officers must obtain a telephonic warrant rather than conduct a warrantless search or seizure..

The State has argued that the exigent circumstances needed for a telephonic warrant are no different from the exigent circumstances justifying a bypass of the warrant requirement. We disagree, because if the State were correct the police would never have reason to apply for a telephonic warrant. Simply stated, for purposes of a telephonic warrant, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain a written warrant. For purposes of a warrantless search, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain any form of warrant.

State v. Pena-Flores, 198 N.J. 6 (2009)

Legitimate considerations are as varied as the possible scenarios surrounding an automobile stop. They include, for example, the time of day; the location of the stop; the nature of the neighborhood; the unfolding of the events establishing probable cause; the ratio of officers to suspects; the existence of confederates who know the location of the car and could remove it or its contents; whether the arrest was observed by passersby who could tamper with the car or its contents; whether it would be safe to leave the car unguarded and, if not, whether the delay that would be caused by obtaining a warrant would place the officers or the evidence at risk. As we have previously noted, "[f]or purposes of a warrantless search, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain *any form* of warrant."

4. Supreme Court Special Committee Report on Telephonic & Electric Search Warrants

NOTICE

REPORT OF THE SUPREME COURT SPECIAL COMMITTEE ON TELEPHONIC AND ELECTRONIC SEARCH WARRANTS – PUBLICATION FOR COMMENT

The Supreme Court invites written comments on the January 22, 2010 Report of the Supreme Court Special Committee on Telephonic and Electronic Search Warrants published with this notice. The report also can be accessed and downloaded on-line from the Judiciary's website at njcourts.com.

The Special Committee, chaired by retired Appellate Division Judge and former Administrative Director of the Courts Richard J. Williams, was created as a follow-up to State v. Pena-Flores, 198 N.J. 6 (2009), in which decision the Supreme Court addressed the issue of warrantless searches of motor vehicles. In Pena-Flores, the Court stated that:

> We should give police access to an efficient and speedy electronic and telephonic warrant procedure that will be available to them on the scene; that will obviate the need for difficult exigency assessments; and that will guarantee our citizens the protections that the warrant requirement affords – an evaluation of probable cause by a neutral judicial officer. [198 N.J. at 36.]

The Special Committee was directed by the Court to "study the telephonic and electronic warrant procedures and make practical suggestions to ensure that technology becomes a vibrant part of our process. That will include recommendations for uniform procedures (including forms), equipment, and training, along with an evaluation of the scheme once it is underway." 198 N.J. at 35-36. The Special Committee's recommendations are set forth in its report.

Please send any comments on the Special Committee's report and recommendations in writing by Friday, June 18, 2010 to:

> Glenn A. Grant, J.A.D. Acting Administrative Director of the Courts Attention: Comments on Reports Hughes Justice Complex; P.O. Box 037 Trenton, New Jersey 08625-0037

Comments on the Committee's report and recommendations also may be submitted by Internet e-mail to the following address: Comments.Mailbox@judiciary.state.nj.us .

The Supreme Court will not consider comments submitted anonymously. Those submitting comments by mail should include their name and address, and those submitting comments by e-mail should include their name, address, and e-mail address.

Comments submitted in response to this notice will be made public unless the author specifically requests confidentiality. In the absence of such a request, the comments, including the identity of the commenter, will be posted on the Judiciary's Internet website, updated on a periodic basis. Note that this represents a change from the usual approach of not making comments public until after Court action on the matter.

/s/ Glenn A. Grant
Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Dated: May 19, 2010

January 22, 2010

Supreme Court Special Committee
on
Telephonic and Electronic Search Warrants

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COMMITTEE'S RECOMMENDATIONS

TECHNOLOGY ISSUES RECOMMENDATIONS

NDATION Pre-programmed cell phones should be utilized by law enforcement officers, emergent duty prosecutors and emergent duty judges in seeking, and fielding, telephonic search warrant applications.

NDATION It is the responsibility of the Judiciary to record any sworn oral testimony taken in support of a telephonic or electronic search warrant application. The preferred manner of recording such testimony is through the use of the Judiciary's CourtSmart system, but a hand-held recording device would meet minimally acceptable standards.

HUMAN RESOURCE ISSUES RECOMMENDATIONS

NDATION During regular court hours, Criminal Division Judges should respond to requests for telephonic search warrants

NDATION The present Superior Court emergent duty structure should be used to respond to requests for search warrants made via telephonic means after normal business hours. However, the current schedule should be amended to: (1) ensure that each vicinage specifically designates at least one judge as the backup emergent duty judge; and (2) ensure that any vicinage "Do Not Disturb" policies do not place limits on telephonic search warrant applications.

NDATION The county prosecutors should ensure that a sufficient number of emergent duty prosecutors are available to handle requests from law enforcement for telephonic search warrants. As such, there should be at least one emergent duty prosecutor, and a backup emergent duty prosecutor, in each county.

NDATION Within a month of the Supreme Court's approval of the recommendations contained in this report, each Assignment Judge, in consultation with the County Prosecutor, should develop an implementation plan and submit it to the Administrative Director of the Courts.

NDATION The vicinages and the Administrative Office of the Courts should closely monitor the volume of telephonic search warrant requests in order to allow for rapid implementation of an alternative system if the volume of searches is dramatically greater than the current system can address.

NDATION If the number of requests for telephonic search warrants exceeds the ability of the current emergent duty system to handle them, another system should be implemented as quickly as possible.

NDATION Options to enhance or replace the current emergent duty system.

ADMINISTRATIVE ISSUES RECOMMENDATIONS

NDATION R. 3:5-3(b) should be amended to remove the references to "exigent circumstances," and to more closely follow the language contained in R. 3:5-3(a) regarding applications for in-person warrants.

NDATION A duplicate original warrant form should be promulgated for use throughout the State.

NDATION A worksheet for judges to record the details of telephonic search warrant applications should be promulgated for use throughout the State.

NDATION R. 3:5-5(b) should be amended to: (1) delete the requirement that the applicant sign the transcript of any oral testimony taken in connection with a telephonic search warrant application, and (2) specify that the prosecutor shall have a transcript prepared, and shall thereafter review the transcript, and any discrepancies must be brought to the attention of the judge who issued the warrant within 30 days of the prosecutor's receipt of the transcript.

NDATION R. 3:5-5(a) should be amended to allow for the inventory filing and return to be accomplished via fax or other electronic means.

NDATION R. 3:5-7(g) should be amended to clarify that in the absence of bad faith, a telephonically or electronically authorized search warrant should not be rendered invalid due to technical difficulties or errors in recording the application, or by errors in completing the duplicate original warrant form.

NDATION The Administrative Office of the Courts, in conjunction with the Criminal Division Presiding Judges, should develop a training program for judges handling telephonic search warrants. In addition, the Office of the Attorney General, in conjunction with the County Prosecutors and the New Jersey State Police, should develop a similar training program for law enforcement.

NDATION The Administrative Office of the Courts, in cooperation with the Office of the Attorney General, should develop specific procedures regarding the collection of data to closely monitor the handling of telephonic search warrants.

NDATION If Municipal Court Judges are eventually enlisted to respond to telephonic search warrant applications, reviewing courts should give the probable cause determinations made by Municipal Court Judges the same "substantial deference" given to similar determinations made by Superior Court Judges.

NDATION If Municipal Court Judges are eventually enlisted to respond to telephonic search warrant applications, R. 3:5-3(b) should be amended to explicitly grant Municipal Court Judges that authority.

I. BACKGROUND

On February 25, 2009, the New Jersey Supreme Court decided State v. Pena-Flores, 198 N.J. 6 (2009), an opinion involving two consolidated cases, State v. Pena-Flores and State v. Fuller, that involved warrantless automobile searches.

In deciding the two cases, the Court was asked to reexamine the standards governing the automobile exception to the requirement that police officers must obtain a warrant before searching a motor vehicle. The Court was asked to return to the standard set forth in State v. Alston, 88 N.J. 211, 234-35 (1981), which held that the only requirements for the automobile exception were an unforeseen stop, probable cause, and the inherent mobility of the vehicle. At issue was whether a mobile automobile, in and of itself, constituted exigent circumstances sufficient to justify a warrantless search. After hearing original arguments, the Court requested supplemental briefing and further argument on the question of whether it should adopt the federal standard in cases involving the automobile exception to the warrant requirement. Subsequently, in a 4-3 decision, the Court reaffirmed its "longstanding precedent" that in New Jersey, a warrantless search of an automobile is permitted when

> (1) the stop is unexpected; (2) the police have probable cause to believe that the vehicle contains contraband or evidence of a crime; and (3) exigent circumstances exist under which it is impracticable to obtain a warrant.
>
> [Id. at 11, 29.]

The Court also reaffirmed that "exigency encompasses far broader considerations than the mere mobility of the vehicle," and that it must be

determined on a case-by-case basis under the totality of the circumstances, with a focus on officer safety and the preservation of evidence. Id. at 29.

The Court acknowledged the great difficulty that police officers could have in accurately assessing the presence of exigent circumstances. However, rather than relaxing the legal principles that governed warrantless searches, the Court felt that the problem could be solved by providing immediate access to a judge to obtain a search warrant by telephonic or electronic means. To accomplish this, the Court indicated that it would revise the procedures for obtaining telephonic and electronic search warrants. A search pursuant to a telephonic or electronic warrant had historically been considered the equivalent of a warrantless search. That fact, along with R. 3:5-3(b)'s requirement that the applicant demonstrate the presence of exigent circumstances "sufficient to excuse the failure to obtain a written warrant," had relegated telephone or electronically obtained warrants to a kind of second-class status. Id. at 33. The Court noted that other jurisdictions had recognized long ago "that a warrant obtained by telephonic or electronic means is the analytical equivalent of an in-person warrant and should be treated accordingly."[1] Ibid. In addition, legal commentators had also suggested that expanding the use of telephonic search warrants would benefit both the judiciary and law enforcement.[2] Id. at 34-35. The Court therefore stated that it would amend R. 3:5-3(b) "to clarify the parity between the various methods for obtaining a warrant and to underscore that an officer may resort to electronic or telephonic

[1] See Cal.Penal Code § 1526(b) (West 2008); N.Y.Crim. Proc. Law § 690.45(2) (McKinney 2008); Or.Rev.Stat. § 133.545(5) (2007); Wis. Stat. § 968.12(3) (2007); and Wash.Crim. R. 2.3(c) (2008).

[2] See Laurence A. Benner & Charles T. Samarkos, Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project, 36 Cal. W. L. Rev. 221, 223, 263, 265 (2000).

means without the need to prove exigency." Id. at 35. The Court also announced that it would form a Task Force, which would

> . . . study the telephonic and electronic warrant procedures and make practical suggestions to ensure that technology becomes a vibrant part of our process. That will include recommendations for uniform procedures (including forms), equipment, and training, along with an evaluation of the scheme once it is underway."
> [Id. at 35-36].

In taking these actions, the Court hoped to

> . . . give police access to an efficient and speedy electronic and telephonic warrant procedure that will be available to them on the scene; that will obviate the need for difficult exigency assessments; and that will guarantee our citizens the protections that the warrant requirement affords – an evaluation of probable cause by a neutral judicial officer."
> [Id. at 36].

II. CHARGE TO THE COMMITTEE

On March 31, 2009, Chief Justice Stuart Rabner appointed the *Supreme Court Special Committee on Telephonic and Electronic Search Warrants* (hereinafter *Committee*) to conduct the study that the Court had requested. The *Committee* was charged with studying the procedures used in New Jersey and other jurisdictions for obtaining telephonic and electronic search warrants. The *Committee* was also instructed to examine the policy and financial issues associated with implementing procedures for telephonic and electronic search warrants, and, giving full consideration to all relevant interests, to make recommendations to the Court. Finally, the *Committee* was asked to consider the most appropriate means of implementing its recommendations, such as through amendments to the Rules of Court or by some other means.

III. COMMITTEE COMPOSITION

Hon. Richard J. Williams, J.A.D., Retired, Chair
Hon. Susan L. Reisner, J.A.D., Vice-Chair
Hon. Harry G. Carroll, P.J.Crim.
Hon. Albert J. Garofolo, P.J.Crim.
Hon. Joan Robinson Gross, P.J.M.C.
Hon. Thomas S. Smith, Jr., P.J.Crim., Retired
Evans C. Anyanwu, Esq., Garden State Bar Association
Joseph J. Barraco, Esq., Assistant Director for Criminal Practice, New Jersey Administrative Office of the Courts
Arnold N. Fishman, Esq., New Jersey State Bar Association, Municipal Court Practice Section
Chief Kevin Gaffney, New Jersey Association of Chiefs of Police
Darren M. Gelber, Esq., Association of Criminal Defense Lawyers of N.J.
Bruce I. Goldstein, Esq.
Theodore F.L. Housel, Esq., Atlantic County Prosecutor, County Prosecutors Association of New Jersey
Dale Jones, Esq., Assistant Public Defender
Ralph J. Lamparello, Esq., New Jersey State Bar Association, Criminal Law Section
Boris Moczula, Esq., Assistant Attorney General, Division of Criminal Justice
Jeffrey A. Newman, Deputy Clerk, Appellate Division, New Jersey Administrative Office of the Courts
Major Christopher W. O'Shea, New Jersey State Police
Alexander R. Shalom, Esq., Assistant Deputy Public Defender
John Vasquez, Esq., Hispanic Bar Association
Lawrence Walton, Esq., Chief, Judicial Services, Municipal Court Services, Administrative Office of the Courts

Committee Staff

Vance D. Hagins, Esq., Assistant Chief, Criminal Practice Division, Administrative Office of the Courts

[3] Throughout this report the *Committee* will refer to telephonic and electronic search warrants as telephonic warrants.

IV. STATUS OF TELEPHONIC AND ELECTRONIC SEARCH WARRANTS

A. Committee Work Plan

The *Committee* reviewed case law, state statutes, court rules and scholarly articles in an effort to identify which jurisdictions across the United States permitted telephonic or electronic search warrants,[3] and to determine whether any of those jurisdictions had established procedures that governed the issuance of such warrants. The *Committee* also examined the Report of the Supreme Court's Committee on Criminal Practice, 113 N.J.L.J. 697 (June 21, 1984), and *Attorney General Law Enforcement Directive No. 2002-2: Approval of Search Warrant Applications, Execution of Search Warrants, and Procedures to Coordinate Investigative Activities Conducted by Multiple Law Enforcement Agencies* (August 8, 2002), in order to review the current requirements and procedures for issuing

telephonic search warrants in New Jersey. See http://www.nj.gov/oag/dcj/agguide/directives/dir_2002_2.pdf. The *Committee* also met with representatives of the Burlington County Prosecutor's Office, which, following the Court's decision in Pena-Flores, had developed a plan for obtaining telephonic search warrants which it was proposing for implementation.

[4] Those states are Alabama, Alaska, Arkansas, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Vermont, Virginia, Washington and Wisconsin.

[5] Those states are Colorado, Kansas, Missouri, Vermont and Virginia. See Colo. R. Crim. P. 41(c)(3); Kan. Stat. Ann. §§ 22-2502(a), 22-2504; Mo. Rev. Stat. § 542.276, subsections 3 and 6; V.R.Cr.P. Rule 41(h); and Va. Code Ann. § 19.2-54.

[6] Those states are Georgia, New Hampshire, North Carolina and Pennsylvania. See O.C.G.A. § 17-5-21.1(a); RSA 595-A:4 and RSA 595A:4-a; N.C. Gen. Stat. § 15A-245(a)(3); and Pa. R. Crim. P. 203(A) and Pa. R. Crim. P. 103.

B. National Experience with Telephonic and Electronic Search Warrants

In addition to New Jersey, thirty-one states,[4] the District of Columbia, and the federal courts currently have statutes or court rules that allow for search warrant applications, affidavits, or warrants to be transmitted by telephonic or electronic means. Of those jurisdictions, nine permit various forms of electronic technology to be used in the search warrant application process, but do not permit oral applications over the telephone. A number of states, for example, allow the supporting affidavits and/or warrants to be transmitted by fax.[5] Other states allow the use of technologies such as video conferencing, closed circuit television, or e-mail.[6]

Before the Supreme Court's decision in Pena-Flores, New Jersey was the only jurisdiction in the country that required the presence of exigent circumstances before a telephonic search warrant could be issued. It was not, however, the only jurisdiction that placed some sort of limitation on the use of telephonic or electronic means to apply for and obtain a warrant. The federal rules, for example, allow a judge to base a search warrant on sworn testimony, including information communicated by telephone or other reliable electronic

[7] See Ala. R. Crim. P. Rule 3.8(b)(1); N.D.R. Crim. P. Rule 41(c)(2)(A); S.D. Codified Laws § 23A-35-5; and Utah R. Crim. P. Rule 40(L)(1).

[8] Those jurisdictions are Alabama, Alaska, Arkansas, Arizona, California, Hawaii, Idaho, Illinois, Indiana, Louisiana, Minnesota, Montana, Nebraska, New York, North Dakota, Oregon, South Dakota, Utah, Wisconsin, and the federal courts.

means, "if doing so is reasonable under the circumstances." See F.R.Crim.P. 41(d). Four states – Alabama, North Dakota, South Dakota and Utah - place a similar "reasonable under the circumstances" condition on the issuance of telephonic search warrants.[7] Similarly, Montana requires that if a search warrant application is by telephone, the applicant must state the reasons that justify the immediate issuance of a warrant. See Mont. Code Anno., § 46-5-222(1). Nebraska requires a law enforcement officer to contact a county attorney and explain the reasons that a telephonic warrant should be issued. If the attorney is satisfied that a warrant is justified, and that circumstances require that it be issued immediately, he or she must then contact the judge or magistrate and state that he or she is convinced that a telephonic warrant should be issued. See R.R.S. Neb. § 29-814.03.

Other states are even more restrictive. Minnesota allows oral requests for search warrants only when circumstances "make it reasonable to dispense with a written affidavit." See Minn. R. Crim. P. 36.02. Illinois also permits telephonic search warrants when "circumstances make it reasonable" to dispense with a written affidavit, but only when the underlying crime is terrorism or a related offense. See § 725 ILCS 5/108-4(b)(1).

Of the twenty-four other jurisdictions that permit telephonic search warrants, twenty[8] have procedural safeguards that are substantially similar to those contained in New Jersey's R. 3:5-3(b); namely, requiring the judge to

contemporaneously record the officer's sworn oral testimony or take longhand notes, have the testimony transcribed, and then certify the transcript; requiring the officer to enter the terms of the search verbatim, and print the issuing judge's name, on a duplicate original warrant; requiring the judge to issue a written confirmatory warrant; and requiring the judge to put the time that the duplicate original warrant was issued on the written confirmatory warrant. It is therefore clear that the vast majority of jurisdictions that permit telephonic warrants felt that it was important, as our Supreme Court did in State v. Valencia, 93 N.J. 126 (1983), to enact procedures that assured the "integrity and soundness" of the judge's decision to issue that warrant.

During the course of its research, *Committee* staff spoke to a number of law enforcement officials from various states across the country, and on more than one occasion, officials remarked that they could not remember the last time that someone had applied for a telephonic search warrant. It therefore seemed, at least anecdotally, that although telephonic search warrants were permitted, they were rarely sought in practice. The *Committee* did not find any jurisdictions that had established statewide procedures for obtaining telephonic search warrants. The *Committee* also reviewed the study of the San Diego Search Warrant Project, which has been cited in support of the more widespread use of telephonic applications for search warrants. However, a closer look at the study of that project revealed that only 14 of 122 search warrants were telephonic warrants, and not a single warrant, telephonic or otherwise, was issued solely for the search of an automobile. See Laurence A. Benner & Charles T. Samarkos, Searching for Narcotics in San Diego: Preliminary Findings from the San Diego

, 518 Search Warrant Project, 36 Cal. W. L. Rev. 221 (2000). That is probably because, unlike New Jersey, California follows the federal standard regarding warrantless automobile searches. Under that standard, a warrantless search of an automobile is permissible if probable cause exists and the auto is mobile. See Pennsylvania v. LabronU.S. 938, 940, 116 S.Ct. 2485, 2487, 135 L.Ed. 2d 1031, 1036 (1996); and People v. Chavers, 33 Cal. 3d 462, 469 (1983). As it was envisioned that any telephonic search warrant procedures developed in New Jersey would be used primarily for roadside automobile stops, the San Diego study did not offer much guidance in that regard.

C. New Jersey's Experience with Telephonic and Electronic Search Warrants

1. State v. Valencia and Rule 3:5-3(b)

In New Jersey, the procedures for obtaining telephonic or electronic search warrants are governed by R. 3:5-3(b), which reads as follows:

> (b) A Superior Court judge may issue a search warrant upon sworn oral testimony of an applicant 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, adequate longhand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the applicant must identify himself or herself, specify the purpose of the request and disclose the basis of his or her information. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a search warrant. A warrant may issue if the judge is satisfied that exigent circumstances exist sufficient to excuse the failure to obtain a written warrant, and that sufficient grounds for granting the application have been shown. Upon approval, the judge shall memorialize the specific terms of the authorization to search and shall direct the applicant to enter this authorization verbatim on a form, or other appropriate paper, designated the duplicate original search warrant. This warrant shall be deemed a search warrant for

> the purpose of R. 3:5. The judge shall direct the applicant to print the judge's name on the warrant. The judge shall also contemporaneously record factual determinations as to exigent circumstances. If a recording is made, the judge shall direct that the testimony be transcribed as soon as practicable. This transcribed record shall be certified by the judge. The judge shall promptly issue a written confirmatory search warrant and shall enter thereon the exact time of issuance of the duplicate original warrant. In all other respects, the method of issuance and contents of the warrant shall be that required by subsection (a) of this rule.

R. 3:5-3(b) was the result of the New Jersey Supreme Court's decision in State v. Valencia, 93 N.J. 126 (1983). In Valencia, the Court held that a telephonically authorized search was the equivalent of a warrantless search. Id. at 136. The Court also required a law enforcement officer seeking a telephonic warrant to show not only the presence of probable cause to search, but also that exigent circumstances make it necessary to bypass obtaining a written warrant. Id. at 137. In order to assure the "integrity and soundness" of a judge's decision to issue a telephonic warrant, the Court required the following safeguards:

> The applicant-police officer must suitably identify himself; he must specify the purpose of the request. He must also disclose the basis for the information he intends to impart to the judge and must be placed under oath or affirmation by the judge before presenting any information. The judge shall also make a contemporaneous record of the application, either by tape or stenographic recording or by making adequate notes thereof. The judge shall also make a contemporaneous record or notation of his factual determination as to exigent circumstances and probable cause. He shall also memorialize the specific terms of his authorization to search. Further, promptly after such authorization, the judge shall issue a written confirmatory search warrant and shall file that warrant together with all documents evidencing the oral application and authorization with the clerk of the court.
>
> [Id. at 138-139].

The Court also asked its Criminal Practice Committee to "assist . . . in the adoption of appropriate rules" for the issuance of telephonic search warrants. Id. at 142.

Approximately one year later, the Criminal Practice Committee submitted a proposed draft of R. 3:5-3(b) for the Court's approval. See Report of the Supreme Court's Committee on Criminal Practice, 113 N.J.L.J. 697 (June 21, 1984). In drafting R. 3:5-3(b), the Committee examined the statutes and court rules of other jurisdictions across the United States that permitted telephonic search warrants, and discovered that those jurisdictions had several procedures in common. As a result, the Committee included those procedures in its proposed R. 3:5-3(b) and expanded upon the procedural safeguards required by Valencia. The proposed rule, for example, (1) provided that only Superior Court Judges could issue telephonic search warrants; (2) permitted oral testimony not only by telephone, but also by radio or other means of electronic communication; (3) expressed a preference for recording the conversation by tape or stenographic machine over longhand notes; (4) required the judge to record the specific terms of the authorization to search and direct the applicant to copy those terms verbatim onto a duplicate original warrant; (5) required the judge to direct the applicant to print the judge's name on the duplicate original warrant; (6) required the judge to have the tape or stenographic recording transcribed forthwith; (7) required the judge to certify the transcribed record; and (8) required the judge to record onto a written confirmatory warrant the time of issuance of the duplicate original warrant. The Court adopted R. 3:5-3(b) on July 26, 1984. Until the Court's decision in Pena-Flores removed the requirement that a police officer

prove the existence of exigent circumstances when seeking a telephonic warrant, only minor stylistic changes had been made to the rule.

2. Statewide Attorney General and New Jersey County Prosecutor's Association Initiatives

In 1985, shortly after the adoption of R. 3:5-3(b), the Attorney General and the County Prosecutor's Association issued a joint policy statement requiring that all search warrant applications be reviewed by the Attorney General or his or her designees, or by the appropriate County Prosecutor or his or her designees, prior to submission to a court. That joint policy statement was later superseded by *Attorney General Law Enforcement Directive No. 2002-2: Approval of Search Warrant Applications, Execution of Search Warrants, and Procedures to Coordinate Investigative Activities Conducted by Multiple Law Enforcement Agencies* (August 8, 2002). *Directive No. 2002-2* requires that no law enforcement officer may apply to a judge for a search warrant without first obtaining "express authorization" from an appropriate "Designated Attorney." Not only is the "Designated Attorney" responsible for determining whether sufficient probable cause exists to justify requesting a search warrant, he or she is also responsible for practically every aspect of the warrant application, including selecting the appropriate court to hear the application; making sure that the application form has been properly completed (or, in the case of a telephonic warrant, making sure that the applicant has answered each question on the form); making sure that the areas to be searched, and the property to be seized, have been adequately and specifically described; determining, if necessary, whether exigent circumstances are present; and deciding how the warrant should

be executed. The Division of Criminal Justice and each County Prosecutor is responsible for keeping a list of designated attorneys who are available at all times to prepare, review and approve search warrant applications. Those lists are to be made available to all appropriate law enforcement agencies.

Directive No. 2002-2 was binding on all law enforcement agencies in the state. It remains in effect today.

Although procedures for issuing telephonic search warrants have been in place for over twenty-five years, it appears that such warrants have rarely been sought in New Jersey. An informal inquiry of county prosecutors revealed that only one Prosecutor's Office reported fielding any requests for telephonic warrants in recent memory.

3. Burlington County Prosecutor's Office's Proposed System for Obtaining Telephonic Search Warrants

Shortly after the *Committee* began its work, it learned that the Burlington County Prosecutor's Office had drafted tentative procedures for applying for telephonic search warrants. Consequently, members of the Burlington County Prosecutor's Office were asked to meet with the *Committee* to outline that office's proposed procedures. The proposed procedures are as follows:

A police officer stops an automobile and observes something that leads the officer to believe that there is probable cause to search the car.

The officer, via cell phone or police radio, would contact Central Communications (Central) and ask Central to contact the duty prosecutor. Central has the ability to patch an officer who calls in via his or her police radio into a phone line. Central would then contact the duty prosecutor, who would in turn immediately call the officer.

The officer would explain to the duty prosecutor the nature of the car stop and the facts constituting probable cause. If the duty prosecutor agreed with the officer that there was probable cause to search the car

and/or its occupants, the duty prosecutor would authorize the application for a telephonic search warrant. The officer would have a carbonless pad in his car with blank duplicate original search warrant forms, which he would then complete under the prosecutor's telephonic supervision.

When the form was completed in its entirety, the assistant prosecutor and/or police officer would contact Central and request that Central contact the emergent duty judge to hear the telephonic search warrant application.

Central would contact the emergent duty judge, who would be given a phone number that allowed him or her to dial into a "conference call" system. The prosecutor and police officer would have already called into the "conference room," and would be waiting for the judge. The Burlington County Prosecutor's Office planned to purchase a phone conference system that could handle up to eight (8) parties. Each party would be provided with a telephone number. The duty judge, for example, would call 609-265-1000; the prosecutor would call 609-265-1001; and the officer would call 609-265-1002. Those lines would automatically be connected to each other, and all dialogue would be recorded on a separate server once a party dialed into the system. Thus, the entire conversation between the three parties, from start to finish, would be recorded onto the Burlington County Prosecutor's Office's server.

Once the judge enters the "conference center," the parties would identify themselves, the prosecutor would explain the nature of the call, and the judge would swear in the officer for the presentation of the probable cause application. The judge would also have a blank copy of the "duplicate original" search warrant form. If the judge found that there was probable cause for the search, he or she would authorize the search of the automobile and/or persons identified. The judge would also authorize the officer to sign the judge's name on the duplicate original warrant form. If the judge so desires, he or she could also make separate notes on his or her copy of the duplicate original form. The call would then conclude.

A carbonless copy of the "duplicate original" form would be provided to the driver of the car as required by court rule. There would be four carbonless copies of the form. The original would be filed with the Court; a second copy would be for the Burlington County Prosecutor; a third copy would be for the officer; and a fourth copy to be given to the driver.

The inventory of the search would also be completed on the duplicate original form, and a carbonless copy of the duplicate original form would be provided to the driver of the car. The form would be delivered to the court on the following day. The duplicate original form

would also contain a space for the judge to determine whether, pursuant to R. 3:5-3(b), the duplicate original would also serve as a written confirmatory warrant. This would eliminate the need for the court to prepare separate forms.

The Prosecutor's Office would copy the conversation from the server onto a CD-ROM and deliver it to the court. The Prosecutor's Office would also prepare a transcript as required by R. 3:5-3(b).

It was estimated that the application process, beginning when the officer called Central Communications, would take approximately 45 minutes to complete. In addition, the conferencing system would automatically time and date stamp the times that the calls were received. The system was expected to cost between $12,000-13,000.

The Burlington County Prosecutor's Office eventually decided to hold off on purchasing the conferencing equipment, and on implementing its proposed procedures, until after the *Committee* completed its work and the Court issued its Administrative Determinations.

[9] State v. Pena-Flores, 198 N.J. at 36.

V. CONCEPTUAL ISSUES

In developing a system that was consistent with the Court's intent to "give police access to an efficient and speedy telephonic search warrant procedure that will be available to them on the scene,"[9] the *Committee* created subcommittees to examine three different areas: (1) technological requirements; (2) human resource requirements; and (3) administrative requirements. Before the subcommittees began their work, however, the *Committee* agreed on a number of conceptual issues.

First, the *Committee* recognized that officers seeking telephonic search warrants would often be stopped on the sides of heavily-traveled highways and roads, along with the cars' drivers and occupants. This raised safety concerns. There were also concerns that an officer who detained a vehicle and was engaged in seeking a telephonic warrant would necessarily be unable to tend to other police matters. This could create resource issues, especially in smaller police departments. Those safety and police resource concerns dictated that applications for telephonic search warrants should be handled as quickly as possible. Consequently, the *Committee* agreed that telephonic search warrant applications should be completed in no more than 45 minutes, with an ideal goal of 30 minutes.

Second, the *Committee* recognized that prosecutors must be involved in the telephonic search warrant application process. As noted above, *Attorney General Law Enforcement Directive No. 2002-2* requires that law enforcement officers must first obtain "express authorization" from an appropriate "Designated

Attorney" before contacting a judge for a search warrant. (See Section IVC2). As telephonic search warrants have historically been rarely sought in practice, the timely availability of assistant prosecutors and the technology necessary to involve them in the process have heretofore not been reviewed. However, as the *Committee* anticipates that the number of telephonic search warrant applications will increase in the future, it views the timely and effective involvement of assistant prosecutors as a necessity.

Third, the *Committee* agreed that any system developed for handling telephonic search warrant applications should ensure that the official court record is controlled by the Judiciary.

VI. TECHNOLOGY ISSUES

A. Goals

In examining technology issues, the goal was to develop a telephonic or electronic system for search warrant requests that: (1) would enable multiple parties to be involved; (2) would ensure that all communications were secure and not subject to interception by others; (3) would ensure that the official court record is controlled by the Judiciary; (4) was economically reasonable; (5) was relatively easy to use; and (6) allowed the search warrant application process to be completed in no more than 45 minutes, with an ideal goal of 30 minutes.

B. Application Process

To determine technology needs, the following steps for currently obtaining a telephonic search warrant were identified:

1. The police officer makes a motor vehicle stop and believes there is probable cause to search.
2. The police officer contacts the county's on-duty prosecutor.
3. The police officer and the on-duty prosecutor have a discussion regarding whether or not to request a search warrant. If the prosecutor believes a search warrant is necessary, the prosecutor, with the police officer still on the connection, contacts the on-duty judge.
4. The judge will swear in the police officer.
5. The police officer will identify himself, state the purpose of the request and present facts supporting the applications.
6. The sworn oral testimony will be recorded, or if this is not possible, the judge will make contemporaneous longhand notes summarizing what is said.
7. A warrant will be issued if the facts support the issuance of a warrant.
8. If the judge approves a warrant, the judge will memorialize the terms of the authorization and instruct the officer to enter the terms of the authorization on a form that will be deemed a duplicate original search warrant.
9. The judge will issue a confirmatory search warrant and will enter the exact time of issuance of the duplicate original search warrant.

C. Models Considered

The *Committee* considered six models for handling telephonic applications for search warrants:

(a) A central dispatch model using police radios (The Burlington model);

(b) A central dispatch model using police radios coupled with Judicial control of the record;

(c) Using encrypted police radios;

(d) Using a private vendor to manage and record the conference call;

(e) Using cell phones in combination with a private vendor to manage and record the conference call;

(f) Use of a Judiciary-operated recording system and equipping police, and emergent duty judges and prosecutors, with cell phones

1. A central dispatch model using police radios (The Burlington model)

As previously discussed, in Section IVC3, the Burlington County Prosecutor's Office provided the *Committee* with an overview of its proposed system for handling telephonic search warrants. Under that proposal, police officers would contact Central Communications via cell phone or police radio, and Central Communications would first patch in the emergent duty prosecutor, and then the emergent duty judge. The Burlington County Prosecutor was willing to purchase equipment, at a cost of between $12,000-13,000 that could accommodate up to eight parties and handle more than one call at a time. The recording of the conference would be stored on the Prosecutor's Office's server, and the Prosecutor would provide a copy of the recorded conference to the court the following day, as well as a transcript (if requested) of that conference for the court record.

The *Committee* had three significant concerns about the proposal. First, the Prosecutor's Office, rather than the Judiciary, would have control and custody of the official court record. Second, since police officers would use their radios to facilitate their participation in the application process, the details of the application, as well as the conversation between the judge, assistant prosecutor and law enforcement officer, would be susceptible to interception by anyone with the capability of monitoring police communications. Third, not every county had a Central Communications dispatch system like Burlington County's, and therefore might lack a significant component of the necessary infrastructure.

2. A central dispatch model using police radios coupled with judicial control of the record

The *Committee* also considered a proposal that eliminated one of the problems associated with Burlington's system, i.e. judicial control of the record. Under that proposal, the officer would again call dispatch via his or her police radio, and dispatch would connect the officer to the emergent duty prosecutor's cell phone. The prosecutor would then contact the judge via the cell phone's conferencing feature. However, rather than law enforcement equipment being used to record the conference, the judge would record the conference through one of the Judiciary-controlled methods subsequently discussed in this report.

Although this proposal would address concerns about the custody of the record, it would not address concerns about the security of the application process, or the unavailability of a central dispatch infrastructure in some counties.

3. Using encrypted police radios

Since police radio communications can easily be intercepted by a standard police scanner, the *Committee* looked into the costs for encrypting police radios. The *Committee* learned that the Hamilton Township Police Department in Atlantic County had recently purchased an encryption system, and that it cost approximately $9,000 to add an encrypted line to its dispatch system, plus an additional $446 for each encrypted radio. As the Hamilton Township Police Department had purchased approximately 100 portable radios, plus an additional 60 for each police vehicle, the total cost was in the area of $80,000. Although encryption would address issues regarding the security and privacy of calls over police radios, the *Committee* was nevertheless concerned about the costs, and encryption alone would not solve problems related to lack of infrastructure in the county

4. Utilizing a private vendor to manage and record the conference call

The *Committee* considered using a private vendor to handle requests for telephonic search warrants. To test the feasibility of this alternative, the *Committee* obtained a proposal from a private vendor to manage search warrant conference calls and the recording of same. The vendor's system was similar to that proposed by the Burlington County Prosecutor's Office in that a police officer would begin the process by calling dispatch from his or her car radio, and would then be patched in to the emergent duty prosecutor over a land line. If the prosecutor agreed that the situation called for the issuance of a telephonic warrant, the prosecutor would contact dispatch. Dispatch would then bring up

the vendor's application on its computer and click on links for the emergent duty prosecutor and judge. The vendor's system would automatically call the prosecutor and the judge, bridge the police officer into the call, and activate the recording device. Upon completion of the call, the recording would be uploaded to a temporary FTP server. The following day, the judge would notify vicinage IT staff of the search warrants issued the previous night, which would then pull the recordings from the vendor's FTP server for storage on the Judiciary's servers.

This proposal would address concerns about Judiciary custody of the record, but would not address concerns about the security of application communications. In addition, the system's costs would be substantial, and it would still require the involvement of a local dispatch operation. The approximate cost for a statewide yearly contract would be approximately $30,000, with an additional administrator cost of $180 per vicinage and a charge of 56¢ per minute for each conference. Assuming that the average telephonic warrant application was completed within no more than 45 minutes, with an ideal goal of 30 minutes, a typical phone call would cost between $16.80 - $25.20.

5. Using cell phones in combination with a private vendor to manage and record the conference call

This system is similar to the previous proposal, but instead of the initial call being placed to dispatch via police radio, the officer would use a duty cell phone to place a call to the emergent duty prosecutor. If the prosecutor agreed on the need for a telephonic search warrant, he or she would disconnect the officer and contact the private vendor. The private vendor would then call each

of the parties to initiate the phone conference and would also record the conference.

Although this system would not have the same issues regarding the security and privacy of the initial call into dispatch, or judicial control of the record, it still involved a central dispatch infrastructure and the C*ommittee* was concerned about the costs of the system for the reasons expressed above.

6. Providing direct access to emergent duty prosecutors and judges through use of pre-programmed cell phones coupled with a Judiciary-operated recording system

Another proposal the *Committee* considered was that of providing direct access to an emergent duty prosecutor and judge through pre-programmed cell phones, coupled with a Judiciary-operated recording system.

For the reasons expressed herein, the *Committee* adopted this proposal and makes the following recommendations:

NDATION Pre-programmed cell phones should be utilized by law enforcement officers, emergent duty prosecutors and emergent duty judges in seeking, and fielding, telephonic search warrant applications.

NDATION It is the responsibility of the Judiciary to record any sworn oral testimony taken in support of a telephonic or electronic search warrant application. The preferred manner of recording such testimony is through the use of the Judiciary's CourtSmart system, but a hand-held recording device would meet minimally acceptable standards.

The *Committee* believes that cell phones would provide the quickest and simplest means of communication for all parties involved in the telephonic search warrant application process. Most, if not all, cell phones have conference call

capability, so a police officer seeking a telephonic search warrant would simply call a pre-programmed (speed dial) phone number for the emergent duty assistant prosecutor, and assuming that the prosecutor agreed that the situation called for a telephonic warrant, either party could then conference in the emergent duty judge. The parties would communicate directly with each other, without the need for a central communications dispatcher or a private vendor. In addition, it is the *Committee's* understanding that both Superior Court Judges and assistant prosecutors are often provided with cell phones for use during emergent duty, and then pass those phones on to the next emergent duty judge or prosecutor when their period of emergent duty ends. Therefore, since the phone numbers would not change, police officers would be able to pre-program their phones so that both emergent duty judges' and prosecutor's phones were on "speed dial." Also, unlike communications via police radio, cell phone conversations are secure, and can not be intercepted without the use of extremely expensive eavesdropping equipment. Finally, cell phones are relatively inexpensive, especially when compared to the other options that the *Committee* considered. Any added cost for providing cell phones for backup emergent duty personnel would be relatively small. The costs for each municipality may vary since each may currently have different contracts with cell phone providers. Under the current State contract, the charges for cell phones are $9.99 per month, per phone, with a 14¢ per minute rate for calls outside the network. The *Committee* notes that many carriers do not charge a per-minute rate for calls made to other subscribers within their networks. Therefore, to the

extent that local law enforcement could use the same service provider, those per-minute costs could be eliminated or significantly reduced.

The *Committee* is sensitive to the fact that the majority of costs under this recommendation may be borne by local police departments. It should be noted, however, that the *Committee* is recommending only that each patrol car be equipped with a cell phone for use in seeking telephonic search warrants, rather than each individual patrol officer. As envisioned, the pre-programmed phones would remain in the patrol cars, for use by the officers assigned to those cars. This would minimize costs. Furthermore, since the phones would be used for law enforcement purposes, the cost of purchasing phones could possibly be covered through the use of forfeiture funds.

Although R. 3:5-3(b) allows judges fielding telephonic search warrant requests to either record any sworn oral testimony, or to take longhand notes summarizing what is said, the *Committee* believes that the better practice is to record the testimony, and to take longhand notes as a backup. The *Committee* considered two alternative ways to record the colloquy between judge, prosecutor and police officer regarding the issuance of a telephonic search warrant: (1) adding an additional recording device to the courts' present CourtSmart recording infrastructure at the courthouses, or (2) the use of digital handheld recording devices.

CourtSmart is a server-based central digital recording system for making the record in courtroom proceedings. Each courtroom is designated a folder on the CourtSmart servers where that courtroom's recordings are stored. Access to the record is controlled by the court.

The use of CourtSmart would involve establishing a virtual courtroom with a dedicated phone number for use in search warrant conferences. For each individual virtual courtroom, there would be a one-time cost of approximately $15,000. This option would require the judge to put the police officer and the prosecutor on hold, call a number to initiate a conference call with the recording device, and then bring back the other parties into the conference. The benefit of this approach is that it is relatively simple. A concern may exist in the fact that because CourtSmart can only handle one call at a time, costs for additional virtual courtrooms could become a factor. Busy vicinages might need two or more virtual courtrooms to handle the volume of telephonic search warrant requests within 45 minutes, with an ideal goal of 30 minutes. However, since access to the virtual courtroom would be through telephone systems, consideration could also be given to using the CourtSmart systems in neighboring counties, or even creating a regional or statewide CourtSmart primary or backup system.

The second option involves the use of small digital recorders that would connect to cell phones to record the conference. The cost of a quality digital recorder is approximately $175. Judges would simply connect the digital voice recorders to their cell phones when needed. The following day, the cell phone recorders would synch to the courthouse servers via a USB cable to upload the recorded conferences. While this approach was the least expensive solution and was also relatively simple, there was some concern that judges would be responsible for managing the recording at the same time that they were focusing on the substance of the application.

The *Committee* preferred the CourtSmart option, but would find the hand-held recording approach to meet minimally acceptable standards if the cost factor were the predominant consideration for the Judiciary.

[10] There were 40 judicial vacancies.

VII. HUMAN RESOURCE ISSUES

In considering human resources issues, the goal was to ensure that an adequate number of judges and prosecutors were available and organized to provide for an effective, independent judicial review of telephonic search warrant requests within a reasonable period of time, i.e., within no more than 45 minutes, with an ideal goal of 30 minutes, from the time of the initial call by a police officer. In considering various ways to achieve that goal, the *Committee* was mindful of the Court's admonition in Pena-Flores that "[t]here may be problems in developing an effective scheme to obtain warrants electronically or telephonically, but quick access to a judge should not be one of them." State v. Pena-Flores, 198 N.J. at 36, n.8.

In meeting that goal, the *Committee* needed to answer three critical questions. First, what would be the expected volume of requests for telephonic search warrants? Second, what amount of judicial resources would be necessary to promptly respond to that volume? Third, what was the most effective way of structuring those judicial resources?

In order to address those questions, the *Committee* sought to obtain information on: current judicial resources; current emergent duty policies and responsibilities; and the expected volume of requests for telephonic warrants.

A. Current Judicial Resources

As of January 1, 2010, there were 408 sitting Superior Court Judges[10], 374 of which were trial level judges. Of those 374 trial level judges, 95 were

[11] Municipal Court Judges also handle emergent duties, but are not included on the Superior Court emergent duty schedule.

assigned to the Criminal Division. In addition, there were 343 Municipal Court Judges, 22 of whom were full-time Municipal Court Judges.

B. Current Emergent Duty Policies and Responsibilities

In order to learn more about how the courts currently respond to emergent matters, the *Committee* asked the Administrative Office of the Courts to conduct a survey of vicinage emergent duty policies and responsibilities. The survey revealed the following:

. Superior Court emergent duty judges generally handled the following responsibilities: setting bail pursuant to R. 3:26-2(a); search warrant requests; civil commitments; juvenile detention matters; applications for temporary restraining orders; and violations of domestic violence restraining orders.[11]

. In thirteen of the fifteen vicinages, there was at least one emergent duty judge to handle all types of matters. In the other two vicinages, emergent duty requests were divided by subject matter among the divisions. In all cases, some provision for a backup was made if the primary emergent duty judge was unavailable.

. The general, but not universal, practice was that a judge was assigned to emergent duty for one week at a time.

. In half of the vicinages, emergent duty began after regular court hours. In the other half, there were also limited emergent duty assignments during regular court hours.

. A number of vicinages had a “Do Not Disturb” policy, in which judges were not to be contacted for certain types of matters after certain hours.

. Generally, Superior Court Judges from all divisions were assigned to emergent duty. In several vicinages, however, Assignment Judges and Presiding Judges were excluded from emergent duty.

[12] We will refer to these searches in this report as pre-Pena-Flores.
[13] We will refer to these searches in this report as post-Pena-Flores.

C. Expected Volume of Automobile Searches

In order to ensure that a sufficient number of judges are available to respond to telephonic search warrant requests, it is necessary to determine the number of requests that can be anticipated, as well as the times of day that those requests will likely occur. No statewide data was available for consideration by the *Committee* in addressing these issues. The *Committee* therefore conducted a survey of law enforcement agencies to attempt to obtain data that would enable it to make such projections.

The survey requested that each municipal police department provide information regarding: (1) the number of searches conducted with and without warrants; (2) the number of automobile searches conducted with and without warrants; and (3) the percentage of searches that occurred during each of three time periods (7:00 a.m. - 5:00 p.m., 5:00 p.m. - 11:00 p.m. and 11:00 p.m. - 7:00 a.m.). The *Committee* sought to document the total number of searches, not simply automobile searches, because anticipated telephonic search warrant requests would not necessarily be limited to automobile searches. Because the *Committee* had received anecdotal information that automobile searches had dropped significantly after the Court's decision in Pena-Flores, it requested that information for two different time periods: (1) an average week prior to February 25, 2009 - the date that the Court decided Pena-Flores;[12] and (2) the week of June 14-20, 2009 – which was deemed to be a representative week after Pena-Flores.[13] The survey also asked whether law enforcement agencies anticipated

[14] Note: this includes searches with and without a warrant. The data in our survey reflected that 93% of searches were warrantless searches.

that they would conduct more searches if procedures were in place for expeditiously obtaining telephonic search warrants. The survey was circulated to all local police departments through their county prosecutors, and to the State Police through their representative on the *Committee*.

Despite multiple requests, the response to the survey was spotty. The respondents included 102 municipal police departments from nine counties, three college law enforcement agencies, four county level law enforcement agencies, and the New Jersey State Police, which provide police coverage in 69 municipalities, and also patrol major roadways, including the Parkway and Turnpike. The responses revealed the following:

. Pre-Pena-Flores, the law enforcement agencies that responded to the survey conducted 656 automobile searches during an average week.[14] Post-Pena-Flores, those same departments conducted 304 automobile searches in a week - a decrease of 54%.

. Pre-Pena-Flores, responding law enforcement agencies estimated that approximately 73% of searches occurred outside of work hours. That percentage essentially remained the same post-Pena-Flores, as responding departments estimated that approximately 68% of searches occurred outside of work hours.

. 83% of responding law enforcement agencies believed that the number of searches would increase if procedures were in place for obtaining telephonic or electronic search warrants.

The responses from municipal police departments, along with those of the New Jersey State Police, represented a response rate of approximately 30% of statewide municipalities. The *Committee* would have benefited from more complete data from which it could quantify present practices. However, despite the *Committee's* best efforts, none could be obtained. The *Committee* therefore

sought the assistance of the Administrative Office of the Courts Quantitative Research Unit (AOC) in an attempt to determine whether the limited survey data could be used to project an estimate of the number of automobile searches that might be expected annually throughout the State.

The AOC developed three methods in an attempt to arrive at an estimate. Those three methods, which are described in Appendix A, yielded estimates that were very close numerically. The average of those three methods was used to estimate, on an annual basis, the statewide number of automobile searches that would be expected at both pre- and post-Pena-Flores rates.

Based on the data received, it was estimated that there would have been 92,272 automobile searches annually pre-Pena-Flores and 47,045 automobile searches annually post-Pena-Flores. These figures demonstrate a significant decrease in automobile searches following the decision in Pena-Flores. One possible explanation for the significant decrease in the number of automobile searches following Pena-Flores could be the effect of the Court's decision in Pena-Flores itself. In the context of an automobile search, there are three main rationales that law enforcement uses to justify a warrantless search: (1) consent; (2) plain view; and (3) the combination of probable cause and exigent circumstances. While there is evidence that the number of consent searches has increased after Pena-Flores, it was the third rationale that was most directly impacted by the Court's decision. Therefore, an assumption could be made that a significant part of the drop-off in the number of automobile searches could be attributed to the impact of that decision. If that assumption has any merit, then an estimate of the number of automobile searches that could result in telephonic

search warrant applications might be derived by subtracting the estimated number of post-Pena-Flores automobile searches from the number of pre-Pena-Flores automobile searches. Using that methodology, and the AOC estimates, the *Committee* projected that the size of the statewide post-Pena-Flores decrease in searches was 45,227. It was assumed that a significant part of this estimated decrease would have been exigent circumstance searches. Based on the *Committee's* survey, approximately 68-73% of searches occur after court hours. Using a ratio of 70%, the *Committee* projected that the total number of searches after court hours would be approximately 31,658. This figure could therefore be used as an estimate for the number of emergent duty telephonic search warrant requests based upon allegations of probable cause and exigent circumstances.

The *Committee* was not confident, however, that its estimates were reliable enough to propose significant changes at this point to the existing emergent duty system. The *Committee* had numerous concerns as to the reliability of its projections. The data the *Committee* used represented only two weeks out of the year, and the *Committee* questioned whether those weeks were accurately representative of data over a sustained period. The *Committee* received data from only 30% of all law enforcement agencies, and had serious concerns as to whether the data received was representative of the work of law enforcement agencies over the entire State. Most large municipalities, for example, did not respond to the survey. To illustrate our concern, it is quite a leap to take a small sample (656 automobile searches) and extrapolate that out to 92,272 automobile searches yearly statewide. The *Committee* also

recognizes that its assumption that the drop-off in the number of automobile searches was due to a drop-off in exigent circumstance searches is not the only possible explanation for this occurrence. Furthermore, even if a significant portion of the estimated 31,658 cases were exigent circumstance cases, it is not clear that law enforcement officers would, in all cases, choose to apply for a warrant. In some cases an officer might be confident enough in his or her judgment about the presence of exigent circumstances that the officer would conduct the search without a warrant and be prepared to offer justification at a hearing later on a motion to suppress.

Because of these and other uncertainties inherent in these estimates, the *Committee* felt it should adopt a conservative approach until more actual experience could be gained. The *Committee* therefore felt that the most responsible approach was to use the current emergent duty structure, with some modifications. Although the *Committee* has adopted a conservative approach due to its uncertainty about the estimated figure of 31,658 cases, the *Committee* nevertheless views that estimated figure with great concern. Should the volume of telephonic search warrant requests reach that level, it would not appear that the current system could adequately respond. Therefore, the *Committee* felt that it was imperative to monitor the volume of telephonic search warrant requests very closely in order to allow for rapid implementation of an alternative system if need be. Should the actual number of telephonic warrant applications be far greater than can be adequately handled by the current structure, the *Committee* has also identified a number of alternative systems that could be used to address that greater volume of requests.

D. Models Considered for Providing Judicial Resources

The *Committee* considered several models to respond to applications for telephonic search warrants. The first two of these models, (a) and (b), have been rejected for the reasons set forth below. The other three are included among the *Committee's* recommendations.

(a) use of selected pilot programs to allow for greater development of data on the volume of cases;
(b) exclusive use of Criminal Division Judges to respond to applications;
(c) using Criminal Division Judges during regular court hours to respond to applications;
(d) using the current emergent duty schedule to respond to applications after court hours; and
(e) alternatives to enhance or replace the current emergent duty system:

(1) using Municipal Court Judges to respond to applications;
(2) creation of a regional call system to respond to applications;
(3) creation of a statewide call system to respond to applications;
(4) use of special masters or magistrates.

1. Use of selected pilot programs to allow for greater development of data on the volume of cases

Given the extremely wide range projected for the possible number of telephonic search warrant requests, and the *Committee's* subsequent lack of confidence in those projections, the *Committee* considered whether it would be better to create several pilot programs in order to develop more concrete numbers. The concept would establish a telephonic system in 5-6 counties, and monitor how the system worked before going statewide. The pilot program would last for three, or possibly six, months, after which the *Committee* would be able to more confidently assess the number of judges that would be necessary to field

telephonic warrant requests. Eventually, however, the *Committee* rejected this concept, because it felt that in light of the Court's decision, and existing law enforcement responsibilities, there was a need to make emergent access to judges available throughout the State, and to do so as soon as possible.

2. Exclusive use of Criminal Division Judges to respond to applications

The *Committee* also considered whether telephonic search warrant requests should be handled exclusively by Criminal Division Judges. The *Committee* believed that this would be impractical due to the potential volume of applications, the limited number of Criminal Division Judges, and the need to create separate emergent duty lists in most vicinages.

NDATION During regular court hours, Criminal Division Judges should respond to requests for telephonic search warrants

Currently, Criminal Division Judges handle search warrant requests during regular business hours. The *Committee* sees no reason to change this practice. However, to ensure that these requests are handled in a timely manner, i.e., within no more than 45 minutes, with an ideal goal of 30 minutes, there will need to be a point-of-contact for law enforcement. The *Committee* recommends that the contact person be the Criminal Division Manager, or his or her designee. It will be the responsibility of the Criminal Division Manager to find an available Criminal Division Judge to handle these requests immediately upon receiving the request from law enforcement.

NDATION The present Superior Court emergent duty structure should be used to respond to requests for search warrants made via telephonic means after normal business hours. However, the

current schedule should be amended to: (1) ensure that each vicinage specifically designates at least one judge as the backup emergent duty judge; and (2) ensure that any vicinage "Do Not Disturb" policies do not place limits on telephonic search warrant applications.

The current Superior Court emergent duty system is well-established, and by all accounts, it is working well. The *Committee* therefore agreed that the current emergent duty schedule should be used unless and until experience provided sufficient reason to change it. However, it is imperative that every vicinage specifically designate a backup emergent duty judge, and to the extent that any vicinages have "Do Not Disturb" policies, those policies must be changed to provide for immediate access to a judge for telephonic search warrant applications. Simply put, there must be a judge available at all times to quickly respond to search warrant applications.

NDATION The county prosecutors should ensure that a sufficient number of emergent duty prosecutors are available to handle requests from law enforcement for telephonic search warrants. As such, there should be at least one emergent duty prosecutor, and a backup emergent duty prosecutor, in each county.

In order to meet the *Committee's* goal of completing telephonic search warrant applications within no more than 45 minutes, with an ideal goal of 30 minutes, the *Committee* believes that it is just as important to ensure that a sufficient number of prosecutors are available as it is to ensure that there are a sufficient number of judges. As previously noted, Attorney General Directive No. 2002-2 requires that a law enforcement officer receive approval from a designated attorney before requesting a search warrant. It would not do the law

enforcement officer seeking the warrant any good, for example, if sufficient numbers of judges were available to field those requests, but a police officer could not reach an emergent duty prosecutor to assist in preparing the application and ensuring that the legal and procedural requirements were met. As a result, in order to ensure that there are a sufficient number of emergent duty prosecutors available to handle telephonic warrant requests, the *Committee* respectfully recommends that there be at least one emergent duty prosecutor, and a backup emergent duty prosecutor, in each county.

NDATION Within a month of the Supreme Court's approval of the recommendations contained in this report, each Assignment Judge, in consultation with the County Prosecutor, should develop an implementation plan and submit it to the Administrative Director of the Courts.

In order to ensure that any recommendations approved by the Supreme Court are implemented in a timely manner, the *Committee* recommends that the Assignment Judge in each vicinage convene a meeting with his or her County Prosecutor to develop an implementation plan. The *Committee* recognizes that some of the recommendations may take longer than others to implement, and that some, such as the purchase of cell phones, may not be implemented by local police departments. Nevertheless, the *Committee* believes that it is important to establish a timeframe within which the recommendations will be implemented. The *Committee* also believes that it is important to effect implementation consistently on a statewide basis, and therefore recommends that the implementation plans be submitted to the Administrative Director of the Courts.

NDATION The vicinages and the Administrative Office of the Courts should closely monitor the volume of telephonic search warrant requests in order to allow for rapid implementation of an alternative system if the volume of searches is dramatically greater than the current system can address.

The *Committee* recognizes that the emergent duty responsibilities of Superior Court Judges have increased considerably over the years, and it is probable that with the addition of telephonic search warrants, those responsibilities will increase even more. The survey conducted by the *Committee* suggests that the majority of telephonic search warrant applications will occur outside of regular court hours. The *Committee* is concerned that if the number of after-hours telephonic search warrant requests is too great, it could overwhelm the current system and result in an inability to provide timely responses to such applications. If the emergent duty judge were to handle numerous applications during late evening hours, it could also affect the judge's ability to function during regular working hours. The Judiciary needs to be in position to quickly address this problem should it occur. Therefore, the *Committee* recommends that the vicinages closely monitor the number of those requests, and during the first six months of implementation, file reports with the Administrative Office of the Courts on a weekly basis.

NDATION If the number of requests for telephonic search warrants exceeds the ability of the current emergent duty system to effectively respond to them, another system should be implemented as quickly as possible.

The selection of an alternate system will depend on the volume of requests and the location or locations where such occur. Problems that could

develop might be limited to individual counties, certain regions (e.g., Turnpike or Parkway counties), or be statewide in nature. For these reasons, the *Committee* recommends a variety of options to be considered for implementation, with selection of the appropriate option depending upon the nature of any problems encountered. The options set forth below are not listed in order of preference. Which option, or options, to use will depend on what the situation requires

NDATION Options to enhance or replace the current emergent duty system

1. Using Municipal Court Judges to respond to applications

If there are increases in the volume of telephonic search warrant requests, those increases may not be uniform across the State, or may occur in only a few counties. If that is the case, the use of select Municipal Court Judges to augment Superior Court emergent duty judges in responding to telephonic search warrant applications should be considered. If this occurs, the *Committee* recommends that the Assignment Judge, after consultation with his or her Municipal Presiding Judge, prepare a list of Municipal Court Judges that the Chief Justice could authorize to handle these applications. The *Committee* notes that authorizing Municipal Court Judges to handle telephonic search warrant applications would require a change to R. 3:5-3(b), as noted later in this report.

Certain members of the *Committee* did not agree with the recommendation that the Court authorize Municipal Court Judges to respond to telephonic search warrant applications. The *Committee* sought to address this concern by recommending that only carefully selected Municipal Court Judges be authorized to respond to telephonic applications for search warrants. Despite the

Committee's proposed limitation on which Municipal Court Judges would be authorized to hear those applications, those members believed that only Superior Court Judges should hear applications for telephonic search warrants. They cited the 1984 Report of the Supreme Court Committee on Criminal Practice and felt that the rationale for that decision, i.e. the increased experience of Superior Court Judges in making determinations of exigency and probable cause, has not changed. They were also concerned that Municipal Court Judges do not have the experience and training that Superior Court Judges possess.

2. Creation of a regional emergent duty call system to respond to applications

It is possible that dramatic increases in the number of telephonic search warrant requests may occur in some parts of the State, but not others. In that instance, it may be useful for neighboring vicinages to combine judicial resources and create a regional system for emergent duty purposes. Under such a system, judges would likely be required to field a greater number of calls when assigned to emergent duty, but they would be assigned to emergent duty less frequently. As a result, the work load would be more evenly distributed. This may require shuffling the emergent duty judge's schedule so that he or she does not have a regular calendar during the period that he or she is on regional emergent duty.

3. Creation of a statewide emergent duty call system to respond to applications

If the volume of telephonic search warrant applications increases too dramatically across the State, it may be that even a regional system would not work. In that instance, it may be necessary to create a statewide emergent duty call system. Under this system, the Judiciary would establish a central call-in

number, and requests for telephonic search warrants would then be directed to judges who could be located anywhere throughout the State. Such a system could also include Recall Judges and Municipal Court Judges. To the extent that sitting Superior Court Judges participated in this system, the volume of calls would almost certainly dictate that they be excused from other assignments when assigned to emergent duty. While this proposal addresses only telephonic search warrant requests, it could be considered as a 24/7 model for responding to all types of ever-growing emergent duty requests (a form of Judicial emergency room).

4. Use of special masters or magistrates

If the *Committee* was designing a system on a clean slate, it would design one in which certain types of criminal matters, such as telephonic search warrant requests, were not handled by a judge, but by other highly-qualified Judiciary employees – such as special masters or magistrates. The *Committee* notes that other special judicial employees already perform a number of important judicial functions, such as issuing arrest warrants or setting bail. See R. 3:3-1(a), (b) and 3:26-2(a).

This is not the first time that the use of magistrates or special masters has been proposed for criminal matters. In 1989, in response to a dramatic increase in the number of criminal cases caused by the "war on drugs," the Supreme Court created a special committee often referred to as the *Pashman-Belsole Committee*. In January 1991, that committee issued a report entitled *Report of the Special Committee to Assess Criminal Division Needs*, in which it recommended developing and experimenting with new approaches for the

management of criminal calendars - such as the use of masters or magistrates to deal with ancillary proceedings. See *Pashman-Belsole Report* at page 22.

It should also be noted that the federal court system employs magistrates for a variety of tasks. In the federal system, magistrates are statutorily permitted to handle a wide range of judicial functions, including sentencing persons convicted of minor offenses; administering oaths and affirmations; issuing orders concerning the release or detention of persons pending trial; hearing, with certain exceptions, any pretrial matter pending before the court; and taking acknowledgments, affidavits, and depositions. See *28 U.S.C.S. § 636*. The *Committee* therefore suggests that consideration be given to using magistrates, or special masters, to field telephonic search warrant requests if the number of applications threatens to overwhelm current judicial resources.

Some of the same members of the *Committee* who dissented from the *Committee's* recommendation regarding using Municipal Court Judges to respond to telephonic search warrant applications also objected to the use of special masters and magistrates for essentially the same reasons.

VIII. ADMINISTRATIVE ISSUES

A. Goals

In addressing administrative issues, the goals were to ensure that: (1) applicable Court Rules were amended so that the provisions governing telephonic search warrants were consistent with the Court's decision in Pena-Flores; (2) procedures implemented for handling telephonic search warrant requests were applied in a consistent manner throughout the State; and (3) those procedures be monitored in order to determine whether they were working as the Court intended. Consistent with those goals, the *Committee* considered a number of possible amendments to the Court Rules; the creation of training programs for judges and law enforcement personnel handling telephonic warrant requests; the creation of forms for use during the application process; and ways in which to monitor the effectiveness of the procedures that are implemented.

B. Recommendations

To meet the aforesaid goals, the *Committee* makes the following recommendations:

NDATION R. 3:5-3(b) should be amended to remove the references to "exigent circumstances," and to more closely follow the language contained in R. 3:5-3(a) regarding applications for in-person warrants.

In Pena-Flores, the Court announced that it intended to amend R. 3:5-3(b) "to underscore that an officer may resort to electronic or telephonic means without the need to prove exigency." State v. Pena-Flores, 198 N.J. at 35. The Court also announced that R. 3:5-3(b) would be amended "to clarify the parity between the various methods for obtaining a warrant." Ibid. In order to further

the Court's explicit intent, the *Committee* therefore recommends that R. 3:5-3(b) be amended to remove all references to "exigent circumstances." The *Committee* also recommends that R. 3:5-3(b) be amended to mirror the language contained in R. 3:5-3(a), which concerns applications for in-person search warrants. The *Committee* recommends the following amendments to R. 3:5-3(b):

3:5-3. Issuance and Contents

(a) . . . No Change.

(b) A Superior Court judge may issue a search warrant upon sworn oral testimony of an applicant 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, adequate longhand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the applicant must identify himself or herself, specify the purpose of the request and disclose the basis of his or her information. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a search warrant. A warrant may issue if the judge is satisfied that [exigent circumstances exist sufficient to excuse the failure to obtain a written warrant, and that] sufficient grounds for granting the application [have been shown] exist or that there is probable cause to believe they exist. Upon approval, the judge shall memorialize the specific terms of the authorization to search and shall direct the applicant to enter this authorization verbatim on a form, or other appropriate paper, designated the duplicate original search warrant. This warrant shall be deemed

a search warrant for the purpose of R. 3:5. The judge shall direct the applicant to print the judge's name on the warrant. [The judge shall also contemporaneously record factual determinations as to exigent circumstances.] If a recording is made, the judge shall direct that the testimony be transcribed as soon as practicable. This transcribed record shall be certified by the judge. The judge shall promptly issue a written confirmatory search warrant and shall enter thereon the exact time of issuance of the duplicate original warrant. In all other respects, the method of issuance and contents of the warrant shall be that required by subsection (a) of this rule.

Note: Source-R.R. 3:2A-3, 3:2A-4 (second sentence); former rule redesignated paragraph (a) and paragraph (b) adopted July 26, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994[.]; paragraph (b) amended to be effective .

NDATION A duplicate original warrant form should be promulgated for use throughout the State.

As previously noted, the Burlington County Prosecutor's Office created a duplicate original warrant form, which was to be completed when police officers sought a telephonic search warrant. (See Section IVC3). Under the Burlington Prosecutor's proposed system, police officers would have carbonless pads in their cars with blank duplicate original search warrant forms. Each form would fit on a single legal-sized page. When an officer sought a telephonic search warrant, the duplicate original search warrant form would be completed under a prosecutor's telephonic supervision and would then be reviewed with the judge. If the reviewing judge decided to issue a search warrant, the judge would authorize the officer to sign the judge's name on the duplicate original warrant form; the inventory of the search would also be completed on the duplicate

original form; and the form would be delivered to the court on the following day. The duplicate original form would also contain a space for the judge to determine whether, pursuant to R. 3:5-3(b), the duplicate original would also serve as a written confirmatory warrant. This would eliminate the need for the court to prepare a separate form. A carbonless copy of the duplicate original form would be provided to the driver of the car as required by R. 3:5-5(a). There would be four carbonless copies of the form: the original would be filed with the Court; a second copy would be for the county prosecutor; a third copy would be for the officer; and a fourth copy would be given to the driver.

Therefore, in order to encourage consistent procedures regarding the handling of telephonic search warrant applications, the *Committee* recommends that a standard duplicate original warrant form be used throughout the State. The proposed form is included in Appendix B.

NDATION A worksheet for judges to record the details of telephonic search warrant applications should be promulgated for use throughout the State.

In order to further promote consistency in the Judiciary's response to telephonic search warrant applications, the *Committee* believes that judges should use a worksheet to record the details of those applications. Completing the worksheet would not only ensure that the judge met all of the procedural and legal requirements pertaining to telephonic search warrants, it would also serve as a convenient backup if the colloquy between judge, prosecutor and police officer was not recorded due to technical problems or human error. After a reasonable amount of time has passed, and judges gain more experience in responding to telephonic search warrant applications, it may be that the

worksheets would no longer be necessary. Initially, however, the *Committee* believes that the form should be promulgated for use throughout the State. The Bergen County emergent duty judges currently use a worksheet for telephonic warrant applications, and the *Committee* recommends that it be promulgated for use on a statewide basis. The form is included in Appendix C.

NDATION R. 3:5-5(b) should be amended to: (1) delete the requirement that the applicant sign the transcript of any oral testimony taken in connection with a telephonic search warrant application, and (2) specify that the prosecutor shall have a transcript prepared, and shall thereafter review the transcript, and any discrepancies must be brought to the attention of the judge who issued the warrant within 30 days of the prosecutor's receipt of the transcript.

The *Committee* became concerned that if the use of telephonic search warrants increased dramatically, R. 3:5-5(b)'s requirement that the applicant sign the transcript of any oral testimony taken during the warrant application would strain police resources by pulling officers away from their primary duties. The *Committee* also recognized that this would become an even more serious problem if the current county-based emergent duty practice moved to a regional or statewide practice, because officers would then have to travel to another county to sign the transcript. The *Committee* felt that the better procedure would be to simply delete the requirement that the transcript be signed. The *Committee* believes that this would alleviate any concerns about pulling police officers away from their duties.

The *Committee* also considered whose responsibility it should be to prepare the transcript of any oral testimony taken in connection with a telephonic

search warrant application. Currently, pursuant to R. 3:5-3(b), the transcript is prepared by the County Prosecutor's office and submitted to the issuing judge for certification. The *Committee* believes that this practice should continue, and that the Court Rules should clarify that the preparation of the transcript is the prosecutor's responsibility. In addition, as prosecutors reportedly felt that it was extremely important to verify the transcript promptly in order to clear up any accuracy issues prior to discovery, the *Committee* also recommends that R. 3:5-5(b) be amended to specify that the prosecutor shall have a transcript prepared, and shall thereafter review the transcript, and any discrepancies must be brought to the attention of the judge who issued the warrant within 30 days of the prosecutor's receipt of the transcript.

The *Committee* considered whether, given that a disk containing the conversation between the judge, prosecutor and law enforcement officer would be made, the requirement that a transcript be prepared should be eliminated. While the *Committee* could not reach a consensus on this issue, it believes that it is an area that deserves further study.

The *Committee* recommends the following amendments to R. 3:5-5(b):

3:5-5. Execution and return with inventory.

(a) . . . No Change.

(b) If a duplicate original search warrant has been executed, the person who executed the warrant shall enter the exact time of its execution on its face. If a tape or stenographic record of the oral testimony has been made, the judge shall require the [applicant to sign a transcript of that record] prosecutor to prepare

and review a transcript of that testimony. Any discrepancies must be brought to the attention of the judge who issued the warrant within 30 days of the prosecutor's receipt of the transcript. In all other respects, execution and return of the duplicate original search warrant shall be that required by paragraph (a) of this rule.

Note: Source-R.R. 3:2A-4; former rule redesignated as paragraph (a) and paragraph (b) adopted July 26, 1984 to be effective September 10, 1984[.]; paragraph (b) amended to be effective .

NDATION R. 3:5-5(a) should be amended to allow for the inventory filing and return to be accomplished via fax or other electronic means.

The *Committee* believes that R. 3:5-5(a)'s current requirement that police officers appear promptly and personally for the inventory filing and return unnecessarily takes those officers away from their primary duties. The *Committee* also reasoned that if the search warrant itself could now be obtained through telephonic means, then that same flexibility should also be available for the return and inventory. As a result, the *Committee* recommends that R. 3:5-5(a) be amended to allow for the inventory filing and return to be accomplished personally, or via fax or other electronic means.

The *Committee* recommends the following amendment to R. 3:5-5(a):

3:5-5. Execution and return with inventory.

(a) A search warrant may be executed by any law enforcement officer, including the Attorney General or county prosecutor or sheriff or members of their staffs. The warrant must be executed within 10 days after its issuance and within the hours fixed therein by the judge issuing it, unless for good cause shown the

warrant provides for its execution at any time of day or night. The officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property is taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The return and written inventory of any property taken may be accomplished by personal appearance before the issuing judge or by electronic facsimile or other electronic means. The inventory shall be made and verified by the officer executing the warrant in the presence of the person from whom or from whose premises the property is taken or, if such person is not present, in the presence of some other person. The judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(b) . . . No Change.

Note: Source-R.R. 3:2A-4; former rule redesignated as paragraph (a) and paragraph (b) adopted July 26, 1984 to be effective September 10, 1984[.]; paragraph (a) amended to be effective .

NDATION R. 3:5-7(g) should be amended to clarify that in the absence of bad faith, a telephonically or electronically authorized search warrant should not be rendered invalid due to technical difficulties or errors in recording the application, or by errors in completing the duplicate original warrant form.

The *Committee* recognized that, due to technical difficulties or human error, a number of things could go wrong during the telephonic search warrant application process. The *Committee* agreed, however, that those technical difficulties or human errors should not necessarily result in the ensuing search

being rendered invalid and the evidence being suppressed. This is the same general philosophy underlying the exceptions for electronic warrants contained in R. 3:17. As a result, the *Committee* recommends that R. 3:5-7(g) be amended to specify that unless it is apparent that law enforcement or an emergent duty prosecutor acted in bad faith, an otherwise valid search shall not be rendered invalid simply because the colloquy between the parties was not recorded, either due to technical difficulties or human error, or because the duplicate original warrant form was filled out improperly. The *Committee* recommends the following amendment to R. 3:5-7(g):

3:5-7. Motion to Suppress Evidence and for Return of Property

(a) . . . No Change.

(b) . . . No Change.

(c) . . . No Change.

(d) . . . No Change.

(e) . . . No Change.

(f) . . . No Change.

(g) Effect of Irregularity in Warrant. In the absence of bad faith, no search or seizure made with a search warrant, including a search or seizure made with a telephonically or electronically authorized search warrant, shall be deemed unlawful because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in its execution.

Note: Source-R.R. 3:2A-6(a)(b). Paragraph (a) amended, paragraphs (b), (c), (d) adopted and former paragraphs (b), (c), (d) redesignated as (e), (f), (g) respectively January 28, 1977 to be effective immediately; paragraphs (a) and (c) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a)

amended June 9, 1989 to be effective June 19, 1989; paragraph (a) amended July 13, 1994 to be effective January 1, 1995; paragraph (a) amended January 5, 1998 to be effective February 1, 1998[.]; paragraph (g) amended to be effective .

NDATION The Administrative Office of the Courts, in conjunction with the Criminal Division Presiding Judges, should develop a training program for judges handling telephonic search warrants. In addition, the Office of the Attorney General, in conjunction with the County Prosecutors and the New Jersey State Police, should develop a similar training program for law enforcement.

In order to ensure that telephonic search warrant requests are handled in a consistent manner throughout the State, the *Committee* agreed that both judges and law enforcement should be provided with training on how to handle those requests. Consequently, the *Committee* recommends that both the Judiciary and law enforcement develop appropriate training programs for their respective members regarding the proper handling of telephonic search warrants and that those programs be consistent with the procedures that are eventually approved by the Court.

NDATION The Administrative Office of the Courts, in cooperation with the Office of the Attorney General, should develop specific procedures regarding the collection of data to closely monitor the handling of telephonic search warrants.

As previously discussed in Section V, important safety concerns involving police officers, drivers, and passengers dictate that applications for telephonic search warrants should be completed as quickly as possible; specifically, within no more than 45 minutes, with an ideal goal of 30 minutes, from the officer's initial call. Those same safety and resource concerns also dictate that the procedures created to handle telephonic warrants should be closely monitored in

order to determine whether they are working effectively; and if there are delays, to find out where the delay is occurring. As a result, the *Committee* agreed that data should be collected regarding (1) the volume of telephonic search warrant applications; (2) the number of telephonic applications granted and denied; (3) the amount of time that elapsed before a ruling was made; and (4) whether contraband was recovered.

The *Committee* recognized that in order to simplify the collection of the above information, it would be preferable to have that information in one place. The *Committee* therefore amended the duplicate original warrant form to include spaces for both the starting time and the time that the judge joined the call. The *Committee* believed that including both times would enable monitors to determine whether any delays in the application process were occurring on the law enforcement or judicial side. The *Committee* also recommended that the form include spaces for whether the application was granted or denied.

Given the important safety concerns associated with roadside automobile stops and the speedy completion of telephonic search warrant applications, the *Committee* believes that it is imperative that sufficient data is collected to allow Judiciary and law enforcement decision-makers to act quickly if the adopted procedures are not working effectively. The *Committee* is also aware that past efforts to monitor new procedures were frustrated by an inability to collect sufficient information in a timely manner. The *Committee* therefore recommends that the Administrative Office of the Courts, in cooperation with the Office of the Attorney General, develop specific procedures to ensure that the completed duplicate warrant forms are collected and forwarded to both agencies on a

regular basis. It should be noted that a similar process was proposed in the *Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations.* See *Cook Committee Report* at page 52. This recommendation was approved by the Court and implemented soon thereafter.

NDATION If Municipal Court Judges are eventually enlisted to respond to telephonic search warrant applications, reviewing courts should give the probable cause determinations made by Municipal Court Judges the same "substantial deference" given to similar determinations made by Superior Court Judges.

Although it is not currently recommended that Municipal Court Judges be authorized to respond to telephonic search warrant applications, the *Committee* recognizes that it may be necessary do so in the future. Should that possibility become a reality, the *Committee* believes that any probable cause determinations made by Municipal Court Judges during the course of those applications should be given the same "substantial deference" by reviewing courts as similar determinations made by their Superior Court colleagues. The *Committee* believes that to do otherwise would discourage prosecutors and police officers from seeking telephonic warrants from Municipal Court Judges.

The members of the *Committee* that were opposed to Municipal Court Judges hearing telephonic applications for search warrants were also opposed to this recommendation. They believe that if Municipal Court Judges hear these applications, their decisions should be reviewed on appeal using the same legal standard currently applied to other decisions of Municipal Court Judges. See R. 3:23-8.

15 Note that the Committee has previously recommended a change to this rule. See pgs. 45-47. Those changes are also included here for ease of reference.

NDATION If Municipal Court Judges are eventually enlisted to respond to telephonic search warrant applications, R. 3:5-3(b) should be amended to explicitly grant Municipal Court Judges that authority.

As noted previously, in Section VIID, increases in the volume of telephonic search warrant requests could necessitate the use of select Municipal Court Judges to augment Superior Court emergent duty judges in responding to telephonic search warrant applications. The *Committee* envisions that the Assignment Judge, after consultation with his or her Municipal Presiding Judge, would prepare a list of Municipal Court Judges that the Chief Justice could authorize to handle these applications. If this occurs, the *Committee* recommends that R. 3:5-3(b) be amended to specify that select Municipal Court Judges would also be authorized to respond to telephonic search warrant applications. Currently, only Superior Court Judges are authorized to respond to telephonic search warrant requests. The *Committee* recommends that R. 3:5-3(b) be amended as follows:15

3:5-3. Issuance and Contents

(a) . . . No Change.

(b) A Superior Court judge, or a Municipal Court judge designated by the Chief Justice, may issue a search warrant upon sworn oral testimony of an applicant 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, adequate longhand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the applicant must identify himself or herself, specify the purpose of the request and disclose the basis of his or her information. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a search warrant. A warrant may issue if the judge is satisfied that [exigent circumstances exist sufficient to excuse the failure to obtain a written warrant, and that] sufficient grounds for granting the application [have been shown] exist or that there is probable cause to believe they exist. Upon approval, the judge shall memorialize the specific terms of the authorization to search and shall direct the applicant to enter this authorization verbatim on a form, or other appropriate paper, designated the duplicate original search warrant. This warrant shall be deemed a search warrant for the purpose of R. 3:5. The judge shall direct the applicant to print the judge's name on the warrant. [The judge shall also contemporaneously record factual determinations as to exigent circumstances.] If a recording is made, the judge shall direct that the testimony be transcribed as soon as practicable. This transcribed record shall be certified by the judge. The judge shall promptly issue a written confirmatory search warrant and shall enter thereon the exact time of issuance of the duplicate original warrant. In all other respects, the method of issuance and contents of the warrant shall be that required by subsection (a) of this rule.

Note: Source-R.R. 3:2A-3, 3:2A-4 (second sentence); former rule redesignated paragraph (a) and paragraph (b) adopted July 26, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994[.]; paragraph (b) amended to be effective .

APPENDIX A

[1] Data contained in the 2007 Uniform Crime Report was used for arriving at an estimate based on population.

2 This does not include the 69 municipalities covered by the State Police.

Estimate Based on Population

One method the Committee decided to utilize was one based on population.[1] The theory was that since we knew that we had 445 automobile searches (35 with a warrant and 410 warrantless) from 102 municipalities[2] during a one week period, we could arrive at an estimate for all municipalities by assuming that the ratio of searches to population for the 102 municipalities was the same ratio for the remaining municipalities. Combining this estimate of all municipalities with the state police searches and other searches provided a one week estimate that could be multiplied by 52 weeks.

Estimate Based on Index Crimes

Another method the Committee utilized to arrive at an estimate was based on the number of Index offenses. The theory was that since we knew that we had 445 automobile searches from 102 municipalities during a one week period we could arrive at an estimate for all municipalities by assuming that the ratio of searches to index crimes for the 102 municipalities was the same ratio for the remaining municipalities. Combining this estimate of all municipalities with the state police searches and other searches provided a one week estimate that could be multiplied by 52 weeks.

Estimate Based on Police Officers

Another method the Committee utilized to arrive an estimate was based on the number of police officers. The Committee knew that we had 445 automobile searches from 102 municipalities during a one week period. We also

were able to ascertain from Uniform Crime Report data that those 102 municipalities had 6,144 police officers. The theory was that we could arrive at an estimate for all municipalities by assuming that the ratio of searches to police officers for the 102 municipalities was the same ratio for the remaining municipalities. Combining this estimate of all municipalities with the state police searches and other searches provided a one week estimate that could be multiplied by 52 weeks.

APPENDIX B1

Time of initial call to prosecutor: _____ Application **Granted** _____ **Denied** _____
Time that judge was reached: _____
Duplicate Original Superior Court of New Jersey
SEARCH WARRANT Law Division-_____ County
(Criminal Action)
State of New Jersey SS: County of _____
TO: _____ of the _____Police Department
(Print Name of Officer and Badge #)
And/or any Officer of the _____ County Prosecutor's Office, and/or any Officer of the New Jersey State Police and/or any Officer of any law enforcement agency having jurisdiction. This matter being opened to the Court by the above named police officer on an application made by telephone _____ or other electronic means _____for the issuance of a search warrant for the:
( ) Motor Vehicle _____ ( ) Person of: _____
( ) Person of: _____
( ) Person of: _____
( ) Person of: _____
And the Court having reviewed the testimony under oath given telephonically _____ or by other electronic means _____by the above named police officer
And being satisfied that located therein or thereon are:
( ) Controlled Dangerous Substances, and/or Drug Paraphernalia, and/or Currency and/or any other item constituting evidence of violations of N.J.S. 2C:35-1 et.seq.
( ) Firearms, ammunition and any other item constituting evidence of violations of N.J.S. 2C:39-1 et.seq.
( ) Weapons of any type other than firearms and any other item constituting evidence of violations of N.J.S. 2C:39-1 et.seq.
( ) Other: _____
_____
And that probable cause exists for the issuance of this warrant; **YOU ARE HEREBY COMMANDED** to search the:
( ) Vehicle(s) as further described below ( ) Person(s) as further described below
YOU ARE HEREBY ORDERED, in the event you seize any of the above described articles, to give a receipt for the property so seized to the person from whom it was taken on in whose possession it was found, or in the absence of such person to leave a copy of this Warrant together with such receipt in or upon the said motor vehicle from which the property is taken.
YOU ARE FURTHER AUTHORIZED to execute this warrant within ten (10) days from the issuance hereof at any time. And thereafter to forthwith a prompt return to me with a written inventory of the property seized under the authority of this warrant.
The following is a description of the:
Motor Vehicle(s) to be searched: Tag Number: _____ State Issued: ____ Make, Model, Year and Color of Vehicle:_____
( ) In addition to passenger compartment of vehicle, search to include all other accessible areas of the vehicle including the trunk
Person(s) to be searched: #1) Name:_____ DOB: _____ Gender: _____ Race: _____
#1) Name:_____ DOB: _____ Gender: _____ Race: _____
#1) Name:_____ DOB: _____ Gender: _____ Race: _____
#1) Name:_____ DOB: _____ Gender: _____ Race: _____
Given and issued under my hand pursuant to R. 3:5-3 (b) at ___ o'clock ___.m., this _____ day of _____, 20____

_____
Judge of the Superior Court
By Print Name of Police Officer Authorized to Sign Judge's Name
( ) This duplicate original search warrant shall also serve as a written confirmatory search warrant pursuant to R. 3:5-3(b). The original duplicate warrant was originally authorized by the undersigned at ___ o'clock ___.m., this _____ day of _____, 20____

_____
Judge of the Superior Court

INVENTORY OF ITEMS SEIZED

(1) _____ (2) _____ (3) _____
(4) _____ (5) _____ (6) _____
Pursuant to R. 3:5-3(b), this warrant was executed by the undersigned at ___ o'clock ___.m., this _____ day of _____, 20____
_____ (Print Name of Officer Executing This Warrant including Badge #)

APPENDIX C

TELEPHONIC SEARCH WARRANT WORKSHEET

Date: _____ Time: _____am / pm
Applicant: _____
Department: _____
1. Applicant identified self as: _____
_____
_____.
(a) Identity established by:
Recognized voice _____
Call back to Headquarters _____
Other (detail)
_____
_____.

2. Applicant stated the reason for the telephone request was:
_____
_____
_____
_____
_____
_____.

3. Applicant stated the source of information was:

_____
_____
_____
_____
_____.

4. He / she was sworn by me over the telephone at:_____am/ pm.

5. The information provided was:

Tape recorded on tape marked _____.

Stenograph machine was recorded by _____
_____.

(If neither of the above are utilized write notes)

_____
_____
_____
_____
_____
_____
_____
_____

_____
_____
_____
_____
_____
_____
_____
_____.

6. I found probable cause existed because

_____
_____
_____
_____.

7. I authorized search of

_____
_____
_____
_____
_____
_____.

(Set forth the extent of property to be searched, hour thereof, limits thereto, items sought thereby.)

8. Written confirmation was issued by me on _____ _____.

9. My notes, tapes and confirmation were filed with the Clerk on _____ _____ _____.

_____
J.S.C.

5. State v. Pompa – Administrative Exception to Warrant Requirement

State v. Pompa, 414 N.J. Super. 219 (App. Div. 2010)

The State had the burden of demonstrating exigent circumstances and its failure in this regard is revealed by the Trooper's testimony. During cross-examination at the suppression hearing, Trooper Budrewicz admitted defendant's vehicle was incapable of being moved because he was in possession of defendant's keys; common sense strongly suggested it was not likely another person with another set of keys was in the vicinity. In addition, the Trooper admitted he could have had the vehicle towed to a safe location while he applied for a warrant prior to conducting a search beyond the scope of the administrative inspection:

Q: But you could have towed [the truck] to Perryville station, secured it there, and gotten a warrant, or you could have left it there, or called a detective, or called the [prosecutor's] office and said I've got probable cause to search this thing, get me a warrant....

A: I could have done that but I had plain smell.

And, when asked why he decided to search instead of first obtaining a warrant, the officer insisted: "I don't need a warrant **236* with probable cause." Again, *Pena-Flores* requires more than probable cause; exigent circumstances are also required.

6. State v. Lewis - Exigency

State v. Lewis, 411 N.J. Super. 483 (App. Div. 2010)

The stop of defendant's van occurred at night in a Plainfield neighborhood known for high crime and drug sales. As in *Pena-Flores,* the police had no reason to anticipate in advance that defendants would be involved in drug activity because the targets of their investigation were Courtney and Porter, not defendants. Moreover, the stop of defendant's car occurred at a location where it could be readily observed by persons in the neighborhood, such as the five or six people who congregated in the area after the stop. If they drove by, the occupants of the Camry who apparently had purchased drugs from defendants also would have been likely to observe the van and assume that it contained drugs. Therefore, it cannot be said in this case, as in *Fuller,* that "[t]here is nothing in the record to suggest that [defendants] had cohorts who might have come on the scene."

Moreover, although a second police car arrived on the scene after the stop, the search of the car and leather case had already been completed before then. Furthermore, it is unclear whether the officers in the second police car would have been available to detain defendants while Detectives Black and Staten applied for a warrant, because the officers involved in the Courtney-Porter investigation were responsible for searching four different residences, a car, and the persons of Courtney and Porter, and according to Detective Black, "were stretched out kind of thin."

7. State v. Minitee – Exigency and Impoundment –

State v. Minitee, 415 N.J. Super. 475 (App. Div. 2010)

The Pena-Flores Court thus established three basic requirements to uphold the warrantless search of a motor vehicle: (1) the stop must be unexpected; (2) the police must have probable cause to believe that the vehicle contains contraband or evidence of a crime; and (3) there must exist exigent circumstances under which it is impracticable to obtain a warrant. As to the exigency requirement, the Court emphasized that it "encompasses far broader considerations than the mere mobility of the vehicle."

Applying these principles here, we hold that the police clearly had sufficient time to seek a warrant before searching the SUV the day after seizing it. After the car was taken into custody, there was no justification to search it without a warrant. Once the vehicle was removed from the scene, impounded, and taken to the Fort Lee police station, the State had sufficient time to obtain either a telephonic warrant or a traditional one. The warrantless search of the vehicle once it was in the custody of the State was clearly unjustified and unconstitutional.

Applying this mandate to these facts, the exigency that existed at the scene dissipated once the SUV was removed and placed in the custody of the Fort Lee Police Department. Thereafter, the police clearly had sufficient time to obtain, at a minimum, a telephonic warrant before searching the vehicle. Stated differently, the exigent circumstances that permitted the police to seize the SUV from the scene do not justify its subsequent warrantless search at the Fort Lee police station.

We harmonize the seemingly inconsistent holdings in *Martin* and *Pena-Flores* by finding that the exigent circumstances that existed at the scene only permitted the police to seize the vehicle and transport it to a secure location. Thereafter, the police were constitutionally required to obtain a warrant before searching the vehicle. This approach distinguishes between, and guards against, unreasonable *searches* and unreasonable *seizures,* the two fundamental protections embodied in Article I, Paragraph 7 of our State Constitution.