

To: New Jersey Law Revision Commission
From: John Cannel
Re: Mandatory Sentencing; Factors Requiring Jury Determination
Date: November 8, 2019

MEMORANDUM

The only response to the Tentative Report concerning Mandatory Sentencing was a telephone call from Alyson Jones, Legislative Liaison for the Judiciary, from the Administrative Office of the Courts. She stated that there was no Constitutional impediment to a finding by a judge rather than a jury that a crime was committed while the defendant was on pre-trial release. Federal cases have established that the determination whether the defendant had been convicted of prior offenses may be made by the judge. It is true that there is an analogy between the decision about prior offenses and whether the defendant was on pre-trial release. However, there is no case that makes an exception for the pre-trial release determination. Caution and conservatism motivated the inclusion of the proposed amendment of 2C:44-5.1 (Penalties for committing certain offenses while released on bail, own recognizance increased). If the Commission agrees with Ms. Jones that the determination may be made by the judge, that proposed amendment can be deleted and a paragraph can be in the introduction can be changed:

Some revisions involve difficult decisions. The change shown in 2C:44-5.1 is problematic. In most cases bail status is a legal, rather than a factual matter. A legal matter might well be left to the judge. But see, *State v. Anderson*, 127 N.J. 191 (1992) holding that the issue of materiality in perjury prosecutions must be decided by the jury. In addition, in some cases the time of commission of the crime is a factual matter. ~~As a result, the Commission decided that these issues must be left to the jury.~~ However since whether the defendant was on pre-trial release is almost always a legal decision, the Commission decided not to recommend change to 2C:44-5.1